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Essays in Gender-Critical Philosophy

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Holly Lawford-Smith

# Sex Matters

*Essays in Gender-Critical Philosophy*

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# Sex Self-Identification and Costly Signals of Assurance

## 5.1 Introduction

In 2018, the UK Government held a public consultation over proposed changes to the Gender Recognition Act (2004) which would allow ‘self-identification’ for sex, by way of a simple, single-step, statutory declaration.<sup>1</sup> New Zealand was poised to implement a similar change into law, via the Births, Deaths, Marriages and Relationships Registration Bill, when it was announced in February 2019 that the Bill would be deferred because of procedural issues in the select committee process.<sup>2</sup> In 2021, the bill re-emerged and was passed (Tinetti 2021*b*). In April 2019, the state of Tasmania in Australia passed law allowing both self-identification for sex, and for sex to be left off birth certificates entirely (Humphries and Coulter 2019), and in August 2019, the state of Victoria in Australia passed law allowing sex self-identification (Koob 2019). Similar changes had already been introduced in Argentina, Canada, Ireland, Malta, Denmark, Norway, Sweden, Portugal, and three US states (New York, California, and Nevada) (Greaves and Hudson 2018; Stock 2019).

Allowing ‘self-identification’ for sex creates a radical departure between the biological concept of sex and the legal concept of sex. The biological concept creates two categories of people, female and male, the former who produce large immobile gametes (or have gone some way down the developmental pathway toward doing so), the latter who produce small mobile gametes (same caveat).<sup>3</sup> The legal concept creates two very different categories of people, people who identify as women and have made a statutory declaration to that effect (who may be either male or female according to the biological concept), and people who identify as men and have made a statutory declaration to that effect (same caveat). The legal concept also sets a social precedent which interferes with the biological

<sup>1</sup> <GOV.UK> (2018).

<sup>2</sup> <Beehive.govt.nz> (2019). A press release in June 2021 confirmed it would be moving forward, this time with a public consultation (Tinetti 2021*a*; see also commentary at Speak Up For Women 2021).

<sup>3</sup> There are other plausible ways to understand biological sex, but I think this is the best. See also (Joyce 2021, Chapter 3, esp. pp. 64–5); and alternative understandings of sex in (Stock 2021, Chapter 2).

concept, by legitimizing the idea that sex should be a matter of self-identification, not biology.

The biological concept still matters, however. There are significant bodily differences between male and female people that matter (whether in work, in sport, for safety, or otherwise); there is historical injustice against female people that has not yet been fully mitigated; and there is ongoing social, economic, and political injustice and/or inequality, which differs in content and magnitude depending on the country. By acknowledging and accommodating sex differences, we can ensure genuine equality of opportunity for female people, and resolve sex-based injustices. We cannot do this if we are unable to even *refer* to female people as a class, because the only concept we are left with refers to a mixed-sex category based on a subjective identity claim. There should be a legal concept of sex coextensive with the biological concept (whether or not there are also *further* legal categories, for example ‘transgender’ and ‘nonbinary’). That is a reason to reject sex self-identification *tout court*. Indeed, it is a reason to reject the possibility of a change of legal sex *tout court*, except in cases where intersex people have had their sex incorrectly assigned and wish to correct it.

Still, given that many countries already allow change of legal sex, at a minimum on the basis of having had what is sometimes misleadingly called ‘sex reassignment surgery’ (alternatively ‘gender affirmation surgery’), it would be rather pointless to stubbornly maintain *we should have never allowed the concept of legal sex to depart from the concept of biological sex*. Whether or not that’s true, there’s a more pressing question about how much we should want to liberalize the category of legal sex. There are a range of options on the table in different countries, and we can ask about the appropriateness of each. The popular discussion so far has been dominated by the interests of transwomen to the exclusion of any acknowledgement or discussion of possible tensions or conflicts with women’s interests. Needless to say, transwomen are not the only stakeholders in the category of legal sex; and female people, as a set of stakeholders, are a *much* larger group. I’ll approach this question from the perspective of protecting the interests female people have in single-sex spaces. In this chapter, like the last one, I’ll use ‘female’ and ‘woman’ interchangeably.

## 5.2 Costly signals

I borrow from the philosophy of biology the concept of a costly signal. A ‘signal’ here is something that conveys information to others, whether a visible feature of an individual (e.g. a peacock’s tail), a physical action (e.g. a spider plucking the thread of a web) or a verbal communication (e.g. a baby bird chirping when it’s hungry). Signalling comes with what Ben Fraser calls *the problem of reliability*,

which ‘arises when we ask why signal senders do not mislead signal receivers, given the often strong incentive to do so’ (Fraser 2012, p. 264). He asks:

...in cases where signalling dishonestly seems at least possible, [...] there is a real puzzle concerning the persistence of some signalling systems. Under such conditions, shouldn’t signalling systems swiftly descend into a cacophony of dishonest proclamations, and eventually fall silent entirely? If everybody lies, nobody will listen, and if nobody listens, nobody will bother lying (Fraser 2012, p. 265).

A popular suggestion has been that signals are reliable when they are *costly*. Costliness has often been understood in terms of the organism’s history. Some signals are only possible in light of a particular history, for example, a peacock can only display an impressive tail when it has been of high enough physical quality to avoid starvation or predation while being encumbered by it (Fraser 2012, p. 265). But costliness might also mean taking on risk, e.g. risk of predation in the course of developing the signal, or risk of injury in the course of sending the signal.

Fraser argues against both Maynard Smith and Harper (2003), and Searcy and Nowicki (2005), that something should count as a costly signal even when it only comes with a risk of punishment (rather than that it in fact incurred costs to send). That is to say, a further explanation of the reliability of certain signals is that if they were discovered to be deceptive, those with an interest in preserving the reliability of the signalling system would be motivated to punish the signaller. This makes the signal costly even when, oddly, the cost of sending the signal itself might be cheap or even free.

Much of the discussion between biologists about this idea concerns non-human animals. But some have asked similar questions about the reliability of signals between humans (e.g. Frank 1988). One of Frank’s principles is that for something to function as a reliable signal it must be difficult or costly to fake. For example, there are some human facial muscles that operate reflexively when we experience particular emotions, and which only a small number of people can control. A micro-expression involving one of these muscles can therefore be assumed to be reliable. Clearly, signals can be more and less reliable, more and less hard to fake.

When thinking about reliable signals in the context of liberalizing legal sex categories, there are a number of important questions to keep in mind. First, who is the signal operating between? (Who is the signaller, and who is the receiver?) Second, what information must the signal provide? (For example, is it a signal of *sincerity* about identifying as a woman, a signal of *no risk of male violence*, or *no sexist attitudes*, or *no misogynistic policing behaviour*, or something else entirely that is needed?) Third, how reliable does the signal need to be? Is it enough if the signal makes it fairly likely that the information conveyed is correct, or should it

provide *near certainty* that it's correct? Is the law an appropriate vehicle for securing the signals that would reassure women that their interests in women-only spaces will not be undermined by the inclusion of at least some males?

I'll address these questions as the paper goes on, framing them in terms of what it takes to provide women with assurance that select rationales for women-only spaces are not being undermined. I'll focus on three rationales in particular: (i) safety, (ii) privacy/dignity/comfort, and (iii) respite.<sup>4</sup> In Section 5.5 I'll accept Fraser's argument that threat of punishment can underwrite a signal's reliability, and use that to discuss policy options that might serve to give women the assurance they need. But before that, in Section 5.4, I'll follow the earlier discussion between biologists and ask about the costly signals that come from an animal's—here a human's—appearance or evidence of their developmental history.

### 5.3 Providing women with assurance

It is entirely uncontroversial that male violence against women and girls is a serious global problem. This violence takes different forms in different countries.

For example, in Bangladesh some women who reject men's sexual or romantic advances have acid thrown in their faces, the effect of which is to destroy those women's appearances and therefore their access to marriage, work, and education (Spencer 2018). UK retailers recently banned the sale of acids to people under 18 in order to reduce the prevalence of acid attacks in the UK (Press Association 2018).

Child marriage, and therefore in many cases sustained child abuse/rape, is widespread in parts of the world. In West and Central Africa, 14% of women aged 20–24 had been married by the age of 15 years, and 41% had been married by the age of 18 years. Across the least developed countries, it's 12% of women aged 20–24 married by the age of 15 years, and 40% of those women married by the age of 18 years (Unicef 2020).

One in 4 women in the United States have experienced severe intimate partner physical violence, 1 in 10 women have been raped by an intimate partner, and 1 in 7 women have been stalked by an intimate partner to the point of being fearful of themselves or someone close to them being harmed or killed (National Coalition Against Domestic Violence 2020). In 2017 alone, 139 women in the UK were killed by men, 105 of whom knew their killer, 30 of whom were killed by strangers (Perraudin 2018).<sup>5</sup>

<sup>4</sup> For those who have not read Chapter 4, I think there are eight distinct moral rationales for women-only spaces, which are: 1. safety, 2. privacy/dignity/comfort, 3. justice/fairness, 4. respite, 5. likelihood of shared bodily experience, 6. intimate association, 7. self-determination, and 8. intent of the creators.

<sup>5</sup> 21 of the 30 killed by strangers were killed in male-perpetrated terrorist attacks.

The effect of male violence on women is visible throughout their socialization as girls. To give some examples, girls might be taught not to get into cars with strange men; to yell out ‘this person is not my Dad!’ if they are picked up by a strange man in a public place; that ‘*It’s O.K. to say No!*’ to inappropriate contact from male people in their lives;<sup>6</sup> that they should be careful their drinks aren’t spiked when they go out; that they watch out for each other around predatory men; that they should be careful in how they express discomfort with men’s behaviour, for fear of being physically harmed in retaliation; that they should avoid walking alone at night, or carry some kind of weapon if they do; and so on, and so on. All of this conditioning limits women’s access to public space and public life, which is the explanation of such movements as ‘Reclaim The Night’ where women go out together at night to reclaim public space that is ordinarily denied to them because of concerns about safety (MacKay 2015).

Perhaps some of this social conditioning is unnecessary; the risks overstated. After all, as discussed in Chapter 4, women are more likely to be assaulted by someone they know than someone they don’t know (although the rare cases of stranger assault that make the news are usually extraordinarily vicious). But their prevalence is not the point here. The point is that *women are taught, from an early age, to be fearful of men, to be cautious around men, and to be careful in how they express themselves around men* (the latter is particularly important when those men have social or institutional power over them).

It is also uncontroversial that women and girls are subject to severe and persistent sexual objectification. There is a widespread cultural focus on a woman’s appearance, and when women are represented in film, television, and advertising they tend to be sexualized. It is a common assumption that much of a woman’s or girl’s value resides in her attractiveness to men. This pressure causes large numbers of women to internalize self-loathing, and is likely a contributor to high rates of eating disorders, body dysmorphia, and self-harming among teenage girls (see e.g. Widdows 2018; Cameron 2019).

Although women and girls tend to internalize these misogynistic beauty standards, and are far from immune to imposing them on each other, they still have an interest in not having men and boys impose them. The difference is that even while some women act to further entrench misogynistic beauty standards, they are still the victims of them; the same is not true of male people.<sup>7</sup> It is hard to avoid this in mixed-sex spaces, but it is possible to provide women and girls with

<sup>6</sup> This was the title of a child safety book designed for parents and children to read together, published in 1985 (Lennet and Crane 1985).

<sup>7</sup> With the exception of transwomen who fully pass as female. These people will be victims of objectification in the sense that, believing them to be female, people impose the expectations upon them that they impose upon female people.



privacy, dignity, and comfort in single-sex spaces (freedom from the male gaze, freedom from being sexually objectified by males, freedom from scrutiny).<sup>8</sup>

Women-only spaces provide safety and respite from these kinds of concerns, by ensuring that no such threats are present. That the threats are not present means a woman is *safe*; that the threats are not present means a woman doesn't have to waste cognitive energy *worrying about the threats*. All women have an interest in the possibility of such respite, but women who are survivors of male violence have a particularly strong interest in this. Almost all public spaces are mixed-sex, and so place an emotional and cognitive burden on women to manage male responses in them. Women-only spaces allow women to avoid those burdens, without having to avoid public life entirely.

Because of their history of oppression and exclusion, and because of their interest in safety and respite, women have a very strong interest in retaining women-only spaces. Any law proposing to undermine this interest—as sex self-identification does by transforming single-sex spaces into mixed-sex spaces—would need to provide women with sufficient *assurance* that the goods those spaces were designed to secure (here focusing on safety, privacy/dignity/comfort, and respite) will still be secured.

There are two ways that such assurance can be provided: i) by each individual, or ii) by a law.<sup>9</sup> In the next two sections I take up each of these possibilities, asking what kinds of signals reliably assure women that they remain safe from the threat of male violence; retain their privacy, dignity, and comfort, especially from male sexual objectification; and provide respite from both the incidence of the former threats and from thinking or worrying about the former threats.

I argue that there is no such signal, and that because women cannot be provided with the assurance they need, there is no justification for law allowing male people into female-only spaces. The upshot is that law is worse when it lets more male people in, and better when it lets fewer male people in. So sex self-identification is the worst possible law from the point of view of women's interests, and the law requiring sex-reassignment surgery for a change of legal sex is the best possible law from the point of view of women's interests, holding fixed that the ship has sailed on *no* change of legal sex.

<sup>8</sup> Note that this is *not* a point about freedom from sexual *interest* or *attention*. Some women are attracted to women. It is a point about male attitudes, including seeing women as objects, and feeling sexual entitlement to women's bodies, especially in porn-saturated cultures. Women-only spaces secure against the latter.

<sup>9</sup> A sufficiently strong convention or social norm might do the same job, but I'll focus on law here.

## 5.4 Individual signals

In this section I'll discuss four individual signals that might provide assurance to women: physical cues for sex class membership; presentational cues for femininity; speech acts; and self-inclusion.

Here's an obvious signal that conveys relevant information: physical cues for sex class membership. We know that the bulk of sexual and other physical violence, including rape, murder, and terrorism, is inflicted by men.<sup>10</sup> That is not to say that *all men are violent*, it's to say that *most violent people are men*. And importantly, we don't know *which* men are the violent ones and which are not. So a way for women to keep themselves safe is to simply not be around men, in specific contexts. Bracketing trans people for a moment, it is usually possible to tell a person's sex by looking at them. Women have on average different body shapes and different facial features. Even so-called 'gender non-conforming' women, i.e. women who have short hair or wear pants, are usually reliably identified as being female (although lesbian friends have told me that mis-sexing happens more than you might expect).

If the information we want is simply whether a person is male or female, then we already have a pretty reliable source of that information (although imperfect, because we will classify some people incorrectly, and we will find some people difficult to classify). But there's a problem: this information tends to be confounded in the case of some (although not all, and perhaps not most)<sup>11</sup> trans and some nonbinary people. Some trans people have had so-called 'sex-reassignment' surgery so that some of their primary sex characteristics appear as those of the opposite sex; and some take cross-sex hormones so that their secondary sex characteristics align with those of the opposite sex. For example, a female nonbinary person might have a double mastectomy and so lack one prominent secondary sex characteristic that female people usually have; a male trans person might take estrogen and progesterone to develop breasts, and so come to have one prominent secondary sex characteristic that male people usually lack.

This creates two problems. One is that it makes the population-wide physical signal unreliable. A person who has the physical cues that suggest membership in the female sex class is likely to be female, but might be male (they might be a transwoman who has had 'sex-reassignment' surgery or is taking cross-sex

<sup>10</sup> As with 'female' and 'woman', I'm using 'male' and 'man' interchangeably in this chapter. The extension of both is sex, not gender identity category. I'll use 'male' alone when referring specifically to transwomen.

<sup>11</sup> Danielle Muscato and Alex Drummond are two high-profile transwomen who do not take *any* steps to confound their male physical appearance. It is relatively unusual to take *no* steps, but relatively common to take minimal steps that are not confounding.

hormones).<sup>12</sup> Another is that *treating* physical cues for sex class membership as a signal that conveys important information risks further entrenching injustice, both against trans people, by suggesting that they are being *deceptive* (see discussion in Bettcher 2007), and by suggesting that it is important to ‘pass’, which is especially unfair on late-transitioning males (see discussion in Wynn 2018); and against non-trans individuals, by stigmatizing conditions that affect their secondary sex characteristics, for example, polycystic ovary syndrome, androgen excess, or hypertrichosis producing facial hair sufficient to full beards in females.

Surely we should want people to be (i) okay with the bodies they have, however they are, and (ii) able to change their bodies if they feel extremely strongly that they are not okay with them, however they are. So physical cues for sex class membership are not a reliable signal of assurance for women in women-only spaces, and are not a good candidate for *working for* reliability because this risks serious harm to people who are already marginalized and stigmatized. Merely appearing to be male or female is not a reliable signal.

What about presentational cues for femininity, instead? This makes it the case that the signal can be sent by people who are obviously male, through their choices about presentation. For example, a male person might wear clothing that is frequently worn by women and only infrequently worn by men, such as a dress or a skirt. Or he might wear makeup, or jewellery, or style his hair in a way that is common in women and uncommon in men (for example he might wear it long and curl it).<sup>13</sup>

What information does this signal convey, and how reliable is the signal? The information is somewhat ambiguous. It could signal simple gender non-conformity; it could signal that the person understands themselves to be nonbinary or a transwoman; it could signal that the person has a sexual kink or fetish that is satisfied with feminine dress or accessories.<sup>14</sup> The person might sincerely believe themselves to be a woman and/or female, and be using a culturally understood language to convey that to others (Wynn 2019); but they might equally have a poor or distorted understanding of what womanhood is and be awkwardly

<sup>12</sup> They might also be an intersex person who is male but whose body appears female, but such intersex people are not the focus of this chapter (or indeed this book), primarily for the reason that my concern with male sex is as a heuristic for the type of socialization one has experienced, and most intersex people have been intersex since birth and so socialized as whatever sex they were assumed to be. An exception is the Guevedoces in the Dominican Republic, who are observed female at birth but then develop male genitals around the age of puberty, but this takes someone socialized female into the male category, not the other way around (BBC 2015).

<sup>13</sup> Obviously, some men wear makeup and some men wear dresses. I don’t mean to endorse here the idea that either of these things is exclusive to women, only that they are *typically* not things men wear, and so may be useful signals for that reason.

<sup>14</sup> See discussion in (Bailey 2003); (Stock 2021, Chapter 7); (Joyce 2021, Chapter 2); and (Lawford-Smith 2022, Chapter 5).

reflecting that understanding back to the world.<sup>15</sup> In all such cases, it is likely that the signaller will be at risk of sanction for non-conformity with the expectations placed on male people. In patriarchal societies male departures from masculinity are policed more severely than female departures from femininity (just consider how much more liberated female presentation is than male presentation in most societies). The fact that the male person is willing to bear this risk suggests that they feel strongly, whether that is against gender conformity, about their identity as trans or nonbinary, or about their sexual interests. But strength of feeling about any one of those three things provides no assurance to women. A male person can be ‘against masculinity’ in presentation while being ignorant as to the extent of their male-socialized behaviour; they can identify passionately as neither sex while still exhibiting traits typical of males; and their sexual interest in femininity indicates nothing about whether they are likely to inflict violence, objectification, or discomforting behaviour onto women. There is both ambiguity in what the signal communicates, and a mismatch between the information it might communicate and the information women need to receive. Presentational cues for femininity, therefore, are not a reliable signal.

Speech acts are a further kind of signal which communicates information between parties. For example, an obviously male person might assert ‘I am a woman’, or even ‘I am female’ or ‘I am a lesbian’ (I see this on social media regularly; I don’t know how often it happens in face to face interactions). The problem with this signal is that, again, it’s not clear what information it conveys. We learn that unless the person is joking around, or engaged in counter-protest,<sup>16</sup> they probably believe that they are a woman, or are female, or are a lesbian. But why should this *belief* of theirs provide any assurance to women about how they are likely to behave in a female-only space? In the latter two cases, it seems to provide exactly the opposite: when confronted with people who believe what we take to be an obvious falsehood we are usually *less* trusting of them, not more trusting.<sup>17</sup> Furthermore, talk is cheap: especially in the case that a male person has taken on no other costs (such as acquiring physical cues of sex class membership, or presentational cues of femininity), the signal neither conveys the information women need nor does so reliably. Even if it sent relevant information, its reliability would be undermined by its costlessness.

<sup>15</sup> I develop this idea further in Lawford-Smith and Hauskeller (2022), drawing on Lawford-Smith (2020).

<sup>16</sup> #ManFriday was a counter-protest set up by a group of women’s rights activists in the UK, where they would engage in what they called ‘random acts of manliness’. One such act was to visit the Highgate Men’s Pond on Hampstead Heath, wearing hand-knitted beards, and gain access by claiming to identify as men. <<https://manfridayuk.org/2018/07/28/why-do-the-ponds-matter/>>

<sup>17</sup> A male person’s believing themselves to be a woman is not obviously false in the way that their believing themselves to be female, or a lesbian, is. I think both ‘woman’ and ‘female’ have different intensions but the same extension, which means they refer to the same people. But there is reasonable disagreement about what ‘woman’ means.

Finally, what about acts of self-inclusion in spaces that are reserved for women? For example, if a visibly male person uses a female bathroom, particularly when there is a male bathroom right beside it, this can act to communicate the information that they take this space to be appropriately used by them.

Some institutions go so far as to actively encourage such self-inclusion. Two universities in the UK (Bristol and Oxford), and a music hall in Portland, have been reported on social media as displaying posters in their bathrooms that say, for example: ‘If you’re in a public bathroom and you think a stranger’s gender does not match the sign on the door, follow these steps: 1. Don’t worry about it, they know better than you’ (Bristol);<sup>18</sup> ‘Do you feel like someone is using the “wrong” bathroom? Please don’t: stare at them, challenge them, insult them; do not purposely make them uncomfortable. Instead please: respect their privacy; respect their identity; carry on with your day; protect them from harm. They are using the facilities they feel safe in. Please do not take that right away from them. Everyone has every right to be here: in this school, in this university, in this world’ (Oxford);<sup>19</sup> ‘If you’re using this restroom and you think a person’s gender doesn’t match the sign on the door, follow these steps: 1. Don’t worry about it, they know better than you’ (Portland).<sup>20</sup>

Male self-inclusion in female-only spaces is also low cost. In general, male people pose a physical threat to female people, not the other way round, so the male does not take on cost by risking retaliation from females (because such retaliation is unlikely). A female person is less likely to challenge a male one, especially if he is physically intimidating in either his height or build, and even if she does, the male is unlikely to be physically harmed as a result. The people who might be motivated to harm this male if they knew about his self-inclusion—for example the male intimates of those women in the bathroom at the same time as him, who might feel protective of those women—will tend not to know he is in there, precisely because they are outside of that space. So the male does not take on cost by risking retaliation by other men, either. Thus male people *impose* costs when they use the female bathroom (or other female-only spaces), rather than *take on* costs, where the latter would be a way to underwrite the reliability of their signals.

Furthermore, and as above, it’s just not clear what this action communicates. It might communicate the male person’s feeling that the term ‘woman’ or ‘female’ (whatever is on the sign) applies to them; or feeling safer in the women’s bathroom (perhaps because of a fear of harassment or violence by men in the male bathroom); or preferring to be among women; or a desire to test whether they

<sup>18</sup> Archived at <<https://ifunny.co/picture/if-you-re-in-a-public-bathroom-and-you-think-415zl6wu3>>

<sup>19</sup> Archived at <<https://ifunny.co/picture/do-you-feel-like-someone-is-using-the-wrong-bathroom-VA351R898>>

<sup>20</sup> Tweeted by Kristy Smith @speedskater89 6.24 p.m. 26th August 2019. Online at <<https://twitter.com/speedskater89/status/1165872653833404416>>

‘pass’ as a woman, by checking whether they are challenged in a woman’s space; or a desire for female cultural experience (having heard, perhaps, that women share confidences in bathrooms); or having a sexual interest in women or women’s products (sexualized male behaviour on record in female spaces includes assault, exhibitionism, voyeurism, spycam use, and sexual fetishes for women’s used sanitary products). Women cannot be expected to assume that any male including himself in a female bathroom has only the more innocuous of these intentions, and so poses no threat to her safety; and furthermore, that any male *with* one of those more innocuous intentions is unlikely to pose a threat to her interest in privacy/dignity/comfort, or respite.

None of these individual signals send women the information that they would need in order to be assured that their interest in having women-only spaces will not be undermined. And even if they did, the latter two, at least, are not costly enough to be reliable. In the next section I’ll move on to laws that can regulate use of (many/most) women-only spaces, making misuse ‘costly’ with the threat of legal or social sanction.

## 5.5 Legal requirements

In this section I’ll discuss legal requirements that might provide assurance to women instead, following real laws that are in place or have been proposed in various countries. These do not make the use of women’s spaces costly in the same way as the individual signals, where a male person takes on pain, or financial expense, or social discrimination, etc., but rather count as costly in the way Fraser (2012) had in mind, incurring a *risk* of punishment (here legal, or social—the latter as a result of social support *for* the law).

The laws I’ll consider are that a male is free to use women-only spaces if he: has had so-called ‘sex-reassignment’ surgery; has lived as a woman for two years; or has completed a statutory declaration of his self-identified sex (or ‘gender’, depending on the country). Assurance through law works differently to assurance through individual signals. When we’re thinking about individual signals, we’re thinking about what any given female person can know about any given male person when female-only spaces are challenged by them. When we’re thinking about law, we’re thinking about rules whose violation comes with a threat of punishment, and which have an influence on social norms and conventions. The law is not perfect in providing assurance, because people can always choose to break it. But the higher the costs of doing so, and the stronger the norms it influences, the less likely this will be.

There’s a question about which form of official documentation of sex to consider as sufficient to change of legal sex. In Australia at least, the birth certificate is

the best candidate, because while either a birth certificate or a passport is required for other official purposes like starting a new job, enrolling in university, or getting married, a birth certificate is required in order to get a passport. So the birth certificate is the ‘foundation document’ that underwrites all the others.

*Sex-reassignment surgery.* In the states of New South Wales and Queensland in Australia, sex-reassignment surgery is a requirement for change of legal sex. The problem with ‘sex-reassignment’ surgery as a signal is that while it reliably communicates *sincerity*—coming at considerable physical and financial cost—sincerity about *feeling like a woman/female* still does not provide female people with assurance that there will be no threat to their safety, privacy/dignity/comfort, or respite. Having severe enough dysphoria for surgical transition to be a serious option means that the person is likely to have suffered a lot; but there are many male people in the world who have suffered a lot, and who still pose a threat to women and women’s interests. (If that was false, we should expect to see no violence against women and girls from men of colour, working class men, disabled men, etc., and yet we do). The rejoinder may be that only trans-women *identify with* women as part of their suffering (see discussion in Stock 2021, Chapter 6), but it is far from clear that what is identified with is deep (to the point of creating an understanding of *women’s* interests in women-only space) rather than superficial (identification with presentation, e.g. being dolled up, or with apparent function, e.g. penetration by men, are clearly insufficient).<sup>21</sup>

Women don’t need to know whether someone *feels like a woman* (whatever that means to them), they need to know whether a person *is female*, or *has been socialized as female*, or at the very least, *has done the work required to get rid of sexist beliefs and the impulse to interact with women as gender norms permit men to*. The problem should be clear: sex-reassignment surgery, despite its name, does not change sex<sup>22</sup> and cannot change sex-based socialization. Surgery alone is no guide to who has and who hasn’t done the work against male socialization.

<sup>21</sup> For identifications of the latter two kinds, see the testimonies presented in Lawrence (2013) and Chu (2019).

<sup>22</sup> As explained in the note on language at the start of this book, I’m understanding sex as the production, all going well, of either large immobile gametes (ova: female) or small mobile gametes (sperm: male). Sex-reassignment surgery does not create a capacity to produce the opposite sex’s gametes, so sex-reassignment surgery does not change sex. This is not the only way to understand sex, however. Alex Byrne gives a slightly different version of the gamete account: ‘females are the ones who have advanced some distance down the developmental pathway that results in the production of large gametes’, ‘males are the ones who have advanced some distance down the developmental pathway that results in the production of small gametes’ (Byrne 2018). This has the advantage of referring to foetal development, rather than requiring the filling in of an ‘all going well’ clause (for criticism of which see Mason, forthcoming). But similarly, because sex-reassignment surgery can’t change one’s developmental history, this account does not countenance change of sex. Stock discusses three potential understandings of sex, one of which is based on chromosomes, specifically, the presence or lack of a Y chromosome. ‘A human male is a human with a Y chromosome. A human female is a human without a Y chromosome’ (Stock 2021, p. 47). This account of sex, like the next one, has the disadvantage that

Furthermore, having ‘sex-reassignment’ surgery as a requirement for legal change of sex works to incentivize surgical transition. Severely dysphoric trans people desperately want to live as the opposite sex, so whatever the gatekeeping requirement on doing so, they are likely to attempt to meet it. We must, therefore, set gatekeeping requirements with this in mind. We shouldn’t want people to feel that they have to have surgery on their perfectly healthy bodies in order to gain access to living as they want to live. ‘Sex-reassignment’ surgery can look initially like an appealing requirement for change of legal sex when focusing on the interests of women, because it ensures that only those who are very serious about transitioning can change their legal sex. But it’s too much to ask of trans people, who should be able to have that surgery if they want it, but not because they can’t get other things they want without it; and requiring it doesn’t do anything useful for women—doesn’t provide them the information they need.

*Two years living as a woman and diagnosis of gender dysphoria.* In the UK, the Gender Recognition Act (GRA) 2004 requires a person wishing to change their gender<sup>23</sup> to provide: two medical reports, one providing evidence that they have gender dysphoria and detailing treatment; documentation proving they have ‘lived in their acquired gender’ for at least two years; a statutory declaration of intention to live in the acquired gender until death; and for married people, evidence of the consent of a spouse (or the end of their marriage).<sup>24</sup> In 2018, a consultation was held considering reform to this process, potentially to make change of gender a matter of a single-step statutory declaration. I’ll take the requirement of living in the acquired gender for at least two years and having a diagnosis of

(unlike the first two just discussed) it is specific to humans. Sex-reassignment surgery can’t change chromosomes, so the chromosome-based understanding of sex doesn’t vindicate change of sex either. (Indeed, as may be becoming obvious, given that what sex-reassignment surgery changes is genitals, only an understanding of sex based on genitals is likely to give the answer that sex-reassignment surgery changes sex. I know of no one defending a genitals-based theory of sex, although perhaps the folk theory is something close to that). A final way to understand sex is as a property cluster, where to be a sex is to have a sufficient number of the properties in the cluster, rather than to have any single necessary property. If we take the properties in the cluster to be the four primary sex characteristics (external genitalia, internal genitalia, gonads, and chromosomes), and we put sufficiency at 50% of the properties, then sex-reassignment surgery still does not change sex. A normal male would have all four properties, and a ‘sex-reassigned’ male would have two out of four properties (Lawford-Smith 2019). Also, I think Derek Parfit’s origin view of the person, which makes your origin in a specific sperm and egg combination an essential property of you, also makes your sex an essential property. That is an independent reason to deny the possibility of change of sex, because a person cannot change their essential properties (Lawford-Smith, manuscript).

<sup>23</sup> The GRA consultation document distinguishes sex, gender, and gender identity, understanding sex as ‘[a]ssigned by medical practitioners at birth based on physical characteristics. Sex can be either male or female’ (p. 9); gender as ‘[o]ften expressed in terms of masculinity and femininity, gender refers to socially constructed characteristics, and is often assumed from the sex people are registered as at birth’; and gender identity as ‘[a] person’s internal sense of their own gender. This does not have to be man or woman. It could be, for example, non-binary’ (p. 7). The consultation document is online at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721725/GRA-Consultation-document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf)

<sup>24</sup> <http://www.legislation.gov.uk/ukpga/2004/7>



dysphoria as the second possible legal requirement (I'll address single-step statutory declaration as the third option). Note that the 'two years' part of this is arbitrarily specific. What matters is that it's some significant length of time. Enough, perhaps, to establish a commitment.

Right off the bat, there's a serious question to be asked about what it means for a person to live in their acquired gender. Say a male person decides they are a woman and want to live as a woman. How does a woman live? It seems that they can live as a *particular* woman lives (by imitating her), or as a *composite* of women live (by patching together some elements of how women who they're aware of live), or as a *stereotype* of a woman lives (by applying certain ideas they have about what women are like to how they live). But will they be recognized as having lived as a woman if the particular woman they imitate is radical feminist Kate, who has short hair, always goes about in shorts or trousers, and doesn't remove her body hair? If they will, it's not clear why *they* live as a woman while other men don't. If they won't, there's a worry that what the requirement amounts to is presentation that might reasonably be perceived as mocking, appropriating, or reifying stereotypes about, women or womanhood.

It makes sense that because certain ways of presenting are typically not available to men (e.g. wearing skirts or dresses, or any clothing items made of particular fabrics (like silk, satin, or lace), wearing makeup, wearing decorative jewellery, having long hair that is styled or has a fashion cut like a fringe or layers, a male person who wants to present in these ways might feel that they are not a man. They might reason that only women present in this way, so they must be a woman. That doesn't mean they are committed to the thought that all women present in this way, or all women ought to present in this way. So a more charitable reading of what it means for a male person to live as a woman is to say that they live in ways that are typically not available to men, and typically available to women. (Note that if we had a third sex/gender category recognized in law, then such males could feel they are not men without that entailing their feeling that they are women). Gender non-conforming men may also meet this requirement, but remember that the policy option is conjunctive: living as a woman for at least two years *and* having a diagnosis of gender dysphoria. Living as a woman for two years, understood as living in ways not typically available to men for two years, is moderately costly. No one would do it on a whim, or on the off-chance of being able to get some good spycam footage from the women's changing room. So that makes it fairly reliable, as a signal of commitment/sincerity. But does this reliable signal of sincerity give women the information they need? It would appear not. There is nothing about sustained atypical gender presentation that guarantees the relevant male will not compromise women's interests in women-only spaces.

What about a diagnosis of dysphoria? Assuming that sympathetic doctors don't simply start handing these diagnoses out to anyone who asks for them, and

that trans people without dysphoria don't simply learn what they need to say in order to get such a diagnosis (both of which have happened in the past; see discussion in Joyce 2021), this is a legal option that carves a neat separation between people who cannot be asked to bear the costs of contributing to women's liberation, and people who can. For people with severe dysphoria, their experience involves a great deal of psychological/emotional suffering, and transition is one of the ways to ease that suffering. Even if transition doesn't involve full inclusion as a member of the opposite sex, because for some purposes we prefer to provide third spaces than to disrupt female-only spaces, it involves inclusion for most purposes. It is over-demanding to ask such people to live as feminine men, rather than asserting that they are women/female. But this request is not over-demanding when it comes to male people who have a trans identity without gender dysphoria.<sup>25</sup>

A policy requirement of a diagnosis of gender dysphoria protects the vulnerable, without being over-inclusive and protecting those whose interests could be met in an alternative way. This is a good outcome. Indeed, given the positives of this outcome compared to the worries with the 'living as a woman' requirement, why not drop the latter? One reason not to is that the latter is evidence of the former. That is to say, a male person with severe gender dysphoria, as defined in the DSM-5,<sup>26</sup> is highly unlikely to be happy to present as male while merely insisting that they are female/a woman. Their dysphoria is likely to motivate them to take steps to appear as female, or at least to communicate that they wish to be treated socially as a woman. So the requirement of living as a woman goes hand in hand with the requirement to have a diagnosis of dysphoria, by providing further evidence of the latter (which is useful in cases where we think the latter might be easily gamed).

<sup>25</sup> A complication likely to raise objections from radical and gender-critical feminists is that a diagnosis of gender dysphoria (at any age) does not separate out what some clinicians have taken to be two quite different categories of transwomen, those with childhood gender dysphoria who tend to have a same-sex sexual orientation, and those with later-onset gender dysphoria (as teenagers or adults, sometimes quite late in life) who tend to have an opposite-sex sexual orientation or a novel sexual orientation known as 'autogynephilia' (see also fn. 11 in Chapter 9). Another legal option, then, would be a diagnosis of *childhood* gender dysphoria in particular. I suspect this is as close as it would be possible to get to a compromise acceptable to radical and gender-critical feminists; it is significantly more reliable than, for example, having had sex-reassignment surgery, which remains the 'gatekeeping' requirement on a change of legal sex in some states of Australia.

<sup>26</sup> Gender dysphoria in adolescents and adults in the DSM-5 is defined as 'a marked incongruence between one's experienced/expressed gender and assigned gender' of at least six months in duration, manifesting in at least two of the following six conditions: incongruence between experienced/expressed gender and primary and/or secondary sex characteristics; strong desire to be rid of one's primary and/or secondary sex characteristics because of that incongruence (or, if a young person, to not go through the puberty that would produce them); a strong desire for the primary and/or secondary sex characteristics of the opposite sex (they say 'other gender'); strong desire to be another gender; strong desire to be treated as the other gender; strong conviction that one has 'the typical feelings and reactions of the other [or another] gender' (DSM-5, p. 453). There also has to be 'clinically significant distress or impairment in social, occupational, or other important areas of functioning' (p. 453).

The problem, however, and as we have seen several times over already, is that even a reliable diagnosis of gender dysphoria is no guarantee to women that there will not be any threat to their interests in having women-only spaces. It provides *highly reliable* information, but not the information that women need. Knowing that a male person has a certain set of beliefs or feelings about their gender identity, and that they are extremely strongly held, is not the same as knowing that a male person is low- or zero-risk when it comes to women's safety, privacy/dignity/comfort, or respite. We have no reason to think that the *content* of gender dysphoric beliefs or feelings is the same as the *content* of female experience or female beliefs and feelings after female socialization. It is perfectly possible that a male person has experienced dysphoria and taken steps to present as feminine in order to alleviate that dysphoria, and yet has still adopted some of the attitudes, beliefs, and behaviours of a male person socialized under patriarchy, for example in his attitudes of entitlement to women's bodies. Some gender identity activists will argue that childhood gender dysphoria leads a boy to reject gender socialization (see e.g. Finlayson et al. 2019), but they can only reject what they recognize as such, and gender conditioning is extremely pervasive.<sup>27</sup> A diagnosis of gender dysphoria and living as a woman for a period is not a costly signal of *assurance that women's interests in women-only spaces won't be undermined*, even if it is a costly signal of sincere belief.

*Statutory declaration of self-identified sex.* Finally, the third option. In New Zealand, sex self-identification recognized through a single-step statutory declaration was passed into law via the Births, Deaths, Marriages and Relationships Registration Act 2021. The Act is specifically about a change to the process for birth certificates; New Zealand already allowed a change of sex on driver's licences and passports with minimal hassle. The Act allows eligible adults, 16- or 17-year-olds with the consent of a guardian, and guardians on behalf of children, to change their (the child's) registered sex. Applicants can choose between 'male, female, or any other sex or gender specified in regulations' (p. 25). They must make a statutory declaration stating that they (or the child) identify 'as a person of the nominated sex' and understand the consequences of the application (p. 25). In the case of a guardian applying for a child, they must also include a letter of support from 'a suitably qualified third party' confirming that the child understands the consequences of the application (pp. 25–6). A birth certificate issued after the 'registration of nominated sex' (as the Act calls it) 'must...contain the information that it would have contained if...the person's nominated sex had always been their registered sex' (p. 26). There is a nominal fee associated with making the application.

<sup>27</sup> If it weren't we shouldn't expect to see such striking average differences between men and women. (The alternative explanation of those differences is, of course, biology—but that is hardly helpful to the gender identity activists' cause). See also discussion in Chapter 2.

I will take forward single-step statutory declaration (colloquially ‘sex self-ID’) as the third possible policy proposal. The problem with this proposal, from women’s point of view, is that it is virtually costless. The application fee itself is likely to be cheap in financial terms: in New Zealand it is \$55 to register the nominated sex (and in related costs, it is \$33-\$35 for a new birth certificate, and \$170 for a change of name).<sup>28</sup> The only other cost is the minor administrative hassle of filling out the forms. A male person can declare ‘female’ as their nominated sex on a whim, or for a joke, or to get cheaper car insurance (*NZ Herald* 2018), or because they want to collect the prize money in women’s sports,<sup>29</sup> or for any other reason they like. Being legally female, they can access legal protections on the basis of sex, such as being housed in the female prison estate if they are sent to prison; or being able to take a place on a female-only shortlist for a job, or in a political party; to win a female-only prize, or scholarship. Where ‘sex-reassignment’ surgery came at very high cost to the male person, and living as a woman for two years came at moderate cost, single-step statutory declaration comes at extremely low cost.

That means that even only as a sign of sincerity or commitment, having completed a statutory declaration of self-identified sex is not a reliable signal. It’s plagued by the same problems as every other signal we’ve discussed so far, namely that *what* it signals doesn’t correspond to anything that women have an interest in knowing. Being the kind of male who would register his nominated sex as ‘female’ *might* mean being the kind of male who poses a risk to women, and *might* mean not being that kind of male. It just has very little to do with it either way. Unlike some of the other individual and policy-based signals, which at least tell us that the signaller is not someone at the extremes of toxic masculinity (because such a male would not be willing to undergo sex-reassignment surgery, or present in a feminine way), this signal doesn’t even tell us that, because a male could nominate their sex as female simply because they find it funny to do so, or want to intimidate women they have a problem with by showing up in spaces that those women value and from which the male would ordinarily be excluded.

As before, we’re not looking merely for signals of sincerity or commitment, we’re looking for signals of a lack of male socialization that might make a male person a threat to the specific interests that are protected by female-only spaces. Single-step statutory declaration of sex is a particularly bad policy option, because it undermines assurance. Women have reason to be wary of men, in relation to the three interests I’ve been concerned with women-only spaces protecting. Sex self-ID entrenches as law, and therefore influences as a norm, the idea that legal sex—and therefore, entitlement to single-sex services—cannot be generally

<sup>28</sup> <<https://www.dia.govt.nz/bdmreview>>

<sup>29</sup> There is \$150,000 USD at stake for the winner of the women’s category of the Boston Marathon (Owens and Gartsbeyn 2019).

assumed on the basis of appearance, that a fully male-appearing person could nonetheless be legally female.<sup>30</sup> This means women's case for challenging male-appearing people in their spaces is substantially weakened, which leaves them more vulnerable. We shouldn't accept this greater vulnerability simply because it makes things a little easier for those who desire sex self-ID. Single-step statutory declaration for change of sex should be rejected outright. It is an unreliable signal, and it does not provide women with the information they need. It is the worst of the three legal options.

## 5.6 Conclusion

There are a range of individual signals that male people can send while using female-only spaces. They can appear to belong to the female sex class, or to have some of the characteristics associated with belonging to it. They can present themselves in a feminine way. They can assert that they are female, or a woman. And they can simply use the spaces. None of these signals provide women with assurance that their safety, privacy/dignity/comfort, or interest in respite, will be maintained. Mere assertion of femaleness/womanhood, and mere self-inclusion in women's spaces, are too costless to reliably signal anything.

Moving to legal requirements, 'sex-reassignment' surgery is undesirable, because it is extremely costly to transwomen without providing women with the assurance that is needed. Sex self-ID is undesirable, because it is costless and doesn't provide the assurance that is needed. A diagnosis of gender dysphoria and living for a period of time as the sex one wishes to acquire is moderately costly and somewhat informative, even though it still fails to guarantee that women's interests in women-only spaces won't be undermined.

If we have to have one of the three, the legal requirement that the UK currently has—two years 'living as a woman' and a diagnosis of gender dysphoria—is the one to be preferred. But retaining women-only spaces *as women-only*, while providing third / gender-neutral spaces for transwomen, would be even better.

<sup>30</sup> Note that this will be true of both a trans man who has not registered a legal change of sex, *and* a transwoman or male nonbinary person who presents as male and has registered a legal change of sex. If an apparently-male person was known to be a trans man, women would have the assurance they need that the person would not pose any threat to the interests protected by women-only spaces, the problem is that in many public spaces we are interacting with strangers, and so won't normally have that information. This does suggest that norms for inclusion may be able to operate differently in spaces where people are known to each other, like workplaces, however.

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