

FEMINISM, TRANS JUSTICE, AND SPEECH RIGHTS: A COMPARATIVE PERSPECTIVE

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I

INTRODUCTION

In recent years, it has become increasingly common for individuals to be publicly rebuked and penalized when their speech departs from the moral attitudes and commitments deemed necessary to protect those most vulnerable to abuses of power. The question of how social justice relates to freedom of speech is redrawing the political spectrum, frequently placing on the “wrong” side of the moral divide those individuals who might otherwise identify as left-leaning liberals but who consider the free exchange and expression of ideas to be a non-negotiable democratic principle.¹ Critics of those who defend speech rights argue that this principle has never truly been neutral: not all members of society are equally positioned to realize this freedom, which is often wielded by the powerful in the defense of their existing privileges.² Others argue that the phenomenon of “de-platforming” is compounding an already polarized political climate, ultimately with the consequence of jeopardizing rather than advancing social justice causes.³ As such, the current political moment is casting anew the contested matter of how to strike a balance between the prevention of harm on the one hand, and the tolerance of opposing views on the other, in the pursuit of justice.

The purpose of this article is to consider how feminists are shaping this contentious relationship between social justice and freedom of speech, particularly

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1. See, e.g., *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), <https://harpers.org/a-letter-on-justice-and-open-debate/> [<https://perma.cc/6ZF4-ZUMR>] (arguing against the use of de-platforming as a tool of social justice); Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (June 6, 2021), <https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html> [<https://perma.cc/SEB5-2MY7>] (describing the internal struggles at the A.C.L.U. over how to reconcile the organization's commitment to defending free speech with the social justice values of its employees).

2. See, e.g., Hannah Giorgis, *A Deeply Provincial View of Free Speech*, ATLANTIC (Jul. 13, 2020), <https://www.theatlantic.com/culture/archive/2020/07/harpers-letter-free-speech/614080/> [<https://perma.cc/9JHX-496D>] (critiquing the Harper's letter authors as defending their own elitist interests).

3. See, e.g., Svetlana Mintcheva, *The Case Against De-Platforming*, NAT'L COAL. AGAINST CENSORSHIP (Fall 2018), <https://ncac.org/censorship-news-articles/the-case-against-de-platforming> [<https://perma.cc/RC73-SUPA>] (arguing that de-platforming only contributes to social polarization and could ultimately enable populism).

in the context of efforts to advance the rights and inclusion of trans people.⁴ The setting for this intervention is the proposed Equality Act legislation in the United States (US), which has given LGBTQ+ Americans and their communities hope that the nation is ready to recognize the rights of not only people with diverse sexual identities but also the trans community. Feminists have found themselves on the frontline, with the question of the Equality Act's implications for trans inclusion in "women's-only" spaces bringing to the surface—yet again—long simmering debates over the question of how to conceptualize the nature of womanhood and, in turn, define the boundaries of her spaces.⁵

American feminists are not alone in being confronted by their deep-seated internal divisions: across the pond, the British debate about trans rights and inclusion has long been divisive, with the outgoing chair of the Equality and Human Rights Commission in the United Kingdom (UK) in 2020 going so far as to describe the situation as "toxic."⁶ Proposed changes to the UK's overarching gender recognition legislation were ultimately scrapped by the government following several years of consultation. As in the US, it has been the issue of access to women's-only spaces that has emerged as the major point of contention, with a variety of feminist voices and organizations—many of the latter newly formed—mobilizing to oppose any legislative changes that they perceive as watering down the connection between womanhood and biological sex. Those feminists opposed to greater trans inclusion in women's-only spaces, such as sport, prisons, and shelters, have claimed that cisgender⁷ women's privacy, fairness, and/or safety is at stake. The sensitivity of the issue in the UK, particularly for already vulnerable trans individuals, has led to various outspoken trans-opposed feminists being "de-platformed"—having speaking opportunities can-

4. I use the adjective "trans" to refer to those people whose sense of gender identity does not align with the sex category that they were assigned at birth.

5. See, e.g., Mary Kane, *Resistance/Transformation of the Oppositional Binary: Exposing Sport as a Continuum*, J. OF SPORT & SOC. ISSUES 19, 191–218 (arguing that sex-segregated sport conceals the extent of overlap in the athletic abilities of women and men); Ann Travers, *The Sport Nexus and Gender Injustice*, STUD. IN SOC. JUST. 1, 79–101 (debating the alternatives to sex-segregated sport and an exclusively defined female athlete category if the goal is to advance gender equity); Doriane Coleman, Martina Navratilova, & Sanya Richards-Ross, *Pass the Equality Act, But Don't Abandon Title IX*, WASH. POST (Apr. 29, 2019), https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html [https://perma.cc/R4WJ-5WC4] (arguing that the Equality Act as written would harm women and girls' sport by dismantling the protections afforded by sex segregation); Elizabeth Sharrow, *Five States Ban Transgender Girls from Girls' School Sports. But Segregating Sports By Sex Hurts All Girls*, WASH. POST (Apr. 16, 2021), <https://www.washingtonpost.com/politics/2021/04/16/five-states-ban-transgender-girls-girls-school-sports-segregating-sports-by-sex-hurts-all-girls/> [https://perma.cc/NU68-D5MT] (arguing that like sex segregated sport more generally, the exclusion of trans girls from girls' sport reinforces gender stereotypes that harm women and girls).

6. See Jamie Doward, *'Polarised' Debate on Gender Recognition is Harming UK, Says Equalities Chief*, THE GUARDIAN (Aug. 8, 2020), <https://www.theguardian.com/society/2020/aug/08/polarised-debate-on-gender-recognition-is-harming-uk-says-equalities-chief> [https://perma.cc/3GEH-PGMX].

7. I use the term cisgender (or "cis") to refer to those people whose gendered sense of self aligns with the sex category that they were assigned at birth.

celled, or even losing their jobs.⁸ Via the issue of trans inclusion, then, feminism finds itself caught up in the “cancel culture” and related backlash against progressive politics that is emerging in numerous countries.

This article reflects on the Equality Act in the US, and particularly the unfolding feminist response to it, against the backdrop of the fractious debate that has marked the UK context in recent years. I trace how legislation for trans rights and recognition has transformed longstanding divisions amongst feminists over the nature of “sex,” “gender,” and womanhood into a fraught debate over the right to publicly articulate one’s normative views on these objects.⁹ Writing as a sociologist, I propose that there is value in thinking through this issue from the vantage point of a “varieties of feminism” framing: as one that sheds light on the diversity, tensions, and conflicts within feminism, as well as how these differences ultimately come to matter to policy and legislative outcomes.¹⁰ I ask: what (if anything) is new about organized feminist resistance to trans inclusion in women’s-only spaces, how is this variety of feminism unfolding today, and how has it become implicated in debates about the relationship between social justice and speech rights? And, what preliminary conclusions might be drawn about how this variety of feminist mobilization is unfolding differently in the US versus the UK? With the issue of trans inclusion increasingly becoming a defining focus of feminist engagement with regulatory institutions and the public, the moment is ripe for legal and feminist scholars to consider how feminist mobilization matters to institutionalized definitions of gender, sex, and womanhood, as well as to the (re)emergent notion that (cisgender) women’s rights—including her right to speech—are in opposition to trans recognition and inclusion.

To situate contemporary feminist resistance to trans inclusion in women’s-only spaces, I begin by reviewing its historical roots as a schism of radical feminism. I suggest that while contemporary efforts are distinguished by their focus

8. See, e.g., *Maya Forstater v. Centre for Glob. Dev. Euro.* (2021) EAT Appeal No. UKEAT/0105/20/JOJ (Eng.) [hereinafter *Forstater v. CGD*]; Beatrix Campbell et al., *We Cannot Allow Censorship and Silencing of Individuals*, THE GUARDIAN (Feb. 15, 2015), <https://www.theguardian.com/theobserver/2015/feb/14/letters-censorship> [<https://perma.cc/Y72A-N7E9>] [hereinafter Campbell, *Censorship*].

9. For the purposes of this article, I define sex as a system of classification (most commonly female/male), often assigned based on an interpretation of one’s genitalia and believed to reflect underlying biological traits such as chromosomal make-up. Gender refers to one’s sense of self, often as a woman or man, though in sociological research it is also considered an ideology of difference that permeates interactions and organizes social institutions; see Kristen Springer, Jeanne Stellman, & Rebecca Jordan-Young, *Beyond a Catalogue of Differences: A Theoretical Frame and Good Practice Guidelines for Researching Sex/Gender in Human Health*, SOC. SCI. MED. 74, 1817–24 (for a useful analysis of the relationship between gender and sex and how they vary).

10. See, e.g., ELIZABETH EVANS, *THE POLITICS OF THIRD WAVE FEMINISMS: NEOLIBERALISM, INTERSECTIONALITY AND THE STATE IN BRITAIN AND THE US* (2015) (providing a comparison of US and UK varieties of feminisms); MYRA M. FERREE, *VARIETIES OF FEMINISM: GERMAN GENDER POLITICS IN GLOBAL PERSPECTIVE* (2012) (analyzing cross-national differences in mobilization strategies and relationship of feminism to the state); ELÉONORE LEPINARD, *FEMINIST TROUBLE: INTERSECTIONAL POLITICS IN POST-SECULAR TIMES* (2020) (comparing intersections of feminism with racial difference and nationalism in France and Canada).

on the state and other governing bodies, the echoes of earlier expressions of feminist resistance to trans rights and inclusion remain clear, making this a legacy that—despite attempts at rebranding—such feminists must be accountable to. I then delve into the UK context, outlining how the proposed reforms of the Gender Recognition Act (GRA) have been met by trans-opposed feminists, as well as how the issue has shaped debates about speech rights and academic freedom in the British public sphere. I then offer a brief comparison to the situation as it is unfolding in the US context, identifying some common threads as well as some cross-national differences that characterize this variety of feminism. I close by reflecting on why the phenomenon of de-platforming has been seen as a crucial strategy for the advancement of social justice, yet also what its costs to the cause might be, particularly when “freedom of speech” becomes framed as in tension with—rather than necessary for—the advancement of trans rights and inclusion.

II

SOMETHING OLD, SOMETHING NEW

Olivia Records was a Californian music collective that made and promoted women’s music from 1973 until the early 1990s. During its 1970s heyday, it was considered an icon of US lesbian culture. It was also trans-inclusive, employing a trans woman sound engineer by the name of Sandy Stone, who was a member of the collective and a resident of its shared housing in Los Angeles. Stone would go on to become a trans-feminist activist, writer, and scholar in her own right, in part because in 1979 she was singled out as a target of Janice Raymond’s anti-trans manifesto, *The Transsexual Empire: The Making of the She-Male*. Bombarded with death threats—as well as threats of violence towards other Olivia Records members—Stone was eventually forced to leave the collective, despite engineering expertise being sorely needed with plans underway for Stone to lead a women’s recording school.¹¹ In other words, women—cisgender women included—ultimately lost out. Raymond’s book became widely viewed as having brought violence into the lives of trans individuals and feminist communities alike, in the process creating divisions that, as sociologist Sally Hines has noted, have been difficult to heal.¹² For her part, Raymond—a university professor—experienced the feminist rejection of her work as a form of censorship, which deepened over time as feminists (and her own department at the University of Massachusetts-Amherst) became more sensitive to the trans rights agenda.¹³

11. Cristan Williams, *TERF Hate and Sandy Stone*, TRANS ADVOCATE, https://www.transadvocate.com/terf-violence-and-sandy-stone_n_14360.htm [https://perma.cc/A877-NF6L].

12. Sally Hines, *The Feminist Frontier: On Trans and Feminism*, J. OF GENDER STUD. 28, 145–57 (2019).

13. Megan Murphy, ‘*The Transsexual Empire*’ Revisited: Meghan Murphy in Conversation with Janice Raymond, FEMINIST CURRENT (Oct. 16, 2020), <https://www.feministcurrent.com/2020/11/22/the->

The phenomenon of feminist resistance to trans rights and recognition is by no means new. The saga of trans exclusion at the Michigan Womyn's Music Festival in the early 1990s has become the stuff of legend in Global North feminist storytelling.¹⁴ Since at least the 1970s, certain feminists have taken issue with the claim of trans women to belong alongside their cisgender peers within the category "woman." The issues that underpin this divisive debate—the complex relationship between gender and sex, the elusiveness of a singular definition (and experience) of womanhood, and whether and how to class women as distinct from men—are foundational questions and longstanding points of contestation within feminism.¹⁵ They are ultimately questions with political import: how best to conceptualize difference and womanhood in the pursuit of gender equity, and who to include as a subject and stakeholder under the umbrella of feminism? The issue of trans inclusion in women's spaces is one where "the rubber hits the road" for such debates.

At times, feminist theory has engaged the trans body in pursuit of answers to these jointly ontological and political questions. Judith Butler's seminal work in the early 1990s, for example, looked to trans experience to make the case for the irreducible performativity of sexed and gendered bodies.¹⁶ A variation on this poststructuralist theme is found in the dynamic field of feminist science studies, which has argued since the 1980s that scientific claims about female/male biological sex differences are very often shaped by gender ideology.¹⁷ Upon closer examination, what scientists like to refer to as "sex" is best understood as a complex set of traits that vary in unpredictable ways and which are often dynamically entangled with "gender." That is, even before we introduce the examples of intersex and trans variation, cisgender (cis) bodies already reveal the complexity of sex and gender.¹⁸ Such feminists tend to embrace the

transsexual-empire-revisited-meghan-murphy-in-conversation-with-janice-raymond/ [https://perma.cc/UJP7-W5FB].

14. See Elizabeth Currans, *Transgender Women Belong Here: Contested Feminist Visions at the Michigan Womyn's Music Festival*, FEMINIST STUD. 46, 459–88; Diane Anderson-Minshall, *Michfest's Founder Chose to Shut Down Rather than Change with the Times*, ADVOCATE (Apr. 24, 2015), <https://www.advocate.com/commentary/2015/04/24/op-ed-michfests-founder-chose-shut-down-rather-change-times> [https://perma.cc/PW6V-LGSK].

15. See, e.g., Linda Alcoff, *Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory*, SIGNS 13, 405–36 (discussing the fraught efforts of feminists to define "woman" as the central concept from which feminist theory and politics depart); JUDITH BUTLER, GENDER TROUBLE (1990) (detailing the poststructuralist critique of efforts to establish the category "woman" as preceding discourse).

16. *Id.*

17. See, e.g., RUTH BLEIER, SCIENCE AND GENDER: A CRITIQUE OF BIOLOGY AND ITS THEORIES ON WOMEN (1984); ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF Sexuality (2000); EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE (1985); see also REBECCA JORDAN-YOUNG, BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES (2012) (for a more contemporary analysis of the assumptions of sex difference underpinning contemporary neuroscience); SARAH RICHARDSON, SEX ITSELF: THE SEARCH FOR MALE AND FEMALE IN THE HUMAN GENOME (2013) (for a more contemporary analysis of the gendered assumptions embedded in the search for sex chromosomes).

18. See Katrina Karkazis, *The Misuses of "Biological Sex,"* LANCET 394, 1898–99 (2019).

contemporary expansion of trans rights and recognition as entirely consistent with the greater cause of gender equity, seeing any effort to challenge taken-for-granted assumptions about sex as a rigid biological binary as good news for women. By contrast, feminists opposed to or wary of trans inclusion in women's-only spaces see the interests of (cisgender) women—and the related pursuit of gender equity—as intimately tied to the stability and “truth” of sex as the biological basis of womanhood. As such, any effort to decouple sex and womanhood, or to supplant sex with gender identity, is perceived as undoing hard-earned gains, including feminist efforts to secure women's-only spaces and services.

In the late 2000s, feminists critical of this variety of feminism coined a term to describe it: TERF, or Trans Exclusive Radical Feminist.¹⁹ Here the term “radical” refers to a school of thought and activism that emerged as part of feminism's second wave from the late 1960s onwards, which was focused on challenging the systemic patriarchal roots of women's oppression.²⁰ An emerging focus of radical feminist thought and mobilization at this time was sexual violence against women, as exemplified by the formative work of Catharine MacKinnon, who theorized male sexual domination (of women) as constitutive of gender inequality and—consequently—of women's “distinctive perspective on social reality.”²¹ To MacKinnon, it was sexuality and (hetero-)sexual relations that rendered gendered positions in the world unequal, rather than some underlying biological essence of sex.²² But this logic was altered by those radical feminists who began to openly oppose trans women's inclusion in the movement, who considered sexual domination and structural and physical violence against women to be inseparable from the matter of biology (deemed to be essentially male or female).²³ Raymond, for example, argued that the attempt of trans women to acquire femininity was “the ultimate, and we might even say the logical, conclusion of male possession of women in a patriarchal society. Literally, men here possess women.”²⁴ She claimed further, “[a]ll transsexuals rape women's bodies by reducing the real female form to an artifact, appropriating

19. See Ruth Pearce, Sonja Erikainen, & Ben Vincent, *TERF Wars: An Introduction*, SOCIO. R. 68, 677–98 (for overview of the historical emergence of and contemporary debates surrounding the use of the term TERF) [hereinafter *TERF Wars*].

20. ALISON JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983). This variety of feminism can be contrasted with liberal feminism, which focuses more on individual choice and less on structural domination.

21. CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, 127 (1989).

22. See also, Cristan Williams, *Sex, Gender, and Sexuality: The TransAdvocate Interviews Catharine A. MacKinnon*, TRANS ADVOCATE, https://www.transadvocate.com/sex-gender-and-sexuality-the-transadvocate-interviews-catharine-a-mackinnon_n_15037.htm [<https://perma.cc/V38V-2UUR>] (exploring how MacKinnon's approach to sexual difference and violence was not inherently trans-exclusive.).

23. JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1979); see Elizabeth Gross, *Sexual Difference and the Problem of Essentialism*, INSCRIPTIONS 5 (1989) (defining essentialism as the “attribution of a fixed essence to women,” and “biologism” as “a particular form of essentialism in which women's essence is defined in terms of women's biological capacities.”).

24. *Op cit.*, 30.

this body for themselves.”²⁵ In TERF discourse, then, sex is fixed, violence is masculine, and trans women embody male sexual domination of women at its extreme, with Raymond choosing to overlook the violence increasingly being incited against trans women—including as a result of her book.

This effort to shore up biological sex as the unifying foundation of womanhood ran counter to other trends in feminism that were unfolding over the same period, with the category “woman” fracturing not only because of the challenges coming out of feminist science studies and poststructuralism, but also as a result of intersectional disquiet. In 1980, for example, black feminist scholar Audre Lorde observed that “many white women are heavily invested in ignoring the real differences” amongst women, because this “threatens the complacency of those women who view oppression only in terms of sex.”²⁶ In 2000, Emi Koyama honed this critique to center on the radical feminist rejection of trans women, noting that to argue that trans women “should not enter [women’s only spaces] because their experiences are different would have to assume that all other women’s experiences are the same, and this is a racist assumption.”²⁷ As such, the notion of a singular, unified definition of womanhood—including one that elevates biology as women’s defining feature—has long been discredited by critical feminists as one that obscures relations of inequality and privilege amongst women, with the result that TERF ideology has for the most part remained marginal within feminist thought and activism.

Today, however, the winds are changing. Gone is the focus on radical lesbian spaces such as Olivia Records and the Michigan Womyn’s Music Festival. Attention has turned to mainstream women’s-only spaces, such as sport and prisons, and—on an even broader level—to the national legislation that institutionalizes definitions of sex and gender and associated rights and protections. That is, following closely on the heels of an autonomous trans political movement making organized demands for state recognition, this variety of feminism has been scaled up to the level of the state. Many trans-opposed feminists could hardly be described as “radical”: although this element has not entirely disappeared, the project of smashing the patriarchy and building women-friendly institutions from the ground-up has taken a backseat. With the advent of social media, and clear policy targets to organize around, feminist resistance to trans inclusion is taking new organizational forms and deploying new strategies to engage the public and lawmakers. In the UK, a government-led agenda to reform the GRA—in response to critiques of the legislation as inaccessible and stigmatizing—has fueled an already volatile debate about trans inclusion in women’s only spaces, leading also to a highly visible and contested debate about British feminism. In the process, the issue has become emblematic of the na-

25. *Op cit.*, 103–04.

26. AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 118 (1984).

27. Emi Koyama, *Whose Feminism is it Anyway? The Unspoken Racism of the Trans Inclusion Debate*, in *TRANSGENDER STUD. READER* 698, 702, (Susan Stryker & Stephen Wittle eds., 2006).

tion's struggle to define the boundaries of respectful speech and academic freedoms when a progressive cause is at stake.

III

REFORMS ABANDONED

The GRA was passed in the UK in 2004 to grant trans people the right to change their legal gender, including as recorded on their birth certificate. Under the GRA, individuals may apply to a panel of legal and medical experts²⁸ to receive a Gender Recognition Certificate (GRC) which, from the date granted, entitles an individual to be recognized in the eyes of the law as their acquired gender in most situations. They may then also obtain a new birth certificate showing their recognized legal gender, which in the UK can be either “female” or “male.”²⁹ In order to obtain a GRC, the process typically requires two medical reports confirming a diagnosis of “gender dysphoria”³⁰ and detailing any gender affirming medical care undertaken. The applicant must also demonstrate that they have lived “full time in their acquired gender” for at least two years. Married applicants follow a separate process, intended for those individuals who have transitioned some time ago, requiring evidence of having lived in their acquired gender for at least six years but just one medical report. Finally, British residents living overseas may gain a GRC if they have been legally recognized as their acquired gender in an approved country. In all cases, applicants must be 18 years of age or older and pay a fee of up to £140.

The GRA itself does not lay out the implications of gender recognition for inclusion in women's-only spaces, which is taken up instead in the Equality Act 2010: umbrella legislation prohibiting discrimination on the basis of a number of “protected characteristics,” one of which is “gender reassignment.” However, the Equality Act also includes exceptions for single-sex and separate-sex services that apply to someone who has the protected characteristic of gender reassignment.³¹ Specifically, trans individuals—including those with a GRC—may

28. The Gender Recognition Panel is a judicial panel and branch of Her Majesty's (HM) Courts & Tribunal Service.

29. At the time of writing, there is a petition before the UK Parliament to have “non-binary” included as an option under the GRA, in order to allow those identifying as non-binary to gain legal recognition. See UK Government and Parliament, *Petition: Make Non-Binary a Legally Recognised Gender Identity in the UK* (Oct. 26, 2021), <https://petition.parliament.uk/petitions/580220> [<https://perma.cc/F255-QVZ7>].

30. Gender dysphoria can be defined as psychological distress resulting from incongruence between one's assigned sex category and one's sense of gender identity.

31. See PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, ENFORCING THE EQUALITY ACT: THE LAW AND THE ROLE OF THE EQUALITY AND HUMAN RIGHTS COMMISSION, § 7 BALANCING RIGHTS IN SINGLE-SEX SERVICES (2019) (UK), <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/147010.htm> (last accessed Jan. 9, 2022). The first two relevant exceptions (Schedule 3, Paragraphs 26 and 27) allow service providers to provide separate services for men and women, or to provide services to only men or only women in certain circumstances. The third exception (Schedule 3, Paragraph 28) allows providers of separate or single-sex services to

be discriminated against in the form of exclusion from a single-sex service, so long as it is deemed by the service provider to be “a proportionate means of meeting a legitimate aim.”³² For example, trans people can legally be excluded from single-sex sport, if deemed necessary to uphold “fair competition” or “the safety of competitors.”³³ Service providers are advised to take the person’s legal gender into account, including possession of a GRC, but to also consider the potential “impact” on other service users. Here government documentation commonly cites domestic violence refuges for women as a relevant example, as well as support services for women survivors of rape, echoing an association that TERF opposition to trans inclusion in women’s only spaces has long sought to establish.³⁴

The GRA was considered ground-breaking when it was originally introduced, being the first such legislation in the world to not require sterilization. However, the UK trans community has raised numerous concerns about the existing gender recognition process. LGBTQ+ advocates argue that the requirement that trans people (twice) obtain a formal diagnosis of gender dysphoria is often experienced by such individuals as pathologizing, since it constructs their sense of self as a form of mental illness.³⁵ Concerns have also been raised regarding the length, complexity, and cost of the process, which is argued to prevent many trans people in the UK from pursuing a GRC. As evidence for this, some estimates show that fewer than one in ten British trans people have achieved legal recognition.³⁶

By 2015, such critiques were finding support within the UK government. The very first report published by the Women and Equalities Committee after its establishment in 2015 focused on the issue of “trans equality,” noting that “[a] litmus test for any society that upholds the principles of fairness and equality is the extent to which it supports and protects the rights and interests of every citizen, even the most marginalised groups.”³⁷ With regard to the GRA, the report stated that the existing gender recognition process “pathologizes trans

provide a different service to, or to exclude, someone who has the protected characteristic of gender reassignment.

32. PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, MINISTER FOR WOMEN AND EQUALITIES, REFORM OF THE GENDER RECOGNITION ACT: GOVERNMENT CONSULTATION, 12, https://consult.education.gov.uk/government-equalities-office/reform-of-the-gender-recognition-act/user_uploads/gra-consultation-document.pdf [https://perma.cc/MZ77-Y8UT] (2018) (UK) [hereinafter Reform of the Gender Recognition Act].

33. Equality Act 2010, Part 14, § 195 (Eng.).

34. See, e.g., Reform of the Gender Recognition Act, *supra* note 32.

35. See, e.g., *A Vision for Change: Acceptance Without Exception for Trans People*, STONEWALL (2017), <https://www.stonewall.org.uk/vision-change> [https://perma.cc/9LPT-H375].

36. Stonewall, *Written Evidence submitted by Stonewall*, Reform of the Gender Recognition Act [GRA1575] (Nov. 2020), available at <https://committees.parliament.uk/writtenevidence/17743/pdf/>.

37. See HOUSE OF COMMONS WOMEN AND EQUALITIES COMMITTEE, TRANSGENDER EQUALITY: FIRST REPORT OF SESSION, 2015-16, (Dec. 8, 2015), available at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> (UK). The Women and Equalities Committee was appointed by the House of Commons in June 2015 to hold the Government Equalities Office accountable.

identities and runs contrary to the dignity and personal autonomy of applicants,” leading the committee to recommend that the government “update the Act, in accordance with the principle of gender self-declaration.”³⁸ In 2017, then British Prime Minister Theresa May announced that the government would indeed undertake a review of the GRA with the aim of identifying how to make the process of gender recognition less harmful and more accessible to trans people. To this end, a public consultation process was launched in 2018 that received over 100,000 responses. Respondents were invited to assess the existing criteria for gender recognition, including the requirement of a medical diagnosis of gender dysphoria, as well as reflect on “wider considerations,” such as perceived implications for the single-sex exceptions within the Equality Act.³⁹

When the results of the consultation were published in 2020, they showed that the majority of respondents favored relaxing the criteria for obtaining a GRC, including dropping the requirements for a gender dysphoria diagnosis (64.1%), medical report (80.3%), and evidence of having lived in one’s acquired gender for a period of time (78.6%).⁴⁰ Yet a contrasting trend also emerged: a majority of respondents believed that trans access to single-sex spaces—particularly sport and communal accommodation—would change as a result of the proposed revisions to the GRA. This was despite authorities and the survey itself clearly stating that the exceptions embedded in the Equality Act would remain unchanged. As emphasized by the UK Equality and Human Rights Commission, its “firm legal view” was that the proposed reforms to the GRA would “not erode the special status” of the single- and separate-sex provisions in the Equality Act.⁴¹

When the UK government—this time under the leadership of Boris Johnson—finally announced the outcome of the consultation in September 2020, they opted *not* to proceed with changes to the nation’s gender recognition process, other than to change the fee (reduced to £5) and “modernize” the process by providing a downloadable version of the application form. The Women and Equalities Committee has since launched a new inquiry into the reform process for the GRA, with the aim of determining whether the government’s decision to abandon more substantial reforms was appropriate. In April 2021, it was revealed that the Government Equalities Office—which oversees the UK government’s actions on trans rights and recognition—had refused to provide oral

38. *Id.*

39. For example, respondents were asked if they thought the participation of trans people in sport would be affected by changing the Gender Recognition Act; *see* Reform of the Gender Recognition Act, *supra* note 32.

40. Daniel King, Carrie Paechter, & Maranda Ridgway, *Gender Recognition Act: Analysis of Consultation Responses*, GOV’T EQUALITIES OFF. (Sep. 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919890/Analysis_of_responses_Gender_Recognition_Act.pdf.

41. *Our Statement on Sex and Gender Reassignment: Legal Protections and Language*, EQUALITY AND HUMAN RIGHTS COMMISSION (July 30, 2018), <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language> [https://perma.cc/B98D-NHTV].

evidence to the inquiry.⁴² The fractious debate thus continues, and as I will explore below, feminist organizations have been centrally involved in its unfolding.

IV

GENDER BACKLASH, UK STYLE

Several European countries have recently experienced an upsurge in anti-gender sentiment,⁴³ targeting not only initiatives for gender equality and women's rights but in some cases also gender studies as a field, branding it ideological and unscientific.⁴⁴ In an interesting parallel development, numerous feminists in the UK have recently attacked "gender identity" as a threat to women's rights and equality. In the wake of the proposed changes to the GRA, the British public has witnessed an increasingly fierce and polarized public debate, in which numerous purportedly pro-women (and pro-lesbian) organizations and voices have portrayed the sanctity of women's-only spaces as under threat. While the public visibility of this variety of feminism was already increasing prior to Prime Minister May's initial announcement of the GRA review in May 2017,⁴⁵ this process appears to have catalyzed the formal organization of feminists opposed to the expanded recognition of gender identity and trans inclusion.

In contrast with trans-inclusive feminists who see trans women *as women*, and therefore experience no conflict when welcoming trans women into women's-only spaces, those in the UK who question the legitimacy of gender identity as the basis of state recognition believe that biological and developmental factors (e.g., not only one's social experiences as a woman, but one's embodied experiences as "female") are significant enough that in certain circumstances (e.g., sport) cis and trans women ought to be treated as separate categories with distinct needs. At the more extreme end, proponents of this variety of feminism in the UK have gone so far as to suggest that trans women remain biologically

42. See @Commonswomequ, TWITTER (June 11, 2021, 11:54 AM), <https://mobile.twitter.com/commonswomequ/status/1403289637075013639?lang=ar-x-fm> [<https://perma.cc/F2SB-KUWB>] ("Today we have published letters between our Chair & the Minister for Equalities, @KemiBadenoch, in which the Minister has refused our invitation to give evidence to our Reform of the Gender Recognition Act inquiry.").

43. This backlash is not typically focused on the sex/gender distinction *per se*; rather, it is targeting efforts to address gender inequality more broadly, with a particular focus on women's sexual and reproductive rights and health, sex education, and LGBTQ+ rights.

44. See, e.g., David Paternotte, *Gender Studies and the Dismantling of Critical Knowledge in Europe*, AM. ASS'N OF UNIV. PROFESSORS (Fall 2019), <https://www.aaup.org/article/gender-studies-and-dismantling-critical-knowledge-europe> [<https://perma.cc/9X8C-9SUW>]; Resolution on Experiencing Backlash in Women's Rights and Gender Equality in the EU, EUR. PARL. DOC. P8_TA(2019)0111 (2019).

45. See, e.g., Maev Kennedy, *Jenni Murray: Trans Women Shouldn't Call Themselves 'Real Women'*, THE GUARDIAN (Mar. 5, 2017), <https://www.theguardian.com/society/2017/mar/05/jenni-murray-transgender-not-real-women-sunday-times-magazine> [<https://perma.cc/XB6X-YDU3>]; Campbell, *Censorship*, *supra* note 8.

and socially male and constitute masculine intruders in women's-only spaces.⁴⁶ Some have also categorically opposed the adoption of gender inclusive language, taking terms such as "cisgender" as an affront to "real" women.⁴⁷

Two of the most active organizations in this space, Fair Play for Women (FPFW) and A Woman's Place UK (WPUK), were established in 2017 in the months following the announced GRA review. WPUK was originally envisaged as "a campaign formed specifically to ensure women's voices are heard in the debate around proposals to change the Gender Recognition Act," with particular concern about protecting "women-only services and spaces."⁴⁸ FPFW emerged as "a campaigning and consultancy group which raises awareness, provides evidence and analysis, and works to protect the rights of women and girls in the UK,"⁴⁹ including what it sees as the "dangerous consequences" for women of the proposed GRA reforms.⁵⁰ Similar organizations taking up "women's rights" as supposedly at stake in the proposed GRA reforms include Sex Matters (established 2020), Standing for Women (2018), Keep Prisons Single Sex (2020), FiLiA (2015), and Sex in the Census (2021), as well as thinktank MurrayBlackburnMacKenzie (2018). According to one campaign surrounding the single-sex provisions in the Equality Act, "being forced into universal unisex inclusion will effectively mean losing [women's and girl's] rights and widen sex inequality."⁵¹ These organizations are thus characterized by their effort to uphold a biological distinction between cis and trans women and a framing that pits (cisgender) "women's rights" against those of the trans community. Such organizations have sought to claim the voice of scientific reason and authority in a debate that they suggest "is often clouded by emotion,"⁵² with their advocacy promoting a range of new experts on sex difference and its relationship to women's rights and safety.⁵³

46. See, e.g., *Women in Prison*, FAIR PLAY FOR WOMEN, <https://fairplayforwomen.com/campaigns/prisons/> [<https://perma.cc/Y4JS-6FBU>] (describing trans women in prison system as "male prisoners" with male-type crime propensity, especially sex offending, which the organization argues places cisgender women prisoners at risk of assault).

47. See, e.g., *Freedom of Speech*, SEX MATTERS, <https://sex-matters.org/where-sex-matters/freedom-of-speech/> [<https://perma.cc/64NB-J5WS>] (defending the use of gendered terms and pronouns as a form of freedom of speech).

48. *Woman's Place UK: Home*, WOMAN'S PLACE UK (Mar. 18, 2018), <https://womansplaceuk.org/> [<https://perma.cc/3NAH-AQ5N>].

49. FAIR PLAY FOR WOMEN, <https://fairplayforwomen.com/> [<https://perma.cc/2M96-CFQ7>].

50. *The Impact of GRA Reform on UK Prisons*, FAIR PLAY FOR WOMEN (Feb. 27, 2018), <https://fairplayforwomen.com/impact-gra-reform-uk-prisons/> [<https://perma.cc/PHP3-YZ27>].

51. *Campaign for the Right to Choose Single Sex*, SEX MATTERS, <http://www.sexmatters.org.uk/sexmatters.pdf>.

52. *Archived Home Page*, FAIR PLAY FOR WOMEN (Apr. 26, 2018), <https://web.archive.org/web/20180426174837/https://fairplayforwomen.com/>.

53. See e.g., *Woman's Place UK, A Woman's Place is on the Podium: Emma Hilton*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=pzg9QtQeIR8> (last accessed Jan. 9, 2022) (Emma Hilton, a developmental biologist, has been elevated by WPUK and FPFW as an expert on sex differentiation in the context of sport).

Central to this epistemic project is a commitment to reclaiming “biological sex”—argued to be overwhelmingly binary (female or male) and fixed at birth—as the foundation of womanhood and the rightful basis of state recognition and protection, coupled with the parallel move of discrediting gender (and “gender identity” in particular).⁵⁴ For example, FPFW describe their work as focused on “being a human of the female sex, not gender. Gender doesn’t mean sex. Sex can’t be changed.”⁵⁵ According to Sex Matters, “there are two sexes: female and male.”⁵⁶ In their submission to the 2018 GRA reform consultation, WPUK argued that “it is not possible to literally change sex” and thus “the law must uphold . . . exemptions for those who are biologically female.”⁵⁷ The LGB Alliance (established in 2019) applies this logic to the rights of lesbian women, believing “same-sex” attraction to be rooted in biological categories and lesbian women to thus be at risk of losing their right to freely exercise their sexual preference should gender identity become the legal basis of womanhood.⁵⁸

In contrast with sex, gender—and especially gender identity—is presented as “a feeling but not a biological fact.”⁵⁹ In their response to the proposed changes to the GRA, for example, FiLiA argued that de-medicalizing the gender recognition process would embed “a nebulous concept of internal gender identity” in legislation.⁶⁰ In language that bears a striking resemblance to the wider anti-gender movement, FiLiA also described being “aware of a growing concern in society about the prevalence of ‘gender ideology.’”⁶¹ Some such feminist organizations are aligning with efforts to prevent trans youth from accessing gender-affirming care, including the work of Transgender Trend, which describes such care as “an experiment”⁶² and has called into question statistics showing higher suicide rates amongst trans youth.⁶³ In trans adults, gender iden-

54. See Sally Hines, *Sex Wars and (Trans) Gender Panics: Identity and Body Politics in Contemporary UK Feminism*, SOCIO. R. 68, 699–717 (tracing the fraught history of efforts to tie womanhood to biological notions of difference); *TERF Wars*, *supra* note 19 at 677–698 (describing the centrality of biological sex to this variety of feminism).

55. *Archived About FPFW Page*, FAIR PLAY FOR WOMEN (Sept. 9, 2017), <https://web.archive.org/web/20170909005223/https://fairplayforwomen.com/about-fair-play-for-women>.

56. SEX MATTERS, <https://sex-matters.org/> [<https://perma.cc/3VH2-QHF6>] (last visited Nov. 5, 2021) (“Sex matters in law and in life. It shouldn’t take courage to say so.”).

57. *WPUK Submission to UK Government’s GRA Consultation*, WOMAN’S PLACE UK (Mar. 30, 2020), <https://womansplaceuk.org/wpuk-submission-uk-government-gra-consultation/> [<https://perma.cc/T3W2-YX6C>].

58. LGB ALLIANCE, <https://lgballiance.org.uk/> (last visited Dec. 27, 2019).

59. *Sex-Based Discrimination: An Interview With British Olympic Swimmer Sharon Davies*, WOMAN’S PLACE UK (Dec. 3, 2019), <https://womansplaceuk.org/2019/12/03/sex-based-discrimination-an-interview-with-british-olympic-swimmer-sharon-davies> [<https://perma.cc/S6CB-TCJT>].

60. FiLiA, *Written Evidence Submitted by FiLiA*, Gender Recognition Act Reform Consultation [GRA0803] (Nov. 2020), available at <https://committees.parliament.uk/writtenevidence/16818/pdf/> [hereinafter *Written Evidence Submitted by FiLiA*].

61. *Id.*

62. See *About Us*, TRANSGENDER TREND, https://www.transgendertrend.com/about_us/ [<https://perma.cc/GY2E-5LV6>].

63. See *Suicide Facts and Myths*, TRANSGENDER TREND <https://www.transgendertrend.com/the-suicide-myth/> [<https://perma.cc/R9GJ-HMY4>]; compare Nuno Nodin, Elizabeth Peel, Allan Tyler, &

tity is frequently portrayed by this variety of feminism as fraudulent and open to exploitation. According to FPFW, for example, the proposed revisions to the GRA would “have dangerous consequences,” since “any male prisoner will be able to change his legal sex to female and become eligible for transfer into a women’s prison.”⁶⁴ Sex Matters has published claims that “certain men are jumping on the trans bandwagon to access, and harm, very vulnerable women in prison.”⁶⁵ The centrality of this opposition to gender identity (and even gender theory/studies more broadly) is reflected in the label “gender critical feminism”: the name often claimed today by organizations and individuals associated with this variety of feminism in the UK.⁶⁶

Though arguably still marginal within feminist thought and activism, it appears that feminists opposed to an expansion of trans rights and inclusion are having an impact on policymaking circles in the UK context. In December 2017, at the invitation of Conservative MP David Davies, both WPUK and FPFW presented their perspective on the proposed changes to the GRA before parliament. Several other federal politicians, including MP Miriam Cates (Conservative Party), have been claimed as sympathizers towards and even voices for this feminist movement.⁶⁷ For the 2018 GRA consultation process, FPFW generated 18% of the responses received.⁶⁸ In 2021 and on the heels of the GRA “victory” for trans-opposed feminists, FPFW successfully led a separate campaign to oppose changes to the collection of census data on “sex category” in the UK, which had been slated to be broadened in order to allow respondents to list their sex as described in any legal document. The efforts of such organizations may also have had meaningful impacts on wider public opinion: support for trans people to change the sex on their birth certificate fell from 58 to 53% between 2016 and 2019, while the proportion of women willing to share restrooms with trans people also fell from 72 to 66%. Such shifts in public opin-

Ian Rivers, *The RaRE Research Report: LGB&T Mental Health - Risk and Resilience Explored*, PACE (2015), http://www.queerfutures.co.uk/wp-content/uploads/2015/04/RARE_Research_Report_PACE_2015.pdf [https://perma.cc/SV6X-4RXC] [hereinafter RaRE Research Report].

64. *The Impact of GRA Reform on UK Prisons*, FAIR PLAY FOR WOMEN (Feb. 27, 2018), <https://fairplayforwomen.com/impact-gra-reform-uk-prisons/>.

65. *Prisons*, SEX MATTERS, <https://sex-matters.org/where-sex-matters/prisons/> [https://perma.cc/398J-2PRL].

66. See, e.g., Kathleen Stock, *The Importance of Referring to Human Sex in Language*, 66 LAW & CONTEMP. PROBS., no. 1 (2022); and Susanna Rustin, *Feminists Like Me Aren’t Anti-Trans - We Just Can’t Discard the Idea of ‘Sex,’* THE GUARDIAN (Sep. 30, 2020), <https://www.theguardian.com/commentisfree/2020/sep/30/feminists-anti-trans-idea-sex-gender-oppression> [https://perma.cc/BB2V-JSTX] (arguing that it is not transphobic to claim that women’s lives are influenced by physical differences between female and male bodies); but see TERF Wars, *supra* note 19 at 677–98 (describing “gender critical” feminists as a direct extension of TERF lineage and ideology).

67. @SexMattersOrg, TWITTER (Oct. 11, 2021, 4:17 PM), <https://twitter.com/sexmattersorg/status/1447657506038329350> [https://perma.cc/9N5D-L3E4] (“Miriam Cates MP dares to be powerful”).

68. Daniel King, Carrie Paechter, & Maranda Ridgway, *Gender Recognition Act: Analysis of Consultation Responses*, GOV’T EQUALITIES OFF. (Sep. 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919890/Analysis_of_responses_Gender_Recognition_Act.pdf [https://perma.cc/CT4U-U2P6].

ion are worrying for the British trans community, for whom existing rates of violence, discrimination, and mental health struggles are already disproportionately high.⁶⁹ More broadly, some commentators in the UK have argued that this variety of feminist mobilization is proving valuable to far right political agendas: according to Sophia Siddiqui, deputy editor of the Institute of Race Relations journal *Race & Class*, such feminists are “[playing] into the hands of far-right street forces and extreme-right electoral parties which would like to abolish anti-discrimination protections altogether.”⁷⁰ It is on these grounds that advocates for trans rights have often demanded the de-platforming of trans-exclusive feminists, which has evolved into a focus of public debate in its own right.

V

ESSENTIALISM: A PROTECTED CHARACTERISTIC?

Maya Forstater of St Albans, Hertfordshire, was a visiting fellow and tax expert at the Center for Global Development (CGD), a thinktank, until her contract was not renewed in March 2019. This followed Forstater tweeting her concern that recognizing “males” as women would make womanhood “a meaningless concept” and “undermine women’s rights & protections.”⁷¹ Forstater, who later founded Sex Matters, challenged her dismissal at the London Central employment tribunal in 2019 on the grounds that hers was a protected belief under section 10 of the Equality Act 2010. The trial judge in this case sided with CGD, stating that Forstater’s views were “absolutist,” “not worthy of respect in a democratic society,” and “incompatible with the human rights of others.”⁷² In response to the ruling, Forstater declared that it “removes women’s rights and the right to freedom of belief and speech” and subjects “women and men who speak up for objective truth ... to aggression, bullying, no-platforming and economic punishment.”⁷³ Author J.K. Rowling tweeted her support for Maya, objecting to a decision that “force[s] women out of their jobs for stating that sex is

69. See, e.g., RaRE Research Report, *supra* note 63.

70. See Vic Parsons, *So-called ‘Gender-Critical’ Feminists are ‘Peddling the Far-Right Agenda,’ Warns Institute of Race Relations*, PINK NEWS (June 7, 2021), <https://www.pinknews.co.uk/2021/06/07/gender-critical-feminism-far-right-agenda-institute-race-relations-trans-transphobia/> [<https://perma.cc/84F5-8BES>].

71. Maya Forstater (@MForstater), TWITTER (Sep. 3, 2018, 6:08 PM), <https://twitter.com/mforstater/status/1036375232062337025?lang=en> [<https://perma.cc/TRE9-83G5>] (“I share the concerns of @fairplaywomen that radically expanding the legal definition of ‘women’ so that it can include both males and females makes it a meaningless concept, and will undermine women’s rights & protections for vulnerable women & girls.”).

72. *Maya Forstater v. Centre for Glob. Dev.* Euro. (2019) Employment Tribunals Case No. 2200909/2019 (Eng.); *Maya Forstater v. Centre for Glob. Dev.* Euro. (2021) EAT Appeal No. UKEAT/0105/20/JOJ (Eng.)

73. See Owen Bowcott, *Judge Rules Against Researcher Who Lost Job Over Transgender Tweets*, THE GUARDIAN (Dec. 18, 2019), <https://www.theguardian.com/society/2019/dec/18/judge-rules-against-charity-worker-who-lost-job-over-transgender-tweets> (last accessed Jan. 9, 2022).

real.”⁷⁴ Forstater would later win her appeal against the decision, with both the Equality and Human Rights Commission and Index on Censorship intervening to support the view that “gender-critical beliefs” were indeed legally protected.⁷⁵

Via cases such as Forstater’s, the question of whether “biological sex” ought to be recognized by the state as foundational to women’s specific lived experiences (however diverse these are in practice) has escalated into one of the defining issues in UK debates surrounding the limits to and politics of speech rights. In the process, (cisgender) women’s right to speech has become associated with the “truth” of “sex itself.” Put differently, “freedom of speech” now implicates the right of cisgender women to voice their belief that their assigned sex category (female) warrants special recognition as immutable and consequential. Particularly in the context of the proposed GRA reforms, trans-exclusive feminist individuals and organizations have sought to frame cisgender women as the victims of censorship by over-reaching gender ideological extremists, as well as overlooked as key stakeholders by decision-making bodies, thereby pitting trans rights against the freedoms and speech rights of cis women.

WPUK was formed specifically in response to what organizers perceived as “politically motivated violence aimed at silencing women and shutting [them] out of political discussion,”⁷⁶ with the organization calling for the expression of (cisgender) women’s voices to be “actively facilitated by those with civic or legal responsibility for promoting equality.”⁷⁷ FPFW describes their purpose as to “provide the safe platform” for (cisgender) women to “voice their concerns” about trans inclusion, given such women “are afraid to speak out, and fear their jobs and reputation if they do.”⁷⁸ In their response to the GRA consultation, FiLiA called upon the UK government to reaffirm “a commitment to freedom of speech and freedom of conscience in this respect.”⁷⁹ The organization suggested that cisgender women constitute a “less often heard or purposefully silenced” group on this issue, arguing further that “there is a tendency to centre the concerns of the person transitioning, yet there are other people involved for whom this has a devastating effect”—in their view, the partners of trans women and their children. Such organizations have also sought to link cisgender wom-

74. J.K. Rowling (@jk_rowling), TWITTER (Dec. 19, 2019, 7:57 AM), https://twitter.com/jk_rowling/status/1207646162813100033 [<https://perma.cc/4Q2P-XPUJ>] (“Dress however you please. Call yourself whatever you like. Sleep with any consenting adult who’ll have you. Live your best life in peace and security. But force women out of their jobs for stating that sex is real? #IStandWithMaya #ThisIsNotADrill”).

75. *Forstater v. CGD*, *supra* note 8.

76. See Linda Bellos et al., *Violence Has No Place in Transgender Debate*, THE GUARDIAN (Sept. 24, 2017), <https://www.theguardian.com/world/2017/sep/24/violence-against-women-transgender-debate> [<https://perma.cc/XQE3-KUBZ>].

77. *Women Have the Right to Self-Organise*, WOMAN’S PLACE UK, <https://womensplaceuk.org/women-have-the-right-to-self-organise/> [<https://perma.cc/X84U-GAVA>].

78. *Our Aim*, FAIR PLAY FOR WOMEN, <https://fairplayforwomen.com/about-us/our-aim/> [<https://perma.cc/9FDN-8B9D>].

79. *Written Evidence Submitted by FiLiA*, *supra* note 60.

en's freedoms to the right to reject gender inclusive language. For example, Sex Matters has suggested that "people asserting their rights to single sex services should be able to do so in plain English and without the barrier of having to perform the mental gymnastics required to avoid 'misgendering' or 'deadnaming.'"⁸⁰

British universities have emerged as a key battleground for the de-platforming of feminists committed to an exclusive biological definition of womanhood, with various academics experiencing penalties for promoting perspectives that have the potential to harm trans communities. This is a phenomenon that predates the proposed changes to the GRA legislation and has since intensified. In 2015, *The Guardian* published a letter by 130 prominent feminists, including many academics, expressing their concern about several cancelled appearances of feminist speakers on British university campuses, including Germaine Greer because of her open hostility towards trans women.⁸¹ The letter stated that "universities have a particular responsibility to resist this kind of bullying" and to "affirm their support for the basic principles of democratic political exchange."⁸² During one lecture at Cardiff University later that same year, Greer doubled down on her essentialist views and showed why trans communities had reason to be concerned, allegedly stating that a woman is not "a man without a cock," and that "if you didn't find your pants full of blood when you were 13 there's something important about being a woman you don't know."⁸³

Another prominent academic facing "de-platforming," Sussex University professor and philosopher Kathleen Stock, rose to prominence in 2018 when she penned a piece in *The Economist* arguing against self-identification as the basis for being recognized as a trans woman (whom she contrasted with those she termed "natal women").⁸⁴ When the publication of this stance prompted outcry from trans allies, Stock and 53 other academics turned to *The Guardian* to state their fear that an "ideologically driven attack" was suppressing "proper academic analysis and discussion of the social phenomenon of transgenderism."⁸⁵ Most recently, following calls for the University of Sussex to dismiss Stock—and a statement by the Sussex chapter of the University and College

80. *Freedom of Speech*, SEX MATTERS, <https://sex-matters.org/where-sex-matters/freedom-of-speech/> [<https://perma.cc/F3EU-7RRY>].

81. Campbell, *Censorship*, *supra* note 8.

82. *Id.*

83. See Steven Morris, *Germaine Greer Gives University Lecture Despite Campaign to Silence Her*, THE GUARDIAN (Nov. 18, 2015), <https://www.theguardian.com/books/2015/nov/18/transgender-activists-protest-germaine-greer-lecture-cardiff-university> [<https://perma.cc/4BPY-UGXX>].

84. Kathleen Stock, *Changing the Concept of "Woman" Will Cause Unintended Harms*, ECONOMIST (Jul. 6, 2018), <https://www.economist.com/open-future/2018/07/06/changing-the-concept-of-woman-will-cause-unintended-harms> (last accessed Jan. 9, 2022).

85. Kathleen Stock et al., *Academics are being Harassed Over Their Research Into Transgender Issues*, THE GUARDIAN (Oct. 16, 2018), <https://www.theguardian.com/society/2018/oct/16/academics-are-being-harassed-over-their-research-into-transgender-issues> (<https://perma.cc/FA69-75GS>) [hereinafter Stock, *Academics Harassed Over Research*].

Union calling on the university management to “take a clear and strong stance against transphobia”—the university’s Vice Chancellor dismayed the school’s LGBTQ+ community by siding with her, saying “we cannot and will not tolerate threats to cherished academic freedoms and will take any action necessary to protect the rights of our community.”⁸⁶

Kathleen Stock and Germain Greer are not isolated examples: the ranks of academic feminism in the UK appear to have numerous feminists opposed to gender-based definitions of womanhood, putting feminists—and universities—on the frontline of the “culture wars” dividing the country.⁸⁷ And while academics may currently be able to legally justify their opposition to the full recognition of trans women, university administrators sympathetic to the trans community find themselves caught between their values and the law. Essex University offers a revealing example. After conducting an investigation in 2021 into the cancellation of two feminist speakers known to oppose the expansion of trans rights and inclusion, Professors Jo Phoenix and Rosa Freedman, the university came to the conclusion that LGBTQ+ advocacy organization Stonewall (which had advised the university that gender-critical academics could legally be excluded from the university) had provided an “incorrect summary of the law,” since “gender identity or trans status” are not protected characteristics under the Equality Act 2010.⁸⁸ The university proceeded to issue apologies to the two professors, only to offend the university’s trans and nonbinary students.⁸⁹ As then stated by the university leadership, “in meeting our obligations to respect academic freedom and freedom of speech within the law, we have given the impression that we might not care about the lived reality of trans and non-binary people.”⁹⁰ With British universities on notice from the nation’s conservative leaders, who have urged vice chancellors to do more to “champion free speech” while the government considers “how to further strengthen it,” such dilemmas appear likely to intensify.⁹¹

86. Nadeem Badshah, *University Defends ‘Academic Freedoms’ After Calls to Sack Professor*, THE GUARDIAN (Oct. 7, 2021), <https://www.theguardian.com/education/2021/oct/07/university-defends-academic-freedoms-after-calls-to-sack-professor> [https://perma.cc/UL2X-QFE9].

87. See, e.g., Stock, *Academics Harassed Over Research*, *supra* note 85.

88. Anthony Forster, *Review of Two Events Involving External Speakers*, ESSEX BLOGS (May 17, 2021), <https://www.essex.ac.uk/blog/posts/2021/05/17/review-of-two-events-with-external-speakers> [https://perma.cc/SM7V-LCUA].

89. Anthony Forster, *Our Commitment to our Trans and Non-Binary Staff and Students*, STAFF BLOGS (July 2, 2021), <https://www.essex.ac.uk/blog/staff/posts/2021/07/02/our-commitment-to-our-trans-and-non-binary-community?fbclid=IwAR2wwfA6iv0PJjNBzEqRRfjCtsASyukYYWnkF4NjJVP3ZcA6lmAuo0OR3UY> [https://perma.cc/QH8F-XB3L].

90. *Id.*

91. Department for Education, “*Freedom of Speech is One of Those Fundamentals That Universities Are Looked Towards to Uphold and Protect*”—*The Education Secretary on the Importance of Free Speech*, BLOG: THE EDUC. HUB (Dec. 11, 2020), <https://educationhub.blog.gov.uk/2020/12/11/freedom-of-speech-is-one-of-those-fundamentals-that-universities-are-looked-towards-to-uphold-and-protect-the-education-secretary-on-the-importance-of-free-speech/> [https://perma.cc/5Y8A-HA8P].

VI

THE US EXPERIENCE

While it is beyond the scope of this paper to offer a thorough comparison of feminist responses to the advancement of trans rights in the US and UK, it is worthwhile briefly reflecting on events unfolding in the US context through the lens of what has occurred in the UK in recent years, and to consider in particular on how the public expression of normative views on sex, gender, and womanhood intersects with US debates on the boundaries and politics of free speech. How is the trans rights debate different in the US, is feminist resistance to trans inclusion in women's-only spaces becoming organized in the same way, and with what consequences for policy and speech rights?

Certainly, the legislative focus of such debates is different. Whereas in the UK the major point of contestation has been the national process for gender recognition, no such legislation exists in the US context, where a complex patchwork of state and federal laws addresses various aspects of trans rights, recognition, and inclusion. Rather than the gender recognition process itself, the Equality Act debate concerns anti-discrimination laws and specifically whether and when gender identity should count as a protected characteristic. The Equality Act was first passed by the US House of Representatives in May 2019, but it was not taken up by the Senate. It passed the House again in January 2021 and, at the time of this writing, is being considered by the Senate.⁹² Its overarching purpose is to amend the Civil Rights Act of 1964 by providing comprehensive protections against discrimination, including broadening the range of places or establishments to which nondiscrimination provisions would apply. LGBTQ+ rights are central to the legislation, which would for the first time ensure federal protections on the basis of not only "sex" as traditionally understood, but also gender identity and sexual orientation.⁹³

In between the first and second passage of the Equality Act in the House of Representatives, the Supreme Court ruled in *Bostock v. Clayton County* that the prohibition on sex discrimination provided in Title VII of the Civil Rights Act extended to sexual orientation and gender identity.⁹⁴ As stated in the Court's opinion, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."⁹⁵ Upon his inauguration in January 2021, President Biden issued an executive order directing all federal agencies to clarify that civil rights laws prohibiting sex discrimination also extend to sexual orientation and gender identity.⁹⁶

While existing legislation in the US already prohibits discrimination on the basis of sex, what is meant by "sex" has to date gone undefined. The *Bostock*

92. Equality Act, H.R. 5, 117th Cong. (2021) [hereinafter Equality Act].

93. *Id.*

94. 140 S. Ct. 1731 (2021).

95. *Id.* at 9.

96. Exec. Order No. 13988, 86 Fed. Reg. 7023 (2021) (Jan. 20, 2021) [hereinafter Exec. Order No. 13988].

ruling interpreted sex as “biological distinctions between male and female,”⁹⁷ using this as the basis to find that discrimination on the basis of sexual orientation or gender identity couldn’t be done without first referencing that person’s “biological” sex.⁹⁸ By contrast, the Equality Act states that for the purposes of discrimination, the term “sex” can refer to: sex-based stereotypes; pregnancy, childbirth, or a related medical condition; sexual orientation or gender identity; and sex characteristics, including intersex traits.⁹⁹ Advocates of this broadened definition argue that explicitly enshrining gender identity and sexual orientation as forms of sex-based discrimination will offer much-needed protections to trans people, who continue to experience high rates of violence, threats, and harassment, including verbal harassment and interrogation when using single-sex bathrooms.¹⁰⁰ Yet this is precisely where US feminists opposed to trans inclusion in women’s-only spaces take issue with the proposed legislation, since this definition of “sex” means no legal distinction could be made between biological traits and one’s gender identity.¹⁰¹

A related concern for such feminists is the possibility of maintaining single-sex spaces and programs. It is not yet clear how the proposed legislation will affect the existence of sex-segregated spaces, including the single-sex provisions of Title IX. However, the Equality Act explicitly states that individuals may not be denied access to shared (and often single-sex) facilities like bathrooms and locker rooms on the basis of sex, thereby ensuring that discriminatory state-level “bathroom bills” such as that signed into law in Tennessee in 2021 are overridden.¹⁰² Critics have seized on the fact that, unlike the UK Equality Act, the legislation proposed in the US currently does not specify any exceptions to this rule, meaning that it would be a form of discrimination to exclude trans women from women’s-only spaces.¹⁰³ It could also become unlawful to impose conditions on the participation of trans women in women’s athletics, such as the testosterone limit currently mandated by the National Collegiate Athletic Asso-

97. *Bostock*, 509 U.S. at 2.

98. Exec. Order No. 13988, *supra* note 96.

99. Equality Act, *supra* note 92.

100. Harvard T.H. Chan School of Public Health, *Poll Finds a Majority of LGBTQ Americans Report Violence, Threats, or Sexual Harrassment Related to Sexual Orientation or Gender Identity; One-Third Report Bathroom Harrassment*, HARV. T.H. CHAN NEWS (Nov. 21, 2017), <https://www.hsph.harvard.edu/news/press-releases/poll-lgbtq-americans-discrimination/> [<https://perma.cc/9WUU-FARJ>].

101. *See, e.g., US Equality Act: Gender Identity Impact Summary*, WOMEN’S LIBERATION FRONT, <https://static1.squarespace.com/static/5f232ea74d8342386a7ebc52/t/5f2b12d2bf4b780dd15ff37d/1596658386844/Equality-Act-HB5-2019-Summary-3-org-2-pager.pdf> [<https://perma.cc/RWU9-8HBF>] [Women’s Liberation Front, *US Equality Act*].

102. Equality Act, *supra* note 92; *see also* Brandt et al. v. Rutledge et al., Statement of Interest of the United States, Department of Justice (June 17, 2021), <https://www.justice.gov/file/1405411/download> [<https://perma.cc/4XQ6-3Y99>] (stating that where sex-segregated spaces exist and are currently lawful in the US, there can be no discrimination within them on the basis of gender identity).

103. *See, e.g.,* Women’s Liberation Front, *US Equality Act*, *supra* note 101.

ciation (NCAA).¹⁰⁴ At the same time, the process for having one's gender identity legally recognized goes unspecified in the US Equality Act: will the state-by-state patchwork continue in this regard, or will federal identity documents such as passports—set to become more gender inclusive and accessible to trans people—suffice for protection and inclusion on the basis of gender identity?¹⁰⁵

In terms of the evolving landscape of mobilization in the US context, it appears that organized feminist resistance to trans inclusion in women's-only spaces is currently less developed than in the UK, though there are several key organizations that are seeking to engage elected officials and shape public discourse. These include two organizations focused on women's sport alone: Save Women's Sports (established in 2019) and the Women's Sports Policy Working Group (WSPWG) (established in 2021). Several others have defined their agenda more broadly to include women's-only spaces beyond sport, notably Women's Liberation Front (WoLF) (established 2014) and Hands Across the Aisle (2017). While the degree of opposition to trans inclusion does appear to vary across these organizations—WSPWG, for example, does support trans women's participation in women's sport under certain conditions¹⁰⁶—they have all sought to establish recognition of “biological sex” as a foundational “fact” of cisgender women's distinctive experiences in the world and hence as the basis of her separate inclusion in certain institutional spaces. As seen in the UK, feminists committed to a biological definition of womanhood have relied on appeals to the authority of science, particularly in the context of (cisgender) women's sport. For example, WSPWG argues that “science not ideology dictates the need for sex segregation in sports.”¹⁰⁷ Some such feminists, like Save Women's Sports founder Beth Stelzer, have used this claim to biological ascendancy to disparage trans women: “women are not a hormone level or costume to wear. Your sex is a fact about you that is observable at birth.”¹⁰⁸ While the anti-gender (identity and ideology) backlash appears to be more pronounced in the UK context, such sentiment is nevertheless visible amongst US-based organiza-

104. See *Frequently Asked Questions*, WOMEN'S SPORTS POL'Y WORKING GRP., <https://womenssportspolicy.org/faq/#current-law> [<https://perma.cc/HLZ9-PQOG>].

105. In June 2021, the U.S. Department of State announced that it was beginning a process to update procedures for the issuance of U.S. passports to permit self-identification and consider how to introduce non-binary and intersex categories.

106. See *Model State Statute: Inclusion of Transgender Girls and Women in Girls' and Women's Sports*, WOMEN'S SPORTS POL'Y WORKING GRP. (Apr. 15, 2021), <https://womenssportspolicy.org/wp-content/uploads/2021/04/WSPWG-Model-State-Statute.pdf> [<https://perma.cc/L43G-DHJY>].

107. *Briefing Book: A Request to Congress and the Administration to Safeguard Girls' and Women's Sport & Include Transgender Athletes*, WOMEN'S SPORTS POL'Y WORKING GRP. 5 (Feb. 27, 2021), <https://womenssportspolicy.org/wp-content/uploads/2021/02/Congressional-Briefing-WSPWG-Transgender-Women-Sports-2.27.21.pdf> [<https://perma.cc/ZW7F-99HZ>] [hereinafter *Briefing Book*].

108. Beth Stelzer, *Stelzer on NBC Nightly*, “They're Erasing the Definition of Women,” SAVE WOMEN'S SPORTS BLOG (May 12, 2021), <https://savewomenssports.com/about-us-1/f/stelzer-on-nbc-nightly-%E2%80%9Cthey%E2%80%99re-erasing-the-definition-of-women%E2%80%9D> (last accessed Jan. 9, 2022).

tions: according to Hands Across the Aisle, for example, “gender is the problem, not the solution.”¹⁰⁹

Perhaps the most notable departure from the UK experience of this variety of feminism is the clear focus on women’s sport in the US context. While women’s-only spaces such as prisons, shelters, and bathrooms do appear in the public debate surrounding trans rights in the US, the issue of women’s sport has unquestionably consumed the bulk of the oxygen. This likely reflects the strong symbolic association of Title IX with girls’ and women’s sport in the US, which explains at least in part why the legislation has enjoyed strong bipartisan support over the decades since its passage.¹¹⁰ The bipartisan appeal of women’s sport remains evident today: in 2020, several elected representatives sponsored legislation aimed at limiting trans participation in women’s sport, including Representatives Gregory Steube and Markwayne Mullin (Republican) together with Tulsi Gabbard (Democrat).¹¹¹ Mirroring the discourse of feminists opposed to an expansion of trans inclusion in sport, this proposed legislation has sought to define sex as “assigned at birth by a physician” and to exclude without exception those athletes “whose biological sex at birth is male” from sport for (cisgender) women and girls.¹¹²

Religious and otherwise conservative organizations have also emerged as “champions” of trans exclusion from women’s sport and opponents of “gender identity,” suggesting that the right-wing co-optation of feminist efforts to limit trans inclusion in women’s-only spaces has indeed come to pass in the US context.¹¹³ Some such feminists have embraced this alliance. In 2020, the co-founder of Hands Across the Aisle, Miriam Ben-Shalom, participated in a panel sponsored by the Heritage Foundation entitled “Biology isn’t Bigotry: Why Sex Matters in the Age of Gender Identity.”¹¹⁴ Hands Across the Aisle actively endorses what they describe as a Christian perspective on biological sex and a binary ideology of gender difference, namely that “men and women are different at the deepest levels of their being.”¹¹⁵ WoLF openly acknowledges their alliance with conservative groups, stating that “the gender lobby is willing to do anything to dismantle women’s sex-based rights, and we need to be willing to

109. HANDS ACROSS THE AISLE, <https://handsacrosstheaislewomen.com/>.

110. Title IX: Building on 30 Years of Progress Before the Comm. on Health, Education, Labor, and Pensions, 107th Cong. 542 (2002).

111. See Protection of Women and Girls in Sports Act of 2020, H.R. 5603, 116th Cong. (2020); Protect Women’s Sports Act of 2020, H.R. 8932, 116th Cong. (2020).

112. *Id.*

113. See, e.g., *Should Men be Allowed to Compete in Women’s Sports?*, ALLIANCE DEFENDING FREEDOM, <https://adflegal.org/fairplay> [<https://perma.cc/7DR3-NSV5>] [hereinafter ADF article].

114. *Biology Isn’t Bigotry: Why Sex Matters in the Age of Gender Identity*, THE HERITAGE FOUND. (Feb. 16, 2017) <https://www.heritage.org/marriage-and-family/event/biology-isnt-bigotry-why-sex-matters-the-age-gender-identity> [<https://perma.cc/32PP-G3D9>].

115. *Gender Identity Harms Women*, HANDS ACROSS THE AISLE, <https://handsacrosstheaislewomen.com/gender-ideology-harms-women/> [<https://perma.cc/9MRX-496F>].

fight back with all the tools available to us.”¹¹⁶ This is despite many such conservative organizations being committed to curtailing women’s reproductive rights, including Alliance Defending Freedom, which supported cisgender high school girls in Connecticut to take legal action against the participation of trans athletes in school-based competitions.¹¹⁷

With “freedom of speech” also being a core pillar of the conservative agenda in the US, feminists opposing the expanded rights and inclusion of trans Americans may find further common ground with such organizations. While at the time of writing the speech freedoms of trans-opposed feminists is yet to develop into the same flashpoint issue as it is in the UK, there are signs that it is on the way to becoming so, including on US university campuses. This very masthead experienced a backlash of sorts when students learned that it would be publishing a contribution by British professor Kathleen Stock. In response, the journal’s faculty board at Duke Law School stated that “*Law and Contemporary Problems* is committed to the vigorous and open exchange of ideas” and that cancelling Stock’s contribution would be “inconsistent with the journal’s core scholarly mission.”¹¹⁸ In another example, when WoLF was selected to participate in a program of the University of Wisconsin Law School in 2021, the school’s LGBTQ+ student organization objected, writing that WoLF “does not simply hold transphobic beliefs, they advocate for transphobic policies and engage in harmful acts of transphobia.”¹¹⁹ While the school’s leadership was sympathetic, stating that “inclusion is a core value of UW Law,” they concluded that excluding WoLF from the program “would constitute viewpoint discrimination contrary to the First Amendment,” and that “[a]s a public institution, we have an obligation to refrain from all forms of legally prohibited discrimination.”¹²⁰ Like in the UK, then, US universities find themselves caught in the fray that has seen sex, gender, and womanhood transformed into the objects of speech and academic freedom debates.

116. *FAQ: Why Does WoLF Work With Conservatives?*, WOMEN’S LIBERATION FRONT, (Dec. 2, 2020) <https://www.womensliberationfront.org/news/faq-wolf-work-with-conservatives> [<https://perma.cc/QSA7-F94M>].

117. ADF article, *supra* note 113.

118. *See* Joe Patrice, *Student Staff Resign After Duke Law School Faculty Try to Force Anti-Trans Article Into Journal*, ABOVE THE LAW (Jun. 30, 2021), <https://abovethelaw.com/2021/06/student-staff-resign-after-duke-law-school-faculty-try-to-force-anti-trans-article-into-journal/?rf=1> [<https://perma.cc/G2LE-RQAE>]; *see also* Jonathan H. Adler, *Are Duke Law Faculty Forcing a Student-Run Journal to Publish an Offensive Article?*, REASON (Jun. 30, 2021), <https://reason.com/volokh/2021/06/30/are-duke-law-faculty-forcing-a-student-run-journal-to-publish-an-offensive-article/> [<https://perma.cc/E4W5-GZAS>].

119. QLaw Executive Board, *Statement Re: UW Law School’s Inclusion of Transphobic Employer*, QLaw UNIV. OF WIS. L. SCH. (Jan. 29, 2021), *available at* https://drive.google.com/file/d/1WRSNsLV0DhCkVf1VUS6COCoOr_bGhOAY/view.

120. *UW Law School Statement on Women’s Liberation Front and Opposition to Discrimination Based on Gender Identity and Expression*, LAW SCH. NEWS (May 12, 2021) *available at* https://secure.law.wisc.edu/newsletter/Features/UW_Law_School_Statement_on_Women_2021-01-30.

VII

CONCLUSION: WHITHER COMMON GROUND?

When J.K. Rowling began using her Twitter account to air her views on the biological distinctiveness of females, members of the Harry Potter cast joined those publicly condemning the author for failing to be an ally to the trans community. And yet, sales of the Rowling's Harry Potter books grew by 28% in the aftermath,¹²¹ begging the question: what are the consequences of de-platforming in the pursuit of social justice?¹²² The phenomenon has become a much discussed dynamic of the polarized debates surrounding many contemporary and value-laden issues such as climate change, racial justice, sexual harassment, election integrity, vaccines, and rights and protections for LGBTQ+ people. In both the UK and US (as elsewhere), de-platforming has resulted in individuals being dismissed or resigning from their workplace, Twitter accounts being suspended, talks on university campuses being cancelled, and boycotts of certain brands or businesses. Often generated via social media, this "bottom-up" form of collective action has emerged as a particularly important means for minoritized groups to hold more privileged and powerful voices to account, including for the public expression of harmful (or potentially harmful) viewpoints.¹²³ According to the National Coalition Against Censorship, however, the strategy may ultimately do more harm than good to social justice causes.¹²⁴ Certainly, in the case of trans rights and inclusion, there are signs in both the UK and US that the polarization and harms that characterize this debate are only deepening.

The purpose of this intervention has been to reflect on the complex relationship between social justice and speech rights from the perspective of feminism, and specifically feminist resistance to legislative agendas that would change institutional definitions of sex, gender, and womanhood. Ultimately, this variety of feminism has consequences not only for legislative outcomes—and, by extension, for the lives and flourishing of trans people—but also for how it positions feminism generally in relation to the state and within an increasingly polarized public sphere. What role will the issue of trans rights and recognition play in the stories that people come to tell about this moment in feminism, and what will be

121. See Mark Sweney, *Harry Potter Books Prove UK Lockdown Hit Despite JK Rowling Trans Rights Row*, THE GUARDIAN (Jul. 21, 2020), <https://www.theguardian.com/business/2020/jul/21/jk-rowling-book-sales-unaffected-by-transgender-views-row> [<https://perma.cc/73CN-P66T>].

122. See Aja Romano, *Why We Can't Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020), <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate> [<https://perma.cc/ZUU5-5UUL>] (discussing the limitations of de-platforming for the pursuit of meaningful change for social justice causes).

123. See Zack Beauchamp, *The "Free Speech Debate" Isn't Really About Free Speech*, VOX (July 22, 2020), <https://www.vox.com/policy-and-politics/2020/7/22/21325942/free-speech-harpers-letter-bari-weiss-andrew-sullivan> [<https://perma.cc/CU7M-LVD2>] (discussing why de-platforming shouldn't be reduced to a debate about speech freedoms).

124. Svetlana Mintcheva, *The Case Against De-Platforming*, NAT'L COAL. AGAINST CENSORSHIP (Fall 2018), <https://ncac.org/censorship-news-articles/the-case-against-de-platforming> [<https://perma.cc/REL9-ACKM>].

the consequences—for cisgender and trans women alike—as advocates on both sides stake their particular claim about the relationship between social justice and the free expression of normative viewpoints?

Throughout this intervention I have said had little about how other feminists are actively mobilizing in *support* of legislation that advances trans rights and recognition in the US and UK. In the US context, this includes twenty three national women’s rights and gender justice organizations that issued a statement supporting the “full and equal access to participation in athletics for transgender people” in April 2019.¹²⁵ The letter, with signatories including the Women’s Sports Foundation and the National Organization for Women, leads with a message of inclusion, emphasizing “the harm to all women and girls that will flow from allowing some women and girls to be denied opportunities to participate and cast out of the category of ‘woman’ for failing to meet standards driven by stereotypes and fear.”¹²⁶ In 2021, Athlete Ally released a statement on the future of women’s sport—and encouraging the inclusion of trans women—that was authored by several prominent feminist sports scholars and supported by over 75 signatories.¹²⁷ It is thus not the intention of this article to suggest that trans-opposed organizations are monopolizing the feminist voice on legislation that concerns women’s-only spaces, though their influence appears to be growing in the US and has clearly become consequential in the UK.

I have avoided using the term TERF to describe contemporary feminist resistance to trans inclusion, in part because I wish to make the case that the “scaling up” and legislative focus of the variety of feminism explicated in this article renders it in some ways something new. As I have suggested above, this is no longer the trans exclusive feminism of second wave radical lesbians: it has entered mainstream debate and become more aligned with dominant institutions that radical feminists might previously have critiqued, such as science. Moreover, these organizations and individuals are characterized not only by their stances on women’s-only spaces, but also by their emphatic embrace of a certain ideology of biological sex as their ultimate, existential cause, and one that is their fundamental right to voice.¹²⁸ At the same time, there are clear echoes of second wave TERF discourse in contemporary feminist “gender critical” opposition to trans rights and recognition. Consider for example Raymond’s use of “biological maleness” and “biological femaleness.”¹²⁹ Such terminology is

125. American Association of University Women et al., *Statement of Women’s Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People*, ACLU <https://www.aclu.org/letter/statement-womens-rights-and-gender-justice-organizations-support-full-and-equal-access> [<https://perma.cc/G8SZ-SCFJ>].

126. *Id.*

127. *A Statement from Athlete Ally on the Future of Women’s Sport: The Future of Women’s Sports Includes Transgender Women and Girls*, ATHLETE ALLY, http://www.athleteally.org/wp-content/uploads/2021/11/The-Future-of-Womens-Sport-includes-Transgender-Women-and-Girls-Statement_11.15.21.pdf [<https://perma.cc/8XEK-NWL5>] [hereinafter Athlete Ally Statement].

128. See *TERF Wars*, *supra* note 19 at 677–98 (describing “gender critical” feminists as a direct extension of TERF lineage and ideology).

129. RAYMOND, *supra* note 23 at 130.

commonly used in contemporary organized feminist efforts to limit the inclusion of trans women and reclaim “biological sex.”¹³⁰ According to LGBTQ+ organization Athlete Ally, even aspiring moderate organizations such as WSPWG have seen their references to trans women as “biological males” in the context of sport being taken up by conservative agendas targeting trans youth.¹³¹

The “scaling up” of this variety of feminism thus warrants careful scrutiny by feminists, lawmakers, and trans advocates alike, particularly if they wish to circumvent a political climate that is polarized beyond the point of return. The question remains whether, or under what conditions, divergent ontologies of sex, gender, and womanhood could be articulated in the public domain in ways that satisfy the needs of both trans communities and cisgender women—the need for safety, inclusion, equality, and flourishing, which are shared by both groups. Certainly, one feminist perspective would be that the focus on speech rights—and on trans athletes—is taking the eye of the ball by granting the ongoing institutionalization of masculine domination and violence a free pass.¹³² According to Catharine MacKinnon, for example: “Male dominant society has defined women as a discrete biological group forever. If this was going to produce liberation, we’d be free.”¹³³ If gender equality is ultimately the goal, how is it served by pursuing the “truth” of sex, or would other conversations be more productive, such as about pathways to allyship and common ground? For feminists, then, this is ultimately a moral question about the (speech) choices that women make in the world as they respond to their experiences of discrimination and subordination and seek institutional remedies.¹³⁴

130. See, e.g., *Briefing Book*, *supra* note 107.

131. *Id.*; see also Athlete Ally Statement, *supra* note 127.

132. See, e.g., Cristan Williams, *Radical Inclusion: Recounting the Trans Inclusive History of Radical Feminism*, *TRANS GENDER STUD. Q.* 3, 254–58 (arguing that trans inclusion is entirely consistent with the radical feminist struggle to undo and remake male-dominated institutions); Elizabeth Sharrow, *Five States Ban Transgender Girls from Girls’ School Sports. But Segregating Sports By Sex Hurts All Girls*, *WASH. POST* (Apr. 16, 2021), <https://www.washingtonpost.com/politics/2021/04/16/five-states-ban-transgender-girls-girls-school-sports-segregating-sports-by-sex-hurts-all-girls/> [<https://perma.cc/WSW2-UYBT>] (arguing that trans inclusion in women’s and girls’ sport can help undo pervasive stereotypes that constrain female athletes).

133. Cristan Williams, *Sex, Gender, and Sexuality: The TransAdvocate Interviews Catharine A. MacKinnon*, *TRANS ADVOCATE*, https://www.transadvocate.com/sex-gender-and-sexuality-the-transadvocate-interviews-catharine-a-mackinnon_n_15037.htm [<https://perma.cc/P2Z2-3WVV>].

134. See, e.g., Laura T. Hamilton et al., *Hegemonic Femininities and Intersectional Domination*, *SOC. THEORY* 37, 315–41 (arguing that those women who benefit from existing gender relations do so at the expense of those who are multiply marginalized, such as women of color and trans women, and raising the question of what allyship would look like if the goal was the undoing of gender inequality); see also, LEPINARD, *supra* note 10 at 12 (arguing that moral relations are at the heart of the collective feminist project: “They define who is to participate and how feminists engage with one another”); Sara Ahmed, *An Affinity of Hammers*, *TSQ: TRANS GENDER STUD. Q.* 3, 22–34 (describing feminist claims of censorship in relation to the expression of trans-exclusive views as the perspective of women who don’t have to justify their existence).