

FIRST THINGS

SUPREME INCOHERENCE: TRANSGENDER IDEOLOGY AND THE END OF LAW

by
Jeff Shafer
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In *The Trouble with Principle*, Stanley Fish recites an observation that John Milton included in his *Areopagitica*: “No law, Milton points out, can permit activity that constitutes an assault on it, no law, that is, that ‘intends not to unlaw itself.’” Even more self-cancelling is for a law to permit an interpretation of its text that abolishes the very concepts on which its edict depends. In such case, both the law and its interpretation stall in mutual nullification.

Two questions, then. One: Does the federal law prohibiting “sex discrimination” forbid us to countenance the category of “sex”—and thus of “sex discrimination”? Two: Can the rule of law survive a *yes* answer to question one?

In order to do away with the legal decisiveness of the binary of male and female bodies, legal advocates for transgender ideology now brandish the federal ban on sex discrimination in Title IX—which itself depends on the legal decisiveness of the binary of male and female bodies. But banishing the sex binary concurrently banishes the (dependent) prohibition of sex discrimination. And that, in turn, leaves the transgender legal theory empty-handed, having eviscerated the structure on which its own claims rely.

While requiring equal educational opportunity for both sexes, federal law in Title IX and its implementing regulations authorizes schools to maintain “separate toilet, locker room, and shower facilities on the basis of sex.” Does the federal authorization for sex-separation facilities

also forbid schools to keep those facilities sex-separated? That odd question (among others) is presented in the now-famous case of *G.G. v. Gloucester County*. (The Supreme Court was to hear oral arguments in that case this week, but due to the Trump administration's reversal of the Obama administration's guidance on the law at issue, the Court remanded the case to the lower court for renewed consideration.) The *Gloucester* case presents an ironic dispute over whether the federal law enacted to provide equal educational opportunities to students of the female sex requires that schools do away with the category of sex from which the law's solicitude for female students originates, and on which its effectuation depends.

The plaintiff in the case ("G.G.") is Gavin Grimm, a female student at Gloucester High School in Virginia. She wishes to use the restrooms reserved for the male student population, as she identifies as a transgender male. The Fourth Circuit Court of Appeals last year ruled in her favor, offering that "the individual's sex as male or female is to be generally determined by reference to the student's gender identity."

Among the demerits in that assertion is the court's conflating categories that are distinct and incompatible. Indeed, their conflict is the basis of Gavin's claim in her lawsuit. She is, to her chagrin, of the female sex. ("I was born in the wrong sex," she testified.) Her female body is precisely what she wishes to erase from legal visibility, to be replaced by the mental state that she announces: a male "gender identity." If Gavin, who has a female body, has a male gender identity, it is not clear what "male" means in this context, or why her male gender identity should determine which bathroom she uses. What is clear is that "male" with reference to gender identity does not have (in her case, certainly) the same meaning as "male" when the school district employs it to demarcate admittance to restrooms.

And by declaring herself a boy, Gavin dissolves the category she claims to occupy. By denying the identity significance of her body, she has also dispensed with an anchoring referent for her claim to maleness. What, then, is that "male" identity referring to? Nothing. It is a self-referential condition of mind. As such, to apply the word "male" to a body-denying gender identity is an act

of both defiance and deceit. But at this stage of its deconstruction project, transgender ideology must equivocate. It trades on the resonance of concepts it wishes to destroy.

Transgender ideology instructs that the body does not reveal the person; the mind does. Except that the mind is invisible, and so reveals nothing. The pragmatic need of gender-identity dissenters from sex, then, is a mechanism by which the mind's determination may be made visible. This need is ordinarily met by such persons' adopting the appearance, fashion, and practices associated with male or female bodies, in a display intended either to conform to or confound those physical categories—but in either event relying on the social authority of the categories and the visible cues and institutions reflecting them. Thus do those persons who deny the physically manifest nature of identity end up scurrying back to the physicality of identity so as to avoid disappearing from view. Being committed to both the abolition *and* exploitation of meaning in the physical realm, transgender ideology is a case study in dialectical tension.

Transgenderism—at least in its current advocacy posture—refuses to commit itself fully to slaying the categories of reality it denounces, because it needs them alive if its destabilizing demands are to be met. This makes things tricky. If transgender theory were to enjoy complete success in replacing the legal relevance of male and female bodies with reports of gender-states-of-mind, the means to reveal those states of mind would disappear. Consider: names (Gavin changed hers), wardrobe selection (she changed this, too), single-sex restroom access (which she demands in her lawsuit)—these are all dependencies of the publicly meaningful sex-binary. While aiming to replace sex with gender identity, Gavin insists on access to the male facilities that exist only because the public acknowledges the meaningfulness of bodies that she denies have meaning. Her novel theory of identity and her claim for restroom access are mutually refuting.

To disqualify the legal authority of the sex binary won't leave intact its corresponding institutional expressions; these would die and disappear right along with their reason for existence. In such case, the parasitic gender identity construct would be without its host, now

invisible and without a context in which its body-revolt could register. Sex-less persons would be absorbed into the undifferentiated mass of others of infinitely variable mental states with no physical referent to serve as the *in-terms-of-which* these mental states could be deemed sensible, meaningful, or publicly identity-defining. An androgynous nirvana. And if bodies are but neutral, mute substrata in which minds reside and travel about, their mute features hardly seem cause for personal crisis, or for much concern about what we do with them.

As transgender identity is mental, having no enduring physiological referent or other physical-material presence, it also has no necessary persistence. Unlike physical bodies, mental states contain no impediment to moment-by-moment fade or alteration. And due to its voluntaristic rather than given character, gender identity need not hew to rationality. It is a stipulation, not a constituent of reason.

When in a male or female locker room, nobody is in a position to know whether he or she is sharing the facility with those identifying as Gender Female, Two-Spirit, Pangender, Genderqueer, Androgynous, Gender Fluid, or any other of the innumerable possibilities within the abstract category of gender identity. The ability to know others' identities depends on their announcing it. And the accuracy and honesty of that announcement is never confirmable. It is thus a baffling proposal urging that the impossible-to-confirm, non-binary mental states of persons who would enter one of the two sex-binary shower facilities are relevant—or even interesting—in the context of policy-making on who may enter which one.

A summary of the obvious: Bathrooms are not specified in terms of mental states; there's no reason for respective bathroom access to depend on one's mental state; and there's no viable way to regulate admission to separate bathrooms on the grounds of mental states. Why, then, do transgenderism policy proponents counter-intuitively announce their constituents' deep need for cross-sex facility access, rather than merely campaign against the error of binary sex-separation in the first place? Because their demands are not about those facilities, as such.

Cross-sex bathroom access serves two roles, one for each category of participant in the transgenderism policy project. First, for the dysphoria-sufferer, bathroom access presents (as explained above) a social signaling opportunity. A female's invisible "male" gender identity is powerfully broadcast upon her authorized use of the male restroom. (Gavin thus objected to her school district's merely practical offer that she avail herself of the unisex single-user restrooms. That defeats the whole point.) Second, for the transgender advocacy industry, cross-sex restroom access disrupts and destabilizes the otherwise still-stable public practices and institutions that reflect the sex binary that gender theory marks for ultimate annihilation. In neither case is the demand for cross-sex restroom access related to the justification or function of that sex-specific facility.

And in the meanwhile (as Ed Whalen has explained), it is not gender-identity discrimination to exclude males from female restrooms (or vice versa) because of their *sex*. Gender identity plays no role in that policy enforcement. The law has no reliable access to a person's gender identity. Nor does anyone else. Nor (again) in this context does the law care. On the other hand, for a school to allow a male student who identifies as female into a woman's shower facility while refusing such shower access to a male student who identifies as male (or as androgynous, or pangender, etc.), *does* discriminate on grounds of gender identity. If "discrimination on grounds of gender-identity" is what the law forbids (thus consuming and nullifying the incompatible category of sex discrimination), here again, the existence of sex-specific facilities themselves (being binary) and any attending enforcement of the policy would be unlawful. All "toilet, locker room, and shower facilities" that Title IX regulations explicitly authorize to be separated on the basis of sex must now be open to all persons without distinction. Sex-specific facilities disappear along with the legal category of embodied sex.

Behold the regime wherein Title IX is interpreted to un-law itself.

The created truth manifest in sexed bodies cannot endure in law as "one among many" incompatible human identity markers. It can only either be (1) *the* norm, or (2) subservient to

some *other* norm. There is no sharing of power in these precincts. Once male or female embodiment no longer legally anchors human identity, the venerable practices and policies dependent on the identity-profundity of male and female bodies only survive as fugitives, or in a tentative position of contingent state permission, ever vulnerable to the in-fact erasure already accomplished in principle. So, for instance, draining legal meaning from body and its natural functions correspondingly drains legal weight from the body-concepts of motherhood, fatherhood, kinship, and ancestry—from family itself. All to say, this trip doesn't terminate at the bathroom.

Transgenderism public policy advocates are not proposing a compromise at the margins, and indeed they cannot. Their program is totalistic, as its ambition is to redefine humanity writ large. If the law governing us all says Gavin is a boy and not a girl, then “boy” and “girl” no longer mean *for anyone* what they always meant before. We've then all been redefined.

Transgenderism is supremely incoherent not only because it is irrational, but because that irrationality doesn't diminish its appeal or social standing. Its irrationality is not a defect but its principle feature, its point of pride and perverse strength. Judge Niemeyer wrote in dissent to a ruling in Gavin's case that, as against transgender policy, “[v]irtually every civilization's norms on this issue stand in protest.” Well yes; that's rather the point. For transgender ideology, the unanimous testimony of human civilization not only has no authority, but civilization is precisely the foe it aims to vanquish. Settled categories—of law, logic, or physical creation—are targets for subversion.

There is therefore a vital difference between our charitable concern and compassion for the exceptional individual who suffers from dysphoria, and the revolution of making that person's confusion a reason to overthrow the universe in order that dysphoria itself cannot endure as a sensible category. While individuals suffering from transgender confusion desire a different body, the gender ideologues exploiting the condition of those individuals desire a different cosmos. The dysphoric student, then, should be treated quite differently than her handlers.

Transgenderism is not a matter for policy compromise or compatible addition to our sex discrimination laws. It is a form of total negation. And law, already besieged, cannot survive its triumph.

Jeff Shafer serves as senior counsel at Alliance Defending Freedom.

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