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Clare Chambers
cec66@cam.ac.uk

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**Judging Women:
Twenty-Five Years Further *Toward a Feminist Theory of the State*
Clare Chambers**

Abstract

This paper engages with the work of Catharine MacKinnon to consider three ways of understanding the phrase "judging women." First, when is it acceptable or necessary to make judgements about what women do? The paper argues that feminist analysis urges compassion and empathy for women, but also highlights the ways that choices are limited and shaped by patriarchy. Thus we cannot and should not avoid all judgment of women's—and men's—choices. Second, when can women engage in the act of judging? It is sometimes claimed that it is anti-feminist to engage in such judgment, and that feminists must above all else avoid being judgmental. The paper rejects this idea and argues instead that feminism should insist on women's right to exercise judgment: women's voices matter. Third, how are we to judge who counts as a woman? MacKinnon's work offers profound, sustained, rich analysis of these questions, but does not fully resolve them.

Keywords: Catharine MacKinnon, feminism, judgment, gender, women, sex, choice, essentialism

One cannot really overstate the importance of Catharine MacKinnon's work. Its philosophical, political, and legal impact is huge. MacKinnon's legal work has improved the standing of women around the world, and her political philosophy is both a defining statement of feminism and a challenge that every theorist, feminist or not, must face.

Re-reading *Toward a Feminist Theory of the State* for the purposes of this special edition, I kept wanting to interrupt my reading. Every page, every paragraph, has a claim that I want to tell people about and discuss with them. So many of the sentences in the book are quotable: are in themselves

complete,
enlightening,
provocative,
so obviously right,
so fraught with difficulty,
at the same time the final word on one question,
and the thrown-down gauntlet on another.

Reading MacKinnon, in other words, is an exhilarating ride through philosophy and politics, a journey in which it is impossible to sit still and in which it is no use wearing a seat belt. There is going to be challenge, there is going to be danger, and there is, above all, going to be an emergency stop: a point at which everything sharply judders to a halt, silence descends, and you whisper to yourself, *Can that really be true?* and, at the very same moment, *How could I not have seen this before?*

It is tempting, then, simply to proceed by quoting a selection of my favourite MacKinnon sentences. But I will resist that temptation and try to make a more sustained contribution.

One philosophical question with which I have been grappling for some time, and which *Toward a Feminist Theory of the State* tackles head-on, is how much significance we should grant to the fact of *choice*. The role of choice is problematic within the context of social construction generally and gender inequality specifically. In liberal theory, choice is treated as what I call a ‘normative transformer,’ something that transforms a *prima facie* unjust inequality into a just one. I have argued that the fact of social construction prevents choice from playing this role (Chambers 2008). We cannot assess the justice of a situation by reference to a choice that is itself, at the most profound and sometimes unconscious level, a result of that situation. This over-reliance on individual choice is a central problem for liberalism.

MacKinnon’s work provides foundations for this critique. She writes that liberalism’s “aggregation of freely-acting persons is replaced, in radical feminism, with a complex political determinism. Women and women’s actions are complex responses to conditions they did not make or control; they are contextualized and situated. Yet their responses contextualize and situate the actions of others” (1989, 46–47). And, as she puts it in the chapter on consciousness-raising:

The instrument of social perception is created by the social process by which women are controlled. But this apparent paradox is not a solipsistic circle or a subjectivist retreat. Realizing that women largely recognize themselves in sex-stereotyped terms, really do feel the needs they have been encouraged to feel, do feel fulfilled in the expected ways, often actually choose what has been prescribed, makes possible the realization that women at the same time do not recognize themselves in, do not feel, and have not chosen this place. (1989, 102)

MacKinnon here draws our attention to our situation as simultaneously recipients and transmitters of norms, victims and agents of oppression, conformists and rebels, apologists and malcontents. We are all trying to find ways to negotiate the social demands on us: how to fit in while remaining individual, how to distinguish those preferences that are authentic from those

that are distorted, how to live in a way that both we and others can accept, how to find a place that is both unique and human. Western liberal culture requires both conformity and individuality. The individual is exalted as a unit of analysis even while being expected to fit into recognisable social tropes. Culture urges us to assimilate and to differentiate, with predictably unpredictable effects.

An issue that arises from this analysis is the question of *judgment*. One feature of contemporary popular feminism is the rejection of judgment: the idea that it is somehow a violation of feminist ideals, and perhaps a general moral failing, to assess other women's behaviour and find it wanting. One encounters this conviction in discussions of parenting (which usually means mothering—the critique of judgment is most pointed in matters of breast- versus bottle-feeding), activism, domestic violence, *Fifty Shades of Grey*-inspired sadomasochism, beauty practices, and cultural difference.¹

Consider some examples from the popular media. Jemma Wayne writes in the *Huffington Post* that the phenomenon of women who judge other women's parenting styles on online forums is “just as dangerous [a] trend undermining feminist values” as the sexualisation of children.² The risk, according to Wayne, is great: “with every wagging finger we are unravelling the victories of feminism.” Jessica Wakeman, in *The Frisky*, writes that, for feminists, “there are a lot of areas where I think being judgmental is inappropriate, particularly when it comes to people's private choices that do not hurt anyone else and do not affect you.”³ Kiara Imani Williams, in the *Huffington Post* again, writes, “You Know What is Worse Than Donald Trump? Other Judgmental Women.”⁴

Michaele Ferguson interprets critiques of judgment like these as part of choice feminism: the idea that feminism means respecting women's choices, whatever they may be, on the assumption that choice is the measure of freedom. Ferguson proposes that choice feminism is, inter alia, an attempt to

¹ Linda Zerilli discusses the question of whether feminist may judge those from other cultures in “Toward a Feminist Theory of Judgment” (2009), a title that invokes MacKinnon even though MacKinnon is not mentioned at all.

² Jemma Wayne, “Mother Judgement: How Women Are Undermining Modern Feminism,” *Huffington Post*, 4 April 2013, http://www.huffingtonpost.co.uk/jemma-wayne/women-undermining-modern-feminism_b_3006752.html.

³ Jessica Wakeman, “The Soapbox: On Feminism & Judging Other Women,” *The Frisky*, 19 June 2012, <http://www.thefrisky.com/2012-06-19/the-soapbox-on-feminism-judging-other-women/>.

⁴ Kiara Imani Williams, “You Know What's Worse for Women Than Donald Trump? Other Judgmental Women,” *Huffington Post*, 18 August 2015, http://www.huffingtonpost.com/kiara-imani-williams/you-know-whats-worse-for-_b_8002682.html.

neutralise three criticisms of (non-choice) feminism: it is too radical, it is exclusionary, and it is judgmental. Her analysis is that “feminism will continue to provoke these three criticisms so long as it is deeply critical of existing institutions, or aims in any way to speak for or about a collectivity (such as women), or claims that the personal is political” (2010, 249). Ferguson suggests that, while it is both understandable and in some sense laudable for feminism to wish to “make feminism appeal to as many people as possible” (250), feminists should not shy away from judgment. “Without making judgments,” she writes, “politics becomes vacuous relativism: we have no reason to prefer one course of action over another. . . . Political freedom requires that we make the best judgments that we can, without knowing for certain that the judgments we make are correct” (251).

Ferguson’s analysis is helpful and perceptive. I agree with Ferguson that the concern to avoid judgment is a key feature of choice feminism; I agree with her (as I argued in Chambers 2008) that the focus on choice as the measure of freedom is ultimately not compatible with feminism as a political and philosophical project; and I agree with her that one must “resist the temptation to reject judgment” (Ferguson 2010, 252). Ferguson suggests that the concern to avoid judgement is a concern to make people *like* feminism and feminists. This may well be part of the matter. In addition, as evident in the examples from popular feminism given earlier, judgement is often rejected not just for being unappealing but for being in some way *normatively wrong*. In the first part of this paper, I want to question this normative critique of judgement. Why is avoiding judgment seen by some as a central feminist concern?

Feminists might well worry about judgment that is directed *to* women, since one aspect of feminism is the need to listen to women rather than denigrate or silence them. But in wider patriarchal society, judgment is demonised when it is done *by* women. Women are not supposed to judge, not supposed to think themselves sufficiently qualified to have opinions or criticise others, particularly if those others are men. This is part of the reason why women in the public eye are subject to such vile online abuse,⁵ particularly if they write about issues on which men feel themselves to be particular experts (which is to say: all issues). A woman is not supposed to have a controversial opinion (which is to say: any opinion). I don't think I've ever heard a man berate

⁵ See Becky Gardiner, Mahana Mansfield, Ian Anderson, Josh Hodler, Daan Louter and Monica Ulmanu, “The dark side of Guardian comments,” *Guardian*, 12 April 2016, <https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments>; and David Grimer, “Men Read Mean Tweets About Female Sportswriters, and Are Shocked at How Dark It Gets,” *Adweek*, 26 April 2016, <http://www.adweek.com/creativity/men-read-mean-tweets-about-female-sportswriters-and-are-shocked-how-dark-it-gets-171064/>.

himself or another man for being too judgmental. As MacKinnon might say, judgment is a male method.

I get the sense, from discussions with my students and others, that readers of MacKinnon often feel that *they* are being judged. I certainly feel that way. That feeling is, for me, part of the exhilaration that I referred to earlier: there is exoneration in MacKinnon's work, and explanation, and excitement, but there is also judgment. I think one of the reasons I have to keep stopping when I read her work is that I keep needing to introspect: *Do I do that? And: Should I stop?*

MacKinnon address this point directly:

Feminism aspires to represent the experience of all women as women see it, yet criticizes antifeminism and misogyny, including by women. Not all women agree with the feminist account of women's situation, nor do all feminists agree with any single rendition of feminism. Authority of interpretation—here, the claim to speak for all women—is always fraught because authority is the issue male method is intended to settle. Consider the accounts of their own experience given by right-wing women and lesbian sadomasochists. How can male supremacy be diminishing to women when women embrace and defend their place in it? How can dominance and submission violate women when women eroticize it? Now what is women's point of view? (1989, 115)

For MacKinnon, the answer is neither subjectivism nor determinism. We must not assume that women are free, having what MacKinnon calls "considerable latitude to make or choose the meanings of their situation" (1989, 116). No individual is the final arbiter of the meaning of her action. But we must also not rely on an idea of false consciousness, according to which "they" are hopelessly blinded by their situatedness while "we" somehow remain magically isolated, perspectively pure. Instead, the project of feminism "is to uncover and claim as valid the experience of women, the major content of which is the devalidation of women's experience" (116).

Judgment is thus particularly fraught. There is a serious qualm about claiming to speak for all women, to assert the authority of the authentic female voice. This qualm is both to be respected (after all, who are we to judge?) and rejected (why shouldn't we judge?!).

Now, one sense in which it may be right to refrain from judgment is that it is not helpful to judge people for doing something that they cannot avoid doing, or for responding rationally to circumstances they cannot control. And so it does not make sense to judge women for participating in beauty practices in a world that judges them always and everywhere on their appearance; or to judge women for staying with abusive partners in a world that fails to protect them from violence whether they stay or whether they leave; or to judge women for

enjoying sadomasochism in a world that teaches them from childhood that they will find romantic and sexual fulfilment in submission; or to judge women for participating in pornography and prostitution in a world that suggests that doing so is empowering, lucrative and freely chosen, even at the same time as women and children by the thousands are forced into prostitution and pornography by poverty, violence, and powerlessness. Of course, we can praise the bravery and feminism of those who reject beauty practices, or who leave violent men, or who resist pornography, or who escape prostitution. But these things are difficult, often crushingly so, and feminism cannot write off women who do not achieve them.

Still, it surely must make sense to judge men who participate in and benefit from these practices. It is hard to envisage a feminism that lets abusive men off the hook. Although both women and men would be better off in a world without patriarchy, freed from the oppression of gender inequality, it is unpalatable to extend sympathy or even empathy to those men who actively brutalise, use, and exploit women and children. Perhaps the fact that abusive men *benefit*, in terms of power, wealth, and sexual gratification, makes them proper subjects of judgment. But then can we judge those women who deftly manipulate the position patriarchy gives them, those who find status and success, of sorts, through maintaining practices of gender inequality?

MacKinnon studiously avoids making what she terms a moral critique:

This book is not a moral tract. It is not about right and wrong or what I think is good or bad to do. It is about what *is*, the meaning of what is, and the way what is, is enforced. (1989, xii)

Earlier I mentioned that *Toward a Feminist Theory of the State* is full of compelling arguments. In the interests of balance, let me state that the claim just quoted may be my least favourite part of the book. I dislike it for two reasons. First, I find it unconvincing. The idea that there can be a non-moral statement of what *is* seems to me to contradict MacKinnon's claims that "there is no Archimedean point" (1989, 117), no "purely ontological category," no "category of "being" free of social perception" (119). The recognition that there is no authentic subject-position outside of social construction means that we must rely on normative critique if we are to have critique at all. We cannot be against rape and pornography because women *are not* objects for the sexual pleasure of men because, under patriarchy, they *are*. We cannot be against sexual harassment and female poverty because women *are not* unequal to men because, under patriarchy, they *are*. We are against rape and pornography and sexual harassment and gendered poverty because women *should not be* unequal to men, *should not be* objects for the sexual pleasure of men, and because it is *bad* to treat them in that way. And if it is bad to treat women in this way then it

is bad for men to do it, and it is bad for women to do it, and it is at least sometimes right to judge those who do it.

The second reason why I dislike MacKinnon's refusal to declare "what I think is good or bad to do" is that I find it unsatisfying. I would like to know what she thinks is good or bad to do, not just in the legal struggles in which she is such a crucial participant, but in general. In our personal lives, in that space where the political is truly to be found, where *what is* is most significant and most entrenched, what should we do?

Now one answer that MacKinnon gives to this question is consciousness-raising, which she terms feminism's method. MacKinnon argues that consciousness-raising, namely systematic collective attention paid to the realities of women's everyday and personal lives, is politically significant because it is in our personal and everyday lives that male dominance is most located. As she puts it:

Daily social actions are seen to cooperate with and conform to a principle. They are not random, natural, socially neutral, or without meaning beyond themselves. They are not freely willed, but they are actions nonetheless. From seeing that such actions have meaning for maintaining and constantly reaffirming the structure of male supremacy at their expense, women can come to see the possibility, even the necessity, of acting differently. (1989, 101)

This account of consciousness-raising offers hope. It tells us that there can be feminist activism in every action and every location: when thinking, when reading, when caring, when working, when living. We can do these things in an unconscious, habitual way, in a way that conforms to our social context with its explicit and implicit patriarchy. Or we can attempt to do these things in a more conscious way, in a way that is at least aware of, and ideally does something to subvert, gender inequality.

In the current political climate, one area of women's experience that has become profoundly invalidated relates to the question of who counts as a woman and thus what counts as women's experience. The question "What is a woman?" is a question that MacKinnon identifies as "implicit in feminism" (1989, 54). Her answer is developed in chapter 3 of *Toward a Feminist Theory of the State*. In this discussion, the distinction between moral judgment and political critique comes once again to the foreground.

MacKinnon notes that feminists have given a variety of answers to the question of what counts as a woman. She identifies two extremes. At one extreme, there is feminism in which womanhood is "almost purely biological, in

which women are defined by female biology” (54). At the other, there is feminism that sees the category as “almost purely social, in which women are defined by their social treatment” (1989, 54). MacKinnon does not explicitly say where she stands on or outside this continuum, but we can draw some inferences about her view.

The first thing to note is that any feminist account must reject the association between women and inferiority, if it is to count as feminist at all. So any feminist account of womanness based on biology derives its feminism, on MacKinnon’s analysis, from one of two places. Female biology might be seen as the source or cause of women’s subordination. Alternatively, female biology might be seen as the terrain or subject-matter of contestation. MacKinnon certainly rejects the first option and seems to endorse the second.

MacKinnon rejects the idea that biology is “the source” of women’s subordination, an idea that she attributes to feminists such as Simone de Beauvoir and Susan Brownmiller (1989, 55). MacKinnon argues that de Beauvoir sees childbirth and motherhood as necessarily natural functions involving no project, failing to realise that motherhood has no “universal invariant significance” (1989, 58).

Similarly, MacKinnon critiques Brownmiller’s claim that the difference between male and female genitals is what makes rape possible. This claim relies on seeing the penis as in some sense necessarily active with the vagina passive; coitus is thus an act of penetration that can be performed aggressively. MacKinnon notes that the mere fact of genital biology cannot do the work needed for Brownmiller’s account, since it would be equally biologically possible for women to “lurk in bushes and forcibly engulf men” (1989, 56). We might think that this image is somewhat over-optimistic about women’s ability forcibly to procure an erection or proceed with coitus regardless, but MacKinnon’s general point is correct: rape and sexual assault do not necessarily involve what Brownmiller calls the “locking together” of penis and vagina, even when men attack women, and so the fact that women do not sexually assault men with anything like the frequency or ferocity that men attack women cannot be explained by their lacking a phallus. The existence of penises does not explain rape and sexual assault, and sexual assault does not require a penis or even a phallic object.

In the social context of women’s subordination, to be sexually attacked is to be attacked by or as if by a penis. The penis itself is not an aggressive organ. It becomes one only when accompanied with physical strength, brute force, intimidation, or humiliation. By any of these features could, in a different social context, accompany sexual assault by or as if by vagina. MacKinnon demonstrates this alternate social possibility with her use of the language of engulfment. It is society, not biology, that determines that we do not fear aggressive vaginal engulfment (or smothering, flattening, compressing, devouring, the tropes of the *vagina dentata* that have been used by women to

assert power and discourage rape [Blackledge 2003, 190–194]). Rape is explained by doctrines of masculinity and male supremacy, not the existence of penises. These doctrines portray the penis as a powerful instrument of dominance but they do not make it so. To paraphrase Andrea Dworkin, have you ever wondered why women do not frequently rape men? It's not because there's a shortage of dildos.⁶

Viewed in this way Brownmiller's and de Beauvoir's accounts of biology as the cause of subordination are question-begging. They assert that biology causes social subordination, but in fact biology subordinates only if it is socially interpreted as subordinating. As MacKinnon puts it, "Social and political inequality begins indifferent to sameness and difference. Differences are inequality's post hoc excuse, its conclusory artefact, its outcome presented as its origin" (1989, 218).

Brownmiller's and de Beauvoir's accounts may be question-begging, but what makes them feminist is their insistence on applying normative critique to biology and nature. Feminism along these lines encourages a sharp line between nature and nurture, biology and culture: nature may make something possible or even likely, but it does not make it *right*. Normative critique, *judgement*, is crucial here. Brownmiller wants to recognise and prosecute rape as an illegitimate attack; de Beauvoir wants to free women from the fetish of motherhood that stifles their active creativity.

MacKinnon rejects these feminisms insofar as they are based on a normative critique of a biological reality perceived as autonomously, albeit not inevitably, producing subordination. These feminisms, which she identifies with liberalism, "construe evidence of women's subordination as evidence of women's difference, elevating the body of women's oppression to the level of a universal, a category beyond history" (1989, 59).

What we are left with is the idea that "women's biology is part of the terrain on which a struggle for dominance is acted out" (1989, 54); or, as she puts it earlier in the book, "A theory is feminist to the extent it is persuaded that women have been unjustly unequal to men because of the social meaning of their bodies" (37). But this, of course, returns us to the question we started with—what is a woman? Which bodies, and which bodily features, have had the social meaning that counts as legitimating inferiority? Again we are returned to the biology/culture divide. MacKinnon highlights various answers within feminism without directly identifying which, if any, she endorses:

⁶ I am paraphrasing Dworkin's speech to the Midwest Regional Conference of the National Organization for Changing Men: "I came here today because I don't believe that rape is inevitable or natural. If I did, I would have no reason to be here. If I did, my political practice would be different than it is. Have you ever wondered why we are not just in armed combat against you? It's not because there's a shortage of kitchen knives in this country" (Dworkin 1988, 169–170).

What, really, is a woman? Most feminists implicitly assume that biological femaleness is a sufficient index and bond because of what society makes of it: a woman is who lives in a female body. Others locate what women have in common within a shared reality of common treatment as a sex: a woman is who has been treated as one. A few define a woman as one who thinks of herself, or identifies, as one. Most consider women's condition to be a descriptive fact of sex inequality: no woman escapes the meaning of being a woman within a social system that defines one according to gender, and most do. Women's diversity is included in this definition, rather than undercutting it. Once sameness and difference are supplanted by a substantive analysis of position and interest, women become defined politically: since no woman is unaffected by whatever creates and destroys women as such, no woman is without stake in women's situation. (1989, 38)

MacKinnon seems to be rejecting the first three options, or at least highlighting their incompleteness,⁷ and endorsing the fourth. If that is right, then, for her, being a woman is not merely living in a female body, or merely being treated as a woman, or merely identifying as a woman. Instead—or perhaps additionally—MacKinnon seems to endorse the idea that “no woman escapes the meaning of being a woman within a social system that defines one according to gender.” Woman becomes a political category, and one with deep ontological significance: “no woman is unaffected by whatever creates and destroys women as such.”

We can get a handle on this idea by considering the concept of (biological) essentialism. This idea has two main components. First, it invokes the idea that there is something about women's biology that determines their social position. Second, it invokes the idea of commonalities between women: that women exist “as women,” in the sense of having some experiences that transcend other significant differences such as race and class. MacKinnon strongly defends the second idea, as discussed below. We have already seen that MacKinnon rejects the first idea, that biology determines women's social position. This rejection continues in *Women's Lives, Men's Laws*:

While treating women as if they are a biological group is not necessarily easy to avoid, to say that a biologically determinist theory of gender is not very feminist is not very controversial. Contemporary feminism begins by resisting biology as destiny. If women's bodies determine women's inferior social status, the possibilities for sex equality are pretty

⁷ For the argument that woman is a “cluster concept,” requiring resemblance rather than identity between its members, see Stoljar 1995.

limited. On this simplest level, one cannot be essentialist and feminist at the same time. (2005, 86)

However, this first dimension of essentialism actually disguises two contrasting claims. While it is not true that biology *actually* explains or justifies women's oppression, it is true that biology is often *used socially* to explain or justify the oppression of women. Consider the claim that "women are subordinated because women can get pregnant." As a description of *social* reality, it is true. The fact or assumption that some women and not men can become pregnant does lead to their subordination in many ways: it contributes to them being paid less, promoted less, and hired less than men; it allows women to be controlled through restrictions on the availability of birth control and abortion; and it can be a contributory factor in women's vulnerability to domestic violence. But this does not mean that the fact of pregnancy necessarily or essentially explains women's subjection. A feminist society would not use women's propensity to pregnancy in these ways. As a statement of *essential* reality, "women are subordinated because women can get pregnant" is false.

Feminists and anti-feminists do not always expressly distinguish these meanings, which can lead to confusion. Feminism is in part the simultaneous *realisation of* and *resistance to* the fact that women's bodies are used to subject them. We need to be careful to distinguish feminist identification of a social reality with an anti-feminist identification of an essential reality. MacKinnon herself makes this distinction clearly and emphatically, but it is often missed by critics of feminism in general and of her work in particular.

For MacKinnon, it is the truth of the identification of social reality that explains the truth of the second aspect of essentialism: the idea of commonality between women. This idea of commonality between women can be understood in different ways. One answer to the question of what it is that women share "as women" is that they share some biological feature. On this account, women share the experience of having female bodies, and female bodies have a variety of uniquely female experiences such as menstruation, gestation, childbirth, and breastfeeding. Many feminists⁸ insist on the significance of these biological experiences both to individual women and to women as a group, and their work is vitally important.

But though these experiences are shared by many women they are not shared by *all* women. Some do not conceive, gestate, birth or breastfeed a child, and some do not menstruate. The fact that some women, including those who have what is commonly called "female biology,"⁹ do not share some or any of

⁸ Young (2005) is a notable example.

⁹ Many trans people and scholars reject references to "female biology," since they argue that even sex categories are social and perhaps reject the very idea of a biological element to sex or gender. This is a live question within feminist and

these experiences means that it is problematic to speak of them as phenomena that unite *all* women. It does not mean that it is problematic to speak of them as phenomena that unite women. A significant part of the ordinary everyday life that feminist consciousness-raising uncovers as significant and as political concerns bodily experiences and the way they are socially treated—for example, the shame and secrecy associated with menstruation, together with the ways that it is used as a trope to undermine women as irrational or unreliable. The demonization of menstruation is an issue that affects *all* women by affecting their social and political status, regardless of whether they have ever menstruated or will do so in the future.

When feminists including MacKinnon insist on the commonalities between women they predominantly mean that women share the experience of being socially constructed and situated as women. They share the fact that they are treated as inferior to men because they are women. This shared experience applies even if they are also treated as superior to some other women and men because of their position in another dimension of privilege such as race and class.

Sally Haslanger's work seems to question that conclusion. She gives the example of a black man who is treated as a legitimate target for systemic police violence because he is both "Black and *male*," and argues that in cases like these "someone marked for subordination by reference to (assumed) *male* anatomy does not qualify as a woman, but also, in the particular context, is not socially positioned as a man" (2000, 41). Haslanger's account suggests that people who would usually be referred to as men on the basis of their "assumed male anatomy" do not necessarily share the experience of being dominant. But, for Haslanger, that experience of being dominant (an experience which accompanies being socially identified as male and thus accorded male privilege) is necessary for someone to be a man. It follows for her that a person with "male anatomy" who is being subordinated is, at that moment at least, not a man—even if common usage and his own gender identity would label him as one. By implication, a person with "female anatomy" in a position of dominance or power is not a woman and does not share the experience of womanness with other women, even those with the same anatomy.

The problem with this aspect of Haslanger's analysis is that a black man's subordination as compared to white men is compatible with his dominance as compared to black women. It is thus problematic to say that in this interaction the black man loses his manliness. The dominance of masculinity does not translate into absolute dominance; it intersects with other hierarchies. But in

trans theory: how does biology itself interact with gender experience and identity? I want to leave open the idea that, while sex categories are social, they are not *only* social. For an argument that sex categories have a biological basis at the group level, see Richardson (2013).

male supremacist society there is no situation in which a woman is socially positioned as superior to a man of her own race, class, and so on. Even a woman in a position of great power, such as German Chancellor Angela Merkel, is subjected to sexist commentary that serves to mark her as other from and inferior to men in equivalent positions, and in some respects to all men.¹⁰

As MacKinnon writes in *Women's Lives, Men's Laws*:

[Elizabeth Spelman writes about] “assumptions of feminism.” These assumptions include “that women can be talked about ‘as women,’ . . . are oppressed ‘as women,’ . . . that women’s situation can be contrasted to men’s” and so on. Professor Spelman is wrong to call these assumptions. They have been hard-won discoveries. Calling feminism “essentialist” in this sense thus misses the point. Analysing women “as women” says nothing about whether an analysis is essentialist. It all depends on *how* you analyse them “as women”: on whether what makes a woman be a woman, analytically, is deemed inherent in their bodies or is produced through their socially lived conditions. (2005, 86)

So feminism asserts that there is a reality to how women are treated as women, and that this does lead to a commonality between women. Moreover, this shared experience and treatment is often related to assumptions about their biology, to their socially perceived femaleness, in the sense that women’s bodies are the terrain on which gender hierarchy is played out. But this is not to say that women’s bodies produce their social position. Society dictates that women are to be subjected, and it also dictates that much of this subjection will be played out on their bodies, and it also dictates that women’s bodies are to be fraudulently used as the apparent justification for their subjection.

¹⁰ See Mary Dejevsky, “If even Merkel attracts ‘black widow spider’ sexism, what hope is there for the rest of us?” *Independent*, 25 September 2013, <http://www.independent.co.uk/voices/comment/if-even-merkel-attracts-black-widow-spider-sexism-what-hope-is-there-for-the-rest-of-us-8839577.html>; Ngaire Donaghue, “Gender bias: why appearance focus fuels sexism in media,” *Conversation*, 13 April 2013, <http://theconversation.com/gender-bias-why-appearance-focus-fuels-sexism-in-media-13325>; and Amelia Hill, “Sexist stereotypes dominate front pages of British newspapers, research finds,” *Guardian*, 14 October 2012, <http://www.theguardian.com/media/2012/oct/14/sexist-stereotypes-front-pages-newspapers>.

What does this analysis of gender and essentialism mean about what we ought to do? What are the political implications? In a recent interview published on the *TransAdvocate* website, MacKinnon reiterates her distaste for morality and also, in some circumstances, for judgment. For example, she repeats several times her support for trans people and states that there is no need to justify what she calls “individual people’s decisions about the social presentation of their bodies” (Williams 2015). At the same time, she does make normative, political criticisms, some implicit and some more forthright. For example, she states:

There is no relation between the biology of sex and the meanings socially enforced on it, other than the very real consequences of the social system of sexual politics that does that forcing. This does, of course, raise the question: if it is all a social construction, why intervene in the biology of sex? That is a real political question. (Williams 2015)

This statement implicitly questions sex-reassignment surgery and other forms of medical intervention such as hormone treatments. The interviewer does not pick up on this point, and so we do not have a close analysis of why this “real political question” has no implications for “individual people’s decisions about the social presentation of their bodies.” But the comment is not a one-off: MacKinnon also raises questions that do seem directly to affect individual choices, such as when she states “if [as I agree] ‘sex creates oppression,’ how does changing from one sex to another oppose that oppression? If ‘there is no sex,’ how do we describe the gain and stake in changing it?” (Williams 2015).

The general political-philosophical issue is this: if biology is not the cause of oppression, what is its role, both actual and ideal? What significance should we attach to biology? How do changes in biology affect oppression? And what is the significance of shifting our definition of “woman”—and, for that matter, of “man”—so that it does, or does not, require certain biological features?

Viewed in this context, indeed in any recognisably feminist context, “individual people’s decisions about the social presentation of their bodies” are *necessarily* political. After all, the personal is political. We cannot act without being at once the product and the producer of social meaning. Trans issues are paradigmatic examples of MacKinnon’s claim that “women’s biology is part of the terrain on which a struggle for dominance is acted out” (1989, 54). Who counts as a woman? Which privileges does a trans person acquire and which do they lose? Who gets to speak for women or as a woman? If biology does not determine one’s gender position, can men speak for women? If men can speak for women, can women speak for women? Can they speak at all?

In the *TransAdvocate* interview, the main target of MacKinnon’s judgment is non-feminist women:

Having been surrounded by born women who do not identify as women particularly, and reject feminism as having nothing to do with them, it has been inspiring to encounter transwomen who do identify as women, actively oppose violence against women including prostitution (in which those who engage have little choice), and are strong feminists. “Woman” can be, in part, a political identification. To be a woman, one does have to live women’s status. Transwomen are living it and, in my experience, bring a valuable perspective on it as well.

I have encountered transwomen with excellent, clear feminist politics. They are quite a contrast to the many privileged women I am often surrounded by who deny that sex discrimination exists or who assert that prostitution is a liberating choice for women. I’ve encountered transwomen who are prostituting who strongly oppose prostitution, who make clear that they would not be in prostitution if they could be paid to do anything else. And I’m supposed to conclude that the born women who support prostitution are my team? (Williams 2015)

In these passages, MacKinnon praises feminists and judges non-feminists, with particular judgment implied for “born women” non-feminists, which is surprising. But what strikes me particularly is MacKinnon’s praise for people who “identify as women.”

Elsewhere MacKinnon is scathing about the focus on identity, describing it as a “shift away from realities of power in the world” (2005, 90). Identity, she writes, “is not women’s problem. Reality is: a reality of group oppression that exists whether we identify with our group or not” (2005, 90). So why should it be praiseworthy to “identify as a woman,” or problematic not to?

It would be implausible to interpret MacKinnon as suggesting that there is anything suspect about a woman not particularly identifying with *femininity*, since nonconformity to feminine practices such as passivity, beauty, and submissiveness has always been a central part of radical feminism. Alternatively, if the category “woman” is a social category, and if women are socially defined as the sex that is subordinated, then “identifying as a woman” seems to mean “identifying as a member of a subordinate group.” But feminists have pointed out that there are many sensible reasons *not* to “identify as women particularly,” if that means identifying with one’s position of subordination in a male supremacist world (Reilly-Cooper 2014). It is plausible in fact to think of feminism as the claim that one can identify as a woman in the sense of recognising the significance of one’s embodied experience and socialisation as female, while rejecting women’s subordinate position and thus refusing to identify as a woman in the sense of refusing to “live women’s status.” Feminists recognise that women are treated as subordinates and actively fight for the erasure of this subordination. If the end of male supremacy means the erasure of the social category of woman then it would seem right for feminists not to identify

particularly as women, socially; instead, a feminist would identify as a *human* first and foremost, and would identify as a woman only in the sense of recognising the social meaning of her body and socialisation, and feeling solidarity with others whose bodies and socialisation rendered them similarly liable to subordination.

Alternatively, the sense of “identifying as a woman” that MacKinnon is praising might be synonymous with “identifying as a feminist.” But that identification has no direct relationship to sex or gender. Feminists can be male or female, gay or straight, masculine or feminine, trans or not. It would be clearer then if MacKinnon were to say that some people are feminist and some are not, regardless of biology or social position, and that it is better to be a feminist.

But the question then raised by MacKinnon becomes: who is on “my team”? Is it women, defined however they are defined by patriarchy, as a subordinated group, the target of eroticised domination? Or is it feminists, however constituted: those who criticise male supremacy, even if they benefit from it? The notion that all feminists are on the same team seems initially attractive, but it is troubling if the team “feminists” should somehow be pitted against those women who do not identify as women, or do not identify as feminists, if those are different categories. This image of teams means that women who are complicit with patriarchy are ranked lower than those people who critique it, even if those people are men who also benefit from patriarchy and to whom patriarchy grants the right to act as critic. Yet feminist analysis of male supremacy of the sort we find in *Toward a Feminist Theory of the State* provides us with ample resources to understand the complicity of the oppressed. And the image of opposing teams is also vulnerable to MacKinnon’s own critique of the way that liberal feminism focuses on the individual woman and her actions rather than on women as a unified group or class.

One answer to this problem is consciousness-raising as a *collective* practice, as something that women do together. MacKinnon writes:

If every woman’s views are true, regardless of content, how is feminism to criticize the content and process of women’s determination, much less change it? Regardless of the weight or place accorded daily life or women’s insight, feminist theory probes hidden meanings in ordinariness and proceeds as if the truth of women’s condition is accessible to women’s collective inquiry. The pursuit of the truth of women’s reality is the process of consciousness; the life situation of consciousness, its determination articulated in the minutiae of everyday existence, is what feminist consciousness seeks to be conscious of. (1989, 39)

It is thus the collective consciousness-raising of feminism that enables us to question any individual woman’s perspective: together, we can uncover and seek

to change the various ways in which we are determined. But, of course, even consciousness-raising need not produce consensus, and so we are still faced with the issue of how to deal, methodologically speaking, with the persistence of disagreements between women. We are also still faced with the problem of how to answer the prior question of who qualifies as a woman: whose consciousness counts?

Consciousness-raising's focus on the everyday, on ordinariness, shows us that feminists should be interested in someone's presentation of their own body. Bodily presentation is part of the ordinariness of daily life, part of how one fits in with or resists gender norms, how one fits in with or resists structures more generally. Recall MacKinnon's statement in *Toward a Feminist Theory of the State* that "a theory is feminist to the extent it is persuaded that women have been unjustly unequal to men because of the social meaning of their bodies" (1989, 37). This seems to make the social meaning of bodies a fundamental feminist question, and a person's use of their own body, and claims about its proper social place, a fundamental feminist or anti-feminist act.

Of course, one reason to refuse judgment of other people's use of their own bodies is that women, feminist or not, know all too well what it is to be subject to such judgment; and feminists recognise such judgment as a subordinating political act. What we wear is political, how we present ourselves as feminine or masculine is political, and the act of endorsing or critiquing clothes or presentation is political.

For example, wearing revealing clothes or high heels is to position oneself in a certain aspect of femininity. It is to say that one belongs there whether by choice or by necessity. Various responses to such dress are possible: one response from within male supremacy is to say that a person wearing such clothes deserves sexual assault, which is to affirm the male supremacist doctrine that to be feminine (or even just female) is to be worthy of such assault.

Wearing such clothes—wearing any clothes¹¹—thus becomes a political action, because it is to situate oneself in the category of feminine, a category which is taken by many to indicate worthiness for assault. But the possible motivations and meanings for this action are multiple, and there is no stable correlation between motivation (which depends on the agent) and meaning (which does not). Consider some examples of possible motivations. Wearing feminine clothing might be a necessary or normal route to access certain sorts of resources, such as sex or money or power, experienced by the wearer as a necessary evil or just the simple cost of life. It might be a preference, perceived as freely chosen yet socially constructed as all choices are, and this preference might present itself as urgent, profound, and essential to oneself, or as frivolous,

¹¹ Wearing *any* clothes is a political action because it is to situate oneself, or attempt to situate oneself, inside or outside any number of socially defined and politically significant groups: gender, race, class, religion, culture, age, and so on.

pleasurable, and peripheral. It might be a conscious act of rebellion against constraining gender norms, such as in the drag performance or the feminist SlutWalk. Or it might be a wholehearted endorsement of those very same norms. How one presents oneself is inexorably political, in that it cannot make sense outside of a particular context of power.

Moreover, how others respond to those presentations will depend on both their views about, and their position within, that context of power. Wearing feminine clothing might bring success or failure, acceptance or rejection, advantage or attack. When feminine clothes are worn by people whom observers assume to be women the result is simultaneously beneficial and harmful: women benefit from the approval they receive by conforming to norms of femininity at the same time as they are harmed for indicating their membership of the subordinate sex. This simultaneous benefit and harm can be seen in any number of examples: the businesswoman who must wear makeup and high heels to be accepted professionally, but who is then marked out as less serious than a man, less suitable for hiring or promotion, and less deserving of her salary; the young woman who must wear revealing clothing on a night out so as to be considered attractive by her peers and by potential male partners, but whose clothes simultaneously render her physically and symbolically vulnerable to rape; the woman who gains authenticity, comfort, and integrity from rejecting certain feminine beauty ideas, but whose grey hair and natural features earn her derision or disregard.

The body and its presentation are thus deeply politically significant. But we can recognise this and still be wary of judging individuals. Women are damned if they do and damned if they don't, so maybe we should stop damning!

An example of this compassionate approach can be found in Andrea Dworkin's *Woman Hating*. Dworkin urges us to "refuse to submit to all forms of behaviour and relationship which reinforce male-female polarity, which nourish basic patterns of male dominance and female submission" (1974, 192–193). She advocates the wholesale rejection of feminine beauty practices: "The body must be freed, liberated, quite literally: from paint and girdles and all varieties of crap. Women must stop mutilating their bodies and start living in them" (1974, 116). She envisages a future in which "community built on androgynous identity will mean the end of transsexuality as we know it" (1974, 186–187). At the same time, while we are not in that future, Dworkin argues that a trans person is "in a state of primary emergency as a transsexual" (1974, 186–187). A world that violently enforces a gender binary is a world which is hostile to trans people (and, of course, to women). In response, Dworkin argues, "Every transsexual has the right to survival on his/her own terms. That means that every transsexual is entitled to a sex-change operation, and it should be provided by the community as one of its functions. This is an emergency measure for an emergency condition" (1974, 186).

Emergency measures for emergency conditions are understandable and may be the best we can do in any given situation. Dworkin herself was the victim of the most vicious personal attacks, many of which focused on her refusal to participate in various norms and rituals of feminine appearance. As necessary as emergency measures are, though, we must be wary that they do not prolong the emergency situation for everyone even as they alleviate the emergency for some.

There is an intersection between the questions “what is a woman?” and “may women judge?” Feminists and women are increasingly wary of asserting a judgment about who counts as a woman because “transphobia” has become a stick to beat women with, feminist women in particular. In 1997 (published in 2005), MacKinnon spoke of the way that the charge of essentialism was being used against feminism. In 2017, everything she says in the following excerpts from that talk could be said of transphobia. Replace “essentialism” with “transphobia” in the following paragraphs and you get a pretty accurate picture of the current climate:

The “essentialism” charge has become a sneer, a tool of woman-bashing, with consequences that far outrun its merits. The widespread acceptance of the claim seems due more to its choice of target than its accuracy in hitting it. Male power is ecstatic; its defenders love the accusation that feminism is “essentialist,” even though they don’t really know what it means. They do know that it has divided women, which sure takes a lot of heat off. (2005, 88)

Fear of being labelled “essentialist” . . . has far-reaching consequences. Those within and outside the academy who know that male power in all its forms remains entrenched also know they face defamatory attacks and potential threats to their economic survival if they say so. As “essentialism” has become a brand, a stigma, a contagious disease that you have to avoid feminism to avoid catching, it has become one more way that the connections and coherence of the ways women are oppressed as members of the group “women” can be covered up. It is silencing when women cannot tell the truth of what they know and survive. (2005, 89)

The charge of transphobia is so damaging to feminism because it can be used to conflate the legitimate demand for acceptance, consideration, and support of trans people with the illegitimate demands for uncritical acceptance of very specific ways of thinking and speaking. Feminists who question some

forms of trans theory and practice, particularly those feminists who want to reserve some significance for “born women” and “female biology,” have been vilified and, sometimes, threatened with paradigmatic forms of male violence against women, namely rape and murder.¹² Trans people, including trans women, are also subjected to violence, including sexual violence (Stotzer 2009). Violence against trans people is abhorrent. But feminist analysis shows us that violence against trans people and violence against trans-critical feminists are versions of the same thing. They are Misogyny 101, proof that women may not judge, that women may not assert their opinions, that women’s bodies and women’s bodily appearance is a crucial site of their oppression, and that it doesn’t much matter what sort of a woman you are or seem to be when susceptibility to male sexual violence is at stake.

The title of this paper is “Judging Women,” a phrase that can be understood in three senses. First, when is it acceptable or necessary to make judgements about what women do? Second, when can women engage in the act of judging? Third, how are we to judge who counts as a woman? MacKinnon’s work offers profound, sustained, rich analysis of these questions, but does not fully resolve them. This is not to say that full resolution is possible or desirable. It is simply to welcome ongoing discussion.

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¹² Examples are documented at the website “TERF is a slur” at <http://terfisaslur.com>. TERF stands for Trans-Exclusionary Radical Feminist.

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CLARE CHAMBERS is University Senior Lecturer in Philosophy and Fellow of Jesus College, University of Cambridge. She is the author of *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford University Press, 2017) and *Sex, Culture, and Justice: The Limits of Choice* (Penn State University Press, 2008).