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## Women's Spaces, Women's Rights: Feminism and the Transgender Rights Movement

Christen Price

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# WOMEN’S SPACES, WOMEN’S RIGHTS: FEMINISM AND THE TRANSGENDER RIGHTS MOVEMENT

CHRISTEN PRICE\*

*“Systems of power are capable of reorganizing themselves, and the fact that things look different does not mean the hierarchy has changed. It’s the hierarchy we have to look at, not the fact that some social patterns of behavior are different. We have to look at who is on top and who is on the bottom, and then, if we have heart enough to do it, we have to look at what he is doing to her when he is on top and she is on the bottom.”*

*Andrea Dworkin*<sup>1</sup>

I. INTRODUCTION.....	1510
A. Terminology.....	1511
B. Scope of the Article.....	1514
II. BACKGROUND.....	1515
A. Gender Identity in Context.....	1515
B. Gender Identity and Feminism.....	1517
1. Feminists Who Accept the Transgender Rights Movement’s Premise and Aims.....	1517
2. Feminists Who Do Not Accept the Transgender Rights Movement’s Premise and Aims.....	1521
III. WHAT TRANSGENDER RIGHTS ADVOCATES WANT: LEGAL LANDSCAPE AND ADVOCACY.....	1524
A. Redefining Sex Discrimination.....	1525
B. Protecting Conduct Unrelated to Gender Dysphoria.....	1527
C. Preventing Sex-Separated Spaces from Being Assigned Based on Sex.....	1530
D. Compelling Identity Validation.....	1534

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1. ANDREA DWORKIN LIFE AND DEATH: UNAPOLOGETIC WRITING ON THE CONTINUING WAR AGAINST WOMEN 111 (1997).

IV. IMPLICATIONS: WHAT THIS MEANS.....	1535
A. The Transgender Rights Movement Undermines Women’s Rights .....	1535
1. Invading Women’s Spaces: .....	1535
a. Women’s Shelters .....	1535
b. Women’s Prisons .....	1537
c. Women’s Restrooms, Showers, and Locker Rooms .....	1538
d. Other Women-Specific Services and Activities.....	1542
e. Women’s bodies.....	1544
f. Women’s Boundaries.....	1545
2. Coopting Feminist Priorities .....	1546
a. Sex and Gender-Based Discrimination Disproportionately Suffered by Women .....	1549
b. Sex and gender-based discrimination exclusively suffered by women.....	1553
B. The Transgender Rights Movement Undermines the Ability to Even Talk About Women’s Rights Violations .....	1555
1. The Problem with Private Grammar .....	1557
2. The Problem for Truth-telling.....	1558
3. The Problem for the Rule of Law .....	1562
V. CONCLUSION.....	1564

## I. INTRODUCTION

Feminism, it seems, has never been more fashionable. But feminism faces a threat that belies its apparent popularity. The movement dedicated to women’s equality, a key premise of which is that women are entitled to their own spaces, is imperiled by many of feminism’s purported advocates. This Article examines the implications of the transgender rights movement for women’s rights, specifically as to law.

Andrea Dworkin once wrote, breaking down women’s boundaries is core to how male dominance works: “[w]hile race-hate has been expressed through forced segregation, woman-hate is expressed through forced closeness, which makes punishment swift, easy, and sure.”<sup>2</sup> Ultimately, the transgender rights movement’s push for male access to women’s facilities, groups, other spaces, and even bodies teaches men that they are free to disregard women’s boundaries if they do not perceive those boundaries to be reasonable, justified, sufficiently protective of male identities, or simply conducive to what men happen to want.

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2. *Id.* at 49.

My thesis is this: certain of the transgender rights movement's legal and policy goals, especially as manifested in gender identity nondiscrimination laws, represent a new kind of "forced closeness," which elevates male identities, priorities, and desires, and undermines women's rights. I am a feminist attorney working against sex trafficking and other forms of sexual violence, and I am concerned about the implications of these trends for women's equality.

I will argue for my thesis in two parts. First, by describing what the transgender rights movement wants, as evidenced by its advocacy and the resulting laws, particularly its aims of redefining sex discrimination and using the law as a tool for validation. Second, by considering what this means: namely, how women's rights—particularly as to women-only spaces and priorities—and our ability to talk about them are undermined. Before I do so, I will define some key terms, explain the article's scope, offer some background—including historical context—on transgenderism, and discuss feminism and feminist responses to the transgender rights movement.

### A. Terminology

I offer the following definitions aware that they are contested (though the contest is of recent origin). The latter part of this article will defend how I believe the contest ought to come out; this section will only summarize my positions. These definitions either come from or are derived from those in the Merriam-Webster Dictionary and the American Heritage Dictionary of the English Language:

- Male: "an individual of the sex that is typically capable of producing small, usually motile gametes (such as sperm or spermatozoa) which fertilize the eggs of a female"<sup>3</sup>;
- Female: "an individual of the sex that is typically capable of bearing young or producing eggs"<sup>4</sup>;
- Sex: "Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"<sup>5</sup>;

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3. *Male*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/male> [https://perma.cc/2SEF-XS6L].

4. *Female*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/female> [https://perma.cc/TQ6X-CPBS] (last visited March 7, 2019).

5. *Sex*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=sex> [https://perma.cc/A838-7UC2].

- Man: adult person of the male sex;<sup>6</sup> and
- Woman: adult person of the female sex.<sup>7</sup>

Some argue that sex should be defined not in purely biological terms, but also to include gender and gender identity.<sup>8</sup> That approach conflates distinct concepts and leaves us without terms precise enough to describe our biology and distinguish it from cultural norms. Political philosopher Rebecca Reilly-Cooper explains the scientific argument for continuing to understand sex as biological:

Humans, like the vast majority of species, reproduce sexually. This means that the reproduction of our species is achieved through the fusion of a female gamete with a male gamete to produce a new organism . . . . The categories of female and male are thus general biological categories that apply to all species that reproduce sexually. Humans are not special in this regard. While the language we use to describe these biological facts, and the values we attach to these facts, will be shaped by culture, the facts themselves exist independently of culture or our social understandings of them.<sup>9</sup>

Defining sex this way is not defending sex roles: “To acknowledge that on the basis of their biology, only one half of our species is potentially capable of conceiving and gestating live young, neither reduces female persons to that reproductive function, nor prescribes it as necessary for them.”<sup>10</sup> In fact, that sex is biological makes it easier to distinguish gender and critique how gender is used to enforce female subordination:

Gender is the label that feminists use to describe the value system that prescribes and proscribes forms of behaviour and appearance for members of the different sex classes, and that

6. See *Man*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/man> [https://perma.cc/CV4Y-L9TY] (defining man, *inter alia*, as “an adult male human”); *Man*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=man> [https://perma.cc/746X-RPXD] (defining man, *inter alia*, as an “adult male human”).

7. See *Woman*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/woman> [https://perma.cc/N5BR-QQ5U] (defining woman, *inter alia*, as “an adult female person”); *Woman*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=woman> [https://perma.cc/U4CX-6Q5Y] (defining woman, *inter alia*, as an “adult female human”).

8. *Sex and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> [https://perma.cc/6TRS-ZWHR].

9. Rebecca Reilly-Cooper, *Sex*, SEX & GENDER (2015), <https://sexandgenderintro.com/sex/> [https://perma.cc/T2ZU-3YED] (citation and emphasis omitted).

10. *Id.*

assigns superior value to one sex class at the expense of the other. . . . Gender prescribes submission, weakness and passivity as desirable female traits, and dominance, power and aggression as desirable male traits.<sup>11</sup>

Reilly-Cooper notes that gender's function is consistent across cultures and time:

The way in which gender is expressed will vary according to culture and context, so different times and places will impose different norms of appearance, behaviour and comportment for males and females. But the underlying values are the same: females are supposed to perform gender in ways that signal their inferiority and submission; males are supposed to perform gender in ways that signal their superiority and dominance. The function of this system of oppression is to make female weakness and dependence on males seem natural and inevitable[.]<sup>12</sup>

Accordingly, I use "sex" to refer to a person's being male or female, and "man," "woman," and related pronouns will be used consistent with the sex of the person in question. By "gender," I refer to how societies and cultures have understood and framed sex (social norms, traditions, expectations), especially to subordinate women. Sex, then, refers to objective biological reality, and gender to any related social constructs.

I will not use the phrases "biological male" and "biological female," because male and female are inherently biological categories.<sup>13</sup> "Transgender" denotes a person who adopts an opposite-sex identity or otherwise identifies as transgender, recognizing, however, that the term is vague, is "constantly being extended," and now includes both people who present as the opposite sex full time and sometimes cross-dressers.<sup>14</sup>

"Transgenderism," refers to the whole panoply of opposite-sex presentation or identity, and the ideology supporting it. I will not use the terms "transgender man" or "transgender woman" because they are confusing and concede a point I dispute; namely, whether "woman" and "man" should be understood as

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11. Rebecca Reilly-Cooper, *Gender, SEX & GENDER* (2015), <https://sexandgenderintro.com/gender/> [<https://perma.cc/2BZV-KYVT>] (citation and emphasis omitted).

12. *Id.*

13. See MERRIAM-WEBSTER, *supra* notes 3–5 and accompanying text; Reilly-Cooper, *supra* notes 9–11.

14. SHEILA JEFFREYS, *GENDER HURTS: A FEMINIST ANALYSIS OF THE POLITICS OF TRANSGENDERISM* 8 (2014).

biological terms. This informs my approach to pronouns as well.<sup>15</sup> “Gender identity” and “gender expression” will be used consistent with the definitions in the laws described below.

### B. *Scope of the Article*

This Article focuses on adult males who identify as transgender and the legal and practical implications of considering them women, for four reasons. First, this population, by numbers and influence, constitute the movement’s core: until relatively recently, almost all transgender persons were male, and males still comprise a significant majority of transgender adults.<sup>16</sup> Second, when women identify as men, the equality concerns are different from what happens when men claim to be women, as I will show below, not least due to the asymmetry in males’ physical strength and propensity for violence.

Third, while increasing numbers of women identify as transgender, they typically have a very different profile from men who do so: they tend to be same-sex attracted, they usually reject cultural stereotypes of femininity, and they report no sexual satisfaction from adopting the stereotypical dress of men or otherwise adopting a male identity.<sup>17</sup> Males who identify as women by contrast are generally straight (that is, sexually attracted to the women with whom they insist upon sharing private spaces), often have very stereotypically masculine professions or other histories (e.g., being the military, working as airline pilots), and not uncommonly experience autogynephilia.<sup>18</sup>

Fourth, while increasing numbers of children and adolescents are reported to experience gender dysphoria or identify as transgender,<sup>19</sup> a majority of whom may be girls,<sup>20</sup> these individuals statistically grow out of gender dysphoria before adulthood by an overwhelming margin<sup>21</sup> and accordingly present sufficiently distinct and complex questions.

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15. I realize some readers may find this practice offensive. While I am generally in favor of avoiding offense, regardless of what I might think the “right” answer is, in this case I do not think it can be managed without also doing serious harm to the women’s rights movement. In the rest of this Article, I attempt to explain why.

16. JEFFREYS, *supra* note 14, at 102.

17. *Id.* at 101–03.

18. *Id.* at 7, 24–25, 28–29, 144. Autogynephilia is a paraphilia where a man is sexually attracted to the idea of himself as a woman. *Id.* at 29.

19. Jesse Singal, *Your Child Says She’s Trans. She Wants Hormones and Surgery. She’s 13.*, 322 ATLANTIC, July/Aug. 2018, at 88, 91.

20. *Id.*

21. WORLD PROF’L ASSOC. FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 11 (7th version 2011).

I am not making any claims about whether transgender persons are entitled to human rights, which of course they are, but about the import of certain specific gender identity-based rights claims for women's rights. Additionally, I do not consider the important but separate question of the mental health implications of the transgender rights movement, including whether gender dysphoria should be considered a disability for which legally mandated accommodations are appropriate.

Finally, my analysis will focus on the legal consequences of a few notable features of the movement, especially the legal regimes it has influenced (mostly in the United States, but also in international and foreign law). I do not, however, present an exhaustive overview of the laws relevant to transgenderism or gender identity.

## II. BACKGROUND

### A. *Gender Identity in Context*

In its modern form, transgenderism is in part produced by relatively recent medical developments, hormones and plastic surgeries, which were not possible before.<sup>22</sup> As one scholar noted, the men who seek to transition tend to fall into one of two categories: men who are uncomfortable with their homosexuality,<sup>23</sup> and men who do so as a “climax to their interest in cross-dressing.”<sup>24</sup>

While transgenderism, at least in the sense of persons openly adopting an opposite-sex identity and using hormones or surgeries to facilitate it, is a relatively recent phenomenon, cross-dressing is not: men were wearing drag in London (and calling it that) by the 1870s.<sup>25</sup> Historically, men who engaged in cross-dressing were also involved in same-sex sexual relationships, such as in Molly houses in the 1700s.<sup>26</sup> But cross-dressing is also “understood by sexologists as a sexual interest of heterosexual men” that has been “commonly engaged in by privileged, upper class men in colleges and universities.”<sup>27</sup>

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22. JEFFREYS, *supra* note 14, at 20–21.

23. *Id.* at 22.

24. *Id.*; see also Anne A. Lawrence, *Becoming What We Love: Autogynephilic Transsexualism Conceptualized as an Expression of Romantic Love*, 50 PERSP. BIOLOGY & MED. 506, 507 (2007).

25. Katrina C. Rose, *A History of Gender Variance in Pre-20th Century Anglo-American Law*, 14 TEX. J. WOMEN & L. 77, 103–04 (2004).

26. JEFFREYS, *supra* note 14, at 19.

27. *Id.* at 25.



Radical feminist theorist Sheila Jeffreys notes that the boundary between men who transition and men who cross-dress without transitioning is fuzzy at best, and rejected by many researchers: “The historian of sexuality, Vern Bullough, like many other researchers of transgenderism, considers that there is little difference between cross-dressing and transsexualism; some cross-dressers simply go further than others and end up either living permanently as a woman or elect to have surgery.”<sup>28</sup>

In the 1950s, the term “transsexual” was “coined . . . to describe those persons who wished to change their sex” through hormones and surgery.<sup>29</sup> Later, a heterosexual male cross-dresser named Virginia Prince created the term “transgender,” desiring to “distinguish himself from those identified as transsexuals, and to create a more acceptable face for a practice previously understood as a ‘paraphilia’—a form of sexual fetishism.”<sup>30</sup>

Prince, who had a PhD in pharmacy and was married twice before deciding to live full-time as a woman (using hormones and dress, but not surgery, which he thought was problematic), helped turn cross-dressing from a “hobby into a movement.”<sup>31</sup> He published a magazine aimed at heterosexual cross-dressers in which he discussed his view that gender was cultural (adopting cultural stereotypes of femininity), rather than biological, and that transgender people were those who could transcend gender norms.<sup>32</sup> Jeffreys considers this reframing to be part of “‘the move to gender,’ in which both cross-dressing and transsexualism came to be understood as expressions of an internal or essential gender, rather than simply being hobbies carried out for sexual excitement.”<sup>33</sup>

Following this “move to gender,” transgenderism has mushroomed in contemporary society with its advocates largely rejecting sex as an objective category and redefining it based on a person’s subjective mental perceptions, embracing hormones and surgery for people who identify as transgender, obscuring any link between transgender identity and fetishism, and recasting the movement’s aims as civil rights imperatives.<sup>34</sup> Transgenderism’s rise has implications for the feminist movement and feminists have responded in different ways, with the two main approaches discussed below.

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28. *Id.*

29. *Id.* at 14.

30. *Id.* at 14–15 (citing Virginia Prince, *The ‘Transcendents’ or ‘Trans’ People*, 8 INT’L J. TRANSGENDERISM, no. 4, 2005, at 39, 39–46.

31. *Id.* at 25–26.

32. *Id.* at 26.

33. *Id.* at 15.

34. *Id.* at 15, 21.

### B. *Gender Identity and Feminism*

The term “feminist” has a variety of meanings, but feminism, at a minimum, means “advocacy of women’s rights on the ground of the equality of the sexes.”<sup>35</sup> I am concerned in this article with two broad categories of feminism: (1) feminists who accept the transgender rights movement’s premise—that men can become women—as well as its aims, as part of women’s rights advocacy, and (2) feminists who do not.

#### 1. Feminists Who Accept the Transgender Rights Movement’s Premise and Aims

In discussing feminists who endorse transgenderism (I am not speaking of ensuring basic rights for all people, regardless of transgender status, but of incorporating gender identity and expression protections into the law, and into women’s rights), I will use the term “liberal feminism,” by which I mean a commitment to women’s equality that emphasizes liberation, individualism, and agency and tends to see practices that other feminists view as being at the heart of male domination as empowering for women under the right circumstances (e.g., participating in prostitution or pornography, hookup culture’s casual sex, commercial surrogacy).<sup>36</sup> The right circumstances, generally, being consent.<sup>37</sup>

Legal theorist Robin West describes what this autonomy-heavy approach means for how liberal feminists understand sexuality:

Consensual sex, perhaps quintessentially for contemporary liberal legalists, wherever it happens, and whatever its form, and whatever the motivation—whether it be in cars, bordellos or on screen sets; between persons of the same sex, opposite sex, or no discernible sex; whether it be anal, oral, vaginal, missionary, marital, non-marital, vanilla, nonvanilla, sadomasochistic, or something other; whether it be for pleasure, for reproduction, for money, for status, for friendship, or for the approval of one’s peers—should be deregulated. It ought to be left alone: by law, by the community, by various would-be moral censors, and by

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35. *Feminism*, LEXICO, <https://en.oxforddictionaries.com/definition/feminism> [<https://perma.cc/DK7M-E45A>].

36. I recognize that several distinct kinds of feminism fall under what I describe; I use the term as shorthand to identify some common trends.

37. See, e.g., ROBIN WEST, *Sex, Law and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 221–24 (Alan Wertheimer & Franklin Miller eds. 2010) (containing Robin West’s discussion of liberal feminism’s emphasis on consent).

politically motivated interrogators.<sup>38</sup>

Liberal feminism, then, is primarily concerned with freedom, arguably over dignity or equality, yet is too committed to a particular view of sexual autonomy to recognize that people sometimes make unfree choices. The liberal feminist framework, thus, values unimpeded sexual expression over sexual equality. Women in this framework are expected to be “sex-positive,” which more or less means “sex-available.”

This shows up, for example, in liberal feminism’s increasingly pro-prostitution stance, which stands in contrast to feminism that sees prostitution as profoundly threatening to women’s equality. Community advocates Anjilee Dodge and Myani Gilbert trace the sex work lobby’s rising influence, ostensibly about protecting women in prostitution, in practice often funded by the pimps themselves.<sup>39</sup> They write: “Feminist alignment with neoliberal ideology and individual sexual politics created an opening monopolized by the sex industry. Pornographers, pimps, and johns have found an unlikely ally in feminists.”<sup>40</sup> Similarly, the Women’s March platform expresses “full solidarity with the sex workers’ rights movement.”<sup>41</sup>

Liberal feminism is also more open to, and influenced by, queer theory.<sup>42</sup> Queer theory, broadly speaking, is the strand of critical thought concerned with sexuality, and focuses more on gender as identity and performance,<sup>43</sup> in contrast to radical feminist theory, which is concerned with the sex-based hierarchies through which men subordinate women.<sup>44</sup> Queer theory sees gender as something to be performed and played with, rather than something to be opposed.<sup>45</sup>

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38. *Id.* at 222. West strongly disagrees with idea that consent is the only prerequisite for an ethical sexual encounter. *See id.*

39. *See* Anjilee Dodge & Myani Gilbert, *His Feminist Facade: The Neoliberal Co-Option of the Feminist Movement*, 14 SEATTLE J. SOC. JUST. 333, 358–61 (2015).

40. *Id.* at 347.

41. *See* WOMEN’S MARCH, GUIDING VISION AND DEFINITION OF PRINCIPLES 4, <https://static1.squarespace.com/static/5c3feb79fcf7fdce5a3c790b/t/5c433e85c2241ba6b9353fce/1547910789489/2019%2BUnity%2BPrinciples.pdf> [<https://perma.cc/H2NM-B7QG>] (identifying LGBTQIA rights and racial justice as a part of feminism/women’s rights).

42. *See* Dodge & Gilbert, *supra* note 39, at 340.

43. *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY, at viii (1990).

44. DWORKIN, *supra* note 1, at 231; CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 35 (2006).

45. *See* JEFFREYS, *supra* note 14, at 40–44.

Perhaps the most well-known queer theorist is Judith Butler,<sup>46</sup> who identifies heterosexuality, rather than sexism, as gender-based oppression's main cause.<sup>47</sup> Butler rejects "a universal basis for feminism," rooted in the ubiquity of sex-based oppression, as Western colonizing.<sup>48</sup> Butler bases her view in part on the idea that "woman" is not a stable category.<sup>49</sup>

In a similar vein, Andrew Gilden says that gender creates sex, that "bodily sex cannot be prior to, and thus determinative of, gender."<sup>50</sup> Gilden frets that society gives too little weight to autonomy in determining sexual ethics, a complaint he extends even to children.<sup>51</sup> Some view queer theory as intertwined with feminist theory. Other queer theorists acknowledge that they depart from feminism, such as Janet Halley, who is "taking a break" from feminism.<sup>52</sup>

Halley writes about what life might be like if she were a gay man: "As a gay man, I could want some things that could hurt me in my life as a woman. I'm acquiring a deep sense that the resulting inner cacophony is fun."<sup>53</sup> Halley does not elaborate on what these things might be, but nevertheless invites the reader to think of gender as fun rather than as oppressive. She further describes herself a "sex-positive postmodernist, only rarely and intermittently feminist . . . with a strong attraction to 'queer' revelations about the strangeness and unknowability of social and sexual life."<sup>54</sup> Some queer theorists have even minimized consent, as West summarizes:

Nonconsensual sex, in this telling, like sadomasochistic sex or sex within hierarchies, is simply another form of unconstrained

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46. See Brian Duignan, *Judith Butler*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Judith-Butler> [<https://perma.cc/EA6F-XF5J>] ("Butler's *Gender Trouble* was one of the founding texts of queer theory, and her work continued to inform much debate within cultural theory, especially in the United States, in the early 21st century.").

47. BUTLER, *supra* note 43, at vii–xi.

48. *Id.* at 3.

49. *Id.* at 1–3, 15.

50. Andrew Gilden, *Toward A More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 88 (2008).

51. *Id.* at 133 ("The American constitutional balance of rights between parental authority and child autonomy potentially poses significant obstacles for dismantling dominant sex/gender norms. Absent legal protection for autonomous decision-making, children are unable to explore a variety of occupational, aesthetic, and sexual activities that would be at odds with the gender role imposed and enforced by paternalistic families and state institutions.").

52. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

53. *Id.* at 13.

54. *Id.* at 15.

sex, and unconstrained sex—whether nonconsensual, sadomasochistic, hierarchic, or thoroughly vanilla—is of such great hedonic value—that it simply should not be sacrificed to legal niceties. We should, in effect, quit fetishizing consent. Sex, and more particularly the sexualized, eroticized power that drives it, is good, not to be lightly tossed aside. We don't need consent to police it.<sup>55</sup>

Radical feminists have criticized queer theory for sidelining feminism in academia. Jeffreys notes queer theory's deconstructionism “disappeared the category ‘woman’ itself,” which necessarily disappears feminism:

Without “women” feminism cannot exist, since feminism is a political movement for the liberation of a specific category of oppressed persons, and the disappearance of women renders feminism superfluous. “Woman” was not a concern of queer politics, and “gender” displaced any consideration of the fleshly reality of woman's existence. Queer theory created a gender politics which reduced gender to a form of personal expression or performance, and obscured the material power relations of male domination.<sup>56</sup>

Yet much of contemporary feminism has fully embraced queer theory (regardless of whether the strain in question is more libertarian, environmentally conscious, or focused on racial or sexual identity diversity than past forms of liberal feminism have been), in a way that does exactly what Jeffreys decries: ignoring or minimizing the sex-based, material oppression of women.

For example, Connor Cory, an attorney and LGBTQ rights activist, acknowledges that surrogacy can exploit women and therefore some regulation is in order, yet claims that “a feminist analysis is incomplete without advocacy for the procreative rights of gay men.”<sup>57</sup> Cory is particularly concerned that low-income male couples may not be able to afford to pay for a woman's body, and does not want their “access” curtailed by this.<sup>58</sup> Cory states:

Surrogacy, as it is currently practiced, primarily benefits two groups: industry practitioners (predominantly lawyers, doctors, and agencies) and gay men with disposable incomes. Surrogates derive some financial benefits from the transfer of wealth, as well as any potential emotional and altruistic

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55. WEST, *supra* note 37, at 230–31.

56. JEFFREYS, *supra* note 14, at 42.

57. Connor Cory, Note, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. ON POVERTY L. & POL'Y 133, 134 (2015).

58. *Id.* at 143.

rewards, but I have argued in this note that the law needs to do a better job of ensuring that surrogates receive a greater share of the total revenue. Additionally, states should enact clear statutes intended to protect vulnerable parties from exploitation, in much the same way that labor laws have attempted to protect workers from unjust working conditions.

In order to make surrogacy a meaningful contribution to reproductive justice, the law must also do a better job of increasing access for intended parents with limited financial means.<sup>59</sup>

Feminists must—on this view—increase male access to female bodies as a matter of feminist principle. Advocating for men to be able to impregnate the woman of their choice is not only a “reproductive justice” issue but also a feminist one. And so queer theory enables advocates to rationalize serving the interests of male privilege as a bid for women’s equality, despite how the surrogacy industry exploits women, especially women of color in the developing world.<sup>60</sup>

It is, then, no surprise that this strand of feminism accepts the transgender rights movement’s main premise and key aims,<sup>61</sup> because they have already conceded the point about bodies: if they see no inherent problem with women’s bodies being used for money, then they likely do not see women’s bodies as salient for understanding women’s oppression.

## 2. Feminists Who Do Not Accept the Transgender Rights Movement’s Premise and Aims

The feminists who reject the transgender rights movement’s premise (that men can become women) and who largely oppose its aims are typically radical

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59. *Id.* at 159.

60. See, e.g., Julie Bindel, *Outsourcing Pregnancy: a Visit to India’s Surrogacy Clinics*, GUARDIAN (Apr. 1, 2016 4:00 AM EDT), <https://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel> [<https://perma.cc/5Z7M-E8R3>]; *The Dark Side of One Mexican State’s Boom in Surrogate Pregnancies*, SOUTH CHINA MORNING POST (Sept. 26, 2014, 11:45 PM), <https://www.scmp.com/news/world/article/1601085/dark-side-one-mexican-states-boom-surrogate-pregnancies> [<https://perma.cc/8BNX-VLYR>]. India has banned foreigners from hiring surrogates, but clinics find ways to do it anyway. Sharmila Rudrappa, *India Outlawed Commercial Surrogacy – Clinics are Finding Loopholes*, CONVERSATION (Oct. 23, 2017, 12:20 PM EDT), <http://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> [<https://perma.cc/GBT4-XTU9>].

61. The Women’s March, for example, considers males who identify as female to be “women and girls.” See WOMEN’S MARCH, *supra* note 41, at 3.

feminists. Not all radical feminists have weighed in on the transgender debate, and not all the radical feminists who have oppose transgenderism. However, what makes radical feminism distinct is relevant to why some feminists oppose transgenderism: its emphasis on sexual violence and other forms of women's subordination that occur quite literally on the basis of sex (that is, having a body of the female sex), not on the basis of gender. Radical feminists are unwilling to accept consent as a defense to certain practices, believing that some acts are inherently demeaning or dangerous, or are at least at present irredeemably connected to male dominance of women.

Radical feminists, accordingly, oppose pornography and prostitution as both normalization of and impunity for male violence against and objectification of women.<sup>62</sup> They reject claims that either practice—sufficiently regulated—can be empowering, and note the implicit double standard in that suggestion: “Women must be the only group, and sex the only means,” wrote legal philosopher Catharine MacKinnon, “in which a form of oppression is openly defended, not to mention sold as pleasure and even accepted by some of the oppressed, as a means of their liberation.”<sup>63</sup>

Not only did radical feminism focus on the embodied nature of women's oppression, they also sought to undo gender, not “play” with it, as Jeffreys writes: “Radical feminist theorists do not seek to make gender a bit more flexible, but to eliminate it.”<sup>64</sup> This is because they view gender as the social expression of the unequal power relations between men and women. They accordingly do not see gender as something to perform or celebrate or play with, but as something to resist.

This is in contrast to transgenderism, which some argue has been able to exploit the way in which queer theory has removed “gender” from its basis in the subordination of women and made it into an aspect of consumerism, something to be assumed and played with, and inscribed on the body, something that can be bought and paid for through hormones and surgery.<sup>65</sup>

Thus, some radical feminists, perhaps most notably Janice Raymond, see transgenderism as undermining the feminist project. Raymond writes that for men who impersonate women, their “fantasies are based in the male

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62. DWORKIN, *supra* note 1, 69; MACKINNON, *supra* note 44, at 247–49; *see also* Dodge & Gilbert, *supra* note 39, at 351–52.

63. MACKINNON, *supra* note 44, at 248.

64. JEFFREYS, *supra* note 14, at 42.

65. *Id.* at 45.

imagination, not in any female reality.”<sup>66</sup> This is true “not because women innately carry some essence of femininity but because these men have not had to live in a female body with all the history that entails. It is that history that is basic to female reality, and yes, history is based to a certain extent on female biology.”<sup>67</sup>

Thus, not having a female body is disqualifying for anyone who claims to be a woman, because

female biology shapes female history—a history that men do not have because of their sex—including the history of menstruation, the history of pregnancy or the capacity to become pregnant, the history of childbirth and abortion, the history of certain bodily cycles and life changes, and the history of female subordination in a male-dominant society.<sup>68</sup>

Radical feminists have also argued that transgenderism, whether it manifests in temporary drag or permanent, entrenches gender norms (and accordingly, women’s subordination).<sup>69</sup> Robin Morgan, a radical feminist active since the 1960s, writes: “*We know what’s at work when whites wear blackface; the same thing is at work when men wear drag.*”<sup>70</sup> Freelance journalist Kelly Kleiman further compares the two, noting that “each is a masquerade in which powerful or privileged people dress up as less powerful or less privileged people,”<sup>71</sup> and explaining:

It seems ludicrous now that black performers had to “black up” to play themselves—that is, black people. But this is no different from women having their breasts enlarged so they will be sufficiently feminine. African-Americans had to be a particular kind of black to be black enough to satisfy white people; women have to be a particular kind of feminine to be woman enough to satisfy men.

. . . .

Blackface presents its exaggerations through two standard “types,” Zip Coon (an urban dandy out of his depth) and Sambo (a shuffling rural fool). The first makes fun of black

66. JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE*, at xx (Teachers Coll. Press 1994) (1979), <http://janiceraymond.com/wp-content/uploads/2017/08/The%20Transsexual%20Empire.pdf> [<https://perma.cc/32J2-HJV4>].

67. *Id.*

68. *Id.*

69. JEFFREYS, *supra* note 14, at 28–31.

70. ROBIN MORGAN, *GOING TOO FAR: THE PERSONAL CHRONICLE OF A FEMINIST 180* (Vintage Books 1978) (1977).

71. Kelly Kleiman, *Drag = Blackface*, 75 CHI.-KENT L. REV. 669, 670 (2000).



people for being free while the second ridicules them for being slaves. Drag has a pair of “types” of its own, the glamour girl and the pantomime dame (an elderly harridan). The first makes fun of women because of their sexuality and the second for their lack of it. This commonality—in which the aspirations of African-Americans and the sexuality of women are either exaggerated or ignored—suggests the parallel nature of the practices.

Both pairs of tropes are deeply reactionary, and both assert that the people imitated need controlling. . . .<sup>72</sup>

We already know all of this with respect to blackface and racism. Why is the parody acceptable when sex is involved? The author questions the rationale that drag undermines gender and sex-based hierarchies (which arguably can be extended to other ways of “performing” gender): “To impersonate gender is not to eradicate it but to reinforce it, to reify it and, more important, the power relations attached to it.”<sup>73</sup>

This is underscored by the reality that whether the impersonation is performed publicly or privately, by opposite-sex attracted men or same-sex attracted men, or by men who identify as men or who identify as women, it is still performed (primarily) by men, in a way that demeans women, reinforcing who is in power and who is not. Thus, in the radical feminist frame, male impersonation of women is one manifestation of the assumption that men have the right to define and control womanhood.

Many radical feminists, then, oppose transgenderism—and especially its coopting of feminism—on the ground that women’s rights are about women, that men’s violation of them occurs in a material world, not a mental one, and therefore one in which bodies are relevant. To deny this is to make it impossible to identify, speak about, and challenge male domination of and violence against women. I shall argue below that the transgender rights advocacy movement’s current legal and policy goals bear that worry out.

### III. WHAT TRANSGENDER RIGHTS ADVOCATES WANT: LEGAL LANDSCAPE AND ADVOCACY

This Section will describe four features of the transgender rights movement’s legal and policy goals that are particularly relevant for women’s rights: (A) to redefine sex discrimination, (B) to protect conduct unrelated to gender dysphoria, (C) to prevent sex-separated facilities from being assigned

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72. *Id.* at 670–71 (footnote omitted)

73. *Id.* at 683.

based on sex, and (D) to compel validation of a transgender person's identity through pronoun use and other language requirements.

### A. *Redefining Sex Discrimination*

First, transgender rights activists seek to redefine sex discrimination. The Equality Act is a comprehensive legislative proposal that would add gender identity as a protected category in federal law.<sup>74</sup> The coalition supporting the Equality Act includes the Human Rights Campaign, the ACLU, Lambda Legal, and the National Center for Transgender Equality.<sup>75</sup> The bill has 240 co-sponsors in the House, and passed the House 236–173.<sup>76</sup>

The Equality Act would add gender identity (defined as “gender-related identity, appearance, mannerisms, or characteristics”) to federal bans on discrimination in public accommodations (among other areas) by redefining “sex” to include “gender identity.”<sup>77</sup> While some transgender rights advocates have pressed for sex discrimination to be interpreted to include gender identity discrimination for convenience's sake (i.e., getting gender identity protections from laws that explicitly only cover sex discrimination), and many courts have obliged,<sup>78</sup> the Equality Act's provisions prove that at least some advocates want to redefine sex discrimination wholesale, not just as a stopgap measure for shoehorning certain protections into existing law. And protecting “gender-related” appearance and mannerisms necessitates sex-stereotyping, so the Equality Act would rewrite sex discrimination laws to require, rather than prevent sex-stereotyping.

Similarly, a Coalition FAQ on the Equality Act, produced by groups including the Human Rights Campaign, Lambda Legal, and the ACLU, acknowledges this in its question: “Why are the terms ‘Sexual Orientation’ and

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74. Equality Act, H.R. 5, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/5/text> [<https://perma.cc/6ZCN-AV6L>].

75. LAMBDA LEGAL, HUMAN RIGHTS CAMPAIGN, NAT'L LGBTQ TASK FORCE ACTION FUND, FAMILY EQUAL. COUNCIL, SAGE, NAT'L CTR. FOR TRANSGENDER EQUAL., AM. CIVIL LIBERTIES UNION, TRANSGENDER LAW CTR., & CTR. FOR AM. PROGRESS, EQUALITY ACT: FREQUENTLY ASKED QUESTIONS (2015) [hereinafter EQUALITY ACT FAQ], [https://www.lambdalegal.org/sites/default/files/publications/downloads/equality\\_act\\_faq\\_coalition\\_final\\_7.22.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/equality_act_faq_coalition_final_7.22.pdf) [<https://perma.cc/6CJH-8VP4>].

76. H.R. 5.

77. *See id.* §§ 1101(a)(2), 1101(a)(4).

78. *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576–77 (6th Cir. 2018) (holding that sex discrimination in Title VII included gender identity); Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016) (holding Title IX claim based on gender identity was likely to succeed on the merits).

‘Gender Identity’ included within ‘Sex’?’<sup>79</sup> The Coalition responds that courts and administrative bodies defined sex to include gender identity, and the Act merely codifies those decisions—even though courts and agencies only redefined sex to include gender identity because the federal statutes did not include gender identity already.<sup>80</sup>

In the international context, advocates have called for the main international treaty on women’s rights, the Convention to End Discrimination against Women (CEDAW), to be expanded to include gender identity and expression, rather than for a separate treaty to address gender identity and expression.<sup>81</sup> One article argues that the term woman in CEDAW should be interpreted to include men who identify as women,<sup>82</sup> even if only temporarily as drag queens,<sup>83</sup> as the author believes that defining woman as “gender performance” is “closer to a rational and reasonable ordinary meaning” of the term.<sup>84</sup>

Another article criticizes feminism’s tendency to focus on women’s rights as “separatist” and “exclusionary,”<sup>85</sup> with the male author complaining: “While more recent international law efforts have shifted toward a focus on gender and sexuality, the Convention remains bound to ‘women’s rights.’”<sup>86</sup> He considers transgender rights movements as a “challenge posed to women-centered feminism,” and believes that CEDAW should be redrafted to include men, and focus on transgenderism and other rights related to sexual identity and sexuality, not in addition to, but instead of, women’s rights (he seems unconvinced that women exist, as he consistently puts the term in scare quotes).<sup>87</sup>

The above positions, domestic and international, remain proposals for now, but some jurisdictions have already redefined sex. New York, for example, initially added gender identity to its nondiscrimination laws by redefining sex in a regulation stating that “[d]iscrimination on the basis of gender identity is

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79. EQUALITY ACT FAQ, *supra* note 75, at 9.

80. *Id.*

81. Elise Meyer, Comment, *Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 CHI. J. INT’L L. 553, 556 (2016); Darren Rosenblum, *Unsex CEDAW, or What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER & L., no. 2, 2011, at 98, 193.

82. Meyer, *supra* note 81, at 556.

83. *Id.* at 559.

84. *Id.* at 576.

85. Rosenblum, *supra* note 81, at 99.

86. *Id.* at 101 (footnote omitted; the scare quotes are his).

87. *Id.* at 100–06, 193–94.

sex discrimination,”<sup>88</sup> and that “‘sex’ when used in the Human Rights Law includes gender identity and the status of being transgender.”<sup>89</sup>

As I will argue further below, this advocated-for redefinition is a kind of erasure. Some transgender rights advocates seem unwilling to stop at adding gender identity to nondiscrimination laws; many seek to make sex discrimination—as a category purely for discrimination based on sex—disappear from the law.

### B. *Protecting Conduct Unrelated to Gender Dysphoria*

Second, transgender rights activists seek to protect various gender-associated behaviors, even when the person seeking the protection is not gender dysphoric or even woman-identifying. Notably, laws with gender identity protections usually cover behaviors such as cross-dressing, including for men who identify as straight males.<sup>90</sup>

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88. N.Y. COMP. CODES R. & REGS. tit. 9, § 466.13(c) (2019). New York has since explicitly added gender identity to its Human Rights Law, N.Y. EXEC. LAW § 296(1) (LexisNexis 2019), but it has not repealed this regulation.

89. N.Y. COMP. CODES R. & REGS. tit. 9, § 466.13(c)(1).

90. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-51(21) (West 2019) (defining gender identity or expression to include “gender-related identity, appearance or behavior”); DEL. CODE ANN. tit. 19, § 710(10) (2019) (defining gender identity to include “gender-related identity, appearance, expression or behavior”); D.C. CODE § 2-1401.02(12A) (2019) (defining gender identity or expression to include “gender-related identity, appearance, expression, or behavior”); MASS. GEN. LAWS ANN. ch. 4, § 7 (LexisNexis 2019) (defining gender identity to include “gender-related identity, appearance or behavior”); MD. CODE ANN. STATE GOV’T § 20-101(e) (LexisNexis 2019) (defining gender identity to include “gender-related identity, appearance, expression, or behavior”); NEV. REV. STAT. § 651.050 2. (2019) (defining gender identity or expression to include “gender-related identity, appearance, expression or behavior”); OR. REV. STAT. § 174.100(7) (2019) (defining sexual orientation to include gender identity, which covers “gender identity, appearance, expression or behavior”); 28 R.I. GEN. LAWS § 28-5-6(11) (2020) (defining gender identity or expression to include “gender identity, gender-related self image, gender-related appearance, or gender-related expression”); *see also* DEL. CODE ANN. tit. 6, § 4502(10) (2019) (defining gender identity to include “gender-related identity, appearance, expression or behavior”).

Of the states that do not explicitly include behavior, their definitions are largely tautological. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (2019) (“‘Sexual orientation’ means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.”); IOWA CODE § 216.2(10) (2020) (defining gender identity as a “gender-related identity of a person, regardless of the person’s assigned sex at birth.”); N.J. STAT. ANN. § 10:5-5(tr) (West 2020) (“‘Gender identity or expression’ means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person’s assigned sex at birth.”); VT. STAT. ANN. tit. 1, § 144 (2019) (“The term ‘gender identity’ means an individual’s actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual’s gender or gender-identity, regardless of the individual’s assigned sex at birth.”); *see also* UTAH CODE ANN. § 34A-5-102(1)(o) (LexisNexis 2020)

Consider, for example, California's definition, which also redefines sex to include gender identity: "'Sex' also includes, but is not limited to, a person's gender. 'Gender' means sex and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."<sup>91</sup>

As noted above, New York's state nondiscrimination laws explicitly only included sex until February 2019.<sup>92</sup> A separate regulatory provision redefines sex to include gender identity, and defines gender identity to include behavior (note that it is distinct from gender dysphoria as defined in the statute):

(b) Definitions.

(1) Gender identity means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.

(2) A transgender person is an individual who has a gender identity different from the sex assigned to that individual at birth.

(3) Gender dysphoria is a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.<sup>93</sup>

(c) Discrimination on the basis of gender identity is sex discrimination.

(1) The term "sex" when used in the Human Rights Law includes gender identity and the status of being transgender.

(2) The prohibitions contained in the Human Rights Law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected category, also prohibit discrimination on the basis of gender identity or the status

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(defining gender identity in accordance with the DSM-5 definition of gender identity). The DSM-5's definition is just as subjective and vague as the others: "Gender identity is a category of social identity and refers to an individual's identification as male, female, or, occasionally, some category other than male or female." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013), <https://dsm.psychiatryonline.org/doi/abs/10.1176/appi.books.9780890425596.dsm14> [<https://perma.cc/JZX6-LH39>] (emphasis omitted).

91. CAL. GOV'T CODE § 12926(r)(2) (West 2020).

92. N.Y. EXEC., § 296(1).

93. N.Y. COMP. CODES R. & REGS. tit. 9, § 466.13(b).

of being transgender.<sup>94</sup>

Hawaii defines gender identity similarly:

“Gender identity or expression” includes a person’s actual or perceived gender, as well as a person’s gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth.<sup>95</sup>

These laws explicitly protect behaviors without regard to how a person identifies. They do not require that a person identify as transgender or gender nonconforming to claim protections related to gender expression, and this consistency is hardly accidental; it is precisely what the activists are asking for. For example, an ACLU policy document defines “transgender” as follows:

Transgender is frequently used to describe a broad range of identities and experiences that fall outside of the traditional understanding of gender. Some of those identities and experiences include people whose gender identity is different from the sex they were assigned at birth, people who transition from living as one gender to another or wish to do so (often described by the clinical term “transsexual”), people who “cross-dress” part of the time, and people who identify outside the traditional gender binary (meaning they identify as something other than male or female). Some transgender people describe themselves as gender variant or gender nonconforming.<sup>96</sup>

The policy document defines as transgender people who ““cross-dress part of the time,”” a tacit acknowledgment that cross-dressing persons are covered by the gender identity nondiscrimination laws, but – like the laws themselves – does not specify exactly what the nature of that protection is. Does the law, applied to, for example, a man who does not identify as a woman, protect his right to wear a dress and heels on the job? Does it protect anything else? Does

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94. *Id.* § 466.13(c).

95. HAW. REV. STAT. ANN. § 378-1 (West 2019); same definition for public accommodations, HAW. REV. STAT. ANN. § 489-2 (West 2019), and housing, HAW. REV. STAT. ANN. § 515-2 (West 2019).

96. AM. CIVIL LIBERTIES UNION, TRANSGENDER PEOPLE AND THE LAW: FREQUENTLY ASKED QUESTIONS 19–20 (Mar. 2015), [https://www.aclu.org/sites/default/files/field\\_pdf\\_file/lgbttransbrochurelaw2015electronic.pdf](https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochurelaw2015electronic.pdf) [<https://perma.cc/U7RJ-7U25>].

the law allow him, as a gender nonconforming person, to choose which sex-separated facilities he wishes to use?

Most United States' state law definitions, by their terms, include people who are not gender dysphoric, but who cross-dress for sexual excitement—people who are nearly always male, and who are often heterosexual.<sup>97</sup> One study indicated that some 2–3% of men say they are sexually aroused by cross-dressing, and a survey of over a thousand such men found that most of them were heterosexual, and “none . . . lived full-time as women.”<sup>98</sup> Thus gender identity laws not only give men access to women's spaces, but specifically do so for men with sexual fetishes, who remain sexually attracted to women.

At best, these laws are overbroad. I do not argue that men who sincerely believe themselves to be women ought to be treated as such, as that would center male motives and beliefs in the question of what rights women should have. But state nondiscrimination laws do not even require that much—no sincere belief is needed to claim protections from gender identity nondiscrimination laws.

The sections in this Article on sex-separated spaces should be read in light of this. In almost none of the states that permit men to gain access to women's spaces must the men in question believe themselves to be or identify as women. While a man might pretend to identify as a woman to use a gender identity nondiscrimination law to gain access to women's spaces, most gender identity nondiscrimination laws make that pretense unnecessary.

### C. Preventing Sex-Separated Spaces from Being Assigned Based on Sex

Third, the transgender rights movement seeks to prevent sex-separated facilities from being assigned based on sex. This is not to say that certain kinds of accommodations (such as access to a single-user restroom) are not appropriate if a person does not wish to use communal facilities. However, many activists find accommodations to be unacceptable, because they are not validating in the way that admission to the opposite-sex facility is.<sup>99</sup> Rather, advocates desire for people to access sex-separated facilities based on how they identify,<sup>100</sup> and reduce women's concerns about physical safety to mere bias,

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97. JEFFREYS, *supra* note 14, at 15, 25–30.

98. Lawrence, *supra* note 24, at 507. Lawrence suggests the majority of men who identify as women experience some form of autogynephilia. *Id.*

99. See, e.g., LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT: A LEGAL GUIDE FOR TRANS PEOPLE AND THEIR ADVOCATES 14 (November 17, 2016), [https://www.lambdalegal.org/sites/default/files/publications/downloads/2016\\_trans\\_toolkit\\_final.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/2016_trans_toolkit_final.pdf) [<https://perma.cc/VKW3-DWC2>].

100. See, e.g., Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC'Y 301, 317–19 (2013).

here invoking Title IX, a statute enacted to promote women's equality in education:

While some non-transgender students or staff may feel genuine discomfort with the presence of a transgender person of the same self-identified and lived gender, these feelings of discomfort are rooted in unfortunate cultural bias and stereotypes regarding transgender people. It is well settled law that the discomfort of third parties that is based on a protected characteristic, framed as a "customer preference" defense in the employment context, cannot constitute a legitimate, nondiscriminatory motive for adverse treatment. The purpose of Title IX is to ensure that a student's educational opportunities are not subordinated to another person's negative feelings about a group of people, however genuine those feelings may be. . . .

. . . . Whether couched in terms of privacy, modesty, or fears about safety, the desire to avoid sharing a facility with a transgender person represents precisely the sort of entrenched cultural bias that our nondiscrimination laws are designed to address.<sup>101</sup>

These claims characterize objections to sharing small, enclosed spaces with men to objecting to a transgender person's very "presence" and reduce the concerns of a woman who may be suffering from post-traumatic stress disorder to mere "discomfort." Women's concerns about male bodies in sex-separated spaces receives short shrift; on this view, there is nothing legitimate about a woman's desire to avoid a male gaze or exposure to male nudity.

The evidence of several millennia of history notwithstanding, if Tobin and Levin's argument is taken to its logical conclusion, women are no longer allowed to even feel threatened by male bodies in their private spaces. This identity-based access applies in contexts where people usually find themselves voluntarily: public accommodations,<sup>102</sup> gyms, university education, counseling,

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101. *Id.* at 317–18 (footnote omitted) (citing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971)); *see also* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 144 (2010) (arguing that bathrooms should be separated by gender identity, not sex, and comparing sex-separated bathrooms to now-unconstitutional laws against cross-dressing).

102. HUMAN RIGHTS CAMPAIGN, SAMPLE RESTROOM POLICY (2016), [https://assets2.hrc.org/files/assets/resources/HRC\\_Sample\\_Restroom\\_Policy\\_and\\_Talking\\_Points\\_for\\_Managers.pdf?\\_ga=2.254991489.861115651.1552073948-61766.1547228568n](https://assets2.hrc.org/files/assets/resources/HRC_Sample_Restroom_Policy_and_Talking_Points_for_Managers.pdf?_ga=2.254991489.861115651.1552073948-61766.1547228568n) [<https://perma.cc/ZMT4-8R9Q>]; LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT: A LEGAL GUIDE FOR TRANS PEOPLE AND THEIR ADVOCATES 14 (Nov. 17, 2016),



coaching, athletics, and other voluntary associations such as professional development groups or mentoring relationships.

For example, the Human Rights Campaign has a sample restroom policy for employers that allows employees, customers, and guests to use sex-specific facilities based on gender identity and recommends that managers tell employees who remain uncomfortable with this that they can use restrooms on other floors or after the transgender person exits.<sup>103</sup> The National Center for Transgender Equality (NCTE) states that nonbinary people should be able to pick the restroom they wish to use.<sup>104</sup> Lambda Legal says that “restroom usage is a necessary part” of the experience of living out one’s gender identity, making restroom use about identity validation.

Even more significantly, advocates want the same rule for involuntary contexts – that is, where the people affected do not even have the option, if they object to an opposite sex person’s presence in a sex-specific space, to remove themselves to another environment. Involuntary contexts disproportionately affect vulnerable people and include public schools, prisons, and homeless shelters.<sup>105</sup> In public schools, this means that male students may be treated as female in all respects, including in athletics, and with respect to single-sex facilities and overnight accommodations.<sup>106</sup>

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[https://www.lambdalegal.org/sites/default/files/publications/downloads/2016\\_trans\\_toolkit\\_final.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/2016_trans_toolkit_final.pdf) [<https://perma.cc/VKW3-DWC2>].

103. HUMAN RIGHTS CAMPAIGN, *supra* note 102.

104. NAT’L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER PEOPLE AND BATHROOM ACCESS 1, 2 (July 10, 2016), <https://transequality.org/sites/default/files/docs/resources/Trans-People-Bathroom-Access-July-2016.pdf> [<https://perma.cc/WV8B-N5MR>].

105. See Sam Pazzano, *Predator Who Claimed to be Transgender Declared Dangerous Offender*, TORONTO SUN (Feb. 26, 2014), <http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender> [<https://perma.cc/49PH-WUBC>]; *Police: Calif. Locker Room Suspect Used Disguise*, ABC 7 NEWS (Oct. 22, 2010), <https://abc7news.com/archive/7739509/> [<https://perma.cc/C7DB-63RL>]; Abbie Wightwick, *Pupils are Missing School Because They Don’t Like Mixed Sex Toilets and ‘Period Shaming’ is One of the Main Issues*, WALES ONLINE (Feb. 15, 2019), <https://www.walesonline.co.uk/news/education/pupils-missing-school-because-dont-15839558> [<https://perma.cc/7UTA-9CX6>].

106. See, e.g., U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 3 (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/R9JW-D4J7>] [hereinafter 2016 DEAR COLLEAGUE LETTER]. This letter formalized OCR’s already-existing practice at the time. It has since been rescinded. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (Feb. 22, 2017) [hereinafter DEAR COLLEAGUE LETTER WITHDRAWAL], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/S9SN-97EK>].

In prisons, advocates want sex-specific facilities assigned based on the inmate's gender identity.<sup>107</sup> The NCTE suggests that gender identity, not sex, is what controls for determining who may search whom,<sup>108</sup> and recommends that law enforcement and security officers “develop a policy that recognizes officers' gender identity for purposes of gender-specific job duties, such as searches.”<sup>109</sup> This means that a man identifying as a woman (whether sincerely or deceptively) would be permitted to invasively search women arrestees and inmates.

In homeless shelters, males must be permitted in women's shelters. The National Gay and Lesbian Task Force states that homeless shelters must house people according to their self-identified gender, or their preference, if they are not living in any one gender fulltime.<sup>110</sup>

In the District of Columbia, government-run and privately-run shelters receiving public funds<sup>111</sup> must treat homeless persons “in all ways in accordance with the individual's gender identity and expression”, including:

- (A) Use of gender-specific facilities including restrooms, showers, and locker rooms;
- (B) Being addressed in accordance with the individual's gender identity and expression;
- (C) Having documentation reflect the individual's gender identity and expression;
- (D) Being free from dress codes that are in conflict with the individual's gender identity and expression;
- (E) Confidentiality of information regarding the individual's gender identity and expression[.]<sup>112</sup>

Similarly, under a 2016 rule, shelters receiving federal assistance must house people based on gender identity,<sup>113</sup> and the regulation specifically states

107. LAMBDA LEGAL, *supra* note 102, at 6–7.

108. NAT'L CTR. FOR TRANSGENDER EQUAL., A TRANSGENDER LOCAL AGENDA: AN OVERVIEW OF POLICIES FOR CITIES AND COUNTIES 2 (Oct. 2016), <https://transequality.org/sites/default/files/docs/resources/NCTE%20Local%20Agenda%20v5.pdf> [<https://perma.cc/TB85-NNJQ>].

109. *Id.*

110. LISA MOTTET & JOHN M. OHLE, NAT'L GAY & LESBIAN TASK FORCE, NAT'L COAL. FOR THE HOMELESS, TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE 11–15 (2003), <https://srp.org/wp-content/uploads/2012/08/TransitioningOurShelters.pdf> [<https://perma.cc/2ZW4-PCMP>].

111. D.C. CODE § 4-754.01(a)(1) (2020).

112. *Id.* § 4-754.11(19)

113. 24 C.F.R. § 5.106(b)(2) (2017). The current administration has proposed a change to the rule that would allow shelters more flexibility in determining who may stay in them, but it has not yet

that shared bathroom, shower, and sleeping facilities must be assigned based on gender identity.<sup>114</sup> Shelters may not ask prospective residents for any evidence of their professed gender identity.<sup>115</sup>

If other residents raise privacy concerns, the shelter must take “nondiscriminatory steps” to address them and change its existing policies to comply with the rule.<sup>116</sup> Even if a shelter determines placements on a case-by-case basis, and sometimes houses transgender residents based on gender identity, the shelter is still noncompliant if its policies assign housing based on sex.<sup>117</sup>

As an apparent result of attempting to comply with this rule, Naomi’s House, a California women’s shelter, is now facing a lawsuit for allowing a man dressed as a woman into the shelter.<sup>118</sup> The lawsuit claims that the man leered at, made sexual advances toward, and otherwise harassed the women in the shelter’s communal showers. The shelter claimed that it “had to respect D.N.’s decision to identify as a woman, and that because Naomi’s received HUD funding, there was nothing Naomi’s could do.”<sup>119</sup>

#### D. *Compelling Identity Validation*

Fourth, transgender rights activists wish to compel others to acknowledge and validate their identities through pronoun use and other legal restrictions on language.<sup>120</sup> One example can be found in New York City, where a local ordinance requires employers and public accommodations to use a patron’s preferred pronouns or face up to \$250,000 in fines.<sup>121</sup> As noted above, in the

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been published to the Federal Register. See *Revised Requirements Under Community Planning and Development Housing Programs (FR-6152)*, REGINFO.GOV, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53> [<https://perma.cc/YP9M-NFLG>].

114. 24 C.F.R. § 5.106(c)(1).

115. 24 C.F.R. § 5.106(b)(3).

116. 24 C.F.R. § 5.106(c)(2).

117. 24 C.F.R. § 5.106(c)(1).

118. *McGee v. Poverello House*, No. 1:18-cv-00768-LJO-SAB, 2019 WL 5596875, at \*3 (E.D. Cal. Oct. 30, 2019).

119. *Id.*

120. See, e.g., NAT’L CTR. FOR TRANSGENDER EQUAL., *supra* note 108, at 4.

121. N.Y.C. Admin. Code §§ 8-102, 8-107(4), 8-126(a) (2020); N.Y.C. COMM’N ON HUMAN RTS., LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102, at 4–5 (Feb. 15, 2019) [hereinafter N.Y.C. ENFORCEMENT GUIDANCE], <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf> [<https://perma.cc/7UGR-WLGC>].

District of Columbia, certain shelters must address residents consistent with their gender identity.<sup>122</sup>

These language restrictions go beyond allowing a person to access sex-specific spaces based on their gender identity; they require others to affirm that identity with their words, under threat of criminal penalty. As will be discussed in more detail below, similar censorship occurs among private actors, as well, without the intervention of the state. In either case, gender identity nondiscrimination norms are used to coerce people into policing their language.

#### IV. IMPLICATIONS: WHAT THIS MEANS

Those four features of transgender rights advocacy have serious implications for women's spaces, women's rights priorities, and naming women's rights violations.

##### *A. The Transgender Rights Movement Undermines Women's Rights*

The various laws and policies embodying the transgender rights movement undermines women's rights by invading women's spaces, and pushing for feminism to adopt different—and often conflicting—priorities and interests.

##### 1. Invading Women's Spaces:

First, the transgender rights movement undermines women's rights by invading women's spaces. This represents a comprehensive threat to women's boundaries, and the less control a woman has over her environment, the more this matters. That is, saying that these sex-based boundaries do not matter (or matter less than the wishes of males who wish to cross them) is always going to affect the most vulnerable people the most – such as women prisoners, homeless women, and girls. Several examples follow, grouped into these categories: women's shelters, women's prisons, women's communal restroom and shower facilities, other women's spaces, and women's bodies.<sup>123</sup>

##### *a. Women's Shelters*

Women in women's shelters have had their privacy and safety put aside to accommodate men's desires, despite shelter life being a particularly vulnerable

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122. D.C. CODE § 4-754.11(19)(B) (2020).

123. None of what follows is intended to minimize the concerns of privacy and safety for people who identify as transgender and who—for a variety of reasons—do not “fit” in the facilities for their sex (such as a man in a male prison or shelter who has been taking feminizing hormones); accommodations may be necessary for their protection. I do not here address what form those accommodations should take, except to say that they should not involve male access to women's spaces.

place: women's shelter residents are living with strangers, with no stability, often after fleeing domestic violence, including sexual violence, or sex trafficking.

Yet the National Gay and Lesbian Task Force takes a dismissive attitude toward women's trauma and desires, focusing largely on transgender residents' wishes and feelings, and asserts that showers and sleeping areas must be assigned based on a person's gender identity (or whatever makes them feel most comfortable, if they don't have a full-time gender identity).<sup>124</sup> One section of the report includes a header declaring that women's shelters are "just as safe with transgender women."<sup>125</sup>

If a woman who has been sexually abused by men in the past is traumatized by encountering a man in her women's shelter bathroom, the report advises: "The first thing to know is that this was not the trans woman's fault. Both of these women need support. The trans woman may need support around what it felt like to be accused of being a man."<sup>126</sup>

The report also compares a woman's discomfort with a male in a women's shelter to racists' discomfort with black people:

Staff must validate the experience of trauma but it can never be a reason to discriminate. It can be helpful in these situations to look at a form of discrimination that staff might be more familiar with, such as racism. Ask the question: "Should a shelter ask a woman of colour to leave because another woman is afraid of her? What if a woman had had a bad experience with a person of colour? Would this be acceptable?" This can sometimes make the appropriate action more clear.<sup>127</sup>

The report treats as equivalent the trauma a woman could feel about sharing private spaces with a man after being abused by one with how a man might feel when his is opposite-sex impersonation is unsuccessful. It essentially says that rape survivors' needs are no more important than male desires for validation.

Allowing males to access women's shelters puts male wishes above women's safety, signaling to men that they may invade without consequence. An Oregon women's shelter admitted a man who identified as a woman, even though the shelter had no private rooms, and many women residents were

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124. MOTTET & OHLE, *supra* note 110, at 13–16.

125. *Id.* at 13.

126. *Id.* at 37.

127. *Id.* at 37.

domestic or sexual abuse survivors.<sup>128</sup> The women were upset—one woman left—and one remarked that the shelter's decision “jeopardized the security of a dozen or so women for the benefit of one man's sense of belonging.”<sup>129</sup>

In another case, women were kicked out of a women's shelter in British Columbia for protesting a man in the shelter who had not even “transitioned” yet. A woman who had to share a room with the man was told the shelter had to go by how he identified himself.<sup>130</sup> She and another woman who protested were forced back on the street for speaking to the media about the incident.<sup>131</sup>

Christopher Hambrook, a male rapist who identified as a woman named Jessica, specifically preyed on women at shelters (at least one of which was a women's shelter, where he lived for a time).<sup>132</sup> Hambrook may not have genuinely believed he was a woman, but his subjective belief is legally irrelevant when the standard is how he identifies himself to others. He had already been imprisoned for sexually abusing a five year old girl and raping a mentally disabled woman, and is now imprisoned indefinitely as a “dangerous offender.”<sup>133</sup>

#### b. Women's Prisons

The ways that male residents in women's shelters endanger women's privacy and safety are even more pronounced in the prison context, where inmates have even less freedom to leave the compromised environment, and where the males in question are at least as likely to be violent as any other males. For example, in *R. (on the application of B) v Secretary of State for Justice*, a man who strangled his male lover for refusing to support his gender reassignment surgery was released from prison.<sup>134</sup>

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128. Malka Davis, *Man Who Identified as a Woman was Allowed in our All-Women's Shelter. It was the Wrong Call (OPINION)*, OREGONLIVE (May 24, 2016), [https://www.oregonlive.com/opinion/2016/05/man\\_who\\_self-identified\\_as\\_a\\_w.html](https://www.oregonlive.com/opinion/2016/05/man_who_self-identified_as_a_w.html) [<https://perma.cc/K466-TJTX>].

129. *Id.*

130. Klaudia Van Emmerik, *Concerns Over Transgender Client at Okanagan Shelter*, GLOBALNEWS (Mar. 9, 2017, 9:05 PM), <https://globalnews.ca/news/3300518/concerns-over-transgender-client-at-okanagan-shelter/> [<https://perma.cc/G6D3-4JGX>].

131. *Id.*

132. Pazzano, *supra* note 105.

133. *Id.*

134. *R. (on the application of B) v. Secretary of State for Justice*, [2009] H.R.L.R 35, 1052, 1071; JEFFREYS, *supra* note 14, at 159; Vanessa Allen, *Transsexual Killer and Attempted Rapist Wins 'Human Rights' Battle to be Moved to Women's Prison*, DAILYMAIL.COM (Sept. 4, 2009), <https://www.dailymail.co.uk/news/article-1211165/Transsexual-prisoner-wins-High-Court-battle-moved-womens-jail.html> [<https://perma.cc/CLX3-CJBJ?type=image>].

Mere days later, he attempted to rape a woman, and was sentenced to life imprisonment.<sup>135</sup> The court found that he was entitled to reside in the women's prison so that he could fulfill the state-funded surgery conditions, and that his original assignment to a men's prison violated his Article 8 rights.<sup>136</sup> The women whose prison he joined were not told about his sex or his crime.<sup>137</sup> The court was sympathetic to the man's plight (not being allowed wigs and makeup in the male prison), and felt that this justified housing women with a would-be male rapist.<sup>138</sup>

Undermining sex-specific protections in the prison context also implicates the guards' role. As noted above, some transgender rights advocates want sex-specific prison guard roles to be assigned based on gender identity.<sup>139</sup> The threat to women's dignity, privacy, and safety—already compromised in the prison context—is obvious, as this would allow male guards to search women prisoners, violating international human rights standards.

The United Nations' guidelines for women's treatment in prisons, the Bangkok Rules, require that all searches of women prisoners be carried out by women staff, and that women prisoners have the right to be seen by women doctors (if an emergency makes this impossible, a woman staff member must at least be present).<sup>140</sup>

### *c. Women's Restrooms, Showers, and Locker Rooms*

Nineteenth century feminists fought intensely for women's restrooms – so successfully that sex-specific restrooms no longer seem as consequential to us.<sup>141</sup> They reasoned that if women had no separate restroom, they could continue to be barred from public life: “Women's subordination on the grounds of their sex has, historically, been organised through the relegation of women to the private sphere and their exclusion from public space.”<sup>142</sup>

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135. *R. (on the application of B) v Secretary of State for Justice*, [2009] H.R.L.R. 35, 1053; JEFFREYS, *supra* note 14, at 159.

136. *R. (on the application of B) v Secretary of State for Justice*, [2009] H.R.L.R. 35, 1051, 1075. Article 8 of the European Convention on Human Rights deals with rights to privacy and family life.

137. JEFFREYS, *supra* note 14, at 159.

138. *Id.*

139. *See supra* notes 110–11.

140. UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE BANGKOK RULES 10, 12 (Mar. 16, 2011), [https://www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf) [<https://perma.cc/8ZTQ-6CHA>].

141. Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to 'Degender' a Women's Space*, 45 WOMEN'S STUD. INT'L F. 42, 46 (2014).

142. *Id.*

The men of that time recognized this, and vigorously opposed public restrooms for women.<sup>143</sup> But the women's groups, including the Ladies' Sanitary Association, "which organised lectures and published tracts on the subject, throughout the following decades" persisted, and the "campaign for toilets was about what would now be understood as the human right of women to existence and movement in public space."<sup>144</sup>

Yet contemporary women's opposition to male use of women's toilets, restrooms, showers, and locker rooms has been subjected to condescension and derision, as an overwrought and unwarranted reaction,<sup>145</sup> despite numerous incidents where cross-dressing males filmed or otherwise observed women in those private spaces.<sup>146</sup> The leader of the ACLU chapter in Georgia resigned over the ACLU's support for males in women's spaces after being in a women's restroom with her young daughters, who became frightened when three male transgender persons, "over six feet" and "with deep voices" came in.<sup>147</sup>

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143. *Id.*

144. *Id.* Note that this campaign differs in a significant and fundamental way from that of men who identify as transgender. The women were campaigning for their *own* spaces, not for the right to access anyone else's.

145. See, e.g., Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373 (2017); see also *Students v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at \*24 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted sub nom. Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017) (suggesting that no right to privacy in single-sex facilities exists, and treating any desire for it as a matter of personal discomfort or intolerance) ("No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.").

146. See, e.g., ABC 7 NEWS, *supra* note 105; *Man Snaps Pictures in UC Berkeley Locker Room*, ABC 7 NEWS (Oct. 13, 2010), <https://abc7news.com/archive/7721742/> [<https://perma.cc/T7HT-NEP3>] (UC Berkeley man disguised himself as a woman to get into a locker room and photograph women); Shawn McGinnis & Ryan Kennedy, *DA: Cross-Dressing Man Secretly Taped Women at Macy's*, KTLA 5, (May 15, 2013, 9:21 PM), <https://ktla.com/2013/05/14/da-cross-dressing-man-secretly-videotaped-women-in-macys-bathroom/#ixzz2TKsMicgJ> [<https://perma.cc/M5M3-RYAR>] (Man dressed up as a woman to videotape women in the restroom at a Macy's store); Lisa Fernandez, *San Jose Sex Offender Wearing Fake Breasts, Wig Arrested for Loitering in Womens' Restroom*, MERCURY NEWS, (Jan. 26, 2009, 9:02 PM), <https://www.mercurynews.com/2009/01/26/san-jose-sex-offender-wearing-fake-breasts-wig-arrested-for-loitering-in-womens-restroom/> [<https://perma.cc/5YEE-96VP>] (Registered sex offender in San Jose dressed up like a woman and went to the women's restroom (previously arrested for child molestation and indecent exposure).

147. Ben Johnson, *State Leader Quits ACLU After Daughters were 'Visibly Frightened' by Men Using Women's Restroom*, LIFESITE NEWS (May 31, 2016, 11:59 AM EST),



Sheila Jeffreys, in a feminist analysis of the need for women-only restrooms, warns against enabling predatory males to enter women's facilities unchallenged, especially given the rise in upskirt pornography:

The problem of creating a "right" for men to enter women's toilets is that some men have a clear interest in the sexual excitements that they can access by violating women's right to human dignity in such places. There is a considerable amount of pornography freely available on the web in which men display and exchange photographs they have taken by stealth, through hidden cameras, of women in toilets and locker rooms, defecating and urinating, or naked in showers.<sup>148</sup>

This is of particular concern given that, as noted above, many gender identity nondiscrimination laws extend that right of entry to males regardless of whether they are gender-dysphoric or even consistently identify as women. Beyond the privacy and safety concerns described above, women-only restrooms are also a place for women who are in danger to escape to,<sup>149</sup> as well as a place for women in abusive relationships or at risk for being trafficked to get confidential information on where to find help.<sup>150</sup>

While it is unlikely that opening women's sex-specific facilities to men will result in women retreating to a pre-Victorian engagement level with public life that does not mean that no retreat will occur. In Wales, young girls are already skipping school when they are menstruating because of boys harassing them in unisex restrooms.<sup>151</sup>

And even if the safety concern to the average American or UK woman was minimal, the transgender rights advocacy position would still be a myopic one: the lack of safe, women-only restrooms and other sanitary facilities remains a significant barrier to women's access to education and participation in public life in many other parts of the world, especially the global South. Inga Winkler, the former Legal Advisor to the United Nations Special Rapporteur on the Human Rights to Water and Sanitation explains:

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<https://www.lifesitenews.com/news/state-leader-quits-aclu-after-children-were-visibly-frightened-by-transgend> [<https://perma.cc/K87G-FBJC>].

148. Jeffreys, *supra* note 141 at 48.

149. See Brief of Amicus Curiae Safe Spaces for Women, Supporting Neither Party, at 11–12, *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273).

150. See COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION: INTIMATE PARTNER VIOLENCE 3 (Feb. 2012), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2012/02/intimate-partner-violence.pdf> [<https://perma.cc/W2LL-U7KB>].

151. Wightwick, *supra* note 105.

Where there are no gender-specific facilities, girls, in particular, often drop out of school at the age of puberty since they lack privacy and cannot practice adequate menstrual hygiene. Moreover, women and girls often face risks to their physical security and dignity, including abuse, attack, assault and rape, when having to defecate in the open or relying on shared facilities, especially at night. Altogether, the consequences of the sanitation crisis for human dignity and safety as well as human and environmental health are enormous.<sup>152</sup>

Women and girls are at particular risk in refugee or internally displaced person camps, where the lack of private, sex-specific facilities exposes them to sexual harassment and violence:

Women and girls in displacement camps in Haiti told Human Rights Watch about constant harassment by boys and men when they used insecure bathing facilities. They described being pinched, poked, or leered at in the displacement camps when they washed themselves out in the open, because there was no safe and private place to bathe. Similarly, Human Rights Watch received reports that in some temporary shelters in India a year after the 2004 tsunami, women and girls had resorted to walking in pairs to and from community toilet and bathing facilities to ward off harassment from men.

Human Rights Watch found similar concerns about the absence of privacy in displacement camps in Sri Lanka. Soldiers and police infringed on the privacy of women by watching them when they bathed or used the toilet. In at least one case, this harassment led to sexual violence.<sup>153</sup>

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152. Inga T. Winkler, *The Human Right to Sanitation*, 37 U. PA. J. INT'L L. 1331, 1340 (2016) (footnotes omitted); see also *Menstrual Hygiene Management*, SSWM.INFO <https://sswm.info/humanitarian-crises/rural-settings/hygiene-promotion-community-mobilisation/hygiene-promotion/menstrual-hygiene-management> [<https://perma.cc/7BYT-AQ32>] (highlighting the risks of poor menstrual health practices).

153. *Human Rights Watch Submission on Gender Equality to the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, HUM. RTS. WATCH (Feb. 14, 2016, 12:00 AM EST), <https://www.hrw.org/news/2016/02/14/human-rights-watch-submission-gender-equality-special-rapporteur-human-right-safe> [<https://perma.cc/23GC-V55L>] (endnotes omitted); see also *Women and Girls and Their Right to Sanitation*, UNITED NATIONS HUM. RTS. OFFICE HIGH COMMISSIONER (Oct. 3, 2011), <https://www.ohchr.org/EN/NewsEvents/Pages/Womenandgirlsrighhtosanitation.aspx> [<https://perma.cc/Y6HM-HVP4>] (arguing that girls are vulnerable to dropping out of school, and women and girls are vulnerable to violence without their own, private facilities).

*d. Other Women-Specific Services and Activities*

Permitting males to enter women-only spaces affects many additional endeavors as well, such as women's athletics, where men can use their greater average size and speed to seize women's titles. For example, in 2018, Dr. Rachel McKinnon, a male who identifies as a woman, won a women's cycling world title in the UCI Masters Track Cycling World Championships.<sup>154</sup> The woman who placed third said it was unfair that he was allowed to compete in the women's race.<sup>155</sup> McKinnon responded by tweeting about how hard it was for "transgender women" and stated: "That's what transphobia looks like."<sup>156</sup> She later offered an apology, which McKinnon did not accept, saying "This is why the apology is not accepted: she still thinks what she said. She merely apologizes for being caught saying it publicly."<sup>157</sup>

And men in women's athletics pose greater physical risks to women in contact sports: in 2014, a male MMA fighter, Fallon Fox, who identified as a woman and had gender reassignment surgery, gave his female opponent a concussion and broke her eye socket in a 3-minute fight.<sup>158</sup>

Male access to women's spaces would also prevent women from having women-only professional development groups, gyms, retreats, political associations, rooming assignments during group travel, hostels, spa services, monasteries, and thwart women who wish to work with a female coach,

154. See Alex Ballinger, *Rachel McKinnon Becomes First Transgender Woman to Win Track World Title*, CYCLING WKLY. (Oct. 17, 2018 11:46 AM), <https://www.cyclingweekly.com/news/latest-news/rachel-mckinnon-becomes-first-transgender-woman-win-track-world-title-397473> [<https://perma.cc/AH9F-2PHZ>].

155. Dr. Jen Wagner-Assali (@jkwagnermd) TWITTER (Oct. 15, 2018, 6:19 AM), <https://twitter.com/jkwagnermd/status/1051794655698976773> [<https://perma.cc/M8QP-K6RR>].

156. See Neal Broverman, *Trans Cyclist Slam 'Bigots' After Winning Female World Championship*, ADVOCATE (Oct. 16, 2018, 10:06 PM EDT), <https://www.advocate.com/transgender/2018/10/16/trans-cyclist-slams-bigots-after-winning-female-world-championship> [<https://perma.cc/9NLV-4DBG>] (quoting Dr. Rachel McKinnon, Twitter status, 16 October 2018).

157. Maxine Shen & Leah Simpson, *'My Birth Certificate Says I'm Female': Trans Cyclist Defends Her Win After 3rd Place Competitor Lashed Out Saying 'It's Definitely NOT Fair' After Losing in World Championship Race*, DAILYMAIL.COM (Oct. 20, 2018), <https://www.dailymail.co.uk/news/article-6298053/Trans-cyclist-defends-championship-win-3rd-place-competitor-complained-NOT-fair.html> [<https://perma.cc/8BN3-JP4W?type=image>]; see also Caleb Parke, *'Not Fair': World Cycling Bronze Medalist Cries Foul After Transgender Woman Wins Gold*, FOX NEWS (Oct. 19, 2018), <https://www.foxnews.com/sports/not-fair-world-cycling-bronze-medalist-cries-foul-after-transgender-woman-wins-gold> [<https://perma.cc/2Z48-9UXT>].

158. *A Man Is Still a Man*, INSIDE SPORTS (Aug. 6, 2017), <https://insidesportssite.wordpress.com/2017/08/06/a-man-is-still-a-man/> [<https://perma.cc/8LLX-Q744>].

therapist or other counselor, or physician or midwife. And in any context where there was a gender imbalance (such as equity partnerships in large law firms), men would be able to appoint and promote themselves and claim to be furthering women's equality.

Two examples of this particular concern follow. First, in Windsor, Canada, a man filed a complaint against a spa for refusing him a Brazilian wax.<sup>159</sup> The man identified as a woman, but was physically entirely male, and the spa explained that they did not do Brazilian waxes for male body parts.<sup>160</sup> The spa's female staff (one for religious reasons) was uncomfortable with doing a Brazilian wax for a male, and the person who did waxing for men's arms and backs was on sick leave when the man wished to make his appointment.<sup>161</sup>

Second, also in Canada, the Vancouver Rape Relief and Women's Shelter (VRRWS) was sued by a man when they, consistent with their policy of offering women-only support to female rape victims, refused to train him as a crisis counselor once they realized he was a man.<sup>162</sup> The rape crisis center told him he was welcome to assist with fundraising or volunteer in some other way.<sup>163</sup> The man filed a complaint for sex discrimination against them,<sup>164</sup> refusing to accept a settlement.<sup>165</sup> The Human Rights Tribunal fined the women \$7500,<sup>166</sup> but the Supreme Court of British Columbia ultimately reversed the Tribunal's decision.<sup>167</sup>

More recently, the Shelter lost its funding from the City of Vancouver at the behest of another man, Morgane Oger, who identifies as a woman.<sup>168</sup> After the decision, Oger wrote: "The Cost Of Prejudice: Vancouver Rape Relief would need 9000 donors giving \$10 per month each to replace their \$1.1 million annual income that relies on govt contracts and a charitable status - both

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159. See Mary Caton, *Transgender Woman Files Human Rights Complaint Against Windsor Spa*, WINDSOR STAR, <http://windsorstar.com/news/local-news/transgender-woman-files-human-rights-complaint-against-windsor-spa> [<https://perma.cc/7QNQ-E8DK>] (last updated May 13, 2018).

160. *Id.*

161. *Id.*

162. *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, paras. 3–4 (Can.).

163. JEFFREYS, *supra* note 14, at 178.

164. *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, paras. 6–7 (Can.).

165. JEFFREYS, *supra* note 14, at 178.

166. *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, paras. 8–9 (Can.).

167. JEFFREYS, *supra* note 14, at 178.

168. Meghan Murphy, *Discontinuation of Grant to Vancouver Rape Relief Shows Trans Activism is an Attack on Women*, FEMINIST CURRENT (Mar. 20, 2019), <https://www.feministcurrent.com/2019/03/20/discontinuation-of-grant-to-vancouver-rape-relief-shows-trans-activism-is-an-attack-on-women/> [<https://perma.cc/Q69K-QGAY>].

incompatible with discrimination against women on any basis whatsoever.”<sup>169</sup> By “discrimination against women,” Oger refers to VRRWS’s policy of serving women exclusively.

*e. Women’s bodies*

Refusing women any spaces where men are not has additional consequences for women. By demanding that women consider certain men to be women, the transgender rights movement erases lesbians, and there is some indication that it has always sought to do so.

In her book, *Going Too Far*, Robin Morgan describes a lesbian feminist conference in 1973, where “all hell broke loose that very first night, caused by the gate-crashing presence” of a cross-dressed man who “insisted that he was (1) an invited participant, (2) really a woman, and (3) at heart a lesbian. (It is, one must grant, an ingenious new male approach for trying to seduce women.)”<sup>170</sup> The man divided the women, some of whom were inclined to accept him, and some who thought his presence would undermine the entire purpose of the conference.<sup>171</sup> He had a history of creating similar division and damage by attempting to enter other women’s organizations.<sup>172</sup>

Males who are physically unaltered continue to demand that lesbians accept them as women, and Planned Parenthood is happy to assist them (the men, not the lesbians). For example, in 2011, Planned Parenthood facilitated a workshop in Toronto, entitled “Overcoming the Cotton Ceiling: Breaking Down Sexual Barriers for Queer Trans Women” at a conference called “Pleasures and Possibilities,” for “male-bodied transgenders only, that is a space from which women were excluded, at which these men could discuss tactics to get into the bodies of lesbians or ‘cis’ women in general who were resistant to their charms.”<sup>173</sup> (“The cotton ceiling” is a phrase male transgender activists use to compare their inability to get women to have sex with them to the barriers that women face to equality in public life).

As Sheila Jeffreys put it, “[i]t is perhaps not surprising . . . that male-bodied transgenders, in line with the generations of men who have sought to control women’s bodies, consider that this is an important space to occupy.”<sup>174</sup> Even

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169. Morgane Oger (@MorganeOgerBC), TWITTER (Mar. 18, 2019), <https://twitter.com/morganeogerbc/status/1107741283034923008> [<https://perma.cc/TT5L-NCG3>].

170. MORGAN, *supra* note 70, at 171.

171. *Id.* at 180.

172. *Id.*

173. JEFFREYS, *supra* note 14, at 180.

174. *Id.*

at the Vancouver Dyke March, an event dedicated entirely to lesbian women, it is now verboten for lesbians to express that they will not accept male sexual partners.<sup>175</sup> A group of lesbians who do not believe that males can be lesbians attempted to join the March and were harassed by other marchers—including males—and the March issued an official statement condemning the lesbians as a hate group.<sup>176</sup>

*f. Women's Boundaries*

These demands for access to women's spaces raise some core questions: are women's boundaries to be honored or not? Do women even get to set them? Or are they always to be something that men push, and ultimately push past? As the MeToo movement has made more apparent, women already struggle to assert their boundaries to men, and frequently self-censor rather than confront unacceptable behavior in men, *without* the threat of being branded "transphobic."<sup>177</sup>

So now, on top of *if you say something, you're going to ruin his life*,<sup>178</sup> women are told, *if you say something, you're violently attacking his very existence*.<sup>179</sup> And even where women refused to be cowed by this pressure, some steps they could have once taken to protect themselves from male aggression (like having security officers remove a man who refuses to leave a particular women's space) will become illegal.

Some might argue that men who represent a threat to women's safety are undeterred by laws; they are willing to commit crimes (such as through voyeurism) regardless of whether they can do so with impunity, and therefore gender identity nondiscrimination laws do not increase the chances that they

175. Meghan Murphy (@MeghanEMurphy), TWITTER (June 18, 2018), <https://web.archive.org/web/20180619023807/https://twitter.com/MeghanEMurphy/> [<https://perma.cc/7YBR-KWC9>] (tweeting about the Vancouver Dyke march) (these tweets are no longer available on *Twitter*, but can be located via internet archival tool).

176. Danielle Cormier, *Lesbians are Being Excluded from the Vancouver Dyke March in the Name of 'Inclusivity'*, FEMINIST CURRENT (Aug. 13, 2018), <https://www.feministcurrent.com/2018/08/13/lesbians-excluded-vancouver-dyke-march-name-inclusivity/> [<https://perma.cc/S4TG-ESAT>].

177. I am referring here to women not confronting male harassment from fear of appearing rude or creating social awkwardness, not situations where women do not resist because they fear it will put them in more danger.

178. See Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/E4YZ-9GM2>].

179. See, e.g., Julia Beck, *How I Became the Most Hated Lesbian in Baltimore*, AFTERELLEN (Dec. 10, 2018), <https://www.afterellen.com/general-news/568221-how-i-became-the-most-hated-lesbian-in-baltimore> [<https://perma.cc/GT3H-G7V6>].

will endanger anyone. But, referencing the examples above, while that could be theoretically true in the bathroom context, it is not true in the shelter or prison contexts; a predatory male cannot simply decide to enter those spaces for women without someone or some policy enabling him to do so. And in the Jonathan Yaniv case, the harassing litigation was precisely about enforcing certain gender identity laws.

None of this, of course, is to attribute boundary-crossing motives to every male who identifies as a woman. But it is noteworthy that the transgender rights movement has seemingly made little effort to distance themselves from the boundary-crossers, even violent ones, and has displayed relatively little empathy for women who are at best uncomfortable with and at worst endangered by male presence in their private spaces.

## 2. Coopting Feminist Priorities

In addition to commandeering women's spaces, the transgender rights movement undermines women's rights by coopting feminist work, pushing for different—and sometimes conflicting—priorities and interests. Males who are transgender are asking for a different thing from the law (validation or affirmation), often in a very stereotypically male way (dominance, demands, demeaning women). Sex discrimination bans and other laws aimed at women's equality are not about validating our identity as women but to keep it from being too much of a liability.

Yet instead of feminists being free to focus on preventing, for example, violence against women, transgender rights advocates insist that they prioritize in their work the right of men to appear in drag.<sup>180</sup> Not only is this unspeakably trivial in light of the real violence women's rights work is trying to stop (not speech-as-violence, but actual violence, the kind where you can bleed out before anybody finds you), but drag itself is an insult to women.

Janice Raymond argues that drag and transgenderism are both related to men's oppression of women, and thus “there are more male-to-constructed-female transsexuals because men are socialized to fetishize and objectify. The same socialization that enables men to objectify women in rape, pornography, and ‘drag’ enables them to objectify their own bodies.”<sup>181</sup> Similarly, Kleiman describes drag as a form of social control:

The point of glamour drag is not to tell jokes but to perform the feminine. The only reason to hire a man for this purpose—when there are plenty of women available, by definition more experienced and better qualified—is to give men the continued

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180. *See, e.g., id.*

181. RAYMOND, *supra* note 66, at 29.

right and privilege to determine the content of the feminine. Just as white people in blackface announced and established the limits of African-Americans' behavior, men in dresses announce, establish, and enforce the limits of what will be expected of, and tolerated from, women.<sup>182</sup>

And many of these men do not confine themselves to insinuation, but are direct about their contempt for women; for example:

Genetic women cannot possess the very special courage, brilliance, sensitivity and compassion—and overview—that derives from the transsexual experience. Free from the chains of menstruation and child-bearing, transsexual women are obviously far superior to Gennys in many ways.

Genetic women are becoming quite obsolete, which is obvious, and the future belongs to transsexual women. We know this, and perhaps some of you suspect it. All you have left is your 'ability' to bear children, and in a world which will groan to feed 6 billion by the year 2000, that's a negative asset.<sup>183</sup>

Some males who identify as women have been extremely demanding and even abusive toward their female partners, in one woman's words about her transitioning husband: "He also engaged in other forms of bullying and threats and a new 'Tracey' emerged, the one who 'intimidated and threatened, who laid down the law and expected me to abide by it. If Tracey was becoming a woman, he had never seemed so male—a tyrannical bully he had never been in our marriage.'"184

Some have made threats to others that few actual women would even be able to make: Charles Clymer, a man who reinvented himself as the transgender person Charlotte when his male feminism was exposed as hypocrisy,<sup>185</sup> once issued this Twitter threat: "I'm also 6'4' in stilettos and an Army veteran trained

182. Kleiman, *supra* note 71, at 685.

183. RAYMOND, *supra* note 66, at 117 (citing letter from Angela Douglas to Sister, newspaper (1977)).

184. JEFFREYS, *supra* note 14, at 86.

185. See Natasha Chart, *What's Current: Exiled 'Male Feminist' Charles Clymer Declares Himself a Woman*, FEMINIST CURRENT (Jan. 19, 2018) <https://www.feministcurrent.com/2018/01/19/whats-current-exiled-male-feminist-charles-clymer-declares-woman/> [<https://perma.cc/4QH7-HFA9>]; see also Hayley Krischer, *Fast Company Promoted a Live Chat with Creepy 'Male Feminist'*, SALON (Dec. 3, 2014, 1:03 AM UTC) [https://www.salon.com/2014/12/02/fast\\_company\\_promotes\\_live\\_chat\\_with\\_creepy\\_male\\_feminist/](https://www.salon.com/2014/12/02/fast_company_promotes_live_chat_with_creepy_male_feminist/) [<https://perma.cc/4Y3X-RS8L>].



in combat arms. I mean, you can make that choice, Scooter, but it probably ain't gonna end well for you."<sup>186</sup>

And some go beyond even contempt as they threaten to punch, slap, rape, and kill the women who consider them men, saying things like: "kill all TERFs," "All TERFs deserve to be shot in the head," "Colonize TERF faces with a fist," and even threatening to commit "TERF genocide."<sup>187</sup> Some of the males posting these threats include pictures of themselves with weapons, including knives.<sup>188</sup>

Referring to the men described above as women and allowing their preferences and their threats to dictate feminist advocacy, not only sidelines women's concerns, especially the specific sex-based ways that women experience violence and other discrimination; it obscures males as agents of women's subordination.<sup>189</sup>

This raises the question of whether women's interests to be maintained as such or not. Do they deserve their own movement? The sex and gender-based discrimination disproportionately suffered by women, and the sex and gender-based discrimination exclusively suffered by women suggest that a specific movement is in order. Catharine MacKinnon portrays some of that discrimination this way:

If women were human, would we be a cash crop shipped from Thailand in containers into New York's brothels? Would we be sexual and reproductive slaves? Would we be bred, worked without pay our whole lives, burned when our dowry money wasn't enough or when men tired of us, starved as widows when our husbands died (if we survived his funeral pyre), sold for sex because we are not valued for anything else? Would we be sold into marriage to priests to atone for our family's sins or to improve our family's earthly prospects? Would we, when allowed to work for pay, be made to work at the most menial jobs and exploited at barely starvation level? Would our genitals be sliced out to 'cleanse' us (our body parts are dirt?), to control us, to mark us and define our cultures? Would we be trafficked as things for sexual use and entertainment

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186. See Charlotte Clymer (@cmclymer), TWITTER (June 26, 2018, 4:55 PM) <https://twitter.com/cmclymer/status/1011729588781748229?lang=en> [<https://perma.cc/D8KK-YUZN>].

187. See, e.g., *Threats of Violence, Harassment, and Abuse*, TERF IS A SLUR, <https://terfisaslur.com/> [<https://perma.cc/DGT6-LG9R>].

188. See, e.g., *id.* TERF is an acronym that means "trans-exclusionary radical feminist."

189. See JEFFREYS, *supra* note 14, at 4-5 (raising a similar concern about the term "gender" as "disappear[ing] men as agents in male violence against women," specifically when that violence is called "gender violence.").

worldwide in whatever form current technology makes possible? Would we be kept from learning to read and write?

If women were human, would we have so little voice in public deliberations and in government in the countries where we live? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly to death, and to death, by men with whom we are close? . . . If women were human, would our violation be *enjoyed* by our violators? And, if we were human, when these things happened, would virtually nothing be done about it?<sup>190</sup>

*a. Sex and Gender-Based Discrimination Disproportionately Suffered by Women*

The Council of Europe defines “gender-based violence against women” as “violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>191</sup> The violence and discrimination disproportionately suffered by women includes rape, other forms of sexual assault or abuse, exploitation through prostitution and pornography, sex trafficking, domestic violence, honor violence, and child marriage.

According to the World Health Organization, one out of every three women “will experience physical or sexual violence by a partner or sexual violence by a non-partner,” and nearly 40% of women who are murdered are reported as killed by an intimate partner.<sup>192</sup> These statistics do not include the non-sexual violence that men commit against women who are not their partners. Some national figures place the intimate partner violence figure much higher—up to 70%.<sup>193</sup>

190. MACKINNON, *supra* note 44, at 41–42.

191. COUNCIL OF EUR., COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE 3, COUNCIL OF EUROPE TREATY SERIES 3 (May 11, 2011), <https://rm.coe.int/168008482e> [<https://perma.cc/74QA-AD9H>].

192. *Violence Against Women: Global Picture Health Response*, WORLD HEALTH ORG., [https://www.who.int/reproductivehealth/publications/violence/VAW\\_infographic.pdf?ua=1](https://www.who.int/reproductivehealth/publications/violence/VAW_infographic.pdf?ua=1) [<https://perma.cc/ZT8R-JU2V>]; *see also* WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 31 (2013), [https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625\\_eng.pdf;jsessionid=831D9D1091C84CC655B517242D6519AD?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf;jsessionid=831D9D1091C84CC655B517242D6519AD?sequence=1) [<https://perma.cc/S3GL-D78D>].

193. *Facts and Figures: Ending Violence Against Women*, UN WOMEN, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> [<https://perma.cc/TC66-3G4D>] (last updated Nov. 2019).

Women are disproportionately the victims of acid attacks, which disfigure and sometimes kill them, usually for rejecting a man's advances.<sup>194</sup> Women also bear the brunt of the sexual brutality run rampant in the Democratic Republic of the Congo, where men use rape as a weapon in the ongoing war.<sup>195</sup>

An estimated 650 million women and girls worldwide were married before age eighteen,<sup>196</sup> and child marriage, in addition to being a form of forced marriage, usually keeps girls uneducated, in poverty, and at high risk for domestic violence and unsafe pregnancies.<sup>197</sup> The child marriage victims in the U.S. are almost all girls<sup>198</sup>—and thirteen U.S. states have no statutory minimum age for marriage.<sup>199</sup>

Women and girls account for over 70% of trafficking victims, most of them trafficked for sex.<sup>200</sup> Many anti-trafficking and women's rights organizations have noted the parallels between prostitution and sex trafficking—the women who are exploited are usually poor and subjected to violence, including rape.<sup>201</sup>

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194. See, e.g., Sujoy Dhar, *Acid Attacks Against Women in India on the Rise; Survivors Fight Back*, USA TODAY, <https://usat.ly/2w2Mkc5> [<https://perma.cc/3TSB-CGUX>] (last updated July 27, 2017, 7:00 AM ET); Tom de Castella, *How Many Acid Attacks Are There?*, BBC NEWS MAG. (Aug. 9, 2013), <http://www.bbc.com/news/magazine-23631395> [<https://perma.cc/MLX7-XZQ7>] (citing expert estimates that 75–80% of acid attack victims are women); Arafatul Islam, *Why Acid Attacks are on the Rise in India*, DEUTSCHE WELLE (June 8, 2016), <http://www.dw.com/en/why-acid-attacks-are-on-the-rise-in-india/a-19313750> [<https://perma.cc/N9TN-QDCB>].

195. See, e.g., Megan Bradley, *Sexual and Gender-based Violence in the Democratic Republic of the Congo: Opportunities for Progress as M23 Disarms?*, BROOKINGS INST. (Nov. 13, 2013), <https://www.brookings.edu/blog/africa-in-focus/2013/11/13/sexual-and-gender-based-violence-in-the-democratic-republic-of-the-congo-opportunities-for-progress-as-m23-disarms/> [<https://perma.cc/T5HG-SHX6>].

196. UN WOMEN, *supra* note 193.

197. *Id.*; TAHIRIH JUSTICE CTR., FALLING THROUGH THE CRACKS: HOW LAWS ALLOW CHILD MARRIAGE TO HAPPEN IN TODAY'S AMERICA 4–5 (Aug. 2017), <https://www.tahirih.org/wp-content/uploads/2017/08/TahirihChildMarriageReport-1.pdf> [<https://perma.cc/PFF7-CYE3>].

198. TAHIRIH JUSTICE CTR., *supra* note 197, at 3.

199. TAHIRIH JUSTICE CTR., UNDERSTANDING STATE STATUTES ON MINIMUM MARRIAGE AGE AND EXCEPTIONS 2 (July 1, 2019), [https://www.tahirih.org/wp-content/uploads/2016/11/State-Statutory-Compilation\\_Final\\_July-2019\\_Updated.pdf](https://www.tahirih.org/wp-content/uploads/2016/11/State-Statutory-Compilation_Final_July-2019_Updated.pdf) [<https://perma.cc/Q88W-EAEE>]; TAHIRIH JUSTICE CTR., APPENDIX A: ALL STATES AND D.C. (June 2019), [https://www.tahirih.org/wp-content/uploads/2019/07/Updated-Appendices-combined\\_June-2019.pdf](https://www.tahirih.org/wp-content/uploads/2019/07/Updated-Appendices-combined_June-2019.pdf) [<https://perma.cc/4ZHZ-HKP2>].

200. UN WOMEN, *supra* note 193.

201. See, e.g., NAT'L CTR. ON SEXUAL EXPLOITATION, PROSTITUTION: "THE ZONE" OF RAW MALE PHYSICAL AND SEXUAL VIOLENCE 19 (2017), [https://endsexualexploitation.org/wp-content/uploads/NCOSE\\_Prostitution-Violence-Booklet\\_2017\\_FINAL.pdf](https://endsexualexploitation.org/wp-content/uploads/NCOSE_Prostitution-Violence-Booklet_2017_FINAL.pdf) [<https://perma.cc/8FGQ-AEN5>]; Melissa Farley, *Slavery and Prostitution: A Twenty-First Century Abolitionist Perspective*, in

Moreover, legalizing prostitution (as opposed to the Nordic model: decriminalizing the women in prostitution, while retaining legal bans against pimps and buyers) results in an increase in sex trafficking, as the demand for sex tends to exceed the consenting supply.<sup>202</sup>

The UN has long recognized the link between prostitution and sex trafficking; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others opens by saying that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person . . . .”<sup>203</sup> Moreover, the treaty requires that the states-parties ban people from enabling, participating in, or exploiting “the prostitution of another person, even with the consent of that person.”<sup>204</sup>

Here it is worth noting that the major transgender rights groups, claiming to speak for women, are uniformly pro-prostitution. When Amnesty International came out in favor of prostitution, the Transgender Law Center reaffirmed their own support for “sex work” (a euphemism for legalizing and normalizing prostitution) and supported Amnesty International’s statement.<sup>205</sup>

Lambda Legal listed other LGBT rights groups that support prostitution and supported Amnesty International’s decision: Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal, National Center for Lesbian Rights, and

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LINKING THE HISTORIES OF SLAVERY IN NORTH AMERICA AND ITS BORDERLANDS 283, 304–05 (Bonnie Martin & James F. Brooks eds., 2015).

202. See, e.g., NORDIC MODEL NOW!, WHITE RIBBON CAMPAIGN UK, LONDON FEMINIST NETWORK, NOT BUYING IT!, SCARY LITTLE GIRLS, ROOMS OF OUR OWN, A CALL TO MEN UK, OBJECT, CAMPAIGN AGAINST SEX ROBOTS, CHELT FEMS, ZERO OPTION SHEFFIELD, JURIES, END ONLINE MISOGYNY, YES MATTERS, JOINT SUBMISSION TO THE UN WOMEN CONSULTATION ON “SEX WORK, THE SEX TRADE AND PROSTITUTION” 4–5 (Oct. 16, 2016) [hereinafter JOINT SUBMISSION], <https://nordicmodelnow.files.wordpress.com/2016/10/joint-un-women-submission-nmn13-others-ws.pdf> [<https://perma.cc/ML9W-HBAH>]; see also Seo-Young Cho, Axel Dreher, & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking?*, 41 WORLD DEV. 67, 69 (2013) (empirical study concluding that legalization of prostitution “leads to an expansion of the prostitution market,” which in turn leads to “a larger degree of reported human trafficking inflows”).

203. G.A. Res. 317 (IV), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, pmbl. (Dec. 2, 1949).

204. *Id.* art. 1 (2).

205. TLC Welcomes Amnesty International Policy and Research on Sex Worker Rights, TRANSGENDER L. CTR. (May 26, 2016), <https://transgenderlawcenter.org/archives/13022> [<https://perma.cc/R3NP-5X2C>].

the National Center for Transgender Equality.<sup>206</sup> Lambda Legal itself even suggests that engaging in prostitution is a constitutional right:

Money complicates sex. But a commercial exchange shouldn't negate these constitutional rights. And frankly, sometimes relationships are transactional. For just a few common examples, consider prenuptial agreements, surrogacy, and hook-up websites; the fact that money is involved does not obliterate constitutional protections for marriage, parenting or sexual intimacy.<sup>207</sup>

While transgender rights activists celebrated Amnesty International's decision, many feminists criticized it: the Coalition Against Trafficking Women argued that decriminalizing brothel owners, pimps, and men who use women in prostitution rather than only prostituted women is siding with the exploiters.<sup>208</sup> As a joint submission to the UN from fourteen UK women's rights groups on this subject explains:

We reject the terms "sex work" and "sex worker" because they confuse and obscure the reality.

"Sex work" covers activities from lap dancing and phone line "sex", to the intimate contact of prostitution. Those who style themselves "sex workers" may not have experienced prostitution as such, but have dabbled in phone or dominatrix work, or be pimps or brothel keepers. Invariably these are the voices that dominate the debates, and even determine policies, and not the vulnerable and marginalised women and girls who are the majority in prostitution.<sup>209</sup>

The Joint Submission notes the violence as well as the vulnerability to STIs and other problems for reproductive health that women in prostitution suffer.<sup>210</sup>

And at least some feminists see pornography as deeply linked with, and sometimes more dangerous than, prostitution. In *Life and Death*, Andrea

206. *LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Sex Work*, LAMBDA LEGAL (Aug. 20, 2015), [https://www.lambdalegal.org/blog/20150820\\_decriminalize-sex-work](https://www.lambdalegal.org/blog/20150820_decriminalize-sex-work) [<https://perma.cc/BM72-CT4G>].

207. Hayley Gorenberg & Richard Saenz, *The Constitution Should Protect Sex Work*, LAMBDA LEGAL (Oct. 12, 2016), [https://www.lambdalegal.org/blog/20161012\\_constitution-should-protect-sex-work](https://www.lambdalegal.org/blog/20161012_constitution-should-protect-sex-work) [<https://perma.cc/8826-PZ3E>].

208. *It's Official—Amnesty International Creates the Human Right to Pimp and Purchase Sexual Acts*, COALITION AGAINST TRAFFICKING WOMEN, <https://catwinternational.org/2016/05/its-official-amnesty-international-creates-the-human-right-to-pimp-and-purchase-sexual-acts/> [<https://perma.cc/TU5X-ESXE>].

209. JOINT SUBMISSION, *supra* note 202, at 1 (footnote omitted).

210. *Id.* at 2–3.

Dworkin calls pornography “technologized prostitution,” in which a woman “can still be sold after the beatings, the rapes, the pain, the humiliation have killed her.”<sup>211</sup> “With pornography, men masturbate to women being exposed, humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured, and killed,” writes Catharine MacKinnon.<sup>212</sup> She criticizes the idea that pornography should be regarded as speech or ideas, because it “has to be done to women to be made . . . .”<sup>213</sup>

Transgender rights advocates, by contrast, want “sex work” to be made legal and socially acceptable as just another job. Janice Raymond argues that prostitution can even be a form of validation for transsexual males.<sup>214</sup> It distorts the debate to say that those activists are speaking for women and therefore promoting prostitution is a feminist cause, when many advocates are expressing the wishes of males, whose commitment to the continued existence of prostitution has never been much in doubt.

I am not claiming that all feminists oppose prostitution and pornography— as I have discussed, liberal feminism tends to be for both. But radical feminists do oppose these things, and prostitution and pornography are at least up for debate within feminism. The point is not that feminism is a monolith, but that transgenderism is.

To my knowledge, no equivalent critique of prostitution, let alone pornography, from any transgender rights advocacy groups exists. Nor is there a focus on just the noncontroversial human rights violations disproportionately suffered by women, which raises the question of whether transgender rights advocates are coopting feminism to promote largely male interests.

*b. Sex and gender-based discrimination exclusively suffered by women*

There are also forms of sex discrimination only suffered by women: pregnancy discrimination, reproductive exploitation through egg donation and surrogacy, forced pregnancy, and forced or coerced abortion. Some of these are the direct result of sexual violence committed against women, such as forced pregnancy and traumatic fistula.<sup>215</sup> Around 200 million women and girls

211. DWORKIN, *supra* note 1, at 69.

212. CATHARINE A. MACKINNON, ONLY WORDS 17 (1993), <https://foundationsofgenderstudies.files.wordpress.com/2013/01/catharine-mackinnon-only-words.pdf> [<https://perma.cc/3UA5-ZLSH>].

213. *Id.* at 39.

214. RAYMOND, *supra* note 66, at xxvi.

215. *Gender-Based Violence*, UNITED NATIONS POPULATION FUND, <https://www.unfpa.org/gender-based-violence> [<https://perma.cc/8SFK-577V>].

have been subjected to female genital mutilation (FGM).<sup>216</sup> The majority of these women and girls were cut before they were five years old.<sup>217</sup> FGM can result in several medical problems, including “severe bleeding and problems urinating, and later cysts, infections, as well as complications in childbirth and increased risk of newborn deaths.”<sup>218</sup>

Reproductive technology has enabled couples—many of them male—to access women’s bodies to fulfill their desire for biological children. Surrogacy is physically risky (a risk compounded for surrogates living in developing world countries with fewer medical resources), and exploits economically vulnerable women, for which feminists have criticized it.<sup>219</sup> The European Parliament has also denounced it, stating that it

[c]ondemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments.<sup>220</sup>

Yet the Yogyakarta Principles, an international human rights document on sexual orientation and gender identity, claim a person’s right to found a family: “Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms.”<sup>221</sup> The Principles would require that states “[t]ake all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to

216. UN WOMEN, *supra* note 193.

217. *Id.*

218. *Female Genital Mutilation*, WORLD HEALTH ORG. (Jan. 31, 2018), <http://www.who.int/mediacentre/factsheets/fs241/en/> [<https://perma.cc/PH2J-QTN3>].

219. Bindel, *supra* note 60 (focusing on the plight of Indian surrogates); Kathleen Sloan, *Trading on the Female Body: Surrogacy, Exploitation, and Collusion by the US Government*, PUB. DISCOURSE (Apr. 24, 2017), <https://www.thepublicdiscourse.com/2017/04/19109/> [<https://perma.cc/5CD7-ENR8>] (discussing the physical risks and exploitation, particularly of American military wives).

220. Comm. on Foreign Affairs, *Report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union’s Policy on the Matter*, at 29, A8-0344/2015 (Nov. 30, 2015) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+REPORT+A8-2015-0344+0+DOC+PDF+V0//EN> [<https://perma.cc/3DHH-6YHM>].

221. ARCUS FOUND., *THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY* 27 (Mar. 2007), <https://www.arcusfoundation.org/wp-content/uploads/2007/01/Yogyakarta-principles-LGBT.pdf> [<https://perma.cc/4X7H-TRTK>].

adoption or assisted procreation . . . .”<sup>222</sup> Ensuring a “right to found a family,” regardless of whether that is biologically possible with a person’s partner, necessarily means a right to access other people’s bodies—specifically, women’s bodies. Astoundingly, a UN Rapporteur on Violence Against Women signed the Yogyakarta Principles.<sup>223</sup>

Not only will this weaken any rationale for recognizing and addressing the particular risk of exploitation that reproductive technology, such as surrogacy, presents for women, but rewriting laws so that sex is no longer biological entirely undermines the legal regime and rationale for treating pregnancy discrimination as per se sex discrimination.

All of the above abuses are high priorities for many feminists, and none are central to the rights advocacy of males who identify as women. The very lack of overlap ought to demonstrate that these movements are seeking very different things, and work designed to protect women in the integrity of their bodies should not be forced to assimilate a separate interest group comprised largely of the demographic<sup>224</sup> that threatens the integrity of women’s bodies.

Feminists ought to be able to concern themselves with preventing women from being exploited and tortured and murdered with impunity. They should not be pressured (and they should not give in to the pressure) to add to their agendas fulfilling the desires of males to be fully affirmed as the women they are not; male priorities should not be permitted to coopt women’s rights advocacy.

#### B. *The Transgender Rights Movement Undermines the Ability to Even Talk About Women’s Rights Violations*

Not only does the transgender rights movement undermine women’s rights, it undermines the ability to even talk about the violation. Males who identify as women commit the same crimes against women that other males do: one man who beheaded his wife is demanding that Massachusetts pay for his sex change operation,<sup>225</sup> and also suing to be moved to a women’s prison.<sup>226</sup> A UK site

222. *Id.*

223. *Id.* at 34.

224. By “demographic,” I mean males, regardless of gender identity or transgender status.

225. See *Into the Mind of Kosilek: Grace’s Daughter – a Book Review*, GENDERTRENDER (Apr. 9, 2013), <https://web.archive.org/web/20130414093823/http://gendertrender.wordpress.com/2013/04/09/into-the-mind-of-kosilek-graces-daughter-a-book-review> [https://perma.cc/83ZH-4NEV] (this blog is no longer available, but can be located via internet archival tool)

226. See Marie Szaniszlo, *Michelle Kosilek Files Lawsuit in Bid for Sex Change Surgery, Transfer*, BOS. HERALD (Aug. 29, 2018, 12:00 AM),



details violent crimes committed by people who identify as the opposite sex—the majority of the crimes, most of them sexual in nature, are committed by males.<sup>227</sup>

Yet a sexual assault crisis center volunteer was told, during a training for taking calls, to never assume (or, it seems, record) the perpetrator's sex based upon the terms or pronouns the victim used to describe the assault, because the victim might not know how the abuser identifies.<sup>228</sup> In other words, unless a male assailant identifies himself as male to a rape crisis center, the center refuses to hear the victim saying: “a man did this to me.”

In 2017, CBS reported on an attack on a transgender teen at a pool party.<sup>229</sup> The story was framed as an example of the violence transgender people suffer at bigots' hands. As it happened, a white 18-year-old adult male, who identified as a woman, beat up a black teenage girl, punching her in the face, dragging her on the concrete pavement by her hair, and calling her a “bi\*\*\*” for calling him a man instead of a woman.<sup>230</sup> The man posted a video of the assault on his Facebook page, with this caption: “This is what happened when b\*\*\*\* try me.”<sup>231</sup>

About a week later, several of the girl's family members recognized the man at a party, and assaulted him in return.<sup>232</sup> It was admittedly vigilantism, but it had nothing to do with the man's transgender status. The original story was not just inaccurate, it actually subverted the truth by presenting the original aggressor only as a victim.

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<https://www.bostonherald.com/2018/08/29/michelle-kosilek-files-lawsuit-in-bid-for-sex-change-surgery-transfer/> [<https://perma.cc/4Q9F-AWK3>].

227. See TRANS CRIME UK, <http://transcrimeuk.com/> [<https://perma.cc/RVP5-EVLC>].

228. *IDEVAV 2017: Naming & Recording Male Violence Against Women & Girls*, TRANS CRIME UK (Nov. 25, 2017), <http://transcrimeuk.com/2017/11/25/idevaw-2017-naming-recording-male-violence-against-women-girls/> [<https://perma.cc/5LJS-YXGE>].

229. *Up to 20 People Allegedly Attack Transgender Teen at Pool Party*, CBS NEWS (Aug. 22, 2017), <https://www.cbsnews.com/news/up-to-20-people-allegedly-attack-transgender-phoenix-teen-at-pool-party/> [<https://perma.cc/7M9H-S7MF>].

230. *Transgender “Hate Crime” Victim ‘Dakota Kern’ Exposed*, GENDERTRENDER (Aug. 23, 2017), <https://web.archive.org/web/20180131202223/https://gendertrender.wordpress.com/2017/08/23/trans-gender-hate-crime-victim-dakota-kern-exposed/> [<https://perma.cc/ZYF8-X76X>] (this blog has been suspended, but can be located via internet archival tool. It looks like it happened on November 16th, 2018, I am writing this on November 19th, 2018).

231. *Id.*

232. *Id.*; CBS NEWS, *supra* note 229.

Needless to say, language policing and revisionism obscures male agency in women's violation, exacerbating a trend that began when the term "gender" began to replace "sex," as Jeffrey notes:

Gradually, older terms . . . such as male domination, sex class and sex caste went out of fashion, with the effect that direct identification of the agents responsible for the subordination of women—men—could no longer be named. Gender, as a euphemism, disappeared men as agents in male violence against women, which is now commonly referred to as "gender violence."<sup>233</sup>

This section will analyze and critique the transgender rights movement's undermining the ability to name women's rights violations, by considering (1) the problem with private grammar, (2) the problem for truth-telling, and (3) the problem for the rule of law.

### 1. The Problem with Private Grammar

*"When words lose their meaning, people lose their lives."*<sup>234</sup>

Do words mean things? The world that transgender rights advocates push for is a world with a private grammar: pronouns no longer denote objective qualities like number or sex. "They" can refer to a single person, and "she" can refer to a male. Pronouns become identity signifiers, chosen by each person at will, and therefore private. Man can mean woman; woman can mean man. Man oppresses woman becomes unintelligible.

And this is a world where persuasion becomes impossible. Persuasion depends upon a common grammar, a publicly-agreed upon way of using words, of what the words mean. This is not to dispute that language can shift, but it is to assert that language must have some level of stability, of agreement, and of accessibility if words are to mean anything at all. And shifts in language have historically been societal (or occurring within a society's subcultures), not based on what is going on in one person's head.

Few phenomena threaten an oppressed group like a private grammar. Successful human rights movements rely on a common grammar to express universal truths, including moral truths, and to hold powerful people

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233. JEFFREYS, *supra* note 14, at 4–5.

234. Michael Bauman, Director of Christian studies at Hillsdale College, Address for Summit Ministries: The Meaning of Meaning (June 2005).

accountable for disregarding them.<sup>235</sup> It is necessary for the protection of human rights that words mean things, and don't mean other things.

And it is shortsighted to imagine that if we allow this to happen with the way we talk about sex and gender that the drift will be confined to those subjects. Everything cannot be negotiable, and especially not in a manner dependent on private whimsy. What happens in a society where words can mean anything, where genocide can mean “racial hygiene” or “security measures”? Or where “choke” means “love,” or where “no” means “yes”? (If “sex” is an unstable, fluid term that individuals infuse with their own personal meaning, how stable can “consent” be?)

## 2. The Problem for Truth-telling

The transgender rights movement also presents a problem for truth-telling by mandating that people lie, and turning language once used to explain women's oppression into something else entirely. New York City, quite literally, has a public accommodations law that requires people to lie: that is, to—with pronouns—declare that a person is the sex that he or she identifies with, regardless of what sex he or she is.<sup>236</sup> Willful violations may be punished by a fine of up to \$250,000 (non-willful violations, up to \$125,000).<sup>237</sup>

Less coercively (wielding no state power and therefore, no physical force), but still significantly (given social media's pervasiveness and power), Twitter bans women for saying that males are not women,<sup>238</sup> even though men routinely use Twitter—without apparent consequence—to threaten the women for speaking out in the first place.<sup>239</sup> So women who speak out are punished twice: once for angering the men, and again for refusing to lie.

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235. See, e.g., Elizabeth Cady Stanton, Declaration of Sentiments, Address at First Women's Rights Convention, Seneca Falls, N.Y. (July 20, 1848), <https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm> [<https://perma.cc/TUJ5-ALT3>] (mirroring language from the Declaration of Independence, to advocate for women's equality); Sojourner Truth, Ain't I a Woman?, Address at Women's Rights Convention, Old Stone Church, Akron, Ohio (1851), <https://www.nps.gov/articles/sojourner-truth.htm> [<https://perma.cc/UC6F-RZ2Q>] (appealing to common humanity to advocate for women's human rights).

236. N.Y.C. Admin. Code § 8-102 (2020); N.Y.C. ENFORCEMENT GUIDANCE, *supra* note 121, at 4–5.

237. N.Y.C. Admin. Code § 8-126.

238. *Twitter 'Bans Women Against Trans Ideology', Say Feminists*, BBC NEWS (May 30, 2018), <https://www.bbc.com/news/uk-44288431> [<https://perma.cc/8RTM-JZ46>].

239. Meghan Murphy, *Twitter Wants Me to Shut Up and the Right Wants Me to Join Them; I Don't Think I Should Have to Do Either*, FEMINIST CURRENT (Nov. 20, 2018), <https://www.feministcurrent.com/2018/11/20/twitter-wants-shut-right-wants-join-dont-think-either/> [<https://perma.cc/Z53G-Q6NE>]; TERF IS A SLUR, <https://terfisaslur.com/> [<https://perma.cc/8JW7->

Prominent Canadian feminist Meghan Murphy was locked out of her Twitter account in the past for tweeting statements like “Women aren’t men,” and criticizing a male BDSM “dominatrix” for advocating for men who are pimps.<sup>240</sup> In November 2018, Murphy was permanently banned, ostensibly for identifying Jonathan Yaniv, a male who has made some disturbing comments online about young girls by his given (and more to the point—legal) name, instead of his sometime name “Jessica.”<sup>241</sup>

This occurred in a conversation about how Yaniv had sued multiple spas—that do not do Brazilian waxes for men—for refusing to wax his intact male genitalia.<sup>242</sup> (At the time of the ban, Yaniv still went by Jonathan in his LinkedIn profile, in which he presented as male.)<sup>243</sup> Twitter referenced its new policy against “deadnaming” to defend its decision. (Deadnaming is referring to a transgender person by their pre-gender transition name.) Twitter now bans “targeted misgendering or deadnaming of transgender individuals.”<sup>244</sup> But Murphy herself explained Twitter had not yet announced changes to its Terms of Service when she posted, and that another blogger had revealed Yaniv’s identity, in response to which Murphy sought to confirm:

I tweeted the link to the blog post, asking, “Is it true that the man responsible for trying to extort money from estheticians who refuse to give him a brazilian bikini wax is [link to Twitter handle]?” When provided with a screen shot confirming the man’s identity—an online review of a business called “Foxy Box,” which this individual had left, under his own name, with a photo of himself attached, saying, “Ally was great doing my Brazilian wax!”—I tweeted the image and wrote, “Yeeeah it’s him.” Two weeks later, Twitter permanently suspended my

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LXGR]. Notably, Twitter excludes “sex” from its list of protected categories. *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/ZLL6-EG7L>].

240. Nicole Russell, *Twitter Permanently Bans Feminist For Writing That ‘Men Aren’t Women’*, FEDERALIST (Nov. 25, 2018), <http://thefederalist.com/2018/11/25/twitter-permanently-bans-feminist-writing-men-arent-women/> [<https://perma.cc/LX26-ESNG>];

241. Julie Bindel, *Meghan Murphy, Twitter and the New Trans Misogyny*, SPECTATOR (Nov. 26, 2018), <https://spectator.us/twitter-trans-meghan-murphy/> [<https://perma.cc/S3R5-LS4Y>].

242. *Id.*

243. *See* Jonathan Yaniv, LINKEDIN, <https://www.linkedin.com/in/jonathanyaniv/?originalSubdomain=ca>, (last visited February 15, 2018). As of March 18, 2019, Yaniv’s profile picture was updated to present as woman, but the name remained Jonathan on the profile. Yaniv has since changed the name to Jessica on the platform.

244. *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/MUY4-HJHE>].

account, referencing only that last tweet.<sup>245</sup>

Yaniv bragged at a Township of Langley Council Meeting that he had “personally got her Twitter account suspended,” and then complained that Murphy had not been prosecuted by the state for her “hate crimes.”<sup>246</sup> It has since come to light that Yaniv’s harassment forced some of the women aestheticians to close their businesses.<sup>247</sup> (Yaniv eventually lost the case.)<sup>248</sup>

Similarly, WordPress has removed entirely the radical feminist, gender-identity critical blogs GenderTrender and Gender Identity Watch (both of which this author relied on for this article’s research) for their similar reporting on Yaniv.<sup>249</sup> WordPress, which suspended the sites without warning, said it did so because of “malicious publication of private details of a person’s gender identity.”<sup>250</sup> This was despite WordPress’s ability to simply edit pages (not to justify that either, of course), to redact information it considers to be a privacy violation.<sup>251</sup>

245. Meghan Murphy, *Twitter’s Sexist Hypocrisy Can No Longer Be Ignored*, FEMINIST CURRENT (Dec. 27, 2018), <https://www.feministcurrent.com/2018/12/27/twitters-sexist-hypocrisy-can-no-longer-ignored/> [<https://perma.cc/K7QL-FUKF>].

246. Audiotape: Jessica Yaniv, Address at Regular Evening Meeting of Council of Township of Langley (Dec. 10, 2018, 7:00 PM), <https://twitter.com/BenjaminABoyce/status/1075114991143927808> [<https://perma.cc/LP6D-D5E2>].

247. See Chelsea B., *Human Rights Case Will Determine Whether the State Can Lawfully Compel a Woman to Wax Biological Male Genitals?*, FEMINIST CURRENT (July 21, 2019), <https://www.feministcurrent.com/2019/07/21/human-rights-case-will-determine-if-the-state-can-lawfully-compel-a-woman-to-wax-biological-male-genitals/> [<https://perma.cc/WEG2-4RFT>].

248. See Yaniv v. Various Waxing Salons (No. 2), 2019 BCHRT 222 (Can.), [https://www.jccf.ca/wp-content/uploads/2019/10/222\\_Yaniv\\_v\\_Various\\_Waxing\\_Salons\\_No\\_2\\_2019\\_BCHRT\\_222.pdf](https://www.jccf.ca/wp-content/uploads/2019/10/222_Yaniv_v_Various_Waxing_Salons_No_2_2019_BCHRT_222.pdf) [<https://perma.cc/7D78-MH48>].

249. See GENDERTRENDER, <https://gendertrender.wordpress.com> [<https://perma.cc/577R-RJZ8>]; GENDER IDENTITY WATCH, <https://genderidentitywatch.wordpress.com> [<https://perma.cc/B4WY-8VMZ>]. If you click on these links, you will be taken to a page telling you that the sites are unavailable and “This site has been archived or suspended for a violation of our Terms of Service.” Gender Identity Watch is now housed at <https://genderidentitywatch.com/> [<https://perma.cc/6NUJ-2ZFP>], though the posts from Nov 2018 appear to be lost from the reconstructed site. Gender Trender is now available at <https://www.gendertrending.com/> [<https://perma.cc/JUF3-24X2>], but the posts from before the Wordpress removal appear to be entirely lost.

250. *WordPress Censors GenderTrender; Gallus Mag Responds*, 4THWAVENOW (Nov. 17, 2018), <https://4thwavenow.com/2018/11/17/wordpress-dumps-gendertrender-gallus-mag-responds/> [<https://perma.cc/WU72-R7PJ>]; *WORDPRESS’S SUSPENSION OF GENDER IDENTITY WATCH*, WOMEN’S LIBERATION FRONT (Nov. 21, 2018); see also Rod Dreher, *Transgender Totalitarianism*, AM. CONSERVATIVE (Nov. 18, 2018), <https://www.theamericanconservative.com/dreher/transgender-totalitarianism/> [<https://perma.cc/39Z3-L8NF>].

251. 4THWAVENOW, *supra* note 250.

WordPress initially refused to return the files to Gender Identity Watch's owner, enabling them to restore the site elsewhere, but relented after the Women's Liberation Front began raising money to file a lawsuit.<sup>252</sup>

Not only does this censorship—state-mandated and private—silence women, it erases them and “renders female biology unspeakable.”<sup>253</sup> And finally, this turns language in on itself. Refusing to deny women the right to spaces where men are not becomes “cissexism” and “transmisogyny”—colonizing feminist language to defang feminist work.

In *Board of Education of the Highland Local School District v. United States Department of Education*, the Southern District of Ohio granted a male student's preliminary injunction, based on Title IX, against school's refusal to allow access to women's facilities.<sup>254</sup> The court said that the use of male name and pronouns for the student was bullying, and rejected the idea that Title IX, when it was enacted, was unambiguously referring to sex, not gender identity.<sup>255</sup>

And one transgender rights advocate defines violence and abuse to include refusing to use female pronouns for a male prisoner who identifies as a woman, or facilitate his presentation as a woman, and assigning him to male prison facilities:

The violence of gender policing is psychological, emotional, physical and sexual. Transgender and gender nonconforming people are commonly assigned to a juvenile hall, prison or jail based on their genitalia . . . . The misalignment between a transgender prisoner's self-identity and appearance, and their government classification is frequently used by guards and other prisoners as a basis for psychological abuse. Such abuse can manifest itself in numerous ways, for example, by calling a transgender woman “he” or “Sir”, or denying her access to hormones, cosmetics and appropriate clothing central to her sense of selfhood.<sup>256</sup>

But promoting women's equality in the face of male dominance and aggression is not sexist or misogynistic. It is quite literally the *opposite* of sexism and misogyny. Nor is considering men male a form of bullying, let

252. *Fight the Bans on Women's Speech*, WOMEN'S LIBERATION FRONT, <https://womensliberationfront.nationbuilder.com/wordpress-ban> [<https://perma.cc/3DGE-DFDQ>].

253. Reilly-Cooper, *supra* note 9.

254. 208 F. Supp. 3d 850, 854, 857 (S.D. Ohio 2016) (granting male student's preliminary injunction—based on Title IX—against a school's refusal to let him use women's facilities).

255. *Id.* at 865–71.

256. Julia C. Oparah, *Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239, 260–61 (2012) (footnotes omitted).

alone violence or abuse. In fact, to redefine bullying, violence, and abuse in this way trivializes all three concepts, especially violence, with respect to all people—male and female—who are actually in danger. And when the violence is gendered, this way of using language obscures entirely who is doing what to whom.

### 3. The Problem for the Rule of Law

As noted above, most laws protecting gender identity and gender expression are broad enough to include cross-dressing without any accompanying gender dysphoria or even an opposite-sex identity. These laws and transgender rights advocacy present no limiting principle for any of this.

Some advocates even suggest that a limiting principle is inherently inconsistent with their vision of gender identity. Dylan Vade, the co-founder of the Transgender Law Center, writes:

For some transgender people, gender identification varies frequently. Some people's gender is situational . . . My gender is situational.

. . . . Some people wake up on different days with slightly different genders. For some, gender is fixed, and for some it is fluid."<sup>257</sup>

Vade continues:

Gender is much bigger than a line. It is at least a three-dimensional space, but not a Cartesian one, not a space created by three lines. There are no lines, no ordering. There is just space—an infinite space, a space that allows motion. I have gender claustrophobia and need a big space. I do not like it when people tell me that I have to identify as female or male. I also do not like it when people tell me that, because it is not radical enough, I cannot identify as female or male. I need a big space in which everyone's gender has a space, and in which our genders are not hierarchically ordered. Thus, a conception that works for me is a galaxy. A gender galaxy. . . .<sup>258</sup>

Similarly, transgender rights activist Jamison Green similarly suggests that people should be able to switch back and forth between genders: "All people are entitled to express and actualise themselves; no person should be limited in the number of times they may make a gender change, whether that change

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257. Dylan Vade, *Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 267–68 (2005).

258. *Id.* at 274–76 (footnotes omitted).

applies to clothing, identity documents, or medically assisted change”<sup>259</sup> This amounts to a demand that the law protect rights based on something that it is not only highly subjective and self-referential, but changing. This, of course would mean that a male, who identifies as a male 70% percent of the time could still force a women’s shelter to house him, and otherwise demand entry to women’s spaces in jurisdictions that ban gender identity discrimination.

And even in jurisdictions that do not, judges and agencies are turning statutes unambiguously designed to address inequalities women faced (that is, sex discrimination) into protections for transgender persons, on the theory that the term “sex” is unstable enough to include gender identity.<sup>260</sup>

The Department of Education’s Office for Civil Rights issued guidance in May 2016 interpreting “sex” to include “gender identity,” and requiring schools to use pronouns and names that reflect a transgender student’s gender identity, and permit students full access, based upon gender identity, to sex-segregated activities and facilities, including locker rooms, restrooms, showers, housing (including overnight accommodations), and athletic teams.<sup>261</sup> (The guidance was rescinded in February 2017.)<sup>262</sup>

The EEOC has said that a male police detective, who lost his Department of Justice offer after deciding to transition, was the victim of sex discrimination and asserted that it was wrong to divide his claims into sex, gender identity, and sex stereotyping—because they were all just different ways of stating a sex discrimination claim.<sup>263</sup>

All of this instability and doublespeak in language presents a problem for the rule of law. Without a limiting principle, there is no way to limit power. The rule of law means that the law is holding power in check, keeping it from being abused. If there is no limiting principle, there is no law – just power. Judges, agencies, and human rights commissions get to make it up as they go along, as they are in fact doing. Human rights are protected when texts have meaning. The way to limit power is that words have to mean things, and people with power must be constrained by that meaning.

Human rights work has historically relied on telling the truth about human rights abuses, using a public moral grammar to convey that truth, to change the

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259. Jamison Green, “*If I Follow the Rules, Will You Make Me A Man?*”: *Patterns in Transsexual Validation*, 34 U. LA VERNE L. REV. 23, 85 (2012).

260. *Bd. of Educ.*, 208 F. Supp. 3d at 851, 865–71 (granting male student’s preliminary injunction, based on Title IX’s sex discrimination ban, against school’s refusal allow access to women’s facilities, finding that the student had a likelihood of succeeding on the merits of the claim).

261. 2016 DEAR COLLEAGUE LETTER, *supra* note 106.

262. DEAR COLLEAGUE LETTER WITHDRAWAL, *supra* note 106.

263. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*3–4 (EEOC Apr. 20, 2012).



law (both as enacted and as enforced) to stop the abuses. If grammar is private, lying is mandatory, and texts do not constrain people in power, we cannot sustain any real human rights work, including women's rights work.

#### V. CONCLUSION

In sum, the transgender rights movement, particularly in its legal advocacy and policy goals of making gender identity and expression protected categories in nondiscrimination laws, represents a profound threat to women's rights. Specifically, transgenderism undermines women's rights to have spaces where men may not go, in short, to deny men access. But feminism has long been for the proposition that this is precisely among the rights that women have: to deny men access.

It has always been the case that some men find that denial intolerable. That this resentment comes to us now in the dress of grievance does not change the basic fact. From the rapists demanding access to women's prisons, to the men on Twitter threatening to murder women for daring to call them men, the message of these men is clear: we will continue your oppression, and also, we will disappear it.