Journal of Law and Religion (2023), 38: 1, 10–37

RESEARCH ARTICLE

Gender Identity Discrimination and Religious Freedom

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doi:10.1017/jlr.2022.45

Abstract

Is there a legitimate basis for religious exemptions from laws that prohibit gender identity discrimination on the basis of people's beliefs? The author argues that much depends upon how gender dysphoria is understood. If it is seen as a problem requiring medical diagnosis and treatment, then arguably there is no religious basis for discrimination, except in a few situations where being a biological male or female is theologically essential to a particular role. Transgender identification, understood as a medical issue, fits within a belief system that God created two sexes of human beings, male and female. Within that belief system one can make room for an understanding that there are those who experience disorders of sex development and those who have such a profound sense of being born in the wrong body that they undertake steps toward medical transition to align their bodies, as far as possible, with the opposite sex. However, recent reinterpretations of what it means to be transgender involve an assertion that it should not be seen as a medical issue, that affirmation of a person's self-declared gender identity, with or without having hormonal treatment or surgery, is a matter of human rights and that the law should recognize that people may have a gender that, however described, is nonbinary. These views rely on certain beliefs and positions that have a very weak basis in science. They challenge religious beliefs, which accord with mainstream scientific understanding, that human beings are intrinsically a sexually dimorphic species. People of faith need the freedom to reject beliefs that are incompatible with their worldviews. That does not mean that ill-treatment of someone on the basis of their gender identity can ever be justified; but it does support a religious exemption from a legal obligation to accept someone else's self-declared gender identity. It is one thing to ask me to respect your beliefs about yourself. It is another to ask me to act toward you as if I share your beliefs.

Keywords: gender dysphoria; religious freedom; transgender; gender identity; discrimination

Furious Arguments about Gender Identity

Issues about gender identity have become lightning rods for furious disagreement in Western culture. These arguments find their expression, for example, in vigorous disputes

about the correct use of language, such as debate about whether only women can become pregnant,[1] or conversely, whether "transwomen are women."[2]

These arguments go well beyond language. In the United States, they are playing out in the so-called bathroom wars about whether people should be required to use the bathroom conventionally assigned to the person's natal and chromosomal sex,[3] as part of a broader culture war between conservative and progressive advocates.[4] The federal Equality Act in the United States, which as of this writing has passed the House of Representatives, seeks to resolve that particular issue by providing that "an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity."[5]

There has been a particularly heated debate about natal males who transition to a female presentation, with or without medical assistance in the form of cross-hormone treatment and/or gender reassignment surgery. Those who assert that trans females are the sex with which they identify, irrespective of any sex reassignment procedures, clash with others concerned about the effect that allowance of biological males into women's facilities will have on female safe spaces. There are also concerns about the impact on feminist advocacy and lesbian identification.[6] The debates play out also in sports, to the extent that trans females want to compete in sports where, so it is argued, their performance benefits from physical characteristics associated with male pubertal development, such as strength and speed, give them an unfair advantage.[7]

The Right to Discriminate

Another area of controversy is the tension between transgender rights and religious freedom, for a fundamental question is arising in many different countries: How should the law maintain a position of creedal neutrality between people who hold different beliefs about biological sex and gender, while at the same time providing appropriate protection

[1] Such a debate erupted in Britain in February 2021 over the Ministerial and Other Maternity Allowances Bill to provide for paid maternity leave to government ministers. The bill referred to a *person* on maternity leave. The government amended the bill after severe criticisms in the House of Lords. Clea Skopeliti, *Government Agrees to Call Pregnant Ministers "Mothers*," The Independent (Feb. 26, 2021), https://www.independent.co.uk/news/uk/politics/ministerial-maternity-allowances-bill-leave-pregnant-b1807843.html. In New South Wales, Australia, one does not need to be female to have an abortion, according to the Reproductive Health Care Reform Act 2019. The legislation uses the word *person* rather than *woman* or *female* throughout. In Tasmania, s.28D(3) of the Births, Deaths and Marriages Registration Act 1999, as amended in 2019, provides that any reference in Tasmanian law to the pregnancy of a female includes the pregnancy of a person of another gender and that a person of another gender who carries a child in the "person's female reproductive tract," or who gave birth, is the mother. For a study of trans males in Australia who choose to have babies after transitioning, see Rosie Charter et al., *The Transgender Parent: Experiences and Constructions of Pregnancy and Parenthood for Transgender Men in Australia*, 19 International Journal of Transgenderism 64 (2018).

[2] Brice Bantegnie, *What Are the Debates on Same-Sex Marriage and on the Recognition of Transwomen as Women About? On Anti-descriptivism and Revisionary Analysis*, 63 Inquiry 974 (2020).

[3] Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 Duke Journal of Gender Law & Policy 1 (2016).

[4] Robin Wilson, *Bakers and Bathrooms: How Sharing the Public Square Is the Key to a Truce in the Culture Wars*, *in* Religious Freedom, LGBT Rights, and the Prospects for Common Ground 402 (William Eskridge, Jr. & Robin Wilson eds., 2018).

[5] H.R. Res. 5, 117th Congress (2021) (amending Civil Rights Act 1964, Title XI, to insert sec. 1101(b)(2)).

[6] *See, e.g.*, Sheila Jeffreys, Gender Hurts: A Feminist Analysis of the Politics of Transgenderism (2014).

[7] Erin E. Buzuvis, *As Who They Really Are: Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 Journal of Law & Inequality 341 (2016). On the controversies this has generated in swimming, see, for example, Billy Witz, *As Lia Thomas Swims, Debate About Transgender Athletes Swirls*, N.Y. Times Jan. 24, 2022, https://www.nytimes.com/2022/01/24/sports/lia-thomas-transgender-swimmer.html.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

from discrimination to those who have a gender identity that is incongruent with their natal sex?

In what follows, I explore the issue of exemptions from the operation of antidiscrimination laws that prohibit discrimination on the basis of gender identity, because of an organization's religious belief, or an individual belief. While much has been written about discrimination on the basis of sexual orientation,[8] the issue of the religious basis for discrimination on the basis of gender identity has been little explored.

The notion that people of faith should have a right to discriminate is inherently controversial. Can discrimination on the basis of gender identity be said to be justified on the basis of religious beliefs? To this question, some people who have a strong commitment to equality may immediately answer unequivocally in the negative. Conversely, the question can generate the opposite reaction from those who have a particularly strong view that religious liberty considerations should override conflicting rights to the extent of a conflict.

These unequivocal responses arise from what Jonathan Haidt identifies as the elephant of emotion and intuition, which, he says, has much greater influence on our responses to moral questions than the rider of reason.[9] Aware, as we should be, of the way in which intuitive responses and moral convictions can shape our thinking, constructive dialogue on issues of controversy requires us to try to explore the issue through reason, reflection, and the analysis of evidence, and to find reasonable compromises between different rights and interests.

The question of religious exemptions from antidiscrimination laws that protect transgender people from discrimination is a very complex one, for much depends on how we understand the etiology of gender dysphoria and gender diverse identities and what we mean, in this context, by discrimination.

Overview

I start with an examination of the controversies about religious exemptions—what different forms alleged discrimination might take, and potential for difficulties in religious contexts. I go on to explore the etiology of gender dysphoria for the light this casts upon understanding transgender identification.

A conventional medical understanding of gender dysphoria is compatible with religious beliefs about sexual dimorphism as intrinsic to God's creation. That is, one can hold to a traditional understanding that we are a sexually dimorphic species, with differences between male and female based upon reproductive function, while acknowledging that not everyone fits neatly into this binary. A small number of people, identified as intersex, have disorders of sexual development that do not allow for an unequivocal identification as either female or male, while a small number of others identify so fully as the opposite sex that they seek to live as the other sex and take medical steps to masculinize or feminize their bodies to conform to their inner sense of gender identity. Many will go through surgery that irreversibly removes or alters genitalia or reproductive organs. In an older discourse, they were known as transsexuals.

In the classic understanding of what it means to be transgender, there is an overlapping consensus between science and Christian theology. On this issue, conventional scientific rationality, which accepts sexual dimorphism, is of one accord with traditional Christian belief. However, more recent understandings of what it means to be transgender present a conflict with religious beliefs, particularly to the extent that they assert that there are

[8] *See, e.g.*, Chai Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 Brooklyn Law Review 61 (2006); Joel Harrison, *Debating Rights and Same-Gender Relationships*, 4 Journal of Law, Religion & State 194 (2016).

[9] Jonathan Haidt, The Righteous Mind (2012).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

multiple genders and a myriad of terms to define those genders, all of which should be given recognition in the law through registering a self-declared gender identity.

This more recent understanding of what it means to be transgender, finding its origin in queer theory rather than established medical and scientific knowledge, does not participate in this overlapping consensus between science and faith. It offers a different epistemology regarding the nature of sex and gender that does not accept sexual dimorphism as core to the understanding of the human species. To this extent, it represents a new belief system.

There is a need to balance the rights of people to hold competing beliefs about sex and gender, while ensuring that those who identify as transgender or gender diverse are protected in law from discrimination.

I do not seek to suggest answers to all of the difficult policy issues in this area. My aims are modest: first, to demonstrate that there is no necessary conflict between a belief, whether based on religion or scientific rationality, that humans are sexually dimorphic and acceptance of those who do not fit easily into the gender binary. Secondly, to argue that in recent times the discourse on sex and gender has radically changed, creating conflicts with religious belief that were not visible a decade or so ago. Third, to argue that while people should be protected from discrimination or ill-treatment where gender identity is not materially relevant to appointment to a particular role or the provision of the service, the law should not require people of faith to accept someone's self-declared gender identity to the extent of treating them as of the sex with which they now identify. That is, the law should not compel people to act toward others in a way that either conflicts with their own beliefs or requires them to accept the beliefs of other people about themselves. The law must be creedally neutral between different beliefs and understandings of the world.

These ought to be uncontroversial propositions, but in a changing intellectual environment marked increasingly more by anger than argument, with the elephant of emotion and intuition so much more powerful than the rider of reason, finding agreement on a neutral ground in which people who hold different beliefs can peacefully coexist, can be difficult.

Defining Terms

In any discussion of these issues, clarity about terms is necessary. I use the term *transgender* to refer to someone who identifies as the sex opposite of that of their birth—that is, their natal sex. Someone who identifies as nonbinary is not, within this definition, transgender. They are best described as *gender diverse.* The term *gender dysphoria* refers to an incongruence between natal sex and gender identity that is deeply distressing. People may experience gender incongruence, having a gender identity that is discordant with natal sex, without being distressed about it.

The terms *sex* and *gender* are often interchangeable in common usage, used to refer to being biologically either male or female.[10] However, modern gender theory makes a distinction between sex and gender.[11] *Sex* refers to biological nature as male or female, defined by reproductive organs, gametes, and chromosomes. I use the term *biological sex* in this sense. *Gender* is often used in works of gender theory to refer to the socially constructed roles, behaviors, expressions, and identities associated with being male or female.[12] I use *gender* in reference to identity—to refer to a psychological state of identification with being male, female, or neither (that is, *nonbinary* or one of the other

[10] David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 Archives of Sexual Behavior 87 (2004).

[11] See, for example, the chapters in Gender Reckonings: New Social Theory and Research (James Messerschmidt et al. eds., 2018).

[12] Christine Delphy, *Rethinking Sex and Gender*, 16 Women's Studies International Forum 1 (1993).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

terms in popular usage). Transgender people who see themselves as having been trapped in the wrong body do not perceive gender to be a mere social construct, but the very essence of who they are. This makes it so important to many transgender people to seek the outward appearances of a different gender presentation to their natal sex. They may also have a deep desire that others should recognize and respect their internally discerned gender identity.

Accepting the terminology that differentiates sex from gender does not mean that these represent alternative understandings of human nature. It is entirely consistent with that differentiation to acknowledge that everyone has a biological sex, while there are many variations on gender identity. Thus people may have both a sex and a gender, which for most will be concordant, but, for a few, will be incongruent to a greater or lesser degree.

Antidiscrimination Law and Religious Exemptions

The U.S. Position

Religious organizations in the United States enjoy a substantial degree of freedom from the operation of antidiscrimination statutes, notwithstanding the interpretation of Title VII of the Civil Rights Act 1964 to prohibit discrimination on the basis of being transgender.[13] Cases decided on the First Amendment to the U.S. Constitution give religious organizations in the United States robust protection,[14] as do a plethora of exemptions in state and federal laws.[15]

However, despite the generous ambit of exemption provided by the First Amendment and state and federal statutes, religious liberty issues continue to arise concerning gender identity. For example, the federal Equality Act, which has yet to pass Congress, provides that the Religious Freedom Restoration Act of 1993 "shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."[16] Thus it will not provide the basis for challenge to the prohibition on gender identity discrimination nor offer a defense to a claim.

Where there are exemptions for religious organizations in U.S. laws, they may, at their simplest, just exempt a religious organization entirely from the operation of the law, as is the case for example under Title VII of the Civil Rights Act 1964 in the United States.[17] The exemption is engaged on proof of the religious character of the organization. There is no need to demonstrate that the discrimination has a legitimate basis in that organization's religious belief. When individuals are exempted, it is typically on the basis of sincerely held beliefs.[18]

[13] See Bostock v. Clayton County, 140 S. Ct. 1731 (consolidating R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, which dealt with the termination of a transgender individual).

[14] *See* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[15] Writing in 2016, Robin Wilson identified over 2000 federal and state statutes that had religious liberty protections, including federal laws that prohibit discrimination in employment, housing, and education: Robin Fretwell Wilson, *Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports*, 34 Journal of Law & Inequality 385, 388 (2016). On public attitudes to these exemptions, see Andrew Flores, Christy Mallory & Kerith Conron, *Public Attitudes About Emergent Issues in LGBT Rights: Conversion Therapy and Religious Refusals*, 7 Research & Politics 1 (2020).

[16] H.R. Res. 5, *supra* note 5 (amending Civil Rights Act 1964, Title XI, to insert sec. 1107).

[17] 42 U.S.C. § 2000e–1(a); § 2000e–2(e).

[18] *See* Flores et al., *supra* note 15.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

The Basis for Religious Exemptions in Australia

The law is not necessarily the same in other countries. For example, in Australia, courts may be required to consider the issue of whether there is a religious basis for discrimination on the basis of gender identity.[19] The federal Sex Discrimination Act 1984 prohibits discrimination, inter alia, on the basis of sex, relationship status, pregnancy, sexual orientation, and gender identity.[20] Section 37 of the Act provides exemptions in relation to the selection and training of ministers of religion and any "act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion." Section 38 makes it lawful for faith-based educational institutions to discriminate on a number of grounds, including gender identity, if the institution is "conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed" and the discrimination against another person is "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed."[21] This exemption applies to both employment of staff and issues concerning students.

This formulation in section 38 of the Sex Discrimination Act, which founds the exemption on the basis of acts of discrimination that conform to the doctrine of the religion, or where the discrimination is necessary to "avoid injury to the religious susceptibilities of adherents," is typical of the exemptions in other Australian antidiscrimination laws.[22]

In these statutory provisions, the exemption is not based on the fact that the person discriminating happens to hold religious beliefs, nor merely that the organization of which he or she is a part is religious in character; rather, the exemption applies where the discrimination represents an act or practice based upon those religious beliefs and/or done in good faith to avoid upsetting other adherents of the religion.

This requires consideration of whether the act of discrimination complained of "conforms to the doctrines, tenets or beliefs of that religion" or at least that sufficient members of the religious body would take offense,[23] on the basis of their religious beliefs, were the

[19] All states and territories in Australia have antidiscrimination laws and there are also several federal antidiscrimination laws. All have religious exemptions which vary in their scope. *See* Sarah Moulds, *Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform*, 47 University of West Australia Law Review 112 (2020).

[20] Section 4 of the Act defines gender identity as "the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth."

[21] This exemption may be narrowly interpreted. In *Griffin v. The Catholic Education Office* (1998) EOC 92-928, a federal antidiscrimination commission held that a Catholic school had discriminated against an applicant for a teaching position because she had a high profile as co-convenor of a gay and lesbian educational association. The commission took the view that any offense to the parents and pupils of the relevant school was not an injury to their religious susceptibilities but rather an injury to their prejudices.

[22] *See, e.g.*, the law in New South Wales: *Anti-Discrimination Act 1997* (NSW) s. 56. In the Australian Capital Territory and Queensland, the test is framed in such a way that the respondent must prove both that the discrimination conforms to the doctrine of the religion *and* that discrimination is necessary to prevent offense to adherents: *Discrimination Act 1991* (ACT) s.32(1)(d); *Anti-Discrimination Act 1991* (Qld) ss.90, 109. See also *Anti-Discrimination Act 1998* (Tas.) s.52 (discrimination on the basis of religion).

[23] Determination of whether the exception of offense to religious susceptibilities is engaged depends upon an objective test to be proven through expert evidence. It is not necessary to show that all adherents to that faith would be offended. The question is whether adherents of that particular congregation or organization would be offended: OV v. Wesley Mission [2010] NSWCA 155 (NSW Ct. App.). A literature review of attitudes of people of faith toward transgender and gender diverse people has found that religious fundamentalism, church attendance, and interpretations of the Bible as literal are correlated with greater prejudice: *see* Marianne Campbell et al., *A Systematic Review of the Relationship Between Religion and Attitudes Toward Transgender and Gender-Variant People*, 20 International Journal of Transgenderism 21 (2019).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

organization not to discriminate against the person who would otherwise be protected by the antidiscrimination provision.

Justifying the Doctrinal Basis for Discrimination

That raises the question: is there a religious basis for discrimination on the basis of gender identity? While this issue is not so squarely raised in the United States, where exemptions tend to be given to sincere religious individuals and to religious organizations without needing a doctrinal justification, the issue is relevant to the policy question of whether such exemptions should be given at all.

A starting point in considering this question is to explore the different forms that discrimination can take, in particular, the difference between imposing adverse consequences on someone because of their gender identity, and simply not being prepared to recognize that their gender identity means that they should be treated as being of the sex with which they now identify.

Differential Treatment and Affirmation of Gender Identity

The issue of discrimination on the basis of gender identity is more complex than with the operation of discrimination laws in other contexts. Typically, discrimination involves treating someone differently (and usually in an adverse way) because of, or because of in part, a protected characteristic. That difference in treatment may take the form of an omission, for example, not being willing to shortlist an otherwise well-qualified candidate for a position because of their gender identity. Discrimination also may be direct or indirect.

Usually, the operation of the law is relatively clear. Race is an example. Typically, the case will turn on whether the adverse action against the complainant was motivated by race, or was for other nondiscriminatory reasons. It could scarcely be contemplated that the alleged discrimination was that the accused person did not accept or affirm that the complainant is of the race with which he or she identifies.

Discrimination through an Unwillingness to Affirm a Person's Gender

Discrimination against a transgender person by refusing service in a shop or a restaurant, or refusing to rent out a hotel room, would clearly be unlawful in a jurisdiction that prohibits gender identity discrimination. In such contexts, his or her gender identity is not materially relevant to the provision of the service. The service provider is not being asked to accept the person's gender identity, or otherwise to treat them as a gender other than is apparent from their appearance. He or she is simply being asked to provide a service, and one that anyone who is willing to pay for the service ought to receive.

However, it is not necessarily the case that the law in a given jurisdiction will require that a person be treated as the sex or gender with which they identify. Laws around the Western world vary on this issue in two ways. First, they vary significantly on the threshold that must be crossed before someone can be said to have a legally protected gender identity different from their natal sex. Secondly, they vary in the consequences that flow therefrom.[24]

[24] This is an area where many jurisdictions are legislating change in response to the advocacy of transgender rights groups and changed interpretations of international human rights standards. In the European Union, see, for example, European Commission, Directorate-General for Justice and Consumers, Legal Gender Recognition in the EU: The Journeys of Trans People Towards Full Equality (June 2020).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

Some states in Australia, for example, require sex reassignment surgery for legal recognition as a different gender.[25] In England and Wales, there must at least be a diagnosis of gender dysphoria by a suitably qualified professional.[26]

Conversely, there are jurisdictions that provide that self-identification is sufficient to be recognized as being of a gender different from natal sex. California's Gender Recognition Act allows self-identification for the purpose of state identification documents without the need for a medical diagnosis or certification.[27] In two Australian states, Tasmania and Victoria, the law goes very much further. A person may choose to register as male, female, nonbinary, or as any other gender they choose to name. Parents may choose to register their child with a gender identity different from natal sex. The effect of this registration is to alter the birth certificate. A person whose gender identity has been so registered is treated in law as being of that gender unless a legislative provision expressly or implicitly provides otherwise.[28]

However, even if the legislative approach in a jurisdiction is as radical as this, it still does not mean necessarily that a person who registers as having a female gender identity will be treated as such for all purposes. That is, while the threshold for recognition is nothing more than registration, the scope of protection from gender identity discrimination is still limited, in particular by reference to sex. Laws around the world recognize that some institutions and facilities are legitimately segregated by sex. There are girls' schools and women's colleges, for example.

A law allowing discrimination on the basis of sex is typically not negated by a law prohibiting discrimination on the basis of gender identity. Federal law in Australia, for example, is quite clear that having a legally recognized and protected gender identity as female does not mean that the person must be recognized as female for the purposes of admission to a girls' school or female university accommodation.[29] There are also carve-outs in some jurisdictions for women's sports.[30]

It follows from this, that laws that prohibit discrimination on the basis of gender identity are quite different in their effect from laws that prohibit discrimination on the basis of other

[25] *See, e.g.*, *Births, Deaths and Marriages Registration Act 2003* (Qld) ss. 22, 23; *see also Births, Deaths and Marriages Registration Act 1995* (NSW) s.32C.

[26] In England and Wales, the Gender Recognition Act 2004 requires that an application can be made only by someone over age eighteen who "has or has had gender dysphoria," who has lived in the acquired gender throughout the period of two years prior to the date of application, and who intends to continue to live in the acquired gender until death: s.2. This requires evidence from a medical practitioner or psychologist practicing in the field of assessment of gender dysphoria: s.3.

[27] Gender Recognition Act, 2017 Cal. Legis. Serv. ch. 853 (West) (amending the Code of Civil Procedure).

[28] *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas.); *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic.). These laws provide that if there is a registered gender in relation to a person, the person is, for the purposes of, but subject to, any law in force in the state, a person of that gender. *See,* Patrick Parkinson, *Tasmania's Gender Confused Parliament*, Quadrant Online (April 26, 2021), https://quadrant.org.au/opinion/qed/2021/04/tasmanias-gender-confused-parliament.

[29] Section 21(3) of the *Sex Discrimination Act 1984* (Aus.) provides that it is not unlawful to discriminate on the basis of either sex or gender identity in determining an application for admission to an educational institution that is conducted solely for students of a different natal sex from that of the applicant. Other exemptions apply when accommodation is provided solely for persons of one sex who are students at an educational institution: s.34(2).

[30] See, for example, section 195 of the Equality Act 2010 (England and Wales), which allows for discrimination in sports against a person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. Discrimination is permitted if it is necessary to do so to secure in relation to the activity either fair competition, or the safety of competitors. In Australia, section 42 of the Sex Discrimination Act 1984 states that it is lawful "to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.'"

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

attributes such as race, age, or disability. These laws may, but do not necessarily, require that a person be treated as being of the sex or gender with which they identify. Indeed, in a jurisdiction that allows registration of a gender identity that is neither male nor female, antidiscrimination laws are unlikely to require more than that the person not be subject to adverse treatment. This is because, in a society that is organized, to the extent it matters, on biological sex, there is little room to require affirmation of a gender identity that falls outside of the binary, apart from allowing some variation on passports, driver's licenses, and other identification documents.

Religious exemptions from a prohibition on gender identity discrimination exist within this broader context in which, for most jurisdictions at least, there are limits on the extent to which a person's gender identity needs to be affirmed by others. Recognizing that religious groups may not be able to treat someone as having a gender identity different from natal sex is not materially different from allowing women's sports organizations or same-sex groups such as lesbian associations, to differentiate on the basis of natal sex.

Potential Conflicts with Religious Faith

For people of faith, various issues may arise if the law requires recognition and acceptance of a person's self-declared gender identity as being the sex with which that person identifies. The issue of permissible discrimination based on gender identity may arise for the Catholic bishop faced with an application to train for the priesthood from a natal female who identifies as male and has undergone testosterone treatment. It may arise if a church, which does not allow its premises to be used to solemnize a same-sex marriage, is asked to allow the church building to be used, for the normal fee, by two people who are of the same biological sex but where one of them has legally changed sex. It may arise for the leader of a Christian youth summer camp faced with a request from a natal male to be recognized henceforth as female, with the consequence that the young person asks to sleep in the girls' dormitory at the camp. If the relevant antidiscrimination legislation does not provide exemptions for occupations, organizations, and facilities confined to one sex that allow for discrimination based upon natal sex, notwithstanding a different gender identification, then these faith-based organizations would need to rely upon religious exemptions.

Is there, then, a legitimate basis for saying that nonrecognition of someone's self-declared gender identity should be permitted because this conforms to the doctrines, tenets, or beliefs of that religion? It is obviously difficult to assert definitively what is a Christian position[31]—or indeed the position of any other faith—on the issue of discrimination on the basis of gender identity, and in particular whether it is contrary to religious doctrines to recognize a person's gender identity that is discordant with natal sex. Nonetheless, a shared starting point among Christians for any examination of theological responses to those who are transgender is the expressed position of the major churches.

The Roman Catholic Church's teaching on the subject begins from the premise that God created us male and female and that sexual dimorphism is a given. To quote Genesis 1:27: "male and female He created them." The essence of sexual dimorphism is that it takes a male's sperm to fertilize a female's egg in order for the species to reproduce and that this is fundamental to the natural order. In *Amoris Laetitia*, published in 2016, Pope Francis affirmed the centrality of creation in his approach to issues concerning gender, agreeing with his

[31] For a theological position supportive of new ideas concerning gender, *see* Megan DeFranza, Sex Difference in Christian Theology: Male, Female, and Intersex in the Image of God (2015).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

Synod of Bishops[32] that while biological sex and the sociocultural role of sex (which may otherwise be termed *gender*) might be distinguished, they cannot be separated.[33]

However, that only takes the issue so far. One might accept that God created us male and female while accepting that a very small number of people are born with elements of both male and female reproductive organs[34] or other intersex conditions. These are otherwise described as disorders of sexual development.[35]

The same acceptance of natural variations, notwithstanding sexual dimorphism, could be applied to how people of faith understand gender dysphoria. If gender dysphoria is understood as a medical condition requiring treatment, whether that treatment be therapeutic in nature or through the administration of cross-sex hormones and surgeries, there is arguably no *religious* basis for discrimination except insofar as a religious doctrine (for example, conditions for ordination to the priesthood in Catholicism), requires a person to be biologically male. This requires only limited religious exemptions.

Transgender Identification as a Medical Issue

The medical profession has long recognized that there are those who, while being anatomically and chromosomally either male or female (and not intersex), have so strongly identified as being of the opposite sex that they have eventually taken steps to identify publicly as having a different first name and gender.[36] Compelling personal stories have helped the general public understand this phenomenon.[37] Typically, those who have experienced gender dysphoria have recounted experiencing an incongruence between natal sex and gender identity quite early in their lives. The profoundly troubling disconnect between outward manifestation of genitalia and inward reality leads to gender dysphoria, a condition requiring, or at least justifying, hormonal and surgical treatments that have the effect of bringing a person's external appearance and genitalia more into concordance with their subjective gender identity.

The condition used to be described in the psychiatric literature as "gender identity disorder."[38] In the *Diagnostic and Statistical Manual of Mental Disorders* version 5, the terminology was changed to gender dysphoria, focusing upon the distress caused by gender incongruence as the mental health issue that needs treatment rather than gender incongruence per se.[39] Even in this formulation, transgender identification is still understood as a medical issue. A condition is diagnosed according to recognized criteria. In order to treat the

[32] Relatio Finalis [The final report of the Synod of Bishops to the Holy Father, Pope Francis] 58 (2015).

[33] Francis, Amoris Laetitia [Post-Synodal apostolic exhortation on love in the family] 56 (2016).

[34] True hermaphroditic conditions are defined by the presence of both ovarian and testicular tissues. These are rare. G. Krob, A. Braun & U. Kuhnle, *True Hermaphroditism: Geographical Distribution, Clinical Findings, Chromosomes and Gonadal Histology*, 153 European Journal of Pediatrics 2 (1994).

[35] On the various kinds of disorders of sexual development see Amar Y. Rawal & Paul F. Austin, *Concepts and Updates in the Evaluation and Diagnosis of Common Disorders of Sexual Development*, 16 Current Urology Reports 83 (2015). While it is claimed by some that 1.7 percent of babies born are "intersex," this is based on one article written more than twenty years ago that relies on a wide definition including all who "deviate from a Platonic ideal of sexual dimorphism" at the chromosomal, genital, gonadal, or hormonal levels. Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 American Journal of Human Biology 151 (2000). Leonard Saks has pointed out that the definition used is much wider than as understood for intersex conditions in the medical literature: Leonard Saks, *How Common Is Intersex? A Response to Anne Fausto Sterling*, 39 Journal of Sex Research 174 (2002).

[36] Vern L. Bullough, *Legitimatizing Transsexualism*, 10 International Journal of Transgenderism 3 (2007).

[37] *See, e.g.*, Jan Morris, Conundrum (1974).

[38] *See, e.g.*, Handbook of Sexual and Gender Identity Disorders (David Rowland & Luca Incrocci eds., 2008); Simona Giordano, Children with Gender Identity Disorder: A Clinical, Ethical, and Legal Analysis (2013).

[39] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-5 at 454 (5th ed., 2013). This change followed pressure to de-psychopathologize gender nonconformity.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

condition, cross-hormone treatment and surgery may be justified, at least for some patients.[40]

Genetic or Hormonal Explanations

While, colloquially, people talk about feeling as if they were born in the wrong body, and this idea has had rhetorical power in transgender advocacy,[41] research to date has provided limited support for a physiological cause. To some extent, readings of that research evidence differ. The Endocrine Society in the United States, for example, is confident that there is "a durable biological element underlying gender identity," but it recognizes that the evidence base is very limited.[42] Others who have surveyed the available data are much less confident of a biological or genetic explanation.[43] One review of studies of the brain found that: "Despite intensive searching, no clear neurobiological marker or 'cause' of being transgender has been identified."[44] Analyses of brain structure in those who identify as transsexual is complicated by the lack of agreement amongst scientists as to whether there is such a thing as a typical male or female brain,[45] and the effects of taking cross-sex hormones over many years for those who have undergone medicalized transition.[46] It may be that in course of time, a genetic or biological explanation will be found for at least some transgender identification,[47] but for now it can be offered as, at most, one possible causal factor.

Others posit psychological explanations for the etiology of gender incongruence—at least for some people seeking medical assistance to transition. Disproportionately, adolescents

[40] For some who take the pathway of medical transition, there can be positive benefits, leading to lower utilization of mental health services. *See, e.g.*, E. Castellano et al., *Quality of Life and Hormones after Sex Reassignment Surgery*, 38 Journal of Endocrinological Investigation 1373 (2015); Dmitry Zavlin et al., *Male-to-Female Sex Reassignment Surgery Using the Combined Vaginoplasty Technique: Satisfaction of Transgender Patients with Aesthetic, Functional, and Sexual Outcomes*, 42 Aesthetic Plastic Surgery 178 (2018). However, the mental health of many transsexuals remains precarious even after hormonal treatment and surgery, with high suicide rates even after controlling for prior psychiatric morbidity. Cecilia Dhejne et al., *Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 Plos One, e16885 (2011); Richard Bränström & John Pachankis, *Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries: A Total Population Study*, 177 American Journal of Psychiatry 727 (2020).

[41] Jo Wuest, *The Scientific Gaze in American Transgender Politics: Contesting the Meanings of Sex, Gender, and Gender Identity in the Bathroom Rights Cases*, 15 Policy & Gender 336 (2019).

[42] Endocrine Society, Transgender Health: An Endocrine Society Position Statement (Dec. 16, 2020), https://www.endocrine.org/advocacy/position-statements/transgender-health, citing Aruna Saraswat, Jamie Weinand & Joshua Safer, *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199 (2015). Saraswat, Weinand, and Safer state that conclusions from the scientific literature should be made with caution, given small sample sizes. The authors were also unable to assign specific biological mechanisms for gender identity.

[43] *See* Sven Mueller, Griet De Cuypere, & Guy T'Sjoen, *Transgender Research in the 21st Century: A Selective Critical Review from a Neurocognitive Perspective*, 174 American Journal of Psychiatry 1155 (2017); Lawrence Mayer & Paul McHugh, *Sexuality and Gender: Findings from the Biological, Psychological and Social Sciences: Part Three*, 50 New Atlantis (2016). *See also* Jack Turban & Diane Ehrensaft, *Research Review: Gender Identity in Youth: Treatment Paradigms and Controversies*, 59 Journal of Child Psychology & Psychiatry 1228 (2018).

[44] Mueller et al., *supra* note 43, at 1158.

[45] For different views, see Simon Baron-Cohen, The Essential Difference: The Truth about the Male and Female Brain (2004); Daphna Joel et al. *Sex Beyond the Genitalia: The Human Brain Mosaic*, 112 Proceedings of the National Academy of Sciences 15468 (2015); Gina Rippon, The Gendered Brain: The New Neuroscience that Shatters the Myth of the Female Brain (2020).

[46] Randi Ettner, *Etiology of Gender Dysphoria*, *in* Gender Confirmation Surgery 21, 25–26 (Loren Schechter ed., 2020).

[47] There is recent evidence for possible genetic influences in some male to female transsexuals: Madeleine Foreman et al., *Genetic Link Between Gender Dysphoria and Sex Hormone Signaling*, 104 Journal of Clinical Endocrinology & Metabolism 390 (2019). *See also* Jakob Ristori et al., *Brain Sex Differences Related to Gender Identity Development: Genes or Hormones?*, 21 International Journal of Molecular Sciences, 2123 (2020).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

presenting to gender clinics are on the autism spectrum.[48] In contrast to the children and young people seen in gender clinics a decade or more ago,[49] adolescents now presenting to gender clinics have a range of psychiatric comorbidities,[50] with increases particularly notable for teenage natal females, notwithstanding a decline in reported bullying and abuse.[51] Gender dysphoria has been found to coexist, inter alia, with attention deficit disorders[52] and eating disorders.[53]

These findings are replicated in general community surveys of those who identify as transgender or gender diverse. A study analyzing large datasets with, collectively, more than 640,000 respondents, found that those who identified as transgender or gender diverse were significantly more likely to be on the autism spectrum and had elevated levels of attention deficit-hyperactivity disorder, bipolar disorder, depression, learning disorder, obsessive-compulsive disorder, and schizophrenia compared with those who did not identify as transgender or gender diverse.[54]

Evidence from Australia points to a strong association between gender dysphoria and disordered attachments in childhood.[55] Abuse, neglect and family breakdown are also implicated.[56] Adolescents identifying as transgender or gender diverse report significantly

[48] Annelou de Vries et al., *Autism Spectrum Disorders in Gender Dysphoric Children and Adolescents*, 40 Journal of Autism & Developmental Disorders 930 (2010); Anna van der Miesen et al., *Autistic Symptoms in Children and Adolescents with Gender Dysphoria*, 48 Journal of Autism & Developmental Disorders 1537 (2018); Michelle Tollitt et al., *The Clinical Profile of Patients Attending a Large, Australian Pediatric Gender Service: A 10-Year Review*, International Journal of Transgender Health (2021), published ahead of print, https://doi.org/10.1080/26895269.2021.1939221.

[49] Dr. Annelou de Vries, a leading clinician at the Amsterdam clinic who was a co-author on some of the early papers on the Dutch Protocol, has noted recently that one of the criteria for treatment was that gender incongruence was identified early in childhood. Now, she notes, gender clinics are seeing older adolescents seeking treatment from gender clinics who have more mental health difficulties and whose gender dysphoria had a later age of onset: Annelou de Vries, *Challenges in Timing Puberty Suppression for Gender-Nonconforming Adolescents*, 146 Pediatrics e2020010611, at 1 (2020).

[50] Riittakerttu Kaltiala-Heino et al., *Gender Dysphoria in Adolescence: Current Perspectives*, 9 Adolescent Health, Medicine & Therapeutics 31 (2018).

[51] James S. Morandini et al., *Shifts in Demographics and Mental Health Co-morbidities Among Gender Dysphoric Youth Referred to a Specialist Gender Dysphoria Service*, 27 Clinical Child Psychology & Psychiatry 480 (2021).

[52] Tracy Becerra-Culqui et al., *Mental Health of Transgender and Gender Nonconforming Youth Compared with Their Peers*, 141 Pediatrics e20173845 (2018).

[53] G. L. Witcomb et al., *Body Image Dissatisfaction and Eating-Related Psychopathology in Trans Individuals: A Matched Control Study*, 23 European Eating Disorders Review 287 (2015).

[54] Varun Warrier et al., *Elevated Rates of Autism, Other Neurodevelopmental and Psychiatric Diagnoses, and Autistic Traits in Transgender and Gender-Diverse Individuals*, 11 Nature Communications 3959 (2020).

[55] Kasia Kozlowska et al., *Attachment Patterns in Children and Adolescents with Gender Dysphoria*, 11 Frontiers in Psychology 582688 (2021). A group of fifty-seven children (twenty-four natal males and thirty-three natal females) was compared to children matched by age and sex from the community (comprising a nonclinical group) and a group of school-age children with mixed psychiatric disorders. All of the clinical group presented with gender dysphoria. In contrast to those in the nonclinical group, children with gender dysphoria were mostly classified as high risk in terms of their attachments to caregivers. The gender dysphoric children had a high rate of unresolved loss and trauma. The researchers found no differences between children with gender dysphoria and children with mixed psychiatric disorders in terms of their attachment patterns. See also Guido Giovanardi et al., *Attachment Patterns and Complex Trauma in a Sample of Adults Diagnosed with Gender Dysphoria*, 9 Frontiers in Psychology 60 (2018).

[56] Kasia Kozlowska et al., *Australian Children and Adolescents with Gender Dysphoria: Clinical Presentations and Challenges Experienced by a Multidisciplinary Team and Gender Service*, 1 Human Systems 70–95 (2021). The researchers reported on the circumstances of seventy-nine children and adolescents between the ages of eight and nearly sixteen seen at the gender clinic. The cohort had high rates of family conflict, relationship breakdown, parental mental illness, and child maltreatment. Only 38 percent lived in a nuclear family with both biological parents. Over 35 percent had behavioral disorders (including attention deficit-hyperactivity disorder). Nearly 14 percent were diagnosed as autistic. Nearly 40 percent reported child abuse or exposure to domestic violence, and in almost a fifth of the cohort, child protection services had been involved.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

higher rates of childhood sexual abuse.[57] Even clinicians who consider that there is a biological component to gender diversity nonetheless acknowledge the need for "multiple-level explanations where the social and the biological intersect."[58]

This evidence points to the need for psychotherapeutic treatment before embarking down the pathway of medical transition through cross-sex hormones and surgery, particularly for children and adolescents whose sense of identity is still developing. As Finnish gender dysphoria experts have advised, "for the majority of adolescent-onset cases, [gender dysphoria] presented in the context of severe mental disorders and general identity confusion. In such situations, appropriate treatment for psychiatric comorbidities may be warranted before conclusions regarding gender identity can be drawn. Gender-referred adolescents actually display psychopathology to the same extent as mental health–referred youth."[59]

This has led to serious controversies about the wisdom of an approach that requires clinicians simply to affirm the gender identity of a child or adolescent, leading to the prescription of puberty blockers and cross-sex hormones, without a full exploration of the causes of their gender incongruence that takes account of psychological issues. For example, in April 2021, the Karolinska Hospital in Stockholm, a leader in the field in Sweden, ceased to prescribe puberty blockers and cross-sex hormones for minors under age sixteen. Treatment of sixteen- and seventeen-year-olds is subject to very strict conditions and must occur in the context of a clinical trial.[60] Finland has also revised its practices, with psycho-social support to be the primary course of treatment for minors.[61] Leading clinicians involved in transgender care in the United States have similarly warned of the dangers of assisting young people with serious mental health issues to transition gender medically without a very careful exploration of the etiology of their gender incongruence.[62] In England, the Tavistock Clinic, which provided gender identity services for all of England and Wales, has been forced to close following criticisms by an independent review of its practices in providing puberty blockers and cross-sex hormones to children and adolescents.[63] The service was deemed unsafe.[64] Future provision of such services will be integrated with mental health services provided in regional centers.[65]

[57] Laura Baams, *Disparities for LGBTQ and Gender Nonconforming Adolescents*, 141 Pediatrics e20173004 (2018). For another analysis of the same dataset, see Nicole Rider et al., *Health and Care Utilization of Transgender and Gender Nonconforming Youth: A Population-Based Study*, 141 Pediatrics e20171683 (2018).

[58] Gary Butler et al., *Puberty Blocking in Gender Dysphoria—Suitable for All?*, 104 Archives of Disease in Childhood 509, 509 (2019).

[59] Kaltiala-Heino et al., *supra* note 50, at 38.

[60] *See* Astrid Lindgren Children's Hospital, *Policy Change Regarding Hormonal Treatment of Minors with Gender Dysphoria at Tema Barn*, https://segm.org/sites/default/files/Karolinska%20_Policy_Statement_English.pdf.

[61] *See* COHERE Finland, *Medical Treatment Methods for Dysphoria Associated with Variations in Gender Identity in Minors—Recommendation*, Palveluvalikoima, https://palveluvalikoima.fi/documents/1237350/22895008/Summary_minors_en.pdf/aaf9a6e7-b970-9de9-165c-abedfae46f2e/Summary_minors_en.pdf.

[62] *See, e.g.*, Laura Edwards-Leeper & Erica Anderson, *The Mental Health Establishment Is Failing Trans Kids*, Washington Post (Nov. 24 2021), https://www.washingtonpost.com/outlook/2021/11/24/trans-kids-therapy-psychologist; Erica Anderson, *When It Comes to Trans Youth, We're in Danger of Losing Our Way*, San Francisco Examiner (Jan. 3 2022), www.sfexaminer.com/opinion/are-we-seeing-a-phenomenon-of-trans-youth-social-contagion; Abigail Shrier, *Top Trans Doctors Blow the Whistle on "Sloppy" Care*, Common Sense (Oct. 4, 2021), https://bariweiss.substack.com/p/top-trans-doctors-blow-the-whistle.

[63] *See* the publications of the review conducted by Hilary Cass: Hilary Cass, *Publications*, The Cass Review, https://cass.independent-review.uk/publications/.

[64] *See* Jasmine Andersson & Andre Rhoden-Paul, *NHS to Close Tavistock Child Gender Identity Clinic*, BBC, https://www.bbc.com/news/uk-62335665.

[65] Hilary Cass, Letter to NHS England—July 2022, The Cass Review, *supra* note 63.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

Expert therapeutic counseling with gender dysphoric adolescents has been shown to be effective in assisting some young people to address issues of gender dysphoria without going down the path of cross-sex hormone treatment and surgical interventions.[66] The published standards of the World Professional Association for Transgender Health make it clear that gender dysphoria may be secondary to and better accounted for, by other diagnoses.[67]

As I discuss below, the recognition that presenting gender dysphoria could be secondary to other mental health problems, conflicts with a view that a person's stated gender identity should immediately be affirmed and he or she should thenceforth be treated as of the self-declared gender.

Whatever disagreements there may be in the medical and scientific literature about the etiology of gender dysphoria and modes of treatment, the traditional medical understanding of the condition does not challenge religious beliefs about sexual dimorphism. It assumes a binary idea of gender that nonetheless allows for the possibility that people of one biological sex may have an internal identification as really the other sex. This is reflected in the traditional language used by transsexuals about themselves. The various terms—*trans male*, *trans female*, *MtF*, *FtM*—all signify this acceptance of a natural divide into two sexes, a chasm that those who are transgender want to cross by passing as the other sex as far as medicine can make this possible. Those who understand their own transgender identification in this way do not necessarily see themselves as actually being or becoming the other gender, even after sexual reassignment surgery. Some transsexuals accept that their biological sex remains unchanged by the treatments undertaken to pass as the other sex and to relieve their distress.[68] In a study of 381 self-identified trans people in France who filled in an anonymous survey a few years ago, researchers found that only 75 percent of those who had undergone sex reassignment surgery considered themselves to have completed a transition to the other gender.[69]

Understanding gender dysphoria as a medical disorder, whatever its causes may be, should lead a person of faith to a compassionate response toward sufferers. It is consistent with a theological and scientific understanding of sexual dimorphism to accept that someone who has been diagnosed by well-qualified mental health professionals with severe and intractable gender dysphoria, and who has undergone cross-sex hormone therapy and surgery to transition to the gender presentation with which the person identifies to the extent possible, should be treated as functionally living as that gender. That does not mean that for all purposes they can or should be recognized as the gender with which they identify. As noted, there are issues in particular about women's sports and single-sex organizations or facilities, as well as theological issues such as preconditions for acceptance for ordination as a priest, which may make it difficult to accept a person for *all* intents and

[66] Anna Churcher Clarke & Anastassis Spiliadis, "*Taking the Lid Off the Box": The Value of Extended Clinical Assessment for Adolescents Presenting with Gender Identity Difficulties*, 24 Clinical Child Psychology & Psychiatry 338 (2019) (report from the Tavistock and Portman Gender Identity Development Service in London of twelve gender-dysphoric adolescents who initially sought medical transition but who decided against hormone treatment after counseling.)

[67] World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (version 8, 2022), section 63, https://www.wpath.org/soc8: "[I]t is critical to differentiate gender incongruence from specific mental health presentations, such as obsessions and compulsions, special interests in autism, rigid thinking, broader identity problems, parent/child interaction difficulties, severe developmental anxieties (e.g., fear of growing up and pubertal changes unrelated to gender identity), trauma, or psychotic thoughts."

[68] *See, e.g.*, Debbie Hayton, *Why I Became Trans*, Unherd (August 24, 2021), https://unherd.com/2021/08/why-i-became-trans.

[69] Alaine Giami & Emmanuelle Beaubatie, *Gender Identification and Sex Reassignment Surgery in the Trans Population: A Survey Study in France*, 43 Archives of Sexual Behavior 1491 (2014).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

purposes as their identified gender. However, it is arguably consistent with a faith-inspired compassion for recognition to go a long way.

Conversely, it may not be a kindness at all to treat a troubled young person who identifies as trans as if they are the gender with which they identify on the basis of nothing more than their internal sense that this is so. Identity exploration and experimentation are sometimes part of the journey of adolescence, and ideas about one's identity may for that reason be transient. That may well be relatively harmless if no lasting bodily changes are made. However, adolescents may be influenced by peers or social media to make more substantial changes to their lives. [70] It may be made to seem simple to come out as trans, pick a new name and pronouns, and socially transition to another gender identity. This makes it more likely that they will continue on the pathway toward cross-sex hormones and surgery, life-changing steps that they may later regret.[71]

Immediate affirmation of a new gender identity by well-meaning adults may confirm the young person in a fantasy that his or her serious mental health problems will be alleviated merely by taking on a new name and pronouns, and taking steps toward bodily modifications such as, for a female, taking testosterone and undergoing a double mastectomy. As expert gender clinicians have stressed, this drastic course ought not to be taken without the most careful exploration of the reasons for the presenting issue, including a thorough exploration of mental health problems. This may take years in complex cases involving psychiatric comorbidities.[72]

The idea that a young person should be allowed to transition socially based upon their self-declared gender identity, and that others should just affirm that new identity, has emerged from a relatively new movement that I call the *new transgender movement.* It rests upon a number of different ideas. It strongly rejects medical gatekeeping and the implicit pathologizing involved in the need for a medical diagnosis, and there are those who even reject the notion that humans are sexually dimorphic. These beliefs are arguably incompatible with traditional Christian teaching on the created order. These ideas also cause great difficulties for the interpretation of laws that prohibit gender identity discrimination.

The New Transgender Movement and the Rejection of Sexual Dimorphism

The new transgender movement, informed by queer theory, reflects ideas that are in radical discontinuity with classic medical understandings of the condition. It is based on a human rights model—the right of people to use whatever terminology about themselves that they consider best describes their inward reality. One of the features of it is a demand that people should be regarded as the sex with which they identify, irrespective of whether they have commenced a journey toward medically assisted transition, or ever intend to do so, and irrespective also of whether they have diagnosed gender dysphoria. Identification as being of the opposite sex is not the desired end of a journey of transition, but an immediate demand based upon the individual's dignity and human rights. This involves a radically different understanding of the issue of transgender identification.

[70] On social contagion as a factor in adolescent transgender identification, see Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, 13(8) Plos One e0202330 (2018, revised, 2019).

[71] Thomas Steensma et al., *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*, 52 Journal of The American Academy of Child & Adolescent Psychiatry 582 (2013).

[72] Edwards-Leeper & Anderson, *supra* note 62.

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Gender as Personal Discovery

In this new way of thinking, gender identification is not a matter of medical diagnosis, but of personal discovery. An English charity, the Gender Identity Research & Education Society, seeks to communicate this idea to young children through a penguin story. The penguin parent tells the infant: "We can't always tell if you're a boy or a girl." The parents encourage the infant penguin to tell them when the infant is ready.[73] Helen Joyce has described this idea that everyone has an innate gender identity that may or may not be concordant with biological sex, as a belief in having a "sexed soul."[74] It is a quasi-religious notion.

Furthermore, this innate gender is the higher truth in terms of who a person really is. Because the term *gender* now describes the soul rather than the body, it is not necessarily discernible by a person's external appearance or name. It follows that in a society that is sensitive to the gulf between natal sex and gender identity, it is appropriate to indicate one's own pronouns on the bottom of an email signature block, and to invite people to say what their pronouns are in a round of introductions, for example in the first seminar of a university course.[75] Those preferred pronouns may not be hitherto recognized words in the English language.[76]

Assigned at Birth

Related to this idea that gender is internally discerned is the language of gender being assigned at birth, which has become mainstream in the academic literature on transgender issues[77] and in the popular literature of the transgender movement. While the terms *biological sex* or *natal sex* would be much more readily understandable, they reference an objective concept of gender, a notion challenged in queer theory.[78] Instead, the idea that sex is assigned by someone at birth assumes the exercise of a judgment—one that is fallible. At the very least, the assignation of sex at birth, based upon observation of the genitalia, is provisional.

This view makes genitalia irrelevant to the ascertainment of gender; but it also assumes that there is a *correct* account of the gender of a person—just not one defined by genitalia and reproductive organs. There are those who now argue that recording sex on birth certificates is to be discouraged.[79] Swiss doctoral student Lena Holzer, for example, claims that legally assigning a gender or sex after birth has "intrinsically violent" effects on

[73] Stephanie Davies-Arai & Susan Matthews, *Queering the Curriculum: Creating Gendered Subjectivity in Resources for Schools*, *in* Inventing Transgender Children and Young People 199, 201 (Michele Moore & Heather Brunskell-Evans eds., 2019).

[74] Helen Joyce, Trans: When Ideology Meets Reality 2 (2021).

[75] Marcos Norris & Andrew Welch, *Gender Pronoun Use in the University Classroom: A Post-humanist Perspective*, 5 Transformation Higher Education 79 (2020).

[76] Robin Zembroff & Daniel Wodak, *He/She/They/Ze*, 5 Ergo 371 (2018).

[77] *See, e.g.*, Damien Riggs & Clemence Due, *Mapping the Health Experiences of Australians Who Were Female Assigned at Birth but Who Now Identify with a Different Gender Identity*, 18 Lambda Nordica 54 (2013).

[78] Judith Butler, Gender Trouble 7 (1990) ("If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all."). For an accessible explanation of Butler's theory, *see* Thekla Morgenroth & Michelle Ryan, *Gender Trouble in Social Psychology: How Can Butler's Work Inform Experimental Social Psychologists' Conceptualization of Gender?*, 9 Frontiers in Psychology 1320 (2018).

[79] *See, e.g.*, Vadim Shteyler et al., *Failed Assignments—Rethinking Sex Designations on Birth Certificates*, 383 New England Journal of Medicine 2399 (2020).

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bodies.[80] This could be avoided, she argues, by eliminating the public registration of gender or sex.

Medical Gatekeeping

Because, on this view, gender is a matter of subjective identification, being transgender is not a matter for medical diagnosis, and acceptance as transgender should not be subject to medical gatekeeping. A clear statement of this can be found in the Yogyakarta Principles, drawn up by a group of nongovernmental human rights specialists in 2006.[81] Principle 3 states, "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity." Principle 18, under the heading "medical abuses" also states that gender identity is not a matter for medical treatment: "Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed."[82]

For that reason, on this view, states must ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, regard gender identity as a medical condition to be treated. This view, of course, sits awkwardly with an insistence that cross-hormone treatment and gender reassignment surgery should be paid for by medical insurers or under government-funded health services.

Rejection of the Gender Binary

This new view of gender, influenced by queer theory, emphatically rejects the idea that one must be either male or female. A person may feel neither male nor female, and so may identify as nonbinary or agender; or they may use some other term that best reflects that inward sense of who they are. Belief that one can be nonbinary is necessarily inconsistent with the medical model that involves assisting people to transition across the binary divide by taking on many of the physical characteristics of the opposite sex. There is no anatomical presentation of a nonbinary gender identity to which a person could be medically assisted to transition.[83] Consequently, the rejection of sexual dimorphism presses against some hard barriers when it comes to medical treatment.[84]

[80] Lena Holzer, *Sexually Dimorphic Bodies: A Production of Birth Certificates*, 45 Australian Feminist Law Journal 91, at 91 (2019). This view that the observed sex of a child assigned at birth is no more than provisional would appear to lie behind the decision of the Tasmanian Parliament to make the recording of sex on birth certificates optional: Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (Tas.).

[81] The Yogyakarta Principles, https://yogyakartaprinciples.org (last accessed Aug. 30, 2022). *See also* International Service for Human Rights and ARC International, *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (November 2017).

[82] Yogyakarta Principles, *supra* note 81.

[83] Clinicians and experts in bioethics debated in the leading American journal, *Pediatrics*, what to do with a natal male teenager who had been on puberty blocking drugs for some time, preventing normal sexual development, and who now identifies as neither male nor female. Should clinicians support his desire to remain on puberty blockers until he is eighteen and beyond, despite known and serious medical consequences including lack of normal physical development and long-term effects on bone density? This hypothetical was based upon a composite of several real cases: Ken Pang et al., *Long-Term Puberty Suppression for a Nonbinary Teenager*, 145 Pediatrics e20191606 (2020).

[84] Beth Clarke et al., *Non-binary Youth: Access to Gender-Affirming Primary Health Care*, 19 International Journal of Transgenderism 158 (2018).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

Gender Is Fluid

Another commonly expressed idea in the new transgender movement is that gender is fluid, and gender identity may change over time. Clinicians from four gender identity clinics in the United States explain their framework for treatment, which involves affirming the child or young person's gender identity. They believe that "gender may be fluid, and is not binary, both at a particular time and if and when it changes within an individual across time … if there is pathology, it more often stems from cultural reactions (e.g., transphobia, homophobia, sexism) rather than from within the child."[85]

Consistently with a human rights model, they go on to explain their approach in terms of children's rights: "In this model, gender health is defined as a child's opportunity to live in the gender that feels most real or comfortable to that child and to express that gender with freedom from restriction, aspersion, or rejection."[86]

The idea that gender is fluid is difficult to reconcile with highly invasive medical treatment to align physical characteristics with inward identity. For if gender is fluid, it may change over time, either from or toward, an understanding that aligns with biological sex. Canadian legal scholar and transgender theorist, Florence Ashley has sought to bridge the gulf between her idea that gender is fluid and her advocacy for adolescents to be given various forms of medical treatment if they identify as transgender. She writes that "[G]ender is tentative: it is always provisional and improvisational. If that is so, then transitioning, both socially and medically, is an integral part of exploring ourselves as autonomous gendered beings."[87] This exploration, in her view, should be supported by medical practitioners irrespective of the fact that hormonal treatment and surgery may have irreversible effects.

The extreme version of this position is that having medical treatment for gender dysphoria is a human right irrespective of whether it will actually improve the life of the person demanding it. Thus transgender theorist Andrea Long Chu could write in an opinion piece in the *New York Times*: "Next Thursday, I will get a vagina. The procedure will last around six hours, and I will be in recovery for at least three months. Until the day I die, my body will regard the vagina as a wound; as a result, it will require regular, painful attention to maintain. This is what I want, but there is no guarantee it will make me happier. In fact, I don't expect it to. That shouldn't disqualify me from getting it."[88]

She went on to say that taking cross-sex hormones had made her suicidal. Nonetheless, she considered surgery should be available on demand. The basis for surgery is not that it will necessarily ameliorate her distress, but simply that she chooses it.

The need for assistance from the medical profession in performing surgery illustrates how a claim by one person to be free to pursue their own truth may require the co-operation of others, some of whom may not share the person's belief about themselves, or who may have ethical objections to providing treatment. Human rights are little exercised on desert islands.

It will, perhaps, be apparent that in this belief system there is not a necessary connection between the medical model of transgender identification that relies upon a diagnosis of gender dysphoria and medical treatment to relieve suffering, and the concept of transgender or nonbinary identification as an exploration of one's true identity. One of the reasons that Ashley, for example, gives for rejecting medical gatekeeping is that the motivation for taking cross-sex hormones might be gender euphoria, that is, delight at the prospect of

[85] Marco A. Hidalgo et al., *The Gender Affirmative Model: What We Know and What We Aim to Learn*, 56 Human Development 285, 285 (2013).

[86] *Id.* at 286.

[87] Florence Ashley, *Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth*, 24 Clinical Child Psychology & Psychiatry 223, 224 (2019).

[88] Andrea Long Chu, *My New Vagina Won't Make Me Happy—And It Shouldn't Have To*, N.Y. Times (Nov. 23, 2018), https://www.nytimes.com/2018/11/24/opinion/sunday/vaginoplasty-transgender-medicine.html.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

having features associated with the other gender, rather than distress about their own sexed body.[89] Another reason is creative transfiguration, which sees the body as a "gendered art piece that can be made ours through transition-related interventions."[90]

Affirming Gender Identity

The insistence that transgender identification must not be pathologized or treated leads inevitably to the notion that gender identity is to be affirmed and not questioned. In Australia, Tasmanian legislation allows the Registrar for Births, Deaths and Marriages to require particular documents or information from a person who applies to change his or her gender, as long as the requirement is "reasonable."[91] The one document that the Registrar is not legally allowed to require is "a medical certificate, or other medical document, in relation to the sex, sexual characteristics or gender of the person." [92] In Victoria, government-run schools are under a positive duty to affirm a child's chosen gender identity and to treat the child as the gender with which he or she now identifies. There is no need for any medical diagnosis or professional therapeutic support, although students might be referred for such support. A young person may even transition at school without parental consent or medical support, if the young person is deemed sufficiently mature to make his or her own decision.[93]

Conversion Therapy Should Be Criminalized

Advocates in some jurisdictions have argued that not only is gender identity to be affirmed and not questioned, but any treatment program to change or suppress gender identity should be forbidden.

The vehicle for this is to include gender identity in so-called conversion therapy laws. Such laws have spread throughout the United States[94] and to other countries. The justification given for them is the experience of homosexuals who were subjected to unethical and futile therapies in the past to try to change their sexual orientation.[95] In the United States, some of these laws are limited to prohibiting therapy to change the sexual orientation of minors;[96] but at least some jurisdictions in the United States and elsewhere have extended the scope to include therapies that aim to change or suppress gender identity.

[89] Florence Ashley, *Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanising*, 45 Journal of Medical Ethics 480 (2019).

[90] *Id.* at 481.

[91] *Births, Deaths and Marriages Registration Act 1999* (Tas.) s.28A.

[92] *Id.*

[93] *See* Victorian Government, *LGBTIQ Student Support*, https://www2.education.vic.gov.au/pal/lgbtiq-student-support/policy. *See also* Department for Education (South Australia), *Gender Diverse and Intersex Children and Young People Support*, https://www.education.sa.gov.au/doc/gender-diverse-and-intersex-children-and-young-people-support-procedure. Contrast Queensland, which gives school Principals greater freedom to exercise professional judgment: Queensland Department of Education, *Diversity in Queensland Schools—Information for Principals*, https://education.qld.gov.au/student/Documents/diversity-information-for-principals.pdf.

[94] Jack Drescher et al., *The Growing Regulation of Conversion Therapy*, 102 Journal of Medical Regulation 7 (2016). *See also* https://www.lgbtmap.org/equality-maps/conversion_therapy: As of November 2021, laws in twenty states and the District of Columbia ban conversion therapy for minors. In another five states and one territory, there is a partial conversion therapy ban for minors.

[95] Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009).

[96] *See, e.g.,* California Business and Professions Code § 865 (it is unprofessional conduct to engage in sexual orientation change efforts with a minor under 18). Illinois: Youth Mental Health Protection Act (2015), Public Act 99-0411 (refers to protecting lesbian, gay, bisexual, and transgender youth but limited to sexual orientation change efforts).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

For example, a law passed in Victoria, Australia in 2021 makes it a criminal offense, if certain conditions are satisfied, [97] for someone to provide therapy,[98] or even to pray with another person,[99] to change or suppress their sexual orientation or gender identity. The penalty is up to ten years in jail. The legislation also gives coercive powers to the state's Equal Opportunity and Human Rights Commission to investigate practitioners and to enforce undertakings not to engage in prohibited practices.

The law is applicable whatever the age of the person and whether or not the person consents—or indeed actively seeks such therapy or spiritual support. Consequently, the law makes it unlawful to pray with or provide counseling even to a fifty-year-old who seeks it, if the purpose is to change or suppress the person's sexual orientation or gender identity.

The law defines conversion practices in such a way that therapy that is supportive of or affirms a person's gender identity, including assisting a person to undergo a gender transition is allowed, but therapy that assists a person to become more comfortable with his or her natal sex is likely to be unlawful. It will only be lawful if it is, in the health service provider's reasonable professional judgement, "necessary to provide a health service."[100] Necessity constitutes a somewhat narrow defense.[101]

Queensland and the Australian Capital Territory, where Canberra is located, also criminalize the provision of therapy to change or suppress a person's gender identity. As in Victoria, the law is applicable irrespective of the person's age and whether he or she seeks such therapy.[102]

Perhaps the most extreme of these laws is the one passed in Canada at the end of 2021. The law makes it a criminal offense punishable with imprisonment for up to five years for a person to knowingly cause another person to undergo conversion therapy, including by providing conversion therapy to that other person.[103] As in Australia, conversion therapy is widely defined.[104] It includes not only a practice designed to change a person's sexual orientation, but also to repress or reduce nonheterosexual attraction or sexual behavior. A practice designed to "change a person's gender identity to cisgender" is likewise prohibited, as is seeking to repress a person's non-cisgender gender identity or to repress or reduce a person's gender expression that does not conform to the sex assigned to the person at birth. The consent of the patient is irrelevant. There are no religious exemptions. Nor, in contrast to the Australian laws, are there explicit carve-outs for psychologists or psychiatrists who provide therapy that they consider, in their professional judgment, to be necessary, although there is a clause to the effect that therapy may be lawful if it relates to the

[97] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic.). A criminal offense is committed if three conditions are satisfied. First, the defendant intentionally engages in the prohibited change or suppression practice. Second, injury is caused to the patient. Third, the defendant is negligent as to whether the practice will cause injury to the patient. Injury is defined (in the *Crimes Act 1958* (Vic.) s.15) as physical injury or harm to mental health, whether temporary or permanent.

[98] The Act, s.5(3) is explicit in stating that "a psychiatry or psychotherapy consultation, treatment or therapy" falls within the definition of a prohibited "change or suppression practice."

[99] *Id.* The same subsection states that "carrying out a religious practice, including but not limited to, a prayer based practice" falls within the definition of a prohibited "change or suppression practice."

[100] *Id.* at s.5(2)(b).

[101] Few therapeutic practices in psychiatry or psychotherapy could be described as "necessary" other than to provide medication for a mental disorder. Therapy might help but may not be necessary. See further, Patrick Parkinson & Philip Morris, *Psychiatry, Psychotherapy and the Criminalisation of "Conversion Therapy" in Australia*, 29 Australian Psychiatry 409 (2021).

[102] For an explanation of the similarities and differences between the law in the three jurisdictions, see *id.*

[103] Bill C-4 (2021) (amending the Criminal Code; assented to on December 8th 2021).

[104] Criminal Code, s. 320.101 (as introduced by Bill C-4).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

"exploration or development of an integrated personal identity" and is not premised on the notion that a particular gender identity is to be preferred.

All these laws thus assume that gender identity is something innate and immutable. This is difficult to reconcile with belief that gender is fluid or socially constructed. Victoria allows a change to one's birth certificate on the basis only of self-identification. The chosen sex (this is the word used in the statute) need be neither male nor female. Recognizing a new gender identity by making changes to the birth certificate implies that the birth certificate, in recording natal sex, was "wrong" about the person's real sex. The process is called an acknowledgement of sex.[105] Yet it is possible for a person constantly to change their gender identity legally. The only constraint is that they cannot change their birth certificate more than once per year.[106] This sits on the statute book alongside the state's draconian ban on prayer or therapy to help a person become more comfortable with his or her natal sex.

This illustrates how legislation achieved through the advocacy of the transgender movement does not necessarily convey a consistent understanding of gender. On the one hand, it is an identity that exists in a person from birth and awaits discovery when they are old enough. On the other, it is socially constructed. On the one hand, gender is fluid, but on the other, it is immutable.

The Transgender Movement and the Conflict with Religious Beliefs

The transgender movement promotes an alternative belief system. This was recognized even by a leading clinician at the Tavistock gender clinic in London, who acknowledged that different viewpoints on transgender identification are, in their nature, political, ideological, ethical, or value-based.[107]

Neither the belief that gender identity is different from natal sex nor the belief that gender is fluid can be validated or falsified by science. The first is essentially a belief about subjective understanding versus objective reality, and about the nature of human sexual identity. The essence of who I am is who I consider myself to be rather than how, in a physical sense, I am made. The idea that gender is fluid is also a belief. It begins from the premise that gender is something different from biological sex. Previous generations would have regarded the two words as interchangeable when describing the binary nature of humankind.

Rejecting a Different Belief System

The insistence that there should be an exemption for religious organizations from laws that prohibit discrimination on the basis of gender identity is not based upon a claimed right to discriminate against individuals who suffer from a medically diagnosed problem or disorder, but relies instead upon the right of religious bodies to reject a belief system that is inconsistent with its beliefs. This is perhaps what Pope Francis meant when he said in *Amoris Laetitia*: "It is one thing to be understanding of human weakness and the complexities of life, and another to accept ideologies that attempt to sunder what are inseparable aspects of reality. Let us not fall into the sin of trying to replace the Creator. We are creatures, and not omnipotent. Creation is prior to us and must be received as a gift. At the same time, we

[105] *Births, Deaths and Marriages Registration Act 1996* (Vic.), heading to Part 4A.

[106] *Id.* at s.30A(1)(c).

[107] Bernadette Wren, *Ethical Issues Arising in the Provision of Medical Interventions for Gender Diverse Children and Adolescents*, 24 Clinical Child Psychology & Psychiatry 203 (2019).

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

are called to protect our humanity, and this means, in the first place, accepting it and respecting it as it was created."[108]

The Synod of Bishops on the family likewise rejected the ideology of the new transgender movement:

> Today, a very important cultural challenge is posed by "gender" ideology which denies the difference and reciprocity in nature of a man and a woman and envisages a society without gender differences, thereby removing the anthropological foundation of the family. This ideology leads to educational programmes and legislative guidelines which promote a personal identity and emotional intimacy radically separated from the biological difference between male and female. Consequently, human identity becomes the choice of the individual, which can also change over time. According to our faith, the difference between the sexes bears in itself the image and likeness of God (*Gen* 1:26–27).[109]

The Vatican's Congregation for Catholic Education has taken up this approach, affirming the complementarity of the two sexes as fundamental to the created order, while being open to dialogue on gender issues, and in particular, to research on "the ways in which sexual difference between men and women is lived out in a variety of cultures."[110]

The Anglican Diocese of Sydney, which is known for its commitment to a conservative evangelical theology,[111] has also explored the issue.[112] As do Pope Francis and the Catholic authorities, the Diocese begins its analysis with the biblical conviction that there are only two sexes, male and female, for "male and female He created them."[113] In Jesus's teaching, this complementarity and interdependence of the sexes is the basis of marriage.[114] Such a view presupposes that sex is binary and based on reproductive function. On this view, gender, as distinct from sex, is a completely alien concept within the Christian tradition and results from a different use of the term *gender* linguistically.[115] Furthermore, the theological premise that God created us male and female necessitates the rejection of the idea that gender is fluid or that someone can be nonbinary.

The Diocese goes on to argue that such a belief that God created us male or female does not mean that any particular way of living as a man or as a woman is divinely ordained. That is, the Bible does not teach or affirm particular gender stereotypes.[116] Nor is it to deny in any way the spectrum of possibilities of what it means to be male or female. A Christian understanding of God is informed by the understanding that all of us are made in the image of God and that image somehow encompasses both male and female.[117]

Furthermore, the Diocese argues that a belief that there are only two sexes does not in any way exclude recognition that a very small proportion of babies are born with ambiguous genitalia,[118] or have hormonal or chromosomal features that differ from the norms of what

[108] Francis, *supra* note 33, at 56.

[109] Relatio Finalis, *supra* note 32, at 58.

[110] Congregation for Catholic Education, "Male and Female He Created Them": Towards a Path of Dialogue on the Question of Gender Theory in Education 5 (2019), https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20190202_maschio-e-femmina_en.pdf.

[111] *See* Kenneth Cable & Stephen Judd, Sydney Anglicans: A History of the Diocese (1987).

[112] Social Issues Committee, Anglican Diocese of Sydney, Gender Identity (2017).

[113] *Genesis* 1:27; 5:2.

[114] *Mark* 10:6–7; *Matthew* 19:4–5.

[115] Anglican Diocese of Sydney, *supra* note 112, at 5–8, 13.

[116] *Id.* at 9–11.

[117] *Genesis* 1:27; 9:6.

[118] This is possibly how Jesus' expression in *Matthew* 19:12 about being "born eunuchs" should now be understood.

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it is to be male or female.[119] However, these variations do not comprise a third sex. It acknowledges the many challenges for those who suffer gender incongruence, experienced also by others with disorders of self and body,[120] but it considers that "Any Christian response to gender identity issues will seek to restore and preserve the integrity of body and self, and honour and protect the biologically sexed body that God has given. Significantly, in Christian medical ethics, the ultimate goal is the wholeness and welfare of the whole person: body, mind and spirit. Hence, any treatment of gender dysphoria that seeks to relieve *mental* suffering by inflicting harm on an otherwise healthy *body* cannot be deemed ethical."[121]

If laws treat gender identity as a protected attribute in discrimination law, there is a compelling case, at least, for religious exemptions on the basis that the state must take a position of creedal neutrality between different belief systems and worldviews. Religious exemptions recognize the rights of those of religious faith to hold a different view that is grounded in their doctrines and beliefs.

However, Christian teaching does not support mistreatment of those who identify as having a different gender identity to their natal sex. As the Sydney Anglican Diocesan committee explained: "Christians are to seek the good of all people (Galatians 6:10), and uphold the dignity of all those made in the image of God (cf. Genesis 9:5–6). In particular, this calls for active love and care of the vulnerable. Accordingly, Christians should be concerned for the welfare and best treatment of all people with gender identity issues, not just Christians. We are to show practical love and care of children and adults so affected, and of their families, and condemn all bullying, ridicule, mistreatment, and abuse of gender non-conforming people."[122] A similar view is put forward by the Congregation for Catholic Education. It finds common ground with advocates of new gender theories by condemning "unjust discrimination."[123]

The Distinction between Adverse Treatment and Affirmation

It follows from this analysis that if the law provides only that people who have a gender identity different to their natal sex should not suffer ill-treatment as a consequence, then there is no legitimate religious objection to such a law. However, there are greater issues at stake in the contention that people should be required by law to accept someone's self-declared gender identity, particularly if they have not undergone any form of medical transition. It is one thing to ask me to respect your beliefs about yourself. It is another to ask me to act toward you as if I share your beliefs.

Self-Identification Laws and Validation by Others

The new transgender movement seeks legal recognition for all purposes of those who self-identify as transgender, gender diverse, nonbinary, agender, or who adopt some other terminology for their beliefs about themselves. This is to the detriment of many

[119] Anglican Diocese of Sydney, *supra* note 112, at 9.

[120] For example, anorexia nervosa, body integrity identity disorder, and body dysmorphic disorder. *Id.* at 10.

[121] *Id.* at 11. On this view, Christians should no more be involved in providing cross-sex hormones and surgery than in elective abortions. However, that does not necessarily mean that Christians who hold such a view would have a conscientious objection to treating someone who has completed sex reassignment surgery as functionally living in the opposite sex, at least for most purposes. These are issues on which Christians might differ.

[122] Anglican Diocese of Sydney, *supra* note 112, at 11.

[123] Congregation for Catholic Education, *supra* note 110, at 15.

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transsexuals, whose interests are conflated with that of a larger number of people who hold quasi-religious beliefs that many other people simply cannot share.

These self-identification laws are relatively unobjectionable if all they do is to allow a self-declared gender identity on a driving license or other official document. However, as Helen Joyce has pointed out, what the new transgender movement pushes for is not only that people should be allowed to self-identify as transgender or nonbinary or to use some other descriptor, but that others be compelled to accept their beliefs about themselves. As she writes:

> A liberal, secular society can accommodate many subjective belief systems, even mutually contradictory ones … The other belief systems accommodated in modern democracies are, by and large, held privately. You can subscribe to the doctrine of reincarnation or resurrection alongside fellow believers, or on your own. Gender self-identification, however, is a demand for validation *by others.* The label is a misnomer. It is actually about requiring others to identify you as a member of the sex you proclaim. Since evolution has equipped humans with the ability to recognise other people's sex, almost instantaneously and with exquisite accuracy, very few trans people "pass" as their desired sex. And so to see them as that sex, everyone else must discount what their senses are telling them.[124]

If laws that prohibit discrimination on the basis of gender identity are understood as requiring others, under legal coercion, to accept the person's self-declared gender identity, then it creates a clash with other human rights. For the most part, these clashes adversely affect women and girls. The lesbian group that is unwilling to admit biological males to its association; the women's gym that wants to preserve its all-female status for precisely the reasons that it was established as a single-sex entity; the teenage girls who decide they will not go to summer camp because they are too embarrassed or "weirded out" by the idea that the boy they have known for years as Tom is now to be known as Tina and wants to share their dormitory, shower units, and changing rooms; the girls who love to play tennis at a competitive level and now find themselves playing against someone who has had all the advantages of pubertal development as male before adopting a female identification. No amount of demonizing or denunciation of people who raise these concerns will make these issues go away. Fortunately, acceptance of trans males creates fewer conflicts between human rights.

How can this tension between rights be resolved in the law? This brings me back to the fundamental distinctions made above. The law in many jurisdictions has found ways to prohibit gender identity discrimination while not abolishing all distinctions between sex and gender identity. Prohibitions on gender identity discrimination can coexist with limitations being placed on the duty of others to accept that person's self-declared gender identity. That can be done, for example, by limiting the duty to recognize another person's change of sex identification to those who have gone through certified medical sex reassignment procedures.[125] People of faith who understand and acknowledge the distress of those

[124] Joyce, *supra* note 74, at 4.

[125] The law in New South Wales, Australia, attempts to find this kind of balance. It makes a clear distinction between treating someone differently on the basis of their gender identity, and treating them as the gender with which they identify. Part 3A of the *Anti-Discrimination Act 1977* (NSW) makes it unlawful to discriminate on the grounds of transgender status. However, a distinction is drawn between 'recognized' transgender status and unrecognized status. Recognition is where the birth certificate has been formally changed. This requires an application by someone over age eighteen, supported by two doctors who certify that the person has undergone a sex affirmation procedure: *Births, Deaths and Marriages Registration Act 1995* (NSW) s.32C. It is unlawful to treat an

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who suffer severe and persistent gender dysphoria, may well be able to accept that those who have gone to the lengths of having sex reassignment surgery, and who no longer have genitalia consistent with their natal sex, should be accepted as functionally living in their adopted sex. This recognition may not be for all purposes, but can be for most, and does not involve an acceptance that God created us other than as a sexually dimorphic species. Religious exemptions can be narrowly drawn.

Reconciling the tension between different human rights can also be achieved by limiting the *scope* of the duty to recognize. Those who identify as transgender can be protected from adverse treatment without necessarily giving them a right to participate in women's sports' teams or to utilize accommodation reserved for a single sex. The effect of such limitations in the scope of the duty to recognize is not to *prohibit* trans females from participation in women's sports teams or from female single sex accommodation. It leaves a zone of choice for the sports team or the manager of the accommodation complex to determine the issue as they see fit, and perhaps on a case-by-case basis.

This approach is evident already in U.S. law. Massachusetts is one of the states that compels providers of public accommodations to allow access to single sex facilities by persons based upon their gender identity. The law provides, "An owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement that lawfully segregates or separates access to such place of public accommodation, or a portion of such place of public accommodation, based on a person's sex shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof consistent with the person's gender identity."[126]

However, the law in Massachusetts exempts certain establishments that are single-sex. So for example, women's gyms that are "established for the sole purpose of promoting and maintaining physical and mental health through physical exercise and instruction," are exempt if they do not receive funds from a government source.[127] Likewise, the law allows for single-sex undergraduate colleges.[128] That leaves room for choice in relation to gender identity too. Wellesley and Smith, both historic women's colleges, have chosen to admit males who self-identify as females or females who identify as nonbinary.[129] The law neither compels them to do so nor compels them not to do so.

The distinction between prohibiting adverse treatment of people because of their gender identity and not requiring someone to accept the gender with which a person identifies where biological sex matters, is fundamental to appropriate compromises between the demands of the new transgender movement and those who assert competing human rights.

aggrieved person, being a recognized transgender person, as being of the person's former sex: *Anti-Discrimination Act 1977* (NSW), s.38B(1)(c). That is as far as the law goes to put the coercive powers of the state behind misgendering. There is no right for an unrecognized transgender person to be treated as being of the opposite sex, but of course, people are free to do so.

[126] Massachusetts General Laws ch. 272, § 92A.

[127] *Id.*

[128] See Massachusetts Fair Educational Practices Law: Massachusetts General Laws ch. 151C. Sex is not included among the grounds of prohibited discrimination (§ 2(a)), except for graduate programs (§ 2(d)).

[129] Wellesley College, in Massachusetts, states that it "will consider for admission any applicant who lives as a woman and consistently identifies as a woman. Therefore, candidates assigned male at birth who identify as women are eligible to apply for admission. The College also accepts applications from those who were assigned female at birth, identify as non-binary, and who feel they belong in our community of women. Those assigned female at birth who identify as men are not eligible for consideration for admission." *Mission and Gender Policy*, Wellesley College, https://www.wellesley.edu/news/gender-policy. *See also Gender Identity & Expression*, Smith College, Mass., https://www.smith.edu/about-smith/equity-inclusion/gender-identity-expression.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

The Case for Religious Exemptions Revisited

The distinction between discrimination against someone because of their gender identity, and not being required to accept that gender identity for the purpose of admission, for example, to single sex organizations, educational institutions, and facilities, is central to the resolution of any conflict between religious freedom and the rights of those who assert a gender identity, of whatever kind, that is divergent from natal sex. It provides a rational basis for determining the scope of religious exemptions.

Religious organizations need the same freedom to recognize a person's self-declared gender identity or not to recognize it, as do single sex schools and colleges, women's gyms, and other single sex facilities. By allowing this zone of choice, religious organizations are not compelled to act contrary to their beliefs, and can exercise their best judgment about how to respond pastorally to the person who now declares a different gender identity. A religious school should not be compelled to accept that Tom has now become Tina and has a right to wear the girls' uniform, to compete in the school's tennis tournament, or to sleep in the girls' sleeping accommodation on the school camp. Similarly, it should not be compelled, as a matter of law, to accept that a teenage girl now must be accepted as male or that she should now be treated as nonbinary and therefore exempt from participation in the girls' sports programs or other single-sex programs. This allows scope for the school to exercise pastoral care in the best way it considers appropriate. This may involve some accommodation of the young person's gender identity. The school might request advice from a treating psychologist or psychiatrist, or insist that before facilitating social transition, the school should wait to see how persistent this new gender identification is. If parent or child is not happy with the school's approach, they may have other options for schooling.

Debates about the reach of antidiscrimination laws and the extent to which they should compel acceptance of a self-declared gender identity are taking place against a backdrop of huge medical and scientific debate about the wisdom of placing children and young people too quickly on a pathway of puberty blockers and cross-sex hormones [130] and the efficacy of this form of treatment.[131] There are also issues about capacity to consent, particularly for adolescents who may not have the maturity and life experience to make their own decisions on life-altering and irreversible medical interventions.[132] Central to this debate is whether it

[130] *See, e.g.*, Jiska Ristori and Thomas Steensma, *Gender Dysphoria in Childhood*, 28 International Review of Psychiatry 13 (2016); Stephen Levine, *Ethical Concerns about Emerging Treatment Paradigms for Gender Dysphoria*, 44 Journal of Sex & Marital Therapy 29 (2018); Kenneth Zucker, *Adolescents with Gender Dysphoria: Reflections on Some Contemporary Clinical and Research Issues*, 48 Archives of Sexual Behavior 1983 (2019). *See also* the work of the Society for Evidence-based Gender Medicine, www.segm.org.

[131] In a review of the evidence published in March 2021, the National Institute for Health and Care Excellence in England concluded that the evidence for the benefit of puberty blockers on gender dysphoria, mental health, and quality of life provided a very low level of certainty: National Institute for Health and Care Excellence, Evidence Review: Gonadotrophin Releasing Hormone Analogues for Children and Adolescents with Gender Dysphoria (2021). It reached similar conclusions in relation to cross-sex hormone treatment for adolescents in terms of impact on body image, psychosocial impact, engagement with health care services, and satisfaction with surgery and detransition: National Institute for Health and Care Excellence, Evidence Review: Gender-Affirming Hormones for Children and Adolescents with Gender Dysphoria (2021). These reviews are available at https://cass.independent-review.uk/nice-evidence-reviews/.

[132] The capacity of adolescents to consent to puberty blockers has emerged in Britain as a significant legal issue. In Bell v. Tavistock and Portman NHS Foundation Trust [2020] EWHC (Admin) 3274 the High Court, in a panel consisting of three senior judges, held that it is very doubtful that those under age sixteen are competent to make decisions about puberty blockers and advised clinicians to seek court approval for treatment of sixteen- and seventeen-year-olds. On appeal, the decision was overturned on the basis that it was for doctors to assess competence: Bell v. Tavistock and Portman NHS Foundation Trust [2021] EWCA (Civ) 1363. However, the Court of Appeal was at pains to stress how cautious doctors should be: "Clinicians will inevitably take great care before recommending treatment to a child and be astute to ensure that the consent obtained from both child and parents is properly informed by the advantages and disadvantages of the proposed course of treatment and in the light of

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

is wise so readily to affirm a child or adolescent's gender identity when it is discordant with natal sex, given the growing number of young women in particular, who are detransitioning after making life-changing alterations to their bodies that they now deeply regret.[133]

If laws are carefully drafted to make the distinction between adverse treatment (for example, expulsion of the young person from the school) and some kind of duty to accept instant changes of gender identity, then this provides a way to accommodate religious freedom in a manner that represents an appropriate compromise with the interests of those who identify as transgender. That leaves the issue of acceptance and affirmation as an unregulated matter for choice governed by the laws of courtesy and politeness rather than invoking the coercive powers of the state.

Where the law imposes no obligation on person A to recognize person B's self-declared gender identity, but no inhibition from doing so either, it maximizes the freedom that people ought to have to choose for themselves whether to affirm a person's truth about themselves if their own worldview or understanding of the issues makes it difficult for them to do so. This is the minimum requirement for the law to exhibit creedal neutrality where gender identity comes into conflict with religious freedom.

The assertion of religious freedom on such matters is also a claim of right to speak one's own language concerning what it means to say someone is male or female, rather than being forced to accept someone else's language about themselves or others.

Conclusion

There is a quite fundamental difference between treating a person adversely because of their gender identity, for example by bullying, ridicule, or mistreatment and declining necessarily to accept that a person's self-identification as a different gender should be determinative of how others should respond to them. From a faith perspective, the former can never be condoned. We live in a multicultural society in which people have all kinds of beliefs, religious and nonreligious. Clearly, disagreement about whether gender is fluid, whether sex is merely assigned at birth or observed from the genitalia, or arguments about language such as whether sex and gender should be so sharply differentiated, cannot justify adverse treatment of people who identify as transgender, gender diverse, or nonbinary.

However, states must be neutral between different beliefs, and legislatures must strive for reasonable compromises between the claims of those who assert different human rights. People of faith have long been dissenters from prevailing secular worldviews. Being grounded in beliefs that are ancient, they tend to be less persuaded by newly fashionable ideas that cannot be reconciled with those beliefs. While recognizing that there are those who have long experienced profound and persistent discomfort with their natal sex and have found peace in transitioning with medical intervention, I have sought to demonstrate

evolving research and understanding of the implications and long-term consequences of such treatment." *Id.* at 92. The issue of the young person's capacity to consent is likely to be complicated, in many cases, by the presence of psychiatric comorbidities.

[133] There are varying explanations for this. Jack Turban et al., *Factors Leading to "Detransition" Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis*, 8 LGBT Health 273 (2021); Pablo Expósito-Campos, *A Typology of Gender Detransition and Its Implications for Healthcare Providers*, 47 Journal of Sex & Marital Therapy 270 (2021); Elie Vandenbussche, *Detransition-Related Needs and Support: A Cross-Sectional Online Survey*, Journal of Homosexuality (2021); Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, 50 Archives of Sexual Behavior 3353 (2021); Lisa Marchiano, *Gender Detransition: A Case Study*, 66 Journal of Analytical Psychology 813 (2021). For data on the proportion of detransitioners in military families in the United States, see Christina Roberts et al, *Continuation of Gender-Affirming Hormones Among Transgender Adolescents and Adults*, 107 Journal of Clinical Endocrinology and Metabolism e3937 (2022), https://doi.org/10.1210/clinem/dgac251.

https://doi.org/10.1017/jlr.2022.45 Published online by Cambridge University Press

that many of the claims of the transgender movement are based upon beliefs and values that are discordant with medical and scientific understanding of sexual dimorphism. They involve issues about the particular use of language, or views about categorization.

Given that the issue of gender identity is so much an issue of belief and worldview, inevitably, responses to a person who declares a gender identity different to natal sex are likely to be influenced by a person's own beliefs and ethical positions. Such responses do not, and cannot occur, within a belief or value-free zone.

For that reason alone, religious exemptions need to remain, insofar as they allow faith-based organizations the freedom not to have to treat someone as a gender different to their natal sex. Those exemptions might be narrowly drawn in the case of an adult with persistent and severe diagnosed gender dysphoria who has undergone sexual reassignment surgery; but the new transgender movement has gone far beyond supporting the civil rights of transsexuals. It has sought to push legal reforms that rest upon premises that are incompatible with both conventional science and traditional Christian beliefs. People of faith should not be compelled to act toward others as if they share the other person's beliefs.

Cite this article: Parkinson, Patrick. 2023. "Gender Identity Discrimination and Religious Freedom." *Journal of Law and Religion* 38: 10–37. https://doi.org/10.1017/jlr.2022.45