

# Beyond Trans: Does Gender Matter?

Heath Fogg Davis, New York: New York University Press, 2017

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## Transgender Justice and the Administration of Sex/Gender

Following the Trump administration's repeated attempts to further legalize discrimination against transgender people, Heath Fogg Davis's *Beyond Trans: Does Gender Matter?* seems a refreshing push for an immediate public policy shift towards greater trans inclusion. Davis draws from his expertise as a Political Science professor and consultant, coupled with his experience as a transgender man, to ask: Is there a legitimate basis for public and private sector institutions classifying us according to sex and gender?

Davis challenges the ways in which sex classification has become an unquestioned structuring principle of our daily lives, dedicating each of four concise chapters to a different case study: government-issued identification documents, public restrooms, same-sex college admissions, and sports. Davis examines a variety of recent legal texts, policy documents, and press articles in a prose clear enough to be accessible to anyone interested in the administration of sex/gender. Indeed, he even includes gender audit documents as an appendix, so that readers may be able to, when relevant, evaluate and pursue changes to their own organizations. At the same time, his focus on reform within current legal and policy frameworks limits the sorts of futures we might imagine when we think about moving "beyond trans."

## I. Beyond Trans Inclusion

*Beyond Trans* can be considered as part of recent feminist, queer, and transgender studies scholarship that questions whether existing legal structures are an appropriate foundation for resistance movements (Duggan, 2003; Sycamore, 2004; Spade, 2011; Conrad, 2014), and that points to a future where gender might go far beyond the binary (Bornstein and Bergman, 2010; Halberstam, 2017). Davis considers that the common transgender rights strategy of assimilation and accommodation, which mimics strategies adopted by liberal feminism and gay and lesbian rights organiza-

tions, has failed to question the gendered nature of existing structures. In doing so, he positions himself as increasing administrative and organizational efficiency while also radically questioning liberal demands for transgender inclusion. These demands have typically centered around easing the legal change of sex markers for trans people and ensuring their safety and access to sex-segregated spaces. Most institutional aims, Davis argues, are not actually furthered by the omnipresent checking of “M” and “F” boxes. So why retain them?

Davis names the constant “judgment about whether a person belongs to the category of male or female” as “sex-identity discrimination” (2). This is a timely intervention, as government officials debate whether Title IX, widely considered to be one of the most comprehensive frameworks for legal protection against sex discrimination in the United States, should protect transgender people. On October 21, 2018, the *New York Times* detailed one of the Trump administration’s memos suggesting that Title IX would no longer follow former president Barack Obama’s guidelines (Green et al., 2018), which had recommended that government officials “treat a student’s gender identity as the student’s sex” (Gupta and Lhamon, 2016). Instead, the article went on, “The agency’s proposed definition would define sex as either male or female, unchangeable, and determined by the genitals that a person is born with,” with any possible ambiguities to be judged based upon genetic testing.

Davis’s differentiation between traditional notions of sexism and sex-identity discrimination develops a vocabulary through which to understand the particular struggles undergone by those whose gendered experiences are erased or illegible within the legal system. Once this classification has been named as a matter of discrimination that must be addressed, Davis can then go on to explain how “the basic structure of antidiscrimination law can help us make this happen” (17). This existing structure is legally known as the “rational relationship test,” which is the determination of whether a classification of people “is harmful, and whether it is necessary” (17). (Currently, the classification of gender must pass the slightly higher threshold of the “intermediate scrutiny test,” since it is understood to have been historically linked to women’s oppression, whereas the classification of race must pass the highest threshold “strict scrutiny test,” since the latter is more widely understood to have served primarily racist ends.) Davis pushes public and private sector organizations to ask themselves: does gender matter?

In Chapter One, Davis begins with the case study of government-issued identity documents. Does the inclusion of legal sex markers rationally relate to the policy aim of being able to identify individuals? Since people might have unisex names, and one’s sex is not immutable, Davis concludes that identity documents should have legal sex suppressed. There are, after all, many other immutable characteristics that could be used for identification purposes and that are not related to sex classification.

He applies this method to sex-segregated colleges, restrooms, and sports, in each case advocating for a reduction in sex classification. Restrooms could be redesigned without sex segregation so as to attain the goal of maximal safety and relative privacy for all. Same-sex colleges should rework their admissions processes to state their institutional aims and explain, if necessary, how sex classification works towards those aims. Finally, sports might, for example, base competitions off of testosterone

levels rather than sex if their goal is to level the proverbial playing field. (For most non-professional or less competitive contexts, Davis suggests that any form of biological sorting might be counterproductive, since the aim is often individual physical fitness or the creation of a congenial atmosphere.) Though sex identification is sometimes legitimate, it could be vastly reduced were it restricted exclusively to contexts where it furthers a stated policy aim.

Ultimately, Davis's most important contribution may be to challenge the apparent opposition between liberals and conservatives on the subject of transgender rights. Republicans have justifiably come under attack in the liberal press because of repeated attempts to make genitals assigned at birth the basis of immutable legal sex (such as House Bill 2, a 2016 North Carolina state law mandating that individuals use the gender-segregated restroom corresponding to the sex on their birth certificate). Liberals point to the halcyon days of Obama, who urged officials to consider gender identity as legal sex in some contexts, in contrast with the nightmarishly transphobic Trump administration. Yet both sides of the debate continue to reinforce a key assumption within the very conservative policies that they seek to dismantle: that sex identification is necessary in the first place. "Liberal accommodation," Davis states, "is conducive to conservative ends" (78).

It is certainly valuable to question the assumptions shared by liberal and conservative approaches to law and public policy, and in doing so Davis situates himself as taking a more radical stance. At the same time, it also begs the question of what it means to take a non-assimilationist approach to law and policy reform. In the following three sections, I will critically examine Davis's recommendations by asking whether it is possible to critique liberalism without proactively advocating for radical change *beyond*—rather than *within*—the current system.

## II. The Law of Sex/Gender

Davis situates his critique of trans inclusion within a broader gender studies framework. Our understanding of the relationship between the terms "sex" and "gender" speaks to which sorts of gendered subjectivity we believe we can inhabit. Davis's insistence upon a definitional separation between these two terms, coupled with his own incapacity to maintain stable definitions throughout, leaves the reader wondering how he envisions the relationship between the legal and the social. Should sex and gender be considered as two distinct categories? Which legal consequences does that entail?

Davis of course rejects the conservative view that so-called "biological sex" equals gender. But he is also careful to situate himself as being at odds with the common liberal counter-narrative that he recalls having once ascribed to in his own lesson plans: "I taught my students, just as I had been taught, that 'sex' referred to the biological categories of female and male, and that 'gender' referred to the socially constructed norms that we, as a society, construct and attach to the sex categories of male and female" (29). This is the view taken up in most "liberal feminist theory and

jurisprudence” (29): sex and gender are distinct, and one should be able to autonomously determine gender identity beyond one’s sex assigned at birth.

In a surprisingly brief account of gender studies scholarship, which focuses exclusively on Judith Butler’s notion of gender performativity, Davis suggests that we re-evaluate the assumption that sex and gender are distinct. For Butler, the sex/gender system relies on the constant repetition of social custom that congeals into what we consider to be the natural dyadic sexes. Maintaining a division between sex and gender inscribes within the realm of “sex” some unchanging biological reality, when that is itself *also* socially-determined. Instead of considering sex to be immutably assigned at birth in comparison to one’s socially-constructed gender, Butler’s innovation is to state that they *both* performatively shape our material understanding, and that there is no original to which to return. Sex was gender all along.

Yet even as Davis agrees that sex and gender are two sides of the same coin, he argues that collapsing the two “robs us of a language with which to differentiate between the sexism of sex-based disadvantage and the sexism of sex-identity discrimination triggered by sex-classification policies” (31). Sex and gender may both be socially constructed, but a conceptual distinction between the two is necessary for parsing out different forms of discrimination: “Just because we perform sex/gender simultaneously, and both are socially constructed, does not eviscerate the conceptual distinction between sex and gender. Gender stereotypes are at the heart of traditional sexism [...] Sex-identity sexism envelops traditional sexism, but goes further to assess who is permitted to be in the categories of male and female” (31–32). For Davis, this distinction is necessary to name the discriminatory nature of most sex classification policies.

Nowhere, however, does Butler state that there is no *conceptual* distinction between sex and gender; rather, it is that very conceptual distinction that naturalizes oppression. If liberal feminism focuses on dismantling traditional sexism, then Butler’s queer feminism has helped us understand that the distinction between sex and gender is a social gate-keeping mechanism determining what belongs to what we see as the immutable “natural” versus the potentially-malleable “social.” Emi Koyama has developed this line of thinking in “The Transfeminist Manifesto:”

*Transfeminism* holds that sex and gender are both socially constructed; furthermore, the distinction between sex and gender is artificially drawn as a matter of convenience. While the concept of gender as a social construct has proven to be a powerful tool in dismantling traditional attitudes toward women’s capabilities, it left room for one to justify certain discriminatory policies or structures as having a biological basis. It also failed to address the realities of trans experiences in which physical sex is felt more artificial and changeable than their inner sense of who they are (Koyama, 2003).

What does maintaining this distinction, then, accomplish for Davis from a transgender justice perspective, and can he avoid the liberal feminist pitfalls of which he is so clearly aware?

Whereas some parts of the United States tackle transgender discrimination by adding “gender identity” clauses to their existing gender legislation, Davis believes that “sex-identity discrimination” better pinpoints the issue of judgment about whether one belongs to the sex categories of “male” or “female” (2). He recognizes that, legally, the terms “sex” and “gender” are often used almost interchangeably,

demonstrating that in most contexts the conceptual distinction between the two is highly ambiguous. And indeed, by the time Davis gets to his own specific policy recommendations, he is unable to maintain this distinction.

This is apparent in Davis's own materials that he used in the gender audit of a corporate bank, included in the appendix at the end of the book. Though he consistently uses the term "sex-identity discrimination" throughout the book, his appendix defines "gender identity discrimination" as being "judgments about whether or not a person is male or female" (153). Here, he is presumably adopting the very legal strategy of discrimination based on "gender identity" that he began the book by criticizing (2). He then defines "sex" as "how a person identifies, or is identified, in relation to the categories of male or female, or both," and defines gender as "how a person expresses, or is perceived as expressing, the concepts of masculinity and femininity (e.g., clothing, haircut, mannerisms, comportment)" (152).

The distinction between these terms risks sliding into precisely the sort of liberal feminist approach to sex and gender policy that he critiques. For example, Davis applauds Fenway Health Center in Boston for their approach to sex and gender on their intake form, which asks for people's "preferred name and pronouns" in addition to asking for their legal sex (143). But the term "preferred" pronoun implies that behind that *preferred* one lies their *real* pronoun. Despite all good intentions, this reinforces precisely the kind of problematic cisgender "allyship" that has been criticized by transgender activists since day one. Sex is ultimately the "real" box you have to check, that generally determines which types of care and consideration one receives. The blog *Androgeneity* just about summed it up by saying that "trans 101" rhetoric separating sex and gender is "more of a useful device for cisgender people to seem inclusive while still being transphobic, rather than something that actually benefits trans people" (*Androgeneity*, 2015).

My concern here is not that Davis should resolve this issue with more consistency and definitional clarity. My objection is that his attempt to nail down these definitions betrays a broader belief that clarifying terms *can* solve the problem. He seems to believe that the legal slipperiness between them is due to poor design, and that correcting this language will correct the world. Yet part of how these terms enact administrative and material violence upon trans people is through their very malleability, which allows both liberal and conservative lawmakers to continually shape them to transphobic ends.

### III. The Nonperformativity of Policy

In Davis's sample gender audit materials, he suggests that organizations begin overhauling their approach to sex/gender by asking: "Is sex classification necessary for achieving the policy/practice goal?" A "proactive" approach to sex eliminates sex-identity markers to the greatest extent possible (for instance, by replacing male and female pronouns with "the employee"), whereas an "innovative" approach would go beyond that by actively affirming individuals' right to determine their own identity—for instance by adding a statement to the handbook "reiterating the firm's

strong commitment to affirming the self-reported gender identity of all employees” (155). This approach, which would indeed reduce the day-to-day stress of transgender people navigating their workplaces and public services, espouses a few of the book’s major assumptions regarding policy: that policies only accomplish their stated aims, and that commitments to equality actually do what they say they do.

Much of the book’s argument seems based on the belief that, armed with reason, administrators will choose to decrease sex-identity discrimination. Davis does acknowledge that it will be no easy task to convince them (142), though, in part because “removing the sex markers from such documents is tantamount to extracting the first card that topples the house of cards that is sex classification” (142). If policy-makers pursue Davis’s rational line of questioning, then eventually the whole system will reveal itself to be based upon shaky foundations, which will incite change. Yet here Davis speaks to the *unstated* policy aim of so many of the sex/gender boxes that we must check: what if the consolidation and concealment of this “house of cards” is actually one of the most important and least clearly-stated functions of sex-identity classification? How might power operate in ways that cannot be easily identified and addressed?

Legal scholar Dean Spade has drawn on the scholarship of Michel Foucault to suggest that power functions in a multiplicity of ways, not all of which can be easily addressed within nondiscrimination law. In his recent book *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, Spade applies Foucault’s concept of “population management power,” which he defines as power that “is not primarily operating through prohibition or permission but rather through the arrangement and distribution of security and insecurity,” and that “distributes life chances across populations” (Spade, 2011, p. 110). Identity documentation programs are one such example of this power, because they do not enforce any kind of direct legal discrimination against transgender people, but rather expose them to violence through the creation of administrative roadblocks. While Davis’s proposed solutions would certainly remedy some of those roadblocks, they do not address how the “house of cards” is part and parcel of how, as Spade puts it, these administrative programs “produce clear ideas about the characteristics of who the national population is and which ‘societal others’ should be characterized as ‘drains’ or ‘threats’ to that population” (Spade, 2011, p. 110).

In a similar vein, Sarah Ahmed explores how policies’ effects frequently differ from their stated aims. She asserts that verbal commitments to diversity and inclusion in reality often lead to further marginalization of oppressed groups. Verbal commitments to equality are typically assumed to be what John Austin has called a “performative utterance”; equality clauses are interpreted as binding the institution to action. Ahmed, however, argues that university diversity policies are in fact “non-performative”; it is precisely their existence that can make coming forward with accusations of institutional racism most challenging. Students and faculty alike are frequently met with responses that their concerns cannot possibly be founded at an institution that is committed to equality. “In other words,” writes Ahmed, “the failure, or the nonperformativity, of anti-racist speech acts is a mechanism for the reproduction of institutional authority, which conceals the ongoing reality of racism” (Ahmed 2006, 110).



Let me extend this analysis to an example of sex-identity discrimination from my own research experience. *Cineffable* is a Paris-based international lesbian feminist film festival whose “woman-only” attendance policy has come under increased scrutiny from queer and trans activists for the past several years. In 2018, the festival, whose website states that it is only open to women, responded to concerns about trans exclusion by stating on its Facebook page that it is open to “all people who identify as women.” This clause purportedly welcomes trans women, yet in reality very few attend. Gender policing at the door of the festival means that transgender women who do not “pass” as cisgender are unlikely to feel welcome in that space, the film’s programming contains few or no films with trans characters or directors, and the festival’s exhibits frequently contain essentialist, transmisogynist imagery that directly equates vulvas with women’s corporeal experience. Thus, this statement of apparent inclusion functions nonperformatively because, when the festival organizers are accused of transphobia, their commitment to inclusion provides them with an alibi for structural transphobia. As one *Cineffable* supporter pointedly asked, “What is transphobic about seeing trans women as women?” (Delphine and L., 2018). (There is not enough space here to discuss the festival’s explicit exclusion of non-binary people and transgender men, which, as despicable and indefensible as it may be, has at least allowed for open debate on the subject.)

Ultimately, an organization’s commitment to equality may actually be harmful to the aim of assessing and addressing structural transphobia. This means that, despite Davis’s clear intentions to the contrary, transphobia is likely to persist *because of* and *through* his policy recommendations. Indeed, transphobia may actually become more difficult to address through coded or seemingly inclusive language. Oppression operates by and through the law precisely in its repetitive and performative functions that are not necessarily explicit, clearly intentional, or easily addressed through policy reform.

#### IV. The Limits of Legal Reform

My final question regarding this book, which builds upon the previous ones, is to ask, broadly, what going “beyond trans” allows us to do. If Davis focuses on asking whether “gender matters” in accomplishing legitimate stated policy aims, then how are we to determine what constitutes a legitimate policy aim in the first place? Which policy aims should be combated in and of themselves, and which ones should be reformed through his rational relationship test? This concluding section will return to Dean Spade’s reflections in order to interrogate the limits of Davis’s approach.

It is clear, for example, that Davis does not deem legitimate House Bill 2’s purported aim to increase the security of public restrooms, rightly insisting on its thinly-veiled transphobia (56–57). However, in Chapter One he states that “personal identity verification” is a “legitimate policy aim” (28)—albeit one that would be better served through the use of biometrics instead of gender markers: “Biometric techniques are promising because they zero in on unique personal identity features that are (mostly) immutable, instead of sex identity, which is mutable and not a

unique personal characteristic” (51). Davis goes on to cite the 2005 REAL ID Act, which pushes for the use of biometrics in identifying applicants (51). This brief example is a telling one.

The REAL ID Act was passed based upon recommendations from the 9/11 Commission in order to increase national security via tightening the restrictions on driver’s license applications. In addition to increasing the use of technologies in measuring and recognizing individual human characteristics, this law requires individuals to provide documentation that they are in the country legally, and federally mandates the information to be printed on all licenses. It continues to require the appearance of “gender” on all driver’s licenses. Davis recognizes that “concerns over the loss of privacy and liberty that increased governmental surveillance can produce are valid,” which makes it all the more unexpected that he does not propose to address this in any way (52). Merely validating this critique does little to assuage my concern that his focus on certain legal reforms is causing him to lose sight of what trans justice must look like for the most vulnerable members of that population.

By contrast, Dean Spade contextualizes the REAL ID Act within a broader project of transformative trans justice. Like Davis, Spade sees ID documents as a critical site of struggle for trans people as they are subjected to administrative violence, but Spade emphasizes that, far from neutrally identifying individuals, “these systems are part of a national security project that constructs national norms to sort populations for the distribution of life chances” (152). Rather than attempting to integrate transgender people into the existing system, Spade works for the “emergence of politics and resistance strategies that understand the expansion of identity verification as a key facet of racialized and gendered maldistribution of security and vulnerability” (154). Though he would undoubtedly laud the elimination of legal sex markers, he is careful to situate any reform within the context of post-9/11 fear-mongering and targeting of undocumented immigrants. “Identity verification” can only be considered a legitimate aim if one ignores its persistent gendered and racialized aims and effects.

Davis’s legal harm reduction model is in part inspired by Spade’s call for a focus on administrative reform as a way to concretely reduce violence against transgender people, and in particular those who are most vulnerable: undocumented people, racialized people, poor people, people with disabilities (27). These approaches cannot be boiled down to a “practical” reformist approach, on the one hand, and a “utopian” revolutionary approach, on the other; indeed, Spade discusses both. Rather, it is a question of contextualizing certain practical recommendations within a larger intersectional approach to trans justice. Spade demonstrates that law and policy intervention in the administration of sex identity is effective because it can mobilize people, raise awareness, and help people survive. Ultimately, however, Spade contextualizes those legal changes within a broader struggle for prison abolition, economic justice, access to healthcare, and the end to immigration enforcement (39). If *Beyond Trans* situated its reforms within larger and longer-term political struggles, then many of its recommendations could easily be understood as a part of that broader project. Without that overarching framework, Davis’s approach to legal reform cannot be truly intersectional.

Ultimately, then, going “beyond trans” still risks focusing on harm reduction for the most privileged members of the trans community, helpfully interrogating some



forms of transphobia while failing to address the concerns of, for instance, undocumented or incarcerated people. If going “beyond trans” is to entail a broader change that would benefit *all* trans people, then he would need to take transgender experience as a site through which to identify and understand administrative transphobia, and then use that perspective as a springboard to work towards more radical change. As Spade puts it, “Trans people are told by the law, state agencies, private discriminators, and our families that we are impossible people who cannot exist, cannot be seen, cannot be classified, and cannot fit anywhere. [...] Inside this impossibility, I argue, lies our specific political potential—a potential to formulate demands and strategies to meet those demands that exceed the containment of neoliberal politics” (Spade 2011, 41).

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