

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

Summer 2019

## Why Women: Judging Transnational Courts and Tribunals

Bridget J. Crawford

*Elisabeth Haub School of Law at Pace University*

Kathryn M. Stanchi

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

Linda L. Berger

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Courts Commons](#), [International Law Commons](#), [Judges Commons](#), and the [Law and Gender Commons](#)

---

### Recommended Citation

Kathryn Stanchi, Bridget J. Crawford, and Linda L. Berger, Why Women: Judging Transnational Courts and Tribunals, 34 Conn. J. Int'l L. 319 (2019), <https://digitalcommons.pace.edu/lawfaculty/1157/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# WHY WOMEN? JUDGING TRANSNATIONAL COURTS AND TRIBUNALS

*Kathryn M. Stanchi, Bridget J. Crawford & Linda L. Berger\*\**

*“Running in the streets wearing silly pink hats does not make a woman a woman.”<sup>1</sup>*

---

\*\* Kathryn Stanchi is the E.L. Cord Professor of Law at the UNLV Boyd School of Law. Bridget Crawford is a Professor of Law at the Elisabeth Haub School of Law at Pace University. Linda Berger is the Family Foundation Professor of Law at the University of Nevada, Las Vegas.

<sup>1</sup> Meghna Chakrabarti, *Pennsylvania's Adventures in Redistricting and How They Could Impact Midterms*, NPR PODCAST: ON POINT (Oct. 8, 2018), <https://www.wbur.org/onpoint/2018/10/08/pennsylvania-gerrymandering-redistricting-midterms> (quoting Pennsylvania voter and President Trump supporter Dorothy Niklos).

# CONNECTICUT JOURNAL OF INTERNATIONAL LAW

## TABLE OF CONTENTS

INTRODUCTION .....	319
I. WHAT IS A WOMAN ANYWAY?.....	320
A. <i>THE DEFINITION PROBLEM</i> .....	320
B. <i>BINARISM IN BIOLOGY</i> .....	321
C. <i>BINARISM IN LAW AND CULTURE</i> .....	324
D. <i>BINARISM IN THE TWENTY-FIRST CENTURY</i> .....	327
II. THE EPISTEMOLOGY OF JUSTICE(S) .....	328
CONCLUSION.....	332

## INTRODUCTION

At the 2019 Association of American Law Schools (“AALS”) Annual Meeting, the panel on Judicial Diversity in Transnational Courts asked, “Why do so few women serve on transnational courts and tribunals?”<sup>1</sup> That line of feminist inquiry has a long tradition. As Catharine MacKinnon observed, “Feminists have this nasty habit of counting bodies and refusing not to notice their gender.”<sup>2</sup> Underlying the panel’s organizing question—and indeed much of feminist jurisprudence—is the belief that the presence (or absence) of women has consequences in almost any context. Based on personal and professional experience, we share this foundational assumption, though we note that the research on whether women judges make a difference in outcome is equivocal.<sup>3</sup>

Despite our understanding of the intuitive power of asking for more women, we do not pursue the panel’s original inquiry. Instead, this essay takes up a second-order question: *why ask* why so few women serve on transnational courts and tribunals? If the reason for posing this question is to strengthen these tribunals in their work of recognizing and remedying injustice, the question limits the range of potential solutions. This perspective is informed by our experience with the Feminist Judgments Projects, an international collaboration of feminist scholars and lawyers who use feminist reasoning and methods to rewrite judicial opinions.<sup>4</sup> The feminist

---

<sup>2</sup> Judicial Diversity in Transnational Courts Session at the 2019 Association of American Law Schools Annual Meeting (Jan. 5, 2019), <https://tinyurl.com/yxzb4arr> (the session description in the 2019 AALS Annual Meeting Program asks “Why do so few women and people of color serve on transnational courts and tribunals?”). This essay focuses in particular on the “woman” part of the question, but the analysis merits extension to a paucity of people of color on the bench, as well. *See infra* Part Conclusion.

<sup>3</sup> CATHARINE A. MACKINNON, *On Difference and Dominance*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 35 (1988). The “nasty habit of counting bodies” is an empirical starting point that one might call asking the “woman question.” *Id.* Other variations on the “woman question” include asking how law fails to take into account the experiences and viewpoints of members of historically disadvantaged groups, or what implications the law has for groups of people based on identity categories such as sex or gender. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836 (1990) (“One [feminist legal] method, asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups”); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (3d ed. 2013) (describing asking the “woman question” as a way of “tracing out the gender implications of a social practice or rule”).

<sup>4</sup> Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 603–09 (2003) (providing an overview of research on how gender, race and political affiliation impact judicial voting). *Compare* Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996*, (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (noting that women and African American male judges were more likely to vote in favor of the plaintiff in sex discrimination cases) with Jennifer Segal, *Representative Decision Making on the Federal Bench: Clinton’s District Court Appointees*, 53 POL. RES. Q. 137, 143–44 (2000) (noting that male judges are more sympathetic to claims involving “gender discrimination sexual harassment, abortion rights and maternity rights, custody battles and equal pay”).

<sup>5</sup> *See, e.g.*, Diana Majury, *Introducing the Women’s Court of Canada*, 18 CANADIAN J. WOMEN & L. 1, 4 (2006); FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010); AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al. eds., 2014); FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2016) [hereinafter US FEMINIST JUDGMENTS]; NORTHERN/IRISH FEMINIST

judgments methodology demonstrates that judges who apply feminist perspectives—not judges who claim a particular biology or gender—can make a difference in the substance and form of judicial opinions. As editors of the U.S. Feminist Judgments Project, we specifically declined to guide contributors on what we meant by “feminism.”<sup>5</sup> From a personal and professional perspective, though, we understand feminism as a historical and contemporary movement, related to politics, that motivates multiple social, legal and other projects seeking women’s equality.<sup>6</sup> At the same time, feminism to us is “a movement and mode of inquiry that has grown to endorse justice for all people, particularly those historically oppressed or marginalized by or through law.”<sup>7</sup> Our version of “feminism” therefore is not the unique province of “women,” and we believe that both terms must include multiple and fluid identities and perspectives.<sup>8</sup>

Thus, even if tribunals were full of “feminist” judges, they would be applying feminisms that are sufficiently complex, nuanced and different that even majority-feminist benches would disagree. For that reason, the overall justice project may be better served by asking why in transnational courts and tribunals there is so little diversity of all kinds. Part I of this essay provides an overview of the limitations of using binary categories like “women” and “men.” Part II reframes the initial question as part of a broader quest for diversity in decision-making. The essay concludes by considering further avenues for inquiry.

#### I. WHAT IS A WOMAN ANYWAY?

##### A. *The Definition Problem*

The global population is approximately 49.56% female and 50.44% male.<sup>9</sup> Most schoolchildren understand this to mean that half of all humans are girls or women, and half of all humans are boys or men. But there also are people whose bodies, as described by the United Nations Office of the High Commissioner for Human Rights,

---

JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright, et al. eds., 2017); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald et al. eds., 2017). There are projects under way in Scotland, India, and Mexico, as well as an International Feminist Judgments project, *see* SCOTTISH FEMINIST JUDGMENTS PROJECT, <https://www.sfjp.law.ed.ac.uk> (last visited Oct. 4, 2019); THE FEMINIST JUDGMENTS PROJECT INDIA, <https://fjpindia.wixsite.com/fjpi> (last visited Oct. 4, 2019); E-mail from Trish Luker, Co-Editor, AUSTRALIAN FEMINIST JUDGMENTS, to authors (July 7, 2017, 12:38 AM) (on file with the author) (describing Mexico Feminist Judgments Project); *Feminist International Judgments Project: Women’s Voices in International Law*, U. LEICESTER, <https://tinyurl.com/y6qm8ef6> (last visited Oct. 12, 2019).

<sup>6</sup> US FEMINIST JUDGMENTS, *supra* note 5, at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3–4.

<sup>10</sup> *Population, female (% of total) and Population, male (% of total)*, WORLD BANK, [https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?end=2017&name\\_desc=false&start=1960&view=chart](https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?end=2017&name_desc=false&start=1960&view=chart) (last visited Oct. 4, 2019) (providing estimates for 2017 population based on the United Nations Population Division’s World Population Prospects: 2017 Revision).

"do not fit typical binary notions of male or female bodies."<sup>10</sup> Intersex individuals may comprise 0.05% to 1.7% of the population.<sup>11</sup>

Separate and apart from physical appearance and genetic make-up—typically called “sex”—are the related classifications of “gender” and “gender identity.” *Gender*—the socially constructed expectations for behavior and appearance of individuals—may or may not correspond to an individual’s sex.<sup>12</sup> So, too, *gender identity*, or the perception of oneself as male, female, neither or some combination, may be different from one’s sex or gender.<sup>13</sup> And further distinct from all three is *sexual orientation*, meaning the sex and/or gender of the individuals one finds sexually attractive.<sup>14</sup>

### B. Binarism in Biology

There is no universally accepted definition of “woman.” In feminist theory, the concept has been the subject of much debate, resulting in recognition of the limitations of various options.<sup>15</sup> From a biological perspective, sex can be defined in terms of one or more attributes of physical appearance, chromosomes, or hormone

---

<sup>11</sup> U.N. Hum. Rts. Office of the High Comm’r, *Fact Sheet, Intersex*, [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf) (last visited Oct. 4, 2019) (using the term “intersex” to refer to people “born with sex characteristics [including genitals, gonads and chromosome patterns] that do not fit typical binary notions of male or female bodies”).

<sup>12</sup> *Id.*; see also Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. OF HUM. BIOLOGY 151, 151–66 (2000) (estimating frequency of births of infants whose bodies do not fit typical binary sex category as high as 2% of live births); ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 53 (2000) [hereinafter *SEXING THE BODY*] (claiming 1 in 60 human births might be of people with intersex characteristics). The study by Blackless et al. and the work of Fausto-Sterling have been the subject of extensive criticism for use of outdated terminology. Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, 33 THE SCIENCES 20 (1993) [hereinafter *The Five Sexes*]. Nevertheless, some intersex groups have embraced the studies’ figures. See, e.g., *How common is intersex?*, INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/frequency> (last visited Oct. 4, 2019).

<sup>13</sup> The U.N. World Health Organization defines gender as “the socially constructed characteristics of women and men—such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed.” *Gender, Equity and Human Rights, Gender*, U.N. WORLD HEALTH ORGANIZATION, <https://tinyurl.com/yyg6g9hw> (last visited Oct. 4, 2019). Sex, in contrast, is the “different biological and physiological characteristics of males and females, such as reproductive organs, chromosomes, hormones, etc.” *Gender, Equity and Human Rights, Glossary of terms and tools*, U.N. WORLD HEALTH ORGANIZATION (2011), <https://www.who.int/gender-equity-rights/knowledge/glossary/en/>; see also Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1209 (2016) (discussing courts’ confusing use of terms “sex” and “gender”).

<sup>14</sup> *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <https://tinyurl.com/yd43z59j> (last visited Oct. 4, 2019) (defining gender identity as a person’s “innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth”).

<sup>15</sup> See *id.* (defining sexual orientation as “[a]n inherent or immutable enduring emotional, romantic or sexual attraction to other people”).

<sup>16</sup> Paul G. Lannon, *Transgender Student Admissions: The Challenge of Defining Gender in A Gender Fluid World*, BOS. B.J. (Apr. 22, 2015), <https://bostonbarjournal.com/category/spring-2015-vol-59-2/>.

levels, to give just three possibilities.<sup>16</sup> Using even one of these approaches can result in multiple answers as to an individual's sex.<sup>17</sup>

Rules governing international track and field competitions illustrate the difficulty of determining "sex." The International Association of Athletics Federations began to require women to provide a medical certificate of their sex in order to compete in sanctioned competitions.<sup>18</sup> The International Olympic Committee adopted mandatory sex testing in 1968.<sup>19</sup> But physical examinations can be inconclusive because an individual may have a large clitoris, a small penis, an undeveloped or underdeveloped vagina, or undeveloped or underdeveloped testes.<sup>20</sup> Alternately, a person may have unambiguous (or insufficiently ambiguous) genitalia, but other biological characteristics—i.e., genes—associated with a different sex.

Two decades ago, Anne Fausto-Sterling suggested that there may be five, not two, sexes.<sup>21</sup> Although the vocabulary she used now seems outdated (at best) or even hostile (at worst),<sup>22</sup> she named and recognized multiple sex classifications to argue for the end to "corrective" infant genital surgery.<sup>23</sup> Fausto-Sterling asserted that "[t]he more we look for a simple physical basis for 'sex,' the more it becomes clear that 'sex' is not a pure physical category. What bodily signals and functions we define as male or female come already entangled in our ideas about gender."<sup>24</sup> Both Fausto-Sterling's work from decades ago and the possibility of changing one's

---

<sup>17</sup> JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES* (2d ed. 1994) (setting forth eight factors that may contribute to the medical determination of an individual's "sex"); see also GLAAD MEDIA REFERENCE GUIDE, at 10 (10<sup>th</sup> ed. 2016), <https://perma.cc/Z7PR-C8ZQ> (defining sex as "a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics"). We acknowledge that scientific knowledge and word choices and definitions are constantly changing, and thus we do not endorse any particular view of how to define "sex." We fully expect that any present-day knowledge and terminology will (and should) change in the future.

<sup>18</sup> See, e.g., Matthew Bramble et al., *Psychological Effects of Sex Differentiation*, in *ENCYCLOPEDIA OF REPRODUCTION* 250 (2d ed. 2018) (noting that in utero exposure of a developing fetus to estrogens or androgens does not necessarily lead to development of external genitalia that corresponds with the stereotypical "male" or "female" phenotype).

<sup>19</sup> See, e.g., Erin Elizabeth Berry, *Respect for The Fundamental Notion of Fairness of Competition: The IAAF, Hyperandrogenism, and Women Athletes*, 27 *WIS. J.L. GENDER & SOC'Y* 207, 210 (2012).

<sup>20</sup> Jan Todd & Terry Todd, *Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999*, in *DOPING IN ELITE SPORT* 65, 68–69 (Wayne Wilson & Edward Derse eds., 2001) (describing implementation of International Olympic Committee's newly-adopted mandatory testing for drugs and sex).

<sup>21</sup> Lisa Melton, *New Perspectives on the Management of Intersex*, 357 *LANCET* 2110, 2110 (2001) (describing variations in genital appearance).

<sup>22</sup> Fausto-Sterling, *SEXING THE BODY*, *supra* note 12, at 33.

<sup>23</sup> Writing in 1993, Fausto-Sterling used the labels "males," "females," "herms" (for "hermaphrodites"), "merms" ("male pseudo-hermaphrodites") and "ferms" ("female pseudo-hermaphrodites"). *Id.* at 21–22. Fausto-Sterling was criticized for this terminology. Eric Vilain et al., *We Used to Call Them Hermaphrodites*, 9 *GENETICS IN MED.* 65–66 (2007); Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, *N.Y. TIMES MAG.* (June 28, 2016), <https://tinyurl.com/kbaajcd> ("[t]he word 'hermaphrodite' is considered stigmatizing, so physicians and advocates instead use the term 'intersex' or refer to the condition as D.S.D., which stands for either a disorder or a difference of sex development.").

<sup>24</sup> FAUSTO-STERLING, *SEXING THE BODY*, *supra* note 12, at 78–79.

<sup>25</sup> *Id.* at 4.

external genitalia (and hormone levels) through gender confirmation surgery<sup>25</sup> demonstrate that physical appearance is hardly the best proxy for sex classification.

From a genetics perspective, biology students learn that females have two X chromosomes and males have an X and Y chromosome.<sup>26</sup> But some people's genes do not fall into either category,<sup>27</sup> and some individuals may have "mosaic genetics."<sup>28</sup> People with these genetic differences can have the physiology of a female or a male, or a physiology that does not fit neatly in the binary gender paradigm.<sup>29</sup> A recent scientific study suggests that up to one-third of human genes operate differently in men and women, and that it is not the X or Y chromosome that drives such difference.<sup>30</sup> Given this possibility, for legal scholars to limit their understanding of "women" to persons with only XX chromosomes is contrary to reality.

Having moved on from physical examinations and genetic testing, international athletic competitions now favor hormone testing of competitors. Hormone testing has resulted in few definitive results, instead generating rounds of tests followed by a series of lawsuits and appeals.<sup>31</sup> The process of classifying international athletic

---

<sup>26</sup> See *Gender Confirmation Surgeries*, AM. SOC. PLASTIC SURGEONS, <https://www.plasticsurgery.org/reconstructive-procedures/gender-confirmation-surgeries> (last visited Oct. 12, 2019) (describing different surgical options for patients who would like to change their external appearance to match the gender they feel themselves to be). The American Society of Plastic Surgeons reported that more than 3, 200 of these procedures were performed in 2016. Alexandra Sifferlin, *Gender Confirmation Surgery is on the Rise in the U.S.*, TIME (May 22, 2017), <http://time.com/4787914/transgender-gender-confirmation-surgery/> (attributing increase in number of surgeries to changes in medical care coverage and greater education of doctors and the public about the need for these surgeries).

<sup>27</sup> See *Men and Women: The Differences are in the Genes*, SCIENCE DAILY.COM (Mar. 23, 2005), <https://tinyurl.com/ydho4m3> (reporting results of scientific study by Pennsylvania State University showing significant X-linked gene expression in females).

<sup>28</sup> See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 281 (1999) (describing array of variation in chromosomes). Such chromosomal variation may or may not impact sex development; Padawer, *supra* note 22.

<sup>29</sup> *What Is Intersex?* INTERSEX SOCIETY OF NORTH AMERICA, [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Oct. 6, 2019).

<sup>30</sup> See generally FAUSTO-STERLING, *SEXING THE BODY*, *supra* note 12, at chapter 3; see also 46, *XX Testicular Disorder of Sex Development*, NIH U.S. NAT'L LIBR. OF MED.: GENETICS HOME REFERENCE (Oct. 1, 2019), <https://ghr.nlm.nih.gov/condition/46xx-testicular-disorder-of-sex-development>.

<sup>31</sup> See Moran Gershoni & Shmuel Pietrokovski, *The Landscape of Sex-Differential Transcriptome and its Consequent Selection in Human Adults*, 15 BMC BIOLOGY 1 (2017) (reporting results of RNA-sequencing from 544 adults); Jenny Graves, *Not Just About Sex: Throughout Our Bodies, Thousands of Genes Act Differently in Men and Women*, THE CONVERSATION (Oct. 31, 2017), <https://tinyurl.com/y594tnyq> (elaborating on implications of study by Gershoni & Pietrokovski).

<sup>32</sup> In 2014, officials barred Indian sprinter Dutee Chand from track competition when testing revealed that her body contains elevated levels of androgens (male sex hormones like testosterone). *Chand v. Athletics Federation of India*, CAS 2014/A/3759 (Ct. of Arb. for Sport 2015). International attention continues to focus on South African middle-distance runner and two-time Olympic champion Caster Semenya. Katrina Karkazis & Rebecca Jordan-Young, *The Treatment of Caster Semenya Shows Athletics' Bias Against Women of Color*, GUARDIAN (Apr. 26, 2018, 12:40 PM), <https://tinyurl.com/y8z29k82>; see also Jeré Longman, *Track's New Gender Rules Could Exclude Some Female Athletes*, N.Y. TIMES (Apr. 25, 2018), <https://tinyurl.com/y3odj5wy> (describing the alternatives for athletes who refuse to artificially lower their testosterone levels as entering competitions for men, entering competitions for intersex athletes, if any exist, changing distance specialties or not participating in elite competitions). In May 2019, the Court for Arbitration in Sport rejected Semenya's appeal of the regulations promulgated by the International Association of Athletics Federations that would require her to take medication to suppress her natural levels of testosterone, if Semenya wishes to compete in middle-distance at IAAF-sanctioned

competitors as “male” or “female” reveals the exercise of power that is involved in defining who is a woman or a man—no matter what the context.<sup>32</sup> First, a governing body must decide how sex will be determined. Then, someone must physically test the candidates to assign them to categories. Finally, someone must police the category boundaries.

In addition to biological complexity, the number of people identifying as neither male nor female is increasing rapidly. A 2017 poll by the Harris group found that 12% of people aged 18-34 self-identify as other than cisgender.<sup>33</sup> A similar survey by the National Center for Transgender Equality showed that the respondents who identified as transgender wrote in *more than 500 unique gender terms* with which they identified, including non-binary, multi-gender, bigender and agender.<sup>34</sup> Moreover, as Heath Fogg Davis notes, these are studies of people who identify as *transgender*, which means that the numbers within the general population are likely higher.<sup>35</sup> Dr. Diane Ehrensaft calls the expanding number of persons identifying as transgender, gender fluid or genderqueer a “new gender revolution. It's erased boxes and created gender infinity instead.”<sup>36</sup>

### C. Binarism in Law and Culture

Similar to scientific ideas about sex and gender, the law's treatment of sex and gender is on a collision course with reality. For the most part, the law operates as if gender were “a fixed phenomenon that derives naturally from an individual's biological sex.”<sup>37</sup> One commentator notes that “it is almost ludicrous to maintain that sex discrimination, sexual identification, or sexual identity takes place on the level of biology or genitals. Yet the law continues to insist that they do.”<sup>38</sup>

For example, Title VII has been slow to protect sexual minorities, particularly transgender people and people whose gender expression does not fit the binary of male/female. Ann McGinley observes that “[t]he problem of adequately protecting sexual minorities under Title VII lies in the courts' binary view of sex and gender, a view that identifies men and women as polar opposites and that sees gender as naturally flowing from biological sex.”<sup>39</sup> Anti-discrimination law can handle discrimination when it fits neatly into traditional categories. Behavior or identity

---

events. Hailey Middlebrook, *Court Rules Against Caster Semenya in IAAF Testosterone Case*, RUNNERS WORLD (May 1, 2019), <https://www.runnersworld.com/news/a27332526/caster-semenya-court-ruling> (explaining ruling and its negative impact on Semenya's ability to compete in prestigious international competitions).

<sup>33</sup> This idea borrows from Foucault's notion of the legal subject. See MICHEL FOUCAULT, *HISTOIRE DE SYSTÈMES DE PENSÉE, ANÉE 1980-1981* (1981) (Fr.); see also HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* 10–11 (2017) (“The administrative discretion to decide who is female and who is male is the essence of sex identity discrimination...[and] a specific subcategory of sexism.”).

<sup>34</sup> GLAAD, *ACCELERATING ACCEPTANCE* 4 (2017), <https://www.glaad.org/publications/accelerating-acceptance-2017>.

<sup>35</sup> SANDY E. JAMES ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 40 (2016).

<sup>36</sup> DAVIS, *supra* note 33, at 11.

<sup>37</sup> Jon Brooks, *Boy? Girl? Both? Neither? A New Generation Overthrows Gender*, KQED SCIENCE (April 24, 2017), <https://tinyurl.com/y9utnq2c>.

<sup>38</sup> *Id.*

<sup>39</sup> Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: Disaggregating Sex from Gender*, 144 U. PA. L. REV. 1, 40 (1995).

<sup>40</sup> Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 715 (2010).

outside this norm presents a situation similar to what Catharine MacKinnon called a “paradigm trauma” that creates a “crisis time for the doctrine.”<sup>40</sup>

The problem of defining “woman” in legal and cultural settings is elucidated by several examples. For example, in *Corbett v. Corbett*,<sup>41</sup> the court heard “extensive testimony from psychiatrists, gynecologists, endocrinologists, physicians, and state-appointed sexual organ inspectors”<sup>42</sup> to attempt to discern whether April Ashley Corbett, a transgender woman, was actually a “woman” for purposes of UK divorce law.<sup>43</sup> Ashley Corbett had male chromosomes and had been born with male genitalia, but after surgery had female hormone levels and “remarkably good” female genitals.<sup>44</sup> She fully identified as a woman and presented so convincingly as a woman that the court noted her remarkably compelling “pastiche of femininity.”<sup>45</sup> Nevertheless, the court disregarded this evidence as well as Ashley Corbett’s own testimony and concluded she was male, relying mainly on her chromosomes and genitals.<sup>46</sup> The court therefore granted Arthur Corbett’s petition for divorce, on the grounds that the marriage had been void *ab initio* because Ashley Corbett was a “man,” and same-sex marriage was not possible under UK law at the time.<sup>47</sup>

The cultural battle over single-sex bathrooms is another example of the difficulties in defining certain identity categories.<sup>48</sup> Ruth Colker notes that signs on sex-segregated restrooms rely on stereotypes, yet “few women probably recognize themselves as a stick figure wearing a triangle dress or skirt.”<sup>49</sup> Decades before the issue erupted in North Carolina,<sup>50</sup> Colker worked at a university where only the men’s bathroom had showers, so her employer furnished her with a “woman in shower” placard to place on the entrance to the men’s room when she wished to shower. This caused her some tongue-in-cheek “gender confusion” because her

---

<sup>41</sup> MACKINNON, *supra* note 2, at 36.

<sup>42</sup> *Corbett v. Corbett* [1970] All ER 33 (Fam).

<sup>43</sup> *Id.* It is difficult to imagine what a sexual organ inspector is, how someone would qualify to be one, and what kind of intrusive process is involved in submitting to such an inspection.

<sup>44</sup> *Id.* (discussed in Franke, *supra* note 39, at 45).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> For a sophisticated analysis of the relationship between sex-segregated bathrooms and equality, see Mary Anne Case, *All the World's the Men's Room*, 74 U. OF CHI. L. REV. 1655 (2007); Mary Anne Case, *Changing Room? A Quick Tour of Men's and Women's Restrooms in U.S. Law over the Last Decade, from the U.S. Constitution to Local Ordinances*, 13 PUB. CULTURE 333 (2000).

<sup>50</sup> Ruth Colker, *Public Restrooms, Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 150 n.30 (2017) (describing results of image search for male and female restrooms, noting that the male figures always have long trousers). *But, see* #ItWasNeverADress, <https://itwasneveradress.com> (last visited Oct. 12, 2019) (reimagining the triangle dress a superhero’s cape).

<sup>51</sup> See, e.g., Amber Phillips, *The Tumultuous History of North Carolina’s Bathroom Bill, Which is On Its Way to Repeal*, WASHINGTONPOST.COM (Mar. 30, 2017) (providing overview of controversy that followed the February, 2016 passage by the Charlotte City Council of a law that would prohibit discrimination in public accommodations against gay or transgender customers), <https://tinyurl.com/y2q3gq3l>; Camila Domonoske, *North Carolina Repeals Portions of Controversial “Bathroom Bill,”* NPR. (Mar. 30, 2017), <https://tinyurl.com/y2zh9c52> (describing prohibition until 2020 on local jurisdictions from passing laws that would protect LGBT people).

gender was “different” depending on the purpose for which she was using the facility (male to shower, female to use the toilet).<sup>51</sup>

Similarly, Patricia Williams wrote in the late 1980s of the experience of a trans woman law student who was not permitted by other students to use either the male or female bathrooms.<sup>52</sup> The student approached Williams because the student’s failure to fit within the gender binary rendered her a “nobody” when it came to using a bathroom.<sup>53</sup> Non-binary people report similar problems even of self-policing: if there are only men’s and women’s rooms, which does a person choose, if the person identifies as neither?<sup>54</sup>

The reactions of some feminists to the “paradigm trauma” of who-counts-as-a-woman provide further examples. The Michigan Womyn’s Music Festival for years banned trans women based on its “festival for womyn-born womyn” policy.<sup>55</sup> This policy led to a boycott by state and national equality groups in 2014; the festival elected to shut down rather than allow trans women to attend the festival.<sup>56</sup> In the North Carolina bathroom controversy, some feminists have aligned with the fundamentalist Christians in backing the law requiring strict sex-segregated bathrooms.<sup>57</sup>

Many women’s colleges have struggled to define who is a “woman.” Compare Mount Holyoke’s policy, which allows admission to any student who “is female or who identifies as a woman” (which appears to include anyone except for someone who is “born male and identifies as a man”) with Smith College, which does not permit applications from trans men (or anyone identifying as male) or students who are gender non-binary.<sup>58</sup> Smith College relies entirely on admissions material to make its judgment about gender, but both Wellesley and Bryn Mawr require information beyond the admissions material.<sup>59</sup> Wellesley College “will consider for

---

<sup>52</sup> Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 56, 47–48 (1995).

<sup>53</sup> Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2144–46 (1989).

<sup>54</sup> *Id.*

<sup>55</sup> Brooks, *supra* note 37.

<sup>56</sup> Kat Callahan, *I Don’t Care About MichFest’s Trans Exclusion, You Shouldn’t Either*, JEZEBEL (Aug. 14, 2014, 10:15 PM), <https://tinyurl.com/y4e4u5fp>.

<sup>57</sup> Diane Anderson-Minshall, *Op-ed: Michfest’s Founder Chose to Shut Down Rather Than Change with The Times*, ADVOCATE, (Apr. 4, 2015, 7:15 PM), <https://www.advocate.com/commentary/2015/04/24/op-ed-michfests-founder-chose-shut-down-rather-change-times>.

<sup>58</sup> See, e.g., Kaeley Triller Haver, *A Rape Survivor Speaks Out Against Transgender Bathrooms*, THE FEDERALIST, (Nov. 23, 2015), <http://thefederalist.com/2015/11/23/a-rape-survivor-speaks-out-about-transgender-bathrooms/> (arguing that men will take advantage of bathroom sex desegregation to sexually assault women); Fr. Mark Hodges, *Proposed Bathroom Bill Will Keep ‘Transgender’ Men Out of Girls’ Bathrooms in Texas*, LIFE SITE, (Jan. 9, 2017, 10:47 PM) <https://www.lifesitenews.com/news/public-reacts-to-texas-proposed-bathroom-privacy-law-with-praise-protests> (describing need for the “Women’s Privacy Act” to protect women’s privacy while using a restroom).

<sup>59</sup> Compare Admission of Transgender Students, MOUNT HOLYOKE, <https://tinyurl.com/yy24nws7>; with Gender Identity & Expression, SMITH COLLEGE, <https://tinyurl.com/y3n2xwkh>. For a discussion of the category dilemma raised by single sex educational institutions, see Davis, *supra* note 33, at 85–86 (discussing the case of Calliope Wong, a transgender woman denied admission to Smith College).

<sup>60</sup> See Lannon *supra*, note 16 (calling the decision to probe beyond admissions material “remarkable”).

admission any applicant who lives as a woman and consistently identifies as a woman,” a definition that excludes trans men and some others who are outside the binary.<sup>60</sup> Bryn Mawr's policy is open to transgender and intersex individuals, but only if they “live and identify as women at the time of application,” and trans men, as long as they have not taken “medical or legal steps to identify as male.”<sup>61</sup>

#### *D. Binarism in the Twenty-First Century*

The twenty-first century has brought increased visibility of gender fluidity,<sup>62</sup> making the term “woman” seem anachronistic in some contexts. Although the terms “men” and “women” likely still function as cognitive or linguistic shorthand for more nuanced understandings of the terms,<sup>63</sup> framing any policy discussion in terms of “men” and “women” will fail to account for biological variety, individual difference, diverse gender identity, multiple sexual orientations, and the significant role that society plays in constructing these identifiers. To ask, “Where are the women?” (as one of us has done frequently and publicly)<sup>64</sup> is, upon critical reflection, to risk converting persons who do not fit into the binary into “unnatural outcasts.”<sup>65</sup>

If the global culture is starting to move away from binary thinking about sex, then feminist legal scholars should do the same. Legal scholars who believe in the value of diverse perspectives on the bench should support methods that “erase boxes”<sup>66</sup> and reconfigure the “woman question.”<sup>67</sup> As already discussed, the question of “women” on the courts raises myriad definitional issues. While feminists may agree that greater diversity on the bench is necessary for political legitimacy, as Sally Kenney argues,<sup>68</sup> counting “women” is complicated.<sup>69</sup> Moreover, if feminists agree that society constructs the meaning of both sex and gender,<sup>70</sup> then the feminist

<sup>61</sup> *Mission and Gender Policy*, WELLESLEY COLLEGE, <https://www.wellesley.edu/news/gender-policy>.

<sup>62</sup> *Transgender Applicants*, BRYN MAWR COLLEGE, <https://www.brynmawr.edu/admissions/transgender-applicants>.

<sup>63</sup> Karina Collins, *How to Market to the Gender Fluid*, MEDIUM.COM (Nov. 26, 2018), <https://medium.com/datadriveninvestor/how-to-improve-your-marketing-in-the-era-of-gender-fluidity-d3fefb25ce28> (calling gender fluidity, as an idea popularized and embraced by young people born in 1982 and after “the new cool”).

<sup>64</sup> See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (describing identity categories as “strategies for simplifying the perceptual environment and acting on less-than-perfect information”).

<sup>65</sup> Bridget J. Crawford, *Where are the Women? Faulkner Law Review Edition*, FEMINISTLAWPROFESSORS.COM (Aug. 31, 2017), <http://www.feministlawprofessors.com/2017/08/where-are-the-women-faulkner-law-review-edition>; Bridget J. Crawford, *Where are the Women? Not in this Issue of “The Tax Lawyer”*, FEMINISTLAWPROFESSORS.COM (Apr. 27, 2017), <http://www.feministlawprofessors.com/2017/04/where-are-the-women-not-in-this-issue-of-the-tax-lawyer-review>.

<sup>66</sup> McGinley, *supra* note 40, at 718.

<sup>67</sup> *Id.*

<sup>68</sup> MACKINNON, *supra* note 2.

<sup>69</sup> SALLY KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 126, 175 (2012).

<sup>70</sup> JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 34 (2d ed. 1999) (arguing that gender is a social construct and performance and is far from immutable).

<sup>71</sup> See generally *id.*

project must reconfigure the details of its “nasty habit of counting bodies and refusing not to notice their gender.”<sup>71</sup> Without more fully considering these concepts, the inquiry is intellectually and politically precarious.<sup>72</sup>

To reframe the question, we need to better understand the purpose of asking for more “women” on the courts. The goal may be to have more judges who *look like* women so that more individuals in our society will be able to see themselves on the bench.<sup>73</sup> But that purpose might require appearance- and presentation-policing that many feminists can and should reject.<sup>74</sup>

For other feminists, asking for more women on the bench might be shorthand for seeking judges who are sensitive to “women’s issues” or “women’s lived experiences.” But the newcomers most likely to be placed on tribunals and in courts will be women who most closely resemble—and are least threatening to—those in power.<sup>75</sup>

Rather than the question posed to this panel, we take up Mari Matsuda’s invitation to ask the “other question,” taking into account the interconnectedness of all subordination.<sup>76</sup> With an expansive view of feminism, one can ask how a judge’s lived experience, identity, and perspective inform decision-making. Increasing diversity on the bench might correlate to diversity in sex, gender, gender identity, or sexual orientation, but it ought not be confined to those qualities. What might courts and tribunals look like if more judges had lived in poverty; grew up in rural areas; suffered discrimination based on gender, race, religion, nationality, or disability; lived in fear of group-based violence; or otherwise struggled because of a marginalized position in society?

## II. THE EPISTEMOLOGY OF JUSTICE(S)

Suggesting that the effects of unrepresentative courts and unequal justice will be alleviated by appointing more women to the bench is rooted in the kind of binary thinking that has long entangled women. This solution evades the real problem that feminist legal scholars presumably want to solve: the lack of diverse perspectives on the bench. As Katherine Franke describes the problem:

Defining sex in biological or anatomical terms represents a serious error that fails to account for the complex behavioral aspects of sexual identity. In so

---

<sup>72</sup> MACKINNON, *supra* note 2.

<sup>73</sup> WORLD BANK GROUP, *supra* note 10.

<sup>74</sup> KENNEY, *supra* note 69 at 56–58, n.84 (recognizing the “role model” argument).

<sup>75</sup> See, e.g., *Rosa v. Park West Bank and Trust*, 214 F.3d 213 (1st Cir. 2000) (discussing that this is a serious danger); DAVIS, *supra* note 33, at 89–90 (discussing how some responses to transgender woman’s application to Smith College centered on the opinion that she looked “obviously male”).

<sup>76</sup> Rosemary Hunter, *Can Feminist Judges Make a Difference?*, 15 INT’L J. L. PROF. 7, 7–8 (2008); see also MACKINNON, *supra* note 3, at 37 (explaining that women who would likely benefit would be “women who have been able to construct a biography that somewhat approximates the male norm, at least on paper”).

<sup>77</sup> Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (“The way I try to understand the interconnection of all forms of subordination is through a method I call ‘ask the other question.’ When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, I ask, ‘Where is the heterosexism in this?’ When I see something that looks homophobic, I ask, ‘Where are the class interests in this?’ Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.”).

doing, this definition elides the degree to which most, if not all, differences between men and women are grounded not in biology, but in gender normativity.<sup>77</sup>

Feminist theory's attempts to define "woman" have been riddled by essentialism and stereotyping. A prominent example occurred in the 1980s, largely due to the success of Carol Gilligan's book *In a Different Voice*, when feminist theory exploded with theories of women's relational nature and "connectedness." Scholar Suzanna Sherry summarized the claimed essential difference: "the basic feminine sense of self is connected to the world, the basic masculine sense of self is separate." This difference suggested that due to factors including pregnancy, child-rearing responsibilities, menstruation, and intercourse, "women have a 'sense' of existential 'connection' to other human life which men do not."<sup>78</sup> That many people who identified as women did not experience any of these physical connections did nothing to stop the wave of scholarship on women's "different" voice.<sup>79</sup>

Feminists used Carol Gilligan's sociological data to reach wide-ranging conclusions. Among them were that women's "special" sense of connection created "a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one's place within it which sharply contrasts with men's."<sup>80</sup> And some feminist legal scholars generated an entire scholarly oeuvre about how women's "ethic of care" could change the law, legal education, legal practice, and judging.<sup>81</sup>

The "connection" theory of womanhood has been roundly critiqued,<sup>82</sup> but vestiges remain. Consider, for example, a speech by Baroness Hale, the first woman in the House of Lords; she resists the notion that women judges are "different" and likely to make "different decisions" from their male counterparts.<sup>83</sup> At the same time, she elevates the importance of stereotypically female work such as changing diapers and cooking meals for children: "I would like to think that a wider experience of the world is helpful: knowing a little about bearing and bringing up children must make some difference."<sup>84</sup>

Similarly emphasizing the presumed difference of women and girls, Justice Ruth Bader Ginsburg wrote a separate concurring opinion in *Safford v. Redding*, where the U.S. Supreme Court found that a school's strip search of a 13-year old

<sup>78</sup> Franke, *supra* at 39.

<sup>79</sup> Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 15–16 (1988).

<sup>80</sup> See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in the Law*, 15 VT. L. REV. 1 (1990).

<sup>81</sup> West, *supra* note 78, at 15–16 (calling this feminism's "official" story).

<sup>82</sup> See, e.g., Menkel-Meadow, *supra* note 79; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Minna J. Kotkin, *Professionalism, Gender and the Public Interest: The Advocacy of Protection*, 8 ST. THOMAS L. REV. 157 (1995).

<sup>83</sup> KENNEY, *supra* note 69, at 30–38 (rejecting "difference" as a basis for calling for more women judges); MACKINNON, *supra* note 3, at 38–39; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 602–05 (1990).

<sup>84</sup> Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, PUB. L. 489, 504 (2001).

<sup>85</sup> *Id.*

female student violated her Fourth Amendment rights.<sup>85</sup> News reports said the case “revealed a gender fault line at the court,” because Justice Ginsburg said that her (then all-male) colleagues “have never been a 13-year-old girl. It’s a very sensitive age for a girl. I don’t think that my colleagues, some of them, quite understood.”<sup>86</sup> Questions by the male Justices during oral argument seemed to imply that requiring a 13-year-old girl to strip down to her underwear is not traumatic because it is akin to a bathing suit or like changing for gym class.<sup>87</sup>

Ginsburg’s comments have been frequently cited as evidence for the need for more women on the bench to understand the perspectives of the women and young girls.<sup>88</sup> But if instead of asking the “woman question” Ginsburg had asked the “other question,” she might have reached the conclusion that a 13-year-old boy would be equally embarrassed, shy, and traumatized, by being strip searched by school administrators.<sup>89</sup> As masculinities scholars have pointed out, the male cultural imperative requires even young teenagers to “man up” and accept bodily indignities when they resemble typical “locker room” scenarios.<sup>90</sup>

A different strand of feminist theory, one that examines women in terms of their structural and interpersonal subordination to men,<sup>91</sup> avoids the “woman as caregiver” trap but has other weaknesses. Under anti-subordination theory, what women have in common is a shared experience of being devalued *as women*.<sup>92</sup> Patriarchy, and women’s position in it, is maintained through a set of purportedly neutral, objective standards of merit that mask the masculine ideal.<sup>93</sup> Constant threats of sexual violence against women, pornography and harassment, and the devaluation of characteristics associated with women buttress the system of subordination.<sup>94</sup> In a patriarchal society, “women” are those who occupy the lowest rung.

Many feminist scholars disagree that anti-subordination theory describes all “women’s” experiences, pointing out that women have multiple types of oppressions

<sup>86</sup> Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).

<sup>87</sup> Adam Liptak, *Supreme Court Says Child’s Rights Violated by Strip Search*, N.Y. TIMES (June 25, 2009), <https://www.nytimes.com/2009/06/26/us/politics/26scotus.html>.

<sup>88</sup> Transcript of Oral Argument at 21–22, 44–46, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (No. 08-479).

<sup>89</sup> See, e.g., Joan Biskupic, *Ginsburg: Court Needs Another Woman*, ABC NEWS (May 6, 2009, 1:25 AM), <https://abcnews.go.com/Politics/ginsburg-court-woman/story?id=7513795>.

<sup>90</sup> Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (No. 08-479), 2009 WL 870022, at 5–8 (discussing the social science documenting trauma from strip searches to children and young adults, gender neutral).

<sup>91</sup> Cynthia Godsoe & Margo Kaplan, *Rewritten Opinion in Michael M. v. Superior Court*, in FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 268 (Kathryn M. Stanchi et al. eds., 2016) (noting that the California statutory rape law at issue ignored “the trauma of ... young male victims... [whose] sexual exploitation has long been ignored.”); see also DAN KINDLON & MICHAEL THOMPSON, RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS 165 (2009) (describing how boys are taught “to be willing to take the bullet—take the emotional pain—and act as if it doesn’t matter”).

<sup>92</sup> See, e.g., MACKINNON, *supra* note 3; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005–08 (1986).

<sup>93</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638–39 (1983).

<sup>94</sup> MACKINNON, *supra* note 3, at 36.

<sup>95</sup> Mary Becker, *Patriarchy and Inequality: Towards A Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 23–29 (1999).

to resist, and so it is not appropriate to create some sort of hierarchy, putting sexism before any other concerns.<sup>95</sup> Angela Harris has emphasized that it is inaccurate to combine all women's experiences into one "devaluation," as the experiences of poor women and women of color are qualitatively different from those of many white women.<sup>96</sup> Similarly, several lesbian feminist theorists have distanced themselves from the description of women's experiences as always those of subordination, giving as examples their contrasting experiences with pornography<sup>97</sup> and their experience of escaping patriarchy in their romantic and sexual lives.<sup>98</sup> Still other women, like the rural Pennsylvania woman quoted at the beginning of this essay, reject the idea that they are subordinated at all. And, to be sure, the emphasis of anti-subordination feminist theory on women's experiences under patriarchy can also sometimes transform into devaluation of the experiences of trans, lesbian, gay or other gender-non-conforming people.<sup>99</sup>

These critiques serve as a reminder to avoid essentialist pitfalls when talking about the need for more "women" on courts and tribunals. Chief among these pitfalls is the assumption that "women" judges will transform the institutions they serve simply because they are women. As Rosemary Hunter writes: "Why did we think that women would transform institutions without simultaneously—or alternatively—being transformed by them? Why did we believe that women appointed to positions of power would be 'representative' of women as a group, rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status quo?"<sup>100</sup> Catharine MacKinnon has long observed that the women who benefit from feminism's emphasis on formal equality are "mostly women who have been able to construct a biography that somewhat approximates the male norm . . . They are the qualified, the least of sex discrimination's victims."<sup>101</sup>

This factor is multiplied because the system of judicial appointment is marked by bias and elitism. Deborah Rhode calls this the "misleading myth of meritocracy," the dangerous and false idea that opportunity and advancement result from a system untainted by bias.<sup>102</sup> Sally Kenney recounts her frustration that whenever she talks

---

<sup>96</sup> See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 35 (2d ed. 2000) (saying that feminism "can end the war between the sexes. It can transform relationships so that alienation, competition, and dehumanization that characterize human interaction can be replaced with feelings of intimacy mutuality, and camaraderie," and, therefore, changing gender roles need not be the top priority at all times).

<sup>97</sup> Harris, *supra* note 83, at 596–97.

<sup>98</sup> See generally Mary C. Dunlap, *Sexual Speech and the State: Putting Pornography in Its Place*, 17 *GOLDEN GATE U. L. REV.* 359 (1987).

<sup>99</sup> See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191 (1989).

<sup>100</sup> See, e.g., Elinor Burkett, Opinion, *What Makes a Woman?*, *N.Y. TIMES* (June 7, 2015), <https://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html> (arguing, with controversial effect, that Caitlin Jenner is not "really" a woman because she has not lived as a woman under patriarchy); see also DAVIS, *supra* note 33, at 89–90 (asking "if female socialization is the litmus test for being considered "female" then how much time lived "as female" is enough to earn one's "woman card").

<sup>101</sup> Hunter, *supra* note 76, at 8.

<sup>102</sup> MACKINNON, *supra* note 3, at 37.

<sup>103</sup> DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 147–48 (1997); Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 588 (1996).

about women on the bench, she is urged to modify “women” with the word “well-qualified,” as if her goal is to populate the bench with unqualified women.<sup>103</sup>

Federal judges, for example, tend to be chosen from prestigious clerkships and big corporate law firms, two professional enclaves that tend to favor white, wealthy and male candidates.<sup>104</sup> The more than 1300 sitting federal judges overwhelmingly attended Harvard (140 judges) and other elite law schools.<sup>105</sup> These elite law schools—including Yale, Columbia, Stanford, Berkeley, NYU—tend to skew white and wealthy.<sup>106</sup> Indeed, every step leading up to that first appointment to the bench—from academic indicators to standardized testing and beyond—embeds race, class and gender bias.<sup>107</sup>

While calling for more “women” in the judiciary may yield a short-term gain, the real work lies in broadening the definition of who is “qualified” to be a judge. That requires open acknowledgment of the biases inherent in the admissions processes that lead to judicial positions: elite law schools, clerkships, prestigious law firms and other gate-keepers. Otherwise, the effort will yield only female judges who “are able to construct a biography that somewhat approximates the male norm.”<sup>108</sup> Getting a different result requires us to ask a different question.<sup>109</sup>

#### CONCLUSION

When we argue that the panel’s inquiry should be reframed, we must remember that women and men from populations underrepresented in the law—for example, people of color, people who grew up poor—may not be eager to join a campaign (or even attend an AALS program) focused on “more women.” According to Kimberlé Crenshaw, many Black women continue to be ambivalent “about the degree of political and social capital that ought to be expended toward challenging gender

<sup>104</sup> Sally J. Kenney, *Toward a Feminist Political Theory of Judging: Neither the Nightmare nor the Noble Dream*, 17 NEV. L.J. 549, 557–59 (2017) (“calling for so-called merit selection does little to foster a diverse and representative bench and obfuscates the nature of judging”).

<sup>105</sup> KENNEY, *supra* note 69, at 25 (noting that long after women comprised 50% of law students, “vital gatekeepers” did not recommend women for prestigious clerkships and the United States Supreme Court still has mostly white, male clerks).

<sup>106</sup> See Adam Feldman, *Law Schools, Judges, and Government Attorneys*, EMPIRICAL SCOTUS (Sept. 10, 2017), <https://empiricalscotus.com/2017/09/10/law-schools/> (providing data on law school affiliation of United States Attorneys, sitting federal judges, state attorney generals and state solicitor generals).

<sup>107</sup> See, e.g., *2017 IL Enrollment by Gender & Race/Ethnicity*, AM. B. ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/statistics](https://www.americanbar.org/groups/legal_education/resources/statistics) (follow “2017 IL Enrollment by Gender & Race/Ethnicity” hyperlink) (last visited Oct. 12, 2019). As an example, Harvard Law School admitted 560 students in 2017; of those only 178, or roughly 32%, are minority. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 632–33 (2011) (reporting that only 5% of students in elite law schools come from lower socio-economic classes).

<sup>108</sup> See, e.g., ALL. FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS (2016), <https://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf> (noting that vast majority of Federal judiciary comes from those who practiced as corporate lawyers and prosecutors); see also TRACEY E. GEORGE & ALBERT H. YOON, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS, AM. CONST. SOC’Y, <http://gavelgap.org/pdf/gavel-gap-report.pdf> (last visited Mar. 24, 2019) (noting the lack of diversity in state judiciaries).

<sup>109</sup> MACKINNON, *supra* note 3, at 37.

<sup>110</sup> See Kenney, *supra* note 104, at 558–59 (“I care about more than the legal qualifications of prospective judges. I care about their judicial philosophy, and I care about their views on social facts and most importantly, their willingness to subject their views to rigorous empirical examination.”).

barriers, particularly when the challenges might conflict with the antiracism agenda.”<sup>110</sup>

As the distant and recent past indicates, white women have a history of choosing their racial privilege over solidarity with poor women or women of color.<sup>111</sup> The 2018 midterm elections illustrate this point. Stacey Abrams, an African-American woman running for governor in Georgia against a white man, garnered only 25% of the white female vote.<sup>112</sup> A white woman, Cindy Hyde-Smith, won a Mississippi Senate seat running against an African-American man, even after making racially charged jokes about voter suppression, saying she would be on the “front row” if a supporter invited her to a public hanging and posing in a Confederate cap.<sup>113</sup> Ms. Hyde-Smith is the first female senator from Mississippi because white women supported her,<sup>114</sup> but her election is hardly a victory for the broader social justice project.

If elite white women are the ones who will benefit from a call for more “women” judges, it is imperative to reframe the question. Instead of asking for more women, we should clearly call, as Kimberlé Crenshaw urged almost two decades ago, for the elevation of women who have the least professional capital. Crenshaw relates the story of nineteenth century feminist Anna Julia Cooper. After a community leader claimed that wherever he entered, the Black race entered with him, Cooper observed, “Only the Black Woman can say, when and where I enter . . . then and there the whole Negro race enters with me.”<sup>115</sup> Cooper’s story reinforces the message that efforts to elevate the “qualified . . . the least of sex discrimination’s victims,” will mean that only elite women will advance. Feminists would be better served by a focus on those most hurt by discrimination. As Mari Matsuda frames it, “dismantling any one form of subordination is impossible without dismantling every other . . . particularly in the women of color movement, the answer is that no person is free until the last and the least of us is free.”<sup>116</sup> Truly, all will enter with the elevation of women who are multiply-burdened by not only sex discrimination but also

---

<sup>111</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 161 (1989); see also Danielle Young, *Tarana Burke Explains Why Black Women Don’t Think #MeToo is For Them*, ESSENCE (Nov. 7, 2018), <https://www.essence.com/videos/tarana-burke-explains-why-black-women-dont-think-metoo-is-for-them/>; Tamela J. Gordon, *Why I’m Giving Up on Intersectional Feminism*, QUARTZY (Apr. 20, 2018), <https://qz.com/quartzy/1265902/why-im-giving-up-on-intersectional-feminism/> (“I know what sisterhood is and I know what white women think sisterhood is; they got it all wrong.”).

<sup>112</sup>See, e.g., Treva B. Lindsey, *The Betrayal of White Women Voters: In Pivotal State Races, They Still Backed the GOP*, VOX (Nov. 9, 2018, 10:40 AM), <https://www.vox.com/first-person/2018/11/9/18075390/election-2018-midterms-white-women-voters> (reporting that, nationally, black women voted 92% for progressive candidates, but 49% of white women voted Republican).

<sup>113</sup> *Id.*

<sup>114</sup> Emily Wagster Pettus, *There Was No Ill Will, No Intent Whatsoever: Sen. Cindy Hyde-Smith Apologizes After Controversial ‘Public Hanging’ Remark*, BUS. INSIDER (Nov. 20, 2018, 11:05 PM), <https://www.businessinsider.com/cindy-hyde-smith-apologizes-after-public-hanging-remark-mississippi-2018-11> (quoting the candidate as saying, “For anyone that was offended by my comments, I certainly apologize. There was no ill will, no intent whatsoever in my statement”).

<sup>115</sup> *Id.*

<sup>116</sup> Crenshaw, *supra* note 111, at 160 (quoting Cooper).

<sup>117</sup> Matsuda, *supra* note 77, at 1189.

discrimination based on race, class, disability, immigration status, gender identity, sexuality or other personal identities beyond biological sex.

This essay has challenged the foundational question of the panel but proceeds from the belief that feminist legal theorists share a commitment to facilitating entry for all women to enter, not just privileged white women, and not white women first. The last of these beliefs may be unfounded or even controversial. After all, the experience of human nature is that one naturally pushes for changes or reforms that will benefit oneself.<sup>117</sup> Yet our version of feminism is broad. We conceive of it as a project that wants equality and advancement for not only women but for all historically disadvantaged groups. And “women” must be understood to mean women in all of their complexities, with all of their multiple identities.

Calling for more “women” is easy. Achieving true diversity is harder. Let’s begin.

---

<sup>118</sup> *But see*, Dylan M. Smith et al., *A New View of Utility: Maximizing “Optimal Investment,”* in *MOVING BEYOND SELF-INTEREST: PERSPECTIVES FROM EVOLUTIONAL BIOLOGY, NEUROSCIENCE, AND THE SOCIAL SCIENCES* 239 (Stephanie L. Brown et al. eds., 2012) (explaining and then questioning basic assumption of economics that “if given freedom of choice, people will generally act rationally to promote their own self-interest”).