THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.70029

ARTICLE

Grounds in Equality Law: Before and After *For Women Scotland*

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Grounds are the fulcrum of equality law. Thus, discrimination is *discrimination* when it is based on or because of certain kinds of personal characteristics or grounds such as race or sex. But there is no definition of grounds in general or a definition of grounds such as race or sex in particular in equality law. This article shows that in defining the ground of sex as biological sex in *For Women Scotland Ltd* v *The Scottish Ministers*, the UK Supreme Court has undone the meaning of grounds which had developed in the UK since the first equality legislation came into force 60 years ago. It shows that grounds in equality law have been understood in a functional sense such that they signify a wide range of disadvantages that are attached to them rather than convey some objective or essential information about personal characteristics themselves. In failing to adopt a functional approach to grounds and in particular the ground of sex, *For Women Scotland* has fundamentally reshaped equality law in the UK.

INTRODUCTION

What is sex? This question can be answered from various perspectives. The Oxford English Dictionary lists nine meanings of sex as a noun and four as a verb. The preference for a particular meaning would depend on the context in which the question is asked. For instance, if the question is asked in the context of equality law, the answer would depend on the particularities of what it means to be a ground and in particular the ground of sex in equality law.[1] Interestingly, this meaning of grounds and of sex may not be apparent in the list of meanings

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1 I abbreviate various interchangeable references to equality law, discrimination law, non-discrimination law and anti-discrimination law to simply equality law for ease and because it comports with the focus of this article on the Equality Act 2010. The reference to equality law however goes beyond the single statute and instead signifies the field of law which prohibits discrimination and promotes equality between persons. Importantly, the reference to the field of equality law exceeds doctrine and includes theoretical accounts.

available in a dictionary. A rather specific inquiry may be needed to answer this question satisfactorily in a technical sense in equality law.

The UK Supreme Court (the Court) in *For Women Scotland Ltd* v *The Scottish Ministers*[2] (*FWS*) came to consider this question in the very context of equality law. The Court held that the meaning of 'sex' under the Equality Act 2010 meant 'biological sex' recorded at birth. In holding so, the Court aligned the technical understanding of sex as a ground in equality law with one particular colloquial understanding of sex as the binarised categorisation of humans as men and women based on their reproductive functions.[3]

While alignment may be desirable, it is unsatisfactory in the present context because it fundamentally altered the technical meaning of grounds and in particular the ground of sex in equality law. Again, while such alteration may be desirable, this article shows that few grounds existed in fact for such alteration.

The article begins by considering the technical meaning of grounds developed in equality law. The second part of the article points to what appears to be a consensus in equality law towards a functional approach which signifies the disadvantages attached to grounds of discrimination rather than any essential properties of grounds in an objective sense. The third part examines the Court's preference for a colloquial or lay understanding of the ground of sex as biology in *FWS*. This preference emerges from a literal misinterpretation of the Equality Act 2010 which undoes the functional approach to sex that had developed in equality law since the first sex equality legislation came into force in 1975.[4] The fourth part shows how *FWS* unjustifiably narrows sex as a ground from sex as gender to sex as apparent biology. Consequently, *FWS* ends up protecting not even biological sex from discrimination fully. Instead, it shows that the ground of sex, as developed in equality law, had always included not *only* biology (including sex characteristics) but *also* gender (including gender identity and gender expression). The fifth part concludes by iterating the importance of a functional approach to grounds of discrimination in equality law. This does not mean rejecting the colloquial in favour of a functional approach to grounds in equality law. It means embracing *both* the colloquial and functional understandings of grounds with the purpose of widening, not narrowing, the protection afforded by an enabling statue such as the Equality Act 2010.[5]

This article is thus dedicated squarely to understanding grounds of discrimination in equality law. This was also the thrust of the Court's decision in *FWS*, although the decision was not about grounds alone. *FWS* has had a seismic impact far beyond the field of equality law.[6] This article does not focus fully

2 [2025] UKSC 16.

3 Oxford English Dictionary, Entry 1a, 'Sex' at https://www.oed.com/dictionary/sex_n1?tab=meaning_and_use [https://perma.cc/3XP5-X5DL].

4 The Equal Pay Act 1970, passed in May 1970, was the first sex equality statute. It came into force on 29 December 1975, the same day as the Sex Discrimination Act 1975.

5 George Letsas, 'The UK Supreme Court Judgment Has Brought Much Needed Confusion: Why For Women Scotland Did Not Change UK Discrimination Law' *UK Labour Law Blog* 7 May 2025 at https://uklabourlawblog.com/2025/05/07/the-uk-supreme-court-judgment-has-brought-much-needed-confusion-why-for-women-scotland-did-not-change-uk-discrimination-law/ [https://perma.cc/M4V2-55FM].

6 Kenneth Norrie, 'Case comment: For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16' [2025] *Juridical Review* 182; Alexander Maine, 'For Women Scotland: An Interpreta-

or exclusively on *FWS*, and thus does not canvas the vast breadth of issues surrounding *FWS*. It does not consider *FWS* so far as it concerns four other issues: first, the Court's discussion of other grounds such as sexual orientation[7] and gender reassignment under the Gender Recognition Act 2004 in so far as it concerns Gender Recognition Certificates (GRCs), unless it relates directly to the discussion on the meaning of sex as a ground;[8] second, the Court's discussion of the workability of the provisions of the Equality Act 2010 (viz single-sex services, communal accommodation, single-sex higher education institutions, women's participation in sport, public sector equality duty, and positive measures) following its interpretation of sex as biological sex assigned at birth;[9] third, the implications of the judgment on trans rights,[10] and fourth, the role and the view of the Equality and Human Rights Commission in the matter.[11] In the main, the article uses *FWS* only as a point of departure for understanding grounds and in particular the ground of sex. This focus is justified given the significance of both grounds as a central feature in equality law[12] and *FWS* as a critical development in the understanding of grounds in equality law.

GROUNDS

Grounds are the fulcrum of equality law.[13] This means that the field guarantees equality or protects people from discrimination when discrimination is 'on

tion of Equality Rooted in Biology' (2025) 47 *Journal of Social Welfare and Family Law* 377; Peter Dunne, Emily Grabham and Flora Renz, 'How Can Critical and Feminist Scholars Respond to the Decision in For Women Scotland?' (2025) 14 *feminists@law*; Alan Brown, 'For Women Scotland [2025] UKSC 16, [2025] 2 WLR 879: "Paper Certificates", Gender Recognition Certificates and Other Legal Documents' (2025) 14 *feminists@law*; Caroline Derry, 'The (Non-)Use of History and its Significance in For Women Scotland' (2025) 14 *feminists@law*; Rosemary Hunter, 'For Women Scotland Ltd v The Scottish Ministers: An Error of Judgment' (2025) 14 *feminists@law*; Seema Patel, 'The FWS Ruling: Legal Simplicity or Sport Complexity?' (2025) 14 *feminists@law*; Equality and Human Rights Commission, 'EHRC statement on Supreme Court ruling in For Women Scotland v Scottish Ministers' (Statement, 16 April 2025) at https://www.equalityhumanrights.com/ehrc-statement-supreme-court-ruling-women-scotland-v-scottish-ministers; Anurag Deb and others, 'Limits to the UK Supreme Court's Reach: Northern Ireland, the Windsor Framework and Trans Rights' *Administrative Court Blog* 30 April 2025 at https://administrativecourtblog.wordpress.com/2025/04/30/limits-to-the-uk-supreme-courts-reach-northern-ireland-the-windsor-framework-and-trans-rights/ [https://perma.cc/3NTN-RDHE]; Simon McGarr, 'Trans Rights are Data Rights' *The Gist* 21 April 2025 at https://www.thegist.ie/the-gist-trans-rights-are-data-rights/ [https://perma.cc/Q7QP-9SW5]; Crash Wigley, 'For Women Scotland: A Legal Critique' *Trans Legal Project* 29 April 2025 at https://www.translegalproject.org/post/for-women-scotland-a-legal-critique [https://perma.cc/4WVY-U8UP].

7 *FWS* n 2 above at [205]-[208].
8 *ibid* at [63]-[111].
9 *ibid* at [210]-[246].
10 *ibid* at [248]-[263].
11 *ibid* at [247].
12 See the next section of this article.
13 John Gardner 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167; Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: OUP, 2015) 165-171.

the ground of[14] or 'because of'[15] grounds. In other words, discrimination is *discrimination* when it is based on grounds.[16]

What are grounds though? Grounds refer to personal characteristics of individuals.[17] These characteristics often include sex, gender, race, religion, disability, age etc.[18] But they do not include eye colour, membership in a football club, ability to sing, sartorial choices, food preferences etc. The inclusion of some but not other personal characteristics as grounds in equality law points to a technical meaning of grounds which distinguishes grounds from other personal characteristics. This meaning is not apparent. While equality law often enlists grounds, it does not spell out the meaning of grounds. For example, the Equality Act 2010 lists nine grounds as 'protected characteristics': age, disability, gender reassignment, marriage, civil partnership, race, religion or belief, sex and sexual orientation. But the Equality Act 2010 is silent on the basis on which particular grounds are chosen, or the meaning of grounds as such.

FWS arises from this silence. Its main dispute – the meaning of sex as a ground in the Equality Act 2010 – arises only because the Equality Act 2010 does not explain what it means by grounds or by sex. The dispute is neither simple nor purely academic. The meaning of grounds, and in particular sex, matters in order to ascertain the ambit of protection afforded under the Equality Act. In *FWS*, it mattered for the Court to ask what was meant by these terms in order to ascertain whether sex included certificated sex and whether woman meant a woman with Gender Recognition Certificate (GRC) issued under the Gender Recognition Act 2004 (GRA 2004).[19] If it did, then the statutory guidance under the Gender Representation on Public Boards (Scotland) Act 2018 to include trans women with GRCs in women's representation on boards of public authorities, would have been lawful.[20] But it was found to be unlawful, as the Court reasoned that sex meant biological sex and did not include certificated sex. The meaning of the ground of sex was thus critical in determining the ambit of protection for both cis women (whose gender conforms with what is assigned at birth) and trans women (with or without the GRC) (whose gender does not conform to what is assigned at birth).

Because everything turned on the question of the meaning of the ground of sex, it is worth asking the prior question about the meaning of grounds in equality law. This is the question the Court did not pause to answer. In fact, no particular understanding of grounds seems to have framed the Court's approach to the interpretation of the ground of sex. In the absence of this understanding, it is reasonable to think that the Court understood grounds in their colloquial or lay sense (as personal characteristics of individuals) rather than a technical sense (as those personal characteristics which are protected under equality law).

A lone reference to the Court's general understanding of grounds in the Equality Act 2010 confirms the Court's colloquial or lay approach. At para-

14 Sex Discrimination Act 1975, s 1(1)(a).
15 Equality Act 2010, s 13(1).
16 Shreya Atrey, 'Comparison in Intersectional Discrimination' (2018) 38 *Legal Studies* 379.
17 Khaitan, n 13 above 29.
18 Equality Act 2010, s 4.
19 GRA 2004, s 9.
20 Gender Representation on Public Boards (Scotland) Act 2018, s 2.

graph 153 of the judgment, the Court notes that the Equality Act 2010 recognises that 'people who share a particular protected characteristic (known or perceived) often have common experiences or needs, whether arising from differences of biology or physiology, or societal expectations or structures affecting their group.' This is revealing. In this observation, groups defined by grounds/protected characteristics have common experiences or needs which are in turn defined by 'biology or physiology, *or* societal expectations or structures'. The framing of this sentence (in particular the comma before the second 'or') shows that, according to the Court, grounds, and consequently groups defined by grounds, are either biologically or socially determined. Where does this understanding of grounds come from? The Court does not say.

The colloquial or lay approach to grounds is fallacious because it makes no effort to connect grounds – a central feature of equality law – to the 'underlying notions of equality'.[21] In fact, it makes no effort to understand grounds *in equality law*, or in the case of *FWS*, *in the context and purpose of the statute* under consideration: the Equality Act 2010.[22]

Equality lawyers however, have explored the prior question about the meaning of grounds aplenty. As argued below, no major account sees grounds as being about biology. It follows that no major account sees grounds as *either* biologically *or* socially determined. In fact, as the discussion below shows, grounds in equality law have been understood broadly and ultimately functionally – to capture a wide range of historical and contemporary forms of disadvantages which attach to people due to their personal characteristics. It is then not personal characteristics themselves but the range of disadvantage they signify that makes personal characteristics protected grounds in equality law.[23] This is the functional approach to grounds in equality law.

In Sandra Fredman's influential account, she considers whether there is 'a unifying principle' drawing together all grounds that are protected in equality law.[24] Traversing a labyrinth of comparative equality law across the Council of Europe, the EU, Canada, India, South Africa, the UK and the US, she shows that judges across time have offered numerous principles for protecting personal characteristics from discrimination such as political powerlessness,[25] history of unequal treatment,[26] immutability or constructive immutability,[27] history of disadvantage,[28] dignity[29] and autonomy.[30] Fredman concludes that, 'In practice, while emphasizing one particular value, all these courts tend to draw

21 Rosalind Dixon, 'The Supreme Court of Canada and Constitutional (Equality) Baselines' (2013) 50 *Osgoode Hall Law Journal* 637.
22 See the following two sections of this article.
23 Shreya Atrey, 'Grounds of Affirmative Action' (2025) 47 *Human Rights Quarterly* 189, 201-207.
24 Sandra Fredman, *Discrimination Law* (Oxford: OUP, 3rd ed, 2022) ch 4.
25 John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980) 77-88.
26 *San Antonio Independent School District* v *Rodriguez* (1973) 411 US 959 at [40]-[41].
27 *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30 at [130]. See also *Corbiere* v *Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 at [13]; *Egan* v *Canada* [1995] 2 SCR 513 at [5]; *Andrews* v *Law Society of British Columbia* [1989] 1 SCR 143 at [75].
28 *Harksen* v *Lane NO* (1998) (1) SA 300 at [50].
29 *Egan* v *Canada* n 27 above at [171]; *Harksen* v *Lane NO ibid* at [46]; *Puttaswamy* v *Union of India* (2019) 10 SCC 996 at [119], [144].
30 Gardner, n 13 above; Khaitan, n 13 above.

on *a constellation of factors*, which include immutability or lack of autonomy, political exclusion, denial of dignity, and a history of disadvantage … but that *no one indicator is required to be present*.'[31]

Biology appears conspicuously absent in this constellation of factors. The factor which may resemble biology is 'immutability'. This resemblance is fleeting, though. Immutability in equality law has been understood as attaching to racial grounds – such as race, ethnicity, colour and national origin – because these cannot be changed. However, this has not been taken to mean biology. In fact, biological views of racial grounds have been thoroughly debunked as false and dangerous.[32] Immutability in the context of racial grounds thus refers to the inability to change one's skin colour, familial, cultural and religious history, and place of birth. Likewise, on first blush, disability, in section 6(1) of the Equality Act 2010 is a 'physical or mental impairment'. But the biological or medicalised understandings of disability have given way to social[33] and human rights[34] models of disability. Disability is thus not *only* a physical or mental impairment inherent in a person. Rather, it is the result of the 'interaction' of impairments 'with various barriers' that hinder the full and effective participation of persons with disabilities in the society on an equal basis with others.[35] The embodied aspect of disability (impairment) is not disregarded. But it is not considered relevant by itself as disability is considered to be constituted not by differences in human body and mind but in *how* those differences come to matter in the world, especially their impact on the enjoyment of human rights and freedoms.

In a similar vein, sex as a ground is understood not only as a matter of biology, although there is undeniable biology to sex in terms of genetic, chromosomal, hormonal, gonadal and physiological features of human beings. Equality law focuses not on *what* these biological features are but instead on *how* these and other differences come to serve as the basis of disadvantage in a social, economic, material, cultural, political and psychological sense. Importantly, this is the case in equality law for understanding sex *as a ground* as opposed to the case in, say, the determination of legal disputes over the sex of a *particular individual* such as was the dispute in the common law case of *Corbett* v *Corbett*[36] (*Corbett*). *Corbett* however had nothing to do with sex *as a ground* as it was not a case of discrimination at all. As Mr Justice Ormrod remarked in *Corbett*, 'The question

31 Fredman, n 24 above, 206 (emphasis added).
32 Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Oxford: OUP, 2016).
33 Tom Shakespeare, 'The Social Model of Disability' in Lennard J. Davis (ed), *The Disability Studies Reader* (East Sussex: Psychology Press, 1997); Colin Barnes, 'Understanding the Social Model of Disability: Past, Present and Future' in Nick Watson, Alan Roulstone and Carol Thomas (eds), *Routledge Handbook of Disability Studies* (London: Routledge, 2019); Anna Lawson and Mark Priestley, 'The Social Model of Disability: Questions for Law and Legal Scholarship?' in Peter Blanck and Eilionóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (London: Routledge, 2016).
34 Theresia Degener, 'A New Human Rights Model of Disability' in Blanck and Flynn (eds), *ibid*.
35 United Nations Convention on the Rights of Persons with Disabilities 2006 (CRPD), Art 1. See Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *Industrial Law Journal* 359, 361-364; Ryan Thorneycroft, 'Screwing the Social Model of Disability' (2024) 26 *Scandinavian Journal of Disability Research* 286.
36 [1970] 2 All ER 33. See also *Bellinger* v *Bellinger* [2003] UKHL 21.

then becomes what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large'.[37]

In the context of the US, Catherine MacKinnon notes that 'virtually none of the US sex equality canon involves biology per se, but rather deals with male supremacist beliefs, attitudes, stereotypes, policies, and practices that its defenders pretend are biologically-based.'[38] She explains thus:

> The point is not that there are no sex differences. The point is that they are virtually irrelevant to sex inequality. Women are not inferior to men, men superior to women; yet that is how the two are socially ranked. Sex itself is neutral so far as inferiority and superiority are concerned. But society is organized (in general, and among other ways) by gender hierarchy: less and more, better and worse, above and below, valued and devalued, with the male (sex), masculine (gender) and men (people) superior, the female (sex), feminine (gender), and women (people) inferior. Sex inequality, as socially organized, is not and never has been based on sex differences but on hierarchical orderings of gender supported by ideological rationalizations that naturalize it as difference.[39]

MacKinnon's explanation illuminates two things about equality law. First, the normative irrelevance of grounds such as sex such that what a ground *is*, is treated as 'virtually irrelevant' to equality on the basis of that ground. Second, the descriptive relevance of grounds such that a ground signifies at least one group that is disadvantaged because of that ground. The description of a ground in an objective sense is thus irrelevant both from a normative and a descriptive standpoint.[40]

The descriptive significance of grounds attaches only to what Tarunabh Khaitan calls the 'relative disadvantage condition' in equality law.[41] According to this condition, grounds (for example sex) in equality law divide people into at least two groups (for example men and women) where members of at least one group (for example women) are significantly more likely to suffer abiding, pervasive, and substantial disadvantage than the members of the cognate group (for example men). What makes grounds in a technical sense in equality law is then the disadvantage they are able to signify rather than conveying some scientific or biological truth about a personal characteristic itself.

Furthermore, as Khaitan explains, cognate groups need not 'possess any solidarity, coherence, sense of identity, shared history, language, or culture … group "members" do not even have to be consciously aware that they belong to this group.'[42] Thus, personal identity is not a precondition for protection as a group

37 *ibid*, 48.
38 Catharine A. MacKinnon, 'A Feminist Defense of Transgender Sex Equality Rights' (2023) 34 *Yale Journal of Law and Feminism* 88, 89.
39 Catharine A.' MacKinnon, 'Toward a Renewed Equal Rights Amendment: Now More Than Ever' (2014) 37 *Harvard Journal of Law and Gender* 569, 571. See also *Morgenthaler* v *The Queen* [1988] 1 SCR 30, 172 per Wilson LJ.
40 Joanne Conaghan and Katie Cruz, 'For Women? Sex in the Supreme Court' (2025) 14 *feminists@law*.
41 Khaitan, n 13 above, 31.
42 *ibid*, 30.

as 'personal identity does not always translate into relative group disadvantage'.[43] Khaitan explains with the example of fandom of British football clubs which, although it provides a great sense of personal identity, is still not a source of abiding, pervasive, or substantive relative disadvantage.[44] He concludes that, 'the fact that British discrimination law is unlikely to prohibit discrimination on the basis of fandom of football clubs any time soon gives us reasons to think that it is relative group disadvantage rather than personal identity which is central to discrimination law.'[45]

Sophia Moreau agrees. For Moreau, grounds in equality law are those characteristics which are 'normatively extraneous' to how we choose to live our lives but descriptively relevant in the disadvantage they signify. A person's sex, she explains,

> is often a trait that they regard as fundamental to their identity. But it is fundamental in the rather different sense that it determines certain aspects of their appearance and certain of their physical capacities, and it does so regardless of *whether they wish it to or not*, and regardless of *whether they would choose to be of that gender*. And it seems important to protect us from the costs of being of one sex rather than another in part because this trait is unchosen.[46]

Moreau's explanation makes clear that sex matters in equality law not because it can or cannot be changed, but because there are costs (or disadvantages) attached to being of one sex as opposed to another – costs which equality law seeks to insulate people from.[47]

Likewise, in his canonical account, John Gardner insists on the link between grounds and 'the familiar liberal ideal of an autonomous life'.[48] His account is instructive in understanding grounds such as sex, sex characteristics, gender, sexuality, gender reassignment, gender identity and gender expression. Depending on different people in different contexts, sex, sex characteristics, gender, sexuality, gender reassignment, gender identity and gender expression, may be defined as either immutable or by choice or lack thereof. Per Gardner's account, this does not matter in equality law. What matters is to protect such grounds from discrimination because these grounds can be the basis of disadvantage of a particular kind: of denying people an autonomous life.

In a similar vein, Robert Post argues for the protection of both immutable as well as other traits and attributes which are considered as 'somehow essential or integral to a person'.[49] The purpose of equality law, he notes, is 'to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.'[50] Likewise, Cass Sunstein,

43 *ibid*, 32.
44 *ibid*, 32.
45 *ibid*.
46 Sophia Moreau, 'What is Discrimination?' (2010) 38 *Philosophy and Public Affairs* 143, 156 (emphasis added).
47 See Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford: OUP, 2020).
48 Gardner, n 13 above, 170-171.
49 Robert C. Post, 'Prejudicial Appearances: The Logic of American Antidiscrimination Law' (2000) *Faculty Scholarship Series* Paper 192.
50 *ibid*.

proposes that 'the controlling principle' in equality law should be the 'anticaste principle' of no group being 'made into second-class citizens.'[51] He suggests that 'instead of asking "Are blacks or women similarly situated to whites or men, and if so have they been treated differently?" we should ask "Does the law or practice in question contribute to the maintenance of second-class citizenship, or lower-caste status, for blacks or women?"'[52] Importantly, he explains that second-class status arises not from 'social or biological difference' or 'nature' but from a 'broad and eclectic' set of 'social and legal practices' which lead to systemic disadvantage.[53] Owen Fiss too clarifies that equality law protects 'specially disadvantaged groups' which '*can* be defined in terms of characteristics that do *not* have biological roots and that are *not* immutable'.[54] Ultimately, what matters to equality law is not the nature of characteristics per se; but the nature of disadvantage suffered by members of groups defined by those characteristics in social, economic, material, cultural, political and psychological sense.[55]

The US Supreme Court recently embraced this functional approach to grounds in *Bostock* v *Clayton Country, Georgia*[56] (*Bostock*). The majority found that employment discrimination 'simply for being homosexual or transgender' constituted sex discrimination under Title VII of the Civil Rights Act 1964. The defendants had argued that 'it should make a difference that plaintiffs would likely respond in conversation that they were fired for being gay or transgender and not because of sex'.[57] The majority rejected this and instead held that 'conversational conventions do not control Title VII's legal analysis, which asks simply whether sex is a but-for cause'.[58] The majority thus held that it did not matter that discrimination against homosexual or transgender persons was not explicitly covered under Title VII because such discrimination was 'necessarily' based on sex 'in part' and hence constituted sex discrimination.[59]

Importantly, writing for the majority, Gorsuch J did not decide whether sex as a ground in Title VII signified biology but instead proceeded on the assumption that it did. He quickly followed with, 'Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it.'[60] What Title VII said about sex, Gorsuch J explained, was that discrimination was prohibited when it was 'because of' sex.[61] This signified a but-for test of causation where sex was part of the discriminator's reasoning such that discrimination would not have occurred but-for the sex of the plaintiff even if other factors were also present in the discriminator's reasoning.[62] Crucially, to pass the but-for test, the discriminator's reliance on sex did not need to be reliance on the

51 Cass R. Sunstein, 'The Anticaste Principle' (1994) 92 *Michigan Law Review* 2410, 2429.
52 *ibid*.
53 *ibid*, 2430.
54 Owen M. Fiss, 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107, 155 (emphasis added).
55 *ibid*, 147-156.
56 590 US 644 (2020).
57 *ibid*, 646.
58 *ibid*, 666.
59 *ibid*, 667.
60 *ibid*, 656.
61 *ibid*.
62 *ibid*, 655-659.

biological features of sex but what sex signified and how it became the basis of disadvantage for some and not others.[63] This was made particularly clear in the examples Gorsuch J brought up to show what sex discrimination looks like: higher pension contributions for women;[64] burden of motherhood;[65] and sexual harassment.[66] None of these, Gorsuch J explained, turned on sex solely in a biological sense.[67] They were also not, admitted Gorsuch J, specifically envisaged by the Congress when enacting Title VII.[68] Yet, Gorsuch J emphasised, 'as enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.'[69] Thus, even when Gorsuch J operated from the assumption that sex signified biology, he was clear that nothing turned on that in the context of equality law. What mattered was the function sex *as a ground* played in being the basis of disadvantage or discrimination rather than what sex *is*.

Indeed, this was the position adopted by the Court of Justice of the European Union (CJEU) in its landmark decision *P* v *S and Cornwall County Council*[70] almost two decades ago. The case concerned a trans woman in the UK who argued that her treatment on grounds of her gender reassignment constituted sex discrimination under the Equal Treatment Directive 76/207/EEC. In upholding her claim, the CJEU was unencumbered by the absence of gender reassignment as a ground in the Directive. It instead included gender reassignment discrimination within the prohibition of sex discrimination because of the coincidence of the disadvantage both signified.[71] Although this led to the explicit inclusion of the ground of gender reassignment in UK equality law, the implication of the CJEU's judgment was that such explicit inclusion was not needed – that gender reassignment was covered by the ground of sex given the overlapping nature of disadvantage between them.

This has been the position of British judges too, especially under the Human Rights Act 1998 (which gives effect to the European Convention on Human Rights 1950): grounds are grounds because they often serve as the basis of disadvantage for people when they should be normatively irrelevant to people's life choices and outcomes. In Lady Hale's words in *Ghaidan* v *Godin-Mendoza*:[72]

> It is not so very long ago in this country that people might be refused access to a so-called 'public' bar because of their sex or the colour of their skin; that a woman might automatically be paid three quarters of what a man was paid for doing exactly the same job; that a landlady offering rooms to let might lawfully put a 'no blacks' notice in her window. We now realise that this was wrong. It was wrong because

63 *ibid*, 660.
64 *ibid*, 663.
65 *ibid*, 668.
66 *ibid*, 664.
67 cf *ibid*, 719 per Alito J, dissenting.
68 *ibid*, 670.
69 *ibid*.
70 Case C-13/94 *P* v *S and Cornwall County Council* ECLI:EU:C:1996:170 (*P* v *S*).
71 *ibid* at [20]-[21]. See also Case C-117/01 *KB* v *National Health Service Pensions Agency* ECLI:EU:C:2003:332; Case C-423/04 *Richards* v *Secretary of State for Work and Pensions* ECLI:EU:C:2006:256.
72 [2004] UKHL 30.

> the sex or colour of the person was *simply irrelevant* to the choice which was being made … it was wrong because it was based on an *irrelevant characteristic* which the woman or the black *did not choose and could do nothing about*.[73]

Following similar logic, in *Al Serbia* v *Secretary of State for the Home Department*,[74] Lady Hale found that being without a family could be a ground of discrimination because even though 'being without a family may not be immutable, like sex and race, [sic] it is something over which the young person has no control.'[75]

This case law is revealing even though it is not in the context of the Equality Act 2010. The list of grounds in Article 14 of the European Convention on Human Rights is open ended. It has thus required judicial reflection on the meaning of grounds, in order for new or analogous grounds to be protected from discrimination.[76] This reflection has been muted in the context of the Equality Act 2010 since it is restricted to the grounds enumerated therein as 'protected characteristics'. In rare cases where the courts have considered the meaning of grounds in the Equality Act 2010, they have indeed taken a functional view of grounds, just as under the Human Rights Act 1998.

For example, in *Chandok* v *Tirkey*,[77] the Employment Appeal Tribunal held that although caste was not explicitly recognised under the Equality Act 2010 and in fact lacked a 'formal'[78] or 'single'[79] definition, it fell within the meaning of ethnic origins as a ground protected from discrimination under section 9(1)(c) of the Equality Act 2010.[80] Langstaff P relied on two authorities in making this finding. First, he relied on *Mandla* v *Lee*[81] which had found that Sikhs were protected from discrimination as a distinct ethnic group based on a range of social and cultural variables even though they were 'not biologically distinguishable from other peoples living in the Punjab'.[82] Second, he relied on *R* v *Governing Body of JFS*[83] which had found that discrimination on the basis of matrilineal descent constituted racial discrimination even though 'descent simpliciter [lineage] is not necessarily discrimination on racial grounds'.[84] Both cases had thus rejected a biological meaning to the ground of ethnic origins. Langstaff P relied on them in giving 'a wide and flexible scope to the meaning of "ethnic origins"'[85] to include caste within its ambit under section 9(1)(c) of the Equality Act 2010.

Thus, in the Equality Act 2010 too, while determining the meaning of grounds, the emphasis appears to be on a functional view of grounds – of what grounds could do (serve as the basis of disadvantage) – rather than biology or

73 *ibid* at [130] (emphasis added).
74 [2008] UKHL 42.
75 *ibid* at [32].
76 Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 *Human Rights Law Review* 99.
77 [2015] IRLR 195.
78 *ibid* at [51].
79 *ibid* at [45].
80 *ibid* at [52]-[53].
81 [1983] 2 AC 548.
82 *ibid* 565, 562 (quoting with approval *King-Ansell* v *Police* [1979] 2 NZLR 531, 543).
83 [2010] 2 AC 728.
84 *ibid* at [29] per Phillips LJ.
85 *ibid* at [42].

identity or any other feature of the personal characteristic itself.[86] This is the view that has emerged in the context of the grounds of race and disability – both of which were initially understood as objective/biological categories but over time have been understood functionally as signifying particular forms of disadvantages. There is little reason to think that the general approach to grounds under the Equality Act 2010 would be any different in the context of other grounds. In fact, (i) as no comparable considered reflection on the general approach to grounds existed in sex discrimination cases (until *FWS*), and (ii) as the plain language of section 11 of the Equality Act 2010 does not refer to sex as biology and simply explains sex to include references to men and women,[87] there is good cause to think that neither grounds generally nor sex in particular were meant to be biological. The next section examines the unexpected biological creep in the Equality Act 2010 through the Court's interpretation of sex in *FWS*.

But as this section has shown, no major account of the meaning of grounds, conceptually or doctrinally, seems to attach itself to biology.[88] Rather, grounds are considered *grounds* in equality law in a functional sense for connecting personal characteristics to particular forms of disadvantages or harms that equality law is meant to address. Moreau helpfully sums it up: 'grounds serve heuristic purposes only. They point us in the direction of the kind of wrong that discrimination involves and the kinds of groups that normally suffer from it.'[89]

BIOLOGY

Where does the Court's interpretation of the ground of sex as biology come from in *FWS*?

The Court's approach to understanding sex in the Equality Act 2010 can be gleaned from its general approach to statutory interpretation in *FWS*. The Court set out the general principle of statutory interpretation recognised in previous dicta as to 'identify the meaning borne by the words in question in the particular context'.[90] It cautioned against giving literal interpretation to words in the absence of the context or the purpose of the statute.[91] Despite citing and proclaiming to adopt a purposive approach to statutory interpretation,[92] the Court tried to find a literal meaning of the terms in the context of the statute but not its purpose. In fact, not much was mentioned of the purpose of the Equality Act 2010 in the judgment.

86 Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (Oxford: Hart, 3rd ed, 2023) 3.
87 Equality Act 2010, s 11.
88 cf Michael Foran, 'Defining Sex in Law' (2025) 141 LQR 76 (considers doctrine outside of equality law such as *Corbett* in reaching this conclusion).
89 Sophia Moreau, 'Structural Injustice and Systemic Discrimination' (paper on file with the author).
90 *FWS* n 2 above at [8]-[14]. *R* v *Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 396; *R (O)* v *Secretary of State for the Home Department* [2022] UKSC 3 at [29]-[31].
91 *FWS ibid* at [10]; *R (Quintavalle)* v *Secretary of State for Health* [2003] UKHL13 at [8].
92 *FWS ibid* at [166].

The next section explores how a purposive approach to interpretation would have led to a functional view of sex as set out in the previous section. This section shows that even a literal approach to interpretation would have led to the same but the Court's approach to literal interpretation instead led to a colloquial or lay understanding of sex as biology. The Court's approach was misguided for four reasons: first, its inability to pursue logical or analytical reasoning; second, its reliance on assumptions rather than persuasion; third, its preference for a disjunctive reading of grounds; and fourth, its choice of reasoning through the exceptions rather than the rule.

First, the main consideration which guided the Court's literal interpretation to grounds was to give a meaning which was 'coherent and predictable'[93] or 'clear and predictable'[94] to achieve 'clarity and consistency'.[95] The Court noted that 'clarity and consistency about how to identify the relevant groups that share protected characteristics are essential to the practical operation of the [Equality Act]'.[96] Since the Equality Act 2010 apportioned legal rights and duties, according to the Court, 'it must be possible for sex to be interpreted in a way that is predictable, workable and capable of being consistently understood and applied in practice by this wide range of duty-bearers'.[97]

Not long after the Court pronounced this, the Court turned to consider 'the central question' in the appeal, at paragraph 155, over halfway through the judgment. It noted that although the terms 'biological sex' or 'certificated sex' did not appear in the text of the Equality Act 2010, 'references to sex could only be references to biological sex in [the] context'[98] of the Victims and Witnesses (Scotland) Act 2014 (as amended by the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021) which allowed requests for medical examination by a registered medical practitioner of a sex specified by the person.[99] From this, the Court concluded that 'if the [Equality Act] can only be read coherently to mean biological sex, the same result must follow.'[100]

The logic behind this conclusion is amiss. It is difficult to see how a through-line could be drawn (i) *from* the need for clarity and predictability in statutory interpretation (ii) *to* the interpretation of 'sex' in the Equality Act 2010 to mean 'biological sex' (iii) *because* sex in another statute (which too did not refer to biological sex) could only mean biological sex (iv) *since* it allowed for the co-incidence of the sex of a medical examiner with that of the examinee. The reasoning is disjointed as none of the steps follow those prior in the sequence. The Court's pained efforts at analytical reasoning plainly fail.

Second, to bolster its failed reasoning, the Court relied on the assumption that: 'ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman. These are *assumed to be self-explanatory and to require no further explanation*. Men

93 *ibid* at [2], [5].
94 *ibid* at [12].
95 *ibid* at [154].
96 *ibid*.
97 *ibid* at [152].
98 *ibid* at [158].
99 *ibid* at [159].
100 *ibid* at [160].

and women are *on the face of the definition* only differentiated as a grouping by the biology they share with their group.'[101]

This is the main and the only paragraph dedicated to setting out the meaning of sex as biological sex assigned at birth. In its insistence on the assumption of obviousness of sex as biology, the Court abandons public reasoning and just makes a declaration.[102] The lengthy recital of the provisions of the Equality Act 2010 preceding this declaration seems to have been made to show that it was obvious or commonsensical that sex meant biological sex. The Court recites but does not closely analyse these provisions. For example, it does not consider the relevance of the Equality Act 2010 which in section 7 acknowledges the possibility of 'reassigning the person's sex by changing physiological or other attributes of sex.' It also does not consider the implication of the use of both sex and gender as terms in the Equality Act at different places, ostensibly, interchangeably.[103] The Court also summarily dismissed the GRA 2004 as having any bearing on the meaning of sex under the Equality Act 2010 even though section 9(1) of the GRA 2004 provides that 'where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender', given that section 9(3) of the GRA 2004 provides that 'Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.'[104] Again, this was despite the lengthy recital of the GRA 2004 that preceded the Court's discussion of the 'central question'.[105] The actual analysis of what sex means happens in the two paragraphs of failed analytical reasoning recounted above.[106] Ultimately, the conclusion that sex means biological sex actually seems to flow from the stance assumed in the very opening of the judgment, when on the first page on terminology, the Court adopted the lay or colloquial understanding of sex as biological sex which in turn meant sex assigned at birth, implying both innateness and permanence and testing neither in the course of its reasoning.[107]

Third, the lay assumption that sex is biological sex which in turn is sex assigned at birth, flowed from the Court's disjunctive reading of grounds and in particular its disjunctive reading of the grounds of sex and gender reassignment. This is most apparent in the Court's opening paragraph where it framed *FWS* as an appeal

> directly affect[ing] women and members of the trans community. On the one hand, women have historically suffered from discrimination in our society and since 1975 have been given statutory protection against discrimination on the ground of sex. On the other hand, the trans community is both historically and

101 *ibid* at [171] (emphasis added).
102 John Rawls, 'The Idea of Public Reason' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (Boston, MA: MIT Press, 1997); Robert S. Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification' (1978) 63 *Cornell Law Review* 707.
103 McColgan, n 86 above, 332.
104 *FWS* n 2 above at [156]-[158], [161].
105 *ibid* at [155].
106 *ibid* at [159]-[160].
107 *ibid* at [6].

> currently a vulnerable community which Parliament has more recently sought to protect by statutory provision.[108]

The Court viewed women and trans community as distinct groups owing to the inclusion of the 'distinct and separately protected characteristics in sections 11 and 7' (sex and gender reassignment) of the Equality Act 2010.[109] It did not consider that grounds intersect in reality (even if the Equality Act 2010 does not presently allow a claim of intersectional discrimination under section 14).[110] So, just as the separateness of the grounds of sex and race does not drive a hard wedge between women and Black people such that Black women are considered as belonging to *only* one of the groups; similarly, separate grounds of sex and gender reassignment cannot be considered as driving a hard wedge between women and trans community such that trans women are considered as belonging only to the latter. The logic is as simple as not considering a person who becomes disabled as a disabled person only and as ceasing to have a sex or gender.

But for the Court, because the possibility of changing one's sex or gender is explicitly recognised under the GRA 2004 and also protected from discrimination separately from the ground of sex and through the ground of gender reassignment under the Equality Act 2010, sex and gender reassignment became mutually exclusive.[111] This interpretation seems to be based on the bare fact of separateness of the two grounds but actually diverges from the very principle from which separate grounds emerged.

To recall, the ground of gender reassignment came to be included in UK equality law after the CJEU decision in *P* v *S* which had found that discrimination on the basis of gender reassignment was discrimination on the basis of sex. A separate ground of gender reassignment was thus not *needed* to protect the trans community from employment discrimination so long as the ground of sex was present. This was because, much like the later decision of the US Supreme Court in *Bostock*,[112] in *P* v *S*, discrimination on the basis of transgender status was considered at least, in part, to be based on discrimination on the basis of sex.[113] The separate recognition of gender reassignment under the Sex Discrimination (Gender Reassignment) Regulations 1999 made the protection explicit for the first time in the UK. It also extended the scope of protection from employment (Equal Treatment Directive 76/207/EEC) to employment, education, and the provision of goods, facilities and services (Sex Discrimination Act 1975). But the separate recognition of gender reassignment did not extinguish the overlap between sex and transgender status. In fact, it could not, because the overlap was not based on biology but on a functional view of the shared experience of discrimination based on these grounds. The Court in *FWS* however did extinguish this overlap mistakenly through its disjunctive reading of the grounds of sex and gender reassignment. For the Court, gender reassign-

108 *ibid* at [1].
109 *ibid* at [167], [199].
110 Equality Act 2010, s 14.
111 *FWS* n 2 above at [198].
112 n 56 above.
113 *P* v *S* n 70 above at [20]-[21].

ment existed 'distinctly from sex, in section 7' of the Equality Act 2010 such that 'there is no conflation of these separate characteristics.'[114]

Fourth, the possibility of an overlap was considered as rendering incoherent the provisions of the Equality Act 2010 which referred to, inter alia – (i) breast-feeding;[115] (ii) pregnancy;[116] (iii) maternity;[117] (iii) single sex spaces;[118] and (iv) women's fair participation in sport,[119] because those provisions were assumed to be workable only if sex meant biological sex and not certificated sex or the sex a person was living in. The Court explained,

> It is significant, however, that there is only one definition of sex. The concept of sex is of foundational importance in the EA 2010. The words sex and woman appear across different parts of the Act and in many sections. It would be surprising if the words sex and woman were intended to have different meanings in different sections or parts of the EA 2010… Indeed, it would offend against the principle of legal certainty and the need for a meaning which is constant and predictable, especially in the context of an Act with the purposes we have identified, and which has such practical everyday consequences for so many individuals and organisations in society.[120]

With this, the Court brushed over the fact that many of the provisions it was referring to were exceptions to the Equality Act 2010 (as opposed to what the Court says in the quote above were the 'the purposes'). The rule to which these exceptions were attached was of sex equality, or the prohibition of discrimination based on sex.[121] Importantly, the exceptions were to be narrowly construed as they were subject to the proportionality requirement.[122]

Instead of reasoning through the rule, the Court reasoned through the exceptions – reversing the canon of statutory interpretation which sees exceptions as narrower and more limited in their application than the general rule or principle.[123] It thus found against the possibility of a 'variable' meaning of sex across the Equality Act 2010 – which, as a vast consolidating act, states the general rule prohibiting sex discrimination, along with justifications,[124] exemptions[125] and exceptions.[126] The Court did not even consider the possibility of a capacious

114 *FWS* n 2 above at [198].
115 *ibid* at [177], [178a]; Equality Act 2010, ss 13(6)(a), 17(4).
116 *FWS ibid* at [177], [178]; Equality Act 2010, ss 17(2),17(3).
117 Equality Act 2010, s 18.
118 *FWS* n 2 above at [210]-[221], [226]-[228]; Equality Act 2010, s 29; Sched 3 [26], [27]; Sched 11 and 12.
119 *FWS ibid* at [232]-[236]; Equality Act 2010, s 195.
120 *FWS ibid* at [175].
121 Equality Act 2010, ss 13, 19.
122 For example, Equality Act 2010, Sched 3 [26], [27], [28]. See Peter Dunne and Alex Sharpe, 'Gym Use and Changing Rooms: The Illegality and Chilling Effect of (Trans)Gender Segregation' *Oxford Human Rights Hub Blog* 28 March 2019 at https://ohrh.law.ox.ac.uk/gym-use-and-changing-rooms-the-illegality-and-chilling-effect-of-transgender-segregation/ [https://perma.cc/ULJ8-K5WY].
123 Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (New York, NY: LexisNexis, 8th ed, 2020) [11.2]. See also Rosalind Dixon, 'Constitutional Carve-outs' (2017) 37 OJLS 276.
124 Equality Act 2010, s 19(2)(d).
125 Equality Act 2010, s 13(6)(b).
126 Equality Act 2010, Sched 3 [28].

meaning of sex (which is not restricted to biology) in the main provisions of the Equality Act 2010 which are, in the first instance, to do with the prohibition of forms of conduct: direct discrimination, indirect discrimination, harassment and victimisation. The Court spent a mere three paragraphs engaging with the rules concerning prohibited conduct based on sex and gender reassignment in Part 2 of the Equality Act.[127] Where it did spend more time reciting the rules, it did so to discuss points otherwise tangential to the appeal: that the Equality Act 2010 affords protection to both individuals and groups, the comparator requirement, and discrimination by perception and association.[128] The lengthy recital of the main provisions of the Equality Act 2010 directly led the Court to conclude that it was important for the Equality Act to have clearly defined grounds and groups for its protections to apply consistently.[129] But an even lengthier consideration of exceptions led the Court to conclude that the exceptions would be rendered 'incoherent and unworkable unless woman and man have their biological meaning.'[130] No reference to the prevailing general understanding of grounds or groups in equality law (as discussed in the previous section) was made in reaching this conclusion. Most importantly, the Court failed to observe that no such strict boundary drawing exercise *defining* grounds or groups was done in the Equality Act 2010 itself which, as an enabling legislation, seeks to protect the widest range of interests.[131]

Purposive interpretation could have made apparent the capacious meaning of sex to include both (i) sex as sex characteristics and (ii) sex as gender and in turn gender identity and expression. The next section considers how the Court's interpretation of sex as biology discards both – and unjustifiably so. But at this stage, it should be clear that the Court's misguided literal interpretation of sex as biology seems to come from nowhere. It does not seem to come from a literal interpretation of the Equality Act 2010, since, first, the Court fails at simple logic or analytical reasoning; second, it relies on assumptions rather than persuasion in its reasoning; third, it prefers a disjunctive reading of the grounds of sex and gender reassignment; and fourth, it reasons through the exceptions rather than the general rule of the prohibition of sex discrimination.

SEX

The problem with the Court's decision in *FWS* which held sex to be biological is not only that it cannot be justified on its own terms, that is, in the context of the literal interpretation adopted in the judgment. As shown above, it cannot be justified against the prevailing general understanding of grounds in equality law – which are deemed to be biological neither in theory nor in practice, but also that it cannot be justified against the purposive interpretation of the ground of sex, which, as this final section shows, in equality law, has always been a capacious ground. Sex as a ground is capacious in at least two senses – as

127 *FWS* n 2 above at [115]-[117].
128 *ibid* at [131]-[150].
129 *ibid* at [151]-[154], [175].
130 *ibid* at [177]-[188].
131 Bob Hepple, *Equality: The Legal Framework* (Oxford: Hart, 2nd ed, 2014).

including all biology-linked sex characteristics; and as including gender, gender identity and gender expression. The Court's interpretation of sex as biological sex assigned at birth unduly narrows the ground of sex to the exclusion of both. Each exclusion is considered in turn below.

First, in trying to protect sex as biological sex assigned at birth, the Court does not actually protect all biology-linked sex characteristics. This oversight in protecting even biology fully is the result of an absence of any discussion on what is meant by biology, or what is meant by biological sex as assigned at birth.[132]

Sex characteristics that can be assigned and recorded at birth are those that can be observed or assumed, that is, external genitalia: '(i) a characteristically female vulva, including the small, visible, external portion of the clitoropenis (or clitoris), inner and outer labia, and vaginal opening and (ii) a characteristically male penis-and-scrotum.'[133] Other sex characteristics – genetic, chromosomal, hormonal and gonadal – are internal, and cannot be observed, assigned and recorded at birth. Those with differences in sex development (DSD or intersex) – for whom sex characteristics do not fall within the assigned 'characteristically female' and 'characteristically male' binary – are often unassigned or misassigned sex at birth.[134] Sex characteristics also evolve throughout the life course of humans and indeed, in the case of transgender people, can be wilfully changed.[135] There is also incredible variation *within* the ordained categories of male and female, so much so as to blur any sharp lines of distinction *between* them.[136] The Court pays scant attention to *actual* biology and the immense complexity of it.[137]

There is a question that arises here as to the legitimacy or appropriateness of courts in making scientific evaluations of the kind made in *FWS*.[138] There

132 Alex Benn, '"Biological Sex" in the UK Supreme Court: Four Problems with For Women Scotland v Scottish Ministers' *Oxford Human Rights Hub Blog* 17 April 2025 at https://ohrh.law.ox.ac.uk/biological-sex-in-the-uk-supreme-court-four-problems-with-for-women-scotland-v-scottish-ministers/ [https://perma.cc/WFG5-SHEK]; Robert Mullins, 'For Women Scotland: Fastening the "Biological" Straitjacket' *UK Constitutional Law Association Blog*, 22 May 2025 at https://ukconstitutionallaw.org/2025/05/22/robert-mullins-for-women-scotland-fastening-the-biological-straitjacket/ [https://perma.cc/NR93-5SXH].

133 Nathan Hodson and others, 'Editorial: Defining and Regulating the Boundaries of Sex and Sexuality' (2019) 27 *Medical Law Review* 541, 544.

134 Julie A. Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York, NY: New York University Press, 2012); Silvan Agius and Christa Tobler, *Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity, and Gender Expression* European Network of Legal Experts in the Non-Discrimination Field, Migration Policy Group (Luxembourg: Office for Official Publications of the European Union, 2012).

135 Sara Hägg and Juulia Jylhävä, 'Sex Differences in Biological Aging with a Focus on Human Studies' (Epidemiology and Global Health, Review article, 13 May 2021) at https://elifesciences.org/articles/63425#abstract [https://perma.cc/SX4U-SUVE]; Noa Ben-Asher, 'The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties' (2006) 29 *Harvard Journal of Law and Gender* 51.

136 Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) MLR 598, 606.

137 Sarah S. Richardson, 'Sexing the X: How the X Became the "Female Chromosome"' (2012) 37 *Signs* 909, 927; Pieter Cannoot and Sarah Ganty, 'Protecting Trans, Non-binary and Intersex Persons Against Discrimination in EU Law' (2022) 1 *European Equality Law Review* 37, 39; Fae Garland and Mitchell Travis, 'Sex is Complicated' (2025) 14 *feminists@law*.

138 Katalin Sulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (Cambridge: CUP, 2020) ch 10; Elizabeth Fisher, 'Sciences, Environmental Laws and Legal

may be a strong objection to the exercise of judicial power for making scientific evaluations. However, if we concede that judges can and often do examine evidence of a scientific nature, the question that remains is the way in which they do so.[139] The argument here is not that the Court in *FWS* could or should not have decided that sex meant biology but that in doing so the Court should have at least explained what *it* meant by biology. In the absence of this explanation, the Court's reliance on *apparent* biology seems to gesture towards science when science requires not gestures but cogent reasons when brought up judicially.[140] In the absence of cogent reasons for adopting a biological definition of sex which is confined to sex as assigned at birth, the Court unduly restricts sex to those sex characteristics which are observed or assumed and hence assigned and recorded at birth rather than the whole range of sex characteristics which cannot be observed, are not normally observed at birth, and continue to evolve over time. No purposive interpretation could have led the Court to adopt a biological meaning of sex as restrictive as it did in *FWS*.

One consequence of this restrictive interpretation is that a situation like that of Olympic winner Caster Semenya, who was discriminated against because of her naturally elevated testosterone levels, would likely not fall within sex discrimination in the UK. In contrast, the Third Section of the European Court of Human Rights, in *Semenya* v *Switzerland*, recognised sex characteristics as a ground analogous to sex under Article 14 of the European Convention on Human Rights.[141] However, the Equality Act 2010 is not open-ended in the same way as Article 14. Semenya's situation would only be covered under the Equality Act 2010 if sex is interpreted to include the full range of biological sex characteristics including those which can be readily observed and those which cannot be observed (such as testosterone). *FWS* forecloses this possibility by interpreting sex selectively as sex characteristics that are observed and assigned at birth.

Second, and perhaps most startlingly, by reducing sex to biological sex assigned at birth, the Court undoes the undisputed understanding of sex as gender that had prevailed in equality law ever since the first sex equality legislation was enacted – the Equal Pay Act in 1970 and the Sex Discrimination Act in 1975; an understanding that was only reinforced by the GRA 2004 and the Equality Act 2010.

Cultures: Fostering Collective Epistemic Responsibility' in Emma Lees and Jorge E. Viñuales, *The Oxford Handbook of Comparative Environmental Law* (Oxford: OUP, 2019) 749; Emily Hammond, 'Scientific Avoidance: Toward More Principled Judicial Review of Legislative Science' (2010) 84 *Indiana Law Journal* 239; Richard B. Katskee, 'Science, Intersubjective Validity, and Judicial Legitimacy' (2008) 73 *Brooklyn Law Review* 857.

139 Thomas D. Albright, 'A Scientist's Take on Scientific Evidence in the Courtroom' (2023) 120 PNAS 1; Leah Trueblood, 'The Science of Accountability: The Role of Reason-Giving When Deferring to Scientific Assessments in Judicial Review' (2025) 30 *Judicial Review* 55; Jessica A. Clarke, 'Sex Assigned at Birth' (2022) 122 *Columbia Law Review* 1822; Mihika Poddar, 'The Legal Fiction of Binary Sex – Interrogating the Relation Between Law, Reality and Science' (manuscript on file with the author).

140 Trueblood, *ibid*, 56.

141 *Semenya* v *Switzerland* Application No 10934/21, Merits, 11 July 2023 (referred to the Grand Chamber which declined to rule on Article 14 and instead only issued a ruling on Article 6 (*Semenya* v *Switzerland* Application No 10934/21, Merits, 10 July 2025)).

The first example of equality legislation – the Equal Pay Act 1970 – was passed on 29 May 1970. The statute was aimed at eliminating pay discrimination between men and women in the workplace. It had little to do with biological sex and everything to do with the disadvantage that accrued to women as opposed to men. In fact, differences between sexes (in biological or another sense) were deemed immaterial in enforcing the principle of equal treatment in pay.[142] While this legislation did not define the terms sex, men or women, it also did not use the words male, female or biological anywhere.

The second example of sex equality legislation – the Sex Discrimination Act 1975 (SDA 1975) was passed on 12 November 1975. During the Standing Committee debates on the Sex Discrimination Bill 1975, David Lane asked whether the government were sure that the proposed legislation 'adequately and clearly covers the cases of sex change, which we read about occasionally and which we should hate to be overlooked in such a comprehensive Bill?' Shirley Summerskill, the Under-Secretary of State for the Home Department, replied, 'We considered this. Clearly people who have legally changed sex will be covered by the Bill, under whatever sex they have legally changed to'.[143] Thus, even at the time of the passage of the SDA 1975, sex was not considered innate or permanent, or as biological sex assigned at birth.

Writing about the passage of the SDA 1975, David Pannick, in what may be regarded as the first monograph on sex discrimination law in the UK, explained away the biological basis of sex by stating that 'sex is no more accurate an indicator of physical attributes than social factors, such as class and occupation'.[144] He quoted from the 1974 White Paper *Equality for Women* which paved way for the SDA 1975, which had found that there was 'insufficient recognition that the variations of character and ability within each sex are greater and more significant than the differences between the sexes'.[145] Pannick was unequivocal that, 'biological differences between the sexes play a less important part in the development of social roles than the differences of gender … these roles are primarily the consequences of social or cultural, and not biological, characteristics'.[146]

Early case law under the SDA 1975 which had referred to 'natural differences of sex'[147] was 'soon renounced'[148] in favour of applying the 'simple words of the statute'.[149] The simple words of the SDA 1975 were to do not with sex's biological meaning but with sex *as a ground* for serving as 'the activating cause'[150]

142 Equal Pay Act 1970, s 2(6).
143 HC Standing Committee B cols 102-103 24 April 1975, quoted in 'Written evidence submitted by Professor Zoë Playdon to the transgender equality inquiry' at https://committees.parliament.uk/writtenevidence/57319/html/#_edn40 at [31]. See David Pannick, *Sex Discrimination Law* (Oxford: OUP, 1985) 208.
144 *ibid*, 31.
145 *ibid*.
146 *ibid*, 15.
147 *Peake* v *Automotive Products Ltd* [1977] ICR 968, 973.
148 Pannick, n 143 above, 29. See *Minister of Defence* v *Jeremiah* [1980] ICR 13 and *Gill* v *El Vino Co Ltd* [1983] QB 425.
149 Pannick, *ibid*, 33.
150 *ibid*, 34.

of discrimination.[151] Thus, it was the reliance on 'generalised assumptions'[152] about sex rather than biology which was considered the subject of sex discrimination law. As the Employment Appeal tribunal explained in a 1982 case,

> the reason for the discrimination was a generalised assumption that people of a particular sex … possess or lack certain characteristics, e.g. 'I like women but I will not employ them because they are unreliable' … Most discrimination flows from generalised assumptions of this kind and not from a simple prejudice dependent *solely on the sex* … the reason for the discriminatory treatment was simply an assumption that women … possessed or lacked particular characteristics and *not that they were just women*.

Sex was thus what it signified: gender. This explains the coverage of both direct and indirect forms of discrimination in the SDA 1975, for the first time in the UK. Direct discrimination tackled the plain reliance on sex-based or gendered assumptions (such as excluding women from employment because they were considered weak or belonging at home). Indirect discrimination tackled the disparate impact of gendered assumptions (such as excluding from employment all young people which disproportionately impacted childbearing women or all people of average height which disproportionately impacts women as compared to men; or excluding part-time workers from employment benefits which disproportionately impacts women who constitute a vast majority of the part-time workforce).

Writing a few years after Pannick, Katherine O'Donovan and Erika Szyszczak in their monograph *Equality and Sex Discrimination Law* confirmed that the SDA 1975, 'by making less favourable treatment on grounds of sex illegal, attempt[ed] to undo the social world' where 'social construction of biology', had placed women and men in 'separate and opposite categories' and made it difficult for transgender people to change sex.[153] They considered the SDA 1975's reliance on the male-female binary as rather 'ironic' and limiting in achieving sex equality.[154] O'Donovan and Szyszczak thus critiqued the SDA 1975's apparent reliance on binaries and biological determinism; and also engaged with the possibility of it being purposively interpreted to subvert both.[155]

Realising this possibility was actually crucial for addressing discrimination associated with biology.[156] For example, it was only when women's sex or biology began to be considered not as fated or destined but in fact actively gendered or subjected to disadvantage, that pregnancy discrimination began to be covered under the SDA 1975.[157] It is thus important to appreciate that even pregnancy

151 *Skyrail Oceanic Ltd* v *Coleman* [1981] ICR 864; *R* v *Entry Clearance Officer, Bombay ex parte Amin* [1983] 2 AC 818.
152 *Horsey* v *Dyfed CC* [1982] ICR 755.
153 Katherine O'Donovan and Erika Szyszczak, *Equality and Sex Discrimination Law* (Oxford: Basil Blackwell, 1988) 41.
154 *ibid*, 40.
155 Katherine O'Donovan, 'Transexual Troubles: The Discrepancy Between Legal and Social Categories' in Susan Edwards (ed), *Gender, Sex, and the Law* (London: Croom Helm, 1985); Fredman, n 23 above, 53.
156 *Turley* v *Allders Department Stores* [1980] ICR 66.
157 *Hayes* v *Malleable Working Men's Club and Institute* [1985] ICR 703.

discrimination was covered as sex discrimination not *only* for its biological aspects.

These developments contributed to the adoption of an 'objective and causal test of liability'[158] under the SDA 1975 which depended neither on the biology of the discriminatee nor on the animus of the discriminator but on 'the adoption of a gender-based criterion'[159] by the discriminator. This was the ratio in *James* v *Eastleigh*, which is arguably the most significant decision on the meaning of sex discrimination (or direct discrimination specifically) in the UK. This meaning was firmly fixed as to do with the use of sex as a ground in the discriminator's reasoning rather than the essential nature of sex per se.[160]

Thus, the case law under the SDA 1975 went on to address sex discrimination related not only to women's biology or reproduction[161] (pregnancy, maternal health etc) but also women's unequal status in relation to their social interests[162] (marriage, adoption, childcare etc), political interests[163] (elections, participation, consultation etc), economic interests[164] (pay, pensions, ownership etc) and material interests[165] (harassment, security, privacy etc).[166]

It appears then that sex 'almost always meant gender, actually'.[167] This was so in the 1974 White Paper which made the case for sex discrimination law in the UK. It was so under the SDA 1975 and the ensuing case law.

Nothing in the subsequent and current legislation, like the GRA 2004 and the Equality Act 2010, their drafting history, text or case law under them, indicates that *this* was meant to change. There were plentiful other changes that were brought forth by the GRA 2004 and the Equality Act 2010 but sex was not meant to be divorced from gender in the sense that it was to be considered biological and as assigned at birth.[168] In fact, the GRA 2004 extended the SDA 1975 to cover not only gender but also gender identity as an independent ground or protected characteristic.[169] The Equality Act 2010 followed suit in section 7 and acknowledged the possibility of 'reassigning the person's sex by

158 Nicholas Bamforth, 'The Changing Concept of Sex Discrimination' (1993) 56 MLR 872, 874.
159 *James* v *Eastleigh BC* [1990] 2 AC 751, 771.
160 J. M. Finnis, 'Directly Discriminatory Decisions: A Missed Opportunity' (2010) 126 LQR 491, 496.
161 *Webb* v *Emo Air Cargo (UK) Ltd* [1992] UKHL J1126-1; *Clayton* v *Vigers* (1990) IRLR 1; *Page* v *Freight Hire (Tank Haulage Ltd* (1981) IRLR 13; *George* v *Beecham Group Ltd* (1977) IRLR 43.
162 Sex Discrimination Act 1975, pmbl.
163 Sex Discrimination (Election Candidates) Act 2001 which amended the Sex Discrimination Act 1975.
164 *Lewen* v *Denda* [2000] IRLR 67.
165 *Burton* v *De Vere Hotels Ltd* [1996] IRLR 596; *Equal Opportunities Commission* v *Secretary of State for Trade and Industry* [2007] IRLR 327.
166 Christine Forster and Vedna Jivan, 'Sex as a Protected Ground in International and Domestic Law' (2020) 4 *Comparative Discrimination Law* 1.
167 Catharine A. MacKinnon, 'A Feminist Defense of Transgender Sex Equality Rights' (2023) 34 *Yale Journal of Law and Feminism* 88, 89. See also Stefano Osella, *Gender Diversity in Public Law, The Challenges Ahead* (Oxford: OUP, 2026).
168 Stephen Whittle and Lewis Turner, '"Sex Changes"? Paradigm Shifts in "Sex" and "Gender" Following the Gender Recognition Act?' (2007) 12 *Sociological Research Online* 75; Paddy McQueen, 'Feminist and Trans Perspectives on Identity and the UK Gender Recognition Act' (2016) 18 *British Journal of Politics and International Relations* 671.
169 See 'Gender Recognition Bill, Explanatory Notes' HL Bill 4, House of Lords, 27 November 2003, at https://publications.parliament.uk/pa/ld200304/ldbills/004/en/04004x–.htm at [27].

changing physiological or other attributes of sex.' The Equality Act 2010, in recognising the ground of gender reassignment, had thus plainly rejected the idea that sex was biological alone, innate and permanently fixed at birth; and along with the GRA 2004, confirmed that sex as a ground protected gender including gender identity and gender expression. Though, as this article has shown, this was not even excluded from the SDA 1975.

So, when the Equality Act 2010 came into force, it was understood that 'although the [Equality Act] only mentions the protected characteristic of sex, rather than gender, sex discrimination legislation ha[d] long "read in" gender discrimination.'[170] Sex as gender was thus not moot when the Equality Act 2010 came into force. So much so that in the *Blackstone's Guide to the Equality Act 2010*, Razia Karim, devoted the following two sentences to the section titled 'meaning of sex': 'The provision [section 11 of the Equality Act] makes clear that the protected characteristic of sex applies to both men and women of any age and so includes boys and girls. It also means that women can share this characteristic with other women and men with other men'.[171] These sentences merely iterated the position in the Equality Act 2010 which in turn showed (i) an intersectional understanding of sex combined with age; and (ii) the formation of the groups of women and men based on sex. No reference to biological sex at birth was made in explaining the 'meaning of sex'.

Where sex is read as biological sex in the Equality Act 2010, such as in Karon Monaghan's 2013 commentary on equality law,[172] it is clearly acknowledged as an *assumption* and not an undisputed interpretation of the Equality Act 2010. As Monaghan says, 'sex [in the Equality Act 2010] is to be determined by reference to certain biological characteristics … These are *assumed* to be self-explanatory and require no further definition or explication.'[173] Indeed Monaghan is quick to turn to criticising this reading of the Equality Act 2010.[174]

Likewise, Bob Hepple, in his commentary on the Equality Act 2010 noted that,

> for most legal purposes … it is the biological difference that is critical … The [Equality Act 2010] has followed earlier legislation by identifying a range of differences – sex, gender reassignment, marriage and civil partnership, pregnancy and maternity, and sexual orientation – rather than developing a concept of socially constructed gender … However, it must be recognised that the law's focus on the biological differences between men and women can be an obstacle to the achievement of full equality in practice.[175]

Hepple too lands on the view that sex as biology is obstructive to equality, by first assuming and then critiquing the adoption of sex as biology in the Equality

170 Sharon Cowan and others, 'Sex and Gender Equality Law and Policy: A Response to Murray, Hunter Blackburn and Mackenzie' (2021) 30 *Scottish Affairs* 74, 79.
171 Anthony Robinson, David Ruebain and Susie Uppal (eds), *Blackstone's Guide to the Equality Act 2010* (Oxford: OUP, 4th ed, 2021) 31.
172 Karon Monaghan, *Monaghan on Equality Law* (Oxford: OUP, 2nd ed, 2013) [5.280].
173 *ibid* (emphasis added).
174 *ibid* at [5.290].
175 Hepple, n 131 above, 58.

Act 2010. As this article has shown, there are good reasons to doubt this initial assumption given the drafting history, text and case law of sex discrimination law. But more importantly, this assumption rests not on an understanding of equality law but the quotidian difference drawn between sex and gender where sex is seen as biology (male/female) and gender as its sociology (man/woman). Casual reliance on this leads to sex *being* biology and then only later *becoming* gender. It is nothing but a misreading, perhaps, of Simone de Beauvoir's famed observation that 'one is not born, but rather becomes, a woman'.[176]

The problem with this 'becoming' gendered narrative (where sex is considered biology first and then later as what becomes gender) is that it relies on a pre-discursive understanding of sex as preordained and gender as obtained.[177] This is a colloquialism at least from the perspective of equality law because grounds in equality law are not pre-discursive and are actually *constituted* (or rather, reconstituted from personal characteristics) for the purposes of equality law. As the development of sex discrimination law shows, sex as a ground is constantly being constituted, as opposed to *being* biology and then *becoming* gender. Attention to the impossibility of a pre-discursive understanding of grounds in equality law punctures the assumption of sex as biological at all and prevents a circuitous route to critiquing that assumption.

A final point about the scope of sex as gender helps reinforce this. The moment the Equality Act 2010 explains sex as referring to men and women (section 11(a)) which in turn means males and females (section 212(1)), the Equality Act 2010 is perforce binarising sex and cissexing sex respectively. That is, the vast differences in biology-linked sex characteristics are being positively demarcated into two, and then fixed as that observed or assumed at birth. There are two implications of this.

First, this demarcation itself is gendered as it is about meaning-giving to the category of sex – even if that meaning is considered biological or scientific. Because there is no automatic translation of science into a statute like the Equality Act 2010[178] – any rendition of science or otherwise in the Equality Act 2010 is inevitably *constituted*, and in the case of sex, is a *gendered constitution*.[179] Thus, no interpretation of sex can be exclusive of gender in the Equality Act 2010.

Second, in this exercise of gendering, the Equality Act 2010 opens up sex for being gendered expansively, capable of accommodating all diversity within it.[180]

176 Simone de Beauvoir, *The Second Sex* (New York, NY: Vintage Books, 1973) 301.

177 Judith Butler, 'Sex and Gender in Simone de Beauvoir's Second Sex' (1986) 72 *Yale French Studies* 35, 39. See also Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (New York, NY: Routledge, 1993); Michel Foucault, *The History of Sexuality* vol 1 (London: Bantam, 1979); Monique Wittig, 'One is Not Born a Woman' in Monique Witting, *The Straight Mind and Other Essays* (Boston, MA: Beacon Press, 1981); Ásta Kristjana Sveinsdóttir, 'Metaphysics of Sex and Gender' in Charlotte Witt (ed), *Feminist Metaphysics* (New York, NY: Springer, 2010).

178 Claire Ainsworth, 'Sex Redefined' (2015) 518 *Nature* 288, 291.

179 Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?' (2020) 83 MLR 539, 540; Judith Butler, *Gender Trouble* (New York, NY: Routledge, 2006) 9-11; Joan W. Scott, 'The Uses and Abuses of Gender' (2013) 1 *Tijdschrift voor Genderstudies* 63, 66; Sophie Lewis, *Enemy Feminisms: TERFS, Policewomen and Girlbosses Against Liberation* (Chicago, IL: Haymarket, 2025) 263-265. See also Emma Heaney, *Feminism Against Cissness* (Durham, NC: Duke University Press, 2024).

180 Fredman, n 24 above, 54. See also Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex", "Gender", and "Sexual Orientation" in Euro-American Law

Sex as gender can include gender as experienced by the person (gender identity) – something that is experienced by all persons and not only those whose gender does not conform to that assigned at birth (transgender people).[181] Gender can include the expression of gender (gender expression or gender performance) in what we wear, how we behave, what we choose to do with our lives etc.[182]

Even though the Equality Act 2010 limits references to sex to references to men and women (section 11(a)) which in turn mean references to males and females (section 212(1)) – it does not limit these categories from being interpreted widely and critically to protect the diversity or range of sex characteristics, gender, gender identity and gender expression or performance that *constitute* these categories.[183] This process of constitution of grounds, and their eventual legal interpretation, is in no way limited by the legislation.

This history of development of sex discrimination law in particular and equality law more broadly was however missed by the Court in *FWS*. Its own conclusions were drawn not from the references above but from the sources which were not principally about either the meaning of grounds in equality law or the meaning of sex as a ground in equality law.[184] Yet, the Court's conclusions were categorical:

> First, there can be no doubt that Parliament intended that the words 'man' and 'woman' in the SDA 1975 would refer to biological sex – the trans community of course existed at the time but their recognition and protection did not.[185]
>
> The 1999 Regulations did not amend the definitions of 'man' and 'woman' in the SDA 1975.[186]
>
> Before the enactment of the GRA 2004 there is no doubt that references to sex, man and woman in the SDA 1975 were references to biological sex.[187]
>
> There is no reason to suppose that Parliament intended, by the EA 2010, to introduce a change of substance from the SDA 1975.[188]

This section has shown that these conclusions are not licit in light of the context and purpose of the prevailing equality law under the Equality Act 2010. Despite the Court's insistence on referring to 'the wider context and purpose'[189] of

and Society' (1995) 83 *California Law Review* 1, 346-362. See also Susan Stryker, *The Transgender History* (Berkeley, CA: Seal Press 2008); Nikki Sullivan, *A Critical Introduction to Queer Theory* (New York, NY: New York University Press, 2003).

181 See *Chief Constable of West Yorkshire* v *A (No 2)* [2004] UKHL 21 at [56].

182 Butler, n 179 above, ch 1; Judith Butler, 'Gender as Performance: An Interview with Judith Butler' (1994) 67 *Radical Philosophy* 32.

183 Nicola Lacey, 'Legislation against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411; Lara Stemple, 'Human Rights, Sex, and Gender: Limits in Theory and Practice' (2011) 31 *Pace Law Review* 824.

184 See text to n 36 above.

185 *FWS* n 2 above at [51].

186 *ibid* at [62].

187 *ibid* at [162].

188 *ibid* at [164].

189 *ibid* at [166].

the Equality Act 2010, actual references to sources illuminating the context and purpose are sparse. Instead, lengthy recitation of the legal provisions of the Equality Act 2010 was preferred, which, as the previous section argued, also failed to be interpreted in light of their plain and literal meaning in the context of an enabling statute.

CONCLUSION

This article has explained that grounds in equality law are functional in nature. Grounds signify a wide range of disadvantages that attach to people because of their personal characteristics rather than any essential truth about the personal characteristics in an objective sense.

In particular, the ground of sex, has operated in equality law to protect individuals from discrimination based on their sex characteristics and gender, both. Importantly, neither grounds generally, nor sex specifically, has been about biology alone. This has been the position in both theory and doctrine. The Court's decision in *FWS* changed this in a fundamental but inexplicable way. In finding that sex means biological sex assigned at birth in the Equality Act 2010, the Court altered and narrowed the meaning of sex as it has existed as a ground of discrimination since the advent of equality law in the UK.

The decision will have a severe impact on transgender, gender fluid, gender non-conforming, polygender, genderqueer and people with differences in sex development (DSD or intersex).[190] This impact exceeds the remit of equality law and raises human rights and democratic concerns.[191] It makes sense then, that much of the controversy surrounding *FWS* and the wider anti-gender discourse has not been framed as being a dispute about equality law per se.[192]

Yet the controversy has played out on the turf of equality law which had unsurprisingly, by design, steered clear from essentialist definitions – or definitions per se – of grounds.[193] In not 'defining' grounds and in particular grounds such as sex, the Equality Act 2010 had characteristically left open its remit of protection. As an enabling statute which protects people from discrimination, this approach is reasonable because it allows a wide range of disadvantages associated with people's personal characteristics to be understood and addressed via

190 Jessica A. Clarke, 'They, Them, and Theirs' (2018) 132 *Harvard Law Review* 894.

191 See Judith Butler, *Who's Afraid of Gender?* (London: Penguin, 2024); Ruth Rubio-Marín, 'Anti-Gender Constitutionalism' (2025) 21 *European Constitutional Law Review* 37; Mara Malagodi and Elettra Stradella, 'Conceptualising the Link between Constitutional Degradation and Gender Populism' (2025) 21 *European Constitutional Law Review* 8; Silvia Suteu, 'The Rule of Law Crisis Was Always Gendered: The Anti-Gender Playbook in Europe' (2025) 21 *European Constitutional Law Review* 58.

192 Flora Renz, *Gender Recognition and the Law: Troubling Transgender Peoples' Engagement with Legal Regulation* (Abingdon: Routledge, 2024); Sandra Duffy, 'Postcolonial Dynamics in Pro- and Anti-Trans Activism in the United Kingdom and Ireland' (2023) 12 *feminists@law*; Davina Cooper, 'A Very Binary Drama: The Conceptual Struggle for Gender's Future' (2019) 9 *feminists @law*.

193 Alex Sharpe, 'Review Essay: Judith Butler, Who's Afraid of Gender?' (London: Allen Lane, 2024) (2024) 35 *Law and Critique* 653, 662.

an otherwise finite list of grounds or 'protected characteristics' in the Equality Act 2010. *FWS* has undone this understanding.

Unless the Court comes to reassess this question in the future, only parliament can revert equality law to its prior understanding. Given that parliament is sovereign in the UK, it may also be the most appropriate site for restoring this most fundamental understanding in the field of equality law. Just as the current government is considering a reform of the Equality Act 2010 on a range of issues,[194] it may be expedient for it to also consider an amendment to the Equality Act 2010 which not only reverts the narrowed scope of sex but does so unambiguously. This would be in line with what the Labour Prime Minister, Keir Starmer (an equality and human rights lawyer himself) had maintained before the UKSC's decision in *FWS*: that transwomen *are* women (that is, sex is *not* biological sex).[195] Taking a cue from section 9(1), titled 'race', which provides that race 'includes' a list of four non-exhaustive grounds – colour, nationality, ethnic or national origins, section 11, titled 'sex', could be amended to provide that sex 'includes' a list of non-exhaustive grounds – sex characteristics, gender, gender identity, gender expression and gender performance.[196] This would be an important reset not only for sex discrimination law but all equality law for conceiving grounds in a functional and not a biological sense.

194 Office for Equality and Opportunity, The Rt Hon Baroness Smith of Malvern, Seema Malhotra MP, Lord Collins of Highbury, Dame Nia Griffith DBE MP, The Rt Hon Bridget Phillipson MP and The Rt Hon Sir Stephen Timms MP, 'Equality Law Call for Evidence' (Gov.uk, Equality, rights and citizenship, 7 April 2025) at https://www.gov.uk/government/calls-for-evidence/equality-law-call-for-evidence [https://perma.cc/SLU3-W5WU]; Labour Party, 'Labour Party Manifesto 2024: Our Plan to Change Britain' (13 June 2024) at https://labour.org.uk/updates/stories/labour-manifesto-2024-sign-up/ [https://perma.cc/6Q92-CV7Z].

195 HC Deb vol 765 col 945 22 April 2025.

196 See CEDAW Committee, General Recommendation No 27 on Older Women and the Protection of Human Rights, UN Doc CEDAW/C/GC/27 (16 December 2010) at [13]; CEDAW Committee, General Recommendation No 28 on Core Obligations of States Parties under Article 2, UN Doc CEDAW/C/GC/28 (16 December 2010) at [18]; CEDAW Committee, General Recommendation 32 on gender related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc CEDAW/C/GC/32 (14 November 2014) at [6], [16], [32]; CEDAW Committee, General Recommendation No 33 on Women's Access to Justice, UN Doc CEDAW/C/GC/33 (3 August 2015) at [8], [49]; CEDAW Committee, General Recommendation No 35 on gender-based violence against women, updating General Recommendation 19, UN Doc CEDAW/C/GC/35 (26 July 2017) at [12], [31]. See also Flora Renz and Davina Cooper, 'Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?' (2022) 30 *Feminist Legal Studies* 129.