

Critical Legal Feminism

Overview

Critical legal feminism is a branch of legal theory that explores the gendered assumptions of legal reasoning. It encounters unresolved questions of the basis of gender difference, how gender interacts with other identities, and its role in modern social governance. Moving away from liberal feminist theory, which limits itself to direct sexism in the content of the law, critical legal feminism argues that gender informs legal reasoning itself. Explanations for this differ greatly between specific theorists. This entry charts the arguments of key figures, including Carol Gilligan, Catharine MacKinnon, Kimberlé Crenshaw, and Judith Butler.

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Critical Legal Feminism

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Introduction

Critical legal feminism refers to a diverse range of theorists and approaches that focus on how gendered assumptions inform legal reasoning. Exact details beyond this key starting point vary significantly between thinkers, with Judith Butler commenting that ‘the differences among feminists have become so vast that it would take much more than a question-and-answer session even to establish the terms of the disagreements.’¹ This is partly due to the fact that critical legal feminism variously overlaps with post-modern, psychoanalytic, critical race, postcolonial, and queer theories of law, among other approaches.²

Critical legal feminism pays particular attention to the practical realities of the inequalities that law creates. It sits in contrast to ‘liberal’ feminism, which emphasises using the law to achieve gender equality, and tends to be sceptical as to the potential for law to create equality without serious rethinking or intervention.³ This is rooted in a belief that patriarchy is not just created through the contents of law, but in the methods and reasoning of modern law itself.⁴ In doing so, critical legal feminism questions how gender not only informs legal reasoning in overtly gendered issues (e.g.

¹ Judith Butler, ‘Disorderly Woman’ (1991) 53 *Transition* 86, 86.

² Rosemary Hunter, ‘Critical Legal Feminisms’ in Emiliios Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 45.

³ Lucinda Finley, ‘Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning’ (1989) 64 *The Notre Dame law review* 886, 908.

⁴ Finley (n 3) 886–887.

abortion), but also shapes *all* legal thought and judgment.

There are a wide variety of approaches regarding this point, and this entry will go through some major examples. While these theorists may point towards recurring ideas and issues, these should be treated as indicative of key questions in differing legal feminisms rather than a singular feminism⁵ that provides clear answers (indeed, a single, settled feminist answer may be impossible).⁶

Firstly, we will look at what distinguishes critical legal feminism from earlier liberal feminist movements. We will then look at the feminist psychologist Carol Gilligan and her argument for an ‘ethic of care’ in contrast to patriarchal rationalist understandings of law. This will be followed by a notable critic of Gilligan, Catharine MacKinnon, who emphasises that gender difference is rooted in social enforcement rather than natural inevitability. Building from criticisms that MacKinnon’s understanding is rooted in the experiences of straight white women, we will then look at Kimberlé Crenshaw’s understanding of intersectionality and the ways she uses this idea to emphasise the unique oppression of Black women. Finally, turning to queer theory, we look at how transgender feminism takes the ‘artificiality’ of gender even further before looking at the controversial ideas of the ‘gender critical’ movement.

Liberal Feminism vs Critical Feminism

The key focus of feminism until the mid-to-late 20th century was challenging directly prejudiced laws, such as those that made

⁵ Margaret Davies, *Asking the Law Question* (3rd edn, Lawbook Co 2008) 220.

⁶ See Davies (n 5) 249.

certain rights exclusive to men (e.g. voting, owning property).⁷ Since the goal was to extend these rights to women so they could take part in liberal society, this movement is frequently called ‘liberal feminism’. However, despite various women’s rights being achieved, gender inequality persisted, and it became increasingly clear that equal rights alone would not fix the gendered issues of law.⁸ While liberal feminism’s focus on achieving the same formal legal rights as men provided ‘formal equality’, critical legal feminists examine how this has not translated into practical fairness or ‘material equality’.

A central question is whether legal understanding itself—not just explicitly sexist laws—prioritises men over women. As argued by Finley:

[A] crucial project for feminist jurisprudence must be to ask constantly and critically who has been involved in shaping law, in selecting and defining its terms, and in deciding what is and is not one of those terms. Whose understandings, philosophy, and world view are imprinted on law? Consequently, how neutral and how inclusive is the structure of legal reasoning?⁹

The ‘criticality’ of critical feminism goes in several directions. Most obviously, it challenges sexist legal understanding, but unlike liberal feminism it extends this to laws that are formally equal but materially unequal. For instance, criminal defences such as provocation, self-defence, and necessity, are the same for both men and women (formally equal). However, these defences prioritise responses that are gendered male, such as instant retaliation, and do

⁷ Margaret Thornton, *Advanced Introduction to Feminist Perspectives on Law* (Edward Elgar 2024) 15.

⁸ Hunter (n 2) 50.

⁹ Finley (n 3) 890.

not account for actions such as pre-meditated killing in response to prolonged domestic abuse, which, due to the typical gendering of interpersonal power dynamics, are gendered female.¹⁰

Critical legal feminism also turns its attentions to examining other approaches to law. It frequently highlights when legal theory perpetuates gendered assumptions: for instance, issues of sexism and patriarchy in Kant,¹¹ Marxism,¹² or the civil rights movement.¹³ Critical legal feminism also examines issues within feminism itself, notably liberal feminism, as explained above. This includes, for example, the latent ideas that feminists working within patriarchal legal understanding unconsciously reinforce,¹⁴ and how this risks making such feminists complicit in gendered legal violence. Particular issues in this regard include the prioritisation of white femininity in early women's suffrage movements¹⁵ and accusations of transphobia aimed at recent gender critical perspectives.¹⁶ This entry will examine both of these below, but first we will consider the gendered aspects of legal form and normativity in more detail.

¹⁰ See Sharon Cowan and Vanessa Munro, 'Ruxton v Lang 1998 SCCR 1' in Sharon Cowan, Chloë Kennedy, and Vanessa E Munro (eds), *Scottish Feminist Judgments: (Re)Creating Law from the Outside In* (Hart Publishing 2019) 87.

¹¹ Spivak, Gayatri Chakravorty, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 13.

¹² Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1991) 13.

¹³ bell hooks, *Ain't I A Woman: Black Women and Feminism* (Pluto Press 1982) 176–177.

¹⁴ Finley (n 3) 891.

¹⁵ hooks (n 13) 3.

¹⁶ Alex Sharpe, 'Review Essay: Judith Butler, *Who's Afraid of Gender?*' (London: Allen Lane, 2024) pp 308' (2024) 35 *Law and Critique* 653, 660.

Legal Reasoning, Carol Gilligan, and the Ethic of Care

Rather than the sexist effects of individual laws, critical legal feminism frequently argues that such effects are a result of issues with legal reasoning itself.¹⁷ While the details vary between thinkers, the broad argument is that legal reasoning is not neutral or universal (as under formalist or modernist understandings), but instead reflects male experiences and ways of thinking and thus renders legal decisions biased in favour of patriarchal interests.¹⁸ The implications of this approach provide a direct critique of the foundations of legal thought itself. As Hunter argues:

Law's claims to universality, rationality and objectivity have been thoroughly debunked, and its claim to be a neutral arbiter standing outside society and politics has been demolished ... [Demonstrating this has] proved particularly easy to achieve ... by the juxtaposition of law with women's lives. This juxtaposition reveals law's masculinity and partiality, women's exclusion from legal subjectivity and the role of law as a player in the politics of gender.¹⁹

An early feminist critique of legal reasoning was provided by psychologist Carol Gilligan. Gilligan warns that, while equality discourse was successfully arguing against sexist claims of women as 'inferior,' this overlooked the possibility that treating women the same as men could still result in sexist outcomes.²⁰ Gilligan argues that key values of legal reasoning, such as universality, rationality,

¹⁷ Finley (n 3) 886.

¹⁸ Finley (n 3) 887.

¹⁹ Hunter (n 2) 51.

²⁰ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982) 5–6.

and objectivity, reflect male thought; female thought, meanwhile, prioritises relational and contextual concerns.²¹ In particular, Gilligan contrasts justice and rights discourse with an ‘ethic of care’ that prioritises care for others and thinking about people in a relational and contextual way, rather than the rationalist understandings of fixed legal rules and self-contained individuals who exist separately from the world around them.²²

In contrast to the equality argument that women and men think in the same way, Gilligan argues that women actually think differently, and that this difference is devalued because of misogyny.²³ Under Gilligan’s account, dominant understandings of law are not only contingent, but reflect a specifically male view of the world. To Gilligan, the significance of the ethic of care is that taking this argument seriously highlights that the values of law, particularly justice, are not inevitable but one of many things that a legal system could prioritise.²⁴

However, Gilligan’s work has been criticised for relying on an ‘essentialist’ understanding of gender that presents these cognitive tendencies as inherent or natural to men and women.²⁵ By rooting her argument in psychological differences, Gilligan argues that the disparity between masculine and feminine thought is determined at childhood, implying that it is innate and unavoidable.²⁶ While framed in an empowering way through the celebration of women’s differences to men, there are concerns this repeats a sexist stereotype by suggesting, for example, that all female judges

²¹ Gilligan (n 20) 10.

²² Gilligan (n 20) 136–139.

²³ Gilligan (n 20) 16–17.

²⁴ Sandra Laugier, ‘Carol Gilligan: What Gender Does to Moral Philosophy’ in Eléonore Le Jallé and Audrey Benoit (eds), *Thinking with Women Philosophers: Critical Essays in Practical Contemporary Philosophy*, vol 30 (Springer 2022) 11.

²⁵ Thornton (n 7) 31.

²⁶ Gilligan (n 20) 8.

will be more caring and compassionate than their male counterparts. To Bertha Wilson, the first female justice of the Canadian Supreme Court, the assumption that having more female judges will immediately result in more feminist judgments oversimplifies the reality of gender representation.²⁷

While these concerns are widely highlighted, it is also worth noting that they do not go unchallenged. Most notably, Laugier counters these criticisms by highlighting that the key emphasis in Gilligan's work is not that women think differently from men, but that rationalist ways of approaching law are not infallible and are tied to patriarchal power.²⁸ Furthermore, Gilligan has defended her work by noting that her psychological observations reflect common tendencies based on the early impact of gender imposition in upbringing, rather than universal rules rooted in biology: men are not innately worse at caring, but they are more frequently taught to devalue this way of thinking.²⁹ As such, what is central to Gilligan's 'different voice' is not focused on a different *speaker* (i.e. women) but on a different way of *speaking* (i.e. care) that has been undervalued by patriarchal understanding.³⁰ Regardless of opinions on Gilligan's work itself, the prioritisation of gendered context and concerns over the patriarchal dimensions of objective rationality continues to be a significant recurring theme in feminist legal thought.³¹

²⁷ See Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 Osgoode Hall Law Journal 507.

²⁸ Laugier (n 24) 18.

²⁹ Carol Gilligan, *Joining the Resistance* (Polity 2011) 24-25.

³⁰ Gilligan (n 29) 18.

³¹ See Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 49-50.

Catharine MacKinnon and Overlooking Sexist Reality

Catharine MacKinnon departs from Gilligan by arguing that sexism is not rooted in observable differences between men and women, but rather the social and political bias that women are inferior.³² While Gilligan avoids questioning the root causes of gender disparities,³³ MacKinnon argues that by not including this, Gilligan overlooks that she is really charting and celebrating patriarchal understandings of women. As MacKinnon argues:

[Gilligan] revalues that which has accurately distinguished women from men by making it seem as though women's moral reasoning is somehow women's, rather than what male supremacy has attributed to women for its own use. When difference means dominance as it does with gender, for women to affirm differences is to affirm the qualities and characteristics of powerlessness.³⁴

The celebration of care as a feminine virtue has a more sinister edge when the historical confinement of women to caring roles within patriarchal society is taken into consideration.³⁵ Similarly, MacKinnon argues that relational thought cannot be separated from women being historically reduced to their relationships to the men in their lives.³⁶

Rather than Gilligan's treatment of rational neutrality as an inherently 'masculine' value, MacKinnon argues that what the law understands as 'neutral' is in fact heavily influenced by gendered

³² Catharine A MacKinnon, 'A Feminist Defense of Transgender Sex Equality Rights' (2023) 34 *Yale Journal of Law and Feminism* 88, 90.

³³ Gilligan (n 20) 2.

³⁴ MacKinnon (n 12) 51.

³⁵ Thornton (n 7) 6.

³⁶ MacKinnon (n 12) 51.

assumptions: ‘the law sees and treats women the way men see and treat women.’³⁷ To MacKinnon, attempts to think ‘objectively’ or ‘neutrally’ with respect to a legal situation do not avoid making a political choice, but just default to dominant patriarchal understandings:

Formally, the state is male in that objectivity is its norm. Objectivity is liberal legalism’s conception of itself. It legitimates itself by reflecting its views of society, a society it helps make by so seeing it, and calling that view, and that relation, rationality. Since rationality is measured by point-of-viewlessness, what counts as reason is that which corresponds to the way things are.³⁸

In a sexist society, this means that legal ‘neutrality’ will inevitably favour men to the detriment of women. This is not because law is being directly sexist in these moments; instead, law acts as if sexual inequality does not exist outside of the courtroom.³⁹ Importantly, since conventional legal understanding treats itself as separate from other forms of understanding in order to protect this neutrality, attempts to highlight its inherent bias can easily be dismissed as political prejudice.⁴⁰

This type of sexism does not rely on there being explicitly sexist laws in place. Women are not excluded from legal processes, but unequal results are nevertheless created precisely by treating men and women the same.⁴¹ For instance, today’s marriage laws do not differ based on gender but they do not account for the heteronormative and patriarchal history of traditional family structures or

³⁷ MacKinnon (n 12) 161–162.

³⁸ MacKinnon (n 12) 162.

³⁹ MacKinnon (n 12) 168.

⁴⁰ MacKinnon (n 12) 164.

⁴¹ MacKinnon (n 12) 163–164.

how they create different lived experiences for women.⁴² By treating women the same as men, the law ignores that women are in a materially disadvantaged position compared to men, and thus fails to meaningfully intervene in the patriarchal structure of society.

However, while MacKinnon tries to highlight obscured social issues with the law, her work has been criticised for trying to create a singular narrative of gender discrimination that shuts down its complex reality.⁴³ One notable challenge to MacKinnon's work has been made by Judith Butler.⁴⁴ Butler argues that, in trying to create a single coherent understanding of patriarchy, MacKinnon oversimplifies sexism, resulting in some dangerous conclusions—particularly regarding MacKinnon's strong anti-pornography stance.

MacKinnon's issue with pornography is not that it is an explicit image, but rather that it violates the women who take part and, by informing men how to treat women, worsens pervasive social issues such as sexual violence against women.⁴⁵ Butler, however, points out that there are some troubling implications of this perspective. Firstly, while MacKinnon is criticising traditional understandings of heteronormative sexuality, Butler argues that she uncritically extends this to all forms of sex that currently or could ever exist.⁴⁶ This also feeds into conservative shaming of sexual activity that has been significantly challenged, perhaps most notably by queer theory where such shame is a key manifestation of

⁴² See Nicola J Barker, 'Rethinking Conjuality as the Basis for Family Recognition: A Feminist Rewriting of the Judgment in *Burden v. United Kingdom*' (2016) 6 *Oñati Socio-Legal Series* 1249.

⁴³ Davies (n 5) 249.

⁴⁴ Butler (n 1).

⁴⁵ MacKinnon (n 12) 197–198.

⁴⁶ Hunter (n 2) 54–55.

homophobia.⁴⁷

MacKinnon's position shuts down the possibility of female sexual agency and, as Butler accuses, all female agency outside of subordination.⁴⁸ Not only is this stance not particularly helpful for promoting change, Butler also argues that it is in any case not logically sound: it fails to explain how prominent feminist thinkers like MacKinnon herself can be possible under her own theory. If MacKinnon's analysis is taken seriously, then patriarchal oppression would be so severe that there is no way she could have become a world-leading legal theorist.⁴⁹

Butler also argues that MacKinnon's stance only 'appear[s] true for some economically advantaged white women.'⁵⁰ Most notably, MacKinnon presents patriarchy as a coherent system of discrimination that unites all women, taking priority over all other forms of discrimination.⁵¹ Beyond playing down other social issues, this approach has been accused of presenting gender as somehow separate from other aspects of identity, such as race, class, and sexual orientation, and thereby normalising white women's experiences as if they were universal for all women.⁵² While MacKinnon avoids the *scientific* gender essentialism she accuses Gilligan of, her work in many ways can still be accused of a *social* gender essentialism.⁵³ It is to issues of gender in relation to other kinds of difference that this entry now turns.

⁴⁷ See Gayle Rubin, 'Thinking Sex: Notes on a Radical Theory of the Politics of Sexuality' in *Deviations: A Gayle Rubin Reader* (Duke University Press 1984) 154.

⁴⁸ Butler (n 1) 91.

⁴⁹ Butler (n 1) 93–94.

⁵⁰ Butler (n 1) 90.

⁵¹ See MacKinnon (n 12) 161.

⁵² Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581, 591–592.

⁵³ Harris (n 52) 588.

Feminism, Race, and Intersectionality

Rather than attempting to think through a universal understanding of women and patriarchy that applies to everyone, other theorists have leaned into the fact that feminism is also influenced by countless other identities (Black, queer, working class, etc) which are often overlooked by both liberal and critical feminist thought.⁵⁴ This includes more targeted critiques, such as abolition feminism's argument to abolish many traditional criminal law institutions due to their gendered and racialised violence, perhaps most famously discussed in Angela Davis's *Are Prisons Obsolete?*⁵⁵ However, they also provide critiques of existing theory and alternative methodological tools, most significantly including Kimberlé Crenshaw's concept of intersectionality which emphasises what happens when different identities intersect.

A historically significant challenge was made on this point in Sojourner Truth's speech, commonly referred to as 'Ain't I a Woman?'; made at the Akron Women's Convention in 1851.⁵⁶ Truth's speech responded to sexist claims that women were innately weak by highlighting the manual labour she had performed as a former slave and her resulting muscularity. Truth highlighted that physical disparities were frequently based on social conditions, rather than (gendered) biological possibility. However, as Kimberlé Crenshaw observes, the speech's legacy is arguably better understood as an argument criticising the feminist movement: 'Ain't I a Woman?' questions why the realities of Black

⁵⁴ Harris (n 52) 585.

⁵⁵ Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003).

⁵⁶ There have been published versions of the speech, but there remains contestation as to potential disparities between what was said and what was later published.

women are not accounted for within feminist understandings of ‘women’s experience’.⁵⁷

Similar to the arguments of thinkers like MacKinnon, that women’s experiences cannot be cleanly equated to male experiences, the feminist belief that white women have had the same experiences as women of other races and ethnicities is deeply troubling. For example, even something like strengthening laws on sexual crimes to better protect women becomes a lot more complex when considered alongside race. Harris highlights that Black women have had very different experiences as the victims of rape, and Black men have long-running experiences of false accusations of rape being used to facilitate their racist overincarceration and mob-based racial violence such as lynching.⁵⁸

For Crenshaw, intersectionality emphasises that it is not as simple as saying that Black women, for example, are subject to racism and sexism separately. The intersection of race and gender causes unique issues for Black women:

[P]roblems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.⁵⁹

One notable example of this can be seen in 20th century feminist movements often including a strong emphasis on women

⁵⁷ Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] *University of Chicago Legal Forum* 139, 153.

⁵⁸ Harris (n 52) 601.

⁵⁹ Crenshaw (n 57) 140.

entering the workforce in order to become financially independent. However, as bell hooks emphasises, this move was framed around getting middle class white women into office jobs and overlooked the fact that working class and particularly Black women were already working in menial jobs that entrenched rather than reduced their oppression.⁶⁰ Meanwhile, as hooks also highlights, the civil rights movement was looking to get Black men into existing patriarchal power structures and frequently overlooked the needs of women.⁶¹ As such, thinking in isolation about racism or sexism (or, as Crenshaw makes clear, any of a range of other identities⁶²) overlooks important dimensions of inequality that can only be seen by looking at their intersection.

However, there are concerns around intersectionality's limitations. For instance, while in principle intersectionality can be applied to any intersections of identity, it notably has frequently struggled to extend beyond the race/gender intersection of Black women.⁶³ Conaghan goes further, expressing doubts as to intersectionality's capacity to address other identities, highlighting that its focus on individuals rather than structures limits its utility in the context of class.⁶⁴ Conaghan also argues that, by emphasising the 'intersection' of identities, intersectionality is in danger of implying that different forms of discrimination emerge independently: an argument that somewhat functions in the context of race and gender, but quickly falls apart in the overarching gendered basis of sexism, homophobia, and transphobia.⁶⁵ This reflects broader

⁶⁰ hooks (n 13) 145.

⁶¹ hooks (n 13) 94.

⁶² Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1990) 43 *Stanford Law Review* 1241, 1299.

⁶³ Jennifer C Nash, 'Re-Thinking Intersectionality' (2008) 89 *Feminist Review* 1, 7.

⁶⁴ Joanne Conaghan, 'Intersectionality and UK Equality Initiatives' (2007) 23 *South African Journal on Human Rights* 317, 327.

⁶⁵ Conaghan (n 64) 329.

problems. For instance, by oversimplifying the ease with which discrimination can be categorised, Nash argues that intersectionality is worse at addressing the overarching idea of privilege in a more contextualised way.⁶⁶

Queer Feminist Theory

Queer feminist theory not only furthers Crenshaw's intersectional approach to consider the realities of queer women, but uses gender non-conformity to push existing arguments around the social creation of gender (e.g. as we have discussed with MacKinnon) even further.

One of the leading thinkers in this regard is Judith Butler, most famously through their book *Gender Trouble*.⁶⁷ While MacKinnon argues that sexism is a social issue separate from the gendered body of women, Butler goes even further and argues that the gendered body only exists because of the social frame of patriarchy.⁶⁸ By exploring methodological issues with key scientific discoveries around gender, such as the differentiation between the X and Y chromosomes, Butler argues that even scientific understandings of gender are rooted in explaining the gender binary without questioning whether it actually exists.⁶⁹ In doing so, Butler challenges the possibility of ever having an accurate understanding of gender that avoids preexisting cultural assumptions.⁷⁰ This is a trend that biologist Julia Serano also notes:

⁶⁶ Nash (n 63) 12.

⁶⁷ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (10th anniversary edn, Routledge 1999).

⁶⁸ Butler (n 67) 135.

⁶⁹ Butler (n 67) 139.

⁷⁰ Butler (n 67).

[W]hen it comes to examining human sex differences, there are no truly well-designed experiments, as they all lack proper controls. There is no way to untangle the social and experiential from the biological, as they all interact with one another, and all influence the final outcome.⁷¹

To Butler, it is thus not the case that patriarchal law understands gender incorrectly, but that gender is actively constructed by law itself:⁷² there is no external version of gender that the law ‘gets wrong’; gender, as we understand it, is something that law creates. Butler highlights drag as a powerful site of resistance, because of its ability to make the performative and constructed nature of gender particularly obvious.⁷³ Since there is no meaningful possibility of either getting a ‘correct’ legal understanding of gender, or of getting rid of it as a social understanding, Butler’s gender performance leaves room for ‘playing with’ gender in a way that is far more conscious of its fallibilities and limitations.

The Rise of the Gender Critical Movement

Queer feminist theory has been in the spotlight in recent years due to an increase in transphobia, a trend which has resulted in a focused response from queer theory, including recent work from Butler herself.⁷⁴ Law has a long history of policing transgender bodies⁷⁵ and continues to face accusations of breaking its own

⁷¹ Julia Serano, *Sexed Up: How Society Sexualises Us, and How We Can Fight Back* (Serial Press 2022) 270.

⁷² Butler (n 67) 118.

⁷³ Butler (n 67) 175.

⁷⁴ Judith Butler, *Who’s Afraid of Gender?* (Penguin Books 2025).

⁷⁵ Alex Sharpe, ‘From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence’ (2001) 8 Murdoch University Electronic Journal of Law 1.

principles in order to do this.⁷⁶ A key expression of this is the high-profile UK case of *For Women Scotland Ltd v The Scottish Ministers*,⁷⁷ which limited ‘sex’ under the Equality Act 2010 to mean ‘biological sex.’ This is a distinction that has since been widely criticised, for not only its dismissal of transgenderism, but also the lack of clarity as to what the judgment actually means in practice.⁷⁸

Criticisms of transphobia have also been made against certain branches of feminism: more specifically ‘gender critical’ feminism.⁷⁹ It is worth noting that many of the anti-trans advocates who have allied themselves with the gender critical movement are right-wing figures, historically opposed to many of the arguments of feminist theory.⁸⁰ Conversely, many feminists not only disavow gender critical policies, but also argue that transphobia is inherently anti-feminist. MacKinnon, for instance, dismisses the gender critical movement as ‘self-identified’ (rather than actual) feminists,⁸¹ and highlights that relying on an understanding of gender rooted in oversimplified assumptions around biology, rather than social treatment, ignores some of the most fundamental aspects of feminism.⁸²

On the other hand, though, Sharpe warns that, while the

⁷⁶ Alex Sharpe, ‘Sexual Intimacy, Gender Variance, and Criminal Law’ (2015) 33 *Nordic Journal of Human Rights* 380, 383.

⁷⁷ [2025] UKSC 16.

⁷⁸ See Aoife Edith Rosa, ‘Trans Liberation and Law: Structure, Limits and Strategy after FWS’ (*Legal Form*, 30 January 2026) <<https://legalform.blog/2026/01/30/trans-liberation-and-law-structure-limits-and-strategy-after-fws-aoife-edith-rosa/>> accessed 5 February 2026.

⁷⁹ Originally ‘Trans-Exclusionary Radical Feminism’ (TERF) was used to describe this group, however, when the name was seen as synonymous with bigotry, ‘gender critical feminism’ became more widely used—though there are signs that the same thing is now happening to ‘gender critical’. See Sharpe (n 16) 660–661.

⁸⁰ Sharpe (n 16) 664.

⁸¹ MacKinnon (n 25) 88.

⁸² MacKinnon (n 25) 90.

stances of gender critical feminists are deeply flawed, to distance them from feminism risks overlooking that the feminist movement has also routinely had its own problems and limitations, including long-running anti-trans sentiment.⁸³ As Butler warns, while the gender critical movement should not be easily accepted as a feminist movement—let alone its highly problematic claims to be *the defining* feminist movement—it must also be recognised that gender critical feminism is rooted in many of the biggest flaws of feminism itself:

For better or worse, a wide range of positions can be called feminist ... [the gender critical movement] is a form of feminism that actively supports the derealisation of trans people and engages in forms of discrimination that arguably go against the commitment to equality for which feminism has stood. One could thus more reasonably conclude that transphobic feminism is not feminism. But the truth is: it should not be.⁸⁴

Gender critical feminism violates some of the key principles of feminism, but in a way that is comparable to mistakes that feminism has made itself. For instance, it is arguable that Gilligan's emphasis that men and women think differently and, to a lesser extent, MacKinnon's privileging of a specific type of 'women's experience' to the exclusion of other minority identities, have provided a breeding ground for transphobia, regardless of these thinkers' own intentions.

⁸³ Sharpe (n 16) 661.

⁸⁴ Butler (n 74) 137.

Concluding Summary

While critical legal feminism argues that sexual inequality has continued despite the efforts of formal equality, the root causes of inequality, as well as other essential questions around how patriarchy, women, and sex/gender should be understood, are far from settled issues. However, refusing to accept easy and settled answers is a key characteristic of feminism insofar as it is a *critical* movement, and can be understood as a strength in terms of approaching law—especially considering the issues that come with trying to reduce feminism to a single coherent experience that all women share.⁸⁵ Despite its variety, critical legal feminism remains an approach to understanding law that is committed to righting lived injustices that law facilitates by highlighting the patriarchal assumptions typically made within legal reasoning, practice, and policy. By doing so, critical legal feminism emphasises the potential to conceive of alternative ways of understanding the law.

Further Reading

Margaret Davies, *Asking the Law Question* (3rd edn, Lawbook Co 2008)

Davies includes a chapter on the history of feminism and the law, going into greater detail on the majority of the topics covered in this entry.

Rosemary Hunter, 'Critical Legal Feminisms' in Emiliós Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019)

Hunter provides a good summary of the foundations of feminism and its uniting themes that is straightforward, without oversimplifying things into a single movement that arguably does not actually exist.

⁸⁵ Butler (n 1) 87.

Lucinda Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *The Notre Dame law review* 886

Finley provides a good introduction to how we can identify gendered assumptions in the reasoning rather than the content of law.

Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139

Crenshaw's paper introduces the idea of intersectionality, providing an essential critical legal tool in a way that is accessible and easy to follow.

Alex Sharpe, 'Review Essay: Judith Butler, *Who's Afraid of Gender?* (London: Allen Lane, 2024) pp 308' (2024) 35 *Law and Critique* 653

While this is a review of Butler's book *Who's Afraid of Gender?*, this piece also serves as a short introduction to the current state of queer theory and the rise of transphobia, in the context of critical feminism.

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