A PHENOMENOLOGICAL APPROACH TO LEGAL EPISTEMIC INJUSTICE

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ABSTRACT

Injustices in legal contexts are widespread, yet we usually tend to think of them through a social lens. The study of epistemic injustices increases the resolution of this lens; it identifies how we wrong others as "knowers." In this paper, I propose that the tradition of phenomenology may be invoked to describe and identify instances of epistemic injustice in legal contexts. In order to justify this claim, I establish a phenomenological methodology predicated on the synthesis of two ideas: (1) the phenomenological recognition of the Other, and (2) society's duty to endow its members with an epistemic sphere of action.

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I. INTRODUCTION

Epistemic injustice is a phenomenon that occurs when an individual's characteristic as a knower is inhibited. To be a person is to be a knower, a person who can contribute knowledge and share a meaningful perspective with others. The field of epistemology is predicated upon the assumption that we have knowledge, that it and its properties are important, and that we are able to use it in order to exercise our capacities as an individual and form meaningful relationships with others and the world. Epistemic injustice occurs when this ability is stifled—when a person in some instance is done wrong by having their knowledge discredited.[1]

In this paper, I will argue that instances of epistemic injustice that occur in legal contexts may be effectively identified and described using a method derived from the phenomenological tradition, a tradition that seeks to contextualize meaningful aspects of the world through the study of conscious experience. This method will be synthesized using two phenomenological ideas: (1) the recognition of the phenomenological "Other" and (2) the societal duty to facilitate the Other's epistemic freedom of action. I will then apply this method to instances of legal epistemic injustice in an attempt to show the significance of the method and consider objections to the method.

II. PHENOMENOLOGY AND THE OTHER

Phenomenology is based on our experience, our capacity to interpret the world not necessarily as a dichotomy between the "thing that experiences the world" and the "world itself," but as a recognition of the fact that we, as the individuals *doing* the experiencing, are part of the world. We may generate knowledge with our conscious experience *in terms of* this experience and make judgments in light of this. In keeping with such a thesis, it is productive not to view us as minds floating around in an arbitrary field, but rather as embodied persons with our own intentions who engage with the world *as a part of* the world.

However, one may argue that if our medium of analysis is experience, and experience is restricted to individual people, how can we share a world with others? How can we generate knowledge *with* and *about* other individuals? There may not be a possibility of constructing a phenomenological methodology related to epistemic injustice since the object of analysis in the phenomenological method appears to be strictly relegated to the lived experience of single individuals.

In response, Maurice Merleau-Ponty points out that our actual experience of the world is far from one of being "incarcerated in our separate perspectives."[2] We experience the world already as if there were other individuals who experience the world. He gives an example by describing a scene in which he and his friend, Paul, are before a landscape. Paul points out a church tower to him. He notes that he is not inclined to perceive Paul's finger as "a finger-for-me" or the church tower as a "church-tower-for-me."[3] The perception of the world is not immediately thought of as a set of private, secluded sensations. We have a sense of the Other and can make sense of them through our own conscious experience while still retaining an individual perspective.

At this point, we have reached a preliminary phenomenological conception of the Other. They are not just another object in a set of objects in the world. They cannot be defined in terms of being, in a Heideggerian sense, "present-at-hand," with an attitude that merely observes things with disinterest.[4] The Other is another perspective, another way of seeing the world. We are able to embody this perspective by engaging, interacting, and communicating with them. Lisa Guenther, in describing Edmund Husserl's account of embodying another's consciousness, likens the Other to a "here" outside of ourselves:

> When I encounter another body, who moves and orients itself towards objects in a way that is structurally similar to my own, I spontaneously experience this body as another 'here': an embodied consciousness with their own perspective on the world, to whom I appear conversely as 'there.'[5]

It is reasonable to infer from this account of the Other that part of our being able to embody the Other's perspective is to understand and appreciate their giving of knowledge (i.e., their epistemic status). Their contribution to the world in the form of knowledge is a facet of self-expression—a statement of a novel experience of the world. Our ability to understand and embody the significance of this knowledge is to appreciate their status as a person with a perspective and as an individual

1 Ian James Kidd, José Medina, and Gaile Pohlhaus Jr., "Introduction" in *The Routledge Handbook of Epistemic Injustice*, ed. Ian James Kidd, José Medina, and Gaile Pohlhaus Jr. (New York: Routledge, 2017), 1.

2 Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. Colin Smith (London: Routledge, 1962), 405.

3 Merleau-Ponty, *Perception*, 405.

4 Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper Perennial Modern Thought, 2008), 103–4.

5 Lisa Guenther, "Epistemic Injustice and Phenomenology," in *The Routledge Handbook of Epistemic Injustice*, ed. Ian James Kidd, José Medina, and Gaile Pohlhaus Jr. (New York: Routledge, 2017), 196.

who is capable of making the world their own. This embodiment is commonplace in everyday life. In interacting with others with whom we are comfortable, we already affirm their status as knowers.

III. THE APPLICATION OF THE PHENOMENOLOGICAL OTHER TO EPISTEMIC INJUSTICE

From this account of the phenomenological Other, we may start to understand how epistemic injustices may be committed within this context. If in a normal case we acknowledge another's knowledge as important due to their being perceived as a true perspective endowed and lived with conscious experience, a phenomenological epistemic injustice occurs when this process is somehow dysfunctional. To delineate the characteristics of this possible dysfunction, it may be productive to assume that the primary site of dysfunction occurs at the level of embodying the Other.

While in the previous case, the Other's perspective is affirmed and made real via our recognition and embodiment of their personhood, a dysfunction may occur when we perceive the Other not as a manifestation of lived experience but as an object devoid of any meaningful conscious behavior. When they are perceived in this manner, their status as a knower is diminished. Their statements about the world are not perceived as having come from another perspective, as products of lived experience, but rather as data that do not have a credible bearer—the reduction of another "here" to another set of spatial-temporal coordinates. The Other is not only *perceived* as an object but exists *ontologically* as an object to whoever commits the epistemic injustice, as objects cannot tap into a world of meaningful significance.[6]

The things that would have meaningfully constituted the Other's world would now be denied to them. Their knowledge is taken and perceived as meaningless; they are shut off to the hearer. In this way, they can no longer trust that their own knowledge and perceptions of the world are meaningful or valuable. Miranda Fricker, in discussing testimonial injustice, a type of epistemic injustice, notes that "Persistent testimonial injustice can indeed inhibit the very formation of self."[7] This is the first precursor to establishing our method.

6 Guenther, "Injustice and Phenomenology," 201.

7 Miranda Fricker, "Testimonial Injustice," in *Contemporary Epistemology: An Anthology*, ed. Jeremy Fantl, Matthew McGrath, and Ernest Sosa (Hoboken: John Wiley & Sons, Inc., 2019), 150–53.

IV. SOCIETY AND EPISTEMIC FREEDOM

We may take this analysis and extend it from the personal realm onto a larger scale to establish the second idea for our method. Sophie Loidolt notes that from a phenomenological perspective, large-scale societal structures and institutions may be described as affirming one's own perspective and selfhood in modern society. This includes the function of legal systems, which may be viewed as a formal means of actualizing one's personhood in a case where their status as a member of society is endangered. She writes:

> A phenomenological thesis could be that law is not just an instrument or tool by which we realize our intentions. It expresses and mediates our individuality in modern society where human actions are to a large extent realized through formalized legal categories.[8]

Phenomenologically, social frameworks provide a large-scale perception of one's experience; they provide an individual with a "world."[9] The status of the significance and importance of this experience may be influenced by the processes that govern social institutions, which include legal systems.

To strengthen this point, Simone de Beauvoir notes that while one cannot do something for another, as the Other is absolutely free, one may create a situation where the Other can act in the best manner possible.[10] We must use our own freedom in order to ensure that others retain theirs; otherwise, no single person enjoys the benefits of being able to operate in the world.[11]

This may also apply in an epistemic sense. If we deny others the freedom to retain their unique epistemologies and beliefs, those individuals may then be subject to a lesser epistemic status within the social system and discriminated against. In other words, epistemic injustices can occur when a social system or institution does not guarantee its members the freedom to hold, form, exchange, or retain epistemic material freely. This freedom may be called an epistemic "freedom of action," given the multitude of possible epistemically-related actions,

8 Sophie Loidolt, "Order, Experience, and Critique: The Phenomenological Method in Political and Legal Theory," *Continental Philosophy Review* 54 (March 2021): 163, 10.1007/s11007-021-09535-y.

9 Loidolt, "Method in Political and Legal Theory," 163–64.

10 Simone de Beauvoir, *Philosophical Writings*, ed. Margaret A Simons, Marybeth Timmermann, and Mary Beth Mader (Champaign: University of Illinois Press, 2004), 135–37.

11 de Beauvoir, *Philosophical Writings*, 138–39.

and the social system or institution in question facilitates this freedom by providing its members with an epistemic "sphere of action," an environment in which one may express these freedoms without unwarranted recourse. While this theory operates in an ideal sense, it may serve as a useful precursor to understanding individual cases of epistemic injustices in legal systems.

V. THE SYNTHESIS OF RECOGNITION AND THE ACTION FOR OTHERS

We have now set up the necessary precursors to establish our phenomenological method. We have established that (1) meaningful interactions with others occur when someone embodies and recognizes the perspective of the Other and that (2) social systems and institutions in the best case, on the basis of an epistemic freedom of action, create the best possible conditions for action for the Other. Our synthesis is that (2) *requires* (1). A social institution cannot create meaningful spheres of action for other people if its constituents do not recognize their personhood and status as phenomenological agents. Our operation in society is predicated on the assumption that other members of society recognize our personhood and that this characteristic permits us to enjoy the freedoms ensured to us by the available institutions.

Following this, we can use this synthesis to provide our instance of a preliminary social phenomenological epistemic injustice. Since it is the case that (1) it is required that social systems and institutions recognize and embody the perspectives of individuals in order for those bodies to create meaningful epistemic spheres of action for them, and if we assume for the sake of argument that (2) those social bodies deny this recognition and embodiment in some way, then (3) these bodies do not create meaningful epistemic spheres of action for those individuals. An institution's failure to recognize a person's status as a person with meaningful experiences indicates that the institution has, by extension, failed to grant a person some epistemic sphere of action that others in that institution possess. It is therefore impossible for an individual who is not phenomenologically and epistemically recognized to receive the full benefits of societal interaction and participation. We may thus define a social phenomenological epistemic injustice (SPEI) as such:

> The denial of an institution to provide an individual an epistemic sphere of action as a result of the failure of that institution to recognize that individual as a meaningful contributor of phenomenological knowledge.

Since legal institutions are a type of social institution, this definition applies equally well to legal institutions, where we obtain the formulation for a legal phenomenological epistemic injustice (LPEI):

> The denial of a legal system to provide an individual an epistemic sphere of action as a result of the failure of that system to recognize that individual as a meaningful contributor of phenomenological knowledge.

VI. THE IMPORTANCE OF LEGAL PHENOMENOLOGICAL EPISTEMIC INJUSTICES

This formulation is especially important since instances of epistemic injustices in legal contexts are quite prevalent and consequential. This is facilitated by the fact that many legal processes rely on the testimony of other individuals. These testimonies create weak points at which predatory legal actors may desire to diminish and delegitimize the epistemic status of the attestant. The role of the judge in legal contexts may also accentuate this behavior, since the action of the judge, especially within the context of legal realism, is particularly important in the creation of legal norms themselves. The late Associate Justice of the Supreme Court Benjamin Cardozo stated:

> In default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of a custom according to the rules which he would establish if he were to assume the part of a legislator.[12]

The late Associate Justice Oliver Wendell Holmes, Jr. also wrote:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[13]

The personal biases of the jury are also of foremost importance in the decision of a verdict in criminal trials, which may reflect greater societal biases and prejudices against certain groups of individuals.

12 Benjamin Nathan Cardozo, *Cardozo on the Law: Including the Nature of Judicial Process, the Growth of Law, Paradoxes of Legal Science, Law and Literature* (Birmingham: The Legal Classics Library, 1982), 140.

13 Oliver Wendell Holmes, "Early Forms of Liability," in *The Common Law*, ed. G. Edward White (Cambridge: Harvard University Press, 2009), 3.

Andrés Páez and Janaina Matida describe particularly potent examples of epistemic injustices as they relate to the Brazilian justice system, which is notable for high rates of legal injustices.[14] Building on Fricker's framework of testimonial and hermeneutical injustices, they provide real-world instances of legal discrimination on the basis of one's race, gender, and socioeconomic status. One notable example concerns a man who was unjustly convicted of stealing on the basis of his race despite having proof of engaging in a legitimate transaction:

> In investigations of thefts, it is often the case that the word of the defendant (black, poor and from the favela) is not taken into account . . . Recently, the Superior Tribunal of Justice had the opportunity to acquit Alexandre Augusto Andrade da Resurreição (HC n. 790.250, Min. Rogerio Schietti), unjustly convicted by the Court of Justice of Rio de Janeiro. The version of the facts offered by the accused was that the car used in the theft of which he was accused had been his, but that he had sold it . . . Despite proof of sale of the car, Alexandre, who is a public servant of the respected Oswaldo Cruz Foundation (Fiocruz), with a college degree and enrolled in a master's degree in pharmacy, was convicted because the victim recognized him, based on his photograph, with 100% certainty.[15]

As the authors note, this individual was clearly discriminated against and his defense rendered ineffective by virtue of his background and phenomenological status. Despite clear evidence that he did not engage in theft, his epistemic status was considered illegitimate on the basis of testimony by another individual. Thus, he was denied an epistemic sphere of action by the legal system; namely, an environment in which he could have used his status, as a phenomenological knower, to defend himself in light of evidence against others' testimonies to the contrary. This makes Alexandre's case a clear example of LPEI.

VII. OBJECTIONS AND OTHER CASES

However, we must consider an important objection: based on our definition of LPEI, does denying an actual murderer's testimony also count as an LPEI? By convicting a murderer, are we "denying their perspective" and invalidating their ability to contribute epistemic value to society? It appears as if an LPEI can apply to every conviction, which seems to expose a weakness in our definition.

In the case of a murderer (whom we will assume to have indubitably murdered another individual), there would be no prejudice involved in the conviction; the charge would have correctly matched the sentence afforded to them. No epistemic harm was done to the defendant since the defendant was convicted on the basis of *whether they murdered someone or not*, not based on whether or not their testimony was legitimate. If such a basis is what was used, this indicates that the legal system recognized the defendant's perspective as important enough not to deny them an epistemic sphere of action.

Now, it may also be said that if a jury convicted a murderer *on the basis* of prejudice or bias instead of the evidence provided, an LPEI was still committed, even if the conviction was correct. Unfortunately, there might not be a way to avoid these types of cases, at least within the bounds of the legal system; other methods of describing epistemic injustice would run into the same problem. In general, if some method of describing epistemic injustice requires the defendant to be convicted on the basis of some parameter for the conviction to be epistemically unjust, the parameter may still be used to convict a proven criminal without invoking an epistemically just parameter. This topic warrants further discussion.

However, this raises an important question: how can one know when an LPEI is committed when they do not know all the facts of the case in question? Our assumptions so far have been predicated on whether the defendant indubitably committed a crime or not, and it may be unclear as to how an LPEI may be identified when ambiguity is a feature of many cases. As a first pass, it may be important to take a look at potential pre-established systemic biases and evaluate them against the facts of the case that are known *at the time*. This way, the testimony of the defendant can be fairly tested against what is known in a given instance.

For example, let us assume that a stabbing took place at 3:15 PM near a certain city block. The police arrest a man with characteristic C a couple blocks away as a potential suspect. The jury knows that the man happened to be near the crime scene ten minutes earlier at 3:05 PM, but apart from this there is no further evidence to support that he perpetrated the crime. If it happens to be the case that juries in that city's county have historically had biases against persons with characteristic C, the likelihood of an LPEI being committed may be tangible; there may not be enough evidence to convict the man *unless he were to be convicted on the basis of an LPEI*. This probability would suggest that factors other

14 Andrés Páez and Janaina Matida, "Epistemic Injustice in Criminal Procedure," *Revista Brasileira de Direito Processual Penal* 9, no. 1 (2023): 28–29, 10.22197/rbdpp.v9i1.821.

15 Páez and Matida, "Injustice in Criminal Procedure," 29–30.

than the evidence could be used in the judgment, and that his epistemic status may be called into question. Establishing thresholds such as this is crucial to determining whether an LPEI takes place or not, although new evidence may update previous thresholds. If upon further inspection the man was found to have a bloody knife in the trunk of his car, the likelihood of his being convicted on the basis of an LPEI may fall in favor of a more informed conviction.

We may also consider an inverse case. If a jury *acquits* an individual on the basis of prejudice or bias despite the individual being proven beyond a reasonable doubt to have committed an offense, one may call this a *legal phenomenological epistemic prejudice* (LPEP), as the system *prioritizes* a certain contributor of phenomenological knowledge to a greater extent than they would another individual and gives them a special epistemic sphere of action as a result. Roughly, we may define an LPEP as such:

> A legal system's provision of an epistemic sphere of action that others do not possess to an individual as a result of the prioritization of that individual's ability to meaningfully contribute phenomenological knowledge.

This does not qualify as an LPEI since the defendant's recognition as a person was not rendered moot, but it does count as a prejudice since the defendant's perspective and phenomenological epistemic status were prioritized over the facts of the case. This still may be categorized as a type of injustice, although based on our definition, this categorization would have to fall out of the bounds of our phenomenological analysis and into the legal sphere.

It is important to distinguish between an instance of this prioritization as it occurs in the legal sphere and an instance that occurs outside of the legal sphere. Naturally, we tend to favor other individuals' perspectives more than others in everyday life, but granting those individuals privileges in a legal context on the basis of prejudices in their favor may be problematic. For instance, if a celebrity were to be acquitted for a murder charge on the basis of their fame, this would count as a clear example of an LPEP.

VIII. CONCLUSION

In this paper, I have demonstrated that a phenomenological approach to legal epistemic injustice is adequate for describing and evaluating cases of epistemic injustice. The synthesis of the phenomenological Other and society's duty to facilitate the Other was used in order to generate a satisfactory definition of legal phenomenological epistemic injustice (LPEI). This definition was then applied to various cases in order to demonstrate its significance and possible flaws. This definition and topic are exciting starting points for future discussions related to phenomenology and its relationships to social institutions. It may serve as a precursor to analyses in cases where epistemic injustices are widespread and in need of rectification.

Eighteen-year-old Christopher Thomas Phillippe-Rodriguez recently graduated summa cum laude from the University of Texas Rio Grande Valley with a bachelor's degree in philosophy and a minor in chemistry. He is seeking a PhD in philosophy and, subsequently, a law degree. He is interested in epistemology, philosophy of language, and jurisprudence.