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THE IMPERATIVE OF REJECTING “GENDER-CRITICAL” FEMINISM IN THE LAW

HENRY F. FRADELLA

ABSTRACT

Roughly a half-century ago at the height of the second-wave feminist movement, some feminist scholars and activists found...
themselves arguing with transgender people about who is a woman. While much of contemporary feminist thought has moved past biological essentialism's outdated embrace of a sex binary to embrace trans-equality, a relatively small but vocal group of self-proclaimed “gender-critical feminists” (who are sometimes called trans-exclusionary radical feminists, or “TERFs” for short) eschew transgender legal rights that they perceive as potentially threatening to the rights of cisgender women. Most gender-critical arguments in that regard are fallacious; they are based on myths and false narratives that misconstrue or ignore empirical data from both the natural and social sciences. Worse yet, the gender-critical position not only threatens to undermine equality under law, but also fosters narratives that contribute to the criminal victimization of transgender persons. In an attempt to minimize the potential for such harmful outcomes, this Article seeks to dismantle some of the more common arguments that gender-critical feminists routinely offer so that judges and lawyers have a source of legal literature that corrects the misinformation gender-critical authors are spreading in this emerging field, thereby providing them with the evidence needed to craft accurate legal arguments and rulings.

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INTRODUCTION

In 2020, Christen Price published an article in the Marquette Law Review entitled “Women’s Spaces, Women’s Rights: Feminism
and the Transgender Rights Movement.” It purported to “examine[] the implications of the transgender rights movement for women’s rights, specifically as to law.” But it failed in this aim, because it relied on outdated biological essentialist arguments that ignore the contemporary scientific literature from related fields, such as medicine, biology, neuroscience, psychology, and criminology. This Article—written primarily for judges, law clerks, lawyers, and legal scholars—responds to some of Price’s questionable assertions and calls for the law to reject interpretations that contribute to both anti-trans discrimination and violence against transgender people.

A. Trepidation About Calling Attention to a Misguided Perspective

One of the problems with critiquing flawed scholarship is that by doing so—even to “correct the record”—a commentator calls attention to the work, potentially giving it more exposure than it would have otherwise received. After all, according to Westlaw’s “citing references” feature, Price’s article has only been cited four times in the scholarly legal literature from the date of its publication through the time of this writing in February of 2024. Importantly, those citations are in articles that are critical of Price’s positions. But two other legal citations to Price’s article—ones in

2. Id. at 1510.

Price’s article has also been cited several times in social science and humanities literature that have criticized the perspective advanced in that article. See, e.g., Monique Kwachou, In Response to Acker: Black and African Feminist Theories on Gender and Education, 59 COMPAR. ED. 169, 173 (2023) [https://doi.org/10.1080/03050068.2022.2147634] (calling for broader, intersectional feminist approaches as part of a “journey of solidarity towards a decolonized future.” Id. at 184); Mete Sefa Uysal, Özden Melis Ulug, Betül Kanık & Aslı Aydemir, “The Liberation of LGBTQ+ Will Also Liberate Heterosexuals”: Heterosexual Feminist Women’s Participation in Solidarity-Based Collective Action for LGBTQ+ Rights, 52 EUR. J. SOC. PSYCH. 377, 387 (2022) [https://doi.org/10.1002/ejsp.2799] (citing Price as an example of how “feminist perspectives differ in support of LGBTQ+ rights” and advocating for more inclusive feminist approaches); Jace Valcore, Henry F. Fradella, Xavier Guadalupe-Diaz, Matthew J. Balli, Angela Dwyer, Christina DeJong, Allyn Walker, Aimee Wodda & Meredith G. F. Worthen, Building an Intersectional and Trans-Inclusive Criminology: Responding to the Emergence of “Gender Critical” Perspectives in Feminist Criminology, 29 CRITICAL CRIMINOLOGY 687, 690 (2021) [https://doi.org/10.1007/s10612-021-09590-0] (criticizing the work of Price and other gender-critical feminists).
appellate briefs rather than any scholarly writing—demonstrate why it is imperative to challenge the dangerous views of people like Price. To wit, the trans-exclusionary “Women’s Human Rights Campaign–USA”\(^4\) cited Price’s article to support the reversal of a preliminary injunction that had barred enforcement of Idaho’s ban on trans women from participating in women’s sports teams.\(^5\) And the

4. Despite its eerily similar name, the Women’s Human Rights Campaign–USA is not to be confused with the well-respected and long-established LGBTQ+ rights organization, the Human Rights Campaign. HUM.RTS.CAMPAIGN, https://www.hrc.org [https://perma.cc/BP76-XXVE].


Scientific investigations into the empirical question of whether trans girls have any unfair advantages over cisgender girls while participating in sports are ongoing. Although the question is not yet settled, most of the scientific research to date suggests that there are few, if any, legitimate reasons to limit trans people’s participation in sports—especially at the high school level—because “[t]ransgender student athletes fall within the spectrum of physical traits found in athletes of their transitioned gender, allowing them to compete fairly and equitably.” See PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 16 (2010), https://www.nclrighths.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf [https://perma.cc/3RJB-P8HU] (internal citations omitted).

When a trans woman decides to transition, usually one of the first medical steps they’ll undertake is to go on hormones. These are testosterone blockers (also known as anti-androgen medications) and estrogen, both of which are common medications that can also be prescribed to cis women to treat various ailments.

These hormones have a number of effects on a trans woman’s body—they add and change the way fat is distributed, they lower the levels of red blood cells, and significantly decrease strength, muscle, and lean body mass.

“In sports cheating via ‘blood doping,’ red blood cells are raised,” wrote Ada Cheung, an endocrinologist from the University of Melbourne, in a Sydney Morning Herald opinion article. “The opposite occurs in trans women: oxygen-carrying red blood cells drop to female levels. Trans women gain fat mass and lose bone density.”

similarly trans-exclusionary Women’s Declaration International USA cited Price’s article in support of affirming a district court’s decision.

therapy is consistently associated with increases in fat mass and decreases in lean mass). Even in cisgender athletes, the data suggests that endogenous testosterone—that is naturally generated within the body—is “not the end-all be-all” about athletic performance. Sara Chodosh, The Complicated Truth About Testosterone’s Effect on Athletic Performance, POPULAR SCIENCE (Nov. 20, 2019, 7:30 PM), https://www.popsci.com/story/science/testosterone-effect-athletic-performance [https://perma.cc/9J3Z-GRRU] (criticizing the interpretation of studies reporting that female runners given exogenous, pharmaceutical testosterone experience an increase in their athletic performance because that amounts to doping, rather than natural differences in endogenous testosterone production (citing Cláudio Heitor Balthazar, Marcia Carvalho Garcia & Regina Celia Spadari-Bratfisch, Salivary Concentrations of Cortisol and Testosterone and Prediction of Performance in a Professional Triathlon Competition, 15 STRESS 495 (2012) [https://doi.org/10.3109/10253890.2011.642033] (reporting no relationship between testosterone levels and performance in male triathletes)); A.R. Hoogeveen & M.L. Zonderland, Relationships Between Testosterone, Cortisol and Performance in Professional Cyclists, 17 INT’L J. SPORTSMED. 423 (1996) [https://doi.org/10.1055/s-2007-972872] (reporting the same lack of correlation in cyclists); Mikel Izquierdo, Javier Ibanez, Keijo Hakkinen, William J. Kraemer, Maite Ruesta & Estaban M. Gorostiaga, Maximal Strength and Power, Muscle Mass, Endurance, and Serum Hormones in Weightlifters and Road Cyclists, 22 J. SPORTS SCI. 465, 465 (2004) [https://doi.org/10.1080/02640410410001675342] (finding a negative correlation between testosterone levels and performance in both cyclists and weightlifters); Blair Crewther, Zhigniew Ohminski & Christian Cook, The Effect of Steroid Hormones on the Physical Performance of Boys and Girls During an Olympic Weightlifting Competition, 28 PEDIATRIC EXERCISE SCI. 580 (2016) [https://doi.org/10.1123/pes.2016-0070] (finding no relationship between teenage boy weightlifters’ testosterone levels and their performance, and a negative correlation among the girls such that they performed better when their testosterone levels were lower); see also Sarah E. Alexander, Gavin Abbott, Brad Aisbett, Glenn D. Wadley, Jill A. Hnatiuk1 & Séverine Lamon, Total Testosterone Is Not Associated with Lean Mass or Handgrip Strength in Pre-Menopausal Females, 11 NATURE: SCI. REP. art. 10226, May 2021, at 1, 1 [https://doi.org/10.1038/s41598-021-89232-1] (finding testosterone levels were not associated with muscle mass or strength in 716 premenopausal females); Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis & Silvia Camporesi, Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes, 12 AM. J. BIOETHICS, 3, 8 (2012) (explaining that it is too simplistic “that a person with more testosterone will have greater athletic advantage than one with less testosterone.”).

that federal prohibitions against sex discrimination do not apply to Section 1557 of the Affordable Care Act to reach discrimination on the basis of sexual orientation and gender identity despite the U.S. Supreme Court's decision in Bostock v. Clayton County.\textsuperscript{6}

As I will explain in this Article, Price’s arguments are specious. They are based on a philosophy that ignores science and empirical criminological data, and they contribute to mindsets that can result in the criminal victimization of transgender people.\textsuperscript{7}

\section*{B. Overview of Gender-Critical Feminism}

One of Price’s critics, Angela S. Boettcher, refers to Price as a dominance feminist\textsuperscript{8} because Price espouses “a framework that foregrounds the patriarchy as context for all interactions between the sexes.”\textsuperscript{9} This perspective, which is closely aligned with gender-critical

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7. See McNamara, supra note 3, at 876 (“[Price’s] safety argument falls flat in the face of real-world evidence. Barely short of accusing all trans women of being sexual predators or as having a proclivity for sexual predation, this . . . form of the argument has already been thoroughly debunked.”); Valcore et al., supra note 3, at 697 (”[T]he arguments made by trans-exclusionary feminists . . . about violence, victimization, and threats to safety are not supported empirically.”). For a brief, freely accessible summary of these points written for a lay audience, see Henry F. Fradella & Alexis Rowland, Baseless Anti-Trans Claims Fuel Adoption of Harmful Laws—Two Criminologists Explain, The CONVERSATION (June 5, 2023, 8:07 AM EDT), https://theconversation.com/baseless-anti-trans-claims-fuel-adoption-of-harmful-laws-two-criminologists-explain-206570 [https://perma.cc/52KW-3QMX].


9. Id. at 196, 203. As Michelle Goldberg explained, this brand of feminism seems to have originated in the early 1970s during the ascendancy of the second-wave feminist movement that is characterized by the works of Ti-Grace Atkinson, Andrea Dworkin, Kathie Sarachild, and Michele Wallace. Michelle Goldberg, What Is a Woman?, NEW YORKER (July 28, 2014), https://www.newyorker.com/magazine/2014/08/04/woman-2 [https://perma.cc/3YDL-SZE3]; see also SUSAN STRYKER, TRANSGENDER HISTORY 101–11 (2d ed. 2017) (explaining the growing rift during the 1970s between second-wave feminists and their more inclusive successors in the feminist movement). As an example, Goldberg quoted Robin Morgan, the keynote speaker at the 1973 West Coast Lesbian Conference, who said the following about a trans folk singer who performed at the conference:

I will not call a male “she”; thirty-two years of suffering in this androcentric society, and of surviving, have earned me the title “woman”; one walk down the street by a male transvestite, five minutes of his being hassled (which he may enjoy), and then he dares, he dares to think he understands our pain?

No, in our mothers’ names and in our own, we must not call him sister.

Goldberg, supra.
\end{flushleft}
feminism or trans-exclusionary radical feminism,\textsuperscript{10} emphasizes “the immutability and explanatory importance of sex”\textsuperscript{11} which, in turn, amounts to the view that sex is “the ‘primary site of women’s oppression’” and that “sexual objectification [is] the key to women’s subjection.”\textsuperscript{12}

Gender-critical feminism, at its core, opposes the self-definition of trans people, arguing that anyone born with a vagina is in its own oppressed sex class, while anyone born with a penis is automatically an oppressor. In [this paradigm], gender is a system that exists solely to oppress women, which it does through the imposition of femininity on those assigned female at birth.\textsuperscript{13}

What lies at the heart of gender-critical feminism is the belief that biology determines sex and, as a result, transgender women are really men “who should not be allowed to use women’s facilities, such

\textsuperscript{10} Those who subscribe to this perspective are often referred to as trans-exclusionary radical feminists (TERFs). Many gender-critical feminists assert that the term “TERF” is a slur. See, e.g., Ruth Pearce, Sonja Erikainen & Ben Vincent, \textit{TERF Wars: An Introduction}, 68 SOCIO. REV. MONOGRAPHS 677, 678 (2020); Colleen Flaherty, “TERF” War, INSIDE HIGHER ED (Aug. 29, 2018), https://www.insidehighered.com/news/2018/08/29/philosophers-object-journals-publication-terf-reference-some-feminists-it-really [https://perma.cc/Y4JN-NYD5]. By contrast, some scholars insist that TERF is not a slur, but an accurate description of a toxic, outdated version of feminism. Hannah McCann, \textit{Is There Anything “Toxic” About Femininity? The Rigid Femininities That Keep Us Locked In}, 13 PSYCH. & SEXUALITY 9 (2020) [http://doi.org/10.1080/194119899.2020.1785534]. As research student Clair Thurlow observed, this gender-critical “moniker represents more than a renaming. Instead, it can be interpreted as a rebranding for a present-day where the explicit transphobia of earlier trans-exclusionary feminism is no longer tolerated.” Claire Thurlow, \textit{From TERF to Gender Critical: A Telling Genealogy?}, SEXUALITIES (forthcoming) (advance online publication available at https://doi.org/10.1177/13634607221107827). Although I personally agree with both McCann and Thurlow, I nonetheless follow Deborah Shaw’s lead by refraining from referring to this brand of “feminism” as trans-exclusionary feminism and those who subscribe to it as trans-exclusionary feminists; instead, “I will apply ‘gender critical’ here out of respect for people’s rights to self-define”—even if those people have not shown much respect members of the transgender or intersex communities. Deborah Shaw, \textit{A Tale of Two Feminisms: Gender Critical Feminism, Trans Inclusive Feminism, and the Case of Kathleen Stock}, 32 WOMEN’S HIST. REV. 768, 769 (2023) [https://doi.org/10.1080/09612052.2022.2147915].


\textsuperscript{12} Boettcher, supra note 3, at 198 (internal footnotes and alterations omitted) (quoting Hila Shamir, \textit{Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making}, 52 CORNELL INT’L L.J. 177, 189 (2019); Catharine A. MacKinnon, \textit{Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence}, 8 SIGNS 635, 651 (1983)).

as public rest rooms, or to participate in events organized exclusively for women.” In other words, gender-critical feminism is built on unsupported and “offensive assumptions[] that trans women”—even those who have undergone sex confirmation surgeries—“are different in an essential way from other women, and that they’re dangerous.” Indeed, second-wave feminists writing during the 1970s explicitly tied trans women to the crime of rape: “All transsexuals rape women’s bodies by reducing the real female form to an artifact, appropriating this body for themselves.”

The common trope of trans women being criminally dangerous extends beyond scholarly writing from forty to fifty years ago. Notably, Hollywood has perpetuated this false belief for decades with depictions of trans persons as violent criminals, including in “deeply transmisogynistic” films such as *Murder!*, *Psycho*, *Dressed to Kill*, *Unhinged*, *Sleepaway Camp*, *Fatal Games*, *The Transsexual Empire*, and many others.

15. Previously referred to as sex reassignment surgery (or even a “sex change”), sex-confirmation surgery (or gender-affirming surgery) is an umbrella term for several distinct types of surgeries that alter a transgender person’s physical appearance to match their gender identity. See, e.g., *Gender Affirmation Surgeons, AM, SO’CY PLASTIC SURGEONS*, https://www.plasticsurgery.org/reconstructive-procedures/gender-affirmation -surgeries [https://perma.cc/VQC9-HMPG].
19. For a thoughtful exploration of transphobic depictions in popular culture, see DISCLOSURE (Netflix 2020) (directed by Sam Feder; produced by Sam Feder & Amy Scholder).
22. PSYCHO (Paramount Pictures 1960) (directed and produced by Alfred Hitchcock).
23. DRESSED TO KILL (Filmways Pictures 1980) (directed by Brian De Palma; produced by George Litto).
25. SLEEPAWAY CAMP (United Film Distrib. 1983) (directed by Robert Hiltzik; produced by Jerry Silva & Michele Tatosian).
Newlydeads, Transamerican Killer, and arguably the most celebrated of such movies, the Silence of the Lambs.

At first blush, the notion of trans people—and trans women in particular—being violently dangerous persons may seem somewhat removed from mainstream criminal justice concerns. But as Part II reveals, the fears that undergird much of gender-critical feminism stem not from any empirically supported criminological data, but rather from a moral panic about sex crimes that are practically non-existent. Such fear-based rhetoric reproduces the ways in which opponents of gay rights framed lesbians, bisexuals, and gay men, in particular, as sexual deviants or even predators who posed threats to the moral and social order if they were treated equally under the law.

30. See Valcore et al., supra note 3, at 697–700 (explaining how actual crime data undercuts the false premise of trans women’s alleged dangerousness). Consider Adam Briggs’s comments on the notorious case of Karen White, a trans woman whom gender-critical feminists often cite as evidence of their fear:

White was convicted of sexual assault on female prisoners . . . . Which reality matters most in the case of White? Is it, as Stock argues, that White has a penis? Or is it that White was a convicted pedophile on remand for multiple rapes and other sexual offenses against women? I would say the latter reality matters the most in this case. A targeted policy about isolating these kinds of criminals would be a far more proportionate policy reaction.

Briggs, supra note 16, at 55. Put differently, gender-critical feminists conflate trans women and sexual predators, painting them “not only as not natural, as immaterial, but as being powerful and dangerous.” Gender Critical = Gender Conservative, FEMINIST KILLJOYS (Oct. 31, 2021), https://feministkilljoys.com/2021/10/31/gender-critical-gender-conservative/comment-page-1 [https://perma.cc/9W8T-L4PZ]. This mirrors the “stranger danger” moral panic that has lumped all “sex offenders” together since the 1980s, despite the criminological inaccuracies of such rhetoric and the corresponding policies that do little other than offer crime control theater—the illusion that law and policy are addressing a problem when, in fact, they are not. See, e.g., Marcus A. Galeste, Henry F. Fradella & Brenda Vogel, Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers, W. CRIMINOLOGY REV., Aug. 2012, at 4, 4 (2012).

Moreover, using Karen White is misguided. White was incarcerated in Britain where the place of imprisonment is not at the discretion of a person who self-identifies their gender so that they might prey upon victims, but rather such decisions are made by board of prison managers and psychologists who had failed to engage in any form of risk assessment when placing inmates—a policy failure which has since been rectified. Ministry of Justice, The Care and Management of Individuals Who Are Transgender, HER MAJESTY’S PRISON & PROB. SERV. (Prison Serv. Instruction Reissue No. 27, Mar. 31, 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148440/transgender-pf.pdf [https://perma.cc/S35L-9KJ8].

C. Related Criticisms of Gender-Critical Feminism

Before moving on to define critical terms in Part I and discuss the natural and social scientific flaws with “scholarship” like Price’s, in Parts II and III, respectively, it bears mentioning that gender-critical feminism contains elements of racist colonialism and neo-fascism. Although in-depth explorations of these two themes are largely beyond the scope of this Article, I will briefly summarize what other scholars have expounded upon for each of these two points.

First, the biological essentialist notion of there being only two sexes stems from more than half a millennium of Western colonialism. “European colonizers throughout the Americas who encountered Indigenous cultures that recognized intersex, third gender, and dual gender or ‘two-spirit’ people viewed them as immoral or perverse. They used this stance to justify colonial theft, enslavement, and genocide—even into the twentieth century.” Notably, the “historical existence of multi-gender systems” was not limited to the Americas:

India’s hijra, which has existed for millennia, has an essential place in Hinduism and a socio-cultural role as performers. Judaism recognizes no fewer than six distinct sex categories in its classical texts and tradition. In Oaxaca, Mexico, the third gender muxe dates back to the pre-Columbian era. The South Sulawesi Bugis people recognize five genders which have been crucial to


their society for at least 600 years . . . . The Dagaaba people in present-day Ghana do not assign gender based on anatomy, but rather on a person’s energy. Some other West African tribes don’t assign genders at all, or at least not until age five or after puberty. 35

By contrast to non-European cultures that were accepting of gender-diversity, Europeans had embraced gendered and racialized views about Black and Brown people as “monstrous[,] laboring beast[s]”—views that helped to justify the slavery trade. 36 These views can be traced to the writings of voyagers to Africa who, even in the mid-1550s, argued that Black men and women were “largely indistinguishable.” 37 For instance, after his visit to Guinea, William Towrson wrote that they “goe so alike, that one cannot know a man from a woman but by their breastes.” 38

By the time the English colonized the Americas, the notions that White people were “religiously, culturally, and phenotypically superior” to those of other races (especially with regard to White women embodying purity and beauty), were firmly established in Western European thought. 39 During the nineteenth century, these views gained the imprimatur of “modern” science such that White Europeans considered sexual dimorphism as an “an evolutionary achievement rather than a natural condition for human beings.” 40 This was due to physicians and scientists of the time relying on a binary conceptualization of sex (alongside views that categorized Black and Brown people as atavistic—primitive and prone to violence


37. Id. at 181.

38. Id. (quoting 11 THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFIQUES AND DISCOVERIES OF THE ENGLISH NATION 1598–1600: AFRICA 108 (Richard Hakluyt & Edmund Goldsmid eds., 1885–1890)).

39. Id. at 168.

and other social maladies) as part of theories about evolution, eugenics, and degeneracy (a concept that was used to explain criminality, mental illness, and atypical sexual desires). Indeed, these scientists “developed elaborate racialized measurements and classifications of genitalia, pelvises, breasts, and buttocks. Undeniably, the present coherence of ‘biological sex’ is an effect of 19th century scientific racism and discourses of white supremacy.”

Thus, gender-critical feminists who cling to the notion of sex being dimorphic “reproduce colonial and white supremacist frameworks of patriarchy and gender violence.”

Second, as the eminent philosopher and feminist scholar Dr. Judith Butler noted, the essentialist perspective espoused by gender-critical feminists embodies fascist sentiments that employ rhetoric designed to paint transgender people as threats to the hard-fought gains of cisgender women over the past century. As she wrote, the gender-critical perspective “is not a conservative position with a clear set of principles,” but rather “a fascist trend [that] mobilizes a range of rhetorical strategies from across the political spectrum to maximize the fear of infiltration and destruction that comes from a diverse set of economic and social forces.” Dr. Serena Bassi and Dr. Greta Lafleur, professors of Italian and American Studies, respectively, expounded upon this point as follows:

Gender-critical movements often reemploy the well-known right-wing populist opposition between “the corrupt global elites” and “the people” . . . imagined, as part of populist rhetoric, through the figurations of “hardworking families” and “concerned citizens” . . . by tweaking it slightly. In anti-gender discourse, the corrupt global elites cast as the enemy of “normal everyday

41. Id. ¶¶ 12–14; see also Andrea Smith, Indigeneity, Settler Colonialism, White Supremacy, in RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 66–90 (Daniel Martinez HoSang, Oneka LaBennett & Laura Pulido eds., 2012). For example, explorer Amerigo Vespucci’s writing depicted Indigenous women as sexually predatory cannibals: “Vespucci made manifest the latent sexualized danger embedded by the man-slaying woman in a letter in which he wrote of women biting off the penises of their sexual partners, thus linking cannibalism—an absolute indicator of savagery and distance from European norms—to female sexual insatiability.” Morgan, supra note 36, at 173.

42. Henderson, supra note 40, at ¶ 9 (citing, inter alia, Richard von Krafft-Ebing, Psychopathia Sexualis, with especial reference to the antipathetic sexual instinct: a medico-forensic study 42 (Rebman Co. 1906) (original work published 1894)).

43. Upadhyay, supra note 32, at 539.

44. Cisgender is a term that refers to gender identity matching the sex assigned at birth, whereas transgender refers to gender identity differing from the sex assigned at birth. Stephanie Watson, Cisgender, WebMD (Nov. 13, 2022), https://www.webmd.com/a-to-z-guides/cisgender-overview [https://perma.cc/ND6H-CKUR].

45. Butler, supra note 32.

46. Id.
people” are the “genderists,” a vaguely defined collectivity that includes visible transgender celebrities and athletes; pro-choice and reproductive rights activists; scholars of women, gender, and sexuality studies; and supranational organizations like the European Union and liberal-leaning private foundations like the Open Society. . . . Moreover, in entering what they frame as a global battle of ideas, the anti-gender movement references and repackages a number of often contradictory and incompatible ideologies and theories, derived from sources as far-flung as Catholic theology, anthropology, colonial-era ethnography, far-right anti-Americanism, and scientific racism, as well as decontextualized references to postcolonial feminist thought.47

D. More Inclusive Feminism

Perhaps the aforementioned reasons help to explain why gender-critical feminism is not the norm in the United States48 or the United Kingdom,49 two of the three countries in which gender-critical feminists are most vocal (the other being Australia).50 Gender-critical feminism stands in contrast to liberal feminism,51

48. Sarah Manavis, Gender-Critical Feminism Is Not as Popular as Its Supporters May Want You to Believe, NEW STATESMEN (Jan. 25, 2022), https://www.newstatesman.com/internet-social-media/2022/01/gender-critical-feminism-is-not-as-popular-as-its-supporters-may-want-you-to-believe [https://perma.cc/Y5J9-MR6W] (reporting that in the United Kingdom, “[g]ender-critical feminists—and the over-amplification of their views—paint a picture where their brand of feminism is the dominant approach to trans rights. But this is out of sync with reality and to suggest otherwise—such as in the case of the #KeepPrisonsSingleSex campaign—is often plain misinformation.”). According to Gillian Branstetter, the media relations manager at the National Center for Transgender Equality, the same appears to be true in the United States:

According to Branstetter, the recent gender-critical wave has largely failed to gain traction in the [United States] outside of the very far-right spheres.

“I don’t think American women are buying it,” she said, pointing out that nearly every major U.S. feminist advocacy group is vocally pro-trans rights and inclusion. “It’s because they understand what it means to be marginalized. They understand that any strict rules placed around gender are to the benefit of nobody.”

Burns, supra note 13 (quoting an interview with Branstetter).
49. Shaw, supra note 10, at 2 (“Trans inclusive academic feminism is dominant in U.K. academia.”).
51. For a detailed, yet accessible exploration of liberal feminism and its two primary
the far more common branch of contemporary feminist thought—so much so that many people refer to liberal feminism as *mainstream feminism.* Notably, most mainstream feminist groups, such as the National Organization for Women and the League of Women Voters, view LGBTQ+ rights, including those of trans women, as a key feminist issue. By way of example, in the very Ninth Circuit case in which the trans-exclusionary Women’s Human Rights Campaign—USA favorably cited Price’s article, the League of Women Voters joined an amicus brief arguing on behalf of the transgender students, rather than against them.

That being said, even mainstream feminism has been criticized for its focus on White womanhood to the neglect of issues facing women of color and trans women. As a result, the perspective I seek to advance in this Article is the one most closely aligned with *intersectional feminism*—the branch of feminist thought that seeks to address sexism and patriarchy while simultaneously addressing inequities on the bases of race, ethnicity, religion, gender identity, sexuality, and other personal characteristics that prompt discrimination and injustice.


56. Law professor Kimberlé Crenshaw is credited for coining the term “intersectionality” as “a prism for seeing the way in which various forms of inequality often operate together and exacerbate each other.” Katy Steinmetz, *She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today,* TIME (Feb. 20, 2020, 7:27 AM EST), https://time.com/5786710/kimberle-crenshaw-intersectionality [https://perma.cc/TD2P-NBA2] (quoting an interview with Crenshaw); see also, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 STAN. L. REV. 1241, 1242–43 (1991). Since then, Crenshaw and other trans-inclusive feminists have built on her early work in an effort to demonstrate that equal rights for transgender person are an integral part of the larger feminist movement’s struggle for women’s rights. See, e.g., JULIA MICHELLE SERANO, *EXCLUDED: MAKING FEMINIST AND QUEER MOVEMENTS MORE INCLUSIVE* (2013); JULIA MICHELLE SERANO,
the “shortcomings of past ways of thinking,” thereby serving the ends of justice through anti-racist, anti-colonial, and LGBTQ+-inclusive perspectives that are necessary to facilitate a world that is more fair, equal, and inclusive.57

E. Why This Matters

Some commentators posit that the influence of gender-critical feminism has waned significantly, especially in the United States.58 Others note that there is a growing backlash against the concept of gender identity and, correspondingly, against intersectional feminism.59 Either way, given the scant attention that Price’s article has received,60 some might think the piece is better left alone without any response adding to its citation count. But it is important that Price’s errors not go uncorrected for several reasons, especially because it is based on some unsupported assumptions about crime.61

But perhaps more importantly, her flawed premises lead Price to conclusions that are not only unjust, but also contribute to real
harm for the reasons that Boettcher explained: “[T]he gender essentialism of the dominance feminist narrative, in its intense focus and reliance on the gender binary” erases women of color, trans women, and non-binary people.  

Boettcher specifically quoted from Price to illustrate how the latter was “outright hostile toward trans women [when Price argued] that ‘the transgender rights movement[] . . . elevates male identities, priorities, and desires, and undermines women’s rights.’”

In addition to having the criminological implications that I will develop in Part III, the gender-critical perspective also has political ramifications, as cultural writer Shannon Keating articulated:

The anti-trans misinformation campaigns that [gender-critical feminists] have successfully laundered through the mainstream media have disastrous implications. Last week, the far right, including at least one Republican Congressman, falsely smeared a real, living trans woman as the Texas school shooter. Donald Trump, who’s claimed to be an LGBTQ ally despite his administration’s assault on queer rights, has found what Ryan Lizza at Politico calls Trump’s “new obsession”: long tirades at his rallies denigrating trans people, which draw the loudest cheers. Texas just restarted investigating families with trans children for abuse, with the goal of forcibly separating children from their affirming and loving parents—one of at least 238 anti-LGBTQ bills announced [in the first five months of 2022], according to NBC News, most of them specifically anti-trans.

The Lemkin Institute for Genocide Prevention went so far as to say that it believes the gender-critical perspective represents a neo-fascist movement that, whether intentionally or not, furthers “a

62. Boettcher, supra note 3, at 203.
63. Id. at 203 (quoting Price, supra note 1, at 1511).
64. Shannon Keating, Mainstream Feminism Has Failed Us, BUZZFEED NEWS (May 31, 2022, 11:43 AM), https://www.buzzfeednews.com/article/shannonkeating/abortion-rights-amber-heard-girlboss-feminism [https://perma.cc/RKY8-BS9G]. A year after Keating made these observations, Fradella & Rowland, supra note 7, offered the following observations about anti-trans bills and laws:

As far back as 2001, Republican lawmakers proposed the first of what are now nearly 900 anti-LGBTQ+ bills. More than 500 of these were introduced in 49 state legislatures and the U.S. Congress during the first five months of 2023. To date, at least 79 have passed.

Many of these anti-trans laws are written and financed by a group of far-right interest groups, including the Alliance Defending Freedom, the Family Research Council, the Liberty Counsel and the American Principles Project.

These groups claim their proposed laws would protect cisgender women and girls—those whose gender identity matches the sex they were assigned at birth—from the sorts of violent trans people that are often depicted in movies and other media.
specifically genocidal ideology” that attempts to eradicate trans identities.\(^{65}\) Whether this is hyperbole or prescient remains to be seen, but there can be little doubt that anti-trans politics motivate conservative legislators and their voters.\(^{66}\)

Even outside the realm of formal politics, gender-critical feminism has legal implications, as well, as evidenced by the aforementioned reliance on Price’s article in an amicus brief filed with the Ninth Circuit.\(^{67}\) Such perspectives have also been presented to the U.S. Supreme Court. Consider the following language from an amicus brief filed in a leading sex discrimination case: “Legally redefining ‘female’ as anyone who claims to be female results in the erasure of female people as a class. If, as a matter of law, anyone can be a woman, then no one is a woman, and sex-based protections in the law have no meaning whatsoever.”\(^{68}\) Notably, this brief was filed by the Women’s Liberation Front (WoLF), a far-right organization that the Southern Poverty Law Center criticizes for disseminating “mis- and disinformation [with] a veneer of legitimacy that contradicts the global medical consensus.”\(^{69}\) Moreover, their argument is based on

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67. WHRC–USA Brief, supra note 5, at *6.


Groups such as WoLF have echoed some of the anti-trans lobby groups in the [United Kingdom] by arguing that “Sex is grounded in materiality, whereas ‘gender identity’ is simply an ideology that has no grounding in science.” WoLF has also “formed a coalition with [the] evangelical and anti-abortion group Focus on the Family to oppose trans-inclusive bathroom bills and attempts to interpret Title IX of the Education Act to protect trans rights.” Along with another campaigning group against trans rights—Hands Across the Aisle—WoLF has “sent a letter to the Department of Housing
the straw person logical fallacy that men simply declare themselves to be women when no one is making such an argument. “Gender identity is not a whim”; transgender persons both identify and live as members of the sex different from the ones assigned to them at birth as a function of “a fundamental sense of self that cannot be voluntarily altered.”

As these examples illustrate, gender-critical feminists reify a binary conception of sex in ways that contribute to harmful social, political, and legal implications for trans, non-binary, and intersex people. This, in turn, results in “an inadequate legal framework in which to exist,” wherein trans and gender-diverse people’s “lives become less,” their “humanity is questioned,” and their “oppression is legitimised.” In the name of equal justice under law and basic human rights, it is therefore worth dismantling the fallacious arguments of people like Price who appeal to flawed or downright incorrect understandings of both natural and social science.

I. TERMINOLOGY

Price begins her article by explaining some terms using definitions from two dictionaries:

Male: “an individual of the sex that is typically capable of producing small, usually motile gametes (such as sperm or spermatozoa) which fertilize the eggs of a female”; 72
Female: “an individual of the sex that is typically capable of bearing young or producing eggs”; 73

and Urban Development in favor of barring trans women from women’s homeless shelters [and] are happy to work alongside conservatives to limit the rights of trans people—even if those same conservatives want to pass legislation limiting their reproductive rights.” By the time that changes were being mooted to the [U.K. Gender Recognition Act], therefore, a formidable international collection of groups hostile to trans emancipation already existed. These included, but were not limited to, evangelical Christians, conservative policymakers (not all), and (some) feminist groups.

McLean, supra note 69, at 478 (internal citations omitted).


73. Id. at 1511 (quoting Female, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/female [https://perma.cc/TQ6X-CPBS]).
Sex: “either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions.”

Man: [an] adult person of the male sex, and
Woman: [an] adult person of the female sex.

Price acknowledges some of these definitions are “contested,” but she justifies using them based on what she refers to as “objective biological reality,” a term that suggests a limited understanding of biology. Before explaining in the next Part why biological sex in humans is not as clear-cut as Price and other gender-critical feminists

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74. Id.
77. Id. at 1511, 1513. A Facebook posting from a science teacher that went viral in 2017 explains why:

First of all, in a sexual species, you can have females be XX and males be X (insects), you can have females be ZW and males be ZZ (birds), you can have females be females because they developed in a warm environment and males be males because they developed in a cool environment (reptiles), you can have females be females because they lost a penis sword fighting contest (some flatworms), you can have males be males because they were born female, but changed sexes because the only male in their group died (parrotfish and clownfish), you can have males look and act like females because they are trying to get close enough to actual females to mate with them (cuttlefish, bluegills, others), or you can be one of thousands of sexes (slime mold, some mushrooms.) Oh, did you mean humans? Ok. You can be male because you were born female, but you have 5-alpha-reductase deficiency and so you grew a penis at age 12. You can be female because you have an X and a Y chromosome[,] but you are insensitive to androgens, and so you have a female body. You can be female because you have an X and a Y chromosome[,] but your Y is missing the SRY gene, and so you have a female body. You can be male because you have two X chromosomes—but also a Y. You can be female because you have only one X chromosome at all. And you can be male because you have two X chromosomes, but your heart and brain are male. And vice-effing-versa. Don’t use science to justify your bigotry. The world is way too weird for that shit.

argue,78 I offer the following, more inclusive definitions of the terms Price outlined in her article. These definitions come from the Cambridge Dictionary and are stated in the order that mirrors how Price defined them:

Male: belonging or relating to men;79
Female: belonging or relating to women;80

78. Dr. Sheila Jeffreys, a British political scientist who specialized in the history and politics of human sexuality, and Dr. Holly Lawford-Smith, an Australian philosopher, are two of the leading academic voices of the contemporary gender-critical feminist movement. See, e.g., SHEILA JEFFREYS, GENDER HURTS: A FEMINIST ANALYSIS OF THE POLITICS OF TRANSGENDERISM 3 (2014); HOLLY LAWFORD-SMITH, GENDER-CRITICAL FEMINISM 13 (2022). Interestingly, the publication of Lawford-Smith’s book, supra, by Oxford University Press (OUP) caused consternation among the staff and scholarly community associated with OUP “including authors, reviewers, series and journal editors, translators, instructors who teach OUP’s books, and readers” because it “attempts to deny transgender rights under the guise of scholarly inquiry,” not from: a scholarly field, but a coordinated polemical intervention, unsubstantiated by peer-reviewed research in the fields of gender, sexuality, queer, and trans studies, that promotes itself by the deliberate sowing of public “controversy” without being held accountable for very real and dangerous consequences of these discourses for entire demographics of human beings.


Jeffreys and Lawford-Smith are joined by some celebrities, such as J.K. Rowling, and many religious personalities, including:

German pro-life sociologist Gabriele Kuby[,] . . . the Italian blogger and chick-lit writer Costanza Miriano[,] . . . and the Belgian theologian and thinker Marguerite Peeters[,] . . . all [of whom] present the word gender as a shorthand for a currently unfolding anthropological revolution that—if not stopped in time—will eventually erase all differences between the sexes, depriving women, in particular, of their right to fulfill their biological destiny and pursue happiness.

Bassi & Lafleur, supra note 32, at 312 (internal citations omitted).

In the United States, sociologist Callie M. Burt caused quite a stir in criminological circles with the publication of her 2020 article opposing the enactment of the U.S. Equality Act (See Callie H. Burt, Scrutinizing the U.S. Equality Act 2019: A Feminist Examination of Definitional Changes and Sociolegal Ramifications, 15 FEMINIST CRIMINOLOGY 363, 365 (2020) [https://doi.org/10.1177/1557085120918667]) largely because prior to Burt writing on the subject, no major criminological journal had lent any weight to such claims. See Valcore et al., supra note 3, at 688. Valcore and his colleagues in criminology joined philosopher Aleardo Zanghellini in surmising that the lack of gender-critical scholarship in criminology prior to Burt’s might be a function of the fact that “the gender-critical case against trans inclusion is not well made, any reluctance to publish gender-critical work in academic outlets might be legitimate, rather than biased.” Id. (quoting Aleardo Zanghellini, Philosophical Problems with the Gender-Critical Feminist Argument Against Trans Inclusion, 10 SAGE OPEN art. 2, 1 (2020) [https://doi.org/10.1177/2158244020927029]).


Sex: the physical state of being either male, female, or intersex;\textsuperscript{81}
Man: an adult who lives and identifies as male though they may have been said to have a different sex at birth;\textsuperscript{82} and
Woman: an adult who lives and identifies as female though they may have been said to have a different sex at birth.\textsuperscript{83}

II. THE NATURAL SCIENCES ESTABLISH THAT SEX IS NOT A BINARY

Various branches of science and medicine explain that neither sex nor gender can be accurately understood or described as binary. As developmental biologist Dr. Claire Ainsworth noted in her article in \textit{Nature}, “the idea of two sexes is simplistic.”\textsuperscript{84} For some of the reasons set forth in the Appendix to this Article (among other reasons explained in this Article), sex is a multifaceted concept that varies based on an individual’s chromosomes, hormones, gonads, genitals, and other secondary sex characteristics.\textsuperscript{85} As Dr. Sari M. van Anders, professor of biological and cognitive psychology and Canada 150 Research Chair in Social Neuroendocrinology, and her colleagues explained, “scientists acknowledge no single or objective way to define sex.”\textsuperscript{86} Rather, they acknowledge “a more nuanced view of sex”—one that embraces a wider “spectrum” than the outdated dichotomy upon which gender-critical arguments are premised.\textsuperscript{87} Thus, by clinging to a rigid, neocolonial, binary conception of both sex and gender by relying on problematic and discredited assumptions about sex and gender, gender-critical feminists not only disregard scientific knowledge from a number of fields, but also dismiss the “valid, lived experiences of trans, nonbinary, and intersex people.”\textsuperscript{88}

\begin{itemize}
  \item[81.] Sex, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/sex [https://perma.cc/S668-7AL2].
  \item[84.] Claire Ainsworth, \textit{Sex Redefined}, 518 \textit{Nature} 288, 288 (2015) [https://doi.org/10.1038/518288a].
  \item[85.] Id. at 288. There is a wonderful graphic that cannot be reproduced in this Article due to copyright reasons, but I encourage readers to visit \textit{Scientific American}’s website to view the image created by Pitch Interactive and Amanda Montañez for the article, Amanda Montañez, \textit{Beyond XX and XY: The Extraordinary Complexity of Sex Determination}, 317 \textit{Sci. Am.} 50, 50 (2017), https://www.scientificamerican.com/article/beyond-xx-and-xy-the-extraordinary-complexity-of-sex-determination [https://perma.cc/FT65-GBDD].
  \item[86.] Sari M. van Anders, Zach C. Schudson, Emma C. Abed, William J. Beischel, Emily R. Dibble, Olivia D. Gunther, ValJ. Kutchko & Elisabeth R. Silver, \textit{Biological Sex, Gender, and Public Policy}, 4 POLY INSIGHTS BEHAV. & BRAIN SCI. 194, 195 (2017) [https://doi.org/10.1177/237273272217720700].
  \item[87.] Ainsworth, supra note 84, at 291.
  \item[88.] Valcore et al., supra note 3, at 693–94.
\end{itemize}
Even the law, which is notoriously slow to evolve, recognizes the biological complexities of sex. Specifically, twenty-four U.S. states legally recognize non-binary or “third gender” identities on driver’s licenses, twelve states and the District of Columbia do so on birth certificates, and all but three states allow people to change their birth certificates.\textsuperscript{89}

The timing of sex determinations is also critical. As distinguished physician and molecular geneticist Eric Vilain asked, “should that sex be assigned by anatomy, hormones, cells or chromosomes, and what should be done if they clash?”\textsuperscript{90} Gender-critical feminists argue the preeminence of anatomy visible at birth. This is why many gender-critical feminists seek to discount the relevance of intersex people and others who experience comparatively atypical sexual development.\textsuperscript{91} But it is precisely because of the natural variation of sex in these people that the biological dichotomy fails. Thus, references to those who are “male-born” and “female-born” by relying on genitalia fail because they largely ignore the fact that we rarely know someone’s chromosomal, cellular, or hormonal make-up, all of which are other ways that biologists classify sex.\textsuperscript{92}

Despite these scientific facts, gender-critical feminists often rely upon political philosopher Dr. Sheila Jeffreys’ work, including the pieces in which she criticized the United Kingdom’s Gender Recognition Act (GRA) for its alleged “profound confusion over the difference between sex and gender.”\textsuperscript{93} But as philosopher Dr. Paddy McQueen noted in his response to Jeffreys,

\begin{quote}
[a] number of theorists have offered persuasive arguments against the idea that sex can be easily defined in terms of biological facts about the body without reference to cultural factors, thus undermining the idea that they are distinct. . . . For example, Fausto-Sterling . . . demonstrates that cultural conditioning shapes
\end{quote}


\textsuperscript{90.} Ainsworth, \textit{supra} note 84, at 291 (quoting Dr. Eric Vilain).

\textsuperscript{91.} See Appendix.

\textsuperscript{92.} See Ainsworth, \textit{supra} note 84, at 288; Doris Bachtrog, Judith E. Mank, Catherine L. Peichel, Mark Kirkpatrick, Sarah P. Otto, Tia-Lynn Ashman, Matthew W. Hahn, Jun Kitano, Itay Mayrose, Ray Ming, Nicolas Perrin, Laura Ross, Nicole Valenzuela & Jana C. Vamosi, \textit{Sex Determination: Why So Many Ways of Doing It?}, PLOS BIOLOGY, July 2014, at 1, 2 [https://doi.org/10.1371/journal.pbio.1001899].

\textsuperscript{93.} Sheila Jeffreys, \textit{They Know It When They See It: The UK Gender Recognition Act 2004}, 10 BRIT. J. POL. & INT‘L STUD. 328, 333 (2008) [https://doi.org/10.1111/j.1467-856x.2007.00293.x]; see also Burt, \textit{supra} note 78, at 384–87.
many sex-specific traits assumed to be purely natural. Her work reveals how social practices shape biology so that we cannot speak of a natural body as it is in itself. Similarly, Fujimura’s research into genetic sex determination collapses the sex-gender distinction by showing that ‘Sex, even at the genetic level, is a socio-material process and product’ . . . and hence the categories ‘male’ and ‘female’ are ‘already and always social categories’ . . . . This reflects the experiences of many trans individuals, for whom identity and the body intertwine in ways that undermine the distinction between physical sex and social gender.  

Gender-critical feminists routinely discount or even ignore the work of the scientists that McQueen referenced in his scholarship, such as Fausto-Sterling, Gatens, Groz, Schrock and colleagues, and Fujimura. Tellingly, Price cites none of these scholars, relying instead on Jeffreys and nearly exclusively other nonscientific sources.

Indeed, Burt’s article did not even cite, let alone discuss, McQueen’s work even though he wrote it in response to the very same arguments Jeffreys made about the GRA that Burt rehashed in her article criticizing the U.S. Equality Act. To paraphrase a comment


95. See Fausto-Sterling, supra note 94; Anne Fausto-Sterling, Myths of Gender: Biological Theories About Women and Men (1993); Anne Fausto-Sterling, The Bare Bones of Sex: Part I—Sex and Gender, 30 Signs 1491 (2005) [https://doi.org/10.1086/424932].

96. Gatens, supra note 94.
97. Groz, supra note 94.
98. Schrock et al., supra note 94.
99. Fujimura, supra note 94.
100. Price, supra note 1 (failing to cite any of the sources cited supra notes 94–95).
101. Burt, supra note 78 (failing to cite any of the sources cited supra notes 94–95 other than Fausto-Sterling’s work).
102. Id. (failing to cite McQueen, supra note 94).
Burt made in 2017 when critiquing an unrelated work by other scholars, “[t]o be sure, this social scholarship was available to [Burt], but it didn’t fit [her] politically and (factually) incorrect story” of dimorphic sex determined at birth.103

Dr. Anne Fausto-Sterling, a Professor of Biology and Women and Gender Studies at Brown University, reported in 2000 that intersex conditions occur in 1.7 of every 100 births.104 Burt criticized this estimate as “significantly inflated” by relying on one article published in 2002 and a letter to a journal editor from 2003.105 Notably, these sources used what other commentators have referred to as the most narrow definition of differences in sex development (DSD) which is limited to chromosomal inconsistency with phenotypic sex as determined by observation106—a limited definition that intersex people reject based on their lived experiences.107 By contrast, when


Notably, unlike the student-edited Marquette Law Review, Feminist Criminology is a peer-reviewed journal that is edited by faculty members. The publication of Burt’s piece in such a journal suggests a significant failure of the peer-review process. Both peer reviewers and journal editors should have caught the problems in Burt’s article, just as editors did when a leading Australian law journal rejected a similar trans-exclusionary paper for publication in the University of Tasmania Law Review. See Matt Dennien, Law Dean Who Was Under Fire for Transgender Comments Steps Down from Role, BRISBANE TIMES (Nov. 3, 2020), https://www.brisbanetimes.com.au/national/queensland/law-dean-who-was-under-fire-for-transgender-comments-steps-down-from-role-20201103-p56b5f.html [https://perma.cc/Z43E-GUQY] (noting the rejection of the former dean’s manuscript by the law review).


broader criteria are used that include atypical variations at either the chromosomal, genital, gonadal, or hormonal levels, others have come up with similar estimates as Fausto-Sterling. Those definitional differences notwithstanding, Fausto-Sterling’s estimate is likely a low one, not an inflated one. As Dr. Tiffany Jones stated in her review of 61 different studies from around the world on differences in sex development,

research has generally estimated that 1.7% to 4% of people go on to actually have intersex variations . . . . Given that many elements of sex (chromosomes, genes, hormones) are not apparent without testing, current estimates of the incidence and types of intersex variations seen in humans may be conservative. Some common intersex variations are diagnosed prenatally, some at birth; others may only become apparent at puberty, when trying to conceive, or through random chance; and it is important to emphasize that many people will never know they have intersex variations. Many individuals with intersex variations have two or more variations . . . . Numbers can also be impacted by the inclusion of congenital variations stemming from hormone-related conditions; some researchers have included extreme polycystic ovary syndrome (PCOS)–related hyperandrogenism within the umbrella of intersex variation.

But regardless of the prevalence rate of intersex conditions, the reality is that such conditions exist and gender-critical feminists dismiss people with such differences in sex development without fully acknowledging how the biology of their conditions undercuts their faulty position that sex is, by definition, a binary.

Neuroscience also adds to the growing body of scientific knowledge about the fallacy of dimorphic sex fixed at birth. Consider that although brain studies are in their infancy, they suggest trans identities have a strong biological basis that do not align with anatomical or even chromosomal sex. Gender-critical feminists do
little to directly undermine this growing body of scientific knowledge about biological sex. Rather, they slip in phrases like “born male”\textsuperscript{112} to emphasize arguments that there is a dimorphic and simple beginning to life—a way of allowing their language to erase the oppositional view that children are assigned a sex at birth based on anatomy, rather than the other ways of determining sex.

III. THE SOCIAL SCIENCES ESTABLISH THE FALSITY OF THE TRANS WOMAN AS A DANGEROUS SEX OFFENDER

Price devoted eleven pages of her article to explaining, from her perspective, several ways in which trans-inclusive feminism poses a danger to women.\textsuperscript{113} Specifically, she alleged that the “privacy and safety” of women’s spaces—such as women’s shelters, women’s prisons, and women’s communal restrooms and shower facilities—are threatened if they are legally required to “accommodate men’s desires.”\textsuperscript{114} This offensive statement, grounded in the flawed gender essentialist binary, labels trans women as “men” and then ascribes nefarious motives to them. But as criminologist Dr. Jace Valcore and colleagues previously explained, gender-critical feminists advance arguments that rest on “assumptions about violence, victimization, and threats to safety [that] are not supported empirically.”\textsuperscript{115}

A. What the Criminological Data Say

First, as previously mentioned, the rhetoric of “stranger danger” does not align with reality.\textsuperscript{116} Between 84% and 90% of all crimes of sexual violence are not perpetrated by strangers lurking in the shadows (or the showers), but rather are perpetrated by people known to victims.\textsuperscript{117}

\begin{itemize}
  \item Kettenis, Sarah M. Burke & Julie Bakker, Brain Functional Connectivity Patterns in Children and Adolescents with Gender Dysphoria: Sex-Atypical or Not?, 86 PSYCHO-NEUROENDOCRINOLOGY 187 (2017) [https://doi.org/10.1016/j.psyneuen.2017.09.014] (reporting on anatomical differences in the brains of cisgender and transgender adolescents that align with their gender identity); J. Graham Theisen, Viji Sundaram, Mary S. Filchak, Lynn P. Chorich, Megan E. Sullivan, James Knight, Hyung-Goo Kim & Lawrence C. Layman, The Use of Whole Exome Sequencing in a Cohort of Transgender Individuals to Identify Rare Genetic Variants, 9 SCI. REPS. art. No. 20099, 2019, at 1, 2 [https://doi.org/10.1038/s41598-019-53500-y] (reporting genetic differences in patients with gender dysphoria that associated with triggering sexually dimorphic brain development in the opposite sex than assigned at birth).
  \item \textit{E.g.}, Burt, supra note 78, at 366, 373, 374, 397.
  \item Price, supra note 1, at 1535–46.
  \item Id. at 1535.
  \item Valcore et al., supra note 3, at 697.
  \item See supra note 29.
  \item \textsc{Tara N. Richards \& Catherine D. Marcum}, \textsc{Sexual Victimization: Then and
Second, the concerns that Price raised about women in prison ignore the fact that roughly 42% of sexual assaults against women in the carceral setting are committed by staff, not other inmates.\textsuperscript{118} Moreover, of those that involve inmates victimizing other inmates, those sexual assaults are almost all committed by members of what gender-critical feminists would call members of the same biological sex (i.e., by cisgender women).\textsuperscript{119} By contrast, it is trans women who are sexually victimized in confinement settings at rates nine to thirteen times higher than their cisgender counterparts.\textsuperscript{120} This is undoubtedly why the U.S. Department of Justice’s National Prison Rape Elimination Act Resources Center recognizes that being transgender “is a known risk factor for being sexually victimized in confinement settings.”\textsuperscript{121}

Third, the concerns that Price and other gender-critical feminists raised about sex-segregated public spaces are similarly unsupported by any empirical data.\textsuperscript{122} Concerns expressed about trans people ignoring the fact that roughly 42% of sexual assaults against women in the carceral setting are committed by staff, not other inmates.

\textsuperscript{118} Ramona R. Rantala, U.S. DEPT OF JUST., BUREAU OF JUST. STAT., NCJ No. 251145, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–2015 6 (2018), https://bjs.ojp.gov/content/pub/pdf/svraca1215.pdf [https://perma.cc/V58X-WSQZ] (reporting that approximately 34% to 34.6% of trans inmates were sexually victimized during a year of incarceration, compared 3.2% to 4.0% of cisgender inmates).

\textsuperscript{119} Id.


One transphobic campaign group, Fair Play For Women, claim that “female toilets and changing rooms are being turned mixed-sex around the country, leading to a huge rise in crimes against females, including sexual assault and rape. . . .” These safety risks are not evidenced; research into the safety of trans-inclusive toilets in the [United States] indicates that reported incidents of crime in public toilets are “exceedingly rare” irrespective of trans-inclusion policies. . . . Phipps notes how the experience of rape becomes capital in these arguments, “mobilised by trans-exclusionary feminists
accessing sex-segregated spaces that align with their gender identity (rather than the sex assigned at birth) rests on an unstated, factually incorrect assumption that trans people seek to access such spaces for the purposes of sexual gratification or sexual exploitation. But like everyone else, transgender people use locker rooms and restrooms to change clothes and go to the bathroom.

Equally importantly, transgender people’s access to such spaces does not endanger the safety of cisgender women in those places:

[M]any communities have had laws forbidding discrimination based on sexual orientation or gender identity for years, there have not been reports of sexual assaults in bathrooms as a result. Twenty-one states, the District of Columbia, and more than 200 cities and counties have adopted nondiscrimination laws allowing transgender people to access sex-segregated facilities that accord with their gender identity. Police, prosecutors, and human rights commissions in those communities have “consistently denied that there is any correlation between such policies and a spike in assaults.” The National Task Force to End Sexual Assault and Domestic Violence noted that “[n]one of these jurisdictions have seen a rise in sexual violence or other public safety issues.”

alongside a construction of trans women as predatory, dangerous and essentially male.” In other instances, trans women and girls are depicted as a “Trojan Horse whose access to women’s spaces will enable predatory men to similarly enter these spaces by claiming that they are women.” In both cases this obscures the threat of harm and exclusion facing trans women. An “emotive politics of fear” is used to exclude trans women from women-only spaces, whilst also averting any admission of cisgender women’s privilege relative to trans women.


123. Jones & Slater, supra note 122, at 839.

In 2019, attorney Amira Hasenbush, political scientist Dr. Andrew R. Flores, and public policy scholar Dr. Jody L. Herman published an article empirically examining the impact of a trans-inclusive nondiscrimination law in Massachusetts on safety and privacy in sex-restricted places.\(^\text{125}\) It was the first study to use crime data to evaluate any changes in crime rates before and after the adoption of a nondiscrimination law that allows trans people to access appropriate spaces according to their gender identity, rather than those aligned with the sex they were assigned at birth.\(^\text{126}\) It remains the only such study as of the date of this writing. The researchers found that the change in the law did not affect the number or frequency of criminal incidents in restrooms, locker rooms, and changing rooms.\(^\text{127}\) Accordingly, they concluded their paper by saying, “[t]his study provides evidence that fears of increased safety and privacy violations as a result of nondiscrimination laws are not empirically grounded.”\(^\text{128}\)

In sharp contrast to the data establishing the myth of trans-gender predators in sex-segregated spaces, there are abundant data that transgender and gender-nonconforming people experience much higher rates of criminally violent victimization in public spaces than their cisgender counterparts.\(^\text{129}\) In fact, upwards of 75% of trans men and 53% of trans women surveyed in the largest study of its kind reported that they routinely avoid public restrooms to minimize the chances of being harassed or assaulted.\(^\text{130}\) And restrictions on using restrooms or locker rooms that align with one’s gender identity are

\[\text{-argument [https://perma.cc/HEA5-YZ5Y] (explaining that municipalities, law enforcement personnel, school officials, women’s rights organizations, and LGBTQ+ advocacy organizations all report that “fears about male predators [in sex-segregated spaces] have not been born out”).}\]


\(^\text{126. Hasenbush et al., supra note 122, at 78.}\)

\(^\text{127. Id. at 77–78.}\)

\(^\text{128. Id. at 80.}\)


particularly precarious for transgender youth, as such limitations increase their risks of sexual assault by a ratio of 1.26 for trans boys and 2.49 for trans girls compared to rates without such restrictions.\textsuperscript{131}

Finally, gender-critical feminists assume that sex-segregated spaces ensure women’s safety, but that assumption is also flawed. It ignores three key facts, including:

the existence of same-gender and woman-perpetrated sexual assault, as well as the comparably high rates of intimate partner and sexual violence that cisgender and trans women experience from their same-gender partners. Moreover, [it] ignores decades of evidence sufficiently debunking the myths of “rape-free” women-only spaces and “lesbian utopias.” Sexual assaults may be perpetrated by people of all sexes and gender identities.\textsuperscript{132}

In short, neither what gender-critical feminists refer to as biological sex nor the gender identity of a sexual assault perpetrator has any bearing on the criminality of the act. “[T]he notion that the lack of a law protecting transgender people is all that’s stopping male predators from acting ‘is preposterous.’”\textsuperscript{133}

B. Selective and Often Flawed Anecdotal Evidence

Because people like Price and Burt who advance gender-critical feminist arguments cannot rely on criminological data, they attempt to bolster their assertions of danger to cisgender women in sex-segregated spaces by highlighting the actions of a handful of people who

\textsuperscript{131} Gabriel R. Murchison, Madina Agénor, Sari L. Reisner & Ryan J. Watson, School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth, 143 PEDIATRICS, June 2019, at 1, 5 [https://doi.org/10.1542/peds.2018-2902].

\textsuperscript{132} Valcore et al., supra note 3, at 698 (citing XAVIER GUADALUPE-DIAZ, TRANSGRESSED: INTIMATE PARTNER VIOLENCE IN TRANSGENDER LIVES (2014) (analyzing intimate partner violence that transgender people face); ADAM M. MESSINGER, LGBTQ INTIMATE PARTNER VIOLENCE: LESSONS FOR POLICY, PRACTICE, AND RESEARCH 127 (2017) (documenting the increased risks of experiencing intimate partner violence in LGBTQ+ relationships); Bethany M. Coston, Power and Inequality: Intimate Partner Violence Against Bisexual and Non-Monosexual Women in the United States, 36 J. INTERPERSONAL VIOLENCE 381, 381 (2021) [https://doi.org/10.1177/0886260517726415] (reporting that while roughly one in three heterosexual women experience intimate partner violence across the life course, 61% of bisexual women and 78% of non-monosexual women will); Paula J. Gilroy & Lynne Carroll, Woman to Woman Sexual Violence, 32 WOMEN & THERAPY 423, 432–33 (2009) [https://doi.org/10.1080/02703140903153419] (presenting case studies of violence perpetrated by women against other women); Lori B. Girshick, No Sugar, No Spice: Reflections on Research on Woman-to-Woman Sexual Violence, 8 VIOLENCE AGAINST WOMEN 1500, 1500 (2002) [https://doi.org/10.1177/107780102237967] (discussing woman-on-woman sexual violence)).

\textsuperscript{133} Steinmetz, supra note 124 (quoting Sarah McBride from the Ctr. for Am. Progress).
have engaged in harassing or predatory behavior in sex-segregated places.\textsuperscript{\text{134}} But these anecdotes are either isolated incidents or completely inapposite.\textsuperscript{\text{135}}

Consider the examples Price offers in the context of women’s shelters. She reports on a handful of cases of cisgender women who felt triggered by trans women who were permitted in shelters, but there are no allegations of misconduct against those trans women in the cited sources.\textsuperscript{\text{136}} In fact, one of the stories to which Price referred had described the trans woman as “intelligent,” “sensitive,” and “fragile.”\textsuperscript{\text{137}} Thus, to be clear, these examples are not of trans women victimizing cisgender women, but rather of cisgender women feeling uncomfortable and “upset” without evidence of any threats that the trans women’s presence, in Price’s offensive words, “jeopardized the security of a dozen or so women for the benefit of one man’s sense of belonging.”\textsuperscript{\text{138}}

Price similarly cites a news article from 2010 in which a “man wearing dark sunglasses and with a towel over his head” entered a women’s locker room at a University of California, Berkeley, recreational facility.\textsuperscript{\text{139}} But this is a red herring argument for two reasons: first, there is no indication that the person was transgender;\textsuperscript{\text{140}} and second, regardless of anyone’s sex or gender, any motivated offender could engage in similar conduct. “Sexual violence is a power-based phenomenon not limited to cisgender bodies, penises, or male perpetration.”\textsuperscript{\text{141}} Yet, Price used this story to contribute to

\begin{itemize}
\item \textsuperscript{\text{135}} Consider, for instance, the Karen White case, discussed supra note 30.
\item \textsuperscript{\text{137}} Davis, supra note 136.
\item \textsuperscript{\text{138}} Price, supra note 1, at 1537 (citing Davis, supra note 136). For a thoughtful, in-depth exploration of the need for women’s shelters to be trans-inclusive, see Rishita Apsani, Note, \textit{Are Women’s Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause}, 106 CAL. L. REV. 1689, 1689 (2018) [https://doi.org/10.15779/Z38125Q91G].
\item \textsuperscript{\text{139}} Price, supra note 1, at 1536 (citing \textit{Police: Calif. Locker Room Suspect Used Disguise}, ABC 7 NEWS (Oct. 22, 2010), https://abc7news.com/archive/7739509 [https://perma.cc/C7DB-63RL]).
\item \textsuperscript{\text{140}} \textit{Police: Calif. Locker Room Suspect Used Disguise}, supra note 139.
\item \textsuperscript{\text{141}} Valcore et al., supra note 3, at 698.
\end{itemize}
her narrative about the dangers of trans women in certain spaces. This is both disingenuous and unfair.  

Price also offered the story of Christopher Hambrook as an example of someone who had preyed on women at shelters. Notably, Hambrook was a convicted sex offender whose convictions for rape and child molestation call into question the propriety of the shelter’s actions in allowing Hambrook to stay there. Price conceded that Hambrook “may not have genuinely believed he was a woman,” but this concession fails to capture the fact that Hambrook subsequently admitted that he was not transgender:

[Hambrook] served time for child rape in 2002, and was determined to have multiple mental illnesses and rated as a high re-offense risk during psychiatric assessments, during which he admitted he was not transgender. Hambrook’s is one of the only cases of its kind, and yet it barely lends any credence to bathroom bill arguments. If anything, it proves that vigilance in mental health and transitional housing facilities can never be too high, and that solutions are desperately needed to address violent sufferers of mental illness.

Thus, Hambrook serves as yet another example of how gender-critical feminists conflate the dangerousness of trans women and male sexual predators.

Finally, I note that Price refers to a U.K. website that “details violent crimes committed by people who identify as the opposite sex” and claims that “the majority of the crimes, most of them sexual in

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142. As feminist scholar and activist Dr. Sara Ahmed observed, intentional “misgendering enables trans women to be positioned as imposters” within women-only contexts and “as perpetrators rather than victims of male violence.” Sara Ahmed, An Affinity of Ham-mers, 3 TRANSGENDER STUD. Q. 22, 25 (2016) [https://doi.org/10.1215/23289252-3334151].
143. Price, supra note 1, at 1537 (citing Pazzano, supra note 134).
144. See Pazzano, supra note 134.
145. Price, supra note 1, at 1537 (citing Pazzano, supra note 134).
147. Since the publication of Price’s article, I have found only one bona-fide news report about a trans woman, Diamond Blount, who was convicted of committing a rape in a sex-segregated correctional facility for women. Patrick Reilly, Transgender Rikers Inmate Sentenced to 7 Years for Raping Female Prisoner, N.Y. POST (Apr. 25, 2022, 7:42 PM EDT), https://nypost.com/2022/04/25/transgender-rikers-inmate-gets-7-years-for-raping-female-prisoner [https://perma.cc/M8U3-78XR]. As with the Karen White situation, supra note 30, this speaks more to the failures of correctional officials to properly classify and house inmates and maintain proper security in New York City jails than Blount’s case speaks to the alleged dangers trans women pose.
nature, are committed by males.”¹⁴⁸ In addition to being subject to criticism for being a non-academic, non-governmental, unvalidated source that relies on anecdotal evidence rather than data, it is clear that this website exists for the specific purpose of building a narrative about trans people as being dangerous.¹⁴⁹ Indeed, language on the website itself refers to transgender persons as “dangerous people in society” who, if granted nondiscrimination protections, would have “greater latitude to offend.”¹⁵⁰ Moreover, a review of the website makes it clear that many of the stories contained on the site are not, in fact, about transgender persons, but rather about men who either cross-dress or use disguises as part of predatory ruses.¹⁵¹ The sources of these stories are often transphobic British tabloids rather than legitimate journalistic venues.¹⁵² Perhaps these reasons help to explain why a search of Westlaw’s secondary sources database reveals that as of February 20, 2024, the website has never once been cited in any article published in a law review or law journal other than Price’s. But even if, for the sake of argument, all of the stories on the website were legitimate (which, to be clear, they are not), one can just as easily cite volumes of counterpoints using evidence of transgender persons’ victimization in sex-segregated spaces. The literature is replete with many such stories, as opposed to the handful of those that illustrate gender-critical feminists’ largely unfounded claims about cisgender women being victimized by trans women.¹⁵³


IV. PRIVACY AND DISCRIMINATION

Relying on Jeffreys’ gender-critical philosophical work, Price asserted that nondiscrimination policies that have the effect of allowing trans women to access sex-segregated places constitutes an infringement of cisgender women’s and girls’ right to privacy. But legal scholars have comprehensively evaluated these claims and concluded that “the privacy concerns asserted in opposition to anti-discrimination protections for [LGBTQ+] people are nothing more than a pretext to justify continued discrimination.”

In her article “Privacy as Pretext,” law professor Susan Hazeldene noted that opponents of LGBTQ+ rights have long relied on privacy arguments. But these arguments are not actually rooted in the law of privacy. Rather, such arguments “raise the
specter of sexual predation”—a false narrative for the reasons explained in Part III. But even when privacy rights are considered separate and apart from their conflation with empirically unsupported concerns about sexual victimization, there are no legally cognizable privacy interests in transgender exclusion from sex-segregated settings.¹⁵⁸

First, trans-inclusive access to such spaces does not involve any governmental intrusion into any protected intimate decisions such as access to contraceptives or the decision for consenting adults to engage in private sexual conduct. Accordingly, the string of so-called sexual privacy cases from *Griswold v. Connecticut*¹⁵⁹ to *Lawrence v. Texas*¹⁶⁰ are not implicated by such policies.¹⁶¹

Second, trans-inclusive policies do not involve the unwanted distribution of intimate images of one’s body.¹⁶² Thus, such policies do not engender any common law or statutory causes of action for invasion of privacy.

Third, Hazeldean also explained that there is no disclosure of informational privacy attendant to sharing most sex-segregated places.¹⁶³ No one obtains any protected information about someone merely by the fact that cisgender and transgender people are using the same restrooms, locker rooms, or the like. Moreover, transgender people’s access to such spaces does not mean that anyone will pay more attention to cisgender women in those locations:

People will not be more likely to notice [cisgender women] going to the bathroom facility just because a transgender woman is also permitted to use it. The bathroom being accessible to transgender women does not increase the attention paid to [cisgender women]. [They] will not be looked at, scrutinized, or observed more closely than were [they] only sharing the bathroom with other cisgender women. Or, to put it another way, [their] level of anonymity . . . is simply not affected by the decision to allow

¹⁵⁸. Hazeldean, supra note 124, at 1730–45.
¹⁶³. *Id.* at 1750–51, 1757–60.
transgender women to utilize the women’s bathroom. Some people may notice [them] walking to the bathroom, others may see [them] washing [their] hands in the sink, or spot [them] leaving the facility after [they are] done using it. But this is no more likely because transgender women also have access to the same facility . . . . [Their] level of scrutiny or anonymity is the same.\(^{164}\)

Fourth, equal access for trans and cisgender persons to sex-segregated spaces does not violate privacy when conceptualized as personhood—“those attributes of an individual which are irreducible in [one’s] selfhood.”\(^{165}\) As Hazeldean explained, such arguments fail for the reasons that Jed Rubenfeld first articulated:

Rubenfeld criticized the personhood conception of privacy[,] . . . pointing out that some people may define their personhood through intolerance. Such individuals deeply value living in a community that excludes others of whom they disapprove. He noted that recognizing the right of LGBT people to engage in same-sex relationships without being criminalized might be said to undermine the rights of an “intolerant heterosexual” who “can claim, on personhood’s own logic, that critical to his identity is not only his heterosexuality but also his decision to live in a homogenously heterosexual community.”\(^{166}\)

Hazeldean artfully explained that if an objecting cisgender woman were compelled to share spaces like restrooms and locker rooms with a trans woman, “that would not seem to undermine her conception of who she is as a woman any more than a tall woman using the facility would make a petite person tall. Her identity formulation remains intact.”\(^{167}\) Quite the contrary, failing to allow transgender, intersex, and non-binary people access to such spaces fails to respect their identities in ways that put them at risk both psychologically and physically.\(^{168}\)

\(^{164}\) Id. at 1751 (relying on Cruzan v. Minn. Pub. Sch. Sys., 165 F. Supp. 2d 964, 966 (D. Minn. 2001) (rejecting a challenge to an employer’s trans-inclusive restroom policy on both religious and hostile work environment theories)).

\(^{165}\) Id. at 1759 (citing Paul A. Freund, Address at the Annual Dinner of the American Law Institute (May 23, 1975), 52 A.L.I. PROC. 563, at 574 (1975)).

\(^{166}\) Id. at 1761 (citing Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 768 (1989)).

\(^{167}\) Id. at 1762 (rejecting Janice Raymond’s assertion that trans women are an affront to the identity of cisgender women; see RAYMOND, supra note 18, at 104–06).

\(^{168}\) Id. at 1762–63 (quoting Doe ex rel. Doe v. Boyertown Area Sch. Dist, 897 F.3d 518, 523 (3d Cir. 2018) (“Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes ‘severe psychological distress often leading to attempted suicide.’” (citations omitted))).
Fifth, as the U.S. Court of Appeals for the Third Circuit said, “the presence of transgender students in the locker and restrooms is no more offensive to constitutional . . . privacy interests than the presence of the other students who are not transgender.” That conclusion is supported by the fact that people using such communal spaces are not isolated, but rather they “expect to see other[s] . . . in varying stages of undress, and they expect that other[s] . . . will see them in varying stages of undress.” Given the lack of reasonable expectations of privacy, coupled with the fact that trans persons are private individuals, not governmental actors, it is clear that trans-inclusive policies do not implicate the Fourth Amendment.

Finally, Price faults trans-inclusive, intersectional feminism because it allegedly undermines “forms of sex discrimination only suffered by women: pregnancy discrimination, reproductive exploitation through egg donation and surrogacy, forced pregnancy, and forced or coerced abortion.” This is yet another red herring argument. But granting nondiscrimination protections to transgender people does not diminish the necessity of combatting these forms of discrimination. Yet, gender-critical feminists continue to weaponize gender equality in their attacks against trans people, creating a false dichotomy in which two . . . oppressed groups are positioned against each other. However, the attempts of gender-critical feminists to represent themselves as defenders of women’s rights fall short in the face of strong voices standing up for trans rights . . . [that make clear] “trans rights do not come at the expense of women’s rights.” This point is also reaffirmed in both domestic and international human rights instruments.

In other words, there is no reason equality cannot be pursued—socially and legally—in an inclusive manner for both cisgender and transgender women.
CONCLUSION

My colleagues and I ended our 2021 article in Critical Criminology advocating for trans-inclusive feminism in law and criminology by saying that we had endeavored to critique three distinct lines of reasoning that had been advanced by Burt in her opposition to the U.S. Equality Act, including faulty legal interpretations; misunderstandings about the science of sex; and flawed assumptions about victimization, offending, and threats to safety. In this Article, I have omitted any discussion of the U.S. Equality Act largely because I, and others, have already addressed Burt’s errors of statutory interpretation, case law analysis, and legal history. Moreover, because this Article is written for a law journal that primarily reaches legal audiences, I do not believe it is necessary to rehash those points relevant to the law.

On the other hand, the arguments about the science of sex, victimization, offending, and threats to safety bear reiteration for a legal audience—and not just because lawyers and legal scholars might be unfamiliar with the natural and social scientific findings that undercut the gender-critical perspective. Indeed, the impetus for my writing the present Article was the fact that the Marquette Law Review published Price’s severely flawed manuscript and a discriminatory organization had then relied on that work to advance legal arguments in federal court that are harmful to transgender, non-binary, and gender-diverse people.

In 2020, the editors of Nature Genetics published an editorial in which they acknowledged that they had “been complicit in maintaining inequitable systems and that allowing these systems to go unchanged contributes to deeper injustice.” They pledged that they would reexamine their editorial practices and take “concrete actions” such as inviting submissions about experiences of racism in science, diversifying their referee pools, using social media to amplify the voices of scholars of color, and working “to change the prevailing for Women and LGBTQ Equality in the Workplace, 10 FRONTIERS PSYCH., Feb. 2019, at 1, 13 [https://doi.org/10.3389/fpsyg.2019.00272] (arguing that business policies that advance the needs of women and LGBTQ+ people can “propitiate gender equality and counteract gender-based discrimination and harassment.”).

175. Valcore et al., supra note 3, at 700.
176. Id. at 689–96; see also Susan Gluck Mezey, In Favor of the 2019 Equality Act: A Comment on Burt, 16 FEMINIST CRIMINOLOGY 526 (2021) [https://doi.org/10.1177/1557085121991336].
177. See supra note 5. As previously explained, another anti-trans group has since done the same. See supra note 6.
178. Racism and the Status Quo, 52 NATURE GENETICS 641, 641 (2020) [https://doi.org/10.1038/s41588-020-0666-6].
assumptions about who gets to be considered an expert.” I hope that the editorial teams of all academic journals will reflect on how they might similarly adopt practices designed to counter prejudice in all its forms, rather than perpetuate it. Scholarly publications should advance equality and justice, not undermine them.

Finally, I urge the members of the judiciary and their law clerks to look beyond arguments in appellate briefs that rely on faulty premises and erroneous understandings of natural and social science. With regard to transgender rights, it is my hope that this Article provides the information court actors need to understand why they should not rely on the work of Price, Burt, and other gender-critical feminists that are philosophically motivated, rather than being grounded in medicine, biology, neuroscience, psychology, and criminology. The consequences of legal actors not understanding the natural science about sex or the social science about transgender victimization and anti-trans discrimination are profound. Trans people experience anxiety, depression, self-deliberate harm, and suicidal ideations at rates far in excess of cisgender people. And they are at least four times more likely than cisgender people to experience violent victimization, including aggravated, simple, and sexual assaults. The law should be helping to combat these outcomes.

Of course, neither legislation nor judicial decisions can, by themselves, force the social acceptance of any minority group.

[But] the law can provide new opportunities for members of minority groups to expand their lives into areas from which they were once excluded. This enables their fellow citizens for the first time to have the chance to know them as individuals and to discover in them their special talents as well as the common humanity we all share. Through this direct social experience, prejudices are overturned.

179. Id.
180. See, e.g., Shanna K. Kattari, Leonardo Kattari, Ian Johnson, Ashley Lacombe-Duncan & Brayden A. Misiolek, Differential Experiences of Mental Health Among Trans/Gender Diverse Adults in Michigan, 17 INT’L J. ENV’T & RESCH. & PUB. HEALTH 6805 (2020) [https://doi.org/10.3390/ijerph17186805].
182. Welsh, supra note 70, at 1456 (quoting ERIKSON EDUC. FOUND., LEGAL ASPECTS OF TRAÑSEXUALISM AND INFORMATION ON ADMINISTRATIVE PROCEDURES 1 (rev. ed. 1971)).
## APPENDIX

### Table Summarizing Select Differences in Sex Development

<table>
<thead>
<tr>
<th></th>
<th>Typical male</th>
<th>Subtle variations</th>
<th>Moderate variations</th>
<th>46, XY DSD</th>
<th>Over-testicular DSD</th>
<th>46, XX Testicular DSD</th>
<th>Moderate variations</th>
<th>Subtle variations</th>
<th>Typical female</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chromosomes</strong></td>
<td>XY</td>
<td>XY</td>
<td>XY</td>
<td>XY</td>
<td>XX, XY, or mix of both</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td><strong>Gonads</strong></td>
<td>Testes</td>
<td>Testes</td>
<td>Testes</td>
<td>Testes</td>
<td>Both ovarian and testicular tissue</td>
<td>Small testes</td>
<td>Ovaries</td>
<td>Ovaries</td>
<td>Ovaries</td>
</tr>
<tr>
<td><strong>Genitals</strong></td>
<td>Male internal and male external genitals</td>
<td>Male internal and male external genitals</td>
<td>Male external genitals with anatomical variations such as urethral opening on underside of penis</td>
<td>Ambiguous</td>
<td>Ambiguous</td>
<td>Male external genitals</td>
<td>Female internal and female external genital</td>
<td>Female internal and female external genitals</td>
<td></td>
</tr>
<tr>
<td><strong>Other characteristics</strong></td>
<td>Male secondary sexual characteristics</td>
<td>Subtle differences such as low sperm production; some caused by variations in sex-development genes</td>
<td>Affects 1 in 250–400 births</td>
<td>The hormonal disorder persistent Müllerian duct syndrome results in male external genitals and testes, but also a womb and Fallopian tubes</td>
<td>Rare reports of preponderantly XY people conceiving and bearing a healthy child</td>
<td>Usually caused by presence of male sex-determining gene SRY</td>
<td>Variations in sex development such as premature shutdown of ovaries; some caused by variation in sex-development genes</td>
<td>Subtle differences such as excess male sex hormones or polycystic ovaries</td>
<td>Female secondary sexual characteristics</td>
</tr>
</tbody>
</table>

*Source: Adapted from Ainsworth, supra note 82, at 290–91.*