

H.R.5: Legal Analysis & Necessary Revisions.

INTRODUCTION

The “Equality Act” was introduced and passed in the House of Representatives in 2019 as H.R.5.

Its purported intent is to expand the classes of people and situations specifically protected under federal civil rights legislation.

These are three classes of people named for additional or altered protection under H.R.5:

1. People who face discrimination on the basis of sex.
2. People who face discrimination on the basis of sexual orientation.
3. People who face discrimination on the basis of “gender identity”.

H.R.5 then provides that “gender identity” shall take priority over both sex and sexual orientation; so that a man who identifies as a woman is to be treated as a woman under the law, regardless of his sex; and so that a man can be a lesbian under the law.

H.R.5 defines “gender identity” as “the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.”

The main problem, aside from the definition’s circularity, and aside from the fact that sex is observed at or before birth and not designated, is that “gender identity” erases all rights and protections, existing and proposed, that are based on sex or sexual orientation. If men can be women, and vice versa, then there can be no meaningful discrimination based on an immutable sex category, or on a sexual orientation, which is meaningless without biological sex. Common sense informs us that a woman who only wants and only has sex with a man is not a lesbian, no matter how her male partner “identifies” on the basis of “gender”. But under H.R.5, “gender identity” would trump sex. She and her male partner could be entitled to legal protection as a lesbian couple or a gay male couple, depending on how they both “identify”.

SEX vs “GENDER IDENTITY”

Sex is biology: All humans belong to one of the two biological sexes. If a person has a Y chromosome, he’s male; if not, she’s female. It’s that simple. Even so-called “intersex” people either have or do not have a Y chromosome. All people are either female or male, and their sex does not change, because chromosomes do not change, at least so far.

Under existing federal law, Title IX of the Civil Rights Act of 1964 protects women from sex discrimination in education and school sports; and Title VII protects against sex discrimination in employment. H.R.5 in its present form would destroy those existing protections by effectively redefining the protected sex class “women and girls” to include men and boys.

Discrimination against women is based on sex, not gender. Women have been excluded from employment, credit, military service, education, jury service, etc., based on their sex. “Gender identity” reinforces regressive sex-based stereotypes that assign dominance to males and submission to females; federal law should not be doing that.

It is not possible for women to “identify” out of their discrimination by simply claiming to be men. It is sex that needs specific protection in the interests of justice. And it is “gender”, i.e., enforced femininity and masculinity, that needs to be abolished altogether, if equal rights are to be achieved.

IMPLICATIONS OF THE EQUALITY ACT FOR LESBIANS & GAY MEN

H.R.5 would similarly destroy the protections afforded by existing law to lesbians and gay men, but especially for lesbians, who often face multiple forms of discrimination – sex, pregnancy, sexual orientation, and nonconformity with traditional sex roles (that is, “gender”).

Homosexual people are now called hateful and transphobic for the very thing that makes them lesbians or gay men; i.e., for excluding people from their dating pools based on sex. But lesbians and gay men need federal protection from discrimination in employment, public accommodations, housing, health care, etc.; also from violence that targets them based on sexual orientation; and also from so-called “conversion therapy” to attempt to make them heterosexual — or to make them “transgender”.

Until about 30 years ago, lesbians had a rich culture that could be found in lesbian bars, lesbian social and political groups, lesbian music and art, lesbian recording companies, lesbian literature and presses, and lesbian festivals where it was so safe for lesbians to gather exclusively with other women that many of them ventured out at night, alone or with other women, clothed or half-clothed or not clothed.

This vibrant and public culture has been completely destroyed by the opposing cultural phenomenon of men demanding and achieving inclusion because they claim to be women. In fact, one such man, Dana Rivers, murdered a lesbian couple and their child because they had tried to exclude him from the Michigan Womyn’s Music Festival (now defunct). Meanwhile, young lesbians are being lured into surgical and chemical mutilation [<https://womansplaceuk.org/2020/11/30/keira-bell-there-was-nothing-wrong-with-my-body>] of their bodies by the lie that they can escape the burdens of femaleness and homosexuality by becoming men.

NONCONFORMITY WITH SEX-BASED STEREOTYPES

Existing case law presently protects both sexes from some instances of discrimination on the basis of nonconformity with sex-role stereotypes. The 1989 Supreme Court case *Price Waterhouse v. Hopkins* established that an employer who denied a promotion to an employee while noting that she was too “macho”, and that she should take “a course at charm school” had engaged in impermissible sex discrimination; and that is still good law.

That ruling rejects the traditional notion that women are inherently feminine and men are inherently masculine; or that everyone has a societal duty to conform to an assigned sex role; or that an employer can treat nonconformity as a character flaw that can legitimately be discriminated against. Femininity is the performance of submission, while masculinity is the performance of domination. If women are to achieve equal civil rights, the regressive sex-role stereotyping that “gender identity” relies on must not be enshrined into law.

To be clear, a man can perform femininity and a woman can perform masculinity; or they can not perform either stereotype. In reality, nearly all people deviate to some extent, and deviation should be protected by law.

GENDER IDENTITY

In common usage, one’s “gender identity” is who one subjectively feels oneself to be. “Gender identity” is a feeling. It’s not surprising that H.R.5 hedges to avoid defining “gender identity”, because there are problems with protecting feelings in legislation:

1. People can lie about their feelings, because feelings alone are not verifiable: A man could say he feels like a woman when he actually just wants access to vulnerable women in women’s rape shelters or women’s prisons, or to win trophies and scholarships in women’s sports.
2. Nonconforming people do not face discrimination because of their feelings, but because of their observed behavior. It is their perceived unfeminine or unmasculine behaviors that need protection. The plaintiff in *Price Waterhouse* did not face discrimination based on her feelings or her claimed “identity”. It was based on her observed behavior and it was her female sex.

Protection of feelings alone is not only unnecessary, but detrimental to equal justice. The 2020 Supreme Court case *Harris Funeral Homes v. Stephens* protected a male employee who informed his boss that, among other things, in future he would be dressing in feminine attire at work. The Court could have protected his employment on the basis of the *Price Waterhouse* precedent; but instead hung its ruling on “transgender” status, while never defining “transgender”; and wrote a confused ruling that begs for good legislation to supersede it.

For all the reasons discussed here, H.R.5 is clearly not that legislation.

EQUALITY ACT REVISIONS

A well written “Equality Act” should avoid enshrining “transgender” status or “gender identity” into law in any way. A revised “Equality Act” should do the following:

1. Define sex on the basis of biology, and use the definition to protect women and girls from unjust discrimination in all areas of public life.

2. Define homosexuality on the basis of same-sex attraction, and use it to protect lesbians and gay men, by name, and not merely a letter in LGBTQ, from unjust discrimination in all areas of public life.
3. Define people who do not conform to sex-role stereotypes on the basis of sex, and use it to protect all people from unjust discrimination in all areas of public life.

There is no conflict among these three protected classes; and therefore no reason to create a hierarchy among them.

There are instances where discrimination may be necessary for justice. An example is that men and boys could be excluded from women's and girls' sports, or certain safe spaces or services reserved for women, where the discrimination is necessary for a just outcome. These instances should not be spelled out in legislation, because it is rightly left up to the courts to examine the alleged discrimination under the law and under the particular facts of each case.

At least two feminist revisions to the existing "Equality Act" have been circulated in public forums: one from Women's Human Rights Campaign-USA (WHRC-USA) [<https://womensdeclaration.com/en/country-info/united-states-america/whrc-usa/usa-news>], another from Feminists In Struggle (FIST) [https://feministstruggle.org/wp-content/uploads/2020/02/FeministAmendments.EqualityAct.-cleancopy.final_.newdefinitions.FIST_.12.14.19-1.pdf]. They differ substantially from each other, but both address the problems of H.R.5. One or both need to be introduced into Congress, so that this area of civil rights law can be publicly aired and debated before legislation is enacted.

We urge you to ask your US Senators and your House Representative to introduce whichever bill you prefer.

Any such legislation needs to protect sex, homosexuality, and nonconformity to sex-role stereotypes in every area of the public sphere; it must not recognize "gender identity" or rights specific to "transgender" people; and it should speak rationally, clearly, and consistently; and in a way that will be understandable by the public and defensible in court.

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