# Advanced topics in "gender identity," male nudity, and fraud prevention

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Popular progressive political discourse, fueled by the sloppy legal strategy of LGBT organizations, insists that adding "gender identity" to existing anti-discrimination statutes by legislative amendment is an urgent and necessary legal protection for transgendered and other gender non-conforming people. In fact, however, judicial interpretation of Sex discrimination law already prohibits gender-related sex-stereotyping. More than being benignly redundant, the current legislative strategy actually creates a big problem: it defines and positions "gender identity" as a *new* protected legal class that overrides Sex as a *preexisting* protected legal class. In practice, these classes come to clash in Sex-segregated spaces when a single individual's "gender identity" is prioritized over every other person's physical and legal Sex. I will discuss a particular example of this situation below.

Sex, as a legal category, is important in its own right. Whereas Sex is the necessary legal foundation for the protection and maintenance of women's reproductive freedoms, "gender identity" is loosely defined by an individual's subjective sense of self. Just as female bodies do not have magical ways of shutting down unwanted pregnancies, female humans cannot present, express, or "gender identify" our way out of reproductive exploitation (see: child brides, arranged marriages, femicide, sexual slavery, and rape as a weapon of war). Women's oppression—globally and historically—operates in large part by leveraging female reproductive Sex whether females conform to the tyranny of gendered norms *or not*. Female autonomy requires that our laws recognize the reproductive consequences of biological Sex. For this reason alone, females cannot afford for "gender identity" to override the legal definition of Sex.

Further-- and possibly of more immediate concern to women as a class-- "gender identity" has been used by certain predatory males to fraudulently break the boundaries of women's-only space. My primary argument here is *not* that all trans people are insincere or fraudulent, but that **embedding basic fraud-prevention measures directly into "gender identity" statutes is necessary for the protection of women's right to sex-segregated spaces**. Actively addressing the possibility of fraud, rather than stubbornly insisting that it never happens,[i] will both insulate the larger class of trans persons from negative association with charlatans and, more importantly, it will provide some measure of legal assurance to females that *no males* will be present in sex-segregated space reserved for females. Indeed, there are similar legal restrictions on claiming the right to non-discrimination protections or accommodations on the basis of religion, national origin, and disability.[ii] Fraud prevention is like due diligence, it's a no-brainer.

## IMPROPER PURPOSE

In a previous post, I discussed the unique Improper Purpose exclusions contained within the "gender identity" definitions recently enacted in Connecticut and Massachusetts (my state of residence). Both statutes include *legislatively revised* exceptions that prevent individuals from claiming "gender identity" protections for a so-called Improper Purpose (my red text):

| Connecticut (2011) | Massachusetts (2011) |
|---|---|
| "Gender identity or expression" means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose. | "Gender identity" shall mean a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, as part of a person's core identity; provided however, gender-related identity shall not be asserted for any improper purpose. |
| Conn. Gen. Stat. § 4a-60a(21). (1) | General Laws/PartIV/TitleI/Chapter272/Section92a http://www.malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section92a |

As far as I know, neither clause has been litigated to establish the meaning or reach of Improper Purpose.

Women's legal right to sex-segregated public spaces demands that future judicial interpretation weigh women's need for penis-free environments against the subjective identities of gender non-conforming males. Improper Purpose should *minimally* exclude individuals: (1) convicted of sexual offenses or (2) convicted of violence against women, as well as those who have (3) publicly participated in transvestic fetishism or similar sexualization of cross-dressing. When evidence of these transgressions is established in a court of law, such individuals should be summarily excluded from claiming the legal right to violate the boundaries of sex-segregated space under the guise of "gender identity." This should not be controversial.

## CERTAIN SHARED FACILITIES

As another example of placing reasonable restraints on the use of "gender identity" to override Sex, the proposed federal Employment Non-Discrimination Act (ENDA) of 2011[iii] contains an exception that, *in certain contexts*, would allow an employer to offer similar but different accommodations without being in violation of the non-discrimination law. From Section 8 of the proposed legislation (my red):

> (3) CERTAIN SHARED FACILITIES- Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.

Common sense and shared expectations of privacy demand some limitation on the exposure of naked male bodies in female-only spaces. All contexts *in which being seen unclothed is unavoidable* and expected behavior

should necessarily be governed by stricter "gender identity" guidelines than spaces where males and females mingle freely, such as in restaurant dining areas, concerts, and county fairs.

## ADVANCED APPLICATION OF FRAUD PREVENTION CONCEPTS

### Colleen Francis, the State of Washington, and "risk"

I've been following the media's coverage of Colleen Francis's naked intrusion into women's Sex-segregated locker room space with great interest over the past several weeks. Francis is an intact male. Although he was confronted by the Evergreen Swim Club's coach and a police report was filed on September 27, 2012, Francis continued to insist that he is entitled to expose his penis to other women in the women's locker room. The local district attorney has refused to press charges against Francis under Washington State's indecent exposure statute (Wash. Rev. Code § 9A.88.0 10).[v] On November 1, 2012, The Alliance Defending Freedom (ADF) issued a formal notification to Evergreen State College regarding the school's potential liability for statutory violations relating to Francis's use of the women's locker room facilities.[iv] But a conviction for indecent exposure would require proving that Francis subjectively and "*intentionally ma[de] any open and obscene exposure of his or her person … knowing that such conduct [wa]s likely to cause reasonable affront or alarm*." If we assume, as the district attorney clearly has, that Francis has an affirmative right to be in the women's locker room on the basis of his subjective "gender identity," an indecent exposure prosecution would be nearly impossible because Francis's nudity is consistent with normal usage of the facility.

I want to suggest an alternative legal theory that might successfully exclude Francis, and/or other biological males like him, from relying on their "gender identity" to gain access to women's-only public spaces in the state of Washington. This could be done by **leveraging an exception contained within the non-discrimination statute itself to exclude him before he can establish a right to be in the space to begin with.**

First, the Revised Code of Washington dictates that "sex" means gender.[vi] Sex is literally *the same as* gender according to the laws of Washington. This is semantic sloppiness [vii] of mind-boggling proportions. The legislature should correct this before anything more embarrassing transpires. In the meantime, the public accommodations statute currently accounts for the possibility that certain behavior or actions constituting a risk to others may be disallowed without creating a violation of the law (my red text and underlining):

Wash. Rev. Code § 49.60.215[viii]
**Unfair practices of places of public resort, accommodation, assemblage, amusement — trained dog guides and service animals.**

> (1) It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the

> presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice.

To repeat: "*PROVIDED, That behavior or actions constituting a risk to…other persons can be grounds for refusal and shall not constitute an unfair practice.*" [ix]

This exception makes room for an argument that turns on the other patrons' reasonable apprehension of risk *rather than* on the idiosyncratic mental state of the actor who presumes that he is entitled to access the public space. Instead of waiting for a crime to occur, interrogating an actor's subjective intent from a criminal perspective, and/or trying to prove that someone has sustained demonstrable damages, one would merely show that certain *behavior* creates an objective and/or apparently legitimate risk to the other persons in the space. This approach shifts the focus from the *actor's intent* to the perception of risk that the actor's behavior creates in the minds of reasonable observers. If the behavior itself constitutes a risk to other persons, refusing the actor access to the facility is not an unfair practice under this statute.

**Misconduct**

In Francis's case, he has a history of engaging in sexualized public behavior on the internet. This evidence supports a characterization of him as a sexual exhibitionist, behavior which should be legally categorized as an Improper Purpose for claiming right to access Sex-segregated locker rooms on the basis of an ambiguously defined "gender identity." There is no Improper Purpose exclusion, however, in Washington. So we must argue that Francis's behavioral decision to defiantly expose his penis combined with his subsequent callous indifference to how this would likely be perceived by others, including underage girls ranging from ages 6 to 18, is exhibitionist conduct that qualifies as the kind of risk envisioned by Wash. Rev. Code § 49.60.215. Francis's naked penis in a Sex-segregated space for women objectively threatens women and girls' rights to privacy and safety. As such, Evergreen College should be well within their rights to refuse Francis admission to Sex-segregated spaces where he now has a documented history (see police report) of recklessly exposing his genitals to unsuspecting women and girls.

**Willful Nudity**

Further, supposing that Francis didn't have this history of public misconduct, his biologically male presentation *alone* should arouse reasonable apprehension in the minds of average female observers—especially when minors are present— that his unyielding nudity in a women's-only locker room is lascivious, rather than innocent, *and* that it constitutes an imminent risk to their safety. Significantly, Francis has publicly stated that he likes and does not want his penis removed despite his demand that his "gender identity" legally requires everyone else to consider him "female."[x] **It is both inappropriate and unreasonable to expect underage girls to accept any man's naked penis in their private changing space as "female" or as normal.** This is the exactly the kind of public safety concern/state interest that likely informs ENDA's Certain Shared Facilities exception.

Being unclothed is a state of vulnerability for females. The alarming prevalence of sexual assault against women and girls is both statistically and experientially undeniable.[xi] Female vigilance against sexual predation is highly warranted and necessary for women's self-preservation. Female suspicion in response to male nudity in women's only space is well-founded (not hysterical) and must not be legally disregarded in favor of indulging any males' gendered whimsy and desire to unconditionally expose their genitals in spaces that men are generally not allowed to go. Women should never have to see or be exposed to a penis in the women's locker room. The law should protect women from indecent exposure in women's spaces regardless of the individual's "gender identity." From both a public policy and a legal protection perspective, it shouldn't matter whether Francis (or any other man) perceives his penis as being offensive, only that a reasonable female observer of his conduct *in public Sex-segregated contexts* would be offended by it and consider it a risk to her safety and/or a violation of her legal right to privacy and freedom from indecent exposure. Consistent with ENDA's Certain Shared Facilities exception, Washington's statutory risk exclusion should prohibit biologically intact males from exposing their genitals to women in women's-only space.

## CONCLUSION

No matter how compassionately one may feel towards individuals suffering from the emotional pain of severe gender dysphoria, Sex and gender are fundamentally different states of being. They must not be confused in the law, nor should the subjective concept of "gender identity" be allowed to override Sex without incorporating some reasonable limitations and fraud prevention measures. The Improper Purpose clause legislatively embedded in the "gender identity" laws of Connecticut and Massachusetts is an important first step towards protecting women's-only Sex-segregated spaces from fraudulent intruders and sexual predators. The Certain Shared Facilities provision of the proposed ENDA legislation offers another reasonable restriction on the conflation of "gender identity" with Sex by ensuring that women's right to penis-free changing space is both acknowledged and preserved.

Some limitations, including basic fraud prevention measures, are necessary legal elements of any legislative strategy designed to protect "gender identity." At a minimum, women and girls should have the right to be free from male nudity in all public spaces and this right should be supported by stronger legal protections. In the larger context, women and girls should not have to bear the burden of determining the difference between sexual fetishists, sexual predators, and males who believe they are expressing an alternative "gender identity."

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[i] As in this law review article: Levi, Jennifer and Redman, Daniel, The Cross-Dressing Case for Bathroom Equality (January 17, 2010). Seattle University Law Review, Vol. 34, p. 133, 2010. See page 160, n149. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986853

[ii] See: Sue Landsittel "Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII." 104 Northwestern University Law Review1147 (Summer 2010, No. 3). http://www.law.northwestern.edu/lawreview/v104/n3/1147/LR104n3Landsittel.pdf

[iii] http://www.govtrack.us/congress/bills/112/s811/text

[iv] See: http://www.adfmedia.org/files/EvergreenLetter.pdf

[v] Accessed on the web, November 3, 2012: http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.88.010

[vi] Wash. Rev. Code § 49.60.040(25) http://apps.leg.wa.gov/rcw/default.aspx?cite=49.60.040

[vii] Washington also confuses gender with "sexual orientation." See: http://sexnotgender.wordpress.com/2012/06/28/it-is-inaccurate-to-conflate-sexual-orientation-with-gender-nonconformity-and-such-semantic-sloppiness-has-no-place-in-the-law/

[viii] Accessed on the web, November 2, 2012: http://apps.leg.wa.gov/rcw/default.aspx?cite=49.60.215

[ix] See discussion about the medicalization of gender non-conformity as a legal strategy and what constitutes a disability by Jennifer Levi
here: http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1025&context=facschol 15 Colum. J. Gender & L. 90 (2006). Consider this framing of "gender identity" in light of the statute's specification that "*this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law*." Also note that transsexuality is not recognized as a disability under the federal American with Disabilities Act.

[x] http://jezebel.com/5957108/trans-woman-in-college-locker-room-sparks-title-ix-debate

[xi] See: National Institute of Justice & Centers for Disease Control & Prevention. *Prevalence, Incidence and Consequences of Violence Against Women Survey*. 1998. See also: Davis, T. C, G. Q. Peck, and J. M. Storment. "Acquaintance Rape and the High School Student." *Journal of Adolescent Health* 14 (1993): 220-24.