Taking Gender Seriously: Transgender Equality as Gender Equality

Ding (din@arizona.edu)

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1. Leading Analyses of Transgender Equality

Prevailing approach in trans law: discrimination/differential treatment.

> *Biological analysis*: transgender equality = elimination of differential treatment based on sex.
>
> *Stereotyping analysis*: transgender equality = elimination of differential treatment based on failure to conform to sex stereotypes.
>
> (Sui generis *analysis*: transgender equality = elimination of differential treatment based on transgender status/gender identity, understood as separate from sex or sex stereotypes.)

Prevailing approach in trans philosophy: gender-neutral conceptions of autonomy.

> Details vary: patient-physician autonomy, bodily autonomy (more broadly), negative liberty against state intrusion, and first-person authority (à la Bettcher).

My view: These analyses fail because they do not take the gender in transgender equality seriously.

> *Problem*: It turns out that it's surprisingly difficult to construct a successful alternative.
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> *My positive proposal*: MacKinnon on sex discrimination + Haslanger on gender categories.
>
> > *Pace* the prevailing approach in trans law: substantive (not formalistic) conception of equality.
> >
> > *Pace* the prevailing approach in trans philosophy: explanatory (not primarily normative) & radically pluralistic conception of gender.

2. Trans Law

Bostock v. Clayton County (U.S. 2020): discrimination based on transgender status is discrimination based on sex because, if a trans person had been assigned a different sex at birth, they would not have been treated differently from a similarly situated cis person.

> On a biological analysis, discrimination against trans women is discrimination against persons assigned *male* at birth ("biological males").

Smith v. City of Salem (6th Cir. 2004), extending *Price Waterhouse v. Hopkins* (U.S. 1989): discrimination based on transgender status is discrimination based on sex stereotypes, which is in turn discrimination based on sex.

> Writing of a trans woman: "the discrimination he [sic] experienced was based on his [sic] failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance." *Smith*, 378 F.3d at 572.
>
> On a stereotyping analysis, discrimination against trans women is discrimination against "men [who] *do* wear dresses and makeup, or otherwise act femininely." *Id.* at 574 (emphasis in original).

My worry: Together, these two analyses complete a cis-centric account of transgender equality.

> Whereas on the biological analysis a trans woman is targeted for discrimination as a gender-nonconforming *male*, on the stereotyping analysis she is targeted as a *gender-nonconforming* male.
>
> It objectifies and degrades trans women to analyze discrimination against us as discrimination against "men" who defy masculine gender roles and expectations with our frivolous "dresses and makeup."
>
> Furthermore, to treat trans women's bodies as "male" is itself a *social* act of interpretation that abrogates trans women's own efforts to make sense of our bodies on our own terms.

3. Trans Philosophy

> We do not typically think that it is ethical to require psychological assessments prior to abortions, for instance, an intervention which bears some parallels to transition-related care. Both are frequently justified by reference to personal autonomy and are frequently but not always motivated by dis-tress, and yet neither pregnancy nor being trans is illness. (Ashley 2019, 481–82)

My worry: Bodily autonomy arguments like Ashley's follow, rather than challenge, the cis-centric legal account criticized earlier; they approach gender-affirming care as if it really is *just* like any other form of medical care.

> In an actual analogy to abortion, gender-affirming care is essential to gender equality in a way that most other forms of medical care are not: transition-related care vs. *gender*-affirming care.
>
> Its access, moreover, is regulated through a predominately cisgender medical profession, which means in practice that a requirement for psychological assessments most often becomes a requirement that trans patients justify who we are to the satisfaction of our cis physicians.

4. Alternative

Challenge: How is transgender equality an issue of gender if trans people come in any/all genders?

My proposal: sophisticated account of gender + sophisticated account of equality.

> *Gender categories*: A category is gendered (for critical feminist analytical purposes) if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the category is "marked" as a target for this treatment by observed or imagined, or would-be-observed or would-be-imagined, bodily features presumed (taken, suspected, expected, etc.) to be evidence of a certain (present, previous, or future) body socially interpreted as sexed one way or another.

Trans people are systematically disadvantaged because of the unequal social meaning of our bodies being interpreted as trans; to bring an end to that inequality is an issue—indeed, a requirement and condition—of gender equality.

> *The category of trans persons*: *S* is a trans person (for critical feminist analytical purposes) iff_{df} *S* is systematically subordinated along some dimension (economic, political, legal, social, etc.), and *S* is "marked" as a target for this treatment by observed or imagined, or would-be-observed or would-be-imagined, bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (present, previous, or future) body socially interpreted as trans.

Transgender equality = the equality of trans persons, where *trans persons* comes out as a subordinate gender category for critical feminist analytical purposes. [genders ≠ gender categories]