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Essays in Gender-Critical Philosophy

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Holly Lawford-Smith

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*Essays in Gender-Critical Philosophy*

HOLLY LAWFORD-SMITH

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UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

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Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2023933555

ISBN 978-0-19-289613-1

Printed and bound in the UK by  
Clays Ltd, Elcograf S.p.A.

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## 4

# Women-Only Spaces and the Right to Exclude

### 4.1 'Sex' in the law

In August 2019, a bill was passed in Victoria, Australia, making it possible for people to change their official record of sex in the birth register by making a statutory declaration that they believe their sex to be as nominated. From May 2020, any person observed male at birth was able to change their legal sex to 'female', and any person observed female at birth was able to change their legal sex to 'male'. Similar bills have been considered in other countries (most prominently the UK), and have already passed into law in other states of Australia (Tasmania) and in other countries (Ireland, Malta, Norway, Argentina, Portugal, and others).<sup>1</sup>

Such bills have implications for access to single-sex spaces, services, and provisions (see e.g. Gilligan 2019; Alves 2018; Patrick 2016; Murphy 2018). If any biologically male person can change their legal sex to female, what implications does this have for women's—in this chapter I'm using 'female' and 'woman' interchangeably—sports, women's scholarships, girls' schools, women's rape and domestic violence shelters, female prisons, and more? There are rising numbers of trans people, so this is no longer an issue of tiny numbers of people needing to be accommodated within existing legal and social categories (which it was in the 1960s when the conflicts between radical feminists and transwomen first gained some prominence; see Goldberg 2014).<sup>2</sup> Most transwomen go through a male puberty (which is relevant to women's sports) and increasing numbers are choosing not to have sex reassignment surgery (which is relevant to spaces involving full or partial nudity).<sup>3</sup>

<sup>1</sup> The earliest change was Argentina in 2012, followed by Ireland and Malta in 2015, Norway in 2016, and Portugal in 2018. So there hasn't been a lot of time, in most cases, to assess the social and legal implications of these changes (Greaves and Hudson 2018). For a survey of law relating to legal sex, see Grenfell and Hewitt 2012.

<sup>2</sup> For changes in both the numbers and the categories being identified into, see Fair Play For Women 2018; for discussion of the rise in young girls transitioning to live as boys—which has increased 4,400% in less than eight years—see Rayner 2018.

<sup>3</sup> The only transwomen who don't go through a male puberty are those who had childhood gender dysphoria and were taken to a gender clinic that prescribed puberty-blockers. This will be a relatively small proportion of transwomen simply because there is great variety in the age at which trans identification begins (or is admitted in a way that could lead to medical interventions). Some transwomen

It is common for media and political debate to present the stakeholders in the legal change as being trans groups only. But there are obviously (at least) two stakeholder groups: the biological males who wish to acquire the legal sex ‘female’, and those who are as a matter of biological fact female. Legal recognition of a new category, like ‘nonbinary’, is a different matter from legal recognition as a member of an already existing category.<sup>4</sup> The first need involve no one but the members of the new category while the second invariably involves those already in the category. It is a principle of liberal democracy that people have a say in matters that affect them. Changing the definition of legal sex in a way that affects access to single-sex services, spaces, and provisions will obviously affect women.

Some would respond to this by pointing to the way that transwomen are marginalized. But marginalization cannot function as a trump here, because women are also marginalized, which is one reason why women-only spaces, services, and provisions exist. It needs to be worked out what interests women-only spaces serve, and whether we have adequate reason to maintain them as women-only, *even given* facts about transwomen’s marginalization. The central question of the chapter is: do women have the right to exclude transwomen from women-only spaces?<sup>5</sup> If they do, the conflation of sex and gender identity in law should be resisted.

transition as teenagers or young adults, and some later in life. In a recent article for *The Conversation*, psychologist Jae Puckett reports on a survey he and co-authors ran, which found that ‘overall, trans women reported later ages of starting to live in their affirmed gender and receiving gender-affirming medical care relative to the other gender groups. Trans women were, on average, around 31 when living in their affirmed gender all of the time’ (Puckett 2021; see also Puckett et al. 2022). A 2015 survey of 27,715 trans people in the United States, 33% of whose respondents were transwomen, reported that 12% of the transwomen had vaginoplasty or labiaplasty (James et al. 2016, pp. 45 and 102). That means 88% had not, putting transwomen without sex reassignment surgery in the great majority of transwomen.

<sup>4</sup> An alternative to either (allowing change of legal sex, or creating new legal categories in the vicinity of sex/gender), is to add ‘gender identity’ or ‘gender expression’ as a protected attribute to anti-discrimination law. Gender identity ideology includes the idea of universal gender identity, meaning that everyone has a gender identity. One way to explain what it means to be trans given this assumption is that non-trans people’s gender identities are ‘congruent’ with their sex, while trans people’s gender identities are ‘incongruent’. (For criticism of the understanding of transness in terms of ‘incongruence’ see Vincent and Jane, forthcoming. For the reasons they give, a better term compatible with the assumption of universal gender identity would be ‘typical’ and ‘atypical’, which is purely descriptive). But it is difficult to make universal gender identity coherent. Gender identities are mental states, which not every woman has the capacity to have (e.g. women in vegetative states; see discussion in Barnes 2020). Many women expressly reject the idea that they have any identification with or affinity for womanhood or femininity, saying they simply are female. In these cases it is odd to simply insist that such people have ‘woman’ gender identities, just because they *don’t have* ‘man’ or ‘nonbinary’ gender identities. The motivation for saying that everyone has a gender identity is clearly to normalise gender identity, like insisting that everyone has a sexual orientation. But when you present heterosexual people with a definition of heterosexuality (attraction to the opposite sex), they will agree that this describes them. Many women do not agree that they have ‘woman’ gender identities, or any gender identity at all. So while the motivation is understandable, it would be more coherent to simply say that *some people* (namely trans people) have gender identities; that having a gender identity at all is what makes you trans. However, I acknowledge that the ship may have sailed on this conceptual point.

<sup>5</sup> Another way to put this, which shifts the burden of proof, is ‘do women have an obligation to include transwomen in women-only spaces?’ On this framing, the presumption is with exclusion, and

In Section 4.2 I'll argue that biological sex matters politically, and should be protected legally—at least until such a time as there is no longer sex discrimination. In Section 4.3 I'll turn to the rationales for women-only spaces, arguing that there are eight independent rationales that together overdetermine the moral justification for maintaining particular spaces as women-only. I address a package of spaces, including prisons, changing rooms, fitting rooms, bathrooms, shelters, rape and domestic violence refuges, gyms, spas, sports, schools, accommodations, shortlists, prizes, quotas, political groups, clubs, events, festivals, and language. I do this instead of taking each space in turn, for two reasons. The first is that these spaces have something in common, namely, that they were established in response to women's marginalization in male-dominated societies; the second is that women themselves have demanded—and in many cases themselves established—these spaces, services, and provisions as a way to advance their own political interests. For example, as women entered the workforce and faced harassment from men in men's facilities, they pushed for women's bathrooms (Burlette-Carter 2018); women in the second-wave of feminism established, funded, and volunteered at women's refuges and shelters (Jeffreys 2018, pp. 57–60). In Section 4.4 I turn to the objection that I've obtained my conclusion through linguistic sleight of hand, and answer it by saying that choices about naming don't affect the underlying questions about the basis for inclusion or exclusion.

The arguments of this paper together make a strong case against self-identification as the basis for legal sex.<sup>6</sup> With self-identification, the category of legal sex conflates sex and gender identity, and this makes sex-based exclusion difficult (in many cases, illegal) where it should be simple and legal.<sup>7</sup>

we're asking about the moral reasons for inclusion. This framing would come with the added benefit of avoiding the language of rights, which is ambiguous between legal, political, and moral claims. But because there's such unreflective social support for the idea of 'inclusion' at the moment ('diversity and inclusion' is on the corporate agenda), I think that framing may make the discussion even more difficult.

<sup>6</sup> I don't mean this to refer narrowly to bills that change the requirements for either legal sex or gender recognition (see fn. 7). I also mean to refer to the wider conflation in some countries' law between the two distinct protected attributes of sex and gender identity (in some places 'gender reassignment', or 'transgender status'). The Victorian Equal Opportunity and Human Rights Commission, for example, appear to believe that having a gender identity 'trumps' having a sex, so that in conflict cases (like a boy with a 'girl' gender identity wanting to go to a non-religious girls' school) gender identity wins (meaning, the boy should be admitted to the girls' school). It is entirely unclear why this should be the case given that there is no formal hierarchy of protected attributes, and given that no other protected attribute is taken to trump any other. (To illustrate how absurd this would be, imagine the Commission dispensing the advice that Jewish schools were permitted to exclude all non-Jewish students, except non-Jewish *black* students). If their reasoning is not that gender identity trumps sex, then it can only be that gender identity *changes* sex, i.e. a male person who identifies as a female *is thereby female*. That is a controversial understanding of sex.

<sup>7</sup> The precise details depend on the state/country. In Victoria, we went straight to changing legal sex. In the United Kingdom, there is a separate process for gender, the Gender Recognition Certificate (GRC). There is also explicit provision for sex-based exclusion in specific cases. Their move to

## 4.2 Sex matters politically, and should be protected legally

Around the world, women are subject to sex-specific forms of violence, including Female Genital Mutilation (FGM), female infanticide, child marriage, forced marriage, rape, domestic violence, intimate partner strangulation, ‘accidental’ killing during sex, prostitution, pornography, and forced surrogacy. Women are presented across the media as sexual objects for men’s gratification. Women in poorer countries (and poorer parts of rich countries) experience period poverty. The ‘default male’ assumption in medicine and product design puts female people at greater mortality risk (Criado Perez 2019). Women are under-represented in politics, and in some employment areas, as well as at upper-levels in all employment areas. Women still don’t have full reproductive rights in many countries, and are still subject to pregnancy and breastfeeding discrimination in the workplace and in access to public life. Women undertake a disproportionate share of unpaid labour, e.g. in childcare and the running of households.

In international law, the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) notes that despite various legal instruments existing to uphold the equality of men and women, ‘discrimination against women continues to exist’ (CEDAW, p. 1).<sup>8</sup> It is clear from the wording of the Convention that it means ‘women’ to be understood as synonymous with female sex; for example, ‘Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, *the social significance of maternity* and the role of both parents in the family and in the upbringing of children, and aware that *the role of women in procreation* should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole’ (CEDAW, p. 2, my emphasis).

It defines discrimination against women as ‘distinction, exclusion or restriction made *on the basis of sex*’ which affects the ‘enjoyment or exercise *by women*... of human rights and fundamental freedoms’ (CEDAW, my emphasis). Article 5 talks about prejudices based on ideas about the inferiority or superiority of either of the sexes, and about stereotyped roles for men and women; Article 6 talks about measures to suppress the traffic of women and the exploitation of women through prostitution; Article 11 talks about prevention of discrimination against women in employment, particularly relating to pregnancy and maternity leave; and Article 12 talks about pregnancy and lactation.

self-identification changes eligibility for a GRC, not eligibility to count as legally female. Still, guidance suggests those with a GRC should be treated as the sex they identify with for most purposes.

<sup>8</sup> Some countries believe that CEDAW includes transwomen as women and so include data about transwomen in their reporting. New Zealand is one such country. I have been advised by an International Human Rights Law academic that New Zealand’s approach is idiosyncratic.

In Australia specifically, women first got the right to vote in South Australia in 1895. The first women were elected to the House of Representatives and Senate in 1943. It wasn't until 1956 that the Marriage Bar (which prohibited women from continuing to work after marriage), was lifted for women in education. It wasn't until 1961 that women could acquire the contraceptive pill (and even then, only with a husband). Indigenous women didn't get the right to vote in Federal elections until 1962. The Marriage Bar for women working in the Commonwealth Public Service was only lifted in 1966. The first abortion rights came in 1966.

In 1972, Australian women were granted the right to equal pay. In 1974, the minimum wage was extended to female workers. In 1975, the first women's refugees received government funding. In 1975, women became able to file for no-fault divorce. Rape in marriage was outlawed in South Australia in 1976. In 1977 the Victorian Equal Opportunity Act outlawed discrimination on the grounds of gender or marital status. In 1979 women who had been employed for twelve months or more became entitled to fifty-two weeks of unpaid maternity leave. Sexual harassment was outlawed by an amendment to the Victorian Equal Opportunity Act in 1995. The first female Prime Minister was elected in 2010.<sup>9</sup>

All of this is fairly recent history. There are Australian women alive today who will have been forced to give up their jobs for marriage, who will have had unwanted pregnancies, who will have been paid less than a man for doing the same work, who will have been prevented from voting in elections that affected them, who had no legal recourse when forced into sex within their marriages. *Most* Australian women spent most of their lives without seeing a woman occupy the highest political office in the country. Older Australian women lived through a time when they were socially subordinated to men (as wives and homemakers lacking in social and political rights) and excluded from work, from political life, from public life, and from sport.

This sex-based marginalization has not been fully mitigated, and is not yet over. Australia has not achieved women's liberation. The same can be said of most, if not all, other countries. Some of the ways that we can mitigate women's historical exclusion and ongoing underrepresentation are by maintaining single-sex spaces, services, and provisions. For example, women are underrepresented in politics, and we can partly remedy this by having women-only shortlists; women have been historically excluded from sport in a way that has long-lasting effects, and we can remedy that by having women's sports, and pushing for them to be equally funded and publicized. Until such a time as sex doesn't make such a difference to how people's lives go, it should be protected legally. Women-only spaces, services, and provisions are part of this protection.

<sup>9</sup> All of the facts in this paragraph and the last come from the 'Gender Equality Milestones' page of the Victorian Women's Trust. Online at <<https://www.vwt.org.au/gender-equality-timeline-australia/>>, accessed 30th June 2019.



### 4.3 Moral rationales for women-only spaces

Using the terminology of ‘women-only spaces’ makes it seem like there’s one specific kind of space that serves one specific purpose. But that couldn’t be further from the truth. The term is used to refer to a diverse range of things, some of which aren’t really ‘spaces’ at all in any strict sense.<sup>10</sup> When radical and gender-critical feminists talk about the importance of keeping women-only spaces *women-only*, they might be referring to any or all of:

- Prisons
- Changing rooms
- Fitting rooms
- Bathrooms
- Shelters
- Rape and domestic violence refuges
- Gyms
- Spas
- Sports
- Schools
- Accommodations
- Shortlists
- Prizes
- Quotas
- Political groups
- Clubs
- Events
- Festivals
- Language<sup>11</sup>

Sheila Jeffreys writes in *The Lesbian Revolution* about the various kinds of women-only spaces available to the women of the second-wave of feminism, and the role they played in their feminist organizing. These include feminist bookstores (Jeffreys 2018, pp. 39–41), women’s squats (pp. 42–4), women’s discos (pp. 47–8), women’s and lesbian theatre (pp. 48–50), and feminist conferences (p. 50). But the

<sup>10</sup> Jane Clare Jones makes a conceptual distinction between physical spaces (e.g. toilets, changing rooms), virtual/social spaces (e.g. shortlists, participation in feminism), and conceptual spaces (e.g. the definition of ‘woman’), which I find helpful (Jones 2019).

<sup>11</sup> I’ve included language as a conceptual space, for instance ‘lesbian’, ‘female’, ‘woman’, ‘mother’. Women have an interest not only in sharing certain physical spaces with other women, but in having the capacity to label themselves together with other women (given that they share biological interests e.g. when it comes to healthcare, political interests, reproductive rights). If gender identity activists force a revision of the term ‘lesbian’ then female homosexuals lose this capacity, and the same point might be made about the other sex-specific terms.

moral justification for *having* these spaces seems to have been more or less taken as obvious by feminists.<sup>12</sup> My project here is to articulate those underlying justifications.

There are at least eight distinct moral rationales for women-only spaces, or so I suggest, and elaborate upon below. These are: i. safety; ii. privacy/dignity/comfort; iii. justice/fairness; iv. respite; v. likelihood of shared bodily experience; vi. intimate association; vii. self-determination; and viii. intent of the creators.<sup>13</sup> The first two are regularly suggested by radical and gender-critical feminists in public discussions over spaces like prisons, bathrooms, changing rooms, fitting rooms, bathrooms, and toilets. The others are less commonly invoked (although fairness looms large in the discussion about transwomen competing in women's sporting categories), but are no less important. I take each of these in turn.

### 4.3.1 Safety

Women have an interest in being safe, from physical assault and sexual violence. We know that the risk of physical assault and sexual violence is highest for women in their own homes, and from men they know; not from men in public spaces. The risk of the latter is not zero, however, and this is worth emphasizing because of the way that fact is often used to dismiss women's concerns about safety in public spaces. One study of 849 female patients reporting to a sexual assault clinic over a 40-month period found that the perpetrator was known to the victim in 72% of cases, a stranger in 28% of cases (Jones et al. 2004, p. 454). Assaults by unknown perpetrators happened in the victim's home in 43% of the cases, outdoors in 23% of cases (p. 456). The risk also goes up as the egregiousness of the offence goes down: stranger rape is fairly rare, while voyeurism is less so. What risk should we accept? Given the harms that are at stake, and their long-lasting effects, it seems that we're justified in deploying a precautionary approach: exclude from women-only spaces involving physical vulnerability *all* males, unless and until there is evidence establishing that a particular subgroup of males are no more of a threat to women than other women are.

The safety rationale seems to justify female-only prisons—there have already been problems of sexual assault from housing transwomen in the female estate in the UK and the USA,<sup>14</sup> not to mention that the incentives for heterosexual males

<sup>12</sup> Jeffrey's gives some justifications elsewhere, in a paper about women's toilets. See discussion in Chapter 6.

<sup>13</sup> There is more about the first three rationales in Chapter 5.

<sup>14</sup> On the well-known case of transgender prisoner Karen White in the UK see e.g. Parveen (2018) and *The Guardian* (2019a). For the reporting of a lawsuit alleging rape by a transgender inmate of a female inmate in an Illinois prison, see Masterson (2020).

to transition and gain access to women would be significant.<sup>15</sup> (Threats to safety posed by transwomen themselves should be separated from threats to safety posed by men because of loopholes created by trans-inclusive law and policy. Both are relevant). Data from the UK in 2018 showed that women were at higher risk of sexual assault in unisex changing rooms, with 90% of complaints about sexual assault, voyeurism, and harassment coming from unisex facilities (Hosie 2018). The extent to which these incidents are relevant depends on whether this same outcome is likely in only *partially* unisex rather than fully unisex changing rooms and bathrooms—including only transwomen rather than all males. There is no reason to think it isn't. There have been assaults in women's bathrooms (Corbishley 2019) and incidents in women's spas (Ngo 2021) involving transwomen. Even if the experience of childhood gender dysphoria can be expected to have some inhibiting effect on male socialization (the socialization of males into masculinity), not all transwomen experienced childhood gender dysphoria. Transwomen whose identifications as women have political motivations (Butler 1990; Stone 1987), social causes,<sup>16</sup> or are explained by salient comorbidities,<sup>17</sup> are on a par with any other biologically male person when it comes to the likely effects of male socialization. Statistically, the risk will be lower simply because it's *fewer* males using the spaces, but the difference between including transwomen and including all males is quantitative not qualitative.

In any spaces where women are vulnerable—so those involving full or partial nudity, or intimate physical contact, or sleeping—there is a precautionary safety rationale for exclusion. Of the spaces in our list, the safety rationale justifies retaining as women-only: prisons, changing rooms, fitting rooms, bathrooms, shelters, rape and domestic violence refuges, gyms, spas, sports, (boarding) schools, and accommodations (shelters, refuges, and boarding schools because they involve accommodations; gyms, spas, and sports because they involve toilets, showers, and locker rooms).

#### 4.3.2 Privacy/dignity/comfort

Women have an interest in privacy, dignity, and comfort, which requires protection from voyeurism (a risk in mixed-sex spaces involving full or partial nudity) and the male gaze, and in some cases, the mere presence of male people

<sup>15</sup> See also Chapter 3, fn. 10.

<sup>16</sup> For discussion of social contagion around trans identification, see Littman (2018); Schrier (2020); Marchiano (2017).

<sup>17</sup> See e.g. discussion in Kozłowska et al. (2021), who mention as alternative explanations for a person's distress about their gender: anxiety, depression, behavioural disorders, and autism; as well as histories of family conflict, parental mental illness, separation from important figures, bullying, and maltreatment (emotional abuse, physical abuse, sexual abuse, or exposure to domestic violence).

(particularly important for sexual and domestic assault survivors and some religious women).<sup>18</sup>

Women don't want to be leered at, or sexually objectified, or filmed, or photographed, when they're naked or partly naked. Many women want to be served by people of the same sex in intimate situations, like for some medical examinations, or for airport body searches. Medical examinations made the news in 2017 when a woman in the UK went to the NHS for a smear test, and despite having requested a female doctor, was assigned to a transwoman nurse (Paterson 2017). A hospital in the UK in 2022 cancelled a woman's life-saving surgery because she requested female-only aftercare and the hospital employed a transwoman nurse. The hospital said 'we do not share your beliefs and are not able to adhere to your requests and we have therefore decided that we will not proceed with your surgery' (Hatchet 2022).

Some trauma survivors feel in danger around men, particularly in intimate situations, and more relaxed and comfortable around women only. This fear for safety and inability to relax around men can be coded as a comfort-based reason to justify having some female-only spaces, with shelters and refuges being of particular importance (see also discussion of respite below). In 2018 Kristi Hanna filed a Human Rights suit against the Jean Tweed Centre—a women's shelter in Toronto—after she was forced to share a room with a transwoman (Chart 2018).

Of the spaces in our list, the privacy/dignity/comfort rationale justifies retaining as women-only: prisons, changing rooms, fitting rooms, bathrooms, shelters, rape and domestic violence refuges, gyms, spas, sports (because of toilets, showers, and locker rooms), schools (for the same reasons as sports), and accommodations.<sup>19</sup>

### 4.3.3 Justice/fairness

Women also have an interest in justice and fairness, justice understood as the mitigation of historical exclusion, and fairness understood as fair terms of competition. One way to mitigate historical exclusion is to have categories that guarantee women's representation in male-dominated public arenas or employment areas, for example in politics (women-only political party shortlists, such as exist in the UK), or in STEM (women-only hiring shortlists), or in recognition of

<sup>18</sup> Privacy has recently become an issue in US high schools, with the question being whether girls have a right to 'visual privacy', i.e. not being seen naked by a person of the opposite sex. See discussion in Gerstmann (2019).

<sup>19</sup> In the case of both sports and schools, it would clearly be possible to provide for women's privacy, dignity, and comfort by providing sex-separated toilets, showers, and locker rooms. If this were the only rationale justifying women-only sports or schools, then that might seem the better solution. But I will argue that it's not the only rationale in either case.

overlooked accomplishments in the arts (women's fiction writing prizes). Justice may rationalize female-only schools, if evidence can be provided that these result in better educational outcomes for girls. It also rationalizes the language necessary for women to self-refer and act politically to advance their own interests, which is why the appropriation of the terms 'woman', 'female', and 'lesbian' by gender identity activists have been so fiercely contested by gender-critical feminists.

Fairness requires e.g. sporting categories in which women compete against each other, rather than against male people (give that the latter have a significant physical advantage).<sup>20</sup> Note that even if a case can be made for some male people competing on fair terms with women—e.g. a transwoman who took puberty-blockers so did not go through a male puberty, and so does not have a body that benefited from the historical effects of testosterone—that case will not extend to males who did go through a male puberty.

The justice/fairness rationale justifies keeping as women-only: sports, schools, shortlists, prizes, quotas, and language.

#### 4.3.4 Respite

Women also have an interest in respite. By 'respite', I mean a break from male attitudes, expectations, and behaviours. Women and men are socialized very differently in most societies, and this leads to differences in the average behaviour of women and men, which colours their interactions.<sup>21</sup> Women can experience men as both imposing and exhausting. Men take up more physical space; in conversations they interrupt more, explain things to women that women know more about, and take up more time (my philosopher-readers will have firsthand experience of this from running philosophy tutorials); they may look at or speak to women in sexualized ways; they may make clear in their attitudes, comments, or behaviours that they have certain expectations about how women ought to present themselves, or speak, or act.

All of this can (obviously) be tiresome for women to deal with, and they will be forced to deal with it in mixed-sex spaces. Women-only spaces can provide an important respite from this. Many university campuses have women's rooms for roughly this reason. If transwomen will bring some or all of these male-typical

<sup>20</sup> Knox et al. (2019); Roberts et al. (2021); Harper et al. (2021); Hilton and Lundberg (2021). It might be possible to organize some sports such that there are categories providing fair competition that are not delineated by sex. That would mean taking seriously all the average physical differences between men and women that are relevant to sporting performance (bone size and density, myonuclei, testosterone, muscle mass, height, grip strength, speed, Q-angle...) and figuring out a way to separate people into leagues on the basis of these (see discussion in Knox et al. 2019).

<sup>21</sup> I leave open whether there are other explanations of difference in average behaviour that are either non-social or only partly social.

attitudes, expectations, and behaviours into these spaces, then that is a *prima facie* reason to exclude transwomen from those spaces (Finlayson et al. 2019 argue that transwomen are likely to have rejected their male socialization, and so would presumably think they will not bring such attitudes into women's spaces. They do not provide any argument for why that rejection is likely to have been comprehensive. But if they are right, that would defeat this *prima facie* reason). Note that this rationale does not depend on it being the case that a particular male person *would in fact* bring male-socialized behaviours into a space. It's enough that women have to manage this possibility when men are around. Women-only spaces provide respite not just from certain sorts of behaviours, but from having to make contingency plans about what to do in light of certain sorts of behaviours—from being on guard.

There's also a much more serious kind of respite, which applies to women who have experienced severe or sustained male violence (rape, assault, domestic violence, intimate partner strangulation, etc.). For some women, it's difficult or impossible to feel fully comfortable around male people, and women-only spaces provide an important place to escape such discomfort (in this respect, the 'respite' rationale partly overlaps the 'privacy/dignity/comfort' rationale, on the point of comfort).

This rationale justifies shelters and refuges (at the extremes; respite from male violence), and things like campus women's rooms, or women's political groups or clubs, events for women such as those during university orientation weeks or as part of corporate events, festivals, dance-parties, etc.

#### 4.3.5 High likelihood of shared bodily experience

There is also an interest that women have in a high likelihood of shared bodily experience in particular spaces. Prisons, changing rooms, bathrooms, shelters, and refuges may all involve shared facilities where there is full or partial nudity. Women are embodied in a particular way, which they have in common with each other and which they don't have in common with men. In bathrooms in particular, women may deal with a range of embodied experiences ranging from annoying through embarrassing through distressing (for example, not having tampons when you need them; bleeding through underwear and clothing while menstruating and attempting to deal with the mess; going through a miscarriage). There's something comforting and reassuring about being in a space with other people who are very likely to understand those experiences, and have the resources to help when necessary (e.g. to give tampons, relate over mess, provide comfort for distress). Obviously *not all women* will be interested in providing support and *not all women* will need it, but for those who are and do, having spaces where there is

a high likelihood of shared experience is enormously important. This rationalizes keeping as women-only prisons, changing rooms, bathrooms, shelters, and rape and domestic violence refuges.

#### 4.3.6 Intimate association

This rationale is borrowed from the literature on the ethics of immigration. In the debate over what right states have to exclude would-be migrants, Christopher Wellman has argued in defence of the right to exclude by appealing first to the importance of self-determination, and second to the connection between self-determination and freedom of association (Wellman 2008). If one is free to associate then one is also free to disassociate; so from self-determination we get the right to exclude. Wellman's initial argument depended on an analogy with marriage. He argued that it wouldn't matter how important it was to a potential suitor that he be accepted as a partner, the person faced with the option of accepting him has an absolute right to refuse. And then he argued that this is true of the state:

... just as an individual has a right to determine who (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community. And just as an individual's freedom of association entitles one to remain single, a state's freedom of association entitles it to exclude all foreigners from its political community (Wellman 2008, pp. 110–11).

He thinks the same is true of religious self-determination: '[i]f I elect to explore my religious nature in community with others, I have no duty to do so with anyone in particular, and I have no right to force others to allow me to join them in worship' (p. 110).

Wellman considers an objection that would block the generalization from marriages and religious association to citizenship, namely that 'the intimacy of marriage makes freedom of association immeasurably more important in the marital context than in the political realm. After all, in the vast majority of cases, fellow citizens will never even meet one another' (p. 113). Perhaps we should respect freedom of association in groups where there are intimate attachments, but not otherwise. Wellman responds to this by granting that freedom of association is more important in intimate associations, but says that it doesn't follow that it's *unimportant* in other kinds of associations. It's also less important when it comes to religious association, but still important (p. 113).

We can either side with Wellman, and think that all kinds of associations—intimate, expressive, and political—have a right to exclude, or we can side with

the objection he entertains, and think that there is a right to exclude only in intimate and expressive associations.<sup>22</sup> If we do the latter, groups of women would have an absolute right to exclude *only* if they counted as intimate or expressive associations. The question becomes, what kind of association do women have?

The groups of women who make up political groups, e.g. local radical feminist activist groups, might be intimate associations if the women in them are friends; or they might be expressive associations. The groups of women who attend women's marches, and other kinds of women's events and festivals, likely count as expressive associations. Groups of women will have common or at least loosely-aligned political goals, and will interact on a semi-regular basis. The groups of women who use women-only prisons, changing rooms, bathrooms, toilets, fitting rooms, shelters, refuges, gyms, saunas, spas, or sports, don't seem to be intimate associations—at least not in the technical sense that romantic relationships and friendships are; of course there's intimacy in the sense of close proximity and full or partial undress. So there's no quick path to an absolute right to exclude there.

Those groups don't seem to be expressive or political associations either, at least not in the sense that the state is a political association. There are no formal institutions coordinating these women into mutual benefit relationships. It's not clear that *women*, as a class, are any association at all. Rather, they are simply a group of people who have certain interests in common, interests which are served by their being grouped together politically. Women are physically vulnerable to men. Sex-separated prisons protect women from sexual violence by men. Sex-separated bathrooms, toilets, and fitting rooms protect women from sexual violence, voyeurism, and harassment by men, and provide a space where those they interact with are likely to empathize with certain body-related predicaments. Sex-separated shelters and refuges give women safe haven from the class of people, men, from which individuals have caused them harm in the past. And so on.

From thinking about types of association, then, we see that if it's only intimate associations that justify exclusion, then women have an absolute right to exclude only from political groups and clubs where they are likely to have friendships. If there's an absolute right to exclude from expressive associations too, then women have an absolute right to exclude from all political groups, women's marches, and other kinds of women's events and festivals. (I'll assume it's both, but readers who disagree should make the relevant adjustments to my conclusions.)

<sup>22</sup> An example of an intimate association, as just mentioned, is a marriage. The parties to an intimate association generally have regular face-to-face contact and relate in ways that are deeply personal to those involved. An example of an expressive association is a church. Members of the same church have something that is important to them in common, and generally interact on a semi-regular basis. Finally, an example of a political association is a state. It's not clear that members have anything in common (although they might), and the scale of the association is usually such as to prevent face-to-face interaction between all members. They may nonetheless be coordinated in some way, including into mutual benefit relationships (we all pay taxes, and we all receive state services).



### 4.3.7 Self-determination

Women's oppression involves a particular feature: what it means to be a woman has been disproportionately determined—at least historically—by men, and women are still trying to shake that off and decide for themselves what it means to be a woman. Women of the past were determined by men to be decorative objects, to be wives and homemakers, mothers, people who serviced men's needs (think of even the working women being expected to pour the tea). Women have a lot more liberation now, but the effects of being denied a vote, or forced to quit one's job once married, or unable to access an abortion when wanted, and so on, will have long-lasting effects, even if only through social impacts on other women.

Women are particularly badly off when it comes to self-determination as a social group, because they have been other-determined, so they do not even really have the 'self' required to get started in thinking about a form of collective-oriented self-determination. Here's second-wave feminist Kate Millett ([1971] 1977):

Under patriarchy the female did not herself develop the symbols by which she is described. [...] The image of women as we know it is an image created by men and fashioned to suit their needs (p. 46).

As the history of patriarchal culture and the representations of herself within all levels of its cultural media, past and present, have a devastating effect upon her self image, she is customarily deprived of any but the most trivial sources of dignity or self-respect (p. 55).

For this reason it's particularly important that women, without men—the 'other' who did all the previous determining—decide what it means to be a woman (if anything), what needs to change about the ways women and men relate to each other, and what feminism should look like going forward. This justifies women having some spaces to be together, e.g. for consciousness-raising about feminism, for talking about shared experiences, for building feminist movements.<sup>23</sup> Given that the *content* of this self-determination is likely to extend to an understanding of what it means to be a woman, a lesbian, a mother, etc., this rationale will also extend to language.

The justification just given was instrumental: it said, women need spaces of their own *in order to* self-determine. But it is also possible to rationalize the creation/maintenance of women-only spaces as an *act of* self-determination. Part of

<sup>23</sup> For the case against compelled association on grounds of freedom of thought and expression see Shiffrin (2005); for a consideration of whether women should be considered as a minority group—considering that there are legal protections in many countries protecting minority groups' right to exclude—see Hacker (1951).

what men determined women to be is 'accessible to men,' so in creating space in which to be inaccessible, women are *exercising* self-determination. Marilyn Frye puts it like this: 'When women separate (withdraw, break out, regroup, transcend, shove aside, step outside, migrate, say no), we are simultaneously controlling access and defining. We are doubly insubordinate, since neither of these is permitted. And access and definition are fundamental ingredients in the alchemy of power, so we are doubly, and radically, insubordinate' (Frye 1978, p. 38).

Self-determination (and relatedly, freedom of association, and freedom of thought and expression) justifies exclusion directly in spaces where there is the chance to talk and raise consciousness, e.g. in political groups, feminist events, and women's festivals. But it might also justify some, or even the rest of, the spaces *indirectly* too. Self-determination justifies there being 'some' women-only spaces rather than none; it doesn't really matter which these are. But given that the 'some' we have already include those contested in the debate between gender-critical feminists and gender identity activists, we might well think that *those* are the spaces that matter. Unlike other dominated social groups, most women live in intimate relationships with members of the dominating social group (e.g. husbands, fathers, sons) (Beauvoir 1949). This means there are fewer opportunities for developing resistance. Once women have some spaces, whatever they are, they can make them their own, and can co-opt them for political purposes (consider e.g. feminist graffiti on the insides of bathroom stalls) (see also Scott 1992).

The direct version of the self-determination rationale justifies keeping as women-only political groups, clubs, events, festivals, and language. The indirect version justifies *all* of the spaces listed at the start of the chapter.

#### 4.3.8 Intent of the creators

Finally, it's relevant that for at least some women-only spaces—in particular, women's shelters and refuges—women established these themselves. Women funded, volunteered at, and ran these spaces as services *by women for women*. Some of those women have passed on the running of such spaces to the next generation of women, but are still around to watch how their legacies are handled. The fact that other marginalized groups may benefit from access to such spaces does not give them an automatic right to be included; perhaps such groups should do the same work that women during the second wave of feminism did and establish such spaces for themselves.

This rationale applies most clearly to shelters, refuges, clubs, political groups, and events and festivals with a historical lineage. It may also apply in some cases to prizes, scholarships, fellowships, and other kinds of bequests.

I have given eight distinct rationales for a package of women-only spaces, services, and provisions. These rationales are not mutually exclusive. For example, discussion around transwomen's inclusion in women's bathrooms tends to centre around the question of whether the former pose a threat of (sexual) violence to women and therefore compromise women's safety. If safety was the *exclusive* rationale for women-only bathrooms, and it was shown that there is no such threat, then there would seem to be no further justification for women-only bathrooms. But although they get less airtime, other rationales apply to bathrooms too, like privacy/dignity/comfort, respite, and (less obviously) self-determination (which, as discussed above, justifies there being *some* women-only spaces, where it's contingent rather than necessary that bathrooms are among these).<sup>24</sup>

These rationales together overdetermine the moral justification of women's retaining this package of spaces.<sup>25</sup> If including some males in those spaces were not undermining of those rationales, then there would be a reason to *at least start asking* how the relevant interests between the two groups trade off against each other. But including transwomen in women-only spaces is undermining of *all* these rationales. It will be especially so for transwomen who are transitioned in name and pronouns only, or who are recently transitioned, as they cannot have experienced the social treatment as a woman that may take the edge off their male socialization. If any male person willing to declare themselves a woman can become legally a woman (or is already legally a woman in virtue of the way gender identity is protected), and so cannot be excluded from women-only spaces, then: *safety* is undermined (at least to the degree it would be by allowing the same numbers of non-trans men); *privacy/dignity/comfort* is compromised because some women will feel uncomfortable (e.g. trauma survivors in refuges); *justice/fairness* is undermined because women are forced to compete with male-bodied people who have a physical advantage in sports, and because measures implemented to include more women in areas where they are underrepresented are used instead to include even more male people; *likelihood of shared bodily experience* is undermined because the likelihood is affected (the higher the numbers of transwomen using the space, the lower the likelihood); *intimate association* and *expressive association* are compromised because women are compelled to associate with people they may not be interested in associating with; *self-determination* is compromised because the 'other' who has been part of the story of women's being 'other-determined' is given a say in what it means to be a woman; and *intent of the creators* is undermined because the spaces women fought for, *by women for women*, are being given to male people.

<sup>24</sup> For a more extensive discussion of bathrooms, see Chapter 6.

<sup>25</sup> For a discussion of rationales for feminist separatism, which justify *some or other* women-only spaces (not necessarily the ones we have and which are under discussion in this chapter) see Phelan and Lawford-Smith (manuscript).

In some cases, there's even a direct contradiction, rather than just an 'undermining'. For example, if 'lesbian' means female homosexual, then it doesn't mean male heterosexual; so including transwomen in lesbian speed-dating events, or other types of events aimed at creating intimate association between lesbians is directly antithetical to what it means to be a lesbian. This issue received public attention when producers of the UK show *First Dates* sent a lesbian on a date with a transwoman (*The Guardian* 2019b). In Australia, lesbian groups have ended up in court, accused of discriminating against males with gender identities by refusing them tickets to lesbian-only (i.e. female same-sex attracted only) dances<sup>26</sup> and lesbian-only festivals.<sup>27</sup>

#### 4.4 Women-only spaces: sex or gender identity?

It is easy enough to anticipate at least one objection from gender identity activists, which would go something like this.

*Objection.* You've been asking whether *women* have the right to exclude *trans-women* from women-only spaces. But your stipulation that you'll use 'woman' interchangeably with 'female', and your (related) choice to use 'transwoman' (no space) instead of 'trans woman' (space), begs the question. If you'd instead called them 'trans women', and even better if you'd referred to other women as 'non-trans women', it would be clear that you were actually talking about two groups of women, and whether one has the right to exclude the other. And that's actually the right way to pose the question, because *trans women are women!* So your question is: do *non-trans women* have the right to exclude *trans women* from women-only spaces?

This does reframe the question, and in doing so invites the reply that one group of women should not have the right to exclude another group of women from spaces that belong to both of them. Just as straight women wouldn't have the right to exclude lesbian women, or middle-class women wouldn't have the right to exclude working-class women, neither would non-trans women have the right to exclude trans women. Women-only spaces are for women, so no woman should be excluded. (Notice that if you accept 'trans women are women' then you get to position transwomen as subordinate to non-trans women, in virtue of being trans; whereas if you reject 'trans women are women' you get to position

<sup>26</sup> O'Keefe v Sappho's Party Inc [2009] SAEOT 50 (24 April 2009). The case was dismissed, but only on the grounds that the dance was judged to be a private rather than a public event. The minority opinion concluded that there was in fact discrimination. The details are online at <<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SAEOT/2009/50.html>>

<sup>27</sup> *Al Jazeera* reports that the Victorian Civil and Administrative Appeals Tribunal had granted an exemption to 'Lesfest', a lesbian women's festival, to have only 'female-born lesbians' attend or work at the festival, but the exemption was overturned after a complaint from a transsexual lobby group (*Al Jazeera* 2003).

transwomen as dominant relative to non-trans women, in virtue of being male. This surely accounts for quite a bit of the disagreement between trans rights activists and gender-critical feminists, because it sends people who agree on the relevance of marginalized-status hierarchies in two different directions.)

The problem with this objection is that it too begs the question. Even if there's some conception of gender (e.g. gender as identity) such that transwomen and women share a gender, and even if it would be best all-things-considered to use the terms 'female' and 'women' to refer to that gender category rather than to sex class, it remains true that some of the people in that class are *male* while others are *female* (in the original biological sense), and that sex differences matter morally and politically, at least at the moment. At best, this objection simply establishes that there's a sex class that might have an entitlement to women-only spaces, and there's a gender (as identity) category that might have an entitlement to women-only spaces, and the composition of these groups is different. Then we'd have to go through and figure out, for each of the women-only spaces in question, whether their justification is on the basis of sex, or gender identity. (Note that this also means dropping the package approach to spaces in favour of a piecemeal approach).

For all the spaces whose justification is safety, privacy/dignity/comfort, fairness, and likelihood of shared experience, the justification is sex class. Women face a risk of violence from male people. There is no evidence that this risk is from male people *except for those with 'woman' gender identities*. Until such a time as there is such evidence, there is no reason for women to make exceptions for that sub-group. (Consider also that it's likely that other sub-groups are exceptions, such as gay males, but that we don't think this means they should have access to women-only spaces). Women are subject to sexual objectification and harassment by male people. Male people—at least, those male people who have gone through male puberty—have a physical advantage over women when it comes to sport. Male people do not have an embodiment in common with female people, and so lack shared embodied experience. So for all these spaces, it is sex class membership, not gender (identity) category membership, that rationalizes inclusion and justifies exclusion.

What about respite, and self-determination? These give a little more latitude for inclusion. *Respite* is premised on a break from male-socialized attitudes, expectations, and behaviours. Again, there's nothing about a male's having a 'woman' gender identity that guarantees that these traits won't be brought into women-only spaces. But consider a transwoman who had severe childhood gender dysphoria which led to the rejection of any male-socialized behaviours over which they had conscious control; transitioned early rather than late in life; and passes as female and has therefore been *treated as* a woman for a significant period of time. It is considerably less likely that such a person would bring

male-socialized traits into women's spaces.<sup>28</sup> Similarly, *self-determination* is premised on women being able to decide for themselves what and how they want to be. The whole point is to be able to do this free of males, who have historically played a massive and invasive role in deciding what and how women will be. So where transwomen bring male attitudes, expectations, and behaviours into women-only spaces rationalized by self-determination, they will be particularly damaging. Again, some transwomen can be expected to do this to a greater degree than others. But it remains a problem that they are not a member of the constituency of those who have been other-determined in the way that female people have, so even if they won't make a negative difference to women's self-determination, it still seems to matter that they are given any say at all.

It's not clear that it's really possible to throw off *all* male socialization. At least, doing so would take a lot of work, and it's not clear that transwomen have done that work (or how we could know if they had). So it's not clear that it's justifiable to include any males in such spaces. Unfortunately, the policy on exclusion or inclusion is unlikely to be able to track the nuance of which transwomen are actually likely to bring male-socialized behaviours into women-only spaces. Policies will have to be transwomen-inclusive or transwomen-exclusive. So we have to make a more sophisticated tradeoff. If we were to include *all* transwomen in spaces rationalized by self-determination, how likely is it that women's freedom of thought and expression in self-creating (self-determining *as* women) would be seriously compromised? If we were to exclude *all* transwomen from those spaces, how likely is it that we'd be perpetrating the harms of exclusion (even if these are only harms to the transwoman's feelings, or the small harm of a frustrated desire) against people who would not have compromised the spaces? Because gendered socialization is pervasive and all-encompassing, I think there's a serious risk of compromise to women's self-determination, and so a strong reason to exclude all transwomen from these spaces.

Thus, even if we make a sex/gender (identity) distinction and grant that transwomen might share a gender (identity) with (at least some) women,<sup>29</sup> this doesn't settle in advance that they cannot be excluded from women-only spaces. This question is not settled merely by choices about naming. Almost all women-only spaces are most clearly justified on the basis of sex, not gender identity; so almost all women-only spaces are such that women may exclude transwomen from them. Spaces for respite, like women's rooms on university campuses, may be the only exception to this general rule, at least if it is possible to make a more nuanced distinction between the types of transwomen who are less likely to bring male

<sup>28</sup> However, it may be relevant whether or not the transwoman passes as female, because if not, then the benefits of respite that come from simply not having to think about managing male expectations and behaviours may not be generated for the women in the space.

<sup>29</sup> The 'at least some' caveat relates to the assumption of universal gender identity. See discussion in fn. 4.

socialized behaviours into the space (e.g. those who had childhood gender dysphoria) and those who are more likely (e.g. those who did not have childhood gender dysphoria).<sup>30</sup>

In conclusion, changing the definition of legal sex in a way that affects access to single-sex services, spaces, and provisions will obviously affect women. Women have a moral right to exclude all males, including transwomen, from those spaces. Changes to the legal definition of sex would remove that right, so changes to the legal definition of sex should be resisted or rolled back.

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<sup>30</sup> I am not endorsing the claim that childhood gender dysphoria makes this difference, only allowing that it might.

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