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Essays in Gender-Critical Philosophy

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Holly Lawford-Smith

# Sex Matters

*Essays in Gender-Critical Philosophy*

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## Is Gender-Critical Speech Hate Speech?

### 8.1 Gender-critical speech

Is gender-critical speech hate speech? Some gender identity activists say that it is;<sup>1</sup> gender-critical feminists say that it is not. In this chapter I'll consider the case for saying that it is, and argue that it isn't. In Chapter 9, I'll take up the related, but weaker, claim that gender-critical speech is merely harmful speech.

In order to assess whether gender-critical speech is hate speech, we need to know what counts as gender-critical speech. This is delicate: if we count too much as gender-critical speech, then we're virtually guaranteed to find some of it hate speech; if we count too little as gender-critical speech, then we're virtually guaranteed not to. We need a conception of gender-critical speech that doesn't count just anything a person self-describing as 'gender-critical' says, but also doesn't let gender-critical feminists off the hook for commonplace speech that is made in the name of their movement. The broadest way to understand gender-critical speech would be as any speech that articulates, advocates for, or defends, a gender-critical position. To fill in the details of this understanding, we'd need only to know the details of the gender-critical position. I take it to be a cluster of views centring on the importance of sex and sex-based rights, asserted in the context of ongoing debate over social and legal changes to the understanding and recognition of sex and gender categories.<sup>2</sup> This cluster of views include:

- There are two sexes, male and female.
- It is impossible to change your sex.
- Sex characteristics cluster into a bimodal distribution and intersex people are not outside of the two main clusters.

<sup>1</sup> To give just one example, the National Tertiary Union in Australia has for the last two years been being lobbied to pass an 'Emergency Motion' put forward by its QUTE network ('Queer Unionists in Tertiary Education') which included 'The NTEU should publicly affirm its opposition to transphobic hate speech, including "gender-critical ideology"'. The person who moved an amended version of the motion in late 2022 said in their speech "gender-critical" ideology... is a genocidal hate movement operating in tertiary spaces which contributes to the climate of violence which kills people like me.' The amended motion, which passed, contains the slightly more temperate 'NTEU believes... "Gender-critical ideology" is a term that is used to defend transphobic ideology and when used to do so is not consistent with academic freedom', and later, 'NTEU will... Campaign and educate members about hate speech and the impact that it has on others, especially our LGBTIQ+ members.' See also discussion by Osbaldiston (2022).

<sup>2</sup> For more detail see Lawford-Smith (2022).

- Sex matters politically and women's sex-based rights should be protected.
- Female-only spaces, services, and provisions are important to women and girls and should not be offered on the basis of self-identified sex/gender identity.
- Self-identification, statutorily declared, is an inadequate basis for legal sex.
- A subjective sense of one's 'identity' does not trump all others' interests in conflict cases.
- Transwomen are male and transmen are female, and if they weren't they wouldn't be trans.
- Gender is not gender identity.
- Sex is not gender identity.
- Gender is sex caste by way of gender norms, explained by or built on top of sex difference.
- Gender (as previously defined) should be abolished.
- Everyone is 'nonbinary' (relative to the previous definition of gender) so no one is.
- The terms 'female' and 'male' should refer to sex.
- The terms 'woman' and 'man', 'girl', and 'boy' should refer to either or both of sex and gender (as previously defined).\*
- 'Lesbian' and 'gay' are sexual orientations, and thus refer to and depend on sex.<sup>3</sup>

These are general commitments that anyone self-describing as gender-critical is highly likely to have.

There are some idiosyncratic or eccentric views that gender-critical women have and which are not thereby 'gender-critical views'. For example, some radical feminists active in the gender-critical feminist movement are separatists, who think women should withdraw from the society of men. But separatism is not a commitment of gender-critical feminism.

What about views that are not shared by all or most gender-critical feminists, and yet also cannot be classed as idiosyncratic or eccentric? I put an asterisk on the second-to-last claim in the list to note this kind of complexity. There is reasonable disagreement among gender-critical feminists over the question of whether the terms 'man' and 'woman' are sex terms and so synonymous with 'male' and 'female', or gender terms and so dependent for their meaning on whichever is the correct conception of gender.<sup>4</sup> Most gender-critical feminists maintain a sex/gender distinction in some form, but some use 'female' and

<sup>3</sup> This list also appears in Chapter 9.

<sup>4</sup> See discussion in Byrne (2020) and Bogardus (2020). Byrne talks about the ordinary meaning of the so-called 'gender terms', while Bogardus argues against the sex/gender distinction, which has the effect of collapsing the so-called 'gender terms' back into sex terms.

‘woman’ synonymously for sex and use ‘femininity’ for gender, while others use ‘female’ for sex and ‘woman’ for gender. Some believe the former is technically accurate but think norms of politeness require referring to people as they want to be referred to, or that the ship has sailed on ‘woman’ and we should focus on fighting to retain ‘female’ (Reilly-Cooper 2018). Others insist that we work to reclaim ‘woman.’<sup>5</sup> This means there is considerable diversity in how the words ‘man’ and ‘woman’, along with their accompanying pronouns, are deployed. There is also considerable conflict between gender-critical women on this point.<sup>6</sup>

Despite this disagreement, there are many gender-critical feminists who endorse (and advocate for) the idea that ‘woman’ means ‘adult human female.’ Given that the core commitments of gender-critical feminism include that transwomen are male, and that it is impossible to change your sex, if ‘man’ is synonymous with ‘male’ it follows that transwomen are men. So calling transwomen ‘men’, or using ‘he’/‘him’/‘his’ pronouns to refer to them, should count as gender-critical speech, *even though* it is not the case that all or even most gender-critical feminists do this.<sup>7</sup> This understanding of gender-critical speech should be broad enough to capture most of what has been accused of being hate speech, without being so broad as to unfairly impugn a whole movement for idiosyncratic individual views.

## 8.2 Gender-critical speech as hate speech

I’ll understand ‘speech’ as synonymous with ‘expression’, so that it covers communicative acts not limited to those that are verbal (see e.g. Ely 1974–5). So while what gender-critical feminists say both online and offline will be a central concern, I’ll also include things like the wearing of T-shirts, the putting up of billboards, flags, and posters, and the distribution of stickers and flyers, all containing gender-critical slogans, messaging, or imagery.

There are real-world examples of all of these things being treated as hate speech or similar (at least, speech that deserves suppression, merits punishment, or justifies compensation to its targets). There have been legal cases in the United Kingdom and Australia turning on whether gender-critical comments made on Twitter justified the termination of an employment relationship, or gender-critical

<sup>5</sup> The best-known campaign is likely Kellie-Jay Keen’s. See e.g. the merchandise on sale in her shop (<<https://www.standingforwomen.com/>>), or the T-shirts she generally appears in during her YouTube livestreams (<<https://youtube.com/c/KellieJayKeen>>).

<sup>6</sup> For example, when Kathleen Stock’s book *Material Girls* was published in May 2021, some gender-critical women expressed anger about her choice to use preferred pronouns to refer to transwomen in the book.

<sup>7</sup> This does not mean that all ‘misgendering’ is gender-critical speech, even when done by a gender-critical person. It matters whether it is done in order to express gender-critical beliefs, as opposed to being done in order to insult or offend.

comments made on Facebook counted as vilification on the basis of gender-identity, respectively.<sup>8</sup> The high-profile Spanish feminist Lidia Falcón was accused of hate speech and had to go to court (Sánchez 2020). A gender-critical transwoman was accused of hate speech after wearing a T-shirt that read ‘Trans women are men. Get over it!’ (Lyons 2019). A woman was thrown out of a pub in Cheshire, England, for wearing a T-shirt that read ‘woman/wòmən/noun/adult human female’ (Birchall 2019). A billboard featuring the same words was removed from a site in Liverpool, England, after protest by trans activists (BBC 2018). Stickers in the shape of pink penises featuring the words ‘women don’t have penises’, distributed around Liverpool, were accused of ‘trans hatred’ (Pidd 2018).<sup>9</sup> A billboard reading ‘I ♥ JK Rowling’ was removed from Edinburgh Waverley railway station in Scotland for being ‘too political’ (Hay 2020). An event at the University of Melbourne, Australia called ‘The Future of Sex-Based Rights’, featuring a number of radical and gender-critical feminist speakers, was subject to attempted deplatforming on the basis that by providing a venue for the event, the university was ‘putting transgender and gender non-conforming students and staff at risk.’<sup>10</sup> Gender-critical feminists have been banned from Twitter under its ‘Hateful Conduct’ policies.<sup>11</sup> Reddit banned the popular subreddit r/GenderCritical, which had over 64,000 members (Kearns 2020).

These are just a few examples; the point is that there’s clearly a public perception, at least among some parts of the population, that gender-critical speech is hate speech. The question for the rest of this paper is, *is it?*

<sup>8</sup> The United Kingdom case was (Maya Forstater vs CGD Europe, 2019). The Australian case, heard in the Australian Capital Territory, was (Clinch v Rep (Discrimination), 2020, ACAT 13).

<sup>9</sup> Pidd reports for *The Guardian* that ‘The stickers were condemned by a coalition of women’s groups... In an open statement addressed to “our trans siblings”, the groups said: “In our city there’s no room for hate against trans people. We condemn the behaviour, hate and transphobia of “Liverpool Resisters”/ We condemn their appalling stickers and we absolutely will not tolerate transphobia in our city.’

<sup>10</sup> <<https://equalityaustralia.org.au/open-letter-to-the-university-of-melbourne/>>

<sup>11</sup> Meghan Murphy and Graham Linehan are among the most prominent (BBC News 2019; Blackall 2020). My own account has been banned too. To give an example of what is considered to be ‘hateful conduct’ under this policy, my first suspension was for referring to a self-identified transwoman with he/him/his pronouns, and my second was for saying directly to a self-identified transwoman that they are not female. (@saltyfemst @RipTaraWB @MaggioAlex @annalouiseadams @unimelb just for the record, i’ve blocked tara so cannot see his tweets but can see him tagged here. he has been harassing both me & my employer on facebook and twitter. i have not made any public comment against surgery for trans people. if you’re a rad fem, i recommend blocking.) (@sasha4th when you say ‘transgender female’ do you mean that you’re a trans man? if so, you’re very welcome in female-only spaces, there’s no issue. if you mean trans woman, then you’re not female, and the reasoning applies to you. it doesn’t matter that \*you\* appreciate the spaces.’ 6.00 p.m. 28th April 2019). There are screenshots at my website: <<https://wordpress.com/page/hollylawford-smith.org/2174>>

### 8.3 Hate speech

The standard way to proceed in thinking about *free* speech is to work through the underlying justifications and check whether a particular category of speech is protected in relation to them (Howard 2019, fn. 21); (Yong 2011, pp. 389–94). We might take the same approach to *hate* speech here, figuring out the underlying harms and working out whether that means gender-critical speech belongs in that category or not. Unfortunately, there has been no convergence upon a definition of hate speech, either in the popular discussion or in the academic discussion. There are at least nine different academic definitions (Simpson 2017). Here are some examples: Jeremy Waldron and Steven Heyman characterize hate speech as an assault on dignity;<sup>12</sup> Waldron because it denies recognition of common humanity (Waldron 2012), Heyman because it denies recognition of status as a rights-bearer (Heyman 2009; discussed in Simpson 2013, pp. 710–14). Robert Simpson characterizes hate speech as speech that ‘convey[s] the idea that belonging to a particular social group warrants someone’s being held in or treated with contempt’ (Simpson 2013, p. 702). Rae Langton, Catharine MacKinnon, and Mari Matsuda have all focused on the way that some speech can undermine equality, by subordinating or marginalizing (see discussion in Schwartzmann 2002, p. 421), silencing (MacKinnon 1987; Langton 1990; Langton 1993), or defaming or discriminating against (MacKinnon 1991), people from oppressed groups.<sup>13</sup> Gail and Richard Murrow connect hate speech to dehumanization, and dehumanization to reduced response to the targeted group’s suffering (Murrow and Murrow 2015; see also discussion in Simpson 2016). Caleb Yong identifies a category of hate speech, targeted vilification, intended to wound, insult, or intimidate its targets (Yong 2011, p. 394).

Let’s just pick one of these, to illustrate how this approach might go. Waldron, for example, accounts for the harm of hate speech in terms of assaults upon human dignity, understood in terms of the ‘security and assurance’ had by members of a society. He thinks all members of society deserve ‘protection from the most egregious forms of violence, exclusion, indignity, and subordination’ (Waldron 2012, pp. 82–3). Hate speech denies security and assurance over these things to members of particular groups. On Waldron’s view, dignity is about

<sup>12</sup> For further examples of authors who tie hate speech to dignity, see (Simpson 2013, p. 707, fn. 11). Simpson takes the main reason to take a dignity-based approach to be that ‘the targets of identity-based hate speech are vying to secure a position of esteem and recognition within a wider social and cultural ecosystem, and that this aspiration is what is being opposed – both maligned, and also, some authors claim, impaired – in the hate speaker’s verbal conduct’ (p. 709).

<sup>13</sup> Matsuda talks about racist hate speech (Matsuda 1989). MacKinnon says that pornography is ‘hateful’, ‘propaganda’, ‘a hate literature’, ‘group hate’, and ‘group hate propaganda’—which is close enough to saying that it is hate speech (against women) (MacKinnon 1991, pp. 803 and 807–10). Langton defends MacKinnon’s earlier claim that pornography subordinates and silences women (MacKinnon 1987; Langton 1993).



humanity, about ‘the sorts of beings human persons are’ (p. 86). Everyone is owed equal *recognition* respect, respect in virtue of their humanity. But it is not the case that everyone is owed equal *appraisal* respect, which takes into account their ‘virtues, vices, crimes, views, merits, and so on’ (pp. 82–3). As Simpson explains, for Waldron, hate speech is ‘group defamation’, and we should restrict it in order to protect public order. Public order depends on ‘a widely-shared understanding and acceptance among the populace of the status-respect that we all owe, and are owed, as fellow members of society’ (Simpson 2013, p. 719; following Waldron 2010, pp. 1604–5).

To be helpful in answering the question of whether gender-critical speech is hate speech, the account must allow us to settle novel cases. This is worth saying, because many discussions of hate speech make use of uncontroversial examples of hate speech, directed toward social groups whose classification as oppressed is generally not regarded as controversial. Neither of these things are the case when it comes to gender-critical speech. Trans people, the alleged targets of gender-critical speech, are not one of the social groups usually talked about in connection with hate speech—the paradigm cases are race and religion. And we’re not looking for an explanation of *why* certain gender-critical expressions are hate speech, but rather for an answer to *whether* they are. So our question, framed in terms of Waldron’s account of hate speech, would be something like: does gender-critical speech assault trans people’s human dignity, denying them the security and assurance owed to all members of society?

Some certainly think that it does. Judith Butler, one of the main proponents of gender identity ideology, said in an interview with *New Statesman* that ‘trans women[’s] . . . abiding and very real sense of gender ought to be recognized socially and publicly as a relatively simple matter of according another human dignity. The trans-exclusionary radical feminist position attacks the dignity of trans people’ (Ferber 2020).<sup>14</sup> The judge in *Maya Forstater vs CGD Europe 2019*—a case determining whether the termination of Forstater’s employment relationship because of her gender-critical feminist tweets was a violation of her rights because gender-critical speech is protected as a ‘philosophical belief’—found that her tweets failed at the fifth condition for a philosophical belief, namely that it ‘must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.’<sup>15</sup> (The judge’s verdict was later overturned).

<sup>14</sup> ‘Trans-exclusionary radical feminist’, or ‘TERF’, is gender identity activists’ preferred term for gender-critical feminists. See also Chapter 7.

<sup>15</sup> (*Maya Forstater vs CGD Europe*, 2019), p. 16. Because the fifth condition has three elements, it is technically possible that the judge found Forstater’s tweets to be not worthy of respect in a democratic society, or to conflict with the fundamental rights of others, rather than to be incompatible with human dignity. But there is some evidence in the judgement to suggest that this is not the case. First of all, there is a reference to *P v S and Cornwall CC*, 1996, 795, a European Court of Justice case in which a person was fired for undergoing sex reassignment surgery, quoting ‘To tolerate such discrimination

These claims are not, of course, sufficient to establish that gender-critical speech is, in fact, incompatible with human dignity. For Waldron, assaulting dignity means denying a person's security and assurance, failing to accord them equal recognition respect in virtue of our common humanity. But nothing about denying that males can be or become female, and vice versa, requires denying the equal humanity of a trans person. Humans have sexes; someone is not less human because they're one sex or the other. (Or at least, that is what we are morally committed to as social egalitarians; in practice, if one sex is treated as less than fully human, it's females, not males).<sup>16</sup> Perhaps a transwoman confronted with a 'women don't have penises' sticker in a public space might feel excluded, specifically from the category 'women,' but Waldron's concern is exclusion *from society*, not from a specific social concept. As Kathleen Stock has argued, concepts—like 'woman'—are not tools of exclusion or inclusion, they're tools for tracking features of the world and the interests humans have in them (Stock 2021, Chapter 5).

When there is something that a person wants, for people to refuse to give it to them may be undermining of their 'security' or 'assurance' that they will get it. When male people desire to be recognized, acknowledged, treated as women, it undermines their security and assurance that they will be when there are women on the streets wearing T-shirts proclaiming 'woman / wʊmən / noun / adult human female'. But Waldron is unlikely to think that *any* undermining of security and assurance amounts to a violation of dignity and a failure of recognition respect. After all, he said very clearly that we did not owe all people equal appraisal respect. If there are valid reasons for saying things that someone wants you not to say, or refusing to say things that someone wants you to say (e.g. saying that a woman is an adult human female, refusing to call a male person a 'woman'), then that refusal does not count as a violation of that person's dignity. There are two high-profile cases, both tied to desires that relate to identity, where the widespread public response was to refuse rather than to assent to an individual's desires. Rachel Dolezal wanted to be treated as black, Emile Ratelband wanted to be treated as twenty years younger (Aitkenhead 2017; Boffey 2018). There are valid reasons for refusal in the case of gender-critical speech, namely the feminist

would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard' (para. 66, p. 19). Second, there is a reference to the Equality Act, which defines harassment among other things as violating a person's dignity (para. 73, p. 21). Finally, in the analysis, the judge says 'I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others' (para. 84, p. 24); 'people cannot expect to be protected if their core belief involves violating others' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them' (para. 87, p. 25), and 'the Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society' (para. 90, p. 25).

<sup>16</sup> See e.g. Catharine MacKinnon's book *Are Woman Human?* (2007), in particular the eponymous essay from (1999).

ends served by being able to articulate a conception of women as a political class, and argue for that group's legal, political, social, and economic interests.

One problem with this response is that opponents of gender-critical feminism are likely to simply disagree. They may deny that feminist ends are ends we should care about, or insist that these ends can be met in a 'trans-deferential' way (meaning, deferring to trans people's self-identifications). Or they may allow that there are valid reasons for refusing to say (or not say) certain things, but say that when it comes to sex/gender identifications, these trump all other interests. Maybe not all desires to be recognized, acknowledged, or treated in a particular way should be met on pain of violating human dignity, but trans people's desires to be recognized, acknowledged, or treated according to their sex/gender identifications should. If these specific desires are frustrated, then that is a violation of dignity and a failure of recognition respect.

At this point, we end up in a stalemate. Gender-critical feminists say that calling a male a man is not a violation of dignity, because the person is a man (the defences being truth, and freedom of opinion),<sup>17</sup> and there are compelling feminist reasons for them to call males 'men' (the defence being the moral and political importance of sex-based justice). Opponents say that calling a male (who identifies as a woman) a man is a violation of dignity, because of the overriding importance of sex/gender identifications. Where to from there?

The risk of working through accounts of hate speech to see whether they classify gender-critical speech as hate speech (in the same way that we worked through accounts of slurs to see whether they classified 'TERF' as a slur in Chapter 7) is that we will inevitably end up in this kind of stalemate. To someone already convinced of the absolute and overriding importance of 'gender identity', a sticker saying 'women don't have penises' will seem to assault dignity, convey contempt, undermine equality, dehumanize, and vilify (see above). To those not already convinced of this, including gender-critical feminists but not limited to them, it will not. We're left none the wiser about who is right, because whether gender-critical speech counts as hate speech according to any of these accounts ultimately depends on the prior question of how important 'gender identities' are, and whether they do trump all other interests.<sup>18</sup>

Some of those who have thought hard about hate speech think this problem is a general one. Stanley Fish, for example, says '[i]t could just as well be said that one man's hate speech is another man's (or woman's) speaking of truth to a world

<sup>17</sup> As formalized in the United Nations' Universal Declaration of Human Rights, Article 19: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

<sup>18</sup> We end up in structurally similar stalemates considering whether criticism of Islam, or of Israel, is hate speech; for those two, the disagreement depends on the prior question of how we're understanding Islam, or Israel.

that needs to hear it. Only if the content of hate speech were self-identifying—if upon hearing an instance of it, a *universal* chorus would explain in unison, “That’s hateful”—would it stand still long enough to become the object of principled regulation. But if it is a moving target, as the endless, inconclusive discussions of it amply show, any regulation of it—or of what some persons take “it” to be—will be *ad hoc* and political. In the end, then, hate speech can be defined only as speech produced by persons whose ideas and viewpoints you despise and fear. *Hate speech is what your enemy says loudly*’ (Fish 2019, p. 51, his emphasis).

If Fish is right, and the problem generalizes, then attempting to pin down the ‘correct’ account of hate speech in the first place, in order to ask whether gender-critical speech fits the description, is futile. There is no correct account, on this view; there is just disagreement, and the naming of some of what we each disagree with as ‘hate speech.’ Opponents of gender-critical feminism will call gender-critical speech hate speech because it is what their enemy says loudly. Gender-critical feminists could just as well start calling gender identity activists’ speech hate speech, on the basis of its dismissive and trivializing attitude towards female people’s rights and protections.

Whether the problem generalizes or not, it’s a problem when it comes to gender-critical speech. The underlying issue, relating to the importance of ‘gender identities,’ remains unsettled. Is failing to acknowledge a person’s ‘gender identity,’ that is, their subjective sense of themselves as being a man or a woman, a violation of recognition respect, or not?<sup>19</sup> It is important to keep in mind that the parties to the disagreement use these terms differently. Hold fixed that ‘man’ and ‘woman’ are gender terms for both parties. For those who think that gender is sex caste, transwomen are not women because they are not female, and transmen are not men because they are not male. Gender identity is literally beside the point. For those who think that gender is identity, transwomen are women because they have a ‘woman’ gender identity, and transmen are men because they have a ‘man’ identity. Sex is literally beside the point. So the issue is not whether trans people have the gender identities they say they do, in which case it would be *obviously* disrespectful to deny that. Denial would involve presuming greater authority than the trans person over how they feel about themselves. Rather, the issue is whether

<sup>19</sup> A reviewer made the interesting suggestion that denying a person’s self-conception might helpfully be understood as akin to telling someone that they have an adaptive preference, or are in the grip of false consciousness. This looks especially plausible in the case of gender identity, a self-conception that is the product of an ideology, where denying the self-conception is the result of rejecting the ideology. This is certainly fraught, but it need not be a violation of recognition respect. The same kind of tension would appear between, say, a radical feminist and a liberal feminist sex worker, where the latter has a self-conception as sexually liberated and empowered, and the radical feminist is denying the accuracy of that self-conception on the grounds that she thinks the sex worker is in the grip of patriarchal ideology that positions women as empowered when they act in the service of men’s sexual interests.

the dispute between gender identity activists and gender-critical feminists over what gender is *must* be settled in favour of gender as identity. If it's not the case that it must, then it cannot be that failing to acknowledge gender identity is a failure of recognition respect.<sup>20</sup>

Whether failing to acknowledge a person's 'gender identity' is a violation of recognition respect is a moral question currently being debated in the public sphere, and while gender identity activists tend to treat it as settled, it is not a matter of general consensus—even merely among progressives—in anything like the way it is for e.g. contemptuous comments about whole racial groups. The gender-critical position is the *mainstream* position outside of the activist left in wealthy liberal countries. Anti-racist goals don't impinge on any other identity group's legitimate political interests, whereas gender identity activists' goals do impinge on both women's and lesbian, gay, and bisexual people's interests. While the question remains actively contested, it will not be settled by an account of hate speech, even if some other instances of speech may be. So we should not take the approach of identifying the correct account of hate speech and then working out whether it classifies gender-critical speech as hate speech.

In the rest of the paper, then, we should ask a slightly different question: should gender-critical speech be suppressed?<sup>21</sup> We can answer this question by thinking more directly about the harm that gender-critical speech does (if any), and how these harms (if any) balance out against the interests that gender-critical speech is advancing.<sup>22</sup> I will assume that there is some threshold level of harm that would make it appropriate to suppress gender-critical speech regardless of whether it advanced some interests. For example, if gender-critical speech involved a direct incitement to physical violence, then it would cross this threshold. Below that threshold, I will allow that whether it can be suppressed depends on the balance of the harms done by the speech against the interests served by the speech. For example, if gender-critical speech causes low-level emotional suffering

<sup>20</sup> One might be tempted to wonder why we can't have both gender concepts: caste and identity. We can, but it doesn't help, because what gender identity activists want is that 'trans women are women!' and 'trans men are men!'; and they wouldn't get that from a compromise solution in which trans-women are women in one sense but men in another; transmen men in one sense but women in another. I am also sceptical that a compromise could be reached by conceding the terms 'man' and 'woman', because too many gender identity activists also contest the terms 'male' and 'female', and there wouldn't be much benefit in gender-critical feminists having a sense of gender as sex caste yet with no words left to refer to the people in the caste.

<sup>21</sup> Related questions include: should those who express gender-critical ideas be punished/sanctioned? Do the targets of gender-critical speech deserve compensation? For an intriguing approach to compensation for hate speech see (Meyers 1995).

<sup>22</sup> Robert Simpson takes a similar approach, albeit still in pursuit of a category of hate speech: 'a harm-prevention framework—in which our principal aims are to characterize the harms that may be caused by hate speech, and ascertain whether hate speech does in fact cause those harms—should be adopted for assessing the legitimacy of legal restrictions on hate speech' (Simpson 2013, p. 703). Just substitute the words 'gender-critical speech' for 'hate speech'.

(e.g. insecurity, self-doubt), then it will not cross the threshold, and so depends on the balance of harms done against interests served.<sup>23</sup>

In Section 8.3.1, I briefly consider the claim that gender-critical speech *constitutes* harm, and argue that this is subject to the same problems as looking for an account of hate speech to settle the matter was. In Section 8.3.2 I follow Jeff Howard and ask whether gender-critical speech is ‘dangerous speech’, arguing that in virtue of its political purpose, and in light of demographic considerations about the population alleged to be targeted by it, it is not.

### 8.3.1 Constitutive harm

It has been standard to make a distinction between speech that *causes* harm, and speech that *constitutes* harm, when thinking about the relation between speech and harm.<sup>24</sup> MacKinnon, for example, has argued that pornography itself does harm: it defames and discriminates against women (MacKinnon 1991; 1993). Langton defends MacKinnon’s conclusion, saying more about what it is for pornography to constitute harm. Some speech is not merely a ‘saying’ but a ‘doing’. Speech *acts* are expressions that do things. For example, saying ‘look out!’ *warns* someone, saying ‘I promise you’ *promises* someone, saying ‘I now pronounce you husband and wife’ (when you have the requisite authority and are in the right context) *marries* two people, saying ‘shoot her’ *urges* someone to shoot (Langton 1993, p. 295; following Austin 1962). What harm has speech been said to ‘do’, in this way? Constitutively harmful speech may humiliate, threaten, or legitimate someone’s violation (De Silva 2020, pp. 41–2); it may offend, insult, or intimidate (p. 43); it may subordinate or silence (p. 44). Langton develops the idea that pornography silences because the powerful can do more with words than the powerless, and one of the things they can do is ‘silence the speech of the powerless’ (Langton 1993, pp. 298–9). Pornography does this to women by making women’s refusal of sex and sexual violence unspeakable (p. 324).

Is this a useful idea for thinking about the harm gender-critical speech does, if any? One problem with the examples given above is that there are always causal harms in the vicinity. Saying ‘shoot her’ urges someone to shoot, but if that person shoots then it also causes her to be shot (and if they don’t shoot, it still causes her to be at risk of being shot). Pornography silences women by making sexual refusal unspeakable, but if a woman’s refusal is not given uptake in a specific case,

<sup>23</sup> This may seem to licence gender-critical feminists to engage in targeted harassment of trans people, so long as this ‘only’ causes low-level emotional suffering. I am only saying here that such speech wouldn’t be a clear candidate for suppression. I take up the separate question of harmful speech in Chapter 9.

<sup>24</sup> For further discussion of constitutively harmful speech as it relates to legal protections against vilification see (De Silva 2020).

it also causes rape (and if it does not cause rape in the specific case, it still causes her to be at risk of being raped). And so on. If we're really worried about the rape rather than the silencing itself, then we might consider pornography as causal harm (incitement to rape), rather than as constitutive harm (silencing). To really test whether it's constitutive harm rather than causal harm we care about, we'd have to find a case of constitutive harm without causal harm.<sup>25</sup>

Here's an attempt to try to pull the two apart. Suppose there is a society in which people are very much committed to treating people as equals. A small group of people in this society subscribe to a particular religious view, and are inculcated into this view through family lines. Everyone else in the society thinks that these people are intellectually inferior, because the religious beliefs they subscribe to are so implausible. But they never discriminate. There is no material difference, in this society, between members of that religious group and others in terms of life expectancy, health, employment, income, and so on. People are not less cordial with members of the religious group. In a society like this, the expression of the belief that this group of people are intellectually inferior does not cause anyone to treat the members of the group any differently.

In this context, suppose two people from outside the religious group are filming a live political debate for a local television channel, and while they are perfectly friendly with the members of the religious group working on set, during their debate one mentions the group and the other makes the remark 'a cockroach has more intelligence than those people'. By *those people* he refers to the religious group. By drawing a comparison between cockroaches and a particular social group, he dehumanizes them, positioning them as inferior in relation to other people. This is a failure of recognition respect, in Waldron's terms. This is an excellent candidate for constitutively harmful speech, in that it dehumanizes and subordinates. But we are assuming that this public speech will not affect any individual members of the group in any way in terms of their material outcomes, or put them at risk of being affected in this way, so robust are the citizens' commitments to equal treatment. So it is not a candidate for causally harmful speech. Should this speech nonetheless be suppressed? I think it should not, and I think this shows that our opposition to constitutively harmful speech comes from the close relationship it normally has with causal harm.

This case is exaggerated relative to our purposes: gender-critical speech does not dehumanize or subordinate trans people. There is no entailment from any of the gender-critical commitments outlined in Section 8.1 to the denial of trans persons' moral equality. Many of those expressing gender-critical ideas go

<sup>25</sup> An alternative, not covered by the thought-experiment to follow, is that we care about constitutive harm only when there's causal harm, but that we do care about it *additionally* to the causal harm. We might think the causal harms (perlocutionary effects) are made worse by the constitutive harms (illocutionary effects).

to great lengths to make clear their commitment to trans rights and anti-discrimination protections. What is at issue is not whether trans people are social equals, but whether males who identify as women/female *are women/female*, and females who identify as men/male *are men/male*. This is a disagreement over concepts (what gender is) and terms (whether ‘woman’ and ‘man’ are sex terms or gender terms). But there are plenty of disagreements in the world, over both concepts and terms, that do not produce accusations of hate speech. The case is useful not for the content of its speech, but for its quarantining of constitutive harm.

What the case helps to show is that when we are careful to separate constitutive harms from causal harms, it is much less obvious that constitutively harmful speech is harmful, or if we prefer to grant that it is, that this particular kind of harmful speech should be suppressed. It is likely that those already committed to the overriding importance of respecting ‘gender identities’ will consider it a constitutive harm (perhaps ‘denial of first-personal authority’)<sup>26</sup> while those not so committed will not. We end up back in the stalemate we were in when attempting to settle the issue with reference to accounts of hate speech. For this reason, I’ll set the possibility of gender-critical speech being constitutively harmful aside, and focus on the possibility of it causing harm.

### 8.3.2 Dangerous speech

Jeff Howard argues that ‘we have an enforceable moral duty to refrain from speech that incites the incontrovertible violation of others’ rights’ (Howard 2019, p. 237).<sup>27</sup> The violation does not have to be imminent (p. 211). He thinks that ‘incendiary speakers can render themselves morally liable to coercion’ (p. 211). This is a reorientation of discussions of free speech and hate speech, drawing on the resources of just war theory (p. 212). When speech will impose harm, we can ask whether that harm is narrowly proportional—which means, whether those targeted by it are morally liable to suffer the harm—and whether it is widely proportional—which means, whether those who are not morally liable to suffer the harm will suffer harm, and what the effects of that will be. This distinction allows us to account for the wider consequences of suppressing speech, as well as of not suppressing it. We can also ask whether suppression meets a necessity condition, which means that ‘no more force, or harm, than necessary to defuse a

<sup>26</sup> See Bettcher (2009), and further discussion in Chapter 3.

<sup>27</sup> While this wording suggests it’s the *violation* that’s incontrovertible, he is clear earlier in the paper that it’s the *rights* that must be incontrovertible. Dangerous speech is speech that incites violation of incontrovertible rights, not speech that incontrovertibly incites the violation of rights (Howard 2019, p. 215).



threat is permissible' (p. 248). Listing all of your housemate's character flaws until he cries so that he stops interrupting you when you are trying to read would violate the necessity condition applied to expression.

Establishing that speech incites a clear violation of others' rights will be enough to show that the speaker has violated an enforceable duty, which means that in principle her speech can be suppressed (she can be made to do what she should have done). But Howard treats whether we should in fact suppress it as a separate question that depends on wide proportionality and necessity (p. 213). This helps to show that counter-speech is sometimes preferable to suppression, because when counter-speech would work to eliminate the harm, suppression will violate the necessity condition (pp. 248–54).

In focusing on 'dangerous speech,' Howard is limiting his focus to speech that advocates (whether explicitly or implicitly) or justifies a course of action; where that course of action will violate rights that are incontrovertible, such as the right to life; and where that speech 'dangerously incites' the course of action, meaning that it puts people at risk by advocating or justifying the particular course of action (pp. 215–16). In order to apply this idea in the case of gender-critical speech, it will be useful to consider some of the examples he gives of incendiary speakers, or speech that incites the violation of others' rights. He mentions online extremists advocating a duty to kill, in one an Islamic cleric advocating the killing of Americans, in the other a Norwegian white supremacist advocating the killing of Muslims (pp. 208–9). He also mentions a Ku Klux Klan member calling for 'revengeance' against black and Jewish Americans (p. 209), and a hypothetical case in which a speaker addressing an audience 'argues that members of [a] religious group are vile scum who deserve to be killed,' after which time one member of the audience attacks another who is a member of that religious group (p. 216).

A hypothetical case which does *not* count as dangerous speech is also provided, in which a woman addresses an audience with an argument for atheism, and in response a group of religious fanatics murder her and others (p. 218). Howard writes 'she is engaging in activity that she, intuitively, has every presumable moral right to engage in: the promulgation of her reasonable convictions on matters of religious truth' (p. 218). Because her speech is valuable we should protect her from the violence of those provoked by it, rather than suppressing her speech to avoid that violence (pp. 218–19).

I think it's more or less obvious that gender-critical feminists are like the woman arguing for atheism, who has the bad luck of antagonising a group of religious fanatics. Gender-critical speech is feminist speech, uttered by women as part of a good faith attempt to explain the history of women's oppression, articulate why women are a class, say what women have in common, and provide a coherent justification of, and vision for, feminism. As a historically oppressed group women have every right to do this, and as a group of people whose

self-determination has been severely impacted by men, they have every right to do that without men.<sup>28</sup>

But I'm a gender-critical feminist, so I would say that. And in any case, that won't satisfy the opponent of gender-critical feminism, who is likely to see it as more like the first hypothetical case. So instead let's ask, what's the strongest case we can make that gender-critical feminists are 'incendiary speakers,' whose speech incites the violation of trans people's incontrovertible rights? If we can establish this, then—supposing that Howard is right—we can show they've violated an enforceable duty not to do so, and we can ask whether enforcing that duty by suppressing their speech would be widely proportionate and necessary.

Because the rights in question have to be incontrovertible, we can't pin the harm to anything that is at issue between gender-critical feminists and their opponents, like an alleged right that people believe that one's gender identity determines one's sex/gender.<sup>29</sup> We're dealing with things like the right not to be killed, or physically assaulted, or raped, for example.<sup>30</sup> The opponent of gender-critical speech can work with this, however, by referring to violence against trans people, including the murders, assaults, and rapes that are perpetrated against them. Dangerous speech will be speech that incites the violation of trans people's rights to life, and rights against physical violence. Now that we are clear on what the rights are, we can ask whether gender-critical speech advocates for, or justifies, the perpetrating of murder, physical assault, or sexual assault.

Who perpetrates these harms? It's useful to establish this, in order to figure out whether there's a plausible connection between those people and gender-critical speakers. In Howard's hypothetical examples, there were speakers directly addressing audiences, and either members of the audience or members of the public aware of the events were incited. In the two real cases of terrorism, there was online content (the Islamic cleric's YouTube channel, and the white supremacist's manifesto), which the terrorists had consumed directly. So once we know

<sup>28</sup> By this I mean that ideas about womanhood and femininity have largely been constructed by men to benefit men, which we can see most clearly when we consider the history of women from around the invention of agriculture through to the early 1960s, when feminism finally started to take off. Because of this egregious and long-lasting violation of self-determination (at the level of the whole group, but impacting on every individual woman) it is especially pressing that women begin to rewrite what it means to be a woman/female without men's input, that is, that *women decide this for themselves*. I cannot think of any other historically oppressed social group that is in a comparable situation. See also Hacker (1951).

<sup>29</sup> I say this, rather than 'alleged right to have one's gender identity respected,' because even if there were this right, it wouldn't settle anything between the gender-critical feminist and her opponents. She can accept that you identify as a woman without accepting that your identification makes you a woman, or female.

<sup>30</sup> These are all physical harms. This should not be taken to imply that I don't think psychological harm counts as harm. I do, but I don't think there are incontrovertible rights against psychological harm, precisely because psychological harm is more subjective, and harder to prove. Thus I bracket it in this paper, and take it up in Chapter 9.

who perpetrates the relevant violence against trans people, we can ask about the possible connections between those people and gender-critical feminists.

There are some cases in which trans people are murdered by their sexual partners. The ‘trans panic’ defence is a version of the ‘gay panic’ defence in which criminal defendants try to argue temporary insanity, diminished capacity, provocation, or self-defence to get their charges reduced. As Cynthia Lee describes it, ‘the defendant claiming trans panic tries to blame the transgender victim by claiming the victim’s deceit provoked him (“if he hadn’t lied about being a woman, I wouldn’t have killed him”)’ (Lee 2008, p. 478). Although she doesn’t provide data for trans murders in particular, Lee notes one study on violence against lesbians and gay men finding that 67% of perpetrators were white and 94% male; and another on violence against lesbians, gay, bisexual and transgender people finding that 47% were white and 82% were male (Lee 2008, p. 512, fn. 202).

It’s hard to be precise about the other perpetrator groups, because there isn’t much data. In Lee’s paper only one case involving the trans panic defence is mentioned, but she also writes that the defence was ‘a fairly recent modification of the gay panic defence’, so there may have been more cases attempting to use it in the intervening twelve years (p. 478). The United States does not collect systematic data on trans homicides (Stotzer 2017), but Alexis Dinno attempted an estimate for the years 2010–2014. He found that ‘the overall homicide rate of transgender individuals was likely to be less than that of cisgender individuals’, but that ‘the homicide rates of young transfeminine Black and Latina residents were almost certainly higher than were those of cisfeminine comparators’ (Dinno 2017). Estimates of the transgender homicide rate during this period were between 3.66 people per 100,000 and 110 people per 100,000. (The smaller number came from assuming the Transgender Day of Remembrance and National Coalition of Anti-Violence Programs homicide figures were not undercounted, and that there was a larger transgender population; the higher number came from assuming the figure undercounted so that four in every five homicides were not reported, and that the transgender population was smaller) (Dinno 2017). In Australia, there are just two deaths on record in the last decade, for death by murder, suicide, or drug overdose (Lavopierre 2019).

Wilfred Reilly, in an attempt to investigate frequent news headlines claiming an ‘epidemic’ of trans murders, looked into the Human Rights Campaign’s (HRC) database for transgender individuals killed by violent means in America,<sup>31</sup> and found that it was 29 in 2017, 26 in 2018, and 22 in 2019 (Reilly 2019). (Unfortunately the HRC does not usually note information about the perpetrators. But we do know as a general matter that most murders are committed by men. For example in the United States in 2019, there were 10,335 murders

<sup>31</sup> <<https://www.hrc.org/resources/violence-against-the-transgender-community-in-2017>>

by men, and 1,408 murders by women<sup>32</sup>—although there were also 4,502 murders marked as ‘unknown’ (Statista 2019).) Reilly looked into some of the cases tracked by the HRC, and found that many were not accurately classified as hate crimes. One, for example, was killed in the course of trying to intervene in a physical altercation between family members. Reilly reports on another author’s review of around half of the cases recorded by the HRC, who found that 37 were due to domestic violence, 24 involved sex workers (and related to the dangerous conditions of illegal sex work), a few were random acts of violence, and ‘exactly four of the perpetrators were clearly motivated by “anti-trans bias”, animus, or hatred’ (Reilly 2019; see also Greene 2019). Reilly also reports that transgender murders were usually perpetrated between people of the same race. Seven of the nine killers of white trans people were white, and 34 of the 37 killers of black trans people were black, during 2015–2019.

We have a somewhat unclear perpetrator pool here. It is likely to be mostly, if not entirely, men (as in Lee 2008, discussed above). It contains men who react violently to a perceived threat to their heterosexuality, or who actively target gay or trans people. It contains men who perpetrate domestic violence, men who use sex workers, and a few men—four, as far as we can be sure—with bias, animus, or hatred towards transgender people. It’s hardly credible to try to track domestic violence, violence against sex workers, or acts of random violence back to gender-critical feminist speech. The first two are important social issues that radical and gender-critical feminists stand *against*. We could use the figure of four hate crimes in a five-year period in a country with a population of 328 million, come up with a plausible estimate for the world with some generous overestimating, and this would still be a very small number of men. If we multiply the United States’ population by 23 we get the population of the world, so that’s roughly 92 men, and if we generously exaggerate that by 5 (the overestimate used by Dinno for trans homicides) we get 460. The question that remains is, *is it plausible that these 460 men were incited to murder by gender-critical feminists?*<sup>33</sup>

Bear in mind that none of the gender-critical feminist claims discussed in Section 8.1 had any connection to advocating for, or attempting to justify, violence against trans people. All could be held perfectly consistent with advocating a zero tolerance policy on all forms of violence. So there is certainly no direct incitement. Could there be indirect incitement, instead? Might gender-critical feminists say ‘men shouldn’t be allowed to compete in women’s sports’ and men *hear* ‘you should murder the next transwoman you see?’ That is

<sup>32</sup> An analysis of women who killed in Victoria, Australia between 1985 and 1995 ( $n = 86$ ) found that 40% of the female perpetrators killed a partner or ex-partner, and that 59% of those women killed in response to their partner’s or ex-partner’s violence (Kirkwood 2003; see also discussion of female offenders in Lawford-Smith, forthcoming).

<sup>33</sup> We can collect the relevant evidence, and ask the appropriately modified question, for other incontrovertible rights like the right against physical assault, or rape.

possible, but it looks more like the atheist talking to the audience and coming up against the religious fanatics than it does the speaker arguing that a particular religious group are vile scum who deserve to be killed. Perhaps opponents of gender-critical feminism will argue that gender-critical feminist ideas influence 'the culture', and the culture influences whether trans people are accepted in their chosen gender/sex categories. If we all thought transwomen were really women, then there would be no 'trans panic', because it would be fine, and indeed expected, for a woman to have a penis. If we all thought transwomen were really women, there wouldn't be any trans hatred, and so no hate-motivated murder, assault, or rape. So maybe gender-critical feminists aren't directly inciting this violence, but they're inciting it indirectly, by feeding ideas into the culture which fail to work for the acceptance of gender identities as determinants of sex/gender.

I am sure that Howard would not classify such an indirect causal claim as 'dangerous incitement'. This looks less like incitement and more like extremely diffuse causal contribution, on a par with the role one person's greenhouse gas emissions might play in climate change, or the role purchasing one sweatshop T-shirt might play in global labour injustice. Gender-critical feminists do contribute to the lack of acceptance of gender identities determining sex/gender classification, but that is because they object to such acceptance on political grounds, finding sex classification important. It is perfectly possible for us to think sex is real and can't be changed, that women are adult human females, and that transwomen are men/male, while also thinking that violence against anyone on the basis of how they choose to present themselves or how they choose to think of themselves is unacceptable. If acceptance of gender identity as determining sex/gender classification was the only way to end violence against trans people, then a case could be made against everyone who contributes to a lack of this acceptance that they were endangering trans people's lives (albeit to a lesser degree than non-trans people's lives are endangered). Then we'd be dealing with a collective action problem, but it would be possible to argue that as outspoken contributors to this lack of acceptance, gender-critical feminists had a particularly strong responsibility.

But there is no evidence that this would be the only way to end violence against transgender people. Indeed, surely as strategies go it is a bad one, because it involves science denial (making false claims about what sex is and how it can be changed) and a major shift in interrelated terms and concepts that is unlikely to be easily mainstreamed. The words that pick out sex/gender exist in every language, and connect up with words describing particular roles, like 'mother', and sexual orientations, like 'lesbian'; and not only the terms but the self-conceptions that relate to them, for example thinking that in order not to be 'transphobic' everyone had better start thinking of themselves as attracted to gender identities, or as pansexual. So long as there is a better way to end violence, then

gender-critical feminists are not even causal contributors to violence against trans people along with everyone else who doesn't buy into gender identities, and in that case we don't even need to move to the second stage of asking whether we should enforce gender-critical feminists' duty to not incite rights-violations by suppressing their speech. We should not, because they haven't violated any such duty. Gender-critical feminist speech is not dangerous speech.

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