Taking to Task Left Liberal Opposition to Greening’s Gender Recognition Reforms

We are familiar with opposition to rights acquisition by sexual and gender minorities, at least when it when comes from socially conservative and/or religiously moral quarters. Yet, in our topsy-turvy world, it is elements of the liberal or libertarian left that increasingly appear to block the way. In this article, I will consider this disturbing tendency through the example of the recent announcement of the Equalities Minister, Justine Greening, that the government intends to liberalise legal arrangements governing legal recognition of gender identity.[[1]](#footnote-1)

This reform proposal has led to sustained criticism from several leading liberal or libertarian political journalists. Thus it has been criticised by Brendan O’Neill, editor of Spiked Magazine,[[2]](#footnote-2) and by Helen Lewis, the deputy editor of the New Statesman.[[3]](#footnote-3) In this article, I want to take to task the central objection each raises. O’Neill objects to what he views as the re-writing of history regarding the ‘facts’ of gender. For her part, Lewis imagines all manner of harmful consequences that reform may produce for cisgender women. In O’Neill’s case, existing legal arrangements, as well as proposed reform, appear to represent an affront, while Lewis focuses on potential harms which she links to expanding the pool of people able to receive a Gender Recognition Certificate (GRC).

I will argue that O’Neill’s objection is based on a mistaken view of history, of historical analysis, of the doing of history. Conversely, Lewis’ claim is an empirical one, but one utterly lacking in evidence. What unites both is fantasy. Lewis’ imagination runs amok, sensitising the public to the possibility that one of the most marginalised and vulnerable groups in society (trans women) might, if permitted to pee in female bathrooms, have recourse to female refuges and/or be allocated to a gender-appropriate prison, prey on cisgender women. In a different register, O’Neill invokes the cultural power of Orwell and points to the dystopia he believes reform will inevitably deliver.

Let us begin by being clear about what the proposed reforms ential, before going on to pinpoint and challenge the objections of O’Neill and Lewis. Under current law, a transgender person can apply for a GRC if they meet certain medio-legal conditions. These include, in particular, being diagnosed with gender dysphoria and living in gender role for two years. There is no requirement for surgical and/or hormonal intervention though many trans people have followed this path. The proposed reform would remove from the recognition process, the two year waiting period and the need for a diagnosis. The latter reform would depathologise trans people, thereby achieving what gay men and lesbians accomplished in 1973. The reforms would also recognise the gender identites of non-binary people. In short, if the government proceeds with its proposed reforms, gender identity recognition will become much less bureaucratic, cheaper and consistent with the liberal and human rights goal of promoting self-determination. Let us turn then to the objections outlined.

Fallacy 1: Shafting History

While Brendan O’Neill positions himself as guardian of history, he also expresses concerns regarding free speech on the topic of sex and gender. That is, he worries that post-reform, people may no longer be able to express what they believe (or in O’Neill’s terms, know) to be ‘true’ about what it means to be a man or a woman. However, my focus here lies not with what is sayable within a liberal democracy, though I generally take Mill’s line that we should insist on the maximum freedom possible short of inciting violence. Rather, it is O’Neill’s insistence that his speech is ‘truth,’ and therefore that history is imperiled through falsification, that I want to take up. In the present context, the dispute not only implicates different ways of imagining ‘truth,’ but also the possibility of history itself.

Thus O’Neill argues that reform will alter the historical record. It will obliterate facts, replacing them with falsehoods, which future generations will come to experience as truths. To this end, he peppers his article with references to the ‘ministry of truth,’ the ‘memory hole,’ ‘Winston Smith,’ and ends it abruptly, informing us that we are now going ‘full Orwell,’ by which he means full throttle into the abyss. However, O’Neill’s penchant for citing Orwell appears to be more a matter of clickbait, of engendering feelings of rage in Spiked’s readership, than a genuine attempt to speak truth to power. Interestingly, while he clearly views state institutions who take gender self-identification seriously as peddlars of ‘double-speak,’ the irony of his own language games appear to escape him. Thus while he rightly adopts a sceptical view regarding the claim that ‘War is peace. Freedom is slavery. Ignorance is strength,” he appears, at least in trans contexts, willing to accept and circulate the notions that ‘powerlessness is power’ and ‘history is set in stone.’

Yet history is not set in stone. If it were, the discipline and practice of history would be impossible. Thus claims that the state is about to overturn history need to be treated with caution, and perhaps a rye smile. The claim that gender recognition amounts to the rewriting of history can be understood in two ways. Thus it might mean that the state will no longer retain an accurate record of historical facts, namely facts concerning the designation of gender status at the time of birth. Alternatively, though relatedly, it might mean that an amendment to an individual’s gender status on his/her birth certificate produces a falsehood. Both of these claims are mistaken.

In relation to the first claim, there is no rewriting of history. Under the Gender Recognition Act (GRA), the state maintains a register that records the gender status allocated to a person at birth. The Registrar-General must ‘make traceable the connection between the entry in the Gender Recognition Register and the UK birth register’ (Schedule 3, GRA 2004). In this sense, the historical record is preserved for posterity even while granting GRCs and making amendments to individual birth certificates. It is true that, for reasons of privacy, the register is not available for public inspection or search, but it exists and there has been no suggestion of legal change in this respect. However, if by rewriting history what is meant is change to an individual’s birth certificate subsequent to the conferral of a GRC, then it is a different kind of historical problem to which O’Neill alludes.

Unlike the issue of the historical record maintained by the state, the issue of individual birth certificate change calls into sharp relief the ‘truth’ claims that underwrite O’Neill’s position. In other words, while it may be a fact that Jane Smith was designated male at birth, it is not necessarily the case that this designation is correct. This designation, one typically informed by no more than a glance at genitals, may not accord with how a person experiences their gender identity and body. So the question becomes, must gender identity be understood through a particular understanding of biology (chromosomes, gonads and genitalia at birth), post-surgical anatomy and/or psychiatric diagnosis so that legal recognition outside of these terms defeats history? While O’Neill implies that it is, the answer to this question is not obvious. This is not only a truism within the humanities and social sciences, but also within medical science, which, in contrast to O’Neill’s characterisation of intersex people as ‘nature’s hiccups,’ recognises the complexity of sex and gender identity and the limitations of the binary thinking that often attends discussion of both concepts.

A challenge to one’s birth designated sex then is not a falsification of history, though it is historical revisionism. The latter however, is a common and not especially controversial process of developing and refining the writing of history, unless, of course, it takes the form of recasting historical figures as villains or heroes. But we are not concerned here with post-colonialism’s ‘history wars.’ What is contested, in the present context, is not the historical fact that a gender designation was made, but the claim that it is accurate. Given that history has declared gender to be binary and fixed, gender minorities are necessarily put in the position of historical revisionists. To challenge dominant understandings of gender is not to undermine history but to challenge its truth claims.

Some readers might think historial revision to be some sort of code for the sort of thing Joseph Stalin (Orwell’s Napoleon) got up to. However, a willingness to revisit the past and consider it anew is the condition of history. History is open to interpretation and reinterpretation as new conclusions become possible. Saying new conclusions are possible regarding what it means to be a man or a woman is not to deny the body, or the body parts people possess when they are thrown into the world. Cisgender and transgender people are clearly different in some important respects. This does not however mean that the categories of man and woman are exhausted by cisgender people. Gender cannot be reduced to body parts. It is an existential matter. Unless we think transgender people’s gender identity claims to be trivial or frivolous then birth certificate change does not seek to alter history on the question of actual gender identity. Rather, it restores the historical record. It both re-writes and re-rights history in the service of historical ‘truth.’ While O’Neill enlists an imagined Orwellian dystopia, reform speaks to a ‘truth’ long supressed by actual dystopias, those of homophobia, transphobia and cissexism.

Fallacy 2: Harming Women

Helen Lewis is more thoughtful in her consideration of the issues. Expressing and engendering rage are perhaps not her aims, but the latter may be an effect of the myths she perpetuates. Her argument is one well-rehearsed by some radical feminists, pejoratively, though accurately, described as TERFs (Trans-Exclusionary Radical Feminists). The crux of her argument is that by expanding the pool of people capable of receiving a GRC and having their birth certificates reflect the same, the government will be imperiling the bodily integrity of cisgender women (as it happens, O’Neill also seems prepared to run with this particular myth). This concern is one that speaks to risk, danger and harm. Yet, there is no evidence of harm. Rather, the notion that women’s bathrooms, shelters and/or prisons are likely to become less safe spaces as a result of law reform concerning transgender and non-binary people borders on hysteria. Indeed, if we move from the space of the imaginary to the actual implementation of reforms along lines proposed by the government, what we see is modest take-up of GRCs and no evidence whatsoever of consequent harm to cisgender women. Legislation enacted in the Republic of Ireland in 2015 is a case in point.[[4]](#footnote-4)

Attempts to couple trans rights with causing harm to others is reminiscent of an earlier conflation of male homosexuality with paedophilia. And of course, in contrast to fantasised harms, trans people have to live with the reality of violence and discrimination both outside and inside male prisons. Here empirical evidence is in abundance. Essentially, Lewis adopts the rogue’s favourite logical fallacy, the slippery slope argument. This does not require identifying a clear and present danger. Rather, it trades in the nebulous and in public anxiety, which of course it helps constitute. It was a tactic famously adopted by Lord Devlin in his opposition to what we now celebrate 50 years on, the decriminalisation of homosexuality.

In relation to prisons, Lewis’ argument is especially misleading. For in UK prisons, provision exists for assigning cisgender and transgender women to a male prison in circumstances where their security profile means they pose a danger to others within the female estate (para 4.3 *Care and Management of Transsexual Prisoners* (PSI 07/2011)). There is no reason to assume that trans women pose some kind of threat to Cis women, beyond the threat Cis women pose to each other, and to perpetuate the assumption that they do is, to say the least, unhelpful. In other words, to the extent that a threat is posed within the female estate, either by cis or trans women, provision already exists to deal with it.

The reality is that those who are concerned about minimising gendered harms and who wish to remain faithful to history, will welcome the government’s proposed reforms. In decades to come we will look back on this Governor George Wallace type moment and we will ask after those who opposed reform, including those on the liberal and libertarian left. What we now have is an opportunity to help history unfold in ways which contribute to human flourishing. Needless to say, we should grasp it with both hands, rather than insist, like the Chicken Licken left, that the sky is falling or is about to do so.

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1. *The Independent* 23/7/17 at <http://www.independent.co.uk/news/uk/politics/transgender-rules-reform-gender-dysphoria-changes-2004-gender-recognition-self-identify-a7855381.html> [↑](#footnote-ref-1)
2. *Spiked* 25/7/17 at <http://www.spiked-online.com/newsite/article/the-orwellian-nightmare-of-transgender-politics/20116#.WXx9Zq2ZMwQ> [↑](#footnote-ref-2)
3. *The New Statesman* 19/7/17 at <http://www.newstatesman.com/politics/uk/2017/07/jeremy-corbyn-right-trans-people-should-be-allowed-self-identify-their-gender>; *The Times* 25/7/17 at <https://www.thetimes.co.uk/edition/comment/a-man-can-t-just-say-he-has-turned-into-a-woman-m5lltcgv7>. [↑](#footnote-ref-3)
4. *Pink News* 26/7/17 at <http://www.pinknews.co.uk/2017/07/26/what-will-actually-happen-if-the-uk-adopts-a-self-declaration-gender-recognition-law/amp/> [↑](#footnote-ref-4)