

Scrutinizing the U.S. Equality Act 2019: A Feminist Examination of Definitional Changes and Sociolegal Ramifications

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Abstract

The U.S. Equality Act, which amends civil rights statutes to explicitly prohibit discrimination on the basis of sexual orientation and gender identity, passed the House in May 2019 with unanimous Democratic support. Adopting a feminist perspective, I scrutinize the act from a largely neglected position, one that supports both LGBTQ *and* sex-based rights. Although laudable in its aims, the Equality Act is objectionable in form. The Act extends non-discrimination protections to LGBTQ individuals not by creating new protected classes but by redefining sex to include gender identity and sexual orientation, which is not only terminologically imprecise but also creates a clash between sex-based and gender identity-based rights. By defining gender identity as something that exists to be protected “regardless of sex,” the act undermines sex-based provisions, replacing them with provisions based on gender self-identification. Recognizing confusion over terminology, I describe key terms (sex, gender, gender identity, and sexual orientation) and consider various usages. I conclude by discussing ways the bill might be modified so as to protect LGBTQ people without undermining women’s (sex-based) rights.

Since the turn of the century in the United States, we have observed the extension of socio-legal rights and protections to lesbian, gay, and bisexual (LGB) individuals, from decriminalizing same-sex sexual behavior in *Lawrence v. Texas* (539 U.S. 558, 2003) to the federal recognition of the constitutional right to same-sex marriage in *Obergefell v. Hodges* (567 U.S. __2015). More broadly, after centuries of individual resistance and decades of organized activism, in the span of a mere decade, social attitudes around homosexuality have drastically shifted in the direction of increasing tolerance, if not acceptance (e.g., [Walters, 2014](#)). Although ongoing battles remain, LGB individuals and couples have achieved a degree of social acceptance hardly imaginable only a few decades ago.

In the wake of marriage equality and the increasing social acceptance of nonheterosexuality, transgender or trans¹ rights issues have moved to the forefront. Well-funded activist Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ)+ organizations previously focused primarily on sexual orientation and consolidated around marriage equality (i.e., Human Rights Campaign [HRC], GLAAD, Stonewall) are now prioritizing trans rights. Evidence suggests that prominent LGBT activist organizations have shifted from a long-entrenched primary emphasis on sexuality/LGB issues to a predominant focus on trans issues. At present, at least in the United States and United Kingdom, LGBT lobbying and organized activism center the T over the LGB (Biggs, n.d.).²

Consequently, recent years have seen the trans rights movement gain remarkable, even unprecedented, momentum. [Mara Keisling \(2016\)](#) of the National Center for Transgender Equality averred that trans activism has made “faster progress than any movement in American history,” and [Taylor et al. \(2018\)](#) noted that “progress on trans rights has been stunning . . . rapid and dramatic.” This movement’s success is due in large part to the successful lobbying efforts of these LGBT organizations, which, leveraging their existing reputations as progressive groups acting on behalf of a well-defined and marginalized demographic, have fostered a view of the trans rights movement as the latest frontier in the expansion of human rights and a natural extension of LGB rights. In the United States, the Equality Act of 2019 (H.R. 5) is a recent instantiation of these efforts. The Equality Act is a prominent piece of democratic legislation (with 240 co-sponsors, 237 of whom are Democrats³), which amends the Civil Rights Act of 1964 and other core civil rights statutes to explicitly prohibit discrimination on the basis of sexual orientation and gender identity (like age, race, color, and sex). In addition, the bill widens coverage by “[expanding] the definition of public accommodations to include places or establishments that provide (1) exhibitions, recreation, exercise, amusement, gatherings, or displays; (2) goods, services, or programs; and (3) transportation services” ([CRS, 2019](#)). In 2019, House Majority Leader Nancy Pelosi proclaimed the Equality Act to be a centerpiece of the Democratic party’s legislative agenda leading up to the 2020 elections.

Like many political issues at present, public debates around the Equality Act usually fall on left–right party lines with little debate on substance, including the gender identity theory implicitly endorsed by the bill. The Congressional discussion of the bill

consisted of Democratic lawmakers lauding the bill (e.g., as “literally a life-saving bill”) with Republican representatives panning “the deep flaws” in the legislation (H.R. 5 Text, 2019). Much of the public seem largely content to adopt party-line positions without discussion or critical scrutiny. This lack of public discussion is objectionable in a democratic society, in general, but it is even more problematic in this case given the pronounced shift in American jurisprudence the Equality Act will institute from sex-based to gender identity-based protections. Many on the left supporting the bill appear unaware of the sweeping nature of this legislation and uninformed about the practical details.

Although laudable in its nondiscriminatory aims, the form of H.R.5 is problematic. The Equality Act extends federal nondiscrimination protections to LGBT people *not* by creating new protected classes or by protecting sexuality or gender expression under existing sex-stereotype protections but rather by *expanding the definition of sex* to “include sexual orientation and gender identity.” Departing from our creditable legal tradition of definitional precision, the Equality Act is terminologically imprecise, as it conflates distinct terms (i.e., sex, gender, and sexual orientation), defines gender identity vaguely and circularly, and fails to define gender at all. More concerning, however, is the bill’s prioritization of gender identity over biological sex. The Equality Act defines gender identity as something that exists to be protected “regardless of sex” without exception, thereby giving primacy to gender identity over sex when they clash (i.e., in determining eligibility for [otherwise or previously] sex-based provisions). The result is the erosion of females’ sex-based provisions, which include sex-separated spaces (e.g., prisons, locker rooms, shelters), opportunities and competitions (e.g., awards, scholarships, sports), and events (e.g., meetings, groups, festivals) (see [Lawford-Smith, 2019c](#), for a discussion and justification). As I will discuss, female sex-based provisions remain important given both women’s historical disadvantages and different reproductive biology.⁴

For these reasons, while I support the Equality Act’s nondiscrimination aims, I submit that the bill, in current form, fails to strike a balance between the rights, needs, and interests of two marginalized (and overlapping) groups—trans people and females—and instead prioritizes the demands of trans people over the hard-won rights of female people. This imbalance led Rep. Lesko (2019) to argue that the bill should be called “The Forfeiting Women’s Rights Act.” In current form, the Equality Act’s elision of the distinction between biological sex and gender self-identification, with the prioritization of the latter over the former, amounts to an impracticable attempt to provide sex-based protections with sex-blind policies. Because, as I will discuss, gender identity is vaguely and circularly defined without the requirement for any verification or formal status change, *any* person can access opposite-sex provisions merely on the basis of first-person testimony through gender self-ID (e.g., “I identify as a woman”), no medical or legal gatekeeping or even presentation style (e.g., as feminine) required.⁵ Therefore, and unbeknownst to many, the Equality Act eliminates the right to sex-based provisions.

As a result of its prioritization of gender identity “regardless of sex” and the fact that as defined gender identity is subjective, malleable, and unobservable, and, therefore, unverifiable, the Equality Act would allow *any* male at *any* time to claim access to female-only spaces or provisions on the basis of a gender identity claim.⁶ The act would extend male right-of-access to female provisions both to transwomen and to predatory or opportunist males, and because gender identity is unobservable, there is no way to tell the difference. Females, in particular, cannot discern whether the males in their spaces are safe and sincere transwomen or predatory males. This is noteworthy, because under this bill, convicted male rapists need only to state that they identify as a woman—whether they actually do or not—and the Equality Act would require that they be treated in every way as if they were female, including housing in the women’s estate as well as strip searches and pat downs by female officers. The bill would prohibit as unlawful discrimination any differential treatment of born males who identify as women from that of females. This despite the fact that social norms and international standards specify that female inmates deserve safety from males, in general, and male sexual abusers, especially, and women have sex-separated spaces for their physical and psychological well-being. Such sex-blind policies, which would be legislatively mandated by the Equality Act, evidence a blatant disregard for females. The impact of this legislation on prisons, and other spaces like hospital wards, shelters, and refugees, deserves particular scrutiny given that women do not have a choice whether or not to be there and are often particularly vulnerable with extensive and/or traumatic victimization histories. Many incarcerated women have been targeted by male physical and sexual abuse ([Belknap, 2007](#); [Siegel & Williams, 2003](#)), and evidence suggests that at least one in five incarcerated women suffer from post-traumatic stress disorder (PTSD), a rate that is eight-fold higher than the general population rate ([Baranyi et al., 2018](#)).

Some trans scholar-activists have dismissed concerns about female safety and well-being given male gender right-of-access as “trans panic”; that is, fanciful, unfounded worry about “transwomen as deviant predators” ([Westbrook & Schilt, 2014](#)). However, this critique is misguided, because these concerns are not specifically about transwomen but about male predators. And, unfortunately, such concerns are not farfetched, baseless worry. Indeed, the very scenario described above played out in England in 2018. Karen White, a born male, was incarcerated for charges of sexually assaulting women. Under existing gender self-ID policies, White’s request for housing in the women’s estate on the basis of gender self-ID was granted despite White’s history of sexually assaulting women. While in the women’s prison, White proceeded to sexually assault at least two incarcerated women, charges for which White was later convicted ([Independent, 2018](#)).⁷ Even after sexually assaulting females, the Equality Act would mandate that White *still* be housed in the women’s estate because gender self-ID would supersede sex without qualification.

Although the White incident is particularly egregious, it is neither a lone aberration nor should we expect it to be, as predatory men will go to extraordinary lengths to prey on women. By defining gender identity as sex, the Equality Act would require that benepised male sexual predators all be treated as female in every way if they say they

identify as a woman. Under the Equality Act, there would no longer be a legal distinction between being female and identifying as a woman even when one uses this access to prey on women. Predictably, given the lack of attention to the situation of those incarcerated, almost no public attention has been paid to well-being of females housed with males in the women's estate in the United States (see the Online Supplemental information for some U.S. examples). Notably, international standards, such as the UN Statement on the Treatment of Prisoners, recognize that people have a right to privacy on the basis of sex, which includes separating male and female prisoners.⁸

Crucially then, rather than being a straightforward extension of LGB rights to trans people, the Equality Act would *fundamentally shift* American law and policy from sex-based to gender identity-based rights, thereby eliminating females' sex-based provisions. By privileging gender identity over sex when they conflict *without exception*, the Equality Act would protect one group (trans people) explicitly and purposely by undermining rights and protections for another disadvantaged group (females). Paramount in this legislation is protecting the needs of trans individuals, especially transwomen, including their privacy, safety, and psychological well-being through access to female provisions. Females' right to dignity, privacy, and safety and their well-being, however, are not being given equal consideration. More attention and effort—through dialogue and consultation with affected groups—to balance these competing rights is needed. This includes a consideration of the implications of eliminating the legal right to center the interests of females as a sex-class independently of gender identity.

The public's seeming lack of awareness of the sweeping changes in the Equality Act is due in large part to the nearly complete freezing of public discussion on this matter from those on the left. The trans rights movement has largely succeeded in making an interrogation of its ideology—including its terminology and sociopolitical demands as well as their effects—acts of illegitimate, verboten hate-speech. Many on the left champion trans rights as a logical extension of LGB rights without comprehending the nature of the proposed changes. During House discussions, some democratic representatives proffered misleading statements about the bill's implications; even co-sponsors of the bill seem to be incognizant the Act's implications for women's rights (see, for example, statements by Rep. Cicilline, Rep. Pocan, 2019, pH3936-7).

Within and outside the United States, feminist efforts to discuss concerns about treating gender self-ID as sex under the law as well as philosophical discussions of competing conceptions of gender identity and their implications for sex-based rights are often met with charges of transphobia or bigotry (e.g., [Lawford-Smith, 2019b](#); [Murphy, 2019](#)). Trans-rights activists have castigated women who raise concerns about gender identity-based legislation and sex-based rights as bigoted "trans-exclusionary radical feminists" ("TERFs") who should be vilified and dismissed ([Jones, 2018](#); [Lawford-Smith, 2019b](#)).⁹ In academia, feminists and others who have questioned transgender ideology or its demands have been subject to harassment, no-platforming, calls for termination, intimidation, and in a few cases incitement to

violence (see [Dreger, 2008](#); [Fazackerley, 2020](#); [Jeffreys, 2014b](#); [Lawford-Smith, 2019a](#); [Stock et al., 2018](#); [Sullivan et al., 2019](#)). In universities, several debates and conferences around sex, gender, and gender self-identification have been canceled after protest and threats from trans activists ([Thorpe, 2020](#); [Turner, 2019](#)). [Jones \(2018\)](#) notes that the trans rights movement:

has been *devastatingly* successful at convincing the majority of right-thinking left-leaning people that *anyone* who raises concerns about the trans rights movement is motivated by nothing but pure baseless bigotry and spite, and that there are no legitimate questions or concerns that need to be given full public consideration before they start determining public policy. The practical upshot of this is that both the left-wing press and the vast majority of academics . . . are either fervently opposed to allowing criticism to be expressed, or, in many cases, voices of dissent are too scared about the professional consequences of speaking out to put their heads above the parapet. (emphasis in original)

Feminist philosopher [Kathleen Stock \(2019b\)](#) published (with permission) a few of the many private messages she received in support of her writings on gender identity ideology and legislation. Most messages detailed a fear of the public consequences for discussing concerns or beliefs as well as disquiet about the lack of discussion; others reported attempts to promote discourse around these issues that were met with negative consequences. One articulated, “What we are witnessing now is a closing down of academic avenues of negotiation and compromise and an overt rejection of scientific, cultural, and philosophical enquiry into what has become one of the most important debates of the present moment” ([Stock 2019b](#)). These and other examples evince that “normal academic processes of free intellectual inquiry and unfettered critical scrutiny” are not operating with respect to questions around transgender activism and women’s issues ([Stock 2019b](#); see also [Stock et al., 2018](#)). Consequently, there is a dearth of public and academic discussion of gender identity ideology and critical scrutiny of the implications of the Equality Act—instrumental and symbolic—from a position that both supports LGBT rights but also wants to safeguard women’s rights. The political concerns of female people are being dismissed as phobic and trivialized and this is “stultifying for intellectual discourse and the negotiation of our shared political lives” ([Allen et al., 2019](#), p. 8).

[Murray and Hunter Blackburn \(2019\)](#) have recently described this state of uninterrogated affairs as *policy capture*, characterized not only by a lack of public scrutiny to changes in policy but by the absence of due process—including failure to consult with or consider affected groups (i.e., women’s rights groups or female people), due to the dominance of lobbying groups (i.e., HRC, GLAAD, Stonewall), who monopolize the narrative, disrupt democratic representation, and even craft the language of the bills. [Murray and Hunter Blackburn \(2019\)](#) observed that “decision-making on sex and gender identity issues has been directed towards the interests of a specific interest group [trans people], without due regard for other affected groups [females, lesbians] or the wider population” and raised concerns about “the

inadequacy of institutional safeguards against effective lobbying groups,” suggesting we are “losing sight of women’s rights” (p. 262).

This article is motivated by the silence around these issues and concern for the repercussions of a failure to address foreseeable negative consequences of this legislation. To this end, I scrutinize the sex and gender identity issues legislated in the Equality Act, particularly its legal redefinition of sex to include gender identity (as a protected characteristic that takes primacy over sex), focusing on the implications for women’s sex-based rights. My primary aim is to show that by prioritizing gender identity over sex, the Equality Act would require female people to relinquish sex-separated provisions and to demonstrate that this unjustifiably compromises females’ rights to privacy, safety, and equal opportunity. In current form, the Equality Act prioritizes the interests of trans people over the sex-based rights of female people without due consideration for the latter.

To be crystal clear, I consider the aims of the Equality Act—protecting LGBT people from discrimination—to be laudable; I recognize that LGBT people experience marginalization, stigmatization, and unequal treatment (in intersection with other statuses) in a variety of domains from education to housing and employment; and I believe that this disparate treatment should be addressed. People should not be discriminated against based on sex, sexuality, trans status or identity, or gender expression as well as race/ethnicity, age, and other social statuses or identities already protected. However, failing to consider the implications of the act from a feminist perspective, which includes recognizing potential conflicts and strategizing *in advance* about possible implications for females as a sex class, is unwise, even irresponsible. Genuine transphobia is obviously unacceptable, but a discussion of the way policies and practices will influence female sex-based rights and interests is not only not transphobic but is necessary in a society that has historically failed to consider and treat females as fully human and equal under the law ([Lawford-Smith, 2019a](#); [Stock, 2018a](#)). There are, in my view, several ill-considered practical difficulties with the Equality Act in its current form including definitional imprecision, with real sociopolitical implications that overwhelmingly affect females. My goal is to expand consideration around these issues. Although a discussion of these topics has often been deemed off-limits as “transphobic,”¹⁰ I believe we can (indeed should) discuss these conflicting rights claims and legislative consequences without animus or disregard.¹¹ The policies that we institute around some rapidly changing social issues will have significant effects on the social landscape moving forward. Public dialogue and input from affected groups as well as anticipation and evaluation of possible unintended consequences of legislation are of utmost importance for a functioning democracy. The social sciences and criminology have much to offer in this regard, but we cannot sit on the sidelines rather than offering our insights and specialized knowledge. I address this issue from a particular feminist perspective and submit that the effects of this policy on females have not been sufficiently addressed. I attempt clarification and to foster dialogue recognizing that I occupy a particular position with partial knowledge like everyone else. If I can stimulate attention to these issues along with respectful discussion, I will consider this a success.

Before scrutinizing the Equality Act and its implications, I first briefly turn to the rationale for females' sex-based rights. When considering the compromise or relinquishment of women's sex-based rights, we should first understand the justification for their existence in the first place.

Women's Sex-Based Rights: A Brief Justification

Sex-based rights and provisions for females were instituted after sustained feminist campaigning. These provisions are justified on the basis of both biological differences between males and females (physiological differences and women's reproductive burden) as well as the historical subordination and ongoing discrimination against the female sex class. For most of recorded history, girls and women were male property, denied access to education and paid employment. Women did not gain the right to vote in the United States until 1920, and many women were prohibited from working after marriage. Under common-law rules of coverture, a married woman or *feme covert* was her husband's dependent, like a child or a well-treated slave, and could not own property, control earnings (if allowed to work), or remove consent for sex within marriage. Thus, forcible sex by a husband against his wife was legally permissible behavior; the so-called "spousal rape exemption" was not abolished (at least in some conditions) in all U.S. states until 1993 ([Wooley, 2007](#)). For most of U.S. history, women have been socially, legally, and politically subordinated. Indeed, the exclusion of women from political rights was so taken for granted that the U.S. Constitution did not even need to specify that political "person" meant (White) "male" until the 19th century when women organized to fight for suffrage ([DuBois, 1998](#)).

Over the past century, women have made extraordinary gains in rights. Due in large part to feminist activism spurring sociolegal reforms, women's status has improved substantially in the United States and in much of the world ([Lorber, 1994](#); [Manne, 2017](#)). Yet, male-female inequalities persist due to ongoing social practices and the unequal burden of reproduction, which places a greater physical and economic burden on women than men. Thus, despite unequivocal gains in status, women around the world remain disadvantaged to men in political, economic, and social power. Research evinces continued female disadvantage in terms of: material and socioemotional resources received in infancy and childhood; access to education, jobs, and promotions in the work force; lack of reproductive rights, including legal access to contraception and abortion; pregnancy discrimination; political representation; position in the family unit and roles within (e.g., as the second shift) (e.g., [Budig & England, 2001](#); [England, 2010](#); [Ridgeway, 2011](#)), as well as male sexual harassment and violence against women, as we are all increasingly aware of in the wake of the #MeToo movement. Many women are subordinated by severe forms of domestic violence, known as patriarchal or intimate terrorism, which are almost exclusively perpetrated by males ([Johnson, 1995](#); [Johnson & Leone, 2005](#)). Moreover, the worldwide trafficking of women and girls as sexual slaves, numbering in the tens of thousands in the United States alone, continues ([Siskin & Wyler, 2013](#); [Territo & Kirkham, 2010](#)). As [Kate Manne \(2017, p. 33\)](#) documents in her treatise on misogyny, women still "face hostility of various kinds *because they are women in a man's*

world (i.e., a patriarchy).” In short, women’s social position has improved, but male sociopolitical dominance persists.¹²

Women’s sex-based provisions have been instituted and maintained to mitigate historical and ongoing social disadvantages (e.g., support for women/girls, quotas, and awards and competitions) and to provide female spaces free of the threat of male violence, sexual harassment and objectification to facilitate women’s equal involvement in public life. Some provisions (e.g., female awards and quotas) are designed to overcome social disadvantages rooted in historical exclusion, while other provisions, such as sports and female reproductive control, are sex separated due to biological differences (male physiological advantages and female reproductive burden, respectively) and justified by the individual and social benefits of female social involvement such provisions facilitate ([Coleman, 2017](#)). In general, sex-based provisions continue to be crucial to females’ well-being and equal participation in society, facilitating privacy, equal opportunity, and dignity in a world where male people have long been hostile and exclusionary to female people (e.g., [Lawford-Smith, 2019a](#)).

Using bathrooms as an example, given the prominent (albeit overemphasized) “bathroom debates,” [Carter \(2018, p. 229\)](#) explained that “a key purpose of sex-separation in bathrooms was to protect women and girls from sexual harassment and sexual assault in the workplace and other venues,” and argued that “laws requiring sex-separation in bathrooms were among the earliest noncriminal, anti-sexual harassment statutes passed in the nation” (p. 239). The lack of women’s bathrooms was used to impede female opportunity and participation in male-dominated spaces and occupations. For example, it was not until a wealthy parent financed the construction of a women’s bathroom at Yale Law School that females were allowed to matriculate ([DuBois, 1998](#)). At present, the ongoing threat and reality of male physical and sexual harassment of females and male sexual objectification remains a justification for sex-separation in places where woman are in states of undress and vulnerability ([Lawford-Smith, 2019a](#)). Sex-separated spaces provide much-needed respite from the psychological threat of male harassment, objectification, and violence.

Sex separation is not, of course, a panacea for male violence against women, and some trans scholar-activists have emphasized that norms around sex separation are unlikely to stop predatory males who break rules. Importantly, however, the value of sex separation is not only in the rule itself but in the power it gives girls and women to object to and challenge male persons in their spaces. A “right to exclude” male persons fosters a sense of control and well-being among females, a class socialized from an early age to be cautious and careful around males, especially when fully or partially nude ([Lawford-Smith, 2019a](#)). Research in a range of contexts evinces that a lack of private bathrooms exposes women and girls to heightened risk of non-partner sexual violence as well as persistently elevated psychosocial stress in response to the ever-present threat of violence and male voyeurism ([Jadhav et al., 2016](#)). Moreover, recent reports from the United Kingdom reveal that unisex spaces (i.e., mental health

wards and pool changing rooms) have significantly elevated rates of sexual assaults than spaces that are sex separated ([Hosie, 2018](#); [Lintern, 2020](#)).

In short, given both the prevalence and persistence of women's (sex-based) provisions across society, their justification in historical and ongoing disadvantages based on sex and reproductive biological differences as well as male sexual harassment and violence, we seem to generally agree that these spaces are useful and beneficial (justified and warranted). Thus, a consideration of how the Equality Act erodes women's sex-based provisions is necessary.¹³ Indeed, recognizing the manifold effects of gender identity legislation on women, New Zealand and Scotland recently deferred gender identity legislation because of inadequate consultation with women's groups; we should avoid duplicating their mistakes ([Lawford-Smith, 2019c](#)).

The Equality Act: The Legislation and a Feminist Critique

Two groups on the left are embroiled in a fierce, occasionally vitriolic, debate around sex and gender identity issues legislated in the Equality Act and currently debated in other countries (e.g., the United Kingdom, Australia, and New Zealand). On one side of this debate is a cadre of gender-critical (GC) feminists¹⁴ and women's (sex-based) rights activists who argue that there are problems, conceptually and/or practically, with the legal and social prioritization of gender identity over biological sex (e.g., [Allen et al., 2019](#); [Jeffreys, 2014a](#); [Lawford-Smith, 2019a](#)). On the other side are trans-rights activists and allies (including postmodern and liberal feminists) who argue, among other things, for rejecting biological sex in favor of gender identity (e.g., [Levasseur, 2014](#)). Some trans scholar-activists have asserted that recognizing people's humanity means accepting their personal authority on their own gender identities, which is more important than (even determinative of) biological sex (e.g., [Bettcher, 2013](#); [Dembroff, 2019](#)).¹⁵ At its core, this is a tense social debate between two disadvantaged and overlapping groups (females and trans people) around meanings, identities, and how they shape rights, which comes to stark relief with the Equality Act's redefinition of sex to include gender identity—concepts with deep phenomenological and experiential content and sociopolitical implications.

Importantly, the cornerstone of this leftist debate over the Equality Act *is its form* not its anti-discrimination aims. That is, feminist opposition to the Equality Act is not based on its extension of anti-discrimination protections to LGBT people but the way in which it extends those protections. Rather than creating new protected classes alongside existing ones (e.g., race, religion, sex), the Equality Act extends federal nondiscrimination protections to LGBT individuals by expanding the definition of sex in civil rights law to include "sexual orientation and gender identity" as protected subclasses of sex, despite the fact that neither gender identity nor sexual orientation are properly conceived as subclasses of sex. Not only are gender identity and sexual orientation distinct from sex, but also both rely upon a working conception of sex for meaning.¹⁶ These "subclasses of sex" are defined in the act as follows: sexual orientation "means as heterosexuality, homosexuality, and bisexuality," and gender identity is defined as "the gender-related identity, appearance, mannerisms, or other

gender-related characteristics of an individual, regardless of the individual's designated sex at birth" (H3933). Impractically, gender is not defined. Without an understanding of "gender" in the definiens, the definition is not just circular (as Rep. Lesko noted during House floor discussions) but *incomprehensible*, amounting to "the []-related identity, appearance, mannerisms or other []-related characteristics of individuals, regardless of the individual's designated sex at birth."

The act does not provide a definition of sex; instead, it describes sex as "including" "(a) A sex stereotype; (b) pregnancy, childbirth, or a related medical condition, (c) sexual orientation or gender identity; and (d) sex characteristics, including intersex traits." In addition to expanding the definition of sex, the act inserts "(including sexual orientation and gender identity)," after "sex," each place that sex appears. Further designating gender identity's priority over sex, the act refines the description of discriminatory practices to clarify that sex can no longer be a basis for legitimate exclusion when it conflicts with gender identity. For example, the act amends unlawful employment practices to specify that when "sex is a bona fide occupational qualification, individuals are recognized as qualified in accordance with their gender identity" (see Sec. 701A, H3932), without exception or explanation.

By not only erasing the legal distinction between sex and gender identity, as sex is defined to include gender identity, but prioritizing gender identity over sex, the Equality Act nullifies women's sex-based provisions. Being male can no longer be used as a basis for exclusion from women's spaces, activities (sports, classes, schools), and opportunities if a male person desires access on the basis of gender identity (and vice versa).¹⁷ Under this law, any policies that would regulate access to sex-separated provisions, such as requiring that born males medically transition or have certain hormone levels to participate in female sports, to be housed in women's prisons, or to be eligible for women's scholarships, would no longer be legally permissible. The hard-won rights and protections for females will be replaced by gender self-identification. Again, because gender identity is unobservable and thus only knowable through first-person testimony, the act does not just extend right-of-access to transwomen but to *any male* willing to claim gender right-of-access. All told, this approach of lumping these disparate concepts together as a single class is conceptually unsound, erodes existing sex-based rights, and impedes recognition of the unique situation of female people in society and under the law.

In suggesting that this issue requires more attention, I am unequivocally *not* suggesting that trans people in general or transwomen, specifically, pose a particular danger to women and girls. However, born males do, and there is no evidence that trans women have a different pattern of violence than other male-born and male-socialized people ([Dhejne et al., 2011](#)¹⁸). More concerning is the fact that under the Equality Act, any male can gain unchallengeable access to female provisions or spaces simply by self-declaration, whether that reflects their feelings or they just want to enter the space for some predatory reason. To ignore the access this gives predatory males to female spaces is naïve at best and sexist at worst. Indeed, allowing anyone to opt into female spaces will defeat the purposes of having sex-

separated spaces in the first place. Furthermore, any self-identification policy will grant opportunists access not just to one vulnerable group but two vulnerable groups in the same space: females and transwomen. But even if the self-ID aspect of the law does not fully cancel out what transwomen gain in privacy and safety, it is necessary to consider whether it is fair to impose a cost on females (e.g., a loss of privacy, safety, and equity) to confer a benefit to transwomen (e.g., a gain in privacy, safety, and identity validation). I submit that this compromise is unjustifiable given that there are alternatives available (e.g., third, gender neutral spaces and provisions, discussed later) that could provide safety and privacy to transwomen without undermining women's privacy, safety, and opportunity. However, the Equality Act's conflation of gender self-identification with biological sex makes such compromises and negotiations not just difficult but impossible.

Prioritizing Gender Identity Over Sex

Instructively, this prioritization of gender identity over sex is not an inadvertent consequence of the Equality Act but was intended by the Democratic authors of the bill. This intent is evidenced in several places, such as the employment example mentioned above as well as the added rule in Section 1107: "(with respect to gender identity) an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity." Democrats rejected several Republican efforts to amend the bill to include exceptions for sex-separate spaces where people are undressed as well as for sports. Such exceptions, which would maintain sex-separation for legitimate purposes, are incorporated in similar legislation in other countries. For example, the U.K. Equality Act 2010 allows single-sex provisions (regardless of gender identity) to "be lawful where the exclusion is a proportionate means of achieving a legitimate aim," and Australia includes a specific exemption for sports, recognizing that biological sex differences are the basis for sex separation. That even a consideration of these exceptions was rejected outright by Democrats, in concert with the lack of input from affected groups, suggests both policy capture and insufficient concern for female people.

Under the U.S. Equality Act, then, sex-segregated spaces and provisions will become de jure gender identity-segregated provisions. Furthermore, the act's vague, expansive definition of gender identity creates a protected class based on an unobservable gender identity over biological sex. Under current federal law, sex-segregated women's shelters and rape crisis centers can (in most states) legally refuse access to male persons, due to concerns about privacy, safety, and dignity, as well as providing respite to females from males—who commit at least 98% of sexual assaults. Likewise, businesses that provide sex-specific provisions, such as bikini waxing for females, can exclude male persons when this is relevant to the legitimate operations of their services or for the comfort of their workers or clientele. Under the Equality Act, however, the right to exclude persons access or services on the basis of sex, regardless of their gender identity, will be prohibited.

Foreseeable problematic consequences caused by this clash of rights are unfolding in places such as California, Canada, and the United Kingdom,¹⁹ where similar legislation has already passed (see, for example, [Jeffreys, 2014a](#), [2014b](#)). For example, Canada has experienced several legal challenges by male persons claiming gender identity right-of-access to female spaces and services. This year, the Vancouver Rape Relief & Women's Shelter Society (VRRS)—Canada's oldest rape crisis center (and the only local rape shelter that maintained a born-female only policy)—had its funding revoked from the Vancouver City Council over its policy of employing and administering services only to born females following protests from trans rights activists (see [Dangerfield, 2019](#)). In 2019, the VRRS was vandalized; on one occasion a dead rat was nailed to the front door, and more recently the shelter was tagged with violent graffiti, including "Kill TERFS, Trans Power," in opposition to their born-female policy.²⁰ In Toronto, Jessica Hambrook, a 37-year-old born male (who previously spent time in prison for sexually assaulting a 5-year-old girl and a mentally handicapped 27-year-old woman in the early 2000s), was jailed indefinitely in 2014 after using gender identity right-of-access to women's shelters, where Hambrook sexually assaulted, harassed, and engaged in voyeurism of the women housed there ([Baklinski, 2014](#)). In addition to spaces, these laws also create conflicts with sex-specific services, even when the distinction between sex and gender is relevant like when genitalia are involved for bikini waxing. Notably, research suggests that more than 85% of transwomen in the US retain male genitalia ([James et al., 2016](#)). The Equality Act would require females in jails, prisons, or psychiatric wards to live with males and female service-providers to handle male genitalia as if it were female whether they want to or not.²¹

Currently, females have sex-segregated spaces giving them the right to privacy (e.g., not be exposed to male genitalia in those spaces and to be free from male onlookers); dignity (e.g., to be free from male sexual objectification); and safety (to be free from male violence in those spaces) as well as respite from male presence in a male-dominated society ([Jeffreys, 2014b](#); [Penner, 2001](#)). As [Lawford-Smith \(2019a, p.7\)](#) explains: "Women can experience men as both imposing and exhausting. Men take up more physical space; in conversations they interrupt more, explain things to women that women know more about, and take up more time; they may look at or speak to women in sexualized ways." She continues: "All of this can be tiresome for women to deal with," and women's spaces can provide "a break from such male attitudes, expectations, and behaviors."

Moreover, from a young age many girls are taught to be alert to the possibility of male predation, and sexed spaces provide respite from this threat, a place of felt psychological and physical safety, where women and girls have a right to exclude male entrants. Given that right-of-access to female spaces provided in the Equality Act is based on an unobservable self-identification, females will no longer be able to challenge the presence of males in their spaces, despite not knowing whether the males are predatory or not. Voyeuristic males could watch and shower with women, and, if questioned or challenged, could say that they feel like a woman, making their use of the space and behavior in that space legal as a function gender identity's

priority over sex. This should be hotly debated, and yet it is hardly being discussed. I submit that this is not only due to policy capture but also to confusion around the terms sex and gender, which proves paralyzing for many who attempt to grasp these issues. In fact, I submit that the contest around the meaning of these terms and the conflation of sex and gender among the public and policy-makers is central to the failure to recognize and/or consider the implications of the act for females' sex-based rights.

Conceptual Matters: Defining Sex, Gender (Identity), and Sexual Orientation

Although the Equality Act defines “sex” to include “gender identity and sexual orientation,” these three terms are conceptually and analytically distinct. Most of us understand that sex and sexual orientation are not the same thing. For example, female is not interchangeable with lesbian. In contrast, there is considerable confusion around the concepts sex and gender. As noted, what constitutes “gender” in the Equality Act is undefined, which is unfortunate because unlike the plain meaning of sex, the term gender has several varied and conflicting meanings. In light of the semantic confusion underlying these issues and their inextricability with the debate about sex and gender rights, I discuss the meanings of these terms, highlighting key distinctions and current controversies.

(Biological) Sex

Realist position: Sexual dimorphism

Sex is a biological classification rooted in dimorphism in gamete size or *anisogamy*. Humans like all other mammals, most animals, and many plants are a sexually dimorphic (literally “two form”) species; what differentiates males and females of a species is their gametes. Females produce large, nonmotile gametes; males produce smaller, motile gametes ([Kodric-Brown & Brown, 1987](#)). This definition of male and female—by size of their gametes and the form of the reproductive tract that produces them—is neither arbitrary nor random but is a foundational biological fact ([Del Giudice, 2019](#)).²² Sexual dimorphism arose in evolution as a condition of sexual reproduction, and the categories female and male are used to describe all species that reproduce sexually.

Sex is observed and recorded at birth and is, at present, an exceedingly accurate classification, but like all biological classifications, exceptions exist. Variability is a rule in biology. Indeed, evolution depends on it. Meiosis—the process of splitting, replicating, and pairing chromosomes in the formation of gametes—is a biophysical process with imperfections, including missing or extra copies or parts of sex chromosomes. Such “errors” may have relatively minor effects, but others can have major consequences, including developmental disabilities, endocrine disorders, and sterility. These variations in reproductive development are referred to as differences or disorders in sexual development (DSD) conditions. Genetic recombination and mutations can cause DSD conditions leading to ambiguous genitalia or, in rare cases, a mismatch between chromosomal/genetic sex and phenotypic sex; the latter are

considered classically intersex conditions and are estimated to occur in less than one out of 1,500 births (0.002%–0.018%) ([Hull, 2006](#); [Sax, 2002](#)).²³ Importantly, most individuals with DSD/intersex conditions are unambiguously male or female ([Sax, 2002](#)), and we have an increasingly sophisticated understanding of the etiologies of these conditions. Generally, when a neonate has ambiguous sex characteristics, genotyping and other tests can identify the genetic sex and inform treatment and humane support ([Lee et al., 2006](#)). Thus, the current rhetoric of “assigned sex at birth” depends on historic procedures that were coercive and invasive, irrelevant to most births, and have largely been jettisoned in advanced industrialized countries ([Lee et al., 2006](#)). In sum, in the overwhelming majority of cases (>99.8%), sex classification at birth is an unambiguous, accurate classification based on objective biological criteria: genitalia undergirded by matching genetic sex.

Poststructuralist position: Sex as a spectrum

Increasingly, there have been challenges to the “sex binary,” promulgated by pop science work promoting the idea of “sex as a spectrum” or “continuum” (e.g., [Scientific American, 2017](#)). This spectral view of sex, often grounded in postmodernist/queer theory (e.g., [Butler, 1990, 1993](#)), builds on [Fausto-Sterling’s \(2000\)](#) widely publicized, albeit significantly inflated, estimate that intersex conditions occur in nearly two out of 100 births ([Blackless et al., 2000](#)). The oft-repeated 1.7% estimate of intersex conditions has been shown to be nearly a 100-fold overestimate due both to Fausto-Sterling’s overly expansive conceptualization of intersex ([Sax, 2002](#)) and to calculation errors and oversights (e.g., misplaced decimals, see [Hull, 2003](#)).

Although fostering more humane treatment and raising awareness of DSD conditions, these exaggerated prevalence estimates fueled postmodern accounts of sex as a spectrum with the concomitant notion that sex is a subjective assignment, socially constructed like gender (as we will soon discuss). For example, [Franke \(1995\)](#) states,

most of us believe that on some deep, metaphysical level, biological facts exist independently of the labels we give them. Chromosomes, genitalia and hormones are natural, and together they make up the two natural kinds of people—males and females. But in fact, the process of sexing bodies works just the other way around. Our pregiven dimorphic concepts of gender lead to the discovery of facts that differentiate the sexes . . .

[Franke \(1995\)](#) does not explain how “pregiven gender” could lead to the “discovery of sex” or how that might work in our sexually reproducing species. Similarly, [Butler \(1993\)](#) contends that “the construal of ‘sex’ [is not] . . . a bodily given on which the construct of gender is artificially imposed, but a cultural norm which governs the materialization of bodies” (pp. 2–3). This postmodern sex-as-a-construction view implies that sex classifications are arbitrary social creations, which gives license to the view that sex can be a choice.

Although often used to undermine the reality of sex and thus sex-based rights, this notion of sex as a spectrum is both undertheorized and inaccurate, as sex does not resemble “a continuous sequence or range” (the dictionary definition of a spectrum). Sex, whether in humans or other mammals, is not a continuum with gradations of maleness and femaleness. Notably, such gradations are never clearly defined, and what would that mean anyway? Phrased alternatively, what is the X axis? For example, would a male with more testosterone, be more male than another male (both in the normal range, all else equal)? In any case, this question is moot because the existence of intersex conditions does not undermine human sexual dimorphism any more than the more common conditions of human polydactylism (supernumerary fingers or toes) and oligodactylism (fewer digits) make number of fingers in humans a spectrum.²⁴ One can recognize that there are only two sexes, while also acknowledging that not everyone can be neatly categorized as male or female. Sex is not a spectrum; it is a division of the natural world into well-defined categories of male and female, which exhibits exceptions like all biological kinds do.

Defining human (biological) sex

On a realist view, sex categories are natural kinds based on objective biological criteria. When we speak of biological sex, we refer to the differences in biology beginning in utero and beyond. These include reproductive differences which are sexually dimorphic and take male or female forms: no males ovulate, menstruate, or get pregnant; females do not produce sperm or have prostates. Outside of the sex-typed reproductive arena, sex differences are quantitative (differ in degree) rather than kind, overlap considerably, and are influenced by social forces (e.g., [Fine et al., 2017](#)). Thus, for example, on average, especially after puberty, males are taller, stronger (females have, on average, 40%–60% the upper body strength of males, and 70%–75% the lower body strength), and faster, such that elite males outperform elite females in nearly every sport by at least 10% (e.g., [Coleman, 2017](#)). However, (outside of elite sports) some females are taller, stronger and faster than some males; and while male biology (especially testosterone) primarily shapes these differences, they are also shaped by gendered social forces that encourage male activity and muscularity.

Following others, I conceive of males and females as natural kinds differentiated by genetic, morphological, and hormonal features that are *endogenously* produced and part of a functional reproductive system that, all going well, produces eggs or sperm ([Del Giudice, 2019](#); [Stock, 2019a](#)). Thus, a female whose ovaries are removed does not become a male, and a male who never produced sperm for whatever reason is not a female (and is not unsexed). This conception accommodates DSD conditions while acknowledging the reality of sexual dimorphism. Notably, as what distinguishes male and female humans, like other mammals, is the reproductive morphology that produces different gametes, biological sex is immutable. Exogenous medical interventions can change secondary sex characteristics, but medical intervention cannot transmute a male into an egg-producer or a female into a sperm-producer. Reconstructing external morphology does not alter the causal determinants of sex,

which are genetic and discernable at the molecular level. Moving forward, I employ this basic, widely accepted, biological definition of sex as the two forms with endogenously produced reproductive morphology, *which functioning smoothly*, produces eggs (female) and sperm (male).

Legal Sex

Currently, biological sex and legal sex are not coextensive. Legal sex is a status, which usually, but not always, corresponds with (biological) sex accurately observed and recorded at birth. The exceptions are due to the aforementioned intersex conditions, where external genitalia are ambiguous, appear female or not “sufficiently male,”²⁵ as well as increasingly common situations when people are granted a legal sex change based on their desire to be recognized and treated as the other sex, sometimes accompanied by medical interventions (cross-sex hormone application or “sex reassignment surgery,” which may modify secondary sex characteristics) ([Billings & Urban, 1982](#)).

In some countries and in various U.S. jurisdictions, people can change their legal sex via formal alteration of official documents, including birth certificates, passports, and drivers’ licenses. Most U.S. states permit one’s name and sex to be changed on a birth certificate, either by amending the existing birth certificate or by issuing a new one. Many states require medical proof of sex reassignment surgery for legal sex change, but not all. Three states, as of June 2019, do not allow individuals to change their sex on birth certificates (Kansas, Ohio, and Tennessee). Efforts by several trans activist groups in the United States and elsewhere (the United Kingdom, Australia) to make it easier for individuals to change their legal sex are gaining traction. In addition, some states (e.g., Massachusetts and Washington) have added the option “nonbinary” or “neither” in addition to male or female sex categories on legal documents (e.g., birth certificates). All U.S. states now allow for individuals to change their legal sex on their driver’s licenses, and the criteria are usually less strict than those for birth certificates, although the rules vary by state. Notably, legal sex changes are often discussed, even by reputable sources like the *New York Times*, as changes to “gender” on licenses and passports, *but sex not gender* is recorded on these documents (as of 2019).²⁶ Thus, efforts to add a “third gender” on legal documents are misguided because gender is not recorded on any legal documents.²⁷

Sexual Orientation

As with gender, the Equality Act extends federal nondiscrimination protections to LGB people by defining sexual orientation as a component of sex, despite that being conceptually inaccurate. Typically, sexual orientation is defined as an enduring pattern of erotic and/or romantic attraction to persons of the opposite sex (i.e., heterosexuality), the same sex (homosexuality), or to both sexes (bisexuality). As [Stock \(2019a\)](#) explains, sexual orientation is a concept that “is type-identified in virtue of two features: a) the Sex of the desiring subject; b) the Sex of the type of person typically desired by the subject” (p. 1). The referent, in other words, is sex,

such that other erotic predilections or dispositions (to children [pedophilia], to older or younger people; to people of a certain style or personality) are not considered part of sexual orientation. In recent years, some scholars propose recognizing “asexuality”—as the absence of sexual attraction—as a sexual orientation. Incorporating asexuality, one’s sexual orientation is defined by sexual attraction to those of the same sex, other sex, both sexes, or neither sex.²⁸

Clearly, sexual orientation is not sex but requires a working definition of sex for its determination. Although the conflation of these terms in the Equality Act is imprecise, this is generally unproblematic because the extension of rights to people based on sexual orientation does not create a clash of rights with sex. However, this is not the case for gender identity, and this conflation of terms is exacerbated by their leaving the term gender undefined. Before defining gender, I provide a brief primer on the feminism that frames this discussion.

Feminism and Gender

Feminism

Feminism is characterized by the belief that women/girls are subordinated to men/boys on the basis of their membership in the female sex class; that this subordination is not natural (or an inevitable consequence of biology); and that this situation should be changed (e.g., [Daly & Chesney-Lind, 1988](#); [Hester, 1992](#); [Lorber, 1994](#)). The key contribution of feminism has been to illuminate how ‘biological sex acts as an axis of oppression’ and to document the ways in which ‘living in a female body in a male-dominated society’ is accompanied by a range of disadvantages and injustices ([Reilly-Cooper, 2015](#)). Feminists use the term patriarchy to refer to social systems in which men have political power, resources, and social privilege, and which is associated with a set of supportive ideas (*patriarchal ideology*), which justifies and naturalizes these differences. “More than all men’s individual actions, patriarchy is simultaneously the process, structure, and ideology of women’s subordination” ([Lorber, 1994](#), p. 3).

There are several types of feminisms, which are distinguished by their theories of women’s subordination and their proposed solutions or politics ([Belknap, 2007](#); [Daly, 1997](#); [Lorber, 2001](#); [MacKinnon, 1989](#)). I adopt what is now known as a GC feminist perspective, which (like most feminisms), conceives of sex and gender as analytically distinct concepts and criticizes gender as a socially constructed mechanism anchoring female subordination, which I discuss more below. GC feminism is closely aligned with radical feminism, which theorizes that men as a group oppress women as a group through the operations and ideology of our patriarchal social system—linked institutions, beliefs, and norms (Allen et al., 2018).

Gender

The term gender was employed in feminist theory to capture facets of experience that are distinct from sex and shape observed male–female differences and social

inequality ([Lorber, 1994](#); [Nicholson 1994](#)). As [Bem \(1993\)](#) explained, throughout Western history three beliefs about women and men have prevailed: that males and females have fundamentally different psychological natures (“feminine” vs. “masculine”), that men are inherently the dominant or superior sex (male supremacy), and that both male–female psychological difference and male dominance are natural (biological essentialism) (see also [Daly & Chesney-Lind, 1988](#); [de Beauvoir, 1949](#); [Oakley, 1972](#)). Feminists, especially “second-wave feminists,” challenged this biologically essentialist ideology of natural male supremacy, highlighting the role of culture and socialization in the creation of male–female differences in behavior, personality, and capabilities and challenging the patriarchal ideology of females’ innate inferiority (e.g., [Bem, 1993](#); [Lorber, 1994](#); [Millett, 1970](#)).²⁹

Feminist perspectives do not deny biological differences, which obviously exist between males and females and shape life experiences, but instead theorize that women’s social subordination on the basis of allegedly inferior psychosocial natures (“feminine”) has a social rather than a biological origin. Rather than being innate and thus unchangeable, beliefs about female inferiority—justifying their subordination to men—rely on the endorsement of particular stereotypes around women (e.g., helpless, fragile, unintelligent, irrational, emotionally unstable) and men (competent, assertive, agentic, intelligent, rational) (e.g., [Bem, 1993](#); [Hester, 1992](#)). In other words, feminists point to the social construction³⁰ of women as feminine and males as masculine as a crucial rationale for and mechanism of female subordination, which constrains female bodies in supportive, caregiving (“feminine”) roles and limits the full humanity of both males and females ([Bem, 1993](#); [Haslanger, 2012](#)).³¹

Introduced in psychology by [Money \(1955\)](#)—though others had drawn the social versus biological distinction earlier—and popularized by [Stoller \(1968\)](#), the term gender gained traction in feminist scholarship and by the early 1980s was widely adopted in feminist work to capture malleable socially influenced differences between women/girls and men/boys against competing biologically essentialist ideas ([Haig, 2004](#)). In this usage, which I adopt here, gender refers to social norms or expectations imposed on sexed bodies (i.e., femininity and masculinity) ([Bem, 1993](#); [Oakley, 1972](#)) and is analytically useful as it distinguishes biological sex from the social attributes, meaning, and status that a society ascribes to being male or female, which vary across context ([Mead, 1935](#); [Millett, 1970](#); [Oakley, 1972](#)).

Doing Gender, Doing Difference, and Reinscribing Inequalities

On this feminist view, *gender* is a cultural frame consisting of social scripts, rules, or expectations (attitudes, behaviors, styles—ways of being and doing) imposed on male and female bodies. Gender includes characteristics and attributes appropriate for males (masculinity) and females (femininity) that function as standards by which people are judged to be good instances of their sex. Boys are socialized to be masculine, and girls are socialized to be feminine (and both heterosexual via heteronormativity), and the result of this ubiquitous socialization is what creates observable gender differences that appear to be natural ([Bem, 1993](#); [Millett, 1970](#)).

“Yet, the social pressure to conform to stereotypes, which is the socialization process itself, is a form of slow and subtle coercion and social reproduction of inequality” ([Risman, 2018](#), p. 14). The gendered treatment of males and females begins at birth and continues throughout life producing different types of people imbued with an aura of naturalness and inevitability. Adherence to gender norms is enforced with rewards and violations are deterred with threats of punishment ranging from gossip and teasing to rape and murder. As [Manne \(2017\)](#), p. 47) notes women’s ostensibly natural or freely chosen adherence to femininity “is almost inevitably deceptive, since more or less subtly hostile, threatening, and punitive norm-enforcement mechanisms will be standing at the ready, or operating in the background . . .”

On this feminist view, gender is not a role, a status, or an expression of an underlying sex essence; rather, as [West and Zimmerman \(1987\)](#) theorized in their widely cited account, gender is

a routine, methodical, and recurring accomplishment . . . undertaken by women and men whose competence as members of society is hostage to its production. Doing gender involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of male and female “natures.” (p. 126)

“Doing gender” is ongoing, situationally variable, and relational ([West & Zimmerman, 1987](#); see also [Butler’s, 1990](#), gender performativity). Thus, gender is not a property of individuals (like age) or an achievement (like earning a college degree or completing an Ironman); instead, gender is something we do in interaction in accordance with social scripts. Girls and women are expected to perform femininity; boys and men are expected to perform masculinity, and, like efforts to be a law-abiding citizen or a physically fit person, it is never ending.

Gender is conceptually distinct from sex category; gender and sex are not synonyms. Spotlighting the analytical distinction between sex and gender, West and Zimmerman noted, “[w]omen can be seen as unfeminine but that does not make them ‘unfemale’” (p. 134). Gender is of course linked sex to in that “[g]ender activities emerge from and bolster claims to membership in a sex category” (p. 127), but innate sex differences are not the source of gendered behavior—society is. Thus, what is feminine varies cross-culturally, but what is feminine is invariably appropriate for females, what is masculine is deemed appropriate for males, and what is masculine is universally more highly valued and conducive to higher social status than what is feminine (e.g., [Bem, 1993](#); [Murdock, 1937](#); [Oakley, 1972](#); [Rudman et al., 2012](#)). From an early age, girls are socialized to “ways of being and behaving that subordinate their own needs, desires, abilities, and interests to those of the boys, men, and children in their lives,” a way of interacting that prioritizes others, while males are encouraged to be assertive, agentic, and achievement-oriented ([Bem, 1993](#), p. 158). Male dominance³² is created, enforced, and perpetuated through gender differences and their meanings attached to sex.

Importantly, on this feminist view, gender is not a binary, it is a socially constructed hierarchy, which values masculinity over femininity ([Bem, 1993](#); [Delphy, 1980](#); [Jeffreys, 2014a](#)); punishes those who deviate from their sexed scripts; and disadvantages female people whether or not they conform because femininity is a form of social submissiveness that naturalizes women's dependence on men ([Reilly-Cooper, 2016](#)). The primary feminist objection to gender is not, as some queer theorists have argued, its binarism (i.e., the fact that there are only two options instead of 56) or the lack of a choice of a gender script given sexed assignment (although both are objectionable), but the devaluing of femininity and females under patriarchy. "Gender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power" ([Scott, 1988](#), p. 42; also [Lorber, 1994](#); [Tangri, 1976](#)).

Furthermore, on this account, the terms girl and boy and man and woman are not "genders". We do not have a gender; we do gender as masculinity or femininity, or we challenge gender through gender nonconformity (e.g., women being assertive, ambitious; men being nurturing and emotional). The terms woman and man are but biosocial kinds created through the socialization of differently sexed bodies ([de Beauvoir, 1949/1973](#)). "Woman" as [Jeffreys \(1997\)](#) explains, "is the result of the experience . . . of living in and as a female body and the way in which the actual or potential activities of this body, menstruation, child-bearing are constructed" (p. 66). To be a woman is to be an adult person who has experienced life as a female person, who in our current gendered system (but not inevitably) from birth faces social pressures to be feminine and submissive to men (e.g., [Bem, 1993](#); [de Beauvoir, 1949/1973](#), (see also [Bogardus, 2020](#), for a compelling defense of women as "adult human females" against identity or choice-based accounts)).

Despite being a human invention, gender permeates our lives because of its embeddedness in family, workplace, the state, as well as sexuality, language, and culture ([Lorber, 1994](#); [Risman, 2018](#)). Males are socialized to masculinity, such that what is masculine is seen as belonging to and expected of, even defining of, males and the same is true for females and femininity. This social-cultural concept of gender continues to be crucial to the development of feminist scholarship and activism ([Irvine, 2005](#); [Stone, 2007](#)). Successful challenges to explicitly sexist policies (structural impediments) supporting male supremacy (especially, its material basis, for example, patrilineal inheritance, women as property and unable to own property, barriers to education for women, sexual harassment) have been dismantled and/or eroded in many countries in the past century; yet, male–female inequality in material resources, power, and status persists. This is due in large part to the continued operation of gender at the interactional level ([Ridgeway, 2011](#)). That is, although most formal barriers to women's involvement on an equal plane with males have been largely abolished (at least in advanced industrialized societies), gender norms, along with social enforcement mechanisms, buttress ongoing male dominance and female disadvantage (i.e., patriarchy) ([Bem, 1993](#); [Ridgeway, 2011](#)).

Gender Abolitionism

Crucially, then, a goal of feminism is challenging gender or *degendering* society ([Delphy, 1993](#); [Irvine, 2005](#)). GC feminism is avowedly gender abolitionist; it aims to eliminate gender ([Bem, 1993](#); [Jeffreys, 1997, 2014a](#)).³³ In a world without gender, sex is unrelated to the acceptability or unacceptability of styles, attitudes, and behaviors. In such a (more just) world, which [Risman \(2009\)](#) calls a ‘postgender society’, males and females would be free from the shackles of femininity and masculinity—all that would be left is personality, styles, and behaviors that need not be, may are not, moored to sex. Challenging gender involves rejecting limiting prescriptions for behavior and presentation as appropriate for males and females. Boys can enjoy dolls, dress up, and drama, and girls can enough rough play, competition, and eschew concern with their appearance. Females are of the class that can give birth, and males are of the class that produces sperm, all going well; beyond that, men and women are individuals with varied personalities and presentation styles, which should be valued in their full diversity rather than constrained in limiting gender straitjackets.

In sum, much feminist theory defines *gender* as social scripts of masculinity (dominance) and femininity (submissiveness) attached to sex. Distinguishing femininity from female is distinguishing gender from sex. We can speak of people’s gender identity as being more or less masculine or feminine or androgynous (see [Bem, 1993](#); [Burke et al., 1988](#)). The goal of feminism is not just to unlink sex from gender, where either sex can choose the “male” or “female” scripts of masculinity or femininity, but to abolish the scripts entirely to advance the status of female people and to free both sexes from limiting rules about appropriate behavior (e.g., men can cry when they feel sad; women can prioritize careers over childrearing). This move does not require a retreat into asexual blank slatism or the “denial of sex-specific corporeality” (see [Daly, 1997](#)). One can (and I do) believe that females may show some biological tendencies or dispositions that differ from males, on average (e.g., less physical aggressiveness), even as these dispositions always exist within a social context that is gendered. Rather, this feminist position rejects the idea that being female is innately associated with a package of characteristics labeled “feminine” (and for males, “masculine”), such that being a female means being feminine. Unfettering sex from gender means that being a male and female means nothing more than having the reproductive morphology and biological functions associated with sperm production and egg production, pregnancy, and lactation. There would be no right way of being a male or female—one just is one—and the social significance of sex would be reduced to reproductive (biological) differences.³⁴

Conflating sex and gender

In the late 1960s to 1980s, “second-wave feminists” theorized sex inequality and clarified the role of sexism and gender as mechanisms underlying the continued subordination of women.³⁵ However, as the term gender became more widespread in the 1990s, the term began to be used in several different ways. At present the term gender means different things to different people ([Haig, 2004](#); [Jeffreys, 2014a](#)). Many academics and much of the public use gender as a politically correct synonym for sex,

which, as [Stone \(2007\)](#) noted, allows people to avoid using the term sex, which connotes sexual activity.

Fueling Confusion: Postmodern Gender

As the concept of gender was expanding, postmodern feminist philosophy began a sustained challenge to the existence of an objective reality, including human sexual dimorphism and the sex-gender distinction. Judith [Butler \(1990, 1993, 2004\)](#) is the most celebrated postmodern feminist, although her work echoes arguments made before she popularized them (e.g., [Kessler & McKenna, 1978](#); [Wittig, 1979](#)). Although I cannot detail the intricacies of their arguments here (see [Stone \[2007\]](#) for an accessible discussion, [MacKinnon \[2000\]](#) for a demolition), I highlight some key facets of postmodern theorizing which underpinned a constructivist view of sex, motivating queer theory's sex-gender conflation and gender identity ideology ([Jeffreys, 2014a](#)).

In general, (radical) postmodernism³⁶ denies existence of a knowable reality “by ignoring it, by refusing to be accountable to it, and in a somewhat new move, by openly repudiating any connection with an ‘it’ by claiming ‘it’ is not there” ([MacKinnon, 2000](#), p. 693). In postmodern feminism, the reality of women's disadvantaged situation—the focus of a feminist theory of sex inequality—is displaced by a challenge to the existence of a sex binary: sex is theorized as a social construction not a biological fact (e.g., [Butler, 1990](#); [Enke, 2012](#)). Pointing to DSD/intersex conditions, Butler and like-minded postmodern/queer theorists assert that the division of male and female is constructed by an artificial agglomeration of characteristics, such that the attributes we use to distinguish the sexes (e.g., testes, ovaries) are really capricious distinctions.³⁷ On this view, sex, like gender, is not a biological reality but an arbitrary (even coercive) “assignment” or identification. In postmodernism, “there is no reality, there is only what is thought to be real” ([MacKinnon, 2000](#), p. 708); sexual dimorphism becomes “the myth of biological dimorphism” ([Franke, 1995](#), p. 10); one option among many possible constructed realities.

Most important for our purposes, postmodern feminism ignores or dismisses well-defined, reproductive biological differences between the sexes, downstream of and causally shaped by genetic differences, the effects of which we have increasingly sophisticated understanding due to advances in molecular genetics (e.g., [Arnold, 2017](#); [Deng et al., 2014](#)). By conflating sex and gender and dismissing reproductive sexual dimorphism, postmodern feminism denies biological and social facts, which is paralyzing for feminism (e.g., [MacKinnon, 2000](#)). Without sex, the constituency of feminism—the female sex class—is undefinable ([Jeffreys, 2014a](#)). This impedes challenges to social inequality, including sexism, and recognition of a source of continued female disadvantage—reproductive biology ([Irvine, 2005](#); [Jeffreys, 2014a](#)). This matters for legal equality; as Justice Kennedy explained, “To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it.”³⁸

Thus, although ostensibly radical and progressive, the postmodern conflation of sex and gender *impedes* the feminist challenge to male–female inequality by obscuring sexism and promoting an individualistic solution to the social problem of gender. Reproductive biology is neither arbitrary nor constructed; biological sex differences matter socially and politically ([Hull, 2006](#); [Jeffreys, 2014a](#); [Lawford-Smith, 2019c](#)). Females have historically and continue to be disadvantaged not because they are feminine or feel like women but because they are female. Furthermore, despite postmodern/queer theory efforts, there is (as yet) no feminist way to understand womanhood without recognizing sex. If being a woman is unmoored from female biology, as is required by saying transwomen are women, then (a) being a woman is tied to traditional sex stereotypes of femininity, or (b) there is no difference between men and women and no objective way to discern whether a person is a woman or not ([Allen, 2018](#)). The former is obviously unacceptable to feminists, as it yokes womanhood to regressive stereotypes (and would make females who do not adhere to feminine stereotypes not women), and the latter fails to suffice as a label defining a meaningful political class with identifiable properties ([Allen, 2018](#); [Jeffreys, 2014a](#)). After all, if anyone can be a woman on the basis of in-the-moment self-declaration, then the term loses shared meaning and utility and the possibility for collective action is sacrificed for individualism, an outcome of postmodernism’s deconstructionist regress into a reality-resisting individualism that obscures material power relations and the hierarchy of sex and the role of gender in maintaining male dominance ([MacKinnon, 2000](#)).

Gender as “subjective sex.”

A third account of gender, which is not well theorized but is given license by the postmodern deconstruction of sex and is rooted in medicalizing discourses (see [Billings & Urban, 1982](#); [Raymond 1979](#)), conceives of gender (identity) as some inner essence or “subjective sex.” Gender identity is defined as a deeply held internal feeling or conviction that one is male or female, regardless of one’s sexed biology (e.g., [Benjamin, 1954, 1966](#); [Ettner, 1999](#); see [Bettcher, 2013](#) for a discussion and critique of what she calls the “Wrong-Body Model”). [Alice Dreger \(2008\)](#) depicts this gender essence narrative as holding that

trans people suffer from a sort of trick of nature, whereby they have the brain of one gender [*sic*: sex] in the body typical of the other . . . a sort of neurological intersex condition, typically understood to be inborn. (p. 375)

On this view, trans people are born “profoundly different from all other people in having the true gender identity of one sex in the body of another” ([Dreger, 2008](#), p. 380). This account presumes that everyone has a gender identity; that one’s gender identity is an innate property or essence that is fixed, unobservable, and may not be challenged; and that one’s “real” sex is determined by this innate essence rather than reproductive biology. Thus, in the place of the biological reality of sex and the social construction of gender, gender identity ideology posits the social construction of sex and the biological reality of innate gender ([Jones, 2015](#); see, for example, [Taylor et al., 2018](#)). This

account of gender (identity) as sex motivates the political position that treating one “equally” means treating one as their gender identity (*qua* subjective sex), regardless of actual sex.

Crucially, current expositions leave unaddressed questions about the nature of this innate essence or feeling; its sources; and why (or how) non-trans people who claim to not experience such feelings are, in fact, still sexed and gendered (e.g., [Allen, 2018](#); [Bailey, 2003](#)³⁹; see [Reilly-Cooper, 2016](#)). Moreover, as [Bettcher \(2013\)](#) notes, this perspective “naturalizes sex and gender differences in a troubling way” (p. 234; see also [Irvine, 2005](#)). That is, by theorizing gender as something innate and yoked to sex, gender identity ideology reifies the sexist, biologically essentialist notion, long challenged by feminists, that sex and gender should match, albeit in reverse form. Whereas according to traditional biological essentialism, sex determined gender (i.e., females are naturally feminine), gender identity ideology presumes that gender determines sex (i.e., feminine people are actually female), contravening biological facts about sex and reifying the sexist, archaic notion that females are naturally feminine and submissive. As such, gender identity ideology disappears sexism as well as the role that gender plays in subordinating women and prevents the disruption of gender, which lies at the heart of the feminist project ([Jeffreys, 2014a](#); [Reed, 2015](#)⁴⁰).

Ultimately, this gender-identity-as-innate-sex account fails because it is incoherent and scientifically unsubstantiated. The account is incoherent both because it does not define what “gender identity” is and because explaining how one might have a gender identity-sex mismatch requires a biologically implausible sexed mind-body dualism.⁴¹ Equally important, the idea that “gender identity is an innate, fixed property of human beings that is independent of biological sex—that a person might be a ‘a female trapped in a male body’—is not supported by scientific evidence” ([Mayer & McHugh, 2016](#), p. 8). If a brain is in a male body, it is a male brain (and vice versa). Crucially, rejecting claims of a scientific basis for the gender-identity-essence narrative does not imply, as some (e.g., [Hay, 2019](#)) have argued, the endorsement of a natural link between sex and gender (e.g., being female and femininity); quite the opposite. GC feminism wholly rejects the notion that gender maps onto sex. This implies a refutation of the traditional idea that females are naturally feminine and gender identity ideology’s implication that highly feminine people must really be females.⁴² The idea that feeling feminine signals one’s true sex better than reproductive biology requires the endorsement of the sexist idea that females are defined by feminine pursuits, which subordinate women. Females are not defined by feeling or presenting as feminine; they are defined by being female.

Thus, overall, gender identity ideology offers a deficient exposition of gender identity, assumes a biologically illusory sexed mind-body mismatch, and ignores the sex-gender distinction theorized by feminists. Despite these significant deficiencies, this gender essence narrative undergirds the Equality Act and its prioritizing of gender identity over sex. This has both practical and symbolic effects. The symbolic effects include making womanhood equivalent to a feeling or subjective identity, rather than recognizing that female people have unique social experiences and embodiment from

birth. And, as with the postmodern account, by denying the reality of sexed reproductive biology necessary for describing female subordination, gender identity ideology impairs challenges to ongoing sexism and male–female inequality ([Jeffreys, 1997, 2014a](#)). When gender replaces sex, it obscures sexism.

Disappearing sexism: Cissexism and the cis-trans hierarchy

Not only does gender identity ideology's sex-gender conflation impede females' ability to identify sex and challenge sexism, but also it displaces the feminist challenge to gender with a cis-trans gender hierarchy ([Hungerford, 2016](#)). This hierarchy, and its associated political agenda, comes with a new vocabulary: cis and trans ([Jeffreys, 2014a](#)). Assuming everyone has a gender identity (as a "brain sex"), this account divides the world into two types of people. "Cisgender" people are those whose gender identities match their sex (or those who are "happy" with their "gender assignment," (e.g., [Serano, 2007](#)), and transgender people are those whose gender identities do not match their sex (or who are unhappy with their sex-gender mismatch) ([Stryker, 2017](#)). In this new gender hierarchy, female's disprivileged status in the gender hierarchy is ignored, as non-trans ("cis") females are viewed as *privileged* by gender in comparison to trans-identified males. That is, on this view, non-trans females occupy a dominant position in the gender hierarchy along with non-trans males, both of whom have "cisprivilege" and oppress trans people ([Hungerford, 2016](#)). Thus, "[w]hat feminists have traditionally identified as the essentialist yoking of sexed-body to gendered behavior is rewritten," in this cis-trans gender hierarchy, "as the privilege of alignment between one's gender identity and the sex one is (coercively) assigned at birth" ([Jones, 2015](#)).

The practical implications of this cis-trans gender hierarchy include the labeling of feminist challenges to sexism, ranging from a defense of sex-separated spaces to discussing women's reproductive biology, as various forms of "cissexism"⁴³ and transphobia ([Jeffreys, 2014a](#)). Feminist engagement—efforts to raise the status of female people—is contorted into anti-transgender activism. For example, trans activists deemed it unacceptable transphobia for women to refer to their sexed bodies or reproductive processes as *women's*. In some contexts, simply suggesting that sex is real and binary is deemed transphobic; elsewhere, efforts to raise awareness about and combat shame around women's bodies is deemed offensive to trans people. For example, celebrating women's day with vulva cupcakes was deemed transphobic; pregnant women have been relabeled "pregnant individuals" or "birthing parents" by health advocacy and women's groups; vaginas have become "front holes"; and in discussions of periods, women have been referred to as "menstruators," all to validate the experiences of transwomen who may or do feel hurt or inferiorized by the public recognition of the features of female bodies that they do not possess (e.g., [Bobel, 2010](#); see [Jeffreys, 2014a](#)). Many (if not all) of these instances are motivated by a still pressing need to educate women (and others) about female reproductive biology, to bolster girls and women's low self-esteem in a society that still objectifies women and overvalues female physical attractiveness, and, in some areas, to combat efforts to undermine female reproductive control. This reframing of feminist efforts to maintain

and improve the status of female people as transphobic undermines, in a direct way, the feminist project. As Allen et al. (2018, p. 2) noted, to say that such feminist efforts are transphobic is akin to saying that a children-only swimming session is anti-adult or adult-phobic “and replaces the determination to center the needs of a certain group of people with the determination that the purpose of that centering is to exclude.”

Challenges to sexism and heterosexism are muffled by this revisionary cis-trans gender hierarchy. LGBT publications promulgate the narrative that it is “cissexist” to refer to genitalia as deterministic of gender qua sex, to question assertions about female penises or “lady sticks,” or to conceive of sexuality as referencing sex rather than gender. This latter charge—of sexual orientation as “cissexist”—is generally directed at lesbians, with flyers and videos explaining that lesbian preferences for female or non-bepenised partners is “transphobic genital fetishism.”⁴⁴ This reformulation of gender oppression as a cis-trans axis, where non-trans female and male people are privileged as “cis” relative to trans people by gender, disappears sexism and dismisses people’s sexualities. The language for challenging sexism, female-subordination, and even identifying and discussing female embodiment and experiences (period issues, reproductive rights) is censored as transphobic, sadly just as (some) women in have been gaining the knowledge and confidence to talk about their bodies and exert agency over reproduction.

In sum, the question is not whether sex determines gender, as both GC feminists and postmodern/queer theorists and trans-rights activists all agree that reproductive biology is not ineluctably linked with characteristics labeled masculine or feminine and should not determine life chances. Rather, the crux of the debate is: *does biological sex matter?* GC feminists say absolutely yes, relying upon a wealth of biological research evidencing the reality of sex (distinct male–female forms), which matters in reproduction, in sport, and in broader social life in a world with a long and continuing history of male dominance and sexual aggression against females. Conversely, trans activists and allies assert that sex does not matter, arguing some (usually all) of the following: transwomen are women (like “poor women” or “black women”); that recognizing sex is “biological essentialism”; and that denying that transwomen are women is a denial of their experiences, authenticity, even existence (e.g., [Bettcher, 2013](#); [Davis, 2017](#)). The Equality Act takes sides in this contested, significant sociopolitical debate, endorsing gender identity ideology; privileging gender identity over sex; and thereby prioritizing the rights of transwomen to access female provisions over females’ rights to have sex-based provisions. This, despite the fact that females remain disadvantaged, socially and politically, and are frequently targeted by sexual harassment, rape, and domestic violence at the hands of male people.

Thus, based on the foregoing, I submit that legislating an unobservable gender identity—only ascertainable through in-the-moment first-person testimony (“I identify as a woman”)—as something that can override sex-based rights without exception is not just hasty and misguided, it evinces a profound lack of concern for females—a prototypical instance of female subordination. The Equality Act in current form undermines privacy and safety protections for females and threatens their hard-won

sex-separated provisions. The idea that a male convicted of sexually assaulting or murdering females can gain access to the female estate simply by saying that he feels womanly is not just ill-considered, it is a sexist affront to female people. Prioritizing gender identity over sex is both unacceptable and unnecessary. Alternatives exist that can extend federal nondiscrimination protection to LGBT people without nullifying sex-based rights.

Alternatives to the Equality Act: Protecting LGBT and Sex-Based Rights

In current form, the Equality Act fails to balance sex-based and gender identity–based rights. The act abolishes sex-separated spaces, competitions, and provisions in favor of a circularly defined, unobservable gender identity, prioritizing the rights, feelings, dignity, and safety of those who feel like or identify as women over born females. To be sure, trans people experience discrimination, harassment, and sometimes violence (almost always from males) based on their gender expression. But so too do women and girls on a much larger scale, and females remain disadvantaged by gender and their membership in the female sex caste ([Jeffreys, 2014a](#)). Both females and trans people should be protected from mistreatment and discrimination. How we do this in a manner that does not elevate one group’s disadvantages or challenges as more important or worthy of addressing than another is complicated. Essential to this effort is, in my view, retaining the distinction between sex and gender in the law and recognizing that sex-based rights must not be displaced by gender identity along with a recognition that physical safety has always been prioritized over identity validation and feelings. Exclusion can hurt, but when exclusion exists for legitimate purposes—especially safety—it can be justified. We use age, height, weight, prior experiences, sensory capacities (sight and hearing), health status, to name a few, variously for determining eligibility for participation in a number of social activities from going to a bar, driving a car, operating heavy machinery, donating blood, riding a rollercoaster, consenting to a sexual relationship, and eligibility for marriage.

Here I briefly sketch out an alternative way to extend federal anti-discrimination protections to LGBT individuals while maintaining sex and sex-based rights. This is not fully fleshed out, but rather I offer these suggestions for reformulating the Equality Act in the face of space constraints:

1. Statutorily defining sexual orientation and gender status as new protected classes distinct from sex rather than subclasses of sex. One has a sex, sexual orientation, and a gender status (with gender status possibly as an optional category).
2. Clarifying the definition of sex in federal law as biological sex and ending the practice of allowing “changes to sex” on birth certificates and other legal documents, with exceptions for DSD/intersex conditions where biological sex was unclear. (Recall this is increasingly rare as we now understand more about these conditions and conduct genotyping and other tests when sex is ambiguous at birth.) Identifying one’s sex remains relevant for women’s equality as well as

medical and sociolegal concerns (e.g., blood transfusions to potential pregnancy; identification, including forensic DNA testing).

3. Creating a new (possibly optional) “gender status” category on legal documents (namely, driver’s licenses, passports) where people can record their status as “woman, man, trans, transwomen, transman, nonbinary, agender, other.” This category is self-identified. Sex should continue to be recorded (along with gender when useful) for demographic statistics, including crime.
4. Prohibiting discrimination on the basis of sex, gender status and expression, and sexual orientation in federal civil rights law, while recognizing that *gender status does not equal or supersede sex*. In practice, this means that a person should not be discriminated against on the basis of gender status or expression in sex-neutral contexts, such as employment and housing. When sex-separation is for a legitimate purpose (privacy, biological differences [for sport], safety), sex can be used as a basis for separation, *regardless of gender status*.
5. Committing to the creation of more third (gendered, gender-neutral, or unisex) spaces (e.g., bathrooms, locker rooms, incarceration facilities, refugees, shelters) for individuals who do not wish to inhabit spaces with others of their sex along with more concerted efforts to enhance protections to better protect the privacy and safety of those who do (see [Dolovich, 2011](#); [Jeness et al., 2019⁴⁵](#)). When possible (e.g., in a large facility) spaces might alternate between sexed and gendered spaces (e.g., bathrooms on different floors), with clear signs as to whether they are sex or gender separated.⁴⁶ Private businesses may choose how they separate spaces, with the caveat that single-sex options must exist for female people in some form when sex-specific services have been identified as legitimate and beneficial for females. For example, at least one rape crisis center in a jurisdiction should retain a female-only policy, given that the overwhelming majority of support-seekers will be female, nearly all of whom will have been victimized by male-bodied people, and some of whom will have PTSD. Italy and the United Kingdom, the latter following several negative incidents and an admitted failure to strike a balance between sex and gender identity rights, have established separate transgender prison units ([Gilligan, 2019](#)). This seems to be a practical solution as it protects trans inmates from predatory men without undermining the safety and privacy of females in the women’s estate. In the LA County jail system, for example, the K6G unit houses transwomen and gay males separate from the general population. There is evidence this is an effective compromise, which protects individuals at risk in sex-separated general population without undermining the privacy or safety of another marginalized group—females (e.g., [Dolovich, 2012](#); but see for a different view).

As some have noted, the provision of third (gender-neutral) provisions is not always possible. When it is not feasible, I propose making the men’s provision the “open” provision and the female provision the protected female provision. After all, public spaces were originally men’s, and it was not until females fought for separate provisions that they were provided.⁴⁷

6. Pledging to consult with both women's groups as well as groups representing LGB and TQ+ interests (given that interests are not always aligned) in future discussions or policy considerations that involve negotiating between sex-based and gender identity–based rights. The relative exclusion of female people from political decision-making, in general, but especially around redefining sex-based rights and overriding sex with gender identity is, quite simply, not acceptable in a democratic society.
7. Ceasing the current practice of using gender as a synonym for sex (especially in political, legal, and medical contexts). It is imperative that we maintain the legal distinction between sex and gender. Gender is not coextensive with sex and employing it as a synonym for sex, especially in scientific, medical, and legal contexts is problematic. Discussing and negotiating between competing gender- and sex-based protections is impossible if we cannot (or do not) distinguish between sex and gender. To maintain women's protections on the basis of their sex, we must employ concepts that allow us to make these distinctions.

With these revisions, gender status/expression and sexual orientation would be protected in addition to sex. Being LGB or transgender would not be a basis for discrimination. Crucially, however, this recognizes that being transgender is not the same as being the other sex. Being female or male is not a feeling, identity, or choice but a material, biological reality. There is no adequate justification for undermining female sex-based rights in favor of gender-based rights, given that female people are subordinated for being biologically female, regardless of whether they are feminine or not, and have distinct needs and experiences on this basis. Allowing any male to enter any female space without any gatekeeping compromises the safety of female people. This is only defensible if one thinks that the safety and feelings of male-born people who identify as women matter more than the safety and feeling of female people born female, which amounts to blatant sexism.

Opposing the extension of male gender identity right-of-access to female spaces is not to feed into the myth of a “trans boogey-person” or “trans deceivers” (see [Bettcher, 2007](#)). This is not about transwomen; this is about males. Still other trans scholar-activists have argued that female concerns about sex-specific spaces are irrational “moral panics” (think “reefer madness” for an extreme example), here specifically a “penis panic” ([Westbrook & Schilt, 2014](#)), characterized by excessive even fanciful alarm and serving certain purposes, namely, to exaggerate threats and demonize trans people as “gender deviants.” Given the reality of male violence against females and the lengths to which some males will go to prey on females, it is not fanciful, unfounded worry to have concerns about gender self-id as the sole and sufficient condition for entry into women's spaces. Far from being fanciful, gender identity policies have already resulted in assaults by transwomen against females in formerly sex-separated prisons, bathrooms, and shelters. To be clear, I am not arguing that gender self-ID will usher in a sweeping epidemic of violence against females, nor am I suggesting that transwomen pose a particular danger to women and girls. Rather, I am correcting false claims that concerns about predation are fanciful and will never happen and that gender ID policies will cause no harm to females—they already have.

Instead, like [Stock \(2018b\)](#), I object to letting “even small numbers of females be the automatic collateral in sweeping social changes such as those proposed”.

Another common retort to feminists’ concerns is the argument that extending rights to transwomen will not actually affect female people. For example, some trans-activists have argued that “human rights are not a pie,” implying that extending rights to transwomen is cost-free for female people. However, that is patently false. Giving transwomen access to female provisions (awards, competitions) eliminates provisions that were instituted for female people on the basis of sex. Allowing males into the female estate, for example, undermines female inmates’ rights to sex-separation; allowing males to use the women’s locker room means that girls and women lose their right female-only spaces; and allowing males in female sports has resulted in women and girls losing competitions, scholarships, and professional sport opportunities.⁴⁸ All of these provisions are zero-sum. Inclusion based on gender self-id nullifies sex-separated provisions—an obvious cost to females.

Trans-rights activists have also pointed to the considerable hardships involved in being transgender as a sufficient justification for exempting trans people from sex-based eligibility requirements. However, while I recognize their considerable adversities, there is no contest of oppression for which trans people can claim victory over female people. Moreover, access to women’s provisions is not a solution to the problems that transwomen face ([Hungerford, 2016b](#)).⁴⁹ The argument that transwomen are at such greater risk for physical harm than non-trans women that we should allow males to self-identify into women’s spaces is illogical, given the threat to both females and transwomen that gender self-ID poses, and unnecessary given the option of third gendered or unisex spaces.

Another argument made by trans activists is that the psychological harm to trans people caused by exclusion from women’s spaces should justify their inclusion into opposite-sex spaces; however, this too is misguided, especially when we recognize that sex-separated provisions are purposely exclusionary of the opposite sex. An inclusivity argument is thus wholly inapposite. Furthermore, a corollary argument that we should compromise female physical safety because physical and psychological harm caused to females by male predation as a result of gender self-id will be far less common than the psychological harm caused by exclusion of transwomen from female spaces is also misguided because we have never considered feelings (or identity validation) as equally deserving of protection than actual physical safety. Moreover, the psychological benefit for the inclusion of a small proportion of transwomen is counterbalanced by the loss in felt security that the much larger proportion of non-trans females may experience as a result, and third (gender neutral) spaces address safety needs. The “inclusivity” of the Equality Act is injudicious and comes at the expense of provisions instituted to facilitate women’s equal participation in social life.

Conclusion

The authority and responsibility of defining categories of people and classifying people into these categories is an important governmental function ([Franke, 1995](#)). At present, American equality jurisprudence recognizes the reality of biological sex and provides sex-based rights to women on the basis of objective biological differences between the sexes and women's disadvantaged status. Albeit with the laudable aim of federally prohibiting LGBT discrimination, the Equality Act would revise the definition of sex to include people's identifications with or feelings about their sex and/or gender as a legally protected status that overrides biological sex. This would not only produce some obvious absurdities (requiring female officers and service providers to treat male genitalia based on a feminine gender identity), but also ignores the conjoint biosocial forces that produce women and men, with substantially different life experiences and embodiment. Females cannot identify out of their female bodies, which can attract horrible social practices such as female genital mutilation (FGM), or their female bodily functions such as menstruation, pregnancy, and childbirth, or the subordinating social practices imposed on those bodies. As long as every single person that is alive continues to be the product of female bodies and reproductive labor, sex differences exist, matter, and should be recognized. In fact, equality depends on it.

Despite its many problems, the Equality Act has been supported by all Democratic representatives, who have hailed it as "landmark legislation" that "continues our march towards justice" (Rep. Nadler) and which the majority of the public supports.⁵⁰ In the words of Rep. Cicilline (D-RI) the act is "quite literally a life-saving bill that addresses some of the fundamental inequalities that still exist in America." There are no doubt good intentions behind this bill; however, the bill's form, especially its redefinition of sex, is poorly thought through, ill-defined, rooted in contested and misguided ideas, and if implemented would substantially undermine females' sex-based rights. When sex-based rights are based on in-the-moment self-declaration, the sex-based protections for females are lost.

Democratic representatives have failed to adequately address how this bill will affect the rights of female people, and the lack of attention to these implications is revealing if not surprising. The bill includes no exceptions to gender identity right-of-access, giving male predators, including those convicted of sexual assaults or domestic violence, right-of-access to female spaces on the basis of unchallengeable first-person testimony. Furthermore, there is nothing in the bill to prevent self-declared gender identity from being exploited by males who, for a variety of rapacious reasons, want access to female spaces or provisions. It takes either a profound lack of concern for females or an extraordinary amount of willful ignorance to fail to consider that this legislation will be exploited, given existing instances as well as the fact that predatory males go to extraordinary lengths to victimize females. One does not have to be a feminist to acknowledge that the Equality Act manifests a disregard for females' sex-based rights or to have legitimate concerns about the bill—concerns that are invariably dismissed as transphobia ([Reilly-Cooper, 2016](#)). Following others, I have argued that the insensitivity to the consequences of this bill is due to legislative policy capture and the confusion around sex and gender. To that list some might add that this bill's priorities evince continuing sexism and disregard for females.

The fact that trans individuals experience significant hardships on the basis of their gender expressions or status in society must be acknowledged and addressed. Being or identifying as trans should not be a barrier to full participation in social life, and all people should be respected and extended compassion regardless of the way they do, feel, or experience gender. As a society, we can (and should) continue to evolve in a manner that frees people from gender constraints and works to overcome various forms of sex inequality and gender discrimination, but we must do so in a manner that neither compromises existing rights nor conflates different groups with unique experiences and distinct needs out of a misguided attempt to be inclusive. The Equality Act fails to balance competing rights and interests, and this must be recognized, discussed, and addressed with the consultation of affected groups, which include non-trans women and men as well as trans people and allies. Robust discussion will include a consideration of the implications of significant heterogeneity in the trans population (e.g., length, timing, and reason for transitioning), which affects how people experience and are perceived by the world, and varies from people who pass as their born sex (would not be recognized as trans) from those who pass as the opposite sex and have undergone “sex reassignment surgery.” Recognizing a distinction between transsexual and transgender people or experiences may be useful. A one-size fits all solution for trans people may not be adequate.

In conclusion, good intentions are not enough. All too often, legislation has unintended negative consequences disproportionately affecting already marginalized groups. In this case, the negative consequences for females are foreseeable and should be recognized. When the rights of two protected groups clash, we must work to balance rights and safety, a balance that the Equality Act fails to achieve in part because of a lack of dialogue with affected groups and, at least ostensibly, because it did not even attempt to consider the impact on females. As Allen et al. (2018) note, “It is a mistake to turn our attention away from female oppression out of concern for the additional harms faced by trans people in our society.” If we lived in a world where female bodies were valued equally; females were equally paid, equally treated, and so on, we may not need to protect sex-based rights, even though biological differences related to reproductive functioning remain. However, this is not our world.

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Notes

1. Trans or transgender is an umbrella term that includes many different people and identities, including transgender and transsexual persons as well as those who identify as nonbinary, genderqueer, agender, and other terms. A general definition of transgender is provided by GLAAD as “a term used to describe people whose gender identity differs from the sex they were assigned at birth.” This includes people who have or are in the process of transitioning with surgery and/or cross-sex hormone treatment as well as people who seek no medical intervention. Following others, I use trans to denote this broad population. When I use particular terms such as “transwoman” or “transman,” I refer to these specific groups. Current terminology is diverse and changing, and I attempt to describe populations accurately employing commonly accepted terminology.

2. For illustration, Biggs’ (n.d.) investigation of yearly trends in the use of LGBT+ terms in the annual reports of prominent LGBT lobby groups revealed a drastic shift in emphasis away from sexuality to trans issues. In the HRC annual report, for example, trans terms were rarely mentioned in 1999 (<2%, compared with ~30% lesbian, and ~60% gay), increased to roughly 25% in the first decade of the 2000s, surpassed 50% in 2015, and constituted nearly 75% of mentions in 2017 (with gay, lesbian, and bisexual terms *combined* accounting for the remaining 25%). A similar pattern is observed for GLAAD’s annual report and that of various U.K. LGBT+ organizations. See Biggs: http://users.ox.ac.uk/~sfos0060/LGBT_figures.shtml

3. Rep. Daniel Lipinski (Illinois) is the only House Democrat that did not sponsor the Equality Act; he did, however, vote for the Act (along with eight Republicans) when it passed the house on May 17, 2019. A similar bill in the Senate has been co-sponsored by all but one Senate Democrat but currently faces an unsupportive Republican majority.

4. I will note that in this article, I use the traditional definition of the term women in the biosocial sense as synonymous with adult human females (non-trans); men as adult human males (non-trans); and boys and girls as young males and females, respectively. Following others, I employ transwoman to refer to male-born individuals who identify as women or feminine (other terms adopted include, *inter alia*, male-to-trans, male-to-female, trans-identified, or transfeminine); transman to refer to female-born individuals who identify as men or masculine (other terms include female-to-trans;

female-to-male, or transmasculine); and trans to refer the broader group inclusive of transwomen, transmen, and people who identify as something other than woman or man (e.g., nonbinary). There is considerable heterogeneity within the class of trans people, which should be recognized, including the length of transition, timing of transition (e.g., before puberty vs. after age of 60 years), type of transition (surgery, hormonal, presentational, identity), and the basis of transition (sex or gender dysphoria vs. not; [Lawford-Smith, 2019a](#)). These differences should not be homogenized, in my view, as the social and biological experiences of someone who transitions before puberty for reasons of dysphoria are quite different from someone who transitions after spending half a century with the biological and social experiences of the other sex. However, given my current foci (and inevitable space constraints), I do not elaborate on these distinctions here.

5. For reasons elaborated more herein, my focus is on transwomen rather than transmen, given the clash of rights between transwomen and female people, as two disadvantaged classes. The Online Supplemental information provides more details on framing than permitted given space constraints on this point along with several other points in the form of a FAQs on the article.

6. I use “on the basis of gender identity” or “gender identity right-of-access or claim” because the Equality Act’s vague definition of gender identity concomitant with the absence of a (noncircular) definition of gender (discussed herein) makes it statutorily unclear what constitutes a gender identity claim. Some have naively suggested that males won’t claim to be females to gain access to spaces, but given the lack of clarity in definition, they don’t have to! The current legislation does not provide a clear framework for understanding what gender identity is, what forms or categories it can take, how it could conflict with sex, and why it should be used regardless of sex, all of which is the focus of this article. One could simply say, “I claim gender identity access to the space/provision,” and the Equality Act would make denying that person right-of-access federally prohibited discrimination.

7. Whether Karen White sincerely identifies as a transwoman or used gender-identity to access the women’s estate is not clear. However, the guiding principle in gender identity ideology is that if someone says they are trans, they are trans for all purposes. Furthermore, although this is, of course, an unusual case, a British government survey counted 125 transgender prisoners in 2018. According to Ministry of Justice figures released in response to freedom of information requests by the BBC, 48% of those had been convicted of one or more sexual offenses, a percentage that is far higher than the general population rate ([Fair Play for Women \[FPFW\], 2017](#)). In 2019, following problems including the Karen White incident, England changed course around housing transwomen in the women’s estate. Rather than housing with women, transwomen who do not want to be in the men’s estate are now steered to a separate wing of the women’s prison. See the Online Supplemental information for more discussion.

8. For example, the United Nation's Minimum Standards for the Treatment of Prisoners states, "The different categories of prisoners shall be kept in separate institutions or parts of institutions *taking account of their sex* . . . Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate" (emphasis added).

9. For example, in December, 2019, J. K. Rowling was excoriated by news outlets and virulently criticized (even abused) by others on social media for tweeting in support of the right of a woman to express a belief that biological sex is real without losing her job. Rowling was referencing the case of Maya Forstater, who was fired from a job in the United Kingdom for expressing the belief that sex is real and immutable, see [Bowcott \(2019\)](#). Rowling has been deemed transphobic and a "TERF," labels accompanied by sexist insults and incitements to violence (see: [terfisaslur.com](#)). As another illustration, lesbians' dating preferences for female people (to the exclusion of transwomen with male genitalia) have been deemed "transphobic vagina fetishism," and defining a lesbian as a female person with a homosexual orientation has been deemed bigoted "ontological oppression" for excluding born-males who identify as lesbians (see responses to Ariella Scarcella). This, despite the fact that at no time in history, including the present, does being a lesbian give one access to status or power. Furthermore, while perhaps rude, denying the validity of a male person's lesbian self-identification does not amount to a denial of either their humanity or existence.

10. Although views on this issue vary widely, some scholars (e.g., [Lance, 2019](#)) have suggested that even discussing whether transwomen are women and/or female amounts to *debating their existence*, even *complicity with violence*. I concur with [Jones \(2018\)](#) who argues that the collapsing of the criticism of gender identity ideology and its sociopolitical demands into an act of bigoted hate speech directed at trans people with the consequent silencing of political discourse is not just unwise but democratically illegitimate.

11. To this end, I will note that the conceptual language in this domain is contested, sensitive, and in constant state of flux. Writer and trans activist Julie Serano has noted that "nearly every single word that refers to some aspect of transgender identities, bodies, or life experiences exists in a perpetual state of debate or dispute" (see <http://www.juliaserano.com/terminology.html>). I define my terms as clearly as possible and use the terms as employed in the various perspectives I describe. I admit to some trepidation that my terminology may be outdated or misrepresented in this rapidly changing and heated terrain, but such is not my intention, and these issues are too important to shy away from discussion out of fear of being misunderstood.

12. While my focus on the Equality Act narrows my attention to the United States, I would be remiss to fail to acknowledge the even more dire situation of many women and girls in less developed areas of the world. For example, in some areas, female genital mutilation (FGM) is still used to control female sexuality. Research suggests 100 to 140 million females have been subjected to FGM worldwide, and more than 3

million are at risk each year in Africa alone ([Feldman-Jacobs & Clifton, 2014](#)). In some parts of the world, females lack basic freedoms to go in public (unaccompanied by male chaperones), to drive cars, to own property, etc., remaining under the control of male family members. Undergirded by political and social structures, various forms of violence as female subordination continue to be practiced and condoned, including honor killings, forced or child marriages, trafficking of women and girls, and sexual violence, all of which are barriers to females' health and equal participation in society (e.g., [Belknap, 2007](#); [García-Moreno et al., 2015](#)).

13. Not everyone believes that sex-based provisions are good for female people regardless of the inclusion of people on the basis of gender identity (e.g., [Davis, 2017](#)). See the Online Supplement for a discussion of this point.

14. Broadly speaking and discussed herein, gender-critical feminists tend to be critical of gender, understood as distinct sets of social stereotypes — “femininity” and “masculinity” — attached to sex, arguing that these are harmful social norms that subordinate females and naturalize their submission.

15. In more extreme versions, trans rights scholar-activists contend that biological sex does not in fact exist as a material reality but is instead discursive construction shaped by gender (e.g., [Levasseur, 2014](#)). I discuss this later in this article.

16. For example, sexual orientation is defined in reference to the sex of the person and the sex of those to whom they are romantically/erotically attracted, and gender refers to the personality attributes assigned to sexed (male or female) bodies (i.e., masculinity and femininity).

17. Throughout my focus is on women's sex-based rights, given their disadvantaged position and sexual victimization (male voyeurism, sexual assaults, etc.) and the fact that women's sex-based provisions were hard-won provisions to facilitate women's entry into public spaces and the economic sphere ([Carter, 2018](#); [Jeffreys, 2014b](#)). It should be noted that the Equality Act would also provide females gender identity right-of-access to male spaces and provisions on the basis of gender identity.

18. In a longitudinal study, [Dhejne et al. \(2011\)](#) reported that “male-to-female” individuals retained a pattern of male criminality after transition with their rates of crime and violence being nearly twice that of their matched female controls (and not significantly or substantively different from matched non-trans males).

19. In the United Kingdom, revisions to the Gender Recognition Act of 2004, which would facilitate gender self-identification are currently being debated. At present, the U.K. Equality Act 2010 allows single-sex exemptions, which must “be objectively justified as a means of achieving a legitimate aim” (Schedule 3, para. 28). However, a recent evaluation of the law indicated that these guidelines were being misinterpreted and/or misunderstood, such that legitimate sex-specific spaces or provisions were

being replaced by gender-neutral ones that erode sex-based protections enabled by the Equality Act ([House of Commons: Women and Equalities Committee, 2019](#)).

20. See <https://www.citynews1130.com/2019/08/27/vancouver-rape-relief-center-vandalized-likely-over-restrictions-for-transgender-people/>

21. For example, the New Jersey corrections officers union recently filed a lawsuit seeking to block the transfer of a transwoman to the state's only women's prison. The complaint argues that female corrections officers should not be required to strip search inmates with male genitalia ([Ford, 2019](#)).

22. As we observe in the seahorse, where it is the male who gives birth (through muscular contractions that expel from 5 to 2,500 [!] babies from its pouch), sex is defined by gamete size not by birthing.

23. For example, 46XY individuals with nonfunctional mutant alleles of the X-linked *AR* gene specifying the androgen receptor have a DSD condition known as complete androgen insensitivity syndrome (CAIS). Individuals with CAIS have testes, producing (male levels of) testosterone, but in the absence of a functional androgen receptor to which it binds, the testosterone has no effect. Consequently, individuals with CAIS do not develop male genitalia or male internal duct systems; their external genitalia appear female, but given that they are otherwise genetically male, they do not have the female genetic resources to form female internal duct systems. Such classically intersex conditions, a narrower subgroup of the broader differences in sexual development (DSD) category, are relatively uncommon, estimated to occur in less than 0.02% of births ([Sax, 2002](#)).

24. This does not mean these individuals are not important, deserving of recognition, and humane treatment, only that the existence of a functional sex binary is not challenged by the existence of DSD/intersex conditions. Furthermore, the rights of intersex people *qua* intersex people are included under existing sex protections; thus, interrogating these conditions beyond recognizing that they exist and do not undermine the reality of biological sex and male–female forms is out of the scope of this article.

25. A recent widely publicized example is Caster Semenya; she was assigned female at birth and is legally a female, but she is chromosomally male (XY) with a DSD condition (5-alpha reductase deficiency). That Semenya is genetically male was (unfortunately) shared with the public in the early 2000s when her private medical tests were leaked; this was confirmed by the recent IAAF ruling, which requires Semenya to lower her testosterone levels as an XY individual. (The IAAF does not currently limit endogenous testosterone levels in XX individuals.)

26. I have looked at numerous examples of birth certificates and passports from many different countries, and all list sex not gender. It is possible that some jurisdictions I did not examine list gender or that there have been recent changes of which I am not

aware. However, in the United States, most if not all jurisdictions continue to record sex not gender on legal documents.

27. The term sex is rarely defined in legal statute, perhaps because the meaning of the term is considered to be plain (like pregnancy); however, this may be changing. The Trump administration appears poised to define sex for Title IX and related legislation, in response to Obama-era orders, which directed agencies to consider gender identity rather than sex for the purposes of Title IV. The *New York Times* documented a leaked memo purportedly detailing the Trump administration's plans to issue an executive directive defining sex as "a person's status as male or female, based on immutable biological traits identifiable by or before birth. The sex listed on a person's birth certificate, as originally issued, shall constitute definitive proof of a person's sex, unless rebutted by reliable genetic evidence" ([Green et al., 2018](#)). This would make legal sex tantamount to biological sex for the purposes of Title IX and similar. Such guidelines would, of course, be overridden by the Equality Act.

28. In orthodox usage, sex, not gender, is not a referent for sexual orientation; concepts such as androphilia (sexual attraction to masculinity) and gynephilia (sexual attraction to femininity) may describe stable preferences, such that people can be attracted to femininity in males or females. However, this is not appropriately deemed a sexual orientation, as the latter refers explicitly to sex of subject and desired subject's sex (see [Stock, 2019a](#)).

29. Second-wave feminists were not the first to recognize what is now called the sex-gender distinction. For example, anticipating this distinction, [Wollstonecraft \(1792\)](#) admitted that many women were frivolous, helpless, and seemingly irrational but argued that this was due to their socialization and circumstances, not their biological natures (see [Hester, 1992](#); [Stone, 2007](#)). Although not using the term gender, [Terman and Miles \(1936\)](#) devised not only the notion of masculinity and femininity but developed a personality test to measure individuals' position on a scale.

30. Notably, in this context, the term social construction does not imply "not real" but rather created through a social process of meaning making and symbolic interaction. Gender differences are socially constructed, using [Haslanger's \(1995\)](#) terminology, both causally, in that social forces (e.g., gender socialization) play a causal role in these differences, and constitutively, in that what constitutes "gender" (the array of attitudes, traits, and behaviors) is not given in nature but is created by humans in a social process. [Haslanger \(1995\)](#) uses the example of the concept of "cool" to illustrate constitutive construction. What is deemed "cool" is not out there in nature but is a product of contingent sociohistorical influences and the application of human meaning and social distinction (e.g., 1980s "cool": permed hair, stone-washed, tight-rolled jeans, and Keds). Again, this does not mean that genuine differences do not exist; rather, it is a way of thinking about why and how these differences exist and interrogating their purpose and role in a system of human meanings as well as recognizing that they do not just exist out there in nature waiting to be discovered (like gold or biological sex).

31. That is, in addition to constraining females, norms of hegemonic masculinity limit males' full humanity by proscribing feminine ways of being and doing, with powerful prescriptive norms against, for example, vulnerable emotionality ("boys don't cry") and eschewing bodily adornment and "frilly" dress-up. Gender norms are so pervasive and powerful that highly feminine boys are not only seen as behaving deviantly but even, in the case that behavioral correction does not work, requiring medical/psychiatric intervention (e.g., [Jeffreys, 1997](#)).

32. Again, this is in most Western industrialized societies, dominance disproportionately offered to White, wealthy, heterosexual males who conform to hegemonic masculinity.

33. My recognizing that gender subordinates females as a sex class does not deny the fact that some boys and men are also denigrated and subordinated by other men on the basis of gender (e.g., their insufficient or deviant masculinities; [Connell, 2000](#); [Millett, 1970](#)) or other axes of oppression.

34. Although sex and gender are distinct analytical concepts, they combine in ways not easily disentangled when exploring complex social outcomes. Recognizing this, some scholars employ the term sex/gender to recognize that biological sex and social gender combine to shape differential outcomes for males and females (e.g., [Hester, 1992](#)). For example, in comparing criminal offending between males and females, I describe this difference as sex/gender (e.g., [Burt et al., 2017](#)). This in no way implies that sex and gender are the same thing, but rather, in this instance, that the male–female crime gap is influenced by gendered social forces and their interaction with biological sex differences. Male and female bodies always exist in a social context and we can acknowledge conjoint sex/gender influences on social behavior while also recognizing that biological sex is conceptually distinct from gender.

35. It should be noted that this work was deservedly criticized for undertheorizing intersectionality ([Collins, 1990](#); [Crenshaw, 1989](#); [Rich, 1980](#)).

36. The term postmodernism covers a range of ideas in diverse areas. My focus is specifically on radical postmodernist feminism in its queer theory form characterized by an epistemic relativism connected to a general skepticism toward science and an emphasis on subjective beliefs. I might recognize that some "postmodern" insights of a more moderate form provided useful correctives to overly sanguine and naïve modernism.

37. For example, [Butler \(1990, p. ix\)](#) asked, "How does language itself produce the fictive construction of 'sex' . . .?"

38. *Nguyen v. INS* (99-2,071) 533 U.S. 53 (2001).

39. As [Bailey \(2003, p. 50\)](#) noted, "scientists have not fully appreciated how complicated a trait gender identity likely is, or how little we know about it. One expert

told me, bluntly: ‘Gender identity is defined as “the inner sense of oneself as a male or female.” What the hell does that mean?’” Bailey suggests instead that children naturally exhibit “feminine” and “masculine” attributes and behaviors, and these are categorized as appropriate for females and males such that children get the idea that they are really girls or boys, despite their sexed bodies (see [Dreger, 2008](#) for a discussion).

40. In a brilliant piece, [Reed \(2015\)](#) recognized that recent efforts to legitimize trans identity without the psychological stigma of dysphoria has motivated efforts to collapse the distinction between sex and gender, undercutting the feminist project of the last half century.

41. In asserting that there is no biological evidence for sexed mind-body dualism, I am not arguing that there are no biological influences on gender (one’s degree of femininity and/or masculinity) or gender identity (as one’s feelings about gender, including gender dysphoria or gender incongruence).

42. Recognizing the pervasiveness and constant surveillance of normative gender expectations, the violation of which can lead to bullying, harassment, rejection, and even violence on the part of social enforcers, some critics of gender identity ideology extend this critique to the medicalization of gender dysphoria, situating “the problem” (as the struggle or source of difficulty) in society rather than the individual ([Billings & Urban, 1982](#); [Jeffreys, 2014a](#)). As [Raymond \(1979/1994\)](#) articulates, although putatively an individual problem, the notion of a sexed brain-body mismatch “is basically a social problem whose cause cannot be explained except in relation to the sex roles and identities that a patriarchal society generates” (p. 16).

43. “*Cissexism* . . . is the belief that transsexuals’ identified genders are inferior to, or less authentic than, those of *cissexuals* (i.e., people who are not transsexual and who have only ever experienced their subconscious and physical sexes as being aligned)” ([Serano, 2007](#), p. 12) (emphasis in original).

44. For example, in two widely viewed (more than 1 million) videos on YouTube, Riley Dennis presented the argument to lesbians that “Your genital preferences are discriminatory” and “transphobic.” Generously, Riley excused lesbians who had PTSD from male sexual assaults from this discrimination charge. Many more examples of scholars and activists calling lesbians transphobic for their sexual orientations can be found online (cf., trans activist and philosopher Rachel McKinnon [also goes by the name Veronica Ivy] for a similar argument).

45. Interestingly, in their rich study of transwomen in men’s prisons in California, [Jenness et al. \(2019\)](#) reported that most transwomen expressed a preference for housing in the men’s prison rather than the women’s prison.

46. Some suggest this idea amounts to genital policing and ask “who is going to check the genitals at the door of these sexed spaces?” However, prior to these “bathroom

wars,” we have generally been doing quite fine at using sexed restrooms without problems. Feminists, such as myself, who are interested in maintaining sex-based rights and protections are perfectly content allowing those transwomen who have long used women’s bathrooms without incident, who pass and do not wish to draw attention or do weird things (e.g., talking to children about their periods and asking how to use tampons; filming themselves masturbating in the women’s toilets—incidents that have all occurred recently by transwomen in women’s bathrooms) to continue doing so. There is no law prohibiting the use of other-sex bathrooms; rather it is a custom. However, there is a prohibition of bad behavior in such bathrooms, which should continue. My primary concern is not bathrooms, but I believe taking away females’ right to challenge males in their spaces poses a threat to their physical safety and psychological comfort as well as their personal dignity, and it could undermine female equal participation in social life. See the Online Supplemental information for more details.

47. One reviewer commented that my policy suggestions would require transmen to use female facilities against their will. I should clarify: I am of the view that allowing adult transmen to use male facilities is not objectionable because female people, in general, are not a threat to male people. I am unaware of any instances where female people have sexually assaulted, observed, harassed, or engaged in other voyeuristic and or threatening behavior to male persons in sex-separated spaces. The reverse is sadly not true and is a central justification for sex separation of spaces.

48. See the Online Supplemental information for examples of such instances in addition to those already mentioned in the text.

49. For example, the HRC reports that 2017 saw a record number (29) of trans people killed by fatal violence in the United States. This is, however, a much lower rate of homicide than for the general U.S. population, given that the homicide rate is roughly 5.0 and an estimated 0.6% of the population is trans-identified, more than half of whom are transwomen ([Flores et al., 2016](#)). Based on the general population rate we would expect approximately 100 murders of trans people.

50. As I have noted, given the time limits we all face and the complexity of these issues, often masked by pithy rhetoric, most of the public are likely unaware of the specific implications of this bill for women’s rights. Thus, while surveys may show that most of the public support federal anti-discrimination protections for LGBTQ people, I doubt that the majority of the public supports in-the-moment self-identification into women’s spaces and provisions. Thus, the widespread support for the Equality Act is rooted in misunderstanding of the bill and widespread support for “equality”; (who would tell a surveyor they oppose equality?).

References

Allen, S. R. (2018, October 16). If transwomen are women, what is a woman? Medium. <https://medium.com/@s.r.allen/if-transwomen-are-women-what-is-a-woman-d36121bdd926>

[Google Scholar](#)

Allen, S. R., Finneron-Burns, E., Leng, M., Lawford-Smith, H., Jones, J. C., Reilly-Cooper, R., Simpson, R. J. (2019). On an alleged case of propaganda: Reply to Rachel McKinnon [PhilArchive]. <https://philarchive.org/archive/ALLOAA-3>
[Google Scholar](#)

Arnold, A. P. (2017). A general theory of sexual differentiation. *Journal of Neuroscience Research*, 95(1–2), 291–300.
[Google Scholar](#) | [Crossref](#) | [Medline](#)

Bailey, J. M. (2003). *The man who would be queen: The science of gender-bending and transsexualism*. Joseph Henry Press.
[Google Scholar](#)

Baklinski, P. (2014, March 4). Sexual predator jailed after claiming to be “transgender” to assault women in shelter. [LifeSiteNews.com](https://www.lifesitenews.com/news/sexual-predator-jailed-after-claiming-to-be-transgender-in-order-to-assault). <https://www.lifesitenews.com/news/sexual-predator-jailed-after-claiming-to-be-transgender-in-order-to-assault>
[Google Scholar](#)

Baranyi, G., Cassidy, M., Fazel, S., Priebe, S., Mundt, A. P. (2018). Prevalence of posttraumatic stress disorder in prisoners. *Epidemiologic Reviews*, 40(1), 134–145.
[Google Scholar](#) | [Crossref](#) | [Medline](#)

Belknap, J. (2007). *The invisible woman: Gender, crime, and justice* (3rd ed.). Cengage Learning.
[Google Scholar](#)

Bem, S. L. (1993). *The lenses of gender: Transforming the debate on sexual inequality*. Yale University Press.
[Google Scholar](#)

Benjamin, H. (1954). Transsexualism and transvestism as psychosomatic and somatopsychic syndromes. *American Journal of Psychotherapy*, 8, 219–239.
[Google Scholar](#) | [Crossref](#) | [Medline](#) | [ISI](#)

Benjamin, H. (1966). *The transsexual phenomenon: All the facts about the changing of sex through hormones and surgery*. Warner Books.
[Google Scholar](#)

Bettcher, T. M. (2007). Evil deceivers and make-believers: On transphobic violence and the politics of illusion. *Hypatia*, 22(3), 43–65.
[Google Scholar](#) | [Crossref](#)

Bettcher, T. M. (2013). Trans women and the meaning of “woman.” In Soble, A., Power, N., Halwani, R. (Eds.), *Philosophy of sex: Contemporary readings* (6th ed., pp. 233–250). Rowan & Littlefield.
[Google Scholar](#)

Billings, D. B., Urban, T. (1982). The socio-medical construction of transsexualism: An interpretation and critique. *Social Problems*, 29(3), 266–282.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Blackless, M., Charuvastra, A., Derrtyck, A., Fausto-Sterling, A., Lauzanne, K., Lee, E. (2000). How sexually dimorphic are we? Review and synthesis. *American Journal of Human Biology: The Official Journal of the Human Biology Association*, 12(2), 151–166.

[Google Scholar](#) | [Crossref](#) | [Medline](#) | [ISI](#)

Bobel, C. (2010). *New blood: Third-wave feminism and the politics of menstruation*. Rutgers University Press.

[Google Scholar](#)

Bogardus, T. (2020). Some internal problems with revisionary gender concepts. *Philosophia*, 48, 55–75.

[Google Scholar](#) | [Crossref](#)

Bowcott, O. (2019, December 18). Judge rules against researcher who lost job over transgender tweets. *The Guardian*.

<https://www.theguardian.com/society/2019/dec/18/judge-rules-against-charity-worker-who-lost-job-over-transgender-tweets>

[Google Scholar](#)

Budig, M. J., England, P. (2001). The wage penalty for motherhood. *American Sociological Review*, 66(2), 204–225.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Burke, P. J., Stets, J. E., Pirog-Good, M. A. (1988). Gender identity, self-esteem, and physical and sexual abuse in dating relationships. *Social Psychology Quarterly*, 51(3), 272–285.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Burt, C. H., Lei, M. K., Simons, R. L. (2017). Racial discrimination, racial socialization, and crime over time: A social schematic theory model. *Criminology*, 55(4), 938–979.

[Google Scholar](#) | [Crossref](#)

Butler, J. (1990). *Gender trouble: Feminism and the subversion of identity*. Routledge.

[Google Scholar](#)

Butler, J. (1993). *Bodies that matter: On the discursive limits of “sex.”* Psychology Press.

[Google Scholar](#)

Butler, J. (2004). *Undoing gender*. Routledge.

[Google Scholar](#) | [Crossref](#)

Carter, W. B. (2018). Sexism in the bathroom debates: How bathrooms really became separated by sex. *Yale Law & Policy Review*, 37, Article 227.

[Google Scholar](#)

Coleman, D. L. (2017). Sex in sport. *Law & Contemporary Social Problems*, 80, 63–126.

[Google Scholar](#)

Collins, P. H. (1990). *Black feminist thought: Knowledge, consciousness, and the politics of empowerment*. Unwin Hyman.

[Google Scholar](#)

Connell, R. W. (2000). *The men and the boys*. University of California Press.

[Google Scholar](#)

Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum*, 1989, Article 8.

[Google Scholar](#)

Congressional Research Service (CRS) . (2019). Summary: H.R.5. <https://www.congress.gov/bill/116th-congress/house-bill/5>

[Google Scholar](#)

Daly, K. (1997). Different ways of conceptualizing sex/gender in feminist theory and their implications for criminology. *Theoretical Criminology*, 1(1), 25–51.

[Google Scholar](#) | [SAGE Journals](#)

Daly, K., Chesney-Lind, M. (1988). Feminism and criminology. *Justice Quarterly*, 5(4), 497–538.

[Google Scholar](#) | [Crossref](#)

Dangerfield, K. (2019). Canada's oldest rape crisis center faces backlash for excluding trans women. *Global News*. <https://globalnews.ca/news/5071122/vancouver-rape-relief-and-womens-shelter-funding-trans-women/>

[Google Scholar](#)

Davis, H. F. (2017). *Beyond trans: Does gender matter?* NYU Press.

[Google Scholar](#) | [Crossref](#)

de Beauvoir, S . (1949/1973). *The second sex*. Vintage Books.

[Google Scholar](#)

Del Giudice, M . (2019). Measuring sex differences and similarities. In VanderLaan, D. P., Wong, W. I. (Eds.), *Gender and sexuality development: Contemporary theory and research*. Springer. https://www.researchgate.net/profile/Marco_Del_Giudice/publication/329701788_Measuring_Sex_Differences_and_Similarities/links/5ca2c505a6fdccab2f67c2ef/Measuring-Sex-Differences-and-Similarities.pdf

[Google Scholar](#)

Delphy, C. (1980). A materialist feminism is possible. *Feminist Review*, 4(1), 79–105.

[Google Scholar](#) | [SAGE Journals](#)

Delphy, C. (1993). Rethinking sex and gender. *Women's Studies International Forum*, 16, 1–9.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Dembroff, R. (2019). Real talk on the metaphysics of gender. In Takaoka, B., Manne, K. (Eds.), *Gendered oppression and its intersections*. <https://philpapers.org/archive/DEMRT0-2.pdf>

[Google Scholar](#)

Deng, X., Berletch, J. B., Nguyen, D. K., Disteche, C. M. (2014). X chromosome regulation: Diverse patterns in development, tissues and disease. *Nature Reviews Genetics*, 15(6), 367–378.

[Google Scholar](#) | [Crossref](#) | [Medline](#)

Dhejne, C., Lichtenstein, P., Boman, M., Johansson, A. L., Långström, N., Landén, M. (2011). Long-term follow-up of transsexual persons undergoing sex reassignment surgery: Cohort study in Sweden. *PLOS ONE*, 6(2), Article e16885.

[Google Scholar](#) | [Crossref](#) | [Medline](#)

Dolovich, S. (2011). Strategic segregation in the modern prison. *American Criminal Law Review*, 48, 1.

[Google Scholar](#) | [ISI](#)

Dolovich, S. (2012). Two models of the prison: Accidental humanity and hypermasculinity in the LA County Jail. *Journal of Criminal Law and Criminology*, 102, 965.

[Google Scholar](#) | [ISI](#)

Dreger, A. D. (2008). The controversy surrounding “The man who would be queen”: A case history of the politics of science, identity, and sex in the Internet age. *Archives of Sexual Behavior*, 37(3), 366–421.

[Google Scholar](#) | [Crossref](#) | [Medline](#)

DuBois, E. C. (1998). *Woman suffrage and women's rights*. NYU Press.

[Google Scholar](#)

England, P. (2010). The gender revolution: Uneven and stalled. *Gender & Society*, 24(2), 149–166.

[Google Scholar](#) | [SAGE Journals](#) | [ISI](#)

Enke, A. F. (2012). Introduction. *Transfeminist perspectives*. In Enke, A. (Ed.), *Transfeminist perspectives in and beyond transgender and gender studies* (pp. 1–15). Temple University Press.

[Google Scholar](#)

Ettner, R. (1999). *Gender loving care: A guide to counseling gender-variant clients*. W. W. Norton.

[Google Scholar](#)

Fair Play for Women . (2017, November 9). Half of all transgender prisoners are sex offenders or dangerous category A inmates [Weblog post]. <https://fairplayforwomen.com/transgender-prisoners/>
[Google Scholar](#)

Fausto-Sterling, A. (2000). Sexing the body: Gender politics and the construction of sexuality. Basic Books.
[Google Scholar](#)

Fazackerley, A. (2020, January 14). Sacked or silenced: Academics say they are blocked from exploring trans issues. The Guardian. https://www.theguardian.com/education/2020/jan/14/sacked-silenced-academics-say-they-are-blocked-from-exploring-trans-issues?fbclid=IwAR0nHvyH_Qn9Gd4IaCq2bgHHQismJWuUmtAMAKjztFef58qWDMCjRT-sSe0
[Google Scholar](#)

Feldman-Jacobs, C., Clifton, D. (2014). Female genital mutilation/cutting: Data and trends, update 2014. Population Reference Bureau.
[Google Scholar](#)

Fine, C., Dupré, J., Joel, D. (2017). Sex-linked behavior: Evolution, stability, and variability. Trends in Cognitive Sciences, 21(9), 666–673.
[Google Scholar](#) | [Crossref](#) | [Medline](#)

Flores, A. R., Brown, T. N., Herman, J. (2016). Race and ethnicity of adults who identify as transgender in the United States. Williams Institute, UCLA School of Law.
[Google Scholar](#)

Ford, A. (2019, September 12). Female NJ prison guards shouldn't have to strip search transgender female inmate: Lawsuit. USA Today. <https://www.app.com/story/news/local/courts/2019/09/12/nj-corrections-officers-object-transgender-inmate-womens-prison/2291480001/>
[Google Scholar](#)

Franke, K. M. (1995). Central mistake of sex discrimination law: The disaggregation of sex from gender. University of Pennsylvania Law Review, 144, 1–99.
[Google Scholar](#) | [Crossref](#) | [ISI](#)

García-Moreno, C., Zimmerman, C., Morris-Gehring, A., Heise, L., Amin, A., Abrahams, N., Watts, C. (2015). Addressing violence against women: A call to action. The Lancet, 385(9978), 1685–1695.
[Google Scholar](#) | [Crossref](#) | [Medline](#)

Gilligan, A. (2019, March 22). “Europe’s first jail in a jail” for trans women. The Times. <https://www.thetimes.co.uk/article/europes-first-jail-in-a-jail-for-trans-women-vg7r57qfh>
[Google Scholar](#)

Green, E. L., Benner, K., Pear, R. (2018, October 21). “Transgender” could be defined out of existence under the Trump administration. The New York Times. <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>
[Google Scholar](#)

Haig, D. (2004). The inexorable rise of gender and the decline of sex: Social change in academic titles, 1945–2001. Archives of Sexual Behavior, 33(2), 87–96.
[Google Scholar](#) | [Crossref](#) | [Medline](#)

Haslanger, S. (1995). Ontology and social construction. Philosophical Topics, 23(2), 95–125.
[Google Scholar](#) | [Crossref](#)

Haslanger, S. (2012). Resisting reality: Social construction and social critique. Oxford University Press.
[Google Scholar](#) | [Crossref](#)

Hay, C. (2019, April 1). Who counts as a woman? New York Times. <https://www.nytimes.com/2019/04/01/opinion/trans-women-feminism.html>
[Google Scholar](#)

Hester, M. (1992). Lewd women and wicked witches: A study of the dynamics of male domination. Routledge.
[Google Scholar](#)

Hosie, R. (2018). Unisex changing rooms put women at danger of sexual assault, data reveals. The Independent. <https://www.independent.co.uk/life-style/women/sexual-assault-unisex-changing-rooms-sunday-times-women-risk-a8519086.html>
[Google Scholar](#)

House of Commons: Women and Equalities Committee . (2019, July 17). Enforcing the Equality Act: The law and the role of the Equality and Human Rights Commission. HC 1470. <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf>
[Google Scholar](#)

Hull, C. (2003). Letter: Comment on Fausto-Sterling et al.’s “How Sexually Dimorphic Are We?.” American Journal of Human Biology, 15, 112–115.
[Google Scholar](#) | [Crossref](#) | [Medline](#)

Hull, C. (2006). Ontology of sex. Routledge.
[Google Scholar](#) | [Crossref](#)

Hungerford, E. (2016a). Female erasure, reverse sexism, and the cisgender theory of privilege. In Barrett, R. (Ed.), Female erasure (pp. 38–53). Tidal Time, LLC.
[Google Scholar](#)

Hungerford, E. (2016b). Problem and Solution? Transwomen’s access to private

women-only spaces. In Barrett, R. (Ed.), *Female erasure* (pp. 304–315). Tidal Time, LLC.

[Google Scholar](#)

Independent . (2018, October 11). Karen White: Transgender prisoner jailed for life for sexually assaulting female inmates and raping two other women. <https://www.independent.co.uk/news/uk/crime/karen-white-transgender-prisoner-jailed-life-sexual-assault-rape-a8579146.html>

[Google Scholar](#)

Irvine, J. M. (2005). *Disorders of desire: Sexuality and gender in modern American sexology*. Temple University Press.

[Google Scholar](#)

Jadhav, A., Weitzman, A., Smith-Greenaway, E. (2016). Household sanitation facilities and women's risk of non-partner sexual violence in India. *BMC public health*, 16(1), 1139.

[Google Scholar](#) | [Crossref](#) | [Medline](#)

James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., Anafi, M. (2016). *The report of the 2015 U.S. transgender survey*. National Center for Transgender Equality.

[Google Scholar](#)

Jeffreys, S. (1997). Transgender activism: A lesbian feminist perspective. *Journal of Lesbian Studies*, 1, 33–74.

[Google Scholar](#) | [Crossref](#)

Jeffreys, S. (2014a). *Gender hurts: A feminist analysis of the politics of transgenderism*. Routledge.

[Google Scholar](#) | [Crossref](#)

Jeffreys, S. (2014b, July). The politics of the toilet: A feminist response to the campaign to “degender” women’s space. *Women’s studies international forum*, 45, 42–51.

[Google Scholar](#) | [Crossref](#)

Jenness, V., Sexton, L., Sumner, J. (2019). Sexual victimization against transgender women in prison: Consent and coercion in context. *Criminology*, 57(4), 603–631.

[Google Scholar](#) | [Crossref](#)

Johnson, M. P. (1995). Patriarchal terrorism and common couple violence: Two forms of violence against women. *Journal of Marriage and the Family*, 57, 283–294.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Johnson, M. P., Leone, J. M. (2005). The differential effects of intimate terrorism and situational couple violence: Findings from the National Violence Against Women Survey. *Journal of Family Issues*, 26(3), 322–349.

[Google Scholar](#) | [SAGE Journals](#) | [ISI](#)

Jones, J. C. (2015, May). “You are killing me”: On hate speech and feminist silencing.

Trouble & Strife. <http://www.troubleandstrife.org/new-articles/you-are-killing-me/#tc-comment-title>
[Google Scholar](#)

Jones, J. C. (2018, September 26). Twitter, trans rights, totalitarianism, and the erasure of sex [Web log comment]. <https://janeclarejones.com/2018/09/26/twitter-trans-rights-totalitarianism-and-the-erasure-of-sex/>
[Google Scholar](#)

Keisling, M. (2016). Statement from Mara Keisling on the election of Donald Trump [Press release]. National Center for Transgender Equality. <https://transequality.org/press/releases/statement-from-mara-keisling-on-the-election-of-donald-trump>
[Google Scholar](#)

Kessler, S. J., McKenna, W. (1978). Gender: An ethnomethodological approach. University of Chicago Press.
[Google Scholar](#)

Kodric-Brown, A., Brown, J. H. (1987). Anisogamy, sexual selection, and the evolution and maintenance of sex. *Evolutionary Ecology*, 1(2), 95–105.
[Google Scholar](#) | [Crossref](#)

Lance, M. (2019, July 30). Taking trans lives seriously. Inside Higher Ed. http://www.insidehighered.com/views/2019/07/30/philosophers-should-recognize-serious-risks-trans-people-face-opinion?utm_content=buffer66301&utm_medium=social&utm_source=twitter&utm_campaign=IHEbuffer
[Google Scholar](#)

Lawford-Smith, H. (2019a, July 8). Women-only spaces and the right to exclude [Paper presentation]. Australasian Association of Philosophy Conference. Wollongong, Australia.
[Google Scholar](#)

Lawford-Smith, H. (2019b, June 26). Academic mobbing needs to be challenged, both inside and outside the university. *Feminist Current*. <https://www.feministcurrent.com/2019/06/26/academic-mobbing-needs-to-be-challenged-both-inside-and-outside-the-institution/>
[Google Scholar](#)

Lawford-Smith, H. (2019c, July 7). Implications of sex-change act amendment have not been fully explored. *The Age*. <https://www.theage.com.au/national/victoria/implications-of-sex-change-act-amendment-have-not-been-fully-explored-20190703-p523sx.html>
[Google Scholar](#)

Lee, P. A., Houk, C. P., Ahmed, S. F., Hughes, I. A. (2006). Consensus statement on management of intersex disorders. *Pediatrics*, 118(2), e488–e500.

[Google Scholar](#) | [Crossref](#) | [Medline](#) | [ISI](#)

Levasseur, M. (2014). Gender identity defines sex: Updating the law to reflect modern medical science is key to transgender rights. *Vermont Law Review*, 39(4), 943–1004.

[Google Scholar](#)

Lintern, S. (2020). Hundreds of vulnerable patients sexually assaulted on NHS Wards, data reveals. *The Independent*. <https://www.independent.co.uk/news/health/nhs-sexual-assault-patients-mental-health-mixed-sex-wards-a9273656.html>

[Google Scholar](#)

Lorber, J. (1994). *Paradoxes of gender*. Yale University Press.

[Google Scholar](#)

Lorber, J. (2001). *Gender inequality*. Roxbury.

[Google Scholar](#)

MacKinnon, C. A. (1989). *Toward a feminist theory of the state*. Harvard University Press.

[Google Scholar](#)

MacKinnon, C. (2000). Points against postmodernism. *Chicago-Kent Law Review*, 75(3), 687–712.

[Google Scholar](#)

Manne, K. (2017). *Down girl: The logic of misogyny*. Oxford University Press.

[Google Scholar](#) | [Crossref](#)

Mayer, L. S., McHugh, P. R. (2016). Sexuality and gender: Findings from the biological, psychological, and social sciences. *The New Atlantis*, 50, 10–143.

[Google Scholar](#)

Mead, M. (1935). *Sex and temperament in three primitive societies*. William Morrow.

[Google Scholar](#)

Millett, K. (1970). *Sexual politics*. Rupert Hart-Davis.

[Google Scholar](#)

Money, J. (1955). Hermaphroditism, gender and precocity in hyperadrenocorticism: Psychologic findings. *Bulletin of the Johns Hopkins Hospital*, 96, 253–264.

[Google Scholar](#) | [Medline](#)

Murdock, G. P. (1937). Comparative data on the division of labor by sex. *Social Forces*, 15, 551–553.

[Google Scholar](#) | [Crossref](#)

Murphy, M. (2019). The trouble with ‘transphobia’. *Feminist*

Current. <https://www.feministcurrent.com/2019/02/17/the-trouble-with-transphobia/>

[Google Scholar](#)

Murray, K., Hunter Blackburn, L. (2019). *Losing sight of women’s rights: The*

unregulated introduction of gender self-identification as a case study of policy capture in Scotland. *Scottish Affairs*, 28(3), 262–289.

[Google Scholar](#) | [Crossref](#)

Nicholson, L. (1994). Interpreting gender. *Signs*, 20, 79–105.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Oakley, A. (1972). *Sex, gender & society* (pp. 158–172). Harper.

[Google Scholar](#)

Penner, B. (2001). A world of unmentionable suffering: Women's public conveniences in Victorian London. *Journal of Design*, 14(2), 35–43.

[Google Scholar](#) | [Crossref](#) | [Medline](#)

Raymond, J. (1979/1994). *The transsexual empire: The making of the she-male* [Reissue]. Teachers College Press.

[Google Scholar](#)

Reed, A. (2015, June 15). From Jenner to Dolezal: One trans good, the other not so much. *Common Dreams*. <https://www.commondreams.org/views/2015/06/15/jenner-dolezal-one-trans-good-other-not-so-much>

[Google Scholar](#)

Reilly-Cooper, R. (2015). *Sex and Gender: A Beginners Guide*. [Weblog post]. <https://sexandgenderintro.com/political-implications/>

[Google Scholar](#)

Reilly-Cooper, R. (2016, June 28). Gender is not a spectrum.

Aeon. <https://aeon.co/essays/the-idea-that-gender-is-a-spectrum-is-a-new-gender-prison>

[Google Scholar](#)

Rich, A. (1980). Compulsory heterosexuality and lesbian existence. *Signs: Journal of Women in Culture and Society*, 5(4), 631–660.

[Google Scholar](#) | [Crossref](#)

Ridgeway, C. L. (2011). *Framed by gender: How gender inequality persists in the modern world*. Oxford University Press.

[Google Scholar](#) | [Crossref](#)

Risman, B. J. (2009). From doing to undoing: Gender as we know it. *Gender & Society*, 23(1), 81–84.

[Google Scholar](#) | [SAGE Journals](#) | [ISI](#)

Risman, B. J. (2018). *Where the millennials will take us: A new generation wrestles with the gender structure*. Oxford University Press.

[Google Scholar](#) | [Crossref](#)

Robinson, R. K. (2011). Masculinity as prison: Sexual identity, race, and incarceration. *California Law Review*, 99, 1309.

[Google Scholar](#)

Rudman, L. A., Moss-Racusin, C. A., Phelan, J. E., Nauts, S. (2012). Status incongruity and backlash effects: Defending the gender hierarchy motivates prejudice against female leaders. *Journal of Experimental Social Psychology*, 48(1), 165–179.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Sax, L. (2002). How common is intersex? A response to Anne Fausto-Sterling. *The Journal of Sex Research*, 39, 174–178.

[Google Scholar](#) | [Crossref](#) | [Medline](#) | [ISI](#)

Scientific American. (2017, September 1). The new science of sex and gender. <https://www.scientificamerican.com/article/the-new-science-of-sex-and-gender/>

[Google Scholar](#)

Scott, J. W. (1988.). Deconstructing equality-versus-difference: Or, the uses of poststructuralist theory for feminists. *Feminist Studies*, 14, 33–50.

[Google Scholar](#) | [Crossref](#) | [ISI](#)

Serano, J. (2007). *Whipping girl: A transsexual woman on sexism and the scapegoating of femininity*. Seal Press.

[Google Scholar](#)

Siegel, J. A., Williams, L. M. (2003). The relationship between child sexual abuse and female delinquency and crime: A prospective study. *Journal of Research in Crime & Delinquency*, 40, 71–94.

[Google Scholar](#) | [SAGE Journals](#) | [ISI](#)

Siskin, A., Wyler, L. S. (2013). *Trafficking in persons: US policy and issues for congress*. Congressional Research Service.

[Google Scholar](#)

Stock, K. (2018, October 1). Changing the concept of women will cause unintended harms [Weblog post]. Medium. <https://medium.com/@kathleenstock/changing-the-concept-of-woman-will-cause-unintended-harms-eb0bc141525c>

[Google Scholar](#)

Stock, K. (2019a). Sexual orientation: What is it? *Proceedings of the Aristotelian Society*, 119(3), 295–319.

[Google Scholar](#) | [Crossref](#)

Stock, K. (2019b, July 3). Are academics freely able to criticise the idea of “gender identity” in UK universities? [Weblog post].

Medium. <https://medium.com/@kathleenstock/are-academics-freely-able-to-criticise-the-idea-of-gender-identity-in-uk-universities-67b97c6e04be>

[Google Scholar](#)

Stock, K., Bhatt, C., Freedman, R., Scott, S., Sullivan, A., Phoenix, J., . . . Turner, P. (2018, October 16). *Academics are being harassed over their research into*

transgender issues. The Guardian. <https://www.theguardian.com/society/2018/oct/16/academics-are-being-harassed-over-their-research-into-transgender-issues>
[Google Scholar](#)

Stoller, R. J. (1968). Sex and gender: The development of masculinity and femininity. Hogarth.
[Google Scholar](#)

Stone, A. (2007). An introduction to feminist philosophy. Polity.
[Google Scholar](#)

Stryker, S. (2017). Transgender history: The roots of today's revolution. Seal Press.
[Google Scholar](#)

Sullivan, A., Suissa, J., Smith, H., Gourlay, L. (2019, April 19). UCU must stand up for academic freedom on sex and gender. Times Higher Education. <https://www.timeshighereducation.com/blog/ucu-must-stand-academic-freedom-sex-and-gender>
[Google Scholar](#)

Tangri, S. S. (1976). A feminist perspective on some ethical issues in population production. Signs, 1, 895–904.
[Google Scholar](#) | [Crossref](#)

Taylor, J. K., Daniel, C. L., Donald, P. H.-M. (2018). The remarkable rise of transgender rights. University of Michigan Press.
[Google Scholar](#) | [Crossref](#)

Terman, L. M., Miles, C. C. (1936). Sex and personality studies in masculinity and femininity. McGraw-Hill.
[Google Scholar](#) | [Crossref](#)

Territo, L., Kirkham, G. (Eds.). (2010). International sex trafficking of women & children: Understanding the global epidemic. Looseleaf Law.
[Google Scholar](#)

Thorpe, V. (2020). Echoes of 1970 as row breaks out at celebration of feminist conference. <https://www.theguardian.com/world/2020/feb/29/row-erupts-womens-liberation-anniversary-conference>
[Google Scholar](#)

Turner, C. (2019). Open University forced to cancel conference following threats from the transgender lobby. The Telegraph. <https://www.telegraph.co.uk/education/2019/03/20/open-university-forced-cancel-conference-following-threats-transgender/>
[Google Scholar](#)

Walters, S. D. (2014). The tolerance trap: How god, genes, and good intentions are sabotaging gay equality. NYU Press.

[Google Scholar](#)

West, C., Zimmerman, D. H. (1987). Doing gender. *Gender & Society*, 1(2), 125–151.
[Google Scholar](#) | [SAGE Journals](#) | [ISI](#)

Westbrook, L., Schilt, K. (2014). Doing gender, determining gender: Transgender people, gender panics, and the maintenance of the sex/gender/sexuality system. *Gender & Society*, 28(1), 32–57.
[Google Scholar](#) | [SAGE Journals](#) | [ISI](#)

Wittig, M. (1979). Paradigm. In Marks, E., Stambolian, G. (Eds.), *Homosexualities and French literature: Cultural contexts/critical texts* (pp. 114–121). Cornell University Press.
[Google Scholar](#)

Wollstonecraft, M. (1792). *A vindication of the rights of women* (1992 ed.). Introduction by Miriam Brody. Penguin.
[Google Scholar](#)

Wooley, M. L. (2007). Marital rape: A unique blend of domestic violence and non-marital rape issues. *Hastings Women's Law Journal*, 18, 269–294.
[Google Scholar](#)

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