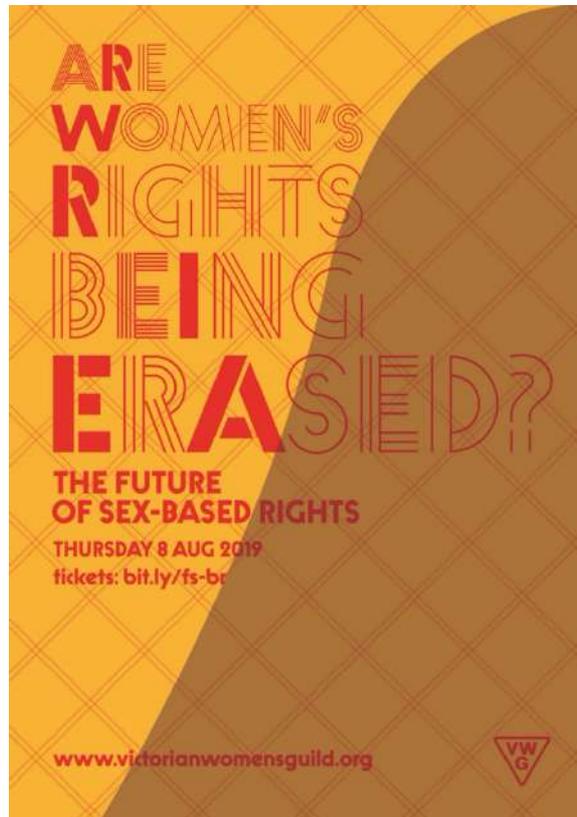


A Philosophical Perspective on Gender Identity [long]



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The current legal understanding of sex in Victoria (Australia) is either of: biological sex, as observed at birth and recorded in the birth register, or, what we can call ‘altered’ sex, as obtained by a change to the birth register on the basis of having had sex reassignment surgery, which means, surgery to alter some primary sex characteristics to bring them into line with those of the opposite sex.

The Births, Deaths and Marriages Registration Amendment Bill 2019, moved to second reading and due to be discussed on August 13th, proposes to substantially liberalise the category of legal sex, shifting from sex reassignment surgery to an ‘acknowledgement of sex application’, which requires only a statutory declaration that the applicant believes their sex to be as nominated. That means, any male-born person who believes his sex to be female (or is willing to make a statutory declaration to that effect whether he believes it or not) can acquire the legal sex classification ‘female’.

I want to focus on this move of replacing sex – understood as a certain kind of embodiment or physiology – in the law with belief about sex. I’m going to suppose for the sake of argument that there will be no fraudulent uses of this legal possibility, even though we have already seen some such uses in other countries, like someone changing their sex to get cheaper car insurance, or to access their superannuation earlier. Our version of the bill protects against fraudulent uses, and so allows remedy if such use is discovered. So I’ll set those cases aside. I’ll focus on belief about sex as the concept of gender identity, which many countries have either protected separately (as we have in both the Australian Sex Discrimination Act and the Victorian Equal Opportunity Act) or are attempting to replace sex with (as in a recently deferred Bill in New Zealand). The question is whether ‘gender identity’ is fit to replace

biological and altered sex as sex, for legal purposes. I will argue that it isn't, drawing on some recent work in Philosophy (which is my academic discipline).

Dembroff: 'Real Talk on the Metaphysics of Gender'

Robin Dembroff's (forthcoming) is not directly about gender identity, so I won't say a lot about it here, but it's worth noting this rather striking claim that they (Dembroff identifies as nonbinary) make:

"In trans-inclusive contexts, in other words, individual autonomy over both gender kind membership and the meaning of that membership is presupposed. Gender classification practices in such communities defer to self-identification, and do not take anatomical information or gender presentation to determine gender. Not only is someone's claim to be (e.g.) a woman taken as authoritative, so too are her claims about what this identity signifies about herself and how she would like others to interpret this claim" (p. 15).

This straightforwardly admits that there could be as many things it means to identify as a woman as there are people identifying as women; and that there's no reason to expect that any of these things are the same as what women are identifying as, if they are identifying as anything at all (rather than just, for example, being female). If it's up to the person to declare not only that they are a woman but also what it means to be a woman then it's very hard to see why women should take this seriously, and in particular why lawmakers should take this seriously in thinking about categories of people that need protecting. (Another way to put this is, what kinds of discrimination or harassment or other social mistreatment do we expect this class of identifying- people to face? It's hard to say anything even remotely uniform. I think we end up back with sex-based discrimination, and discrimination on the basis of gender expression (non-conformity to dominant expectations).

Bettcher: 'Trans Identities and First-Personal Authority'

Talia Mae Bettcher (2009) discusses gender as an 'existential identity', by which she means, a matter of 'who' rather than 'what' one is (where the 'what' is about what genitals one has). She relies on the idea of 'first personal authority', which is a kind of authority that we have over others when it comes to certain kinds of knowledge. For example, we know about the contents of our own pains and pleasures, and our own momentary thoughts, and others generally do not; we know about our own beliefs, fears, desires, and wishes, when others generally do not. We generally think people are experts about how they feel (their pains and pleasures) and pretty reliable about their beliefs and desires (only pretty reliable because sometimes good psychologists can figure us out from our behaviour better than we have been able to). But even though we can be wrong, we're still generally more credible on this stuff than other people.

Still, there's all sorts that can get in the way of this knowledge: 'denial, self-deception, wishful thinking, and unconscious attitudes are common' (p. 100). So Bettcher argues that the authority is not in fact 'epistemic' (about knowledge) but ethical, in that we are supposed to 'take responsibility for' our mental states. We can be faulted for having 'inappropriate, false, or irrational attitudes' (p. 102). So for Bettcher, first personal authority is an ethical phenomenon, whereby we take responsibility for our own mental states, including our attitudes, and our feelings. So when we assert a mental state, like saying 'I am in pain', we do not only report a fact about ourselves (that there is pain going on), but we also put ourselves on the line by accepting the social consequences of our assertion, whatever they may be (suppose I make this claim about a hangnail in the middle of someone else's childbirth, I may face the consequences of everyone else in the room thinking I am a narcissist).

Bettcher points out that we recognize it as a moral wrong when first-personal claims are coercively extracted, as when the domestic abuser forces his wife to 'admit' to having done something deliberately to provoke him. The wife's first-personal authority is violated because someone other than her has

exercised authority over it, and because she is forced to make a claim and accept its consequences when that claim is not a true reflection of what she believes.

Bettcher then argues that we have a right to privacy about our genital status. It would be inappropriate for someone to come up to us and ask: ‘do you have a penis?’ (p. 107). She thinks gender presentation signifies genital status in mainstream society, in a way that means most people are conceding that privacy most of the time (which doesn’t show that we don’t have a right to it – many people are conceding their online privacy by allowing cookies and accepting the terms and conditions of social media sites, but that doesn’t mean we don’t have a right to privacy online). Bettcher’s argument is that in order to avoid constructing trans people as liars or deceivers (whose gender presentation does not signify their genital status – except in the cases of those who have had sex reassignment surgery) we’ll need a fundamental shift in what gender presentation communicates or doesn’t communicate.

Bettcher talks about moving in subcommunities in which gender presentation is taken to be a cue not for genital status, but for how one wants to be treated (p. 108). Self-identifications are accepted at face value in these subcultures. But Bettcher acknowledges that there are problems with this: what is it to believe that one is a woman? (p. 109). And what about trans people who identify as something for political reasons, rather than because of sincere beliefs about themselves (about which they could have first-personal authority). Fixing upon ‘self-identification’ as the criterion for membership in a category – saying that identifying as a woman makes you a woman and identifying as a man makes you a man – leaves no room for metaphysical disputes about what actually makes a woman a woman or a man a man, which trans people do have (p. 109).

What Bettcher says about how she understands self-conception, as existential rather than metaphysical (the example she gives is identifying as a teacher even if you’ve never been employed or trained as one, because you’re an ‘unactualized teacher who has never had the chance to be “who one really is”’) and as compatible with very different understandings (involving the same words) by others, fits well with what Dembroff (forthcoming) says about it being up to people not only how they identify but also what that means. (And again, this points towards there being something very different going on here than what is going on with sex).

Bettcher finishes the chapter by arguing that just as ‘no means yes’ means that women’s sexual autonomy in refusing rape is almost entirely absent, so too is there little room for transwomen to communicate that their gender presentation does not communicate genital status. (We might take a moment here to note that it’s kinda offensive to compare these two things, given that the former is a serious sexual assault that can cause lasting trauma, while the latter is... not having others see you as you see yourself.) For Bettcher, saying to a transwoman ‘you are really a man’ is just like telling someone ‘you want to go home now’: both assert control over another person’s mental states, which only she has the authority to assert / avow.

So much for the summary of Bettcher’s argument; on to the criticism! Her claim about gender presentation communicating ‘genital status’ is extraordinarily reductive, and seems to be deliberately so in order to trivialize the information that is being transmitted. She says “[i]n locutions like ‘that’s really a man’, the word ‘man’ circulates information about genital status’ (p. 106)”. But when we perceive that someone is male, this gives us a lot of information about him. It’s not merely whether he has a penis or not (because if we were told he had prostate cancer and had been castrated we would not lose the only piece of information we had). Rather, knowing that he is male is a heuristic for making predictions about what sorts of beliefs and attitudes he might have, what sort of childhood he has been through, the perspective he might have upon women, and so on. Gendered socialization is pervasive; women generally relate to women differently than they relate to men (and men generally relate to women differently than they relate to men). So talking as though gender presentation is a signifier of genital status pretends that the only information we get from sex is what junk is in one’s pants. But sex is about much more than junk in the pants, it’s about a certain kind of embodiment that has, and has had, a certain kind of social and political significance and is likely to have produced a certain set of experiences.

Jenkins: 'Toward an Account of Gender Identity'

Katharine Jenkins' goal in her (2018) paper is to give an articulation of the concept of gender identity, given its prominence in discourse about trans rights. She sets out six elements that a good definition of gender identity should include, and then argues for a particular understanding in terms of norms. Here are the six elements:

- 1) The definition should render plausible the idea that gender identity is important and deserves respect (p. 719)
- 2) The definition should be compatible with a norm of FPA (p. 719)
- 3) The definition should be compatible with the idea that some trans people have a need for transition-related healthcare that is based on their gender identity.
- 4) The definition should be clear and non-circular.
- 5) The definition should apply equally well to binary and non-binary identities
- 6) The definition should combine well with broader critiques of current gender norms and social structures

You might notice that (2) ties in with Bettcher's discussion of first-personal authority. Jenkins considers three accounts of gender identity which might stand a chance of accommodating all these 6 elements. One is a dispositional account, according to which gender identity involves a set of dispositions to act in particular ways, where those ways involve behaviours relating to e.g. "modes of dress, posture and mannerisms, productive and leisure time activities, styles of communication and social interaction" (p. 725). Another is the self-identification account, according to which gender identity is a matter of sincere self-identification (this is drawing on an idea of Bettcher's in another paper). A third, and the one Jenkins defends in the paper, has it that to have a gender identity is to experience a particular set of social norms as being relevant to you. On this account, if someone has a female/woman/feminine gender identity, then "she experiences the norms that are associated with women in her social context as relevant to her" (p. 728).

Jenkins draws an metaphor in terms of a map of social space, which people of different sexes can mark out according to where they can go, where they feel comfortable and uncomfortable, etc. So for example the female person's map might have the female bathrooms marked as a place she can go but the male bathrooms not, and she might mark a meeting room as a place where she is expected not to speak much (because she is regularly ignored or talked over). She will have a sense of what is norm-compliant (using the female bathrooms) and what is norm-violating (speaking up a lot in meetings). Jenkins thinks she can have this sense even while being aware that others do not have these same expectations of her. For Jenkins, these norms are just a 'sense' that she has of what's right for her or required of her. So her concept of gender identity is:

"S has a gender identity of X iff* S's internal 'map' is formed to guide someone classed as a member of X gender through the social or material realities that are, in that context, characteristic of Xs as a class" (Jenkins 2018, p. 730).

**iff is a shorthand philosophers use to mean 'if and only if', which means here that having an internal map of a certain kind is both necessary and sufficient to having a gender identity of a certain kind.*

In other words, transwoman Alice has a gender identity 'female' ('woman' / 'feminine') only if Alice's 'internal map' is formed to guide women through the social or material realities that are characteristic of women as a class. Women as a class face a certain set of expectations about how they ought to be and

to behave. So people with female/woman/feminine gender identities will have internal maps that guide them to be and behave in these ways, even if, Jenkins says, they simultaneously violate or disapprove of the expectation that women be/behave that way (p. 730). She gives the example of a woman who does not remove her leg hair, feeling uncomfortable and conspicuous in a short dress: simultaneously aware that the norm of removing body hair applies to her (as a woman), and that it shouldn't apply to her and she contravenes it deliberately.

Jenkins argues that this account meets all six elements given earlier, and so is the most persuasive account of gender identity and one that trans rights campaigns should integrate. Note, first, that this is armchair psychology. We have evidence about 'core gender identity' (on which more below), but not about gender identity understood in the senses Dembroff, Bettcher, or Jenkins seem to have in mind. So we might first question the accuracy of this claim that everyone has 'internal maps'. Second of all, there's a question about whether all or only some people have these 'internal maps'. If everyone has one, then we might well get a class of people who have female/woman/feminine gender identities in common (namely the class of non-trans female people and transwomen). But what if only trans people have these 'internal maps'? If that is so, we don't get commonality. (There is a more general debate between feminists over whether all people or only some people have gender identities. Some feminists deny that they have one, and hence refuse to use the term 'cisgender' to self-describe).

Third, why we should be interested in a class of people whose internal maps direct them to act in particular ways, rather than a class of people who are treated in particular ways? When we're just doing metaphysics and social ontology, all such classes of people might be interesting. But when it comes to the law, which is what I'm interested in here, it's not clear that all people with gender identities in the sense Jenkins has in mind need specific sorts of protections (such as anti-discrimination legislation). Some people with female/woman/feminine internal maps – namely non-trans females – are directed to behave in a particular way because if they don't they will be sanctioned for failure to conform to feminine gender norms. Other people with those internal maps – namely transwomen – are directed to behave in a particular way only by the ideas they have about their own identity; if they follow those directions they will be sanctioned for failure to conform to masculine gender norms (unless they 'pass'). This difference plausibly matters: when female people follow the map they are conforming, when male people follow the map they are non-conforming. This is likely to lead to different social sanctions and those sanctions are likely to require different legal protections to mitigate.

Byrne: What is Gender Identity?

Alex Byrne (2019) surveys definitions of 'gender identity' from a wide range of popular sources like the Boston Children's Hospital, the World Professional Association for Transgender Health, UK Professor of Sociology and Gender Identities Sally Hines' book *Is Gender Fluid?*, and the American Psychological Association, and comes up with the following synthesis that he calls 'the standard picture':

A: Everyone has a gender identity, which is usually stable. Non-transgender people have gender identities that match their sex.

B: Transgender people – in particular, MtF and FtM transsexuals, or transgender/trans women and transgender/trans men – have gender identities that do not match their sex.

C: A mismatch between sex and gender identity causes gender dysphoria.

Byrne argues that the standard picture is wrong. 'Gender identity' is best understood as 'core gender identity', following work by Robert Stoller done in 1964, which takes it to be knowledge or apparent knowledge of one's sex (so e.g. a female person can know that she is female, and an intersex person who is actually male but externally looks female can apparently know that he is female, on the basis of the evidence he has). (A) is right. But (B) is not, because there are transwomen who say that they are male,

and there are transwomen who say that they are men. These people do not have core gender identities that are female, and therefore that do not match their sex. So (B) is false.

Byrne asks if there's some other way to think about gender identity, that all transwomen might have in common, no matter how they relate to their sex. He suggests:

- a sense of kinship with females as a group
- a female-typical psychology
- satisfaction at being socially treated as female
- a tendency to conform to the norms of female behaviour
- a tendency to emulate female stereotypes

Byrne argues that even if some of these work for most or even all trans women, they won't work for many non-trans women. There are lots of female people who don't have or do any of these things. The point is that even if we can get a female gender identity that fits all transwomen, it probably won't be held in common with all or even most women, and so that undermines the idea that gender identity is something that transwomen and female people have in common and can thus justify treating them as a unified class under the law. Byrne's conclusion is that there's no way to make both (A) and (B) true, because if gender identity is 'core gender identity' then (A) is true but (B) is false, and if it's something else then (B) is true but (A) is false. And (C) is also false if 'gender identity' is 'core gender identity', because while some trans people say they are the opposite sex (have a 'mismatch') others just say that they want or desire to be the opposite sex. People who transition late, too, seem to have core gender identities that match for most of their lives, so it seems more plausible that late-onset dysphoria causes gender identity, than that gender identity causes late-onset gender dysphoria. The standard picture is false.

Barnes: 'Gender and Gender Terms'

Elizabeth Barnes (forthcoming) also talks about this problem (the 'exclusion problem') that exists in finding an account of gender identity that includes all women and all transwomen.. She says it's been common in the literature to note that 'social position' accounts of gender (accounts in which gender is a position in a social hierarchy) exclude at least some transwomen (e.g. those who don't pass as women and so are not placed into that subordinate social position through their social treatment). But more overlooked is the fact that 'internalist' accounts of gender, that look to gender identity or similar, also have an exclusion problem, in this case of at least some women, like some cognitively disabled women, or neuro-atypical women, who are incapable of forming an identity as female/woman/feminine. (Barnes also notes the problem of saying whether the gender identities of those who do have one are the same as others' or not. As we've already seen, Dembroff simply concedes that they need not be, but does not seem to acknowledge that this is a problem).

Taking stock

In summary, we have three positive accounts of gender identity to consider. They are:

Dembroff: both our gender identities and what our gender identities mean are up to us.

Bettcher: gender identity is something we have first-personal authority about. Gender identity is existential, it's about "who we really are".

Jenkins: gender identity is an 'internal map' formed to guide people of a (gender) class through certain realities. We can have these 'internal maps' while violating their dictates and disapproving of them (and, apparently, without others holding us to them).

...and we have two criticisms of gender identity to consider. They are:

Byrne: on the standard picture, everyone has a gender identity, and non-trans people's matches their sex while trans people's is mismatched with their sex. But the standard picture is false, because not all trans people experience a mismatch. Alternative understandings of gender identity might unify all trans women, but they'll leave out a good number of women.

Barnes: if gender identity is something like sincere self-identification (Bettcher), or internal map (Jenkins), some women will not have a gender identity (e.g. those cognitively disabled or neuro-atypical women incapable of forming one). We have no way of knowing whether the gender identities people have are the same.

Conclusion: gender identity is not fit to replace sex in the law

Let me make a further criticism, which is specifically directed at the attempted conflation of gender identity with sex when it comes to the law. Take the class of people with woman/female/feminine gender identities, as understood on any of these accounts. The questions are:

- (i) should the law be interested in this class of people?
- (ii) should the law be interested in this class of people as members of the sex class they identify as/with?

I think the answer to the second of these questions must be, only if the reasons for why we have sex-based protections also apply to them. And I think we have these protections for three broad types of reasons. The first is to protect privacy, for example when we say that sleeping accommodations can be maintained as single-sex (as both the Australian Sex Discrimination Act and Victorian Equal Opportunity Act do); the second is to protect fairness, for example when we say that female sports can be maintained as single-sex (as the Equal Opportunity Act does); and the third is to protect against discrimination or underrepresentation, for example when we have single-sex scholarships, or prizes, or hiring lists.

So the question becomes, do all or most of the people with female/woman/feminine gender identities need their privacy protected from male (why would it, when they have the same bodies?); would it be unfair to require them to compete against males in sports (why would it, when they have been through a male puberty and have the associated advantages?); have they generally been discriminated against or underrepresented in certain areas compared with males, and in a way that is the same as, or similar to, the way that women have been discriminated against, or for the same, or similar, reasons why women are underrepresented? It seems that in most cases the answer to these questions will be 'no' (although with the occasional exceptions, for transwomen who have had sex reassignment surgery, or who transitioned prior to puberty, or who 'pass' as female). Certainly in the cases of transwomen who have undergone neither surgical or medical transition, have been through a male puberty, and do not 'pass' as female, the answer will clearly be 'no' in all three cases.

The answer to the first of these questions is less obvious – it seems to me that the law should be interested in this class of people, or at least a class of people that includes these people, such as all/any gender non-conforming people. These people do face sometimes quite serious discrimination. But notice that depending on how we characterize this group (e.g. gender identity, gender expression, gender non-conformity), we might already protect this —gender identity is protected in both the Victorian Equal Opportunity Act and the Australian Sex Discrimination Act. And if that's the case, then the Births, Deaths and Marriages Registration Amendment Bill 2019 is attempting to replace sex in the law with something that is already protected in the law, and so the Bill is only bad news for women (rather than being bad news for women but good news for trans people).

In conclusion, we should not be replacing sex in the law with gender identity (through the notion of what sex one believes oneself to be, rather than the fact of what sex one is, or what sex one has taken surgical steps towards becoming). Sex and gender identity are two completely different things. And, we

should not be trying to shoehorn the protection of gender identity into the protection of sex. It should be protected separately (and on some understandings, it already is). For as long as sex-based discrimination and underrepresentation persists, women need sex-based rights.

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