

**Critical Acts of Recognition: Reading Law Rhetorically**

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A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

--*Christine Goodwin v. The United Kingdom*

On July 11, 2002, the European Court of Human Rights (ECHR) set the scene for a significant shift in the way the United Kingdom legally defines sex and the status of transsexual and transgender people (trans people) within British society. The ECHR, in *Christine Goodwin v. The United Kingdom*, found that British laws defining sex according to a set of biological criteria applied at birth prevented trans people from enjoying the full spectrum of rights guaranteed by the European Convention of Human Rights. Barring individuals from changing their sex for legal purposes on official documents, such as birth certificates and insurance forms, these laws, according to the court, created discordance between the lived experience of trans individuals—who they present themselves to be—and their legal status—who the law says they are. The ECHR recognized the potential and real harm of this disjunction “between social reality and law”: left in an “anomalous position,” trans people were subject to discrimination and misrecognition without the protection of law.

To rectify this injury—the “lack of legal recognition of the gender re-assignment of post-operative transsexuals” (*Christine Goodwin v. United Kingdom* para. 120)—the ECHR demanded that the United Kingdom change its laws. Responding to their mandate, the

British Parliament first issued a draft bill of the Gender Recognition Act on July 11, 2003; it received royal assent on July 1, 2004. In an effort to offer trans people a legal status that conforms to their gender identity, this Act establishes a process through which individuals may be granted a gender recognition certificate—a public document that marks the legal recognition of an individual in his or her “new” or “acquired” gender identity.<sup>1</sup> An administrative rather than a judicial process where individuals come before a panel of medical and legal experts, it requires that applicants meet several conditions to receive a certificate. First, each person of at least eighteen years of age must demonstrate that he or she has lived in the “acquired gender” for at least two years, is currently living in that gender, and plans to continue living in that gender permanently. Second, applicants must provide documentation from at least two medical and/or psychiatric professionals who confirm that the applicant experienced (or experiences) gender dysphoria. Significantly, the law stipulates that individuals do not need to undergo gender re-assignment surgery or hormone therapy in order to receive a gender certificate. Third, each applicant must provide evidence that he or she is unmarried. And, finally, the individual must correctly complete the required forms and pay a filing fee. Those who receive gender recognition certificates are then indexed in a Gender Recognition Registry that is not open to public inspection.

Although this registration does not alter the UK birth registry, each individual is issued a

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<sup>1</sup> The Act offers two different types of gender recognition certificates. The first is a full gender recognition certificate. This certificate entitles individuals to all rights and benefits outlined in the act and signals that an individual has met all criteria for gender recognition. The second certificate is an interim gender recognition certificate. A conditional document, it is given to individuals who are in the process of or are waiting to dissolve their legal marriages. If this dissolution takes place within six months, individuals can apply to receive a full gender recognition certificate.

new birth certificate and their entry is marked in such a way that their “acquired gender” will appear on all official forms without noting that this information is found in the Gender Recognition Registry, theoretically guaranteeing privacy rights to trans people.

The introduction of the Gender Recognition Draft Bill provided Parliament the opportunity to demonstrate, among other things, its commitment to human rights for all people in the United Kingdom by affording rights to a small and vulnerable minority—trans people. Such a demonstration was necessary in a political climate that questioned Parliament’s record on promoting and institutionalizing the human rights it claimed to support. As one of the champions of the European Convention of Human Rights and one of the first to ratify it in 1950, the British Government came under fire when it failed to codify the Convention rights in domestic law. If states party to the Convention do not legalize its expressed rights, then citizens of these states cannot enjoy the protection of the ECHR, rendering its decisions powerless (Dickerson 812). The paradox of the Government’s support of the Convention and its failure to “bring the very same rights to bear within its own borders” was not lost on the British people (Dickerson 814). In response to public outcry, the U.K. passed the Human Rights Act 1998 (HRA), granting citizens the full protection of the Convention and, perhaps more importantly, binding U.K. Courts and Parliament to the ECHR’s judgments. The ECHR decision in *Christine Goodwin v. The United Kingdom* and the issue of gender recognition rights more generally put the fledgling HRA—an Act that had entered into force only two years prior to the *Goodwin* decision—to the test. It demanded that the U.K. change its laws so that trans people could enjoy the privacy and

marriage rights guaranteed to them by the Convention, but denied to them by British case law.

The Gender Recognition Act is thus, from the start, imbricated with the creation of a democratic society that realizes fundamental human rights. Casting the Bill as an act that “continues the process of ‘bringing rights home’” (Filkin, HL deb. 18 December 2003, col. 1287), Parliament argues that the inclusion of trans people in society is a condition for democracy.<sup>2</sup> At the outset of the second reading of the Bill, The Parliamentary Under-Secretary of State for Constitutional Affairs, David Lammy, explains:

The Bill is part of the Government’s commitment to reforming the constitution so that it better meets the needs of all people. It reflects, too, our commitment to social inclusion. Transsexual people are a small and vulnerable minority in our society and the Bill addresses one of the key problems that they face. It is essential that no one is left behind as we create the conditions for a credible and effective modern democracy. (23 February 2004, col. 48)

Lammy’s definition of the Bill’s purpose expands the frame of gender recognition. Although it is an issue that affects “a small and vulnerable minority,” the Bill itself is cast as a means to secure a democracy for all. Important for the majority—presumably those who already have a secure position in society—and the minority, legal recognition guarantees a form of social inclusion that enables law (“the constitution”) to reflect the social reality and desires of all citizens. In other words, legal recognition offers those “left behind” the “ability to take part

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<sup>2</sup> When I refer to the “Act” I mean the final legislation passed through Parliament and assented to by the Queen. The “Bill” refers to the draft bill that both houses debated and amended.

in society at large” (Leslie, HC deb. 23 February 2004, col. 100), thereby opening the political scene to all who wish to enter it.

The parliamentary debates demonstrate, however, that what it means for trans people to be included in a social or political sphere—their ability to take a place in society—turns on how and what law recognizes in the act of gender recognition. For proponents of the Bill, the law offers recognition for an individual’s legal status; it does not *institute* his or her gender identity. In an early debate in the House of Lords, Lord Tebbit insisted that “At heart, the Government’s view is that this is a legal issue....It does not make sense to say that a person’s sex is decided by the law, as opposed to biology” (HL deb. 29 January 2004, col. 357). Clarifying what this means, Lord Turnberg added that “The Bill has nothing to do with whether such individuals should or should not change their gender—they have already made their decision and gone ahead and done it—it is about whether, having done it, they can be recognised in law” (HL deb. 29 January 2004, col. 361). In this view, recognition, appearing as an act of positive law, awards a legal status that corresponds to an individual’s already “decided” gender. That is, the law merely bestows rights and privileges without judging, promoting, or constituting the gendered identity of those individuals seeking recognition. To put it simply, the state offers a position or status to a subject *as she already is* (or, in this case, as whom she has decided she already is).

Opponents of the Bill rejected the claim that recognition does little more than offer legal status. To them, it institutes a lie: namely, that one’s sex—a term the opposition understands as the confluence of an individual’s biological, natural, and legal identity—can

be changed. For those who argue from the premise that there is an “original” identity, the Bill’s logic is both invalid and unsound. Baroness O’Cathain explains in succinct terms: “The basic proposition of the Bill is mistaken. A man cannot become a woman. A woman cannot become a man” (HL deb. 29 January 2004, col. 359). Here, the Bill does more than mark the transition of an individual’s gender identity. It *is* an act of transitioning itself:

The Bill requires members of a gender recognition panel, on the production of certain evidence, in broad terms to certify that a person who was born a woman, lived as a woman, married as a woman and has borne children is, despite all that, entitled to be issued with a birth certificate falsely professing that she was a male child. That cannot be anything other than a lie. It is a lie that the state would require its servants, such as the Registrar General, to certify as a truth. (Tebbit, HL deb. 18 December 2003, col. 1304)

Lord Tebbit’s argument indicates that the source of the lie is the law’s declaration of one’s identity, not the change of identity itself. Legal recognition—an act of “professing”—thus constitutes a transition in the truth of who one is: “an untruth can be made a truth” (Tebbit, HL deb. 18 December 2003, col. 1304). The act of recognition, according to this argument, is not a certification of an already constituted gender identity. It is instead an act of speech that brings about this change, taking as its object not legal status but the truth of who one is.<sup>3</sup>

Read together, these oppositional accounts of what it means for law to include trans people in society provide a site to study how legal acts of recognition shape and limit democratic communities. That is, they offer insight into how individuals who are oppressed,

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<sup>3</sup> There is some ambiguity here in understanding what it means for opponents of the Act to claim that recognition *is* an act of transitioning. The ECHR in *Goodwin* argued that legal recognition would complete the process of transitioning, suggesting that the offer of rights was central (but not wholly constitutive of) a trans person’s transition. Some parliamentary members, however, seem to fear that there is in legal recognition an act that does, in fact, constitute the transition.

marginalized, silent, or invisible find a place in legal and political practices. Such an investigation is hardly new. A virtual industry of scholarship examining the relationship between recognition and democracy appears in philosophy and political and legal theory. The point of this paper is not to demonstrate the ways that the Gender Recognition Act “fits” within these theories. It is, instead, to examine the ways the parliamentary debates and the Act itself inform how we might read what it means to take up a place in a democratic community through practices of recognition. Specifically, I argue that the debates and the Act invite a reading of recognition as a double act in and through which individuals lay claim to rights *and* define, critique, and institute the norms that govern recognizability. A (critical) rhetorical reading that addresses who speaks for the subject of recognition, it operates at the limits of political-theoretical accounts that fail to fully appreciate how subjects of recognition appear or are constituted in the *terms* of recognition.

Such a rhetorical analysis is valuable because it allows us to examine how law makes individuals recognizable in political communities, while addressing the limits of law’s power. That is, a rhetorical reading of legal practices of recognition presumes that, while law enables and forecloses the ability of individuals to take up a place in a particular community, positive law might not be able to contain or frame the constitutive practice of recognition. As a result, law itself (like those it addresses) demands recognition; it is put into play in a scene of recognition where individuals negotiate the very terms through which they communicate and acknowledge one another. An argument that challenges and expands political-theoretical accounts of recognition, it demonstrates that attention to *how* subjects of



recognition appear in the (language of) law allow us to examine the potential and limits of legal practices of recognition for creating pluralistic democratic communities.

### [1] Reading Recognition: Political Theory's Identity Claim

In the name of creating an effective democracy that responds to its citizens' interests, the Gender Recognition Act, according to Parliament, creates a place in society for individuals who have been excluded and denied basic human rights. Controversy over what it means for Parliament to extend trans individuals rights in their "acquired gender," however, highlights a need to understand *how* recognition shapes and limits the possibility for building democratic communities in pluralistic societies. For such an explanation, this section reads political-theoretical accounts of recognition. It demonstrates that political theorists figure recognition as a practice through which individuals claim a set of rights on the basis of who they are (that is, on the basis of their identity). A definition that, for some, essentializes identity in unproductive ways, recognition practices have been re-defined in contemporary political theory as sites to study the seemingly irresolvable tensions between individual and group rights, identity and difference, self-realization and economic or material change.<sup>4</sup> What political theorists thus offer is a study of what it means for

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<sup>4</sup> I do not mean to suggest that for all political theorists these categories are mutually exclusive, although for some authors they clearly are (see Fraser, *Recognition or Redistribution?*). Rather, I want to argue that these categories are in tension with one another when theorists consider how to institutionalize practices of recognition.

marginalized individuals to take up a place in a concept of recognition as an ever-evolving struggle over the norms that determine who can claim the protection of law.

Political theorists see in a concept of recognition a potential to understand how individuals gain equal rights, achieve self-realization, and acquire a sense of political agency in pluralistic societies. The so-called “politics of recognition” appeared in response to a series of debates about how political and legal institutions could and should address the different demands of cultural groups. A way to navigate multiculturalism’s political landscape, the politics of recognition for theorists in the late 1980’s and early 90’s became the mechanism for identity politics. As a “radical form of political agency” (Dean 48), identity politics is a form of political association in which individuals articulate their differences—those qualities often denigrated in larger society—and demand respect for these differences. According to Jodi Dean in *Solidarity of Strangers*, identity politics is appealing because it provides “minority groups with a sense of self-in-community they had previously lacked and upon which they could now draw as a source of self-respect” (4). That is, identity displaces the universal subject at the heart of liberal democracy—the abstract, sovereign subject who represents every citizen—replacing him with a subject whose identity is particular, concrete, and situated (Dean 4).

Perhaps no one more than Charles Taylor has advanced recognition as a viable political practice for identity politics. In his seminal essay “The Politics of Recognition,” Taylor claims that recognition is “not just a courtesy we owe people. It is a vital human need” (26). Necessary for individuals to realize their full potential and secure respect from

others, recognition, for Taylor, enables individuals to fashion their identities—a term he defines as “a person’s understanding of who they are” (“Politics” 25)—in conversation with others. Without recognition, Taylor claims that individuals experience a form of oppression that prohibits them from becoming full human agents and free and equal citizens. In his words, “nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being” (“Politics” 25).

The problem Taylor faces—the problem with which many political theorists have grappled since—is how to translate the desire for and offer of recognition into a political or legal institutional practice. For those working within a liberal democratic framework, a politics of recognition relies on a system of rights to justify, mediate, and institutionalize individual and group identities. In short, rights become a condition for an individual’s self-realization. Working under the banner of multiculturalism, Taylor realizes, however, that the relationship between recognition and rights is fragile. He understands that rights can have a universalizing or homogenizing effect that is ultimately counterproductive to the ends of a politics of recognition that seeks to acknowledge and embrace not only the identities or cultures of dominant society, but those that are not dominant as well. Taylor finds this risk of universalism in two different conceptions of liberal democracy: a politics of equal dignity and a politics of difference. In the former, all individuals receive the same set of rights. Although Taylor prefers to remain within this paradigm, he is quick to acknowledge that this model might reduce rights to the lowest common denominator, failing to value individuals’ differences. In the latter, institutions grant rights to citizens according to their differences,

recognizing the uniqueness of each individual (“Politics” 38). In this political vision, individuals and groups demand more than a universal human potential to foster unique identities. They ground demands for recognition in the “value of what [individuals] have made of this potential in fact” (“Politics” 43). Taylor argues that recognizing the concrete situations in which individuals find themselves, however, renders institutions powerless to make judgments about the worth or value of particular identities and, as such, strips rights of their normative force.

Taylor’s assessment of the homogenizing effects of a system of rights frames a problem for political theorists. If rights provide the structures and conditions for self-realization, if these rights must address and value difference and if all differences should not be valued equally, state institutions and political communities must decide who deserves to claim rights and the protection of law. The question that remains is how this decision is to be made in a way that does not simply reproduce the norms of the majority, Taylor’s “we” who offers recognition. Taylor finds his answer in a form of liberalism that allows certain rights, privileges, and immunities to be weighed against the possibility of cultural survival (“Politics” 61). The standard of judgment that determines the worth of a cultural identity is, for Taylor, embedded in a concept of the good life that presumes the equal worth of different cultures. This presumption, according to Taylor, does not assume a pre-conceived judgment of equal value; some identities, in the end, will be judged unworthy of recognition. The presumption of equal worth, instead, begins with the admission that “all human cultures that have animated societies over some considerable stretch of time have something important to

say to all human beings” (“Politics” 66). To put it simply, the presumption of equal worth is a moral obligation to learn from others who are not like us. As a hermeneutic, it enables a “fusion of horizons”—a form of knowledge constituted in our engagement with those different from us. Taylor reasons that if we learn from others, we develop new vocabularies that re-define our standards for what constitutes worth—standards he claims “we couldn’t possibly have had at the beginning” (“Politics” 67). Practices of recognition thus not only grant rights to individuals, they also transform the norms that regulate which identities are worthy of recognition.

Taylor’s hermeneutic approach, however, raises several questions about how a political system might afford recognition. Taylor himself questions whether the moral obligation to learn from the other can be codified or enforced by law. He states, “Perhaps we don’t need to ask whether it’s something that others can demand from us as a right. We might simply ask whether this is the way we ought to approach others” (“Politics” 72). Taylor’s doubt suggests that the question of how to judge the worth or value identity might move the scene of recognition outside or beyond the boundaries of positive law. Those political theorists who wish to retain the possibility of recognition as a practice of political and legal institutions offer alternative accounts of the ways democratic practices might support recognition as a means for individuals to take part in society.

Jürgen Habermas, for example, argues that a deliberative framework explains how a system of rights regulates claims for recognition. He claims that “a correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual

in the life contexts in which his or her identity is formed” (“Struggles for Recognition” 113). What this means is that a system of rights should address and enable the practices of socialization in which *individuals* form their identity in relation to others, often as members of a group. To Habermas, the challenge is to explain how such relationships might be recognized in a system of rights that only grants rights to individuals. In other words, the question is whether modern positive law, with its ground in individual rights, can address claims for recognition that are issued from groups or from individuals asking for recognition on the basis of belonging to a particular group (“Struggles for Recognition” 109). For modern positive law to mediate the tension between collective rights and individual autonomy without sacrificing its (normative) force, he argues that a system of rights must be able to demonstrate the relationship between individual autonomy and popular sovereignty. A struggle for recognition in a deliberative democracy thus entails a claim for private autonomy—a right of individuals to “realize [their] personal life project” (Habermas, “Struggles for Recognition” 112)—that is justified by reasons that demonstrate it is a legitimate claim. In other words, a system of rights can accommodate claims for recognition of a collective identity insofar as those making the claims can reasonably show how their private autonomy is justified by or related to the “binding character” of popular sovereignty (Habermas, *Between Facts and Norms* 104).

Habermas does not stand alone in attempting to re-define how liberal democracy might support recognition claims. Will Kymlicka, for instance, suggests that the problem is that “group-differentiated rights, in short, seem to reflect a collectivist or communitarian

outlook, rather than a liberal belief in individual freedom and equality” (*Multicultural Citizenship* 34). For Kymlicka, the overwhelming theoretical response to this problem, and one that he supports, has been a form of what he calls “liberal culturalism.” A political vision that offers minority or group-specific rights in addition to a common set of rights, it “support[s] policies that make it possible for members of ethnic and national groups to express and promote their culture and identity, but reject any policies which impose a *duty* on people to do so” (*Politics in the Vernacular* 42). Unlike others working from a liberal culturalist perspective, Kymlicka argues that, in order to understand how group rights are defined and justified in political practices, it is necessary to understand the demands for rights in the context of state nation-building. Because each minority group is threatened in different ways by a state’s practice, he argues, the claims of minority groups must be treated differently (*Politics in the Vernacular* 2). This argument is significant because it suggests that a theory of recognition cannot treat all claims for recognition the same. In other words, no single principle exists that can be applied to all groups in order to judge whether recognition is due.

Although Taylor, Habermas, and Kymlicka all point to the need to theorize how democratic practices and institutions define the worth of different identities, others question recognition’s essential relation to identity (politics)—a premise left untouched by Taylor and Habermas. One form of this critique argues that the politics of recognition collapses individual and collective identity, effectively ignoring identity’s normative, coercive, and

even pathological dimensions. In an essay appearing alongside Taylor's piece, Anthony

Appiah explains:

Demanding respect for people as blacks and gays requires that there are some scripts that go with being an African-American or having same-sex desires. There will be proper ways of being black or gay, there will be expectations to be met, demands will be made. It is at this point that someone who takes autonomy seriously will ask whether we have not replaced one kind of tyranny with another. ("Identity, Authenticity, Survival" 162-63)

In Appiah's argument, recognition of group identities risks reproducing the violent,

"tyrannical," relationship between dominant society and under-represented groups in an individual's relationship to her own identity and the groups with whom she identifies.

Group identity binds an individual to a norm of what one *ought* to be, imposing a set of scripts on an individual who receives recognition only when the narrative of who she is corresponds to the larger group narrative. The obvious problem for Appiah is that recognition suppresses individual autonomy and difference in the name of creating equality.

Identifying a similar exchange, Jodi Dean argues that "the identities offered by identity politics are generalized others....But what has happened is that these generalized others have been interpreted as already given. There has not been a space for members to question and criticize *as members* the group's conception of its identity" (*Solidarity* 49). In this account, recognition practices reproduce an abstract conception of a group identity, precluding those who share this identity from critiquing what it represents.

To others, this critique of identity's abstraction in a politics of recognition misses the potential problem of maintaining identity (in either a particular or abstract form) as a ground



or object of recognition. For scholars such as Nancy Fraser and Patchen Markell, recognition's link to identity conceals forms of violence or oppression that play out in recognition's practice. To Fraser, a politics of recognition committed to an identity politics hides forms of economic injustice (*Recognition and Redistribution* 12). It "seeks to celebrate or deconstruct group differences" (*Recognition* 16) in a way that produces only a "cultural or symbolic change" (*Recognition* 12). Two things are lost in this picture of recognition according to Fraser. First, this vision collapses different forms of recognition. She explains that "the equation of recognition politics with identity politics reduces what we shall see is actually a plurality of different kinds of recognition claims to a single type, namely claims for the affirmation of group specificity" (*Recognition* 12). Fraser believes the solution is to abandon a view of politics based on identity claims and, instead, investigate recognition as one paradigm of justice among others. Second, the traditional view of a politics of recognition is understood as mutually exclusive of and oppositional to a politics of redistribution that "aims to abolish class differentials" (*Recognition* 16). The uncoupling of these two politics is not an insignificant or minor problem. Instead, it enables economic orders to become unhinged from political orders in modern capitalist societies. The result for Fraser is that societies support, even promote, social (symbolic) changes in struggles for recognition while negating or refusing to grant economic or material changes.

Equally suspicious of recognition's debt to identity is Patchen Markell. In *Bound by Recognition*, Markell argues that recognition's attachment to identity becomes problematic because identity serves as a ground of subject's agency and action; it appears as "a coherent

self-description that can serve as the ground of agency, guiding or determining what we are to do” (36). Defined as such, the pursuit of recognition becomes synonymous with the pursuit of sovereignty—that is, “the aspiration to be able to act independently, without experiencing life among others as a source of vulnerability, or as a site of possible alienation or self-loss” (*Bound by Recognition* 12). Markell’s argument is that a politics of recognition invokes and fixes identity as a stable expression of who we are in the middle of a politics that betrays the vulnerability of our autonomy and the instability of our becoming.

Visions of a politics of recognition grounded in identity have given way in contemporary scholarship to critical accounts that re-imagine political life with an eye toward critiquing identity’s ill effects. Understanding the problem of recognition differently, these accounts either develop correctives to recognition’s political form or offer alternatives to its practices. What emerges from this literature is a re-definition of the concept of recognition and its relation to identity. In these accounts, recognition is conceived as a practice that mediates and (re-)negotiates recognition’s norms. James Tully, for example, re-thinks the framework of political life to imagine the object of recognition as something other than a fixed, stable identity possessed by a liberal subject—an autonomous, self-interested, sovereign individual. Tully shifts the definition of recognition from a practice that ends or fulfills a struggle for self-realization to a process of democratic debate that has no determined end. In his essay “Struggles over Recognition and Distribution,” he claims that “recognition in theory and practice should not be seen as a *telos* or end state, but as a partial, provisional, mutual, and human-all-too-human part of continuous processes of democratic activity in

which citizens struggle to change their rules of mutual recognition as they change themselves” (477). Here, Tully introduces a concept left underdeveloped by multicultural theorists: practices of recognition not only include struggles over rights, but also struggles over the terms that define who receive these rights. That is, the struggle for recognition in Tully’s argument becomes a process through which individuals and groups negotiate new rules that constantly re-define the terms through which citizens are offered recognition. A practice that celebrates the productive frenzy of disagreement, recognition, first, is removed from an institutional or judicial context in which there is a judgment of the worth or value of any particular group or individual. Law instead acts as a set of rules that enable deliberation about the terms of recognition—rules that are themselves up for debate. Second, identity itself is constantly re-negotiated in the practices of recognition. Refusing a fixed representation in law, it is re-constituted in the deliberations with others, demonstrating identity’s contingent and relational nature.

While Tully understands recognition as a process that continually negotiates and re-defines identities relationally, Fraser seeks a politics that might differentiate between recognition and identity politics while it also relates recognition claims to distribution claims. That is, a politics that enables marginalized individuals to take up an equal place in society must address demands for recognition of one’s identity as well as claims for redistribution of resources. For Fraser, this project requires a normative theory of social justice in which recognition and redistribution are differentiated, each articulated as distinct but related claims. Methodologically and philosophically, Fraser situates this project in a

critical theory of capitalist society—one she admits diverges from many of the tenets of traditional Critical Theory. The result is that both recognition and redistribution act as normative concepts “that are informed by a structural understanding of contemporary society, one that can diagnose the tensions and contextualize the struggles of the present” (*Recognition* 4). They are concepts that allow social critics to read, evaluate, and critique political practices of social justice. This frame defines recognition and redistribution as “folk paradigms”—“sets of linked assumptions about the causes of and remedies for injustice” (*Recognition* 11)—that provide reasons for why these claims normatively bind “all who agree to abide by fair terms of interaction under conditions of value pluralism” (*Recognition* 31). Fraser argues here that in order for recognition and redistribution claims to be valid, individuals making these claims must demonstrate how their demands conform to principles that regulate relations between citizens and the state.

This re-conception of recognition and redistribution, according to Fraser, accomplishes two things. First, it places recognition within the realm of institutionalized norms, removing it from “matters of psychological fact” (*Recognition* 32)—a position she sees most prominently in Axel Honneth’s work. For Fraser, locating recognition within social and institutional structures rather than in interpersonal relationships has the advantage of being able to verify when and whether misrecognition has occurred.<sup>5</sup> That is to

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<sup>5</sup> Fraser seems to suggest that the problem with the psychology model, or the “self-realization model” (i.e., Honneth’s model of recognition), is that there is no way to determine from the outside whether a demand for recognition is legitimate and, if so, why it should bind the beliefs of others. She explains that “When misrecognition is identified with internal distortions in the structure of the self-consciousness of the oppressed, it is but a short step to blaming the victim, as imputing psychic damage to those subject to racism, for example, seems to add insult to

say, when considered a matter of institutional norms, argues Fraser, we are able to determine whether demands for recognition are valid without having to consider “*whether or not they distort the subjectivity of the oppressed*” (*Recognition* 32). This shift, second, allows Fraser to develop a particular standard, “participatory parity,” for judging whether recognition and redistribution claims are promoting or prohibiting social justice. In order to be granted recognition, then, individuals “must show that current arrangements prevent them from participating on par with others in social life” (*Recognition* 38). Fraser’s re-conception of recognition thus suggests that one should read institutional acts of recognition for they open or foreclose an individual’s access to public practices that negotiate the norms of justice.

Tully and Fraser represent two accounts of a politics of recognition that address identity critiques by re-thinking the form of political life and the nature of recognition’s object. Each teaches us that, in order to avoid essentializing identity, recognition must be conceived as a practice that continuously re-negotiates who is included in society and who can lay claim to rights. In this practice of re-negotiation, those engaged in struggles for recognition challenge and transform the norms of what it means to be included. Yet, both authors presume that subjects already have a place at the table to re-define these norms.

That is to say, both presuppose that individuals have always already laid claim to rights. As such, each theorizes the argumentative practices in which norms are de-stabilized and re-

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injury. Conversely, when misrecognition is equated with prejudice in the minds of the oppressors, overcoming it seems to require policing their beliefs, an approach that is illiberal and authoritarian” (*Recognition* 29). Fraser seems to raise here a question of what constitutes misrecognition and who gets to name it as such. She is worried that self-reporting of a felt misrecognition not only erases the possibility for deliberation about the situation, but also creates a potential injury for all involved.

negotiated at the expense of providing an account of *how* individuals enter into these communicative exchanges. The next section of this paper returns to the Gender Recognition Act to understand what it means to read recognition practices with an eye toward understanding *how* individuals lay claim to rights.

## [2] The Subject of Recognition in the Gender Recognition Act 2004

Read within the framework of political-theoretical accounts, the Gender Recognition Act appears to be a practice of recognition in which legal definitions of sex and gender are re-defined. Much has been made of the Act's departure from *Corbett's* standard defining sex in terms of a chromosomal, gonadal, and genital congruence.<sup>6</sup> At stake in this shift is whether this Act transforms the norms—traditional binaries of man and woman or male and female—that regulate who receives a particular gendered status. Scholars do seem to agree that the Act does, at the very least, admit to “the malleability and permeability of binary categories” (Sandland, “Crossing” 207). For legal scholars the Act signals an occasion to “imagine a law that is opposed to the logic of the categorisation of sexuality and gender; a law which can articulate a place, a different sort of ground zero, where human connectedness

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<sup>6</sup> Prior to the Gender Recognition Act, the determination of sex and/or gender for legal purposes within the U.K. was made according to the test set out in the 1971 English probate case *Corbett v. Corbett*—a standard that measured the congruence of chromosomal, gonadal, and genital congruency. This biological (and for many over-medicalized) definition left little room for those who wished to alter their legal status because it instituted the sex assigned at birth as the “historical fact” of one’s sex.

need not be structured through that categorizing imperative which demands a remainder or an outside” (Sandland, “Crossing” 207).

The work of this section is not to offer a decisive answer to the question of the Act’s ability to re-work gender binaries. Instead, I read closely the language of the Act and the parliamentary debates to understand how political theorists’ descriptions of recognition as a process that re-defines who should receive recognition illuminates what it means to take up a place in law. To accomplish this task, I look specifically at the debates that most clearly (attempt to) re-define legal definitions of gender—those debates that consider the forms of evidence individuals must supply in order to receive a gender certificate. Although these debates enter into a re-negotiation of trans sexuality, re-thinking the boundaries of gendered identity, I argue that these debates also expose the limits of political-theoretical accounts. Unable to address the ways the Act not only re-defines which identity is due recognition, but also those norms that make a particular gendered identity *recognizable*, political-theoretical accounts of recognition, I argue, fail to see and theorize the paradox of constitution—how identities are both created and re-cognized in practices of recognition. As such, this section ends with a call for a new way of reading what it means to take up a place in a community through acts of recognition.

The criteria for receiving a gender recognition certificate, for the most part, are straightforward. Individuals must provide proof of age, medical and/or psychiatric documentation, proof that one is unmarried, and a money order. The criterion that has proved to be the most controversial and the most ambiguous, however, is that individuals

must show that they have been living in their acquired gender for at least two years, are “living in a gender now” and “intend to continue to live in the acquired gender until death” (Gender Recognition Act, Section 2 (1)(c)). This requirement presents a very practical problem for individuals seeking gender recognition: How does one provide proof of “living in a gender”? The criterion challenges conceptions of what gender is and how an individual relates to his or her gender identity. What does it mean to “live in” a gender? How does one “acquire” gender?

In the parliamentary debates, this discussion of the criteria for gender recognition is intimately tied to its claim—or perhaps more accurate, the Labour Party’s claim—that recognition is simply and only a change of legal status. For proponents of the Bill, recognition follows a linear temporal narrative: individuals transition, seek recognition from the state for their already established gender identity, and, once provided recognition, enjoy the rights accorded to their “acquired gender.” In this narrative, Parliament maintains that its role in the process is non-constitutive. That is, it does not create or make an individual’s gender identity; it simply confers recognition for an individual’s already constituted identity. In the Cross Party Briefing, for instance, the four authors stress that “It is important to note that the Bill does not create transsexual people” (HC 20 February 2004, 1).

As a matter of merely changing legal status, the parliamentary debates treat the transition of transsexual people as a matter of an equal exchange between mutually exclusive gender categories. Ann Widdecombe comments in a debate about parental titles that “a woman who has lived her life as a woman, has been registered at birth as a woman and has



borne children...change[s] gender to become fully a man” (HC deb. 23 February 2004, col. 52). Within this economy of gender identity, the transition between man and woman is one made without a remainder or excess.<sup>7</sup> A zero-sum game, an individual occupies “fully” the “opposite” gender—trading or exchanging one gender for the other. Running throughout these debates is a familiar narrative that makes references to an individual’s “acquired gender” as his or her “real gender.” Lynne Jones, for example, states that transsexual people are “living in the wrong body, and their brain identity [is] different from their chromosomal identity” (HC deb. 23 February 2004, col. 64). To unify an individual’s gender identity, then, is to perform work on the “wrong body” so that it reflects the “right body” known or felt by the individual. Here, the body (its chromosomal and genetic make-up as well as its appearance) is figured as a medium through which one becomes who one already is.

Some commentators have pointed to this narrative as a sign that the gender recognition act reproduces binary conceptions of gender that are based on an aesthetic view of the body. Sharon Cowan, for instance, claims that a right body/wrong body discourse “depends on the dichotomous framework of sex and gender in order to make sense of the non-sense of transsexuality” (“No Substitute” 72). In her view, this dichotomy requires that “post-operative transsexual people are, literally, ‘made to fit’ within existing sex and gender structures” (“No Substitute” 72). Cowan’s argument is that, despite the ambiguities of legal language, trans individuals appear in society as a man or woman—that is, their bodies “fit” or

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<sup>7</sup> The discourse of economics runs through the parliamentary debates in ways that are too obvious to be ignored. Rights are offered according to one’s “acquired gender.” A virtual take-over of another gender position, a sense of gender as a material product or even property lies just below the surface. And, yet, the conditions for receiving a recognition certificate refuse a model of the body as some kind of property that can prove the legitimacy of rights.

conform to certain aesthetic ideals of gender. A similar logic leads legal scholar Andrew Sharpe to claim that “it is clearly the expectation of the government that surgery will occur” (“Endless Sex” 71). If one maintains his or her “wrong body,” Sharpe argues, “this fact may hinder a diagnosis of gender dysphoria” (“Endless Sex” 72). In both these views, the state promises a change of legal status only to the extent that an individual conforms to the appearance of a gender binary.

This last point is not a simple one. In fact, it is the central issue in the debates over what counts as sufficient evidence for showing that one has lived in, is living in, and intends to continue living in his or her acquired gender. The law removes the body as both the site and the standard for assessing whether an individual should be offered a particular legal status. The final draft of the Gender Recognition Act does not require individuals to demonstrate any form of body manipulation, including gender re-assignment surgery and hormone therapy. According to Lammy, the gender recognition panel must decide instead “whether the person has taken decisive steps to live fully and permanently in their acquired gender” (HC deb. 23 February 2004, col. 53). In this sense, Sharpe is right to say that recognition turns on how one appears in a gender. Yet, if we read Parliament’s explanation closely, this appearance is dislocated from how the body looks or how the body conforms to certain pre-determined gender norms. Lammy insists,

That must be the test for legal recognition in the acquired gender, not whether the person’s physiology fully conforms to the acquired gender and not whether they “look the part.” Such tests are inappropriate and inconsistent with our broader ambition to respond to the needs and concerns of a small minority group. (HC deb. 23 February 2004, col. 53)

The criterion for recognition, here, is that one must appear in a gender without having to “look the part.” A counter-intuitive claim, this provision significantly shifts how we understand and read practices of recognition. To take up a place in society is to appear as (or in) a particular gendered identity. In this case, however, the parameters or forms of this appearance are not already constituted or given. In the context of the Gender Recognition Act, this means that the practice of recognition determines not only who counts *as* a man or woman—that is, who can take up a defined legal status or lay claim to rights *as* a man or woman—but, also, what it means to *be* a man or woman. That is, this provision of the Gender Recognition Act demonstrates that practices of recognition create and define both norms of recognition and norms of recognizability.

Political-theoretical accounts of recognition fail to grasp the critical relation between these two moments of recognition. In the work of Taylor, Habermas, Tully, and Fraser, for instance, recognition—even if re-thought in order to de-stabilize and situate identity—presumes that an individual’s identity is already apparent when individuals engage in recognition, when they enter the scene of recognition. Responding directly to the work of Taylor, Habermas, and Honneth, Alexander García Düttmann makes this claim explicit. In his important work *Between Cultures: Tensions in the Struggle for Recognition*, Düttmann argues that, for these theorists,

Recognition proves to be both something that is already presupposed and secured in its being presupposed, and something which is already a result and secured in its being a result.... Recognition *as...* makes difference disappear the very moment the recognized individual affirms his or her difference and thus asserts himself or herself. (141)

In other words, Düttmann sees in Habermas, Honneth, and Taylor—especially in his hermeneutic approach where there is a “fusion of horizons”—a tendency to unify and close off the scene of recognition. An individual takes up a place in this scene only insofar as he or she adopts a place, an identity, which is both presupposed and created in this practice of recognition.

The difficulty with this vision for Düttmann is that “recognition *as...*” precludes difference in the very assertion of a recognition claim. Düttmann’s argument here is not the same as Appiah’s or Dean’s. It is not that identity politics creates a script that trades individual’s differences for a group identity. Rather, Düttmann claims that difference itself is universalized or generalized in a scene where recognition treats identity as both presupposition and result. To clarify, his argument is that these three theorists have misrecognized recognition. Understanding the concept as a unified practiced that takes place against the backdrop of a given culture simplifies and truncates “the politics of recognition the three social philosophers try to justify, to the political instances which unify, normalize and discipline: the state, the institutions, the police” (*Between Cultures* 146). What these theorists fail to see, according to Düttmann, are the ways that practices of recognition and the act(s) of recognizing are dis-unified and dis-unifying. “Recognition,” he argues “does not leave the presupposed identity of the one who is to be recognized untouched. If act and statement, establishment and confirmation were to coincide without remainder, then the establishment would be mere confirmation and not really an establishment, or the confirmation would ultimately prove to be nothing but an establishment” (*Between Cultures*

4-5). For recognition to establish and confirm an identity, it must on Düttmann's account transform that identity, making it non-identical with itself.

Recognition's transformative power, if we follow Düttmann, depends on a form of recognition that not only grants individuals a place within a society (and societal laws), but also takes into account the ways individuals arrive on the scene of recognition. By this I mean that in recognition practices individuals, communities and institutions create norms that determine who can make a claim to law. In these (deliberative) practices the norms in and through which individuals enter into practices of recognition by making them recognizable as participants, as part of a community, are also constituted. Düttmann describes this second act of recognition as an act of the constitution of culture. Critiquing political theorists, he argues that they "tend to circle around the interpretation of the multiplicity of identities and cultures, rather than addressing the concept of culture itself and that which makes a different culture into a culture in the first place (Düttmann 139).

Düttmann's theoretical intervention points to the need to understand how one takes up a place in a society *and* how this place itself is constituted in practices of legal recognition. In the Gender Recognition Act, we can read these two moments in the decision of whether individuals should receive a gender recognition certificate and in the moment where what it means to be a man or a woman is negotiated and defined. As a double act of recognition, the Gender Recognition Act transforms the structures in which it operates in two ways. First, the parliamentary debates demonstrate that the no surgery requirement calls the force of positive law into question. To some extent, the lack of a definable (or visible) set of criteria

for the determination of gender betrays the state of recognition. Baroness O’Cathain for one expresses her worry that “a great deal of difficulty arises. If people say that they have always felt that they wanted to be man [sic.] and that they will live as such for two years, they can then go to the gender recognition panel and say, ‘I am a man, please give me recognition. That is the way I feel’” (HL deb. 29 January 2004, col. 363). For O’Cathain as well as parliamentary members who both support and oppose the Bill, the question of whether there are standards or evidence for this judgment of recognition determines whether positive law will be reduced to what Lammy calls a “rubber stamp” (HC deb. 9 March 2004, col. 13). That is, without established criteria for what counts as “living in” a gender, positive law no longer has the force to regulate the terms of recognition—who receives a certain legal status and who does not. Recognition is seemingly granted to those who ask for it.

Parliament’s anxiety appears when they cannot make sense of transition in the terms offered by law. Why? The discourses describing transsexuality within the debates remove a concept of willful action or agency from the process. Transitioning is defined by Lynne Jones as a practice of changing genders that is “not a matter over which people [have] control” (HC deb. 23 February 2004, col. 64). Unable to pin down or fix gender, Parliament expresses its concern that the law itself might be in a similar position where it has no choice to control gender identity. Parliamentary Member Boswell warns that there are those who “might engage in a series of changes. Ministers and Press for Change may feel that it is not helpful to public policy if people are moving frequently in and out of the system or to send a signal that they can do that” (HC deb. 9 March 2004, col. 16). Boswell expresses a concern

that people might “change back” once they had “decided a mistake had been made” (HC deb. 9 March 2004, col. 17). For him, such changes also threaten to communicate that such shifts are possible in law—a possibility Boswell is convinced will render the law impotent.

Responding to the anxiety over the law’s force, Parliament closes in the literal scene of recognition. Somewhat paradoxically though, it proposes to do this by opening up the scene—blurring the boundaries between a strictly legal act performed by the state and an interpersonal act performed by families and community members. We see this most clearly in Boswell’s proposal to provide a “double lock on the system of gender recognition” (HC deb. 9 March 2004, col. 57). An almost literal attempt to confine and limit the legal status of gender, Boswell’s proposal targets the make-up of the gender recognition panel. He argues that panels should be formed not only by trained members of the medical and psychiatric community, but also by lay members, family members or lawyers—someone who will bring “an ordered mind to the matter and will also in a sense stand in on behalf of the general public and ensure that doctors...are given some check and balance” (HC deb. 9 March 2004, col. 57-58).<sup>8</sup> The introduction of the public into the scene of recognition, for Boswell, theoretically works to confine what can and cannot be done within these scenes. Boswell’s point is that the panels cannot be trusted; they must be checked by the presence of a third figure that possesses an “ordered mind.” Although we might point to the obvious problems

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<sup>8</sup> Boswell’s argument is offered in a debate that concerns whether family members should be allowed to speak on behalf of or against any individual seeking recognition. Andrew Selous, a parliamentary member less willing to compromise, argues that “If those people [“family members and...many other people”] really care for that individual, they should be able to appear before the gender recognition panel to make any points that they wish” (HC deb. 23 February 2004, col. 94). According to Selous then, it is the responsibility of the state to not only address but make heard the opinions of family members, effectively suggesting that legal recognition must account for interpersonal forms of recognition.

of constructing family and community as an abstract and sovereign “ordered mind,” Boswell’s proposal is interesting, in part, because it was ultimately rejected. Securing the private nature of the debates, Parliament refused this double lock and, as such, left the anxiety over law’s force unresolved.

Parliament’s concern over the authority or force of positive law leads to the second effect of the double act of recognition. Specifically, the parliamentary debates show that, once law’s force is called into question, the relationships between the structures (or characters) of recognition are re-configured. In Labour arguments defining gender recognition as an act that merely changes legal status, recognition is figured as a uni-lateral and uni-directional movement: the state through positive law confers recognition to trans people who can fulfill certain criteria. Called into question, however, legal institutions no longer operate as neutral, uninterested parties in recognition practices. As Jodi Dean rightly notes, “The struggles for recognition that we see in identity politics will not be settled simply by coming up with the right set of juridical procedures and categories....Since law is anchored in already given cultural formations, we have to acknowledge that ‘it’ is never fully neutral” (*Solidarity of Strangers* 71).

In the debates, Parliament not only cedes its neutrality, it understands the state, and by extension law itself, as an object in need of recognition. Throughout the debates, parliamentary members note an analogous relationship between the state and subjects seeking recognition. Yet, the mode and direction of the identification forged between individuals and the state is reversed. Kali Mountford remarks, “Our society is in transition,



as, indeed, is our medical profession and this House. And the same is true of some of the people whom we are talking about” (HC deb. 23 February 2004, col. 85). Here, it is the state that forges an identification with those individuals seeking recognition, positioning itself as a body in transition. This shift, according to parliamentary members, signals the need of the state to “catch up with social changes and reflect how society is moving” (Mountford, HC deb. 23 February 2004, col. 67). The state, admitting its contingency and marking its dependence on the perceptions and faith of society, demands recognition from its citizens. Its place within society is, like the trans person’s place, unstable and uncertain.

Law in this account of recognition cannot be conceived of as the container, medium, or structure of recognition (or recognition’s scene). It cannot offer recognition without itself receiving recognition. The debates suggest then that recognition (or, better, the act of recognizing) is a practice that develops in the relationships between states, citizens, and subjects seeking recognition—relationships that are themselves defined in acts of recognition.<sup>9</sup> This changing constellation of states, citizens, and subjects is evident in the debates over who can provide testimony when the individuals come before a gender recognition panel. Although Boswell’s proposal suggesting that the public check practices of recognition was rejected, Members of Parliament did assert the importance of a form of recognition that exceeds legal recognition. Lammy, for example, claims that the very success

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<sup>9</sup> There is some slippage here that I want to call attention to and justify. The “state” and “law” often appear interchangeable in the following paragraphs. I do not mean to suggest that the operations of the state can be reduced to law nor that the law can somehow contain the state. The reason why these terms are interchanged here is that they are connected through the figure of Parliament as a representative of the state and the agent or author of law. Parliament speaks for the state, or in their terms “for Government,” through the language of law.

of the Bill depends on its ability to address these other forms of recognition offered by communities and families: “If the Bill is to help such people, it must not strain its acceptability to those who come into contact with them, or are more closely related to them—their families, or faith or other interest groups” (HC deb. 23 February 2004, col. 63). The difficulty with such a claim is that Lammy does not (and perhaps cannot) articulate the precise relationship between these different forms of recognition. He merely asserts that the Bill concerns “the autonomy of the individual” who should be allowed to seek recognition “regardless of whether other people may be hostile or supportive” (HC deb. 9 March 2004, col. 44). Here, legal recognition finds its limits in an interpersonal form of interaction in which others may support, tolerate, or reject individuals independent of the law that defines their status. In this way, Parliament distinguishes between a purely legal recognition that defines an individual’s status in law and an interpersonal form of recognition that judges the worth and value of a particular individual’s identity for a community. The difficulty with such a split is that proponents of the Bill as well as its opponents agree that legal recognition “has a close and intimate effect on [an individual’s] family and their relationships” (Boswell, HC deb. 9 March 2004, col. 43). It, therefore, cannot be treated as an independent practice that is irrelevant to or unrelated from other (interpersonal) forms of recognition. And, yet, Parliament, perhaps because it too is invested in and in need of recognition itself, does not offer a definition of what this relationship is.

The appearance of this unresolved (and perhaps irresolvable) tripartite structure of recognition in the Gender Recognition Act suggests that there is a need to understand how

these figures relate to one another to define, enact, and regulate the terms of recognition *and* how these terms allow individuals, communities and states to take up a place in relation to one another. A paradox of how the terms of recognition are constituted, the complexity of this practice is under-appreciated by theoretical-political accounts of recognition. Scholars typically theorize one of these moments at the expense of the other. For those who wish to study recognition as an institutional problem, that is, as a problem of how the state confers both rights and access to democratic practices to individuals seeking recognition, this tripartite structure demonstrates the impossibility of carving out a form of recognition that limits itself only to questions of legal status over and against interpersonal norms that promote self-realization and dignity. Nancy Fraser's "status model" of recognition demonstrates this point clearly. In her response to Axel Honneth's understanding of recognition as a practice that secures the social structures and relationships (love, rights, and solidarity) that make self-realization possible, Fraser argues that "To view recognition as a matter of justice is to treat it as an issue of *social status*. This means examining institutionalized patterns of cultural value for their effects on the *relative standing* of social actors" (*Recognition* 29). In her work, Fraser wants to think recognition as the "institutionalized relation" of justice, rather than psychical formations and relationships that affect ethical practices of self-realization—practices she finds in both Taylor and Honneth (29). Her attempt to sever these ethical forms of recognition from an institutionalized practice frames recognition in such a way that its purpose is "*to deinstitutionalize patterns of cultural value that impede parity of participation and to replace them with patterns that*

*foster it*” (*Recognition* 30). If applied to the Gender Recognition Act, Fraser’s theory suggests that the state’s purpose is to create the conditions in which individuals might negotiate particular rights as equal members.

The predicament of this position, however, is that the state occupies a role in which it, first, remains a neutral party in practices of recognition and, second, garners power at the expense of its citizens. It is perhaps Patchen Markell who best articulates this problem. In his work *Bound by Recognition*, Markell argues that theories of recognition misunderstand (in his words, misrecognize) the place and power of the state. He claims that theorists tend to “treat institutionalized forms of recognition as expressions of, and ultimately reducible to, more elementary and unmediated exchanges of recognition among persons” (26). In this case, the state acts as a kind of unseen medium for exchanges between individuals. As a “background” for citizens to recognize one another, the concept of the state, Markell argues, operates with the assumption that “the people” are an already constituted, stable, and unified entity (*Bound by Recognition* 26). Markell indicates then that that theorists such as Taylor, Fraser, Tully and Habermas who presume that recognition takes an already constituted identity as its object cannot explain how struggles for recognition condition, shape, and limit political communities.

At the same time, however, scholars who theorize how the relationships between states, individuals, and communities are constituted in struggles for recognition—how they emerge as recognizable entities—understand these practices as alternative (and, in some cases, oppositional) accounts to the politics of recognition. Addressing the ways the

emergence of a subject into a community or the constitution of the “people” can itself institute violence or oppression, these theorists often recommend a way to imagine intersubjective relationships outside the confines of a concept of recognition. For example, Kelly Oliver finds in the politics of recognition a “cultural imperialism” created by its dependence on the “the most insensitive operations of liberal multiculturalism, which begins from the benevolence of those in power without regard for the desires of those without power” (*Witnessing* 46). As a result, she finds that recognition presumes and reproduces a logic of oppression through which subjects “desire to become objectified in order to be recognized by the sovereign subject to whom the oppressed is beholden for his or her own self-worth” (*Witnessing* 24). For Oliver, the task then is to imagine ways individuals enter into relationship with others that overcome this oppressive logic and provide an account of subjectivity that does not presume violence, struggle, and power. To do so, Oliver turns away from a concept of recognition and toward a concept of witnessing, a concept, for her, that does not presume a pre-formed subject. She argues, instead, that the “process of witnessing is both necessary to subjectivity and part of the process of working-through the trauma of oppression necessary to personal and political transformation” (*Witnessing* 85). A matter of exploring the conditions of one’s subjectivity and the processes through which individuals enter into ethical relationships with others, witnessing offers her a way to escape the limits of recognition practices.

Much like Oliver, Markell finds in a concept of recognition a pathological model of intersubjective relationships that is driven by and (re-)produces dominance. For him, the

turn from recognition to a concept of acknowledgement provides an opportunity to think about a practical form of relating to others—how individuals treat one another—rather than one based on an epistemology where the desire to know the other is a desire for sovereignty—which he claims is recognition’s epistemological orientation (*Bound by Recognition* 36). Markell claims that this non-utopian approach changes the questions we can ask about the conditions of subjectivity and their relation to politics. He writes:

What’s acknowledged in an act of acknowledgment is not one’s own identity—at least not as the politics of recognition conceives of identity: a coherent self-description that can serve as the ground of agency, guiding or determining what we are to do. Rather, acknowledgment is directed at the basic conditions of one’s own existence and activity, including, crucially, the *limits* of ‘identity’ as a ground of action, limits which arise out of our constitutive vulnerability to the unpredictable reactions and responses of others. (*Bound by Recognition* 35)

The shift from recognition thus allows Markell to investigate what constitutes the grounds of political action without presuming an already constituted identity or re-inscribing the state as a figure that mediates or resolves recognition practices. It represents, for him, an effort to come to terms with the “risk of conflict, hostility, misunderstanding, opacity, and alienation that characterizes life among others” (*Bound by Recognition* 38). That is, Markell’s concept of acknowledgment entails a practice through which a self discovers its dependence on others and reconciles the risk and violence of this dependence as a necessary part of social life.

The point here is that political-theoretical accounts of recognition do not provide a reading of *both* moments of recognition: how subjects become recognizable in a political

community and how institutions and communities negotiate the norms that determine who should receive recognition. Theorizing one or the other, scholars have yet to examine the critical relationship between these two moments. In the next section, I argue that to begin this work we might turn to a study of the rhetorical dimensions of recognition practices.

### [3] Taking Place: The Rhetorical Dimension of Recognition

My reading of the parliamentary evidence debates suggests that political-theoretical accounts of recognition elide the question of how the norms of recognizability—in the Gender Recognition Act, the norms that define what it is to be a man or woman—are themselves constituted in practices of recognition. The result is that we do not find a theoretical framework in these accounts to explain, first, what it means for an individual to appear in a scene of recognition and, second, how recognition practices figure and are figured by relationships between subjects, others, and law. The final section of this paper argues that these questions are, in part, rhetorical questions. Concerned with what it means to speak for the subject of recognition, they invite a study of how demands for recognition allow individuals to take place politically and grammatically. With this argument, I do not mean to dismiss political-theoretical accounts of recognition, replacing them with an alternative or oppositional theory. Instead, I intend to show that their inability to speak to the conditions in which an individual takes up a place follows from their inability to see how taking up a place is an act of speech—a claim that is presupposed and yet unexamined in many political

theorists' work. Reading the rhetorical dimension of recognition, I argue, allows us to re-think the questions we might ask about how recognition challenges, critiques, or transforms political life.

The debates over what constitutes sufficient evidence to show that one “lives in” a particular gender point to a single, unresolved question: Who speaks for the subject of recognition? Read literally, the question asks who might bear witness to the transition and lived gender identity (both past, present, and future) of trans people. Does this task belong to the public or a family member? To the state? To individuals seeking recognition? A question of incredible import in the parliamentary debates, it asks who might provide reliable evidence for the “truth” of a subject’s identity as the law’s record of this identity, “the historical fact” of one’s birth, seems to tell a lie in the present. Read closely, however, this question points to a rhetorical dimension of recognition that is, if you will, unrecognized in political-theoretical accounts.

To ask who speaks for a subject of recognition in the Gender Recognition Act is, in part, to pose a question of subjectivity. Who appears in speech or, more concretely, who is the one that appears in front of the gender recognition panel? As David Lammy argues, the Bill is important because it allows trans people “to leave behind the vulnerable position—the limbo between two genders—that they currently have to endure” (HC deb. 23 February 2004, col. 57). Despite his claim that the transition from one gender to another is complete prior to the action of the law, Lammy here illustrates that, before the law, transsexual people occupy a place that is a non-place—a transitional space of “limbo” in which they do not



occupy a stable position and are, therefore, “vulnerable.” To end this state of transition, the law offers recognition for an “acquired gender.” This language, used throughout the draft bill, the parliamentary debates, and the Act, signifies that what the law provides is a legal status, a position or place that can be acquired, taken up as one’s own. At first glance, this phrase seems to define gender as property or a material good that one can “live in.” It would seem that these gendered positions themselves are stable (subject) positions, always already recognized and identifiable. An individual, on this reading, would then simply have to take up a position, perhaps like property, through some kind of exchange.

The parliamentary debates, however, resist this reading. The acquisition of a gender appears in several places throughout the parliamentary debates to be linked to an individual’s (contingent) statement of who she is in a given moment. According to Kali Mountford, “None of us can be absolutely sure of who we are at any point” and, as such, the search for definitions or referents for gender identity in medical books does not lead to a “sensible and logical conclusion about who we are” (col. 85). Here, Mountford argues that every individual’s identity is, in some way or another, in transition. What she draws our attention to is that there might not be an authoritative source—in this quote, the medical books—that can explain or articulate an individual’s identity definitively. We see this too in Lammy’s explanation of the evidentiary standards for receiving a gender certificate. Whether an individual is “living in” a gender, depends not on their physical appearance or a variety of medical tests, but ultimately in an individual’s narrative of their gendered history addressed to a gender recognition panel. The question of *who* speaks, therefore, is not answered by

thinking about the ways an individual takes up an already established (gender) position in practices of legal recognition. As both Mountford and Lammy seem to suggest, this question asks us to consider how it is through recognition that an individual articulates him- or herself in language.

Political theorists, for the most part, assume that the subject's articulation of herself is transparent and recognizable to the one of whom recognition is demanded. Taylor's vision of recognition, for instance, is grounded in a communicative exchange that he calls "dialogical." According to Taylor, "We become full human agents, capable of understanding ourselves, and hence of defining our identity, through an acquisition of rich human languages of expression....But we learn these modes of expression through exchanges with others" ("Politics" 32). Taylor thus defines language as a medium of expression in which individuals develop and communicate their identities in relation to others. This definition, however, presumes that language can somehow communicate the truth of who one is, one's identity, unproblematically. It assumes that who one says one is coincides with who one is. Taylor's own language suggests, however, that this coincidence might not be possible *in language*. In practices of recognition, identity is crafted and expressed in communicative exchanges between individuals, but a subject seems to stand outside these exchanges, untouched by their reach. Explaining his definition of identity, Taylor writes, "It is who we are, 'where we're coming from.' As such, it is the background against which our tastes and desires and opinions and aspirations make sense" ("Politics" 33-34). There is in Taylor's own language here a disjunct between identity and the one who possesses identity, developing it

in language. Subjects of recognition, presumably the “we,” are prior temporally and ontologically to the identity that is crafted and exchanged. Standing outside the dialogical process, *we* engage in communication in order to develop *our* identity. Taylor’s presumption of a subject constituted prior to engaging in recognition practices is repeated in theorists who understand recognition’s communicative dimension. Jodi Dean, for example, writes that “Based on the communicative ties between the ‘you’ and ‘I’ that are always part of ‘we,’ [solidarity] makes contestation the basis of connection” (*Solidarity of Strangers* 49). Important here is the assumption that the communication seems to occur between already established subject positions without constituting either of these separate, identifiable positions: “you” and “I.”

Both Mountford and Lammy, however, seem to suggest that there is in fact a constitutive moment in recognition’s speech. The subject becomes known to herself (and appears to others) through speech. To put it differently, in an act of recognition the subject is constituted through a set of norms that allows her to take up a *grammatical* place—a place in language as a subject. Taking up a grammatical place in this way, however, does not constitute the subject as a stable, sovereign being. As Judith Butler explains in “Giving an Account of Oneself,” if one takes place in the terms of recognition then one inhabits a place where she is at once “both subjected to that norm [of recognition] and the agency of its use” (22). In this place where one is a subject of language and subject to it, *who* speaks can only be understood by looking at the speech itself—recognition’s grammar.

The question of who speaks for the subject of recognition is not exhausted by an investigation into the way a subject takes place in language. The question can also be read in relation to a concern for who defines the topic or the referent of recognition. It asks that we investigate how the claims of institutions and others shape and limit the terms of recognition. In the parliamentary debates, this issue is pronounced in the discussions about whether the Bill refers to “sex” or “gender.” Bandied about, the now commonplace distinction between gender as a cultural construction and sex as a biological component developed in the parliamentary debates into a problem of the transitional nature of language itself.<sup>10</sup> Lord Turnberg, deconstructing this distinction, argues that “It all seems so straightforward and black and white, but unfortunately this is not quite the whole picture. One’s sex is only a part of one’s gender. It is an important and essential part but not the only part” (HL deb. 29 January 2004, col. 360). The ambiguity of this relation between sex and gender is, according to Lord Filkin, an ambiguity in the terms themselves. He claims, “Our sense of the words ‘sex’ and ‘gender’ has changed over time and no doubt will do so in the future. While the meaning of the word ‘sex’ is not the same as that of ‘gender,’ the word ‘sex’ is increasingly in use in ways that go beyond a narrow biological definition” (HL deb. 29 January 2004, col. 366). Understanding language as something that is “mobile” (HL deb. 29

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<sup>10</sup> Somewhat surprisingly, very few argued for a strict distinction. Baroness O’Cathain was one. She argued that “Save in a tiny number of cases worldwide, doctors have absolutely no difficulty in determining a person’s sex by reference to physical indicators. Gender, on the other hand, is really a modern invention. It conveys the idea of a fluid, changeable view of your own sexual identity that is governed not by any physical, medical or biological criteria but solely by perceptions—your own and those of other people” (HL deb. 29 January 2004, col. 359). The distinction works here not only to separate sex and gender but to define sex as one that has identifiable criteria, and thus is true and can be proven as such, and gender relies on “perceptions” and as such is false. What the Baroness does not seem to understand is that if gender is governed by how one appears to themselves and to others, the question is not what makes it false but what it makes gender legible.

January 2004, col. 365) and “fluid” (HL deb. 29 January 2004, col. 366), Lord Filkin reasoned that there was no sense in debating the specific language as it would undoubtedly change over time (HL deb. 29 January 2004, col. 365). Here, the language of law appears unable to clearly identify the subject of recognition—that is, to what does recognition refer—because its object does not remain constant over time.

The subject of recognition thus appears in a transitional (or, better yet, transitioning) language. For some, the ephemeral character of this language and its inability to concretely state what things mean creates anxiety about who might speak for this subject. Referring to Lord Filkin’s claims as “linguistic relativism,” Lord Tebbit argues that this position suggests that “we should legislate using words whose meanings we do not understand and which mean different things to different people” (HL deb. 29 January 2004, col. 367). This is an untenable position for a practitioner of law, according to Lord Tebbit, because ignorance of the meaning of a term could “prejudice life” (HL deb. 29 January 2004, col. 367). The language of law and the meaning it carries is thus significant precisely because it defines the limits of (human) life. Lord Tebbit’s argument is fascinating given where it falls in the debates. His words ultimately end the discussion of the difference/non-difference between sex and gender. He issues an argument that, in order for the law to mean something, it is necessary to clearly define these terms. In the very next moment he declares that he “find[s] the matter profoundly unsatisfactory” but moves to withdraw the amendment and “move on with the debate on other amendments” (HL deb. 29 January 2004, col. 367). The issue is thus left ultimately open, with no decisive definitions for the terms of law. The movement to

proceed perhaps signals the impossibility of grasping *once and for all* the meaning of law's language.

Lord Tebbit's argument signals that we cannot read the language of law as if its meaning is transparent and ahistorical. Many political scholars of recognition devalue this insight. Understanding recognition as an act that has something to do with communication, they ignore the ways recognition *is* an act of speech—an act that defines and constitutes recognition's subject and object performatively, not one in which subjects merely use speech. In these works then what we miss is a sense of *how* recognition practices operate. How do they bind individuals together to form a community? How do they create the (linguistic) conditions for a subject to take up a place? How do they respond to the desires and needs of citizens (and how do citizens address these desires and needs)? A set of rhetorical questions, they invite us to read the terms of recognition in a way that we can better understand how these practices develop in shifting relationships between subjects, others, and laws. Such a rhetorical inquiry brings together accounts of recognition that imagine it as an act that *either* provides the conditions for the emergence of a subject into a community *or* constitutes an institutional form of action. In the end, reading the relationship between these accounts might help us both understand and critique the way taking up a place in a community through recognition links political agency to the conditions of subjectivity.

## WORKS CITED

- Appiah, Anthony K. "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction." *Multiculturalism: Examining the Politics of Recognition*. Ed. Amy Gutmann. Princeton: Princeton UP, 1994. 149-64.
- Butler, Judith. "Giving an Account of Oneself." *Diacritics* 31.4 (2001): 22-40.
- Christine Goodwin v. The United Kingdom*. Application No 28957/95 (1995) ECHR.
- Cowan, Sharon. "'Gender is no Substitute for Sex': A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity." *Feminist Legal Studies* 13 (2005): 67-96.
- . "'That Woman is a Woman!' The Case of *Bellinger v. Bellinger* and the Mysterious (Dis)Appearance of Sex." *Feminist Legal Studies* 12 (2004): 79-92.
- Dean, Jodi. *Solidarity of Strangers: Feminism after Identity Politics*. Berkeley: U of California P, 1996.
- Dickerson, Hollin K. "Vindication without Substance: Gender Recognition and the Human Rights Act." *Texas International Law Journal* 40 (2005): 807-35.
- Düttman, Alexander Garcia, *Between Cultures: Tensions in the Struggle for Recognition*. Trans. K. B. Woodgate. London: Verso, 2000.
- Fraser, Nancy, and Axel Honneth. *Redistribution or Recognition: A Political—Philosophical Exchange*. Trans. Joel Golb, James Ingram, and Christiane Wilke. London: Verso, 2003.
- "Gender Recognition Act," United Kingdom. Parliament. House of Commons. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 418 (Feb. 23, 2004).
- . United Kingdom. Parliament. House of Commons. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 418 (Mar. 9, 2004).
- . United Kingdom. Parliament. House of Commons. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 418 (Mar. 11, 2004).
- . United Kingdom. Parliament. House of Commons. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 418 (Mar. 16, 2004).

- . United Kingdom. Parliament. House of Lords. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 415 (Dec. 18, 2003).
- . United Kingdom. Parliament. House of Lords. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 416 (Jan. 13, 2004).
- . United Kingdom. Parliament. House of Lords. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 416 (Jan. 14, 2004).
- . United Kingdom. Parliament. House of Lords. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 417 (Jan. 29, 2004).
- . United Kingdom. Parliament. House of Lords. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 418 (Feb. 3, 2004).
- . United Kingdom. Parliament. House of Lords. *Parliamentary Debates, Official Report (Hansard)* 6<sup>th</sup> Series, 417 (Feb. 10, 2004).
- Habermas, Jürgen. “Struggles for Recognition in the Democratic Constitutional State.” Trans. Shierry Weber Nicholsen. *Multiculturalism: Examining the Politics of Recognition*. Ed. Amy Gutmann. Princeton: Princeton University Press, 1994. 107-48.
- . *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Trans. William Rehg. Cambridge: MIT Press, 1996.
- Kymlicka, Will. *Multicultural Citizenship*. Oxford: Clarendon P, 1995.
- Lord Filkin. “Government Announcement on Transsexual People.” July 11, 2003. Available at [www.pfc.org.uk/cgi/printit.pl?gr-bill/filkin1.htm](http://www.pfc.org.uk/cgi/printit.pl?gr-bill/filkin1.htm); Accessed: 4/29/05.
- Markell, Patchen. *Bound by Recognition*. Princeton: Princeton University Press, 2003.
- Oliver, Kelly. *Witnessing: Beyond Recognition*. Minneapolis: University of Minnesota Press, 2001.
- Povinelli, Elizabeth. *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*. Durham: Duke University Press, 2002.



- Sandland, Ralph. "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights." *Feminist Legal Studies* 11 (2003): 191-209.
- . "Feminism and the Gender Recognition Act 2004." *Feminist Legal Studies* 13 (2005): 43-66.
- Sharpe, Andrew N. "Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category." *Feminist Legal Studies* 15 (2007): 57-84.
- Taylor, Charles. "The Politics of Recognition." *Multiculturalism: Examining the Politics of Recognition*. Ed. Amy Gutmann. Princeton: Princeton UP, 1994. 25-74.
- Tully, James. "Struggles over Recognition and Distribution." *Constellations* 7 (2000): 469-82.
- United Kingdom. Parliament, House of Commons, *Cross Party Briefing on the Gender Recognition Bill*. February 2004.
- United Kingdom. Parliament, House of Lords, 2003-04 Sess. *Gender Recognition Act*. As introduced Nov. 27, 2003.
- United Kingdom. Parliament, House of Lords, Joint Committee on Human Rights (Fourth Report). Ordered printed Feb. 10, 2004. (HL4) (Publications on the Internet). Available at [www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/34/-3407.htm](http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/34/-3407.htm); Accessed: 4/29/05.