

Exploring Transgender Law and Politics

Catharine A. MacKinnon, with Finn Mackay, Mischa
Shuman, Sandra Fredman, and Ruth Chang

2023

Contents

Preface 3

Exploring Transgender Law and Politics 4

 Commentary 21

Preface

This discussion of transgender law and politics, held at Oxford University on November 28, 2022, was sponsored by the Oxford Philosophy, Law and Politics Colloquium, the Oxford Feminist Jurisprudence Discussion Group, and the Oxford Jurisprudence Discussion Group. Professor Kate O’Regan of the Bonavero Institute of Human Rights generously provided the space. The dean of the Oxford Law Faculty, Professor Mindy Chen-Wishart, opened the proceedings, framing jurisprudence as the place “where...philosophy, law and politics come together to answer pressing issues of the day.” She wished us all, and herself, “an eye-opening, paradigm-changing experience.”

Professor Ruth Chang, who organized the event and made it possible, charged the participants to “think together about how to move forward in discussing the pressing and urgent issues surrounding transgender politics, issues that are a matter of discrimination, violence, abuse, hardship, and indeed a matter of life and death for some members of our community.” She also observed that “mere discussion of these issues has itself often been marked by acrimony, name-calling, violence, discrimination, anger, and hatred.” Professor Chang initiated the proceedings—its transcript was created by Ellie Jerome and lightly edited by each author for publication—with the hope, shared by the panelists, that the discussion would pave the way for respectful, insightful, and fruitful exploration going forward.

Exploring Transgender Law and Politics

Catharine A. MacKinnon

For the first time in over thirty years, it makes sense to me to reconsider what feminism means. Trans people have been illuminating sex and gender in new and insightful ways. And for some time, escalating since 2004 with the proposed revisions in the UK Gender Recognition Act,¹ a substantial cohort of self-identified feminists have opposed trans peoples' existence as trans.² Male power, which seldom takes seriously anything feminists say, has weaponized the feminist critique against trans people in both the US and the UK.³ In the process, many issues central to the status of the sexes have been newly opened or sharpened; many are unresolved. I hope to learn from our discussion. My thoughts are provisional and could be subtitled “what I’ve learned so far.”

Much of the current debate has centered on (endlessly obsessed over, actually) whether trans women are women. Honestly, seeing “women” as a turf to be defended, as opposed to a set of imperatives and limitations to be criticized, challenged, changed, or transcended, has been pretty startling. One might think that trans women—assigned male at birth, leaving masculinity behind, drawn to and embracing womanhood for themselves—would be welcomed. Yet a group of philosophers purporting feminism slide sloppily from “female sex” through “feminine gender” straight to “women” as if no move has been made,⁴ eventually reverting to the dictionary: a woman is an “adult

¹ Gender Recognition Act, 2004. The recent Scottish gender recognition reforms being blocked by the UK have reintensified much of the controversy. See Pippa Crerar and Libby Brooks, “Rishi Sunak Blocks Scotland’s Gender Recognition Legislation.”

² My understanding of this position is informed by long-term direct engagement with its exponents. A burgeoning literature began with Janice Raymond’s *The Transsexual Empire* and more recently includes, among many others, Raymond’s *Doublethink: A Feminist Challenge to Transgenderism*, Sheila Jeffreys’s *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism*, Holly Lawford-Smith’s *Gender-Critical Feminism*, and numerous articles by Julie Bindel (e.g., “Lesbians Are Being Erased by Transgender Activists”).

³ See, e.g., Samantha Schmidt, “Conservatives Find Unlikely Ally in Fighting Transgender Rights: Radical Feminists” and Tim Fitzsimons, “GOP Senator Quotes J.K. Rowling while Blocking Vote on LGBTQ Bill.” For a sympathetic view of emerging right-wing feminism, see Louise Perry, “Why the Next Wave of Feminism Is Conservative.”

⁴ For this habitual move, see Lawford-Smith, pp. 47–60; Alex Byrne, “Are Women Adult Human Females?” pp. 3783–3803, 3788–3789, and Raymond (n. 2 above), p. xx.

human female.”⁵ Defining women by biology—adult is biological age, human is biological species, female is biological sex—used to be criticized as biological essentialism. Those winging to the Right are thrilled by this putatively feminist reduction of women to female body parts, preferably chromosomes and reproductive apparatus, qualities chosen so that whatever is considered definitive of sex is not only physical but cannot be physically changed into.

Feminism, by contrast, is a political movement. If some imagine a movement for female body parts, the rest of us are part of some other movement, one to end the subordination of women in all our diversity. In other words, what women “are” does not necessarily define the woman question: our inequality, our resulting oppression. Those of us who do not take our politics from the dictionary want to know: Why are women unequal to men? What keeps women second-class citizens? How are women distinctively subordinated? The important question for a political movement for the liberation of women is thus not what a woman is, I think, but what accounts for the oppression of women: who is oppressed as a woman, in the way women are distinctively oppressed?

Women are not, in fact, subordinated or oppressed by our bodies. We do not need to be liberated from our chromosomes or our ovaries. It is core male-dominant ideology that attributes the source of women’s inequality to our nature, our biological sex, which for male dominance makes it inevitable, immutable, unchangeable, on us. As if our bodies, rather than male dominant social systems, do it to us. It is as if Black people’s melanin content is the cause of police violence against them, rather than the meaning police attribute to their appearance (racial markers in this instance) and the law and culture of impunity for their actions. If women’s oppression is defined by what defines women, and that is our sexed biology as this group defines it, the very most we can change is the excesses of male power. Never male power itself.

In reality, women’s inequality—with the oppressive practices that inequality makes possible and that reinforce it through gender, specifically gender hierarchy—has long been recognized as a social and political, not biological, arrangement.⁶ Inferiority, not difference, is the issue of hierarchy, including gender hierarchy. On the technical meaning of sex as physical and gender as its social meaning, sex is equal. It is gender that is unequal. Women are not men’s biological inferiors; we are constrained to be men’s social inferiors. Who knew we would have to keep repeating this. It is gender that constructs women as men’s inferiors, as valued less to worthless, as weak and dependent, as stupid and illogical and emotional, as soft and yielding and receptive, as bitchy and ditsy, whiny, seductive, and manipulative, destined only to reproduce. These at-

⁵ OED Online. “woman, n.” This dictionary definition appears repeatedly in the anti-trans feminist literature, despite simultaneous denials of biological essentialism. See Lawford-Smith and Byrne.

⁶ Simone de Beauvoir wrote, “One is not born, but rather becomes, a woman” (301). Andrea Dworkin denounced “any biological determinism,” calling biological hierarchy “the world’s most dangerous and deadly idea” (110). Most feminist work of the last century attacks the naturalization of sex inequality through gender in some way.

tributions, this power division, not our bodies, is what makes women a political group, caste, or class; resistance to them is what makes the women's movement a political movement.

These imposed fabrications and their dynamics, by the way, have nothing to do with postmodernism, which simply stole feminism's critical insights into sex roles, rebranded them "performance," sucked out their reality, made subordination into a literary text, and claimed a whole new theory.⁷ Unfortunately, we cannot misinterpret our way to freedom.

Facing the fact that gender is social, not biological, does not mean that it is not real, as postmodernism would have you believe. Its social strata are enforced. Its illusions are invented (stereotypes) and imposed (roles, practices), so that it becomes, however thankfully imperfectly, very real. Understanding gender as socially constructed also does not make it easier to change. Turns out, nature is fragile, much easier to change than society. Over the last fifty years, humans have changed the weather without even trying, while despite all our efforts, male dominance has barely budged. Trans people have found, thus demonstrated, that changing their physical bodies, however arduous and often subtle, along with their self-presentation, is far more available than changing the social meanings of their original gender assignments. Trans theorists from Jan Morris to Andrea Long Chu have asked, essentially, if I could live the life I wanted, would I have transitioned?⁸ It's the right question, about the social meanings imposed on sex, lived as gender, if unanswerable as a practical individual matter. In the real world, trans people have found they can't live their one and only life without changing or affirming their gender, at odds with their bodily assignment since birth, such that transition is the only possible form of being, of moving through this world, of resistance to what was imposed on them at odds with their self-conception in relational social space, that makes any sense of their lives in gendered terms.

On my analysis of the real world—a feminist analysis I reckon—the linchpin of the subordination of women, the impetus and structure of women's gendered status as second class, is sexuality, socially gendered through sexualized misogyny.⁹ We are placed on the bottom of the gender hierarchy by the misogynistic meanings that male dominant societies create, project onto us, attribute to us, which, in my observation and analysis, center on women's sexuality. This has nothing whatsoever to do with biology, which serves, however powerfully, as sexuality's after-the-fact attributed naturalized rationalization and supposed ratification. Sexualized misogyny merges synergistically with myriad inequalities: it sucks up and incorporates age-based specifics, takes on ev-

⁷ This is the quintessential Judith Butler move in *Gender Trouble*. Why turning the long-time feminist analysis of "sex roles" into "performance" has been regarded by some as an original breakthrough has long been a mystery, as has much of Butler's opaque jargon.

⁸ Jan Morris, *Conundrum* (146); Andrea Long Chu, "My New Vagina Won't Make Me Happy," "The Pink: Happy New Vagina." This question is not exactly what she says but is one meaning I draw from Chu's evocative and insightful accounts.

⁹ See Catharine A. MacKinnon, "Equality," "A Sex Equality Approach to Sexual Assault."

ery racialized and caste and class guise. In other words, I reject the “single-axis” notion argued by what is currently inaccurately being called “gender-critical feminism.”¹⁰

Sexualized misogyny also works through anti-transgender bigotry in specific ways. The core dynamic of sexualized misogyny is the erotization of disparities of power, typically through gender, so that to be male or masculine is to be elevated as the actualizer, the allowed sexual perpetrator (or disallowed and hyperpotent when raced Black), the initiator, the consented-to, the independent doer. To be female or feminine or feminized is to be denigrated, made into sexual target and prey, rendered available for sexual access and use, defined as the dependent done-to, ever looking for a man for actualization or survival, so the whore by nature. All this is socially, ideologically, attributed to the biology of sex. That it is natural is its most fundamental social idea.

So this is where the oppression of women begins: the unequal sexual point of departure from which its economic, reproductive, familial, legal, and spiritual consequences ensue. Unequal sexuality is the substance of women’s substantive inequality. The institutions that build it out across history and cultures in specific forms are prominently organized as the sexual abuse of children, rape, sexual harassment, deprivation of reproductive control, pornography, and prostitution in all its forms, including sex trafficking. All are disparately racist, depending on each society’s racial inequalities. The worse the gender inequality is, comparative research shows, the more women deny its existence,

¹⁰ Lawford-Smith rejects intersectionality as turning feminism into a toothless movement “for everyone and about everything” (160). Mainstreaming insights into the pervasive interconnections between male dominance and political issues principally defined in other ways is apparently a problem rather than a solution. Any legitimate strategic concerns she raises are far overshadowed by her blithe dismissal of race (all too typical of white theorists) and glaring ignorance of how white supremacy intersects with sexualized misogyny. She writes, for instance, “The way that white people historically perpetrated racism against black people, especially under slavery, involved sexual violence against black women.... We ask whether black men suffered the same issues. If they did, this was a race issue, not a feminist issue. But, in general, they didn’t.... White violence against black women under slavery was sexualized, but white violence against black men generally was not. So [this issue] should be part of feminism understood as being for women as women” (157–58). Even if Black women and Black men were sexualized in the same ways, say they were both raped, that would not mean that white misogyny was not at work. If Black women were sexualized as women and Black men were sexualized as men, white misogyny was definitely at work. That Black women were and are violated as women does not, in other words, mean Black men were and are not violated as men, sexually and otherwise, each on the substantive basis of their gender, raced under white supremacy. This, in fact, is what occurred. The violence of slavery and Jim Crow under white supremacy, including against men and children, was often as sexualized and gender-based as it was racist, and at the same time. The horrific sexual violations of Black men in lynching, for example, along with its frequent racialized sexual pretext and pornographic objectification, make this indelibly clear. See Angela Davis, *Abolition Democracy: Beyond Prison, Torture, and Empire* (55). Further, Lawford-Smith calls hers and other work of its views “gender critical,” as if trans people and feminists who support them are not critical of gender, when we are. Actually, so-called gender critical feminists do not centrally critique gender but centrally affirm sex, making the label a misleading appropriation of terms.

because it makes them feel better.¹¹ This denial also makes it harder to change. Ending all this is what will liberate women. Resisting ending it is what keeps male (meaning masculine) power systemically in place.

Propositions consistent with this analysis follow, most of them in the form of rebuttals to misprisions concerning trans people.

First, the debate around immutability, supposedly tied to biology, asserting that gender identity is original, natural, inborn, innate, unchosen, is, I think, misconceived as well as irrelevant. It also conforms to a legal strategy predicated on race, when critical race scholars have seen through immutability for decades.¹² The ideology of natural differences being the basis of social inequalities is powerful. So we are told that immutability clinches the case for rights and gives some folks dignity. Regrettably, research finds that popular support for rights increases with the belief that trans identity, along with gay and lesbian sexuality, is biologically based. Apart from the fact that many lesbians see being lesbian as a political choice, despite being no choice at all under conditions of male dominance, and with all respect to those trans advocates who argue or imply that gender is innate,¹³ nobody is born in lipstick and heels, liking pink not blue, interested in clothes and makeup instead of hunting and football, playing with dolls rather than trains and guns, good at math instead of fashion. You don't drop out of your mother this way, however early such qualities are observed. And they don't mean anything gendered without their invented and imposed social meanings being gendered.

The gender of sexuality is arguably not innate either. Sexuality is overwhelmingly gendered across sexual orientations and is often fluid across the life span of individuals. How is something innate if it changes every couple of decades in your life, depending on whom you meet? The content of what is sexual also differs fairly substantially across historical time and geographical place. Sexual fetishes (not orientations) are also demonstrably easily conditioned and deconditioned.¹⁴ Consistent, globally, is its hierarchy, premised on but not limited to men over women. That the substantive gender of sexual orientation of most (not all) trans people does not change with their transition or affirmation,¹⁵ even as their gender and/or its external expression changes, does not necessarily make it innate; it could as well make it powerfully learned and im-

¹¹ Jaime L. Napier et al., "Denial of Gender Discrimination Is Associated with Better Subjective Well-Being among Women: A System Justification Account."

¹² Ian Haney López, *White by Law: The Legal Construction of Race*; Dorothy Roberts, *Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century*.

¹³ Julia Serano adopts neither the biologically nor the socially determinist position but reviews, discusses, and considers both cogently in *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity*.

¹⁴ S. Rachman and R. Hodgson, "Experimentally Induced 'Sexual Fetishism': Replication and Development"; S. Rachman, "Sexual Fetishism: An Experimental Analogue."

¹⁵ Matthias Auer et al., "Transgender Transitioning and Change of Self-Reported Sexual Orientation." This study categorizes sexual orientation in terms of gynephilic (attraction to women), androphilic (attraction to men), bisexual (both), or alloerotic (not attracted to other people). Hence, the ques-

printed. That sexuality is experienced physically and internally could show the depth and success of sexuality's social conditioning rather than its biological innateness. The present state of empirical knowledge, although it offers indications, doesn't allow definitive resolution of the nature/nurture contributions to the gender of sexual orientation because the etiology of everyone's sexual orientation has never been studied.

It is my opinion that it demeans the consciousness of trans people, and diminishes the light their perceptions and politics shed on everyone's gender and sexuality, to attribute their gender *identity* to innateness. I don't think identity is innate; it's a social reading that is laid onto us—our social identification—which we then internally embrace or reject, in a process scarcely yet understood. Through their experiences, trans people often see through the gender matrix and its dynamics extremely effectively.¹⁶ Assertions of immutability conform their political analysis of those insights to the requirements of the opposition, which, among other things, depoliticizes it and dulls its analytic edge. Besides, for purposes of protecting rights, as with same-sex sexual orientation, no one has ever explained why it matters that trans people are trans any more than it matters why gay people are gay or why women are women. The origins of so-called differences between groups are not the issue of inequality any more than the so-called differences themselves are. No group differences, by themselves, make some groups inferior to others who are superior to them, which is the issue of inequality that equality guarantees exist to address.

Second, the notion that trans people are living in a fantasy, are imposters, while women assigned female at birth are living in material reality, and are the only real thing, is central to the so-called feminist anti-trans position. But sexuality, however social, is material, and trans people are sexually defined, objectified, violated, and living (and dying) in it at major rates. Their subordination and abuse, which includes abuse as trans, as women, and as trans women, is no fantasy. It also includes sexual abuse as trans men, feminine men, and trans nonbinary. The notion that their transition is somehow unreal, a grand deception, a disjunction with reality, lurks deep in the muscle memory of transphobia. In part, some people react badly to the success of many trans people in living their identified gender, that is, not being read. Gender being a learned behavior in any event, all women have to learn it, and pay a material price for our success or failure.

That trans people are deceptive surfaces as an idea in law is especially damaging ways, though, as exemplified in the UK's gender fraud cases. Here we learn that a man can lie to a woman about his age, marital status, wealth, or education without

tion is substantive sexual orientation rather than the labels of "gay" or "straight" attaching to a person's gender transition.

¹⁶ Memoirs including Thomas Page McBee's *Man Alive: A True Story of Violence, Forgiveness and Becoming a Man*, which illuminates sexual abuse in childhood; Janet Mock's *Redefining Realness: My Path to Womanhood, Identity, Love & So Much More*, which exposes prostitution in this context for much of what it is; and Meredith Talusan's *Fairest*, which subtly analyzes an intersection of sex and race through objectification, are just a few examples.

vitiating her consent (meaning agreement or acquiescence) to the resulting sex. So the sex they had under these false pretenses, by deception, wasn't rape. But when a young woman, so assigned at birth, interacts with another young woman who is being a boy online, and then they have sex in real life, "the nature of the act is changed," so it is not deemed consented to, thus is rape, although the court that holds this never tells us what "the act" was.¹⁷ Think about it. Similarly, in the trans panic defense, in many US cases, a man can kill a trans woman whom he "discovers" is trans in the process of sex, and it is not murder.¹⁸ Sex often does involve a gender imaginary, but none of these consequences are merely imagined.

There is no evidence that trans women remain "men" for purposes of all women's safety from sexual abuse in bathrooms and elsewhere or fair competition in all sports as many who oppose them in these spaces insist there is. From the limited data available—and every violation does matter—trans women are far more often sexually violated than they violate anyone.¹⁹ In fact, it begins to appear, on limited data, that more women assigned female at birth attack trans women than the reverse.²⁰ As to the bathroom wars, originally designated men do sexually assault women and girls in women's bathrooms without bothering to transition first. The fact it says "women" on the door does not deter them. There is little to no evidence that trans women do this. I really don't understand why there is such a feeling of vulnerability around women in bathrooms, which usually have stall doors that lock, compared with homes, where no such protections exist and sexually assaulted women are victimized in high numbers by untransitioned men in their own families. Meantime, largely as a result of the anti-trans bathroom panic, butch lesbians (a term of pride among women I know, maybe this is generational) and other women on the masculinity spectrum, as beautifully theorized by Finn Mackay and Lori Watson in support of trans people, are being even more intensively misgendered in bathrooms and elsewhere, despite being female-bodied, assigned female at birth, and woman-identified. And nobody seems to have any trouble with the unisex bathrooms on those avatars of sex equality, the airlines.

¹⁷ R v McNally (Justine) [2013] EWCA Crim 1051.

¹⁸ For documentation, see Cynthia Lee, "The Trans Panic Defense Revisited."

¹⁹ This is deduced from the extremely high figures of sexual abuse of trans people and the small figures of sexual abuse by trans people. On the sexual abuse of trans people see Sandy James et al., *The Report of the 2015 U.S. Transgender Survey*; Andrew Flores et al., "Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018;" Jill C. Hoxmeier, "Sexual Assault and Relationship Abuse Victimization of Transgender Undergraduate Students in a National Sample." On the limited data concerning transgender perpetrators, see Office for Victims of Crime, U.S. Department of Justice, "Responding to Transgender Victims of Sexual Assault: Perpetrator Issues," (citing data from FORGE, "Sexual Violence in the Transgender Community Survey," 2005).

²⁰ See Office for Victims of Crime.

Every time a trans woman wins in a women’s sport, which happens once in a blue moon, sensationalized reports spew worldwide.²¹ This sure is “news.” When she is bested by a non-trans woman, as happens constantly, nobody notices. After hormone treatments—once required by the International Olympic Commission for trans women along with a maximum testosterone level²²—trans women are arguably *disadvantaged* in sports compared with female-bodied competitors, if circulating testosterone is the concern. Originally female bodied people have some of that stuff too. But if you’re suppressing it in an originally male bodied person and also giving them estrogen, they have less to none of it.²³ However, there seems to be a deep and broad belief that originally male bodies are intrinsically superior to women’s, especially for all sports. Granted, many sports are designed to maximize the characteristics that on average distinguish male bodies from female ones—*citius, altius, fortius*²⁴—but athletes at high levels of competition are generally not average. And trans bodies, like everyone’s, are diverse. Any advantage that height and weight disparities confer, for instance, exist within sexes as well as across them. That’s why there are weight classes in wrestling. If trans women who go through puberty before transition are on average taller than other women, so are Dutch rowers compared with their Japanese counterparts. Michael Phelps is built like a fish, but no one is looking to take away his swimming medals. If this concern was real, trans women would have cleaned up at the Olympics for the past couple of decades, and they have not. They almost never have reached that level of competition.

I actually think that sports should be reconsidered one at a time for sex in general, across the board. I’ve thought this long before any of these issues came up. Meantime the gap between the accomplishments of women and men in sports is shrinking as we speak. Compare marathon times past to present.²⁵

²¹ Azeen Ghorayshi, “Trans Swimmer Revives an Old Debate in Elite Sports;” Louisa Thomas, “The Trans Swimmer Who Won Too Much.”

²² See International Olympic Committee, “IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism.” The 2015 rule changed the original 2004 IOC rule requiring sex reassignment surgery and at least two years of hormone therapy. The rule changed again in 2021, deferring to individual sports governing bodies to determine transgender participation. See International Olympic Committee, “IOC Approves Consensus with Regard to Athletes Who Have Changed Sex”; IOC Framework on Fairness, Inclusion, and Non-Discrimination on the Basis of Gender Identity and Sex Variations.”

²³ Jennifer J. Liang et al., “Testosterone Levels Achieved by Medically Treated Transgender Women in a United States Endocrinology Clinic Cohort”; David Handelsman et al., “Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance” Alice Jones et al., “Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies.”

²⁴ This in Latin is the Olympic motto: faster, higher, stronger.

²⁵ The Biden administration recently proposed a federal rule on transgender athletic participation in K-12 schools. Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 FR 22860 (April 13, 2023). It prohibits blanket bans on participation by transgender youth but would allow some restrictions based on factors such as sport, level of competition, and age of participants, in some

The question of prepuberty physical transition of children is much focused upon and validly so, although much of the attention is the opposite of helpful.²⁶ Use of puberty blockers and hormones, and especially surgery, is in flux²⁷ Not a lot is definitively known in this field, which is true for many health issues involving trans people. Their small numbers, even smaller for trans children, challenge having truly adequate data, especially for comparisons. By statistical standards, it will be a long time before there is truly adequate data on which to predicate evidence-based care, although consensus exists and is building on some aspects.²⁸

Clinical experience, the standards of care make clear, produces agreement that no single approach to prepuberty interventions fits all youth.²⁹ It is a lot easier on trans people not to go through puberty than to change everything that puberty causes. There is some evidence that young people who are allowed to transition early have fewer ideations of suicide with their gender dysphoria than those who are forced to wait until after the age of majority. Many, but by no means all, transition changes at this stage are reversible.³⁰ Obviously not surgery. Leaving surgery for later, especially bottom surgery, is increasingly advised or required, although not all trans people have surgery ever—do not feel the need for it—although many do for reasons including safety and physical integrity. So far, most people who transition before puberty do not detransition.³¹ That is not to say that gender transition solves all problems, especially when there are other issues, and naturally it produces some of its own in a still largely transphobic world.

It seems to me that the questions and concerns for girls and boys with gender dysphoria need to be considered separately, distinctly, given that girls and boys are seeking to escape diverse genders for potentially separate reasons. Their traumas, if they have them, may derive from different sources, although their potential sexual violation and sexualization, for example, may converge.

consistency with the thoughts expressed here some months prior. How the rule is finalized and enforced remains to be seen.

²⁶ Unhelpful examples, increasingly many, include Florida Admin. Code, Rule 64B8-9.019 (2023), Practice Standards for the Treatment of Gender Dysphoria (prohibiting gender-affirming care for minors); Ark. Code Ann. § 20-9-1502, Prohibition of gender transition procedures for minors (2021) (currently enjoined by the Eighth Circuit Court of Appeals); Ark. Code Ann § 16-114-401 et seq., An Act Concerning Medical Malpractice and Gender Transition in Minors (2023) (extending statute of limitations for malpractice cases to 15 years for minors who underwent gender-affirming care); Texas OAG Opinion No. KP-0401 (finding that gender-affirming care can legally constitute child abuse under Texas law); I.C. § 18-1506B (2023) (making it a felony to provide some gender-affirming care for minors, including puberty blockers and hormones).

²⁷ E. Coleman et al., “Standards of Care for the Health of Transgender and Gender Diverse People, Version 8.”

²⁸ Ibid. at S55.

²⁹ Ibid . at S7.

³⁰ Ibid . at S65.

³¹ Ibid . at S77; Kristina Olson et al., “Gender Identity 5 years After Social Transition.”

Puberty sure is where the rubber meets the road for gender inequality for girls.³² With puberty, girls become special sexual targets, although many are sexually violated previously. But why the most common surgery among trans people is removal of breasts (top surgery) is no mystery. Its flip side is breast augmentation surgery, conforming female bodies to male supremacist sexual demands, which has no laws against it and no insistence that girls can't know what they are doing so young. Emerging evidence suggests that trans women detransition more frequently than trans men, although both cite pressures to return to their original gender designation.³³ Recently, the most visible detransitioners have been trans men.³⁴ From their testimonies to date, it seems to me that female bodies are being blamed for male dominant social practices of objectification and abuse. As a close friend, assigned female at birth, put it, "Catharine, to be honest, I found that the best way to keep men away from me was to become one." This may be a unique or minority personal experience, or it may not be. I also think that lesbian feminism should take some weight for detransitioning young women not getting the memo earlier that you don't have to be a boy to love girls. If that movement has undertaken that challenge in this context, I have missed it.

Transgender feminist theorization and realization, emerging into view but begun long ago—in a brilliant literature from Sandy Stone to Julia Serano to Esperanza—embodies a politics of its own but also sheds new light on feminist politics. All this suggests to me that "woman" is a combination of sex and gender, such that sex can be a sufficient condition for being considered a woman but has never been a necessary one. Sufficient, because most women so assigned at birth do not affirmatively identify with all women and women's interests, or even as women really (seeing oneself as part of any group with men in it has more dignity); many (even most) are not critical of male supremacy; but all are constrained to live women's lives, whether they see it that way or not. They are our people.

Not necessary, because not only are trans women living women's lives—often much the worst of that life—but the transgender women I know, anyway, embrace wom-

³² The Centers for Disease Control found that 18 percent of high school girls in the United States experienced sexual violence in 2021, a substantial increase over the previous period two years earlier, and that the percentage of girl students who had been "forced to have sex" increased between 2011 and 2021, from 12 percent to 14 percent.

³³ See Jack Turban et al., "Factors Leading to Detransition among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis." This study involved over seventeen thousand participants who had received gender affirming care. Of those, 2,242 (13.1 percent) reported some history of detransition. Study participants assigned male at birth were 9.9 percent more likely to report detransitions at some point. The dominant reasons given were external factors including family pressure, social stigma, and sexual assault.

³⁴ See Evan Urquhart, "The Trans 'Detransition' Wars," for a discussion of recent viral detransition stories including the highly covered story of Chris Beck. See Van Slothouber, "(De)trans visibility: moral panic in mainstream media reports on de/retransition" for an analysis of media coverage of detransition narratives from 2015–2018. Slothouber argues that the media coverage has contributed to anti-trans healthcare regulation and seeks to reframe detransition narratives beyond media stories of "regret."

anhood consciously, are far more woman-identified than a vast swath of the women assigned female at birth (so-called “natal women” sometimes) whom I also know, many of whom have been trying to escape womanhood their whole lives for real reasons, yet often defend rape of other women as just a bad night and disidentify with women in every possible way short of their own transition, which is a lot of trouble and takes real courage. Trans women are, politically, women. They are our people too.

So what accounts for transmisogyny?³⁵ I don’t really know. Observably, many of this view cling to gender, wrapping it around their chosen measures of sex while claiming to be critical of it, even that they are trying to abolish it. A great many women assigned female at birth—such as the musical genius Dolly Parton—for instance, do to themselves most of the things that this group opposes, and these feminists have never landed all over her, are not critical of her, far less have they written whole books arguing that the feminine stereotyping she openly has done to herself undermines feminism and harms all women. It is evident that many feminist transphobes have been traumatized by women’s gender roles and stereotypes, which they did not fit physically, psychologically, or in life ambition. They had a hard time being accepted and valued as women and seem to resent the ease with which some trans women are accepted as women. Some argue that trans men, people they call “self-declared men (women),”³⁶ should “reclaim” or “recover their womanhood” in order to “return ... to themselves.”³⁷ In other words, become reconciled to their womanhood. What a thing for a feminist to advocate. Surely the lesbians among them do not need my help in saying no to sex that they do not want.

Many of these women, I do not doubt, were traumatized by sexual assault, which may explain why the penis so often seems to be the real issue. I do get this. But puzzlingly, they fail to identify with trans women who have also been sexually assaulted by the same instrument, which at least on my observation, again to be honest, is virtually all of them at one time or another. We’re being told by this group—those of the feminism of female body parts—that they are our team, and the trans women, whose feminism and identification as and with women is often far stronger and more substantive, in my experience anyway, and who really are against violence against women, including prostitution, are not. If anyone wants to exclude some women from the group women, I have a list.

It is impossible not to notice that the lion’s share of criticism in this discussion is leveled at trans women, far less at trans men. In transphobic perspective, maybe the men think trans men are women, so no threat to them, and the women think trans women are men, so do threaten them. The biological determinism of the feminist transphobes may make them sympathetic to trans men because they consider (and call) them women. Or maybe there’s a simple sexism here: trans women’s femininity makes

³⁵ For excess of clarity, by this term I mean bigotry against (not by) trans women for reasons of their femaleness/femininity.

³⁶ Raymond, *Doublethink* (116).

³⁷ Raymond, *Doublethink* (94, 103).

them vulnerable to attack, trans men’s masculinity tends to shield them from attack. Whatever the reasons, trans men, at least so far, get no wall-to-wall news coverage every time they breathe in public, no hysterical think pieces, no new philosophical attack book every other month. The opposition to trans rights surely harms trans men, their work and school and family lives are no walk in the park, especially the younger ones, and they are in constant danger of rape. But men’s organizations, that I’ve seen anyway, don’t scream they aren’t, can’t be, men. Comparatively speaking, maybe their masculinity somewhat protects them. Nothing protects trans women.

For all these reasons and more, discrimination against trans people is discrimination on the basis of sex, that is gender, the social meaning of sex. It does not, contrary to anti-trans self-identified feminists, endanger women or feminism, including what some in this group call “women’s sex-based rights.”³⁸ To begin with, women—in the US anyway—do not have “sex-based rights” in the affirmative sense they seem to have in mind. We do have precious few negative rights to be free from discrimination on the basis of sex—which has almost always meant gender actually³⁹—and so do men.⁴⁰ If this term means a right to single-sex education for women, as against coeducation, it has been on the thinnest possible legal ice for decades under the hegemony of gender neutrality. It may be that women’s schools continue to exist largely because no case challenging them has reached the Supreme Court for a very long time.⁴¹ I support women’s colleges and am glad to see them admitting anyone who identifies as a woman and graduating anyone they admit (some girls become boys these days). But the weight

³⁸ See, e.g., Brief for Women’s Human Rights Campaign-USA as Amici Curiae Supporting Defendants-Appellants and Intervenors at 3, *Lindsay Hecox et al. v. Madison Kenyon et al.*, (No. 20–35815), 2020 WL 7029420;

See also Complaint for Declaratory and Injunctive Relief, *Janine Chandler, et al. v. California Department of Corrections and Rehabilitation, et al.*, No. 1:21-CV-01657 (E.D. Cal. November 17, 2021) (applying the concept of women’s sex based rights to trans-inclusive policies in California prisons). See also Lawford-Smith, pp. 15–16 (advocating “the continued protection of women’s sex-based rights in the face of attempts by some feminists to replace sex with gender identity”) & 158. Nobody to my knowledge anywhere advocates replacing the term “sex” in discrimination laws with the term “gender identity.”

³⁹ See, e.g., *United States v. Virginia*, 518 U.S. 515, 541 (1996) (rejecting “gender-based developmental differences” as a justification for Virginia Military Institute’s “single-sex” policy). Virtually none of the US sex equality canon involves biology per se but rather deals with male supremacist beliefs, attitudes, stereotypes, policies, and practices that its defenders pretend are biologically based. This is even true of the US Supreme Court’s holding that pregnancy-based discrimination is not sex-based. *Geduldig v. Aiello*, 417 U.S. 484, 490n20 (1974) (holding that exclusion of pregnancy disability is not sex-based under the Equal Protection Clause); see also *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271–273 (1993) (holding that antiabortion terrorism is not sex-based under Section 1985(3)). The point being, pregnancy—a biological fact so far unique to female-bodied people—is not the discrimination; policies that discriminate against pregnant women are.

⁴⁰ The foundational cases that won sex-based constitutional rights after *Reed v. Reed*, 404 U.S. 71 (1971) were largely brought for men. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Orr v. Orr*, 440 U.S. 268 (1979).

⁴¹ The last was *Vorchheimer v. Sch. Dist. of Philadelphia*, 430 U.S. 703 (1977) (leaving standing four to four the lower court ruling that single-sex schools do not violate the equal protection guarantee).

of sex discrimination law, built to be gender neutral since Ruth Bader Ginsburg’s early cases, leans strongly against the constitutionality of women’s schools (and against historically Black colleges under the equivalent doctrine of colorblindness), public or private.⁴² In other words, it isn’t trans women who threaten women’s schools. It’s the legal doctrine of gender neutrality.

Although gender neutrality does not have the same traction where women’s prisons are concerned, a similar legal situation exists there. Imprisoned women have no “sex-based rights” to be incarcerated in an all-women’s prison. Inmates are separated by sex for state and police power reasons of security and management and administration. Women, so designated at birth, convicted of sexually abusing and killing women and girls, for instance, are incarcerated in them, alongside women imprisoned for prostitution and credit card fraud and killing their batterers. These are dangerous places. Along with wanted sexual interactions, a fair amount of sexual assault of women by women occurs in them, although the primary threat to women prisoners remains prison guards, who are mainly men; sexual abuse in women’s prisons is systematic and institutionally normalized.⁴³ The dangers incarceration poses for women do not begin with the trans women prisoners who seek to be housed there, in order to keep from being systematically raped in men’s prisons, or possibly seeking to serve time in a less brutal overall environment, if one with far fewer opportunities for work or what is euphemistically termed rehabilitation.

Among the most robust sex equality rights women have is freedom from sexual harassment in employment and education. These rights would not exist but for the theorization of gender apart from, but legally included under, sex. This is because whenever US courts find a sex-based differential in real life, including pregnancy and unequal pay for sex-stratified work (most of the pay gap), treating people differently (including worse) based on that is considered a sex difference, assimilated to biology rather than sex discrimination on a socially systemic level. The lack of any sex equality standards for rape law or abortion are two more examples: the more perfectly a neglect or abuse fits gender lines, the more sexed—that is, natural—it is regarded as being, hence inappropriate for sex equality intervention. The relation of biology and legal protection is reversed from what the fantasy of “women’s sex-based rights” has in mind because courts are in love with the sex difference. As a result, when courts find an overwhelmingly sex-differential social disadvantage, or even a perfect sex-based dis-

⁴² I analyze these cases and others concerning single-sex educational institutions and HBCs in *Sex Equality*, 3rd ed., 399–435. Regarding private schools, see *Bob Jones University v. United States*, 461 U.S. 574 (1983) (finding a racially segregated dating policy violates “public policy” at private university).

⁴³ Kim Shayo Buchanan, “Impunity: Sexual Abuse in Women’s Prisons.” A law against rape in prison, the Prison Rape Elimination Act (PREA), 34 U.S.C. § 30301, *et seq.*, despite its modest aims, is ineffective. See Gabriel Arkles, “Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm”; Lena Palacios, “The Prison Rape Elimination Act and the Limits of Liberal Reform.”

advantage, they think they have found sex, not sex inequality.⁴⁴ If not for the gender argument, separating sexuality as biological from sexuality as social—social facts *can* ground invidious treatment, rather than permitting sex-differential abuse as natural and inevitable—sexual harassment would have been considered a natural sex-based difference, thus not a basis for discrimination, I promise you. In fact, until this gender analysis was argued (by me, in this case), it was considered a natural, personal, universal, biological behavior, so not actionable as sex discrimination.⁴⁵ How including trans women in sexual harassment law’s protection, as they have been since the 1990s,⁴⁶ threatens it for other women completely escapes me.

To unpack this a bit, legally there are three basic ways trans rights can be theorized as sex equality rights: one, textually and literally; two, in terms of stereotyping; and three, substantively. The textual and literal approach—which is simple logic, converges with libertarianism, and needs no feminism—grasps that it is impossible to discriminate against trans people without taking sex into account in some way. The US Supreme Court embraced this in its recent *Bostock* case.⁴⁷ The fact that this logic can apply equally to trans women and trans men, including at the same time, although logically that can vitiate the claim, in reality doubles the discrimination rather than avoids it.⁴⁸ Pam Karlan, arguing for the fired employees in *Bostock*, came close to losing the case by agreeing that discrimination against gay people of both sexes would not be sex discrimination, a concession trumpeted by Justice Samuel Alito in dissent.⁴⁹

This, the simplest “but for sex” claim in existence is apparently too simple for smart people, who think it is some kind of trick, to understand. The fact that logically, equal opportunity discrimination can vitiate the claim, but in reality doubles rather than eliminates it, means that the Aristotelian approach can result in A and not A with equal logical consistency as a matter of law. This simply shows that the Aristotelian approach is not a legal test, despite being the predominant one used for equality around the world. Fortunately, the *Bostock* majority saw through it, possibly understanding that each person with such a claim faced discrimination based on their sex, resulting in discrimination twice over rather than double-is-nothing nondiscrimination.⁵⁰ This breakthrough is one of the ways the *Bostock* decision reaches beyond gender neutrality’s fictions to pierce society’s facts. It offers promise for prohibiting sexual harassment of bisexuals. How Title VII covering trans people, along with lesbian women and gay men,

⁴⁴ This critique of sex equality law in sameness/difference terms is argued throughout my work. See MacKinnon (n. 45 above).

⁴⁵ I trace this history in *Sexual Harassment of Working Women: A Case of Sex Discrimination*, pp. 90–92, 118–126.

⁴⁶ *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

⁴⁷ *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (holding discrimination against homosexuals and trans people to be sex-based discrimination in employment in firing cases under Title VII, which prohibits sex discrimination in employment).

⁴⁸ See *ibid.* at 1742–1743.

⁴⁹ *Ibid.* at 1759 (Alito, J., dissenting).

⁵⁰ *Bostock*, 140 S. Ct. at 1742–173, 1748.

discriminated against as such in firing, harms other women, inquiring minds want to know.

The second argument, the anti-stereotyping approach, is a form of liberalism: women and men are equally sex stereotyped. The substantive content of those stereotypes, and their social consequences, are far from equal, but that is not anti-stereotyping's principal concern. This approach does dip a toe into a bit of social substance by noticing that trans people, when treated unequally as transgender, are considered inadequately masculine or inadequately feminine. A trans woman is considered a feminine man, hence not conforming to social standards of manhood (continuous with, say, femmes) or an inadequately feminine woman. Trans men are considered masculine women (continuous with the many forms of female masculinity). Their gender presentation is punished for not fitting society's rigid standards for the sex and gender they were assigned at birth or the gender they are living.

Sex stereotyping, when a job qualification and irrelevant to the job, is legally sex discriminatory,⁵¹ sex stereotypes being sex-based standards that outliers should not have to conform to in order to be employed. The fewer outliers it takes to show that a generalization, applied to disadvantage, is overgeneralized, the more sex equality protection the category is considered to have.⁵² While addressing one real engine of sex discrimination, the anti-stereotyping approach protects more against illusions than realities. That is, it far better helps those who don't conform to a picture of a sex than those who are routinely denigrated and devalued for fitting that picture. As with most liberal approaches, it prioritizes exceptions, elites, which will be those who meet the dominant standards (e.g., females who meet male dominant standards for work while remaining feminine personally), doing little to nothing for those members of subordinated groups for whom the subordinated stereotype has been made to be real, which is most of us. If anything, as far as I can see, within its limits, extending this approach to trans people strengthens rather than weakens it for all women, underlining stereotyping's arbitrariness in a new way, specifically assisting gender nonconforming women.⁵³

In the third approach, seeing anti-trans treatment as sex discriminatory substantively focuses on what makes men considered socially superior to women, women inferior to men, in dynamic hierarchical social strata driven by sexualized misogyny.⁵⁴ This approach does need feminism. Under male dominance, in transitioning, trans women lose status, trans men gain it. Trans women are intersectionally discriminated against as women and as trans, triply if of color. Trans men, although their gendered social

⁵¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–252 (1989).

⁵² Catharine A. MacKinnon, "Substantive Equality: A Perspective," 6.

⁵³ *Bostock* does not address discrimination against gender-nonbinary persons as such, but it could arguably, in an appropriate case, be developed to cover them with a deeper anti-stereotyping analysis logically analogous to protection of atheists under Title VII's prohibition against religious discrimination. For further helpful discussion, see Jessica Clarke, "They, Them, and Theirs."

⁵⁴ See MacKinnon, "Equality," "A Sex Equality Approach to Sexual Assault."

standing is documented to be improved, may be seen as lesser men, as gay men and racially subordinated men often are.⁵⁵ Trans women, as women, become newly sexualized as targets for incursion, abuse, and devaluation⁵⁶; trans men, as men, no longer occupy that social location, except to the extent that they may continue to appear to the male gaze as feminine men, marked by femininity for sexual and other violence (especially dangerously if it is “discovered” they have female genitalia). In addition, when trans women have not had surgery (some do, many do not), they may become targets for violent attack by men who find their own sexual orientation challenged by “discovering” they are having sex with, or upon upskirting, a person with a penis (the penis as often the center of attention). The legal result, in the absence of a sex equality analysis, can, for instance, allow trans panic murders. If adopting this pathbreaking approach to trans rights would harm non-trans women, I haven’t seen the analysis or evidence for it.⁵⁷ Foregrounding gender hierarchy and sexualized misogyny, as the substantive analysis does, should benefit all women.

Applying this substantive analysis reveals the politics of prostitution, which affect women in vast numbers, in newly clarified light. Currently, many who understand that trans people are members of their identified genders find their position antithetical to understanding that what is called “sex work”—a cover-up euphemism for prostitution, as survivors have taught⁵⁸—is neither sex nor work. Being both strongly pro-trans and strongly anti-prostitution, with pornography an arm of prostitution, are seen as irreconcilable positions.⁵⁹ In light of feminist analysis, the reality that trans women are women, living women’s sex-unequal lives, oppressed as women—whether literally, stereotypically, most of all hierarchically—is consistent with the reality that prostitution is neither sex, in the sense of mutuality and pleasure, nor work, in the sense of productivity and dignity. The sexualization of trans people, particularly trans women,⁶⁰ often through the misogynistic fantasy that their primary motivation for gender affirmation is to have sex with men (which they don’t have to transition to do), plus

⁵⁵ See Kristen Schilt, *Just One of the Guys: Transgender Men and the Persistence of Gender Inequality*, 161. (“As men at work, some transmen benefit from...the advantages that men in general gain from the subordination of women—particularly educated, white transmen who physically pass as men. These changes...reflect the outcome of changing social locations within a racialized gender system.”)

⁵⁶ Serano, pp. 253–63; James et al., pp. 133–34, 159–64, 198.

⁵⁷ Correctly applying individual criteria for danger of being harmed or doing harm, as recently adopted in the federal prison context, could guide decisions in other congregate settings.

⁵⁸ See MacKinnon, “Equality,” “A Sex Equality Approach to Sexual Assault.”

⁵⁹ Although it is reduced to stereotyping, *see, e.g.*, Holly Lawford-Smith, “What Is Gender Critical Feminism (and Why Is Everyone So Mad about It?).” Lawford-Smith argues that gender-critical feminism, “because it is about sex, ... clashes with gender identity ideology, ...[Gender critical feminists] ... see prostitution as the institutionalisation of one of the most pernicious sex stereotypes, namely that women are for sex with men....” See also Julie Bindel, “Why Is Prostitution Being Pushed on Young Trans People?”

⁶⁰ Serano, pp. 253–273.

the equation of women's sexuality with sexual abuse and exploitation as practiced in prostitution, makes trans-positive and prostitution-critical positions seem in tension.

Once anti-prostitution and pro-transgender positions are examined through a feminist critique of sexualized misogyny—prostitution and other institutions of forced sex often being opposed both by feminist trans women and many in the feminist anti-trans group as well⁶¹—their consistency becomes evident. The fact that many trans people have had to resort to prostitution to support themselves and to fund their transition evidences their commonality with the rest of women, sexually violated in institutionalized forms and discriminated against in the labor market and in health care.⁶² The problem arises when anti-trans feminists fail to see this consistency with their anti-prostitution position, and pro-trans feminists miss the inconsistency with their pro-prostitution position. Each fails to recognize the implications of their own analysis, specifically how it supports a position they reject. If these issues were addressed rationally, this would be the end of this conflict.

Consider further that the same people who contend that being trans is not chosen, and is therefore dignified and legally protectable, argue that prostitution is chosen, and is therefore dignified and legalizable. Funny how choice gives dignity and protectability in one setting and takes it away in the other. Both are backwards. Prostitution is a key institution of sex inequality, that is of male dominance, thriving off the deprivation of real choices, while trans identities challenge that very same sex inequality, its assertedly natural basis in particular, exercising and opening choices. Trans people do decide, in a real sense of choice, to transition or affirm an identity contrary to society's designation for them, swimming against massive social tides, however limited their options and however predetermined their gender may feel inside. Prostituted people of all genders, by contrast, are swept out to sea by lack of choices. And nothing can diminish the human dignity of either group one iota, although both suffer the unequal harms of dignitary violations at the hands and in the eyes of a bigoted world.

In movement terms, the anti-trans politics of some who identify as feminists, along with the powerful lockstep of much LGB leadership, has pushed trans women in particular into the arms of the pro-prostitution lobby, where they receive a warm welcome and are used as the latest skirts up front. They then become the anti-trans feminists' example of trans people's anti-women politics—as if there is some deep affinity between what anti-trans feminists call “transsexualism”⁶³ and the sex industry—when it seems to me that these trans people⁶⁴ are being manipulated in a reaction to a reaction, for which anti-trans feminists bear part of the blame.

Probably it bears explaining why I don't use the term “cisgender” or “ciswomen,” although it is a handy term for non-trans; use it if it works for you. To me, it implies

⁶¹ Julie Bindel, “Prostitution Is Not a Job”; Lawford-Smith, *Gender-Critical Feminism*, pp. 67–84.

⁶² James et al., pp. 12–14.

⁶³ See, e.g., Raymond, *Doublethink*, p. 231.

⁶⁴ A caution: not all who purport to be trans online in vituperative defense of prostitution, an industry largely dominated by organized crime as the destination of sex trafficking, are, actually, trans.

a comfort with gender that many of us who politically identify as women, as I do as a struggle position, do not share. A feminist critique extends to the entire gender system, all gender roles, a more extended form of dysphoria, if you will, than applies to one's own person alone. "Cis" has also been used to designate a privilege that, although no one who is not trans has to deal with what trans people have to go through, is hardly a real privilege, when the treatment and status of women is realistically considered. I also don't use the term TERF, not because those who are labeled with it are not trans-exclusive; they are. But because I see nothing radical in their feminism and am baffled by their unwillingness to recognize trans feminism as the contribution that it is, and by their willingness to engage in the transmisogyny that they do.

I take away two overarching lessons from these thoughts in progress. One is that feminism has not yet sufficiently changed the social meaning of gender around us for everyone to be safe and free and equal in gender terms, no matter how strongly we have confronted it or expanded it or bent it or transcended it or worked to abolish it. A lot of people still think it is biologically based. This much is truly obvious. Naturalism, that gender flows from sex in the sense of chromosomes and genitals and reproductive biology and so on, still exercises dominion over the world we all live in. Two, the feminist anti-transgender position is built on and reinforces, rather than challenges, that ideology. The notion that gender is biologically based—the philosophical foundation common to male dominant society and anti-trans feminists—is core to the reason why trans people know with their lives that they have to change their bodies to live the gender of their identities. Trans people do not need to make or defend a progressive contribution to gender politics to be entitled to change the way they inhabit gender. But trans people, in addition to all else they do and are, highlight feminism's success—gender's arbitrariness and invidiousness was our analysis originally—and feminism's failure, or better our incomplete project—as the world is still largely stuck in what feminists oppose and fight to change, and trans people are determined to escape.⁶⁵

Commentary

Finn Mackay: It is a true honor to share a platform with a shero, a giant of radical feminism, Professor MacKinnon. These remarks from the professor are a breath of fresh air and a relief. I agree with every word.

The only area I would like to add to is on the importance of pushing back against a narrative that weaponizes the identity and experiences of trans men, and transgender masculine people, and queer masculine women assigned female at birth.

⁶⁵ Perceptive comments on these ideas and prior versions of these remarks by Lori Watson, Mischa Shuman, Cass Sunstein, Michele Dauber, Jessica Neuwirth, Dorchen Leidholdt, and Anne E. Simon, and the superb research assistance of Max Hantel, made a real difference in their development. Nothing in it should be attributed to any of them, however. Part of this Article was originally published in *Yale Journal of Law and Feminism*, Vol. 34.2, pp. 88–96 (2023).

The UK is awash with commenters claiming on the one hand that they are being silenced for saying the unsayable, all while loudly saying it. Loudly broadcasting hateful, narrow, and simplistic soundbites pushing trans exclusion.

As Professor MacKinnon highlights, trans men are often invisible in the mainstream skirmishes, but the figure of the masculine female or the tomboy girl is frequently invoked to characterize trans men and transgender AFAB/female-bodied people as dupes, as victims, as weak pawns, brainwashed and stolen by a trans conspiracy.

It is important to resist this simplistic and patronizing narrative. Not least because it is unlikely that famous children's authors, journalists at the *Times* or the *Sunday Times*, or Tory baronesses in the House of Lords, or so-called therapists apparently advocating for interventions akin to conversion – actually have any credibility, care, or history in fighting for the rights of queer communities, of masculine women, of butch lesbians, of transgender people.

Masculine women are portrayed as being in flight from femininity, as seeking sanctuary from sexualized male violence. Their gender and sexuality identity is then backgrounded, to put patriarchy in the foreground. And indeed we do know that for the great majority of women, their first insight into their own bodily integrity and sense of a self with boundaries is when those boundaries are violently breached, usually in girlhood, by sexual harassment, by groping, by assault. And it is a shame on society that this is, for so many girls, their first introduction to their physicality, to their sexed body, and their molding into the category of woman.

But while almost all women know the threat and reality of sexualized male violence, all women are not transitioning to be trans men. All women likely experience sexual harassment of some form, but there is not a mass rejection of femininity or the beauty industry. These things incidentally were key points in lesbian feminist theory, points that many people do not know, or ignore, while cherry picking only the parts of that theory that put forward trans exclusion.

Endemic levels of sexualized male violence against women and children are an issue in their own right. Meanwhile, some girls and women are, and will transition to live as, trans men, or as other transgender identities, and that is also significant and important in its own right. It is not reducible to a flight from femininity, as some kind of camouflage or safety net from male violence when queer communities know only too well that we are not immune.

These identities are not an exit. They are not a flight from anything necessarily but a flight to a public identity that has been long felt; they are a flight toward a name by which to be seen and known.

And yet, while the British commentariat embrace the so-called culture wars and ignore the environmental end of days, ignore the crisis of depleting humanity in this country as women, children, and men seeking asylum drown and die in the Channel, or plead for help from behind the razor wire of detention camps, it is important to remember that nobody is actually having words, names, labels, or terms taken away

from them by trans rights. Women are not being erased by trans rights. Mothers are not being erased by trans rights.

What is happening is that some people are finally getting names and terms, finally being included. People who were always there, always here, minoritized and marginalized people, are finally getting our own words and claiming our own terms to define us.

Mischa Shuman: As a woman and a mother, it often occurs to me that the discussion on who trans people are, who women are, who trans women are, is especially prevalent right now. In the UK – Finn pointed this out – gender-critical views are everywhere. They are dominant in fact, in the media, in what you read, in nearly every forum. Yet this idea is put forward that gender-critical views are being silenced and nobody is listening to them. And that a transgender conspiracy is suppressing gender-critical voices. For me – linking it also to, for example, antisemitic conspiracies – the idea that this small group of people has this immense power to do things that are just clearly not happening is a problem that is not getting the attention it deserves. It is crucial to interrogate who actually holds power in this situation.

My children, sometimes they have an agenda. They are often trying to do something, or accomplish something, or ask me to do something. Over the years, I have learned to have healthy skepticism when they propose something that seems very convenient: “Oh yes, this seems like a good idea. *What do they really want?*” In parallel here, what strikes me is, why are more feminists not wondering “what do these men in power who set the media and institutional agenda really want?” Why are some feminists in lockstep with these men in power on issues of excluding trans women? What is their agenda? What is the agenda of power? We’re not asking that question enough.

Taking a step back, in many ways gender hierarchy is not only operational from a very early age, when you start to differentiate “this person is a boy, this one is a girl.” It is imposed before that, before a child is even aware of gender. It is the first form of discrimination we learn and experience as children. Early gender discrimination, I think, teaches us to tolerate and accept that there are different statuses in the world; like there are girls and there are boys, and the girls have to serve the boys, and they have to eat last, and so on. In all kinds of ways, that is the first exposure to a hierarchy for children. We are taught that that is how it should be from so early on. Transgender people – more than blur – they upend that system. This is because if you cannot maintain segregation, strict segregation, then hierarchies are impossible to maintain. This also applies to all forms of racial segregation, apartheid. What those systems feared was blurring lines. That is why marriages or relationships between people of different racial groups were targeted, prohibited. Transgender people blur the lines. Within feminism, when we are endlessly fighting to define women so that we can quantify and put them in a box, we are fulfilling a necessary premise for hierarchy. Transgender people upend that.

There are so many aspects to this, but one part always comes to mind for me in these discussions: are people talking about a perfect world or the world we have now? I

think about that when we talk about gender issues, when we talk about youth gender transition, when we talk about how we would ideally want these things to be addressed. We often want to treat issues pertaining to trans youth as if we are living in an ideal world free of gender stereotypes and barriers to its expression. I would love not to go into a store with my children and see a girls' section and a boys' section. Yet, that's not what we are trying to legislate away in these debates on transgender rights. Instead, what many are trying to do is legislate away trans-affirming models of care for youth. Or they say, "this particular child should not be wearing a dress because they are a boy, they should reconcile with their masculinity." Or they are falling into stereotypes and "performing gender." Rather than trying to legislate away transgender children, why not focus on changes that will have a downstream effect? For example, should we not debate whether should it be legal to market and label toys along gender lines? Does that not fall under sex discrimination? Would all our children not be better served if there were no segregation by gender of toys and other children's items? I think a lot about that as a mother. Some feminists who are spending all of their time publishing books and screeds about how trans people are the biggest threat to humanity, why are they not talking about gender-discriminatory and stereotyped experiences that children have going into a toy store or a classroom?

There is a particular author – I'm sure many people are aware of whom I'm referring to. One of the problems I find with her work is that it perpetuates harmful gender roles through character portrayal. The central character of her novels is a boy. There is nothing wrong with having a boy as a central character. But I consistently see with young children, whether they are reading outside school or assigned reading, the central characters are almost always boys. For an author who claims feminism, and concern about the erasure of girls as her motivation for dedicating her vast resources and platform to opposing trans rights, it is ironic that she does not consider how her own writing has perpetuated the sidelining of girls and centering of boys in children's literature. A great series that my daughters love, coauthored by Stephen Hawking and Lucy Hawking, is *George's Secret Key to the Universe*. I love the book; its coauthor is a woman. Yet the central character is still a boy.

We see these things move past childhood and play out later in life, where men just don't read books authored by women or about women. Men don't engage with female characters; this starts as early as childhood. Girls, however, are frequently exposed to characters who are boys and encounter stories centered on boys. Girls are taught to empathize with boys, but the reverse does not happen. So while this particular author is working so hard to marginalize an already marginalized group, it astounds me why she and those intellectuals aligned with her are not actually addressing some of the real issues being perpetuated in writing for children, and in the ways we engage with our children around gender. That's the future, if you want to impact what happens next and bring us closer to our ideals.

I think it is really important to acknowledge that, in this debate or discussion, there are two sides. The misogyny from people in both corners is really distressing. To see

gender-critical voices and advocates go for the most appearance-based misogynistic targeting of trans people is deeply painful. Then to see trans advocates — and not all of them are trans themselves — use the most violent and misogynistic language toward other women is also tragic. They are essentially replaying the same things that are being done to them by patriarchy and directing them at other women who are highly vulnerable to those attacks.

One distinction, though, that is very important to note is that one group, including so-called gender-critical people, are essentially trying to legislate another group out of existence. There is an undeniable asymmetry there. Gender-critical advocates are saying that this particular group should not access this particular space. This group of people—transgender people—is facing exclusion by law. Aside from the ethical and harm-inducing issues of this legally enforced restriction on access and identification, a practical question that Catharine touched upon is: How can this be implemented? When you have a bathroom rule, what does that entail in a practical sense? Who would judge the people in there? What would they be judged on?

I often experience, and many trans women experience, harassment in bathrooms from those in them. But actually, the more anecdotes I hear are from women who are not trans but do not conform to gender stereotypes; these women are often bullied, harassed, and targeted. As Catharine also said, somebody who is going into a bathroom to assault someone is not going to look at the sign and say, “I haven’t transitioned, I’m not going to go in there.” Someone who is sexually assaulting a woman will not be deterred by a sign on a bathroom door. More broadly, most sexual violence does not occur in public bathrooms. It occurs in homes, and most perpetrators of violence are not strangers to their victims. By obsessing over the public bathroom issue, we are denying space to address the reality of the vast majority of sexual violence that girls and women face.

It almost feels as if trans people are a vulnerable group who are such a minority, they can be picked on for some perceived threat and targeted legislatively. Whereas men, who are in homes, in schools, who are largely the ones perpetrating sexual abuse and assault, we are not having enough substantive discussion about how to reduce the harm and violence they are perpetrating. Would anyone think of legislating men out of houses? Would anyone think of legislating men away from access to children? The fact that people feel entitled to legislate against trans people because they are a small and maligned minority is deeply distressing as well as distracting.

I appreciate the ideas that have been shared, and I hope, as feminists, we are able to interrogate who this debate and conflict really benefits.

Sandra Fredman: I want to start by thanking Catharine for this wonderful paper. The paper articulates so clearly so many of the thoughts that have been anxiously whirling around in my head over the past few years.

I have felt deeply shocked and saddened by the ways in which the banner of feminism has been used to legitimate pure hostility, and to draw lines of inclusion and exclusion,

which have hijacked the vocabulary, leaving many of us speechless. Catharine's paper provides a wonderful compass for navigating these issues.

As she says in her introduction, seeing women as a space to be defended, as opposed to a set of imperatives to be critiqued and transcended, has been startling.

Like her, I would have expected all those who self-identify as women to be welcomed, and that has always been my firmly held position.

So it is extraordinary to find that biological definitions are now being used in ways that set back crucial insights in the history of feminism, and polarize and implode the solidarity we so desperately need. After all, it is nearly seventy-five years since Simone de Beauvoir stated so powerfully: "One is not born, but rather becomes, a woman."

I would like to add two further points, both of which I think need to be said, and I'm grateful to Catharine for opening up the space for us at least to have this conversation.

My first point is to reemphasize the wide range of experience and social locations of all who identify as women. Patriarchy manifests in many different ways, especially when it intersects with other structures of subordination, such as race, class, geography, disability, and sexuality.

So, the fact that trans women's experience of oppression and subordination along their journey might differ from that of other women should never be regarded as a reason for exclusion, but on the contrary, as a reason to embrace and consider how these different journeys can help us work together in response to patriarchy.

This is a lesson that has been learned in many different contexts. Betty Friedan's *Feminine Mystique* exposed one aspect of patriarchy, the suffocation of the "happy housewife heroine." This was an important insight, which many women identified with. But it was trapped in the paradigm of the white American middle-class woman and so made the mistake of assuming this to be *the* experience of womanhood.

But this was never true of the countless women who have always had no option but to undertake paid work.

And it obscured the ways in which paid work is so often an arena of exploitation of women, and most conspicuously the women who took over the domestic drudgery from which middle-class women hoped to escape.

The discussion we are having today reinforces the importance of a notion of solidarity that can embrace, understand, and explore this range of experience. Trans women's experience is a crucial part of this.

As Julia Serano insightfully puts it, "While embracing my own femaleness and femininity during my transition was personally empowering and rewarding, I nevertheless felt overwhelmed by all of the negative connotations and inferior meanings that other people began to project onto me."

This leads to my second point, which responds to the question of whether we still need a category of "woman." My answer is that of course we do. But I want to reassert that I can identify as a woman in a way that is inclusive but also, crucially, in a way that does not buy into a notion of gender binary. In other words, we can have a category of woman without accepting any notion of rigid boundaries or erasing the

identity of gender-fluid people. Just as assuming a race-blind or colorblind world will not make race discrimination vanish, so abandoning the category of woman will not itself erase women's subordination.

This is because legal and social restrictions have been based on a classification of people into the categories of women and men. And it's also because the structural nature of women's subordination should not be made invisible.

If we abolish the category woman, this might simply render invisible the many inequalities to which women are still subject, whether through express law, customary attributions, or structural barriers. For example, we would not be able to note that globally women still earn only 77 cents to every dollar earned on average by men, and that it would take 247 years to close this gap at the rate we are going.

But a recognition that inequality has for centuries been attached to women as women does not mean that there is an assumption of a gender-binary world. This means that "woman" must always be inclusive of all those who identify as women, and of all the wide diversity of expressions, experiences, and social locations that women inhabit or that are ascribed to them. At the same time, the gender ascriptions that continue to fuel this subordination need to be constantly contested.

This discussion needs to go on and on, and I want to thank Catharine again for making it possible to have this conversation in warmth and friendship in this highly charged context.

Audience member 1: Hi, thank you so much for all of your contributions. I suppose that I wanted to ask a question to Catharine about the ways in which gender identity – understood as a sort of assertion of phenomenology within the context of a social position – the way in which that can come apart with political allegiance, as you identify in the case of cis women or reactionary cis women. I suppose my thing is, if you maintain a framework – a sort of dyadic framework for understanding patriarchy – and continue to operate with a notion of male power, implicitly here men are the enemy rather than, say, the sex/gender binary and its enforcement. My concern is, if you portray trans women as fleeing masculinity, embracing femininity, and sort of politically identifying as women by virtue of their transition, the implication of that seems to be that trans men are in some way castrators, or at best – as Finn put it – sort of fleeing sexual violence and sort of reducing their gender identity to that set of political and social motivations. I was wondering how you can maintain your account of trans womanhood without some objectionable consequences for the way in which you theorize trans manhood.

Catharine A. MacKinnon: The key to be clarified first between us is this term "perceived as," or what you call "the notion of" male power. I was talking about realities: male power is a real thing. A reason to be critical of the gender binary is because of the way it instantiates itself in reality. There's a separation in what you said between the idea of the thing and the thing. I was trying to talk about the thing.

I did not give a full account of why trans men are trans. I referred to some documented experiences some people have. However, the numbers of sexually violated

female-bodied and identified people who don't transition massively dwarfs the numbers who do. My feeling with trans women is: welcome. My feeling with trans men was, initially, I didn't know many. People who identify as women are more likely find me. I find them, we connect. I've talked with probably thousands of women all over the world, trans women included, fewer trans men. So I read memoirs by trans men; there are some very good ones. I also have some close trans men friends, and of course some students.

Part of my feeling is this: as with lesbians and gay men, there was a long time when people were asking, why are lesbians and gay men, lesbians and gay men? Are lesbians fleeing men, or running into the arms of women, or is that the same thing? No one really bothered to figure out the relation between sexual abuse and anyone's sexuality. People only seem to be interested in the etiology of sexuality when they think something is wrong with it. So they try to figure out, are lesbians lesbian because they were sexually abused? They don't ask why are straight people straight. And the way empirical work functions is, they want to see a bigger number on one side than the other, so they can think maybe there's at least a correlation here, and then they do the fancy newer mathematical stuff to see if there's any causal connection. This is not going to work, because someone who is sexually abused as a girl can equally have one of two diametrically opposed reactions. One is to avoid all men, say, although girls are abused by adult women also, which is overwhelmingly left out. But more commonly, a young girl is sexually abused by a man. She may decide she never wants anything like that to ever happen to her again, so she tries to never have sex with a man again. Or, alternatively, she keeps trying again and again and again with men for the rest of her life to try to make it come out right. The first is called lesbianism; the second is called heterosexuality.

Since, as I said, nobody cares why anyone has the sexuality they do unless they think there's something wrong with it, and the same is true of gender identity, there haven't been these studies about what makes women heterosexual. If you read Freud, you cannot figure out why. It makes no sense. Nancy Chodorow's book basically says this, on my reading. What I think is, there is nothing stigmatic about an abusive situation teaching you to avoid that situation in order to avoid that abuse. It's only been made into what you call "perceived as fleeing abuse" in order to become a trans man as a diagnosis, hence a stigma. Other people's sexuality doesn't get diagnosed and stigmatized by abuse or gender.

The memoir *Man Alive* by Thomas Page McBee, originally designated female, is informative here. He was, in his girlhood, sexually abused by his stepfather. Eventually Thomas, fully transitioned, confronts his stepfather. On the way, he identifies as a woman and a lesbian, in relationship with Parker, who by the way has the best lines in the book. He says to Parker, "So did I decide to become a man because he hated women" – I'm paraphrasing – "and I thought that's why he did that to me?" Good question. Parker says, basically "No honey, gender isn't what's done to you, it's who you are." So what I think is, gender becomes who you are in part through what's done

to you, and that's true for all of us. That's an insight that trans analysis, trans politics, helps provide. None of us escapes this being done to us, it makes us all who we are, but not in this empirical, social science-y-unidirectional, "once this is done, this then leads to that"-way. It needs to be studied for everyone.

Finally, this might be a complete artifact of who I know. But the trans men I know keep a piece being women inside themselves somewhere. The trans women I know still know everything they experienced as men, but they don't identify as men anymore at all. With the trans men that I know, you ask them, say, "How does it happen that the leadership of trans groups are mostly trans women?" They say, "Honey look, we were raised as women." I don't see trans men as gender traitors at all. To me, as a feminist, I relate to everybody in this space as a woman somehow. Trans women are; trans men were. Becoming a man is what some women do. Now, trans men are men, but something is still there inside at least some of them who have shared it with me, like when they call being a trans man "a woman's experience." Again, that's just one person. These are just the beginnings of knowing anything. There's a tremendous diversity in trans experiences that needs not to be collapsed. I've just offered fragments of what some of that variety has taught me so far.

Audience member 2: Thank you so much for all these really fascinating remarks. I'm just curious, I think you said most detransitioners appear to be trans men; we see almost no trans women detransitioning. Can you shed a bit more light on why you think that dynamic is happening? I think you shared a little bit, but—

Catharine A. MacKinnon: I think everybody else should talk. Also what I've just said is nowhere near as good as what Finn already said about female masculinity. So Finn, do you want to talk about all this?

Finn Mackay: I suppose, well to the first comment, I definitely want to say from my own perspective that it's not men who are the enemy, it's patriarchy that is the enemy. Although conventional, mainstream sites of power are overwhelmingly held by men, that's not a theory dreamt up by radical feminists, that's just a statistical fact. But although men dominate positions of power, all men are not in power, nor do they feel powerful, and many are denied access to power across many axes of inequality. Patriarchy is something that can be overthrown by us all, and will only happen if all do overthrow it. Yet, because it's a common narrative that trans men are traitors – indeed even being a woman and speaking out for trans rights and trans inclusion, you will also be called a class traitor. I get that a lot having been involved indirectly in organizing feminist activism against male violence against women and children most of my adult life, including in policy and in official roles. For speaking up for trans rights and inclusion I'm called a rape apologist, a traitor, an antifeminist, a pedophile on an almost weekly basis. So this is something that's just thrown at people, but it's this idea that trans men are leaving a rank or a battalion and betraying it by going over to the other side. That narrative comes from so-called gender-critical feminists who want to... Well not always feminists, and many of them outspokenly will say they're not feminists, so it comes from gender-critical campaigners who'll say they want to critique

everyone's presentation but their own, it seems to me. That narrative of "you're leaving these ranks, you're a traitor, you're leaving behind these ranks and crossing over some sort of imaginary line," well it's never been radical feminists who impose that line. The whole point of radical feminism is that everybody is a human being with equal capacity for humanity. The whole point of radical feminism was and is anti-essentialism, which is why so much of the neo-Victorian gender criticism is anathema to the feminist project. So that narrative is certainly not coming from feminists, I'd say that it's a common one used by anti-trans activists to demean that. Of course, trans men are that identity that they have chosen and then speak out about and are seen as, they're not pretending to be anything – you get those narratives of deception as well. Why can't trans men just be trans men? Why do they have to be a failed this, or a traitor to that, or an abandoning of this? Why can't they just be somebody who wanted to live and be seen as a trans man, or man. So they haven't left anything, they've come to something. But it's a common one, and I second that we need to study heterosexuality, especially given how dangerous it is! Perhaps it is time that science looked to those questions and tried to find a cause. So that's what I would say about that. And what was your question again, sorry?

Catharine A. MacKinnon: Why trans men more often appear visible in detransitioning, rebecoming women, than trans women are visible in rebecoming men.

Finn Mackay: Yes. There's a lot more attention on detransitioned women than on detransitioned trans men. I think there's a lot of public attention. In Britain, the minute somebody launched a network online, which existed as nothing more than a hashtag for detransitioned women at first, then a basic website, who had been living as trans men, it was covered on *Woman's Hour*, soon after it was covered in the major broadsheets. So it's popular, it's popularized because it affirms this belief that trans men have been "transed up," have been subjected to a process, a trans cabal, and were really all along just innocent tomboyish women. And of course they used that argument to try to roll back the meager human rights that trans people have and access to interventions – hormonal and surgical health interventions – and they use that argument by saying "you are transing girls, this is barbarism, this is child abuse, you are transing girls who are really just masculine, or just masculine lesbians," and "See you in court then when they all want to detransition." Even though it remains a tiny number and the regret rate for transgender surgical interventions is hovering around 2 percent I think, from what I've read, far far less than for almost every other surgery you care to look at: knee surgery, hip surgery, whatever it may be. So they've popularized detransitioners and pushed [them] to the foreground because they fit this idea of an innocent victim, a poor girl who was "just a lesbian." They've always got to put this "just" in front of it as well, as if there's something wrong with that, something lesser, less significant, about being a lesbian. So it's weaponized, which is kind of what I said in my remarks. I think that's the reason we see a lot more of that group. However, it is important to also note that this attention doesn't always seem to extend to ensuring that detransitioned trans people, or those pausing trans healthcare like hormones or

delaying surgery for whatever reasons those may be, have real, non-stigmatized access to quality and informed healthcare. In that need for informed healthcare, support to make healthcare decisions, support and access to ongoing care whatever that might look like, it doesn't seem [like] society is so passionate and opinionated about making sure trans, transgender [people], or those who are pausing intervention or detransitioning, have access to that. And in that need, trans people and detransitioning trans people share concerns, and those groups share many experiences too, not least of navigating medical systems. The media as usual seeks to pit these groups against each other, when, as is so often the case, they have a lot in common that they can work together toward.

Audience member 3: Thoughts on a forward-looking consensus to the thought that the idea of a woman or feminism at large should be more inclusive, and it makes logical sense for it to be. But historically that has not been the case. Feminism in a global sense has not been inclusive when thinking about radical feminism or even – I don't mean to pinpoint one tradition – but also in Marxist feminism. Race has been a very critical blind spot, not just in not including it but also not fundamentally accounting for it. Even the gender-first lens of intersectionality, that kind of misses the point of co-construction. perhaps that in a lot of cases it's not gender, it's something else first. In India also, where I come from, there tend to be more hegemonic, dominant forms of feminism and then those become custodians of how we open up feminism to these sorts of peripheral experiences. So just the global moment of conversation around gender and gender identities and the plurality within it, how does that offer us as feminists a moment of reflection on who is the custodian of the movement, who gets to define what is the universal experience of gender that we need to somehow expand verses rethink and reimagine?

Catharine A. MacKinnon: The feminism that I've practiced and theorized since 1970 has always been based in an antiracist and anti-class perspective. And the movement that we built did that and has done that. The critique of that movement as white and upper class – although that is validly directed at a fair amount of academic work and people the press has decided to focus on – has obscured the fundamental contributions of women of color, in particular in the US Black women, also Indigenous women and Latinas – to everything the women's movement has been and done all along, this wave and before.

The people I've worked with in India have been mainly prostituted women, so I haven't been in a dialogue about who's the custodian of feminism there. We're trying to end prostitution and support women who want to leave it. We are concretely working together toward making it possible for women who are subjected to conditions that make prostitution their only option to have other possibilities for their lives. I take your perception that it has been made visible and legible to you that some people think they're the custodians of feminism and certain other women and work are peripheral. I want to dissent from whatever has created that perception.

Mischa Shuman: First of all, I think that feminism is not just a movement within ourselves, within feminists or even women. It is a potent political force throughout society, and a lot of the work being done at the intersection of authoritarianism and feminism – like how feminism challenges authoritarian society – demonstrates the political importance of feminist activism. I think that one of the reasons you have a system where you have political leaders who are very threatened by feminist movements, including trans-feminist movements, is because these movements show that they can force all issues pertaining to women in a box separate from everything else. I think political feminism has ramifications for every aspect of the political sphere. Even in the US, election data reveal that women participating in elections has resulted in a dramatic shift in the policy platforms that succeed at the ballot box. So to address your point about gatekeeping, I just think that feminism is so embedded in every aspect of society that I don't see it as belonging to a defined group; it's in every arm of society, it's in every branch of progressive change. Feminism is happening within institutions, it's happening within the political movements. I think it's very important to reject the idea that anybody can gatekeep and say "these are the issues that all feminists should only concentrate on."

One tangential point I did also want to address, which Finn also made great points about, is that there are so many things we don't understand in the sphere of feminist activism but also human behavior in general. We don't understand depression really, we don't understand why people are in relationships with others, we don't understand why people are in destructive relationships, self-destructive relationships. We can try to spend a lot of time understanding what makes people who they are, but that is separate from looking at them as a group deserving of political rights and equality, and so I think that when we talk about trans men or trans women and the ways in which individuals are moving through the various strata of the gender hierarchy, [that] needs to be considered through a class analysis lens. I think we don't really know much about the roots of individual identity, including gender identity. For each person it is different, and it is quite important for us to be able to say that every person has the right to live their lives fully with dignity. And I think we should try to diagnose heterosexuality.

Sandra Fredman: I just want to reiterate what I said in my earlier contribution, which is that there are many different journeys, and many different experiences and social locations of women. This means and there is no single way, and no single custodian of what it is to be a woman or a feminist. The reality is that patriarchy works in lots of different ways and there are many different ways in which women are subordinated. And it's only when you essentialize one aspect of women's identity (which really buys into patriarchal assumptions) that you end up with the idea that some people can be given or can take for themselves, this role of being [the] custodian of feminism. But this internalizes the essentializing nature of patriarchy, something we need to all resist. It's been a hard lesson for everyone, but we all need to continue to learn it, which is why

our conversation in this particular arena is so extremely important and so extremely timely.

Ruth Chang: I don't know about the rest of you, but my head is exploding. Amazing insights and ideas. I want to thank Catharine and our panel, and everyone here in the audience, for sharing in what is, I think not an exaggeration to say, an historic occasion. Thank you.

She is Elizabeth A. Long Professor of Law at the University of Michigan and James Barr Ames Visiting Professor of Law at Harvard Law School (since 2009). She holds a B.A. from Smith College, a J.D. from Yale Law School, and a Ph.D. in political science from Yale, specializing in equality issues, focusing on sex equality under international and domestic (including comparative, constitutional, and criminal) law and in political and legal theory.

Professor MacKinnon pioneered the legal claim for sexual harassment and, with Andrea Dworkin, created ordinances recognizing pornography as a civil rights violation and proposed the Swedish model for abolishing prostitution. The Supreme Court of Canada has largely accepted her approaches to equality, pornography, and hate speech, which have been influential internationally as well. Representing Bosnian women survivors of Serbian genocidal sexual atrocities, she won with co-counsel a damage award of \$745 million in August 2000 in *Kadic v. Karadzic* under the Alien Tort Act, establishing the first legal recognition of rape as an act of genocide.

Among the schools at which she has taught are Yale, Stanford, Minnesota, Chicago, Osgoode Hall (York University, Canada), Basel (Switzerland), Hebrew University (Jerusalem), University of Western Australia (Perth), Columbia, and NYU's program in Shanghai. She was awarded residential fellowships at the Institute for Advanced Study, Stanford, the Wissenschaftskolleg zu Berlin, and the University of Cambridge, UK.

Professor MacKinnon's thirteen scholarly books include *Sexual Harassment of Working Women* (1979), *Feminism Unmodified* (1987), *Toward a Feminist Theory of the State* (1989), *Only Words* (1993), *Women's Lives, Men's Laws* (2005), *Are Women Human?* (2006), the casebook *Sex Equality* (2001/2007/2016), and *Traite, Prostitution, Inegalité* (2014). Her latest book, *Butterfly Politics* (2017), proposes a theory of social change through law by strategic reflection on her interventions spanning forty years. She is widely published in scholarly journals, the popular press, and many languages, of which she is competent in three in addition to English.

Professor MacKinnon practices law, consults nationally and internationally on legislation, litigation, and activism, and works regularly with the Coalition Against Trafficking in Women (CATW), and The ERA Coalition. Serving as the first Special Gender Adviser to the Prosecutor of the International Criminal Court (The Hague) from 2008 to 2012, she helped implement her concept "gender crime" under international



Catharine A. MacKinnon is a lawyer, teacher, scholar, writer, and activist.

criminal law. She served as High-level Expert to UN Women' Executive Coordinator and Spokesperson on Sexual Harassment Purna Sen from 2018 to 2020. In 2014, she was awarded the Ruth Bader Ginsburg Lifetime Achievement Award by the Women's Section of the American Association of Law Schools, and is an elected member of the American Law Institute (ALI) and the American Philosophical Society, which awarded her the Henry M. Phillips Award in Jurisprudence in 2022.

Empirical studies document that Professor MacKinnon is among the most widely-cited legal scholars in the English language and over time the most widely-cited woman.

The Ted K Archive

Catharine A. MacKinnon, with Finn Mackay, Mischa Shuman, Sandra Fredman, and
Ruth Chang

Exploring Transgender Law and Politics
2023

<<https://signsjournal.org/exploring-transgender-law-and-politics/>>

© Catharine A. MacKinnon 2023 all rights reserved, including exclusive derivative
and subsidiary rights in this piece and CAM subsequent oral comments.

www.thetedkarchive.com