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## **Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?**

**Davina Cooper and Robyn Emerton\***

### **Abstract**

In decertification, the state withdraws from registering, assigning, or guaranteeing a person's sex and gender, giving one shape to the growing momentum towards their informalisation. This article explores decertification as a speculative reform, now emerging onto the political and legal agenda, in two primary ways. First, it asks what contribution, if any, might decertification make to a feminist politics intent on undoing gender-based hierarchies. Second, as a methodological thread, what concerns, issues, and hopes does decertification bring with it? In addressing these questions, the article considers different versions of decertification alongside an alternative reform strategy of legally recognising multiple gender identities. It explores the feminist benefits of decertification; the concerns and criticisms expressed; and strategies for responding to feminist worries. Here, the article turns to possible and already in-place governmental strategies to manage the informalisation of sex/gender, alongside criticisms that can and have been made of these strategies. It then considers decertification's relationship to other strategies that foreground purpose, specificity, connection, and context, within a politics intent on questioning and unsettling existing orderings. Finally, the article considers the risks of androcentrism and gender-neutral law; and argues for the need to embed decertification within a wider multiplex progressive agenda.

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## Introduction

The Future of Legal Gender (FLaG) is a critical, feminist research project concerned with gender's relationship to law, inequality, subjectivity, society, and imagined futures. FLaG approaches these relations through the prism of reform. Its focus is one specific legal proposal: the decertification of sex/ gender.<sup>1</sup> We use the term decertification to describe a regulatory move in which the state<sup>2</sup> steps back from registering (or assigning) sex at birth and so, also, from subsequent procedures of sex/ gender recertification. Decertification means people would no longer have a legal sex/ gender status. This puts sex/ gender on a par with other social characteristics such as ethnicity and sexuality, which are not legally formalised even though they remain sites of inequality and of statutory equality remedies. Thus, it is important to recognise, from the start, that decertification does not mean the withdrawal of access to equality protections on sex/ gender grounds (however unsatisfactory these practically prove to be).

Opening a project with a proposal may seem counterintuitive. Typically, sociolegal projects arrive at law reform proposals towards the end of the study as different ways of responding to or resolving identified harms are assessed. FLaG reverses this methodology. It starts with a law reform proposal to draw out the hopes, anxieties, possibilities, fears, practices, and narratives that articulating such a proposal generates. Proposing change brings ideas and feelings towards what is and what could be to the fore. These can be very uncomfortable (even hostile) feelings, as Elizabeth Peel and Hannah Newman also explore in this special issue. However, despite – and perhaps because of the criticism that it faces – decertification is worth exploring. It offers a framework through which to examine contemporary conceptions of gender; the challenges and conflicts surrounding gender's regulation and reform; and the stakes and effects of gender's reimagining. But

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<sup>1</sup> The use of sex/ gender terminology is heavily disputed. This article follows the approach adopted by FLaG in focusing on *gender* as a socially manifested process. This process includes 'sex' as a key gender term, including in legislation. Legally and in public policy, the two terms of sex and gender are used unevenly – sometimes interchangeably, sometimes deliberately to distinguish and separate features assumed to be biological from those defined as social and cultural. We use sex/ gender to identify those instances where either the analysis or the claims we are discussing concern sex *and* gender. In some cases, this is because they are interconnected; in other cases, it is either because the analysis or claim made applies to both terms, or because views differ on which is the salient term.

<sup>2</sup> For the purposes of this discussion, we use the term "state" to identify the assemblage of largely official apparatuses involved in public governing and ruling; see also Manji (this issue). States are not unified agentic structures, and state agency is performed in different ways, including by apparatuses acting as if the state can speak. This aspect of the ESRC project builds on earlier work by Cooper (particularly 2019b; but see also 1994, 1995, 2016). Discussion in this paper approaches state law as one expression of, and device for, organising and producing state agency.

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decertification is also more than an analytical method, or kind of “tickling”, even as it “engage[s] in play and provocation around law and its limits” (Enright et al., 2020: 18). In the socio-political context of England & Wales (the case-study jurisdiction for this project),<sup>3</sup> decertification forms a plausible option – at least for discussion. This region has several features that make decertification reasonable. These include: the growth in gender-neutral legislation and legal drafting causing sex/gender to become increasingly undifferentiated at the level of statutory legal form (also Grabham, this issue); legal recognition of gender transitioning (through the Gender Recognition Act 2004); and the social flourishing of gender diversity. At the same time, England & Wales remains a jurisdiction in which gender endures as a source of inequality,<sup>4</sup> and as an abiding structuring feature of societal organisation. This has important implications for how we think about law reform.

Our analysis of decertification, in this article, develops through the following five steps. 1. We start by considering an alternative option, which some have proposed, that would diversify the gendered identifications or categories that state law recognises; and we explain why this option is less critically appealing than decertification. 2. We then explain decertification and its benefits for a feminist politics oriented to transformative change. 3. We explore some feminist criticisms of decertification. And 4. we trace responses to these concerns, focusing on governing strategies that seek to pre-empt the harms and risks that critics identify as well as political responses that fold decertification, more explicitly, into projects for change. Finally, 5. we critically consider the relationship between decertification and androcentric law. Our analysis draws on qualitative data from anonymised semi-structured interviews with approximately eighty policymakers, union officials, and NGO workers and activists,<sup>5</sup> along with publicly available government reports and other documentary and text-based materials. We also draw on feminist scholarship. Materialist, poststructuralist, institutionalist, performative, and sociolegal feminist writing provides intellectual resources for the discussion and analysis that follows. Central to our discussion is a concern with power and harm, articulated together in the gendered dimensions of oppression – of “exploitation, marginalization, powerlessness, cultural imperialism, and violence” -- that Iris Marion Young (1990)

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<sup>3</sup> For reasons of history and present-day devolution, the law in Scotland is different. However, where there is convergence, we use “Britain” to cover both jurisdictions.

<sup>4</sup> We identify gender as an institutionalised, asymmetrical patterning, that remains anchored in the terms of male/ female and masculine/ feminine – these terms also have descriptive and referential salience for other gender identifications.

<sup>5</sup> We selected interviewees based on key sectors of interest (government, trade unions, gender-based NGOs, religious organisations, and social welfare sectors), using purposive sampling and snowballing.

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powerfully examines (see, also, Conaghan 1996; Coy 2016; Dustin and Phillips 2008; Gill and Anitha 2009).

It is worth stressing at the start that, while our article focuses on a specific legal measure, we do not assume that legal reform, and particularly legal reform to “informalise” sex/ gender status,<sup>6</sup> will radically undo gender-based inequalities or the reproduction of gendered categories more generally (see, especially, Smart 1989; see also, e.g., Bottomley and Conaghan 1993; Munro 2001; Sandland 1995; Fletcher, Manji, this issue). State law and legal reform, in this context, are not that powerful. It should also be said that decertification has not been fully introduced formally in any jurisdiction (although “light” versions are emerging, as in Tasmania, discussed below). We therefore cannot empirically assess its statutory effects. Consequently, our focus is on the narratives and imagined consequences – optimistic and feared. We take these up to ask: does decertification contribute to accounts of how gender-based injustices might be undone (in ways that could include gender’s undoing as well) or does it merely signify state withdrawal in conditions of continuing gender inequality, exploitation, and violence?

### **1. Diversifying gender options in law**

We start, however, with a different legal strategy – one that, some have suggested, may prove more practical and effective than decertification at the current time (see discussion in Clarke 2018). Rather than abolishing legal gender status, it involves diversifying gender categories to reflect (in more, or less, open ways) people’s own self-identifications. Expanding formal gender categories has occurred in several jurisdictions, most commonly through a third category of “non-binary” or “other” for gender registration or documentary purposes (see Cannoot and Decoster 2020; Clarke 2018; Holzer 2018).<sup>7</sup> Here, formal gender identifications are retained in an officially expansive form, while the formalities required for people to move between sub-category headings are typically

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<sup>6</sup> We use the term “informalisation” to capture legal responses to gender that incorporate destandardisation, self-identification, lack of formalities, flexibility, and change. In other words, informalisation suggests a process in which sex/ gender are no longer recognised in fixed ways or through fixed processes. However, this does not mean that sex and gender no longer function as legal (or legally recognised) terms.

<sup>7</sup> See for instance Iceland, which in June 2019 introduced a third gender option (X), available if people apply to change their legal gender; <https://www.pinknews.co.uk/2019/06/25/iceland-third-gender-trans-rights/>. In the British context, see the Women and Equalities Committee (2016: 11, para 31), which recommended: “The Government must look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this”.

minimised.<sup>8</sup> The move towards treating gender as a less dualistic, more flexible framework aligns with a growing liberal common-sense that identifies gender as personal, elective, varied, and generally deserving of recognition (discussed further by Cooper, this issue). It also aligns with a more practical set of concerns; namely, that state certification can be beneficial for those whose gender identity is experienced or treated as precarious or contested;<sup>9</sup> and it responds to some people's desire or need to be formally recognised outside of the categories of male or female.

Legal recognition of gender plurality seems to hold out promise, both symbolically and materially, of disrupting the hegemonic status of the dualistic gender categories currently operating in Britain. However, in our view, introducing multiple gender categories is not a straight-forward solution to the problem of gender inequality and oppression. Some commentators focus on the practical difficulties of extending legal recognition to third and other genders. Adding categories to forms (e.g. for data collection purposes) is relatively straight-forward; dealing with spaces and services which are currently organized in a dualist fashion is more complex.<sup>10</sup> Developing provision for other gender identifications is often posed sceptically to emphasise the host of practical, resource-based, and logistical difficulties. However, it also begs more fundamental questions about sex and gender-based differentiation. For feminists who argue for the eradication of gender, legislating gender diversity appears simply to add more, constricting and defining, "boxes". Jessica Clarke (2015: 753) writes that more categories "may pigeonhole liminal, marginal, disruptive, diverse, and dynamic identities into a set of ill-fitting options, or penalize them with nonrecognition." Four other potential shortcomings also emerge from our research (see also Braunschweig 2020; Venditti 2020). First, the move to legally recognise diverse gender categories foregrounds gender as a *human* characteristic – an expression of the subject that deserves recognition. In so doing, the *societal*

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<sup>8</sup> Currently, states vary on the procedures for identifying or changing gender in conditions where the gender category an individual takes up does not "match" their birth certificate entry. The question of match, however, is complicated by challenges to the notion that identifying birth sex as female, for instance, somehow can match (or straight-forwardly corresponds to) a later gender identity as woman or feminine; for discussion on the relationship between female and feminine, see Paechter (2006).

<sup>9</sup> This may be because their gender designation is an unconventional one, or because they are perceived as unconventionally expressing a conventional gender designation. It may also result from socio-economic, sexualised, racialised, disability-based and other social relations that shape how gender is manifested and experienced in different contexts.

<sup>10</sup> This was recognised e.g. by the Scottish government in its (first) consultation paper on the Gender Recognition Act 2004 (2017: paras 7.23-7.29). Cf. Dunne and Mulder (2018: 645) re the possible implications for binary sex-based services and facilities given Germany's new third legal category for intersex births. Also Renz, this issue, on how schools try to adapt to non-binary pupils.

interactions and relations that generate gendered practices, categories, and interpellations, and that give them force and meaning, risk being further obscured. Second, it treats gender as intrinsically, potentially, or hopefully equal<sup>11</sup> (see also Paechter 2006) (even as it begs questions about what this gender might mean and be). Third, it re-inscribes gender as normal and valuable – something that exists and is sufficiently significant to formalise. Fourth, it gives state authorities the power to determine which gender categories count and what they count for (see also Fletcher, this issue). Sonia Katyal (2017: 411) writes: “the legal regulation of sex... establishes the ...power of the state—and its codes—in determining, recognizing, and ultimately administering identity.” As such, she argues, “the state gains a monopoly power in assigning ...sex, obviating the power of alternative interpretations.”

## 2. Why might decertification be a good idea?

Diversifying gender as a set of legal identity categories may improve on the current two-gender system. However, its tendency to reify gender as a natural or benign aspect of personhood and, so, to downplay gender as a societal process, leads us to decertification instead. Decertification involves state law’s withdrawal from determining, registering, or guaranteeing gender and can take different forms. Its “lightest” formulation might mean a state treats sex as an optional descriptor on birth certificates even as people continue to have a presumptive legal sex/ gender (e.g., see Wipfler 2016).<sup>12</sup> In April 2019, for instance, the Australian state of Tasmania introduced legal reform, which specified that sex, while still registered, would only be recorded on a birth certificate if the applicant requested it.<sup>13</sup> At its strongest, decertification might mean the state formally refusing to recognise gender as a dimension of personhood altogether. This could render gender status illegal or, at least,

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<sup>11</sup> Such an imaginary of “equal-but-different” resonates with a liberal multicultural discourse of diversity that has also been heavily critiqued (e.g., Anthias 2002; Fortier 2008).

<sup>12</sup> “Light/ strong” here describes the extent to which state law leaves itself able to recognise or attend to sex/ gender. It contrasts with the discussion of “soft” decertification (in Cooper, this issue), which focuses on the institutional form of informalisation, i.e., whether it is undertaken by state law, by other legal orders, by public bodies engaged in policy-making, or by grass-roots bodies and communities.

<sup>13</sup> People continue to have a legal sex/gender status, however, even if it is not displayed on their birth certificate. Tasmanian law (amendments to the Births, Deaths and Marriages Registration Act 1999 (Tas) effective since September 2019) also now enables adults to register their gender as “male”, “female”, “non-binary”, “indeterminate”, or “neither exclusively female nor exclusively male”. The difficulties with this formulation, in suggesting that male and female are themselves somehow “binary”, run through many of the frameworks adopted. See also Tasmania Law Reform Institute (2020).

beyond state law's regulatory structure, its terms of recognition or gaze.<sup>14</sup> A strong version of decertification, in the case of sex/ gender, could lead state law to withdraw from providing remedies for discrimination, from collecting data on gender-based inequalities, and from allowing gender terms to publicly animate services, organisations, policy decisions, and so on.<sup>15</sup>

Neither the light nor strong versions of decertification, however, form the centre-ground of our research. FLaG focuses on a version of decertification between these two poles. In other words, the decertification framework that we discuss does not entail state withdrawal, neutrality, or disregard when it comes to gender oppression; nor does it simply involve converting sex/ gender into an optional entry on a form when registering births. Rather, we are interested in a version of decertification that removes the state from registering sex at birth, and so from pulling people into a formal, legally gendered edifice stretching across the life-course. At the same time, gender (and embodied sex) remain as sites of critical and remedial concern, including through equality law and affirmative action.<sup>16</sup> This puts gender on a legal par with sexuality and ethnicity – areas of inequality that, in Britain, are not tied to the state's assignment or formalisation of status.

But why might decertification be a good idea? As one interviewee, rather damningly, remarked when asked about the proposal:

“It's like taking a number plate off a car and saying you have changed the car. You haven't changed the car and the car is still a car. That is not going to deal with pollution, is it?”

The experiences of people who seek to officially/legally transition in countries, like Britain, where this is a cumbersome, expensive, slow, sometimes humiliating and pathologising process, offer one set of reasons why no longer having a presumptive legal gender based on birth-registered sex might

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<sup>14</sup> For a parallel example, see attempts in France to remove race as a category from legislation and from the constitution, see <https://www.france24.com/en/20130517-no-such-thing-as-race-french-lawmakers-france-racism-hollande> and <http://constitutionnet.org/news/removing-race-and-adding-gender-french-constitution-constitutional-redundancy-and-symbols>. It is also unlawful to collect data on race or ethnic origin in France; see e.g. <https://www.economist.com/europe/2009/03/26/to-count-or-not-to-count>.

<sup>15</sup> For a related account of strong decertification as “disestablishment”, where state law and state bodies would assume a stance of neutrality between genders, and between gender and a lack of gender, see Cruz (2002).

<sup>16</sup> For wider discussion on ways of reforming British equality law, both within the existing framework and in ways that do not rely on identity categories, see, e.g. Collins (2003), Hepple et al. (2000), Hepple (2010) and (2011), Malleson (2018), and Solanke (2019).

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be a good idea.<sup>17</sup> Similarly, the experiences of people whose assigned birth sex comes to seem erroneous, or who identify as neither male nor female, also provide reasons why getting rid of such a registration structure might be beneficial (e.g., see Garland and Travis 2018; Holzer 2018).

Decertification also allows people to live legally as agender – that is as formally outside of sex/gender classificatory systems. This does not mean that they can escape the gendered society which we inhabit; identifying as agender does not ensure people are treated in non-gendered ways by others. But decertification would make it harder for organisational bodies to demand that people conform to (dualist) gendered norms, including in modes of address, dress codes, and documentation. More generally, decertification *symbolises* the possibility of living and raising children beyond gender, while providing a practical and discursive support for those who refuse to accede to gender's terms (see also Quinan et al. 2020; Venditti 2020).

From a critical and feminist perspective, decertification also has other potential advantages. Despite the momentum towards gender neutral law in countries such as Britain (a move feminists do not read as unequivocally beneficial, as discussed below), registering sex at birth encodes sex as a significant normative distinction;<sup>18</sup> one, as Cannoot and Decoster (2020) also argue, that remains central to the maintenance of heteronormative order. Our starting point is not that abolishing the assignment or registration of sex at birth will end gender-based socialisation, sexual violence, the economic exploitation of feminised workers and carers, or institutional arrangements that take affluent white men as the norm – that would be too easy (see also Waylen 2014). However, to the extent that state law contributes to the constitution of gendered subjects, including through its hailing function (see also Grabham, this issue), decertification may weaken the naturalisation of gender-based distinctions and inequalities, which arise from treating humans, *from the start*, as legally sexed and gendered subjects. In a sense, we might think of decertification as prefiguring *what gender could more broadly become* – patterned or idiosyncratic differences devoid of power. Yet, like all prefiguring projects, one risk in acting “as if things were otherwise” is losing the critical engagement with how things currently are (see Cooper 2020). Can decertification contribute something here too?

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<sup>17</sup> For further discussion of state classification procedures and the effects on people who transition, see Davy (2010), Hines (2010) and (2013: ch 4), Renz (2017), WEC (2016: 11-14, paras 29-45), and, more generally, Spade (2003).

<sup>18</sup> And, also, as one that precedes birth (as regulations in the Human Fertilisation and Embryology Act 2008 on restricting embryo sex selection demonstrate).

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Approaching gender as legally belonging to the subject, whether as a status or identity, can be problematic in reinforcing the notion that gender naturally takes a human shape. Decertification undoes this reinforcement. It is not that it articulates, by itself, a more societal-shaped account of gender, but it avoids contributing to the notion that gender is something that belongs to humans, and only to humans. Reducing gender to human-sized pieces leaves a lot of important processes unaccounted for, from the gendering of public space to the gendering of international relations and war. But in recognising these processes as also gendered, and in approaching gender as an ordering process that gives things shape, one challenge is how to navigate the relationship between a societal account and a human-centred<sup>19</sup> one, concerned with gendered expressions of selfhood, recognition, and attachment as well as gender-based harms (see also Fletcher, this issue).

### 3. Feminist criticisms of decertification

While some feminist interviewees and discussants did not view legal formalisation as necessary, or even helpful, for ameliorating gender-based injustices, others we spoke with did. They argued that retaining a system of legal gender status, based on the sex registered at birth (with some limited regulated movement between categories) provided a crucial regulatory framework for tackling gender-based domination, inequality, and violence. Participants in the research identified three sites as especially vulnerable to decertification's detrimental effects: women-only spaces and activities, affirmative action, and gender-based statistics. After discussing these, we explore managerial responses to the concerns raised before turning to address decertification's potential to be leveraged into a wider critical project.

#### *Unsettling single-sex spaces*

We start with sex/ gender-defined spaces, provision, and activities. These are diverse, and include sites of incarceration and discipline, such as prisons and detention centres, those of vulnerability, such as hospital wards and refuges, and sites of empowerment, pleasure, and community, such as women-only events and festivals (see, e.g. Browne 2009; Cooper 2012; Jackson 2008). Single-sex spaces, provision and activities are the focus for much of the concern that feminists have expressed

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<sup>19</sup> The gendered character of harm also extends beyond humans as a species; for discussion which troubles the human/ animal boundary when it comes to understanding social processes and affective relations, see Riggs and Peel (2016: ch 4).

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about gender's informalisation (see also Peel and Newman, this issue; Renz, this issue)<sup>20</sup> -- concerns that have not received much attention by those calling for sex/ gender "deregistration".<sup>21</sup> These concerns align with different feminist politics and agendas; however, in recent years, their public take-up has been associated with the high-profile emergence of a feminist politics anchored in women's (biological) sex-based rights. Sex-based rights feminists argue that the viability of separate women's activities and spaces depends on state law defining and categorising people by sex in consistent, shared, and durable ways.<sup>22</sup> Decertification's problem is that it informalises sex/ gender, allowing people to self-identify according to personal, potentially idiosyncratic criteria and understandings of what their gender (or sex) is. Karen Ingala Smith, Chief Executive of the anti-violence organisation, Nia, told a Parliamentary Inquiry on the Equality Act 2010, that also addressed the Act's effects on the operation of women-only spaces:

"I have a comment on women-only spaces. That phrase is meaningless if we cannot even agree what a woman is. In our policy, we are very clear ... there are many ways of being a woman, but there is one thing that women share in common; we are adult human females ... we are very clear about that."<sup>23</sup>

One criticism of decertification, and of related moves to informalise sex/ gender, is that it would make sex/ gender-based divisions in prisons, schools, refuges, hostels, changing rooms, public toilets, and sports legally impossible or extremely difficult to accomplish since there would be no authoritative basis for excluding people or challenging their self-identification. Critics argued, this would damage (cis) women's lives in several ways. It would withdraw resources and opportunities for women's empowerment; cause women to be outcompeted in sports; and leave women subject to male intrusions, unwanted sexual interactions, violence, and physical injury. As one interviewee

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<sup>20</sup> For further discussion from different perspectives, see Browne (2004), Jeffreys (2014), and Schilt and Westbrook (2015) (the "bathroom issue"); Gottschalk (2009) (women's services); Lamble (2019), Nellis (2019) and Sharpe (2018) (prisons); and, more generally, Dunne (2018), Finlayson et al. (2018).

<sup>21</sup> We use the term decertification rather than deregistration to emphasise the extended implications of no longer having a formal sex/ gender status. These, as we discuss, go beyond how people are known or described in official documents and data.

<sup>22</sup> They prefer the term "sex" to "gender" since it anchors women's subordination in what they identify as a biologically immutable core; see also Cooper (2019a).

<sup>23</sup> Karen Ingala Smith, CEO, Nia, oral evidence to WEC on how the Equality Act 2010 affects the operation of single-sex services, HC 1470, 22 May 2019 (at Q538), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/enforcing-the-equality-act-the-law-and-the-role-of-the-equality-and-human-rights-commission/oral/102570.html>.

remarked, “There is a bloody good reason why we separate prisoners by sex. Female prisoners are at risk from male prisoners.” Others noted that the effects of decertification on single-sex/ gender spaces would not be evenly felt. Several interviewees mentioned challenges for religious women (and, in some cases, religious men) in navigating spaces where sexed bodies were no longer separated, citing concerns that it would impede their use of public provision such as leisure centres and swimming pools, along with other public spaces, if toilets and changing rooms moved to a mixed-sex model.<sup>24</sup>

### *Confusing gender-based policy work*

A second set of concerns invoked by the proposal to decertify sex/ gender relate to statutory affirmative action provisions. There are currently limited contexts in England & Wales where discrimination *in favour of* people on grounds of disadvantaged or under-represented “protected characteristics” is permitted. Under the Equality Act s.159, where two people are of equal merit, an employer can choose to recruit or promote the one from an under-represented constituency.<sup>25</sup> Training and education can also target under-represented groups to tackle occupational segregation (Equality Act s. 158);<sup>26</sup> and the Equality Act s. 104(7) permits women-only parliamentary shortlists (see also Childs and Lovenduski 2013; Kelly and White 2016). Critics’ worry here, then, is twofold. First, they worry that “under-representation” will lose its meaning, force, and evidentiary base if sex/ gender becomes self-determined. In Britain and the EU, in recent decades, gender mainstreaming has entailed a series of measures to assess men and women’s accomplishments and presence in different areas of life; and to monitor the effects of existing and remedial policies on groups defined by their sex/ gender. If there is no clear and agreed differentiation between sex/ gender categories, can policies continue to be effectively assessed?

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<sup>24</sup> Less discussed was how affluence and poverty might structure experiences of same-sex/ gender provision. Affluence allows people to purchase privacy in many contexts, and it is striking that many of the spaces that decertification might “mix”, such as hospital wards, hostels, immigration detention spaces, and prisons, are spaces of compelled or involuntary use, typically by poorer, more vulnerable populations.

<sup>25</sup> For analysis of the intersectional complexity of this, see Malleon (2018: 604-5). A similar voluntary tie-break provision operates in relation to appointments to the judiciary (Constitutional Reform Act 2005, s.27(5A), as inserted by the Crime and Courts Act 2013), although the application of the provision has been restricted, for the time being, to “race and gender” (Guidance on the JAC’s approach to diversity and equal merit), updated October 2019, <https://www.judicialappointments.gov.uk/equal-merit>.

<sup>26</sup> See EHRC (2019) on the use of positive action to address under-representation of ethnic minority groups, disabled people, and women in apprenticeships, alongside gender segregation in some sectors in which apprenticeships are undertaken.

Remedial strategies' reliance on knowing accurately "what people are" has also generated concern over how sex/ gender-based statistics are gathered. Some women's rights' advocates argue that knowing people's "sex" is essential for generating evidence of patterned disparities – from economic inequalities<sup>27</sup> to acts of violence.<sup>28</sup> Disparities between women and men will be obscured if people answer questions about sex based on self-identified gender, while discrepancies in interpretation, and discontinuities in how survey questions are asked, make data less intelligible or meaningful. One interviewee told us:

“the data [being] collect[ed] is meaningless, because it's not being held up to the same benchmark. How do you measure something if the measurement keeps changing? It has absolutely no meaning.”

Second, critics worried that decertification would allow people to claim unchallengeable membership of disadvantaged groups. These concerns, and potential consequences, were not located only in the future. In 2018, the Labour Party adopted a self-identification approach for women-only parliamentary shortlists – a move that generated considerable heat, politically and legally.<sup>29</sup> In the neighbouring jurisdiction of Scotland, the move to define “woman” more expansively for the purposes of the Gender Representation on Public Boards (Scotland) Act 2018 also generated controversy.<sup>30</sup> These kinds of disputes are not limited to gender. Anxieties about

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<sup>27</sup> E.g. for the purposes of mandatory gender pay gap reporting, the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 requires relevant employers to report on differences, including between female and male employees' rates of pay. Currently, to bring a claim for equal pay for equal work under the Equality Act 2010, a person must be able to show that they are “employed on work that is equal to the work that a comparator of the opposite sex does”, s. 64. For a critique of the lack of attention paid to the potential effects of gender self-determination on women's sex discrimination and equal pay claims (especially as regards the comparator test), see Ludwig (2020).

<sup>28</sup> E.g., see the government's biennial *Women and Criminal Justice Report*. <https://www.gov.uk/government/statistics/women-and-the-criminal-justice-system-2017>. This compiles statistics from data sources across the UK, including police recorded crime, to provide “a combined perspective on the typical experiences of the different sex groups in England and Wales”.

<sup>29</sup> E.g., see, <https://www.theguardian.com/society/2018/mar/17/legal-challenge-to-labour-over-shortlists-and-transwomen>. See also coverage of David Lewis's suspension from the Labour Party for putting himself forward as a women's officer on the provocatively claimed basis he self-identifies as a woman on Wednesdays, e.g. <https://www.theguardian.com/politics/2018/may/23/labour-suspends-activist-challenging-gender-self-identification-policy> and <https://blogs.spectator.co.uk/2018/05/the-catch-22-of-labours-gender-policy/>.

<sup>30</sup> It includes a person “living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female”, and so “has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010)”, s. 2(c). See, further, Statutory Guidance, para 2.12-2.15: <https://www.gov.scot/publications/gender-representation-public-boards-scotland-act-2018-statutory-guidance/>. On criticism of a more expansive definition of “woman”, see <https://www.scotsman.com/news/politics/demands-change-definition-who-should-qualify-woman-scots-equality-law-2550073>.

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opportunistic entry, and the risk of identity categories being overly permeable, mark many discussions about positive action measures including in relation to ethnic, racial, and national categories (see also Bailey 2008; Bailey and Peria 2010).<sup>31</sup> Yet, as we discuss below, these concerns also raise wider questions about the value and effectiveness of remedial measures that rely on targeted bodies or group “representatives” as the way to address wider systemic inequalities.

#### 4. Responding to decertification’s risks

Across public media, concerns about the viability of single-sex provision, opportunistic take-up of targeted places, and unusable statistical data, arising from the informalisation of sex/ gender, have been repeatedly raised. Similar concerns were expressed by some feminist interviewees regarding decertification. Yet, the informalisation that decertification articulates also aligns with a feminist politics, intent on challenging the notion that “birth means destiny”. To recall our earlier discussion: informalisation through decertification removes official state processes that standardise, fix, and allocate sex/ gender categories. This allows people to shape their own terms of belonging and identification; makes it possible to live without a gender label; withdraws the constituting and naming work of the state; and, at a societal level, diminishes gender’s normative significance. At the same time, epistemically, decertification would remove an official prop sustaining the belief that gender (and, some would argue, sex) are intrinsic human attributes rather than organising principles of differentiation and inequality that contribute to societalisation (see Cooper 2004; Walby 2020). If decertification, then, has feminist benefits, what responses can be offered to the feminist concerns identified? How might the informalisation of sex/ gender operate without generating violence, unfairness, or ineffectual public policy?

In this section we consider some responses that have been introduced or proposed to tackle the challenges associated with gender’s informalisation. We do so in two parts. First, we consider governance strategies for dealing with the dangers and risks associated with looser or weaker sex/ gender boundaries. These strategic responses are sometimes cited by advocates of self-determination; however, they have received little systematic attention – or critique – in this context. We then turn to a set of responses that use the challenge of decertification, politically, to question

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<sup>31</sup> Although, as Bailey (2008: 604) also notes, people may self-exclude from opportunities and benefits by not identifying with the targeted group or as disadvantaged people deserving benefits.

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and unsettle different kinds of ordering arrangement – from elite sports to political representation. In this discussion, we orient this unsettling towards a progressive transformative politics that cannot be split into discrete strips – in which gender sits neatly alongside other relations of inequality.

*Governance strategies for managing weaker sex/ gender boundaries*

We start with privacy – a rationality and technique routinely invoked by those who suggest that physical design can manage the proximity of bodies with different genitalia (regardless of sex/ gender identity) in toilet cubicles, changing rooms and, to a lesser degree, hostel and hospital wards.<sup>32</sup> Here, privacy design becomes a solution to the threat of intrusion in contexts where people are undressing or undertaking intimate bodily functions.<sup>33</sup> Yet, it is a solution that has also generated concerns. One interviewee remarked,

“My local swimming centre is moving from having separate cubicles to having a changing village. They were having a display about it and I was talking to one of the guys and I said ... I am a bit worried, because in [town/city],<sup>34</sup> ...the teenage boys pull themselves up over the edge and it's really intimidating. ... They said, oh no, and then went through that the walls are floor to ceiling ... [and] made of drill-proof material.”

The concerns of this interviewee indicate how moves to achieve privacy through walls can create a restless need for further and greater walls. But the problem does not only lie in privacy's limitless logic. Separation through physical barriers reflects, and so normalises, social and cultural anxieties about contact (haptic, but also optic and sometimes aural) that is cross-sex, between strangers, and intergenerational. Creating private spaces may seem to provide protection. However, this assumption exists in uneasy tension with the policy principle that safety is regularly enhanced through the presence of others, including those not personally known. The tacit individualism, and normative bodily imaginaries, invoked by the notion of private cubicles, also coexists uneasily with a

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<sup>32</sup> See NHS policy on delivering same-sex accommodation (2019: 5), “Non-permanent structure changes to the estate can support the delivery of same-sex accommodation where the partition is solid, opaque and floor to ceiling, and protects the privacy and dignity of the individual patient”, [https://improvement.nhs.uk/documents/6005/Delivering\\_same\\_sex\\_accommodation\\_sep2019.pdf](https://improvement.nhs.uk/documents/6005/Delivering_same_sex_accommodation_sep2019.pdf).

<sup>33</sup> The stress (and reliance) on privacy through physical modifications, flagged in this and some other interviews, suggests a move away from designing such spaces for observation – witnessed, for instance, in the deliberate gaps around public toilet doors (see Cavanagh 2010). A related development can be seen in the extension of the criminal law to tackle “upskirting”, see Voyeurism (Offences) Act 2019 amending the Sexual Offences Act 2003.

<sup>34</sup> Town/city name redacted to protect anonymity.

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care-based ethics, in which spaces should comfortably incorporate carers, mobility aids, and other forms of assistance. But safety and care are not the only issues here. Privacy norms may be socially unremarkable. Yet, it is because they are socially unremarkable that they are powerful in reinforcing culturally specific notions of bodily modesty and shame – something that public breastfeeding activism and nudist politics, in different ways, have also sought to address (e.g., see Barcan 2004).

A second governance technique for managing gender's informalisation, and the specific mix of bodies that may arise, is "risk assessment". Utilised in a wide variety of venues, including carceral spaces and provision for vulnerable populations, such as hostels and refuges, risk assessment gets folded into determinations of who is included/ excluded, and the terms under which this occurs. While introducing dividers and walls pre-empts embarrassment and risk by keeping bodies apart, risk assessment determines which bodies can gather, and attends to the social and spatial indices of danger,<sup>35</sup> through actuarial or governance techniques. Like the walls that designing for privacy introduces, risk assessment can also be read as an attempt to box social subjects in. Even when it focuses on behaviours, rather than bodies or identities/ subjectivities, risk assessment is often applied unevenly. Certain subjects, including those who are economically marginal, racialised (see e.g. Mythen et al. 2009), or who have transitioned,<sup>36</sup> are more typically identified as subjects of concern. In the precautionary drive to pre-empt possible and imagined risks by knowing their signs, risk assessment restrains and excludes those deemed to hold danger before danger occurs (see Rose 2000; Werth 2019).

With its focus on harm, risk assessment techniques, like privacy measures, also insufficiently attend to an important set of reasons why feminists and others desire women-only provision. These reasons are not primarily about safety or danger but about the pleasures, solidarities, community-building, and politics that come from activism and consciousness raising, as well as from cultural, religious, arts-based, erotic and recreational activities, that are women-only (see Jeffreys 2018). State law's withdrawal from registering and assigning sex/ gender does not make women-only spaces

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<sup>35</sup> Linked also, in current discourse, to safeguarding, this can also have a spatial and procedural dimension as safe spaces, and orderly processes, are relied upon to organise (out) risk. See also Ramsay (2017) on safe spaces and the Prevent programme/duty (<https://www.gov.uk/government/publications/prevent-duty-guidance>).

<sup>36</sup> Ministry of Justice and HM Prison and Probation Service policy on *The Care and Management of Individuals who are Transgender* (reissued 27 January 2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/825621/transgender-pf.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825621/transgender-pf.pdf).

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impossible. It depends on whether community organisations, as informal legal orders, can do this selection work instead. For this to happen, state law plays a part. This is one reason why we have not described decertification as deregulation since state law is likely to continue to structure the powers and freedoms of other bodies. In conditions of decertification, state law can structure rulemaking by community-based organisations, in relation to membership and access, in several ways,<sup>37</sup> with varying implications for those who are vulnerable to organisational or community exclusion.<sup>38</sup> State law might permit organisations to identify target categories for membership, services, and activities (for instance, as agender, women, subordinate genders, or men-only) but then require organisations to admit everyone who self-identifies. It might allow organisations to set category criteria, establishing, for instance, definitional principles for what it means to be a woman, man, agender etc. It might allow organisations to determine the evidence that is required to meet the criteria; and it might permit organisations to assess whether individuals have adequately met the criteria, even as certain modes of assessment might be proscribed. The extent of organisational autonomy appears a key factor in shaping the social landscape post-decertification, albeit one insufficiently discussed. Asking about decertification is to also ask about state relations with other bodies, in terms of the latter's freedom, power, and resources. Community bodies also have rules and norms; and so, the interplay between different legal orders is central to decertification; state law is not the only law that counts.

The final approach to managing the informalisation of sex/ gender, we want briefly to address, foregrounds practice. Decertification may mean that gender is not assigned or registered by state authorities, but state law can still treat gender as a property or characteristic of subjects. Here, instead of state law basing formal recognition on compliance with specific formalities or biological attributes, it recognises people as members of a particular gender category because they act, in everyday life, *as if* they are. Jessica Clarke (2005) explores this practice-based approach in an

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<sup>37</sup> Permitted organisational powers might depend on organisational size in terms of budget, membership or user numbers; whether the organisation provides a government-funded public service; its type of activity – campaigning or service provision; whether it is aimed at subordinate groups rather than dominant ones; or something else. Legal assessment of these kinds of criteria, in relation to organisational autonomy to define gender categories, arose in *Vancouver Rape Relief Society v. Nixon et al.* [2005] BCCA 601; see, also, e.g., finlay (2003).

<sup>38</sup> This is a live contemporary issue generating litigation in contexts where religious bodies and communities, in particular, seek to exclude members who are deemed to lack the requisite social characteristics, such as being heterosexual or non-trans, see Cooper (2019b); see also *In The Matter of M (Children)* [2017] EWCA Civ 2164 (appealing denial of contact for a transgender woman with her children in the orthodox Charedi community).

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interesting and illuminating discussion of the commonalities between adverse possession, functional parenthood, and common-law marriage. While she suggests a practice-based approach has been less evident for gender, things have changed since her article's publication. The "real life test" comprises a formal element in several legally recognised transitioning procedures. For instance, the Gender Recognition Act 2004, s.2(1)(b) requires people to live for two years in their "acquired" gender.<sup>39</sup> A British practice-based approach is also evident in the growing *de facto* recognition, by state and other public authorities, of the gender identity in which people (effectively) live (see also Cooper, this issue).<sup>40</sup>

For some, living in a gender – with its connotations of gender as a place in which people dwell (and so should dwell comfortably) – constitutes the proper basis for determining which category people come within for forms, take-up of single-sex provision, admittance to community membership, and affirmative action. A practice-based standard also speaks to feminist concerns about people claiming to be female without experiencing the quotidian subordinations, erasures, and dismissals that come with living and being treated as a woman; and it recognises an important interactive dimension of social identity/ status – that it depends on and is forged through relations with others. However, one problem with a practice-based approach to gender, as with other *de facto* (or retrospective) bases for assigning status, is that it can reinforce established norms – what it means and looks like to act as an owner, parent, spouse, man, or woman. In the case of gender, one fear is that inequalities and stereotypes about how women and men behave get reinforced. This concern is also expressed by people going through legal transitioning procedures who feel compelled into more stereotypical behaviour in order to successfully attain the formal status sought (Renz 2017; 2020).<sup>41</sup> A practice or experience-based approach to gender status might, however, take other forms. Scottish-based guidance on gender representation on public boards makes it clear that to be

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<sup>39</sup> This can be met by a change of name and pronouns, including on official documentation.

<sup>40</sup> Although see *R (on the application of McConnell & Anor) v. The Registrar General for England and Wales* [2020] EWCA Civ 559, upholding the ruling in *R (On the application of TT) v. Registrar General for England and Wales and Others* [2019] EWHC 2384 (Fam), in which the court concluded (at para 279) that a person's status as mother "derives from their biological role in giving birth" even when the person giving birth is a trans man. Thus, a functional approach to motherhood here trumped legal gender status.

<sup>41</sup> In other cases, conventional gendered enactments may be deliberately (if ambivalently) taken up to minimise personal risk.

eligible as a woman does not require someone “to dress, look or behave in any particular way.”<sup>42</sup> But what then is this phenomenon: “gender”? If it mainly concerns pronouns and names, on what basis should it remain a regulatory object for states? If it is about domination, and is defined by experiences of domination, does it reduce gender to oppression; and is this a problem? If it is about accomplishment or attainment, does gender become encoded as a form of property that can be invested in, acquired, and given value (see Cooper and Renz 2016). We return to the dilemma of how to account for gender below.

### *Embedding decertification within a broader critical politics*

Privacy, risk assessment, devolved authority, and recognising “lived” gender form part of the governance toolbox used to manage the growing informalisation of gender. This toolbox, we anticipate, would also be available to deal with the dilemmas that decertification might pose. The tools we have discussed can be used in aid of diverse political projects, but we have focused here on their take-up to maintain and safeguard the organisational provision and structures that already exist. Decertification, however, can also be sutured to a more open-ended politics that questions the premises and purposes underlying anxieties about informalisation. In the discussion that follows, we consider how a purposive or granulated approach can problematise the taken-for-granted usages of sex/ gender in pursuit of a broader critical social justice politics. This does not make gender’s terms always or necessarily redundant. Suturing the decertification of sex/ gender to the undoing of other relations of inequality organised around race, socio-economic class, disability, and sexuality involves a series of different moves. These highlight the challenges in using and *also in not using*, the classificatory terms and understandings that liberal governments and law rely upon (see also Malleon 2018).

We start with the claim that policymakers, planners, and medical professionals need to know people’s sex, to consider whether categories of sex and gender have become increasingly unreliable proxies. Knowing that someone is a woman or man, for instance, may give little indication of what their body is like, or what it can do. One official told us,

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<sup>42</sup> See <https://www.gov.scot/publications/gender-representation-public-boards-scotland-act-2018-statutory-guidance/pages/2/> para 2.13.

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“It feels like it’s only really medical situations where that would be the case and, there, I don’t think you would simply be asking a question on what is your sex? You would be asking much more specific questions to do with, I don’t know, hormones or anatomy or things like that or what was actually relevant. ... The sort of example that people will usually bring up is population projections and essentially working out how many babies might be born. But, equally, if you kind of think further about that, you realise that well, right now, the projections are based on the number of people who say they are female, but plenty of those women can’t have kids for all sorts of reasons. It’s already an estimate.”

As this interviewee suggests, even leaving aside questions of choice or social diversity, the argument that sex provides a stable classificatory structure is complicated by the bodily changes some people undergo (hormonal and through surgery); by bodies that diverge from sexed expectations (e.g., Hester 2004); and by science research which challenges the notion of a sex-based binary division (e.g. see Fausto-Sterling 2016; Sanz 2017). At the same time, there remain good reasons to know how people live, shape, and experience the world, including in the terms that social relations give rise to. While using the language of gender, class, race, and other social relations may risk their normalisation (e.g., see Maré 2014), a critically attentive account and politics requires them. But not all contexts are best addressed through these social relational terms.

Competitive sport is one area where other frameworks may be worth attending to. The problem of sex has long been identified as an issue in women’s sports (Erikainen 2019). In the contemporary period, trans women’s participation has provided a focus for anxieties about the limits or disutility of regulating and sorting participation through gender categories – whether lived or legal. Testosterone levels are frequently used to determine entry into women’s sports (e.g. see Cooky and Dworkin 2013; Henne 2014)<sup>43</sup> perpetuating racialised histories of scrutiny and judgment as Black women and those from the global south become especially subject to intrusive bodily incursions, judgments, and norms (Karkazis and Jordan-Young 2018). Yet, despite the belief, held by some, that hormonal or “real” sex is the proper basis for determining participation in sports,

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<sup>43</sup> See also the International Olympic Committee’s guidelines for transgender athletes, <https://www.theguardian.com/sport/2019/sep/24/ioc-delays-new-transgender-guidelines-2020-olympics>; and World Rugby’s guidelines, <https://www.theguardian.com/sport/2020/jul/19/transwomen-face-potential-womens-rugby-ban-over-safety-concerns>.

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“meaningful competition” can be calibrated in other ways (see, e.g., Kerr and Obel 2018). Sports, such as boxing, judo, and wrestling, and the Paralympic Games, use sex/ gender as an allocation device; but they also use other criteria, such as body weight, to determine “fair” or “meaningful” competition.<sup>44</sup> Such criteria are not fixed or uncontentious; Paralympic sports, particularly, demonstrate some of the contestations and constant adjustments that complex systems entail as they assess different kinds of strength and capacity.<sup>45</sup>

Revisiting the question of a “fairer” match, rather than assuming it aligns with sex, also opens larger, more fundamental questions about the purpose of elite sports and athletic competition, along with the geopolitical and economic inequalities that skew success (by shaping, for instance, access and time with elite training facilities and equipment). Purpose and the opportunity to think about material practices in other terms also arise in the different context of surveys and data-gathering. Sex and gender are routinely asked for on forms (with tensions and debate about whether both, neither, or one term only should be used).<sup>46</sup> But what these terms do in fact reveal remains opaque. A purposive, more granular, approach, by contrast, focuses on what it is that planners, researchers, employers, or service providers are trying to discover. Is it about reproductive capacity, the relationship between lived gender (which might include multiple genders) and pay, or the relationship of sexual and racial violence, care work and care work’s uptake to gender roles, experiences, appearance, body form, or something else? Emphasising purpose and context here makes two features that are typically tacit explicit. First, data does not simply *reflect* and represent specific concerns, identities, and interests; it also helps to constitute them (see Squires 2008). Second, the production and use of data take place within and through a series of wider conversations that, as here, can be intensely politicised (see Murray and Hunter Blackburn 2019). When it comes to surveys and other data-gathering documents, respondents will consider what

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<sup>44</sup> See for instance, <https://paralympics.org.uk/sports/para-powerlifting>.

<sup>45</sup> See for instance, <https://www.abc.net.au/news/2020-08-23/paralympics-wheelchair-basketball-reclassification-ipc/12539302>; <https://www.abc.net.au/news/2016-09-06/what-do-the-paralympic-classifications-mean/7813860>; <https://www.theguardian.com/sport/2017/oct/30/paralympic-athletes-face-reclassification-in-row-over-exaggerated-disabilities>; and <https://www.insidethegames.biz/articles/1057214/tim-hollingsworth-the-continued-positive-development-of-classification-fundamental-to-development-of-paralympic-sport>.

<sup>46</sup> See Sullivan (2020a) and (2020b), and responses from Hines (2020) and Fugard (2020); also the Office for National Statistics draft guidance regarding questions on sex, gender identity and sexual orientation for the 2019 census rehearsal for the 2021 census for England and Wales: <https://www.ons.gov.uk/census/censustransformationprogramme/questiondevelopment/genderidentity/guidanceforquestionsonsexgenderidentityandsexualorientationforthe2019censusrehearsalforthe2021census>.

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categories were intended to mean and should mean, and how the data will be used, as they deliberate upon what box to tick. Subsequently, those undertaking data analysis trace back along these processes (see Peel and Newman, this issue).

Positive discrimination and affirmative action identify a further area where a purposive and granular approach supports critical reflection, responding to critics' concerns that loosely defined or absent sex/ gender boundaries will generate opportunistic self-characterisations. Again, such an approach asks: what exactly is being sought? In the case of parliamentary representation, where conflict has arisen in Britain over the means and rationale for determining "woman" in women-only shortlists (as described earlier), does the gendered "lack" to be remedied and compensated for concern a particular social optics, genitalia, status, experience, agenda, interest, or something else (also Mackay 2008)? While the popular tendency is to assume these features cohere, this has been questioned on multiple grounds. This does not mean an absence of gender patterning, simply that it takes a looser, more complex, and intersectional form (e.g., see Hobson et al., 2007; Smooth 2011). Approaching positive discrimination in broader social justice terms means attending to the wider context (also Mackay 2008), to the mix of inequalities at play (Evans 2016; Krook and Nugent 2016), and to other ways of advancing gender equality that do not rely on "correcting" the demographics of bodies in elite spaces.<sup>47</sup>

In the case of women's political representation, parliamentary organisations, policy agencies and social movements may prove more effective in representing (in their diversity) women or subordinate gender experiences (Allen and Childs 2019; Squires 2008; Weldon 2002). The demographics of parliament (and government) is also only one aspect of how state politics is gendered. Other aspects include the schedules, occupational norms, remit, purview, rationalities, discursive style, authority, and power of state apparatuses. These are gendered in their uneven correspondence with male, female, and other actors (in terms of who establishes, uses, and is

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<sup>47</sup> Women-only shortlists may sidestep rather than address the barriers to women's representation in parliament, see UK Parliament (2018) and WEC's work in this area (2017-18) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2017/women-house-of-commons-evidence-17-19/>. For related barriers to women's participation in local government, see Local Government Commission (2017).

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affected by them).<sup>48</sup> But they are also gendered through their constitutional, political, economic, and cultural histories which, rooted in the divisions and norms of patriarchal power, continue to exert effects. Finally, it is important to note that parliamentary decision-making is one tip of a far larger, more complex iceberg of policy practice, much of which is carried out by non-state bodies as political power and responsibility has moved to other geopolitical entities including non-state agencies. Johnson (2018: 69-108) describes how privileged women in power have been “boxed in” through informal rules that have had “bait and switch” effects – where levers of power appear in reach only for those reaching them to find that political power no longer resides there. These lines of analysis, which foreground the complexity of substantive political representation and responsiveness do not mean we should dismiss the value of attending to the demographics of representation (see also Cooper, this issue). But they do act as a reminder that when representation becomes a site of boundary disputes and social policing, as proprietary claims get made over categories now treated as belongings, bedrock concerns with the democratisation of political power can get lost.

Policy and regulatory approaches that refuse to rely on sex/ gender as a basis for naming subjects, or, indeed, refuse to rely on naming subjects altogether may seem better able to respond to the radically diverse, unevenly patterned ways that sex/ gender is lived and organised. But a granular approach that disassembles categories can also appear depoliticising to the extent it denies (or fragments) gendered forms, and their enduring, hierarchically ordered effects. One contemporary context where this has arisen is in how to describe what are conventionally known as sexed body parts. Should they be described neutrally to be inclusive or through the language that has given them social and political meaning – “uterus- and vagina-havers” or “women”, for instance?<sup>49</sup> Some feminist critics of sex-neutral body-language assert the intrinsically sexed character of physical patterns such as menstrual cycles and menopause, or of the need to use gendered terms that users

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<sup>48</sup> For instance, see Annesley and Gains (2010: 910) on “the gendered ‘disposition’ of the core executive in terms of recruitment, resource allocation, relationships and rules and how this disposition structures the opportunities available to feminist actors therein to make a change to policy outcomes.”

<sup>49</sup> See, e.g. the debate surrounding the British Medical Association’s guidelines, which recommend that staff use the term “pregnant people” rather than “expectant mothers”, <https://www.telegraph.co.uk/news/2017/01/29/dont-call-pregnant-women-expectant-mothers-might-offend-transgender/>; and similar criticism of Cancer Research’s leaflet targeting “anyone with a cervix”, <https://www.telegraph.co.uk/news/2018/06/14/cancer-research-removes-word-women-smear-campaign-amid-transgender/>.

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and other publics will recognise. Others emphasise the importance of claiming back a gendered category that has been disavowed. One NGO member told us,

“I mean there are good feminist reasons for ...not bowing to pressure to never again utter the word “woman”, which is rapidly becoming a dirty word. ... I think there are feminist reasons and reasons ... to do with equality. I think there are also very pragmatic reasons for us in terms of the groups that we work with, that actually being understandable and accessible, and talking to women in language that they understand, given that lots of the women who access our services don't have English as their first language.... I've seen it elsewhere, pressures to talk about people with uteruses or people who can become pregnant and, actually, it's just very clumsy language that doesn't speak to the vast majority of women who would need those services.”

Identifying and naming bodily assemblages in gendered terms can be important because it is in and through these social terms that such assemblages form and work. In other words, it is through concepts such as woman and man that gendered characteristics are articulated together, given meaning, and have effects. A similar argument can be made for other categories of social injustice. The challenge, however, is how to recognise the organising work, ideationally and materially, that these terms do while supporting moves to destabilise them (given their legacies, exclusions and power-asymmetries), on the one hand, and, on the other, to prefigure new more progressive representational (and more-than-representational) terms.

## 5. Decertification and gender-neutral androcentric law

The place of human subjects in negotiating, recrafting, and being subject to the social life of gender is an enduringly complex and complicating aspect of gender-based law reform. While different features of oppression are felt as harms by human subjects, we approach gender in this article and project, more generally, as a societal condition. People *experience* gender; and, personally and collectively, help to *remake* it, but conceptualising gender as a property or dimension of personhood is too limited. Gender is far more networked,<sup>50</sup> far more social, and far more heterogeneous in its

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<sup>50</sup> This is something Clarke (2019: 195-8) briefly discusses in relation to “networked pregnancies”, in exploring the conditions and consequences of pregnancy as something that extends beyond individuals, couples, or gestational/functional parents.

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forms. Thus, in thinking about decertification's contribution to a feminist and critical politics, one question that arises is what decertification's impact might be on the institutional elements (of rules, systems, roles, power relations, things, places, interactions and temporalities) that make up gender, and which gender in turn makes up (see also Martin 2004; Risman 2004; Cooper, this issue).

Merely removing the legal hailing so that gender is no longer interpellated through the state-endorsed cry: "it's a girl" or "boy" causes some feminists to fear that undesirable gendered social processes would flourish. Instead of delinking sex/ gender from human subjects in ways that stimulate critical awareness, moves such as decertification may, undesirably, reinforce normative and powerful forms of masculinity. This argument has two strands. The first reads decertification as a form of gender-neutral law. Gender-neutral law typically adopts male norms in its expectations of how people behave and live, and then applies these norms to all social subjects. Feminists have long critiqued gender-neutral law (see generally Conaghan 2000 and 2013; Munro 2007; Smart 1992), and similar concerns were expressed in criticisms of decertification, specifically, that it would not remove gendered inequalities but simply make them harder to identify and to tackle. The second strand of argument focuses less on the asymmetrical effects of gender-neutral law and more on its values and ethos. One dystopic narration has decertification escalate the development of androcentric society. Here, members share and are subject to masculine values and norms in all politically meaningful respects (even as presented gender identities may vary); other gendered values are located elsewhere, beyond the borders of the "here and now". In other words, internal androcentric norms are defined by an exterior societal "other" – those contrasting, seemingly feminised (but not only feminised) norms, meanings, systems, and experiences relocated to a place beyond the present.

Concern that decertification, at its most successful, would intensify androcentric norm-building within social and political life raises questions of strategy and process. It also poses questions about the relationship between gender and other socio-political norms and principles. What does it mean to align specific norms and principles with specific genders in declaring that societal processes are androcentric? Feminists have long argued that militarism, competition, global corporate markets, neoliberal government, the devaluing of care, and environmental depredation are in some way male or masculine (see also Beckwith 2005). Yet, even if this alignment was once powerfully pervasive, what evidence exists – *and what evidence needs to exist* - to know that it endures?

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Is ongoing alignment or suturing something that can be assumed; or does there arrive a point when certain values, practices, or regimes (militarism, competition etc) are no longer cultivated and experienced, or usefully represented critically, in gendered terms? One feminist NGO activist captured this uncertainty when interviewed. Having argued that men receive higher bonuses than women from employers because they express more highly regarded values, she commented:

“maybe it's not gender difference. Maybe it's ‘approach difference’ or ‘priority difference’ within society - that we've linked to gender. But maybe it doesn't need to be linked to gender.”

Severing the linkages between gender and specific social values can be read in critical, prefigurative, reform-oriented, or normative terms as what is, could, or should be (see also Mackay 2014).<sup>51</sup> Yet, as a critical project, FLaG situates the proposal to decertify sex/ gender within a broader framework attuned to the injuries and harms of different social injustices as well as more utopian “better society” values. It may therefore not much matter whether contemporary (or future) practices and values of care-work, peace, environmental sustainability, and horizontal decision-making are defined as feminist, feminine or in some other fashion. Abandoning the need to draw tight critical/ normative alignments between projects and categories allows for a more capacious approach, including in relation to the policy dilemmas that decertification invokes. Following the thread of decertification takes us to a series of value-based policy choices that are not primarily about gender but are nonetheless brought into the spotlight through the question of gender’s legal reform. If state law in England & Wales was changed to eliminate legal sex/ gender status, other laws would also require revisions. These include laws relating to embryo selection,<sup>52</sup> parental leave,<sup>53</sup> schooling,<sup>54</sup> and housing, among others. For instance, to take the last, less familiar example: overcrowding is defined in the Housing Act 1985 as taking place when “two persons of opposite

<sup>51</sup> In a detailed discussion of “constitutional re-engineering”, to re-gender the Scottish parliament, Fiona Mackay (2014: 559) explores how “Each principle of the new politics model can be seen to present a challenge to ‘politics as usual’ and traditional ‘command and control’ models.” However, as she (2014: 561) discusses, these “new elements have not displaced the old but interact and coexist with masculinist practices and underlying norms of ‘politics as usual’”.

<sup>52</sup> See Human Fertilisation and Embryology Act 2008 (amending the 1990 Act), s.11 and Schedule 2, s.1ZA-C.

<sup>53</sup> A wide range of primary and secondary legislation governs this area, including the Employment Rights Act 1996, The Maternity and Parental Leave etc Regulations 1999, and The Shared Parental Leave Regulations 2014.

<sup>54</sup> The Equality Act 2010, s.85(1), prohibits discrimination by a school governing body in relation to offers of admission, and terms of admission, to a school, but insofar as it relates to sex, s. 85(1) does not apply to single-sex schools (by virtue of an exemption provided in Schedule 11, s.1).

sexes who are not living together as a married couple or civil partners”, and who are age ten or over, are required to share a bedroom.<sup>55</sup> How should this be amended if decertification makes the legal notion of “opposite sex” meaningless? Progressive welfare principles might suggest all teenagers, and adults, should have their own bedrooms, with knock-on effects for building and allocating public housing. Such a move could be framed in terms of feminism – whether as a liberal project of human autonomy and privacy or a left project of economic redistribution through the expansion of public welfare. But given FLA’s broad social justice perspective, nothing rests on labelling this framing as a feminist one or as one anchored in other social justice norms.

### **Conclusion**

This article has explored the speculative proposal to decertify sex/ gender. Given the alternative legal path of formally recognising sex/ gender diversity, we have traced arguments in favour of decertification, the counterarguments of critics, and different ways of responding to the issues that critics pose. In doing so, we have considered two kinds of response. The first involves governance strategies to minimise the confrontations, which it is feared, gender’s informalisation will lead to, so that present arrangements can continue. Here, we have considered use of privacy design, risk assessment, decentralising classificatory authority, and recognition of “lived” gender. The second set of responses links sex/ gender’s informalisation to a politics of unsettling and re-examination, drawing on techniques of granularity, deconstruction, connection-forging, and refocus, to pivot decertification towards more fundamental and multiplex social justice agendas. Here, rather than just asking how we can know and define women for sports competition, it asks about the purpose of sports-based competition. Rather than ask how we can ensure (cis) women do not lose opportunities to make up effective women-only parliamentary shortlists, it asks about the place of representation in political processes. Asking these questions does not deny the value of more moderate reforms, and it is not necessarily intended to supplant them as if we inhabited a zero-sum political game. But when increasing energy is placed in maintenance strategies that seek to minimise and contain the challenges that gender’s informalisation poses, including through decertification, it becomes important to ask what this maintenance is for. And to explore how decertification might be tied to a more challenging set of responses as well.

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<sup>55</sup> Housing Act 1985, ss.324 and 325.

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In this article, and project more generally, we approach decertification as a thread – something we “pull” (and pull apart) to consider the challenges and politics that it elicits. This pulling is partly deliberate, but it is also an inevitability in adopting a methodology that does not dismiss, as tangential, the wider issues and concerns that decertification raises. Law reform here becomes a critical method for studying connection and relationship, and for branching out - against the countertendency to narrow in as the study of problems funnels towards solutions. Following the thread of decertification takes us to four clusters of issues. One is the emotional investments, anxieties, hopes, and (occasionally) pleasures triggered by talk of gender-based law reform as Peel and Newman (this issue) also explore. Another concerns the principles for deciding how the British government might act. If every part of state law that references sex or gender status (implicitly or explicitly) requires revisiting and probably revision, how should these revisions be made? What choices should be made so that a wider progressive politics of welfare, anti-poverty, environmentalism, cooperation, care, internationalism, and anti-racism is embedded within these reforms? This question takes us to much longer and wider debates about what can be accomplished, politically and legally, within the evolving frameworks of liberal nation-state capitalism (see also Manji, this issue). A third cluster of issues relates to governance techniques, including of statutory law-making (Grabham, this issue), and to how people and agencies make sense of law. Asking the members and staff of equality agencies, NGOs, trade unions, governmental bodies and wider publics about decertification brings their views and usages of law *as it is* to the fore. While this foregrounds the take-up and comprehension of *state* law, equally important for our research is state law’s ongoing and evolving relationship to organisational and community rules and norms (e.g., Merry 1988). For instance, many employers and service providers now seek to implement a “gender as diversity” approach in the registration forms and pronouns they use. Flora Renz (this issue) explores how some girls’ schools now welcome people with other gender identities even as they retain their historic single-sex name. This is one response to what gender is identified as coming to mean and be. It is not required by state law, but it is also not prohibited by it.

Finally, this article has followed the thread of decertification to questions of conceptualisation – of what gender *is* given the critical value of pulling it away from the propertied form that is coming to dominate. We do not want to ignore or dismiss the ways in which people take up gender and are injured by gender; recognising too that many people today, in Britain as

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elsewhere, treat gender as a positive attachment. For some, a paradigm of multicultural gender diversity, somehow divorced from relations of power, provides a major political aspiration. Yet, its posing requires more discussion about what such a gender might mean. If gender frees itself from relations of domination, does it simply become a stylisation or modality of the self? And does such a depiction of gender have any political traction or mileage in the present? FLaG grapples with these questions. At the same time, while gender continues to shape and structure society and social relations in unequal and androcentric ways, critical moves remain important, including those that pull gender away from being defined, determined, and delimited by a person-centred shape. Departure from treating gender as something that “belongs” to subjects, particularly in propertied form, foregrounds gender as part of our shared social conditions. People are very differently situated in relation to those conditions. But keeping our attention on the social production of gender, we think, supports solidaristic, collective, and critical responses to gender as a powerful and (still) power-allocating differentiation device.

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