

A Feminist Defense of Transgender Sex Equality Rights

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An emerging direction in sex equality law—one I have taught and sought for decades for both sexual orientation and transgender rights—is that discrimination against trans people is discrimination on the basis of sex, that is gender, the social meaning of sex. The *Bostock* decision¹ recently recognized the simplest version of the argument.

This recognition does not, contrary to allegations of anti-trans self-identified feminists,² endanger women or feminism, including what some in this group call “women’s sex-based rights.”³ To begin with, women—in the United States anyway—do not have “sex-based rights” in the affirmative sense some in this group seem to think. We do have (precious few) negative rights to be free from discrimination on the basis of sex—which has almost

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¹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (finding “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

² My understanding of this position is informed by long-term direct engagement with its exponents. A burgeoning literature begins with JANICE RAYMOND, *THE TRANSEXUAL EMPIRE* (1994) and more recently includes, among many others, JANICE RAYMOND, *DOUBLETHINK: A FEMINIST CHALLENGE TO TRANSGENDERISM* (2021); SHEILA JEFFREYS, *GENDER HURTS: A FEMINIST ANALYSIS OF THE POLITICS OF TRANSGENDERISM* (2014); HOLLY LAWFORD-SMITH, *GENDER-CRITICAL FEMINISM* (2022); Julie Bindel, *Lesbians are being erased by transgender activists*, *THE SPECTATOR* (UK) (June 29, 2021), <https://www.spectator.co.uk/article/lesbians-are-being-erased-by-transgender-activists> [<https://perma.cc/5ST3-YR5P>].

³ See Brief for Women’s Human Rights Campaign-USA as Amici Curiae Supporting Defendants-Appellants and Intervenors at 2, *Hecox v. Little*, No. 20-35813 (9th Cir. Nov. 19, 2020), 2020 WL 7029420; see also Complaint, *Chandler v. Cal. Dep’t of Corr. & Rehab.*, No. 1:21-CV-01657 (E.D. Cal. Nov. 17, 2021) (applying the concept of women’s sex based rights to trans-inclusive policies in California prisons); LAWFORD-SMITH, *supra* note 2, at 15-16, 158-59 (advocating “the continued protection of women’s sex-based rights in the face of attempts by some feminists to replace sex with gender identity”). Nobody to my knowledge anywhere advocates replacing the term “sex” in discrimination laws with the term “gender identity.”

always meant gender, actually⁴—and so do men.⁵ If this invented term means a right to single-sex education for women, as against co-education, it has been on the thinnest possible legal ice for decades under the hegemony of gender neutrality. It may be that women’s schools continue to exist largely because no case challenging them has reached the Supreme Court in a very long time.⁶ I support women’s colleges and am glad to see them admitting anyone who identifies as a woman and graduating anyone they admit (some girls become boys these days). But the weight of sex discrimination law, built to be gender neutral since Ruth Bader Ginsburg’s early cases, leans strongly against the constitutionality of women’s schools (and HBCUs under colorblindness), public or private.⁷

A similar legal situation exists for women’s prisons. Incarcerated women have no “sex-based rights” to be incarcerated in all-women’s prisons. They are separated by sex for state and police power reasons of security, management, and administration. Women who sexually abuse and kill women and girls are incarcerated in them, together with women who are there for prostitution and credit card fraud and killing their batterers. These are dangerous places. Along with wanted sexual interactions, sexual assault of women by women also occurs in them.⁸ The primary threat to women prisoners remains prison guards, who mainly are men; sexual abuse in prisons is systematic and institutionally normalized.⁹ The dangers incarceration poses for women do not begin with trans women who seek to be housed in women’s facilities, often to prevent being systematically raped in men’s prisons or to be in a less brutal overall environment, if one with far fewer opportunities for work and what is euphemistically termed rehabilitation. Along the same lines, trans women face far more danger of

⁴ See, e.g., *United States v. Virginia*, 518 U.S. 515, 541 (1996) (permitting women to co-educate a formerly all-male military academy). Virtually none of the U.S. 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. This is even true of the U.S. Supreme Court’s holding that pregnancy-based discrimination is not sex-based. See *Geduldig v. Aiello*, 417 U.S. 484, 490 (1974) (holding that exclusion of pregnancy disability is not sex-based under the Equal Protection Clause); see also *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271-73 (1993) (holding that anti-abortion terrorism is not sex-based under Section 1985(3)). The point being that pregnancy—a biological fact so far exclusive to female-bodied people—is not discrimination; policies that discriminate against pregnant women are.

⁵ The foundational cases that won sex-based constitutional rights after *Reed v. Reed*, 404 U.S. 71 (1971), were largely brought for men. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Orr v. Orr*, 440 U.S. 268 (1979).

⁶ The last was *Vorchheimer v. Sch. Dist. of Philadelphia*, 430 U.S. 703 (1977) (leaving standing 4 to 4 the lower court ruling that single-sex schools do not violate equal protection).

⁷ These cases and others concerning single-sex educational institutions and HBCUs are analyzed in CATHARINE A. MACKINNON, *SEX EQUALITY* 399-435 (3d ed. 2016). Regarding private schools, see *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (finding a racially segregated dating policy violates “public policy” at a private university).

⁸ Leigh Cuen, *Here’s What Relationships Are Really Like Inside a Women’s Prison*, MIC (June 16, 2016), <https://www.mic.com/articles/146276/here-s-what-relationships-are-really-like-inside-a-women-s-prison> [<https://perma.cc/45RP-6TUP>].

⁹ Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45 (2007).

being attacked in women's bathrooms than they pose to other women in them.¹⁰

Among the most robust sex equality rights women have is freedom from sexual harassment in employment and education. This right would not exist but for the theorization of "gender" apart from, but legally included under, sex. This is because whenever U.S. courts find a sex-based differential in real life, including pregnancy and unequal pay for sex-differential work (most of the pay gap), treating people differently (including worse) based on that is considered a sex difference, assimilated to biology, rather than sex discrimination on a socially systemic scale. The lack of sex equality standards for rape law or abortion are two more examples: the more perfectly gender-based abuse fits gender lines, the more sexed—that is, natural—it is regarded as being, hence inappropriate for sex equality intervention. When courts find an overwhelmingly sex-differential disadvantage, or even a perfect sex-based disadvantage, they think they have found sex, not sex inequality.¹¹ If not for the gender argument, separating sexuality as social from sex as biological—which can ground invidious treatment, as opposed to permitting sex-differential violation as natural and inevitable—sexual harassment would have been considered a sex-based difference, hence not a basis for discrimination, I promise you. In fact, until a specific gender analysis was argued (by me, in this case), it was.¹² How other women are threatened by including trans women in this protection, as they have been since the 1990s,¹³ escapes me. Their inclusion certainly did not interfere with the millions of women who have taken part in the #MeToo movement, an uprising of public reporting of sexual abuse that focuses on circumstances of unequal power.

In other words, women's oppression is enforced through gender, specifically gender hierarchy, a social and political, not biological, arrangement. On the technical meaning of sex as physical and gender as its social meaning, sex is equal. Gender is unequal. Women are not men's biological inferiors; we are constrained to be men's social inferiors. This power division, not our bodies, is what makes women a political group and the women's movement a political movement.

Understanding gender as socially constructed does not make it unreal—it is invented, imposed, thus becomes real—or easier to change. Turns out, nature is fragile, much easier to change than society. Over the last 50 years, humans have changed the weather without even trying, while male

¹⁰ Julia Serano, *Transgender People, Bathrooms, and Sexual Predators: What the Data Say*, MEDIUM (June 7, 2021), <https://juliaserano.medium.com/transgender-people-bathrooms-and-sexual-predators-what-the-data-say-2f31ae2a7c06> [<https://perma.cc/UQ7S-9JKP>] (collecting peer-reviewed data and research).

¹¹ This critique of sex equality law in sameness/difference terms is demonstrated throughout my work. See, e.g., MACKINNON, *supra* note 7, *passim*.

¹² This history is traced in CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 90-92, 118-26 (1979).

¹³ *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997).

dominance, despite massive effort, has barely budged. Trans people have found that changing their physical bodies, however arduous, is more available than changing the social meanings of their original gender assignments. Trans theorists from Jan Morris to Andrea Long Chu have asked, essentially, if I could live the life I wanted, would I have transitioned?¹⁴ It's the right question, about the social meanings imposed on sex, lived as gender. Apart from being unanswerable as a practical individual matter, trans people have found they can't live their one and only life without changing or affirming their gender, at odds with their bodily assignment since birth, such that transition is the only possible form of being, of moving through this world, of resistance to what was imposed on them at odds with their self-conception in relational social space, that makes any sense of their lives in gendered terms.

The key question here is not (the endlessly obsessed-over) what is a woman, but what accounts for the inequality of women to men. Women are not oppressed by our bodies—our hormones, chromosomes, vaginas, breasts, ovaries. We are placed on the bottom of the gender hierarchy by the misogynistic meanings male dominant societies create and project onto us, attribute to us, which on my analysis center on women's sexuality.¹⁵ When feminists define women from the dictionary as "adult human female,"¹⁶ in biologically essentialist terms—adult is biological age, human is biological species, female is biological sex—sliding sloppily from "female" (sex) through "feminine" (gender) to "woman," as if no move has been made,¹⁷ they not only give the wrong answer, they are answering the wrong question. And they are ensuring that they can at most address excesses of male power, never that power itself.

Transgender feminist theorization, in a brilliant literature from Sandy Stone¹⁸ to Julia Serano¹⁹ to Esperanza,²⁰ embodies a politics of its own

¹⁴ JAN MORRIS, CONUNDRUM 146 (2002); Andrea Long Chu, *My New Vagina Won't Make Me Happy*, N.Y. TIMES (Nov. 24, 2018), <https://www.nytimes.com/2018/11/24/opinion/sunday/vaginoplasty-transgender-medicine.html> [<https://perma.cc/UQ8B-9EER>]; Andrea Long Chu, *The Pink: Happy New Vagina*, N+1 (2019), <https://www.nplusonemag.com/issue-34/politics/the-pink> [<https://perma.cc/2LZP-28AK>]. This, at least, is one meaning I draw from her evocative and intelligent accounts.

¹⁵ See, e.g., CATHARINE A. MACKINNON, *Sexuality, in TOWARD A FEMINIST THEORY OF THE STATE* 126-54 (1989) among many of my writings, see, e.g., *supra* notes 7, 12.

¹⁶ This occurs repeatedly in the anti-trans feminist literature, *supra* note 2, despite simultaneous denials of biological essentialism. See, e.g., LAWFORD-SMITH, *supra* note 2, at 92; Alex Byrne, *Are Women Adult Human Females?*, 177 PHIL. STUD. 3783 (2020).

¹⁷ For this habitual move, see, e.g., LAWFORD-SMITH, *supra* note 2, at 47-60 (beginning with sex, working through gender, then after all the heavy breathing, concluding at 60 "for gender-critical feminists, 'women' are adult human females"). See also Byrne, *supra* note 16, at 3788-89.

¹⁸ Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in BODY GUARDS 292 (Julia Epstein & Kristina Straub eds., 1991).

¹⁹ JULIA SERANO, WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY (2007).

²⁰ Esperanza, *A Socialist, Feminist, and Transgender Analysis of "Sex Work"*, MEDIUM (Jul. 27, 2020), <https://proletarianfeminist.medium.com/a-socialist-feminist-and-transgender-analysis-of-sex-work-b08aaf1ee4ab> [<https://perma.cc/LX9W-5GD8>].

but also sheds new light on feminist politics, supporting this new direction. It suggests to me that “woman” is a combination of sex and gender, such that sex can be a sufficient condition for being a woman, but has never been a necessary one. Sufficient, because most women so assigned at birth do not affirmatively identify with all women and women’s interests, or even as women really, many (even most) are not critical of male supremacy, but remain constrained to live women’s lives whether they see it that way or not. They are our people.

Not necessary, because not only are trans women living women’s lives—often much the worst of that life—but the transgender women I know, anyway, embrace womanhood consciously, are far more woman-identified than a vast swath of those assigned female at birth (so-called “natal women”²¹) that I also know, many of whom have been trying to escape womanhood their whole lives for real reasons, who often defend rape of other women as just a bad night and disidentify with women in every possible way short of their own transition, which is a lot of trouble and takes real courage. Trans women are, politically, women. They are our people too.

That much said in this much deeper and broader debate, there are three basic ways trans rights can be legally theorized as sex equality rights: one, textually and literally; two, in terms of stereotyping; and three, substantively. The textual and literal approach—which is simple logic, converges with libertarianism, and needs no feminism—sees that it is impossible to discriminate against trans people without taking sex into account in some way.²² The fact that this can apply equally to discrimination against both trans women and trans men, which logically can vitiate the claim, in reality doubles the discrimination rather than avoids it.²³ Pam Karlan, arguing for the fired employees in *Bostock*, came close to losing the case by agreeing that discrimination against gay people of both sexes would not be sex discrimination, a concession trumpeted by Justice Alito in dissent.²⁴ This is the simplest “but for sex” claim in existence. That the simplest Aristotelian approach can result in A and not A with equal logical consistency as a matter of law simply shows that the Aristotelian approach is not, in fact, a legal test, despite being the predominant one used for equality in the world.²⁵ Fortunately, the *Bostock* majority saw through it, possibly understanding that each person faced sex discrimination based on their sex, resulting in discrimination twice over rather than double-is-nothing

²¹ See e.g., Kathleen Stock, *Changing the Concept of “Woman” Will Cause Unintended Harms*, THE ECONOMIST (Jul. 6, 2018), <https://www.economist.com/open-future/2018/07/06/changing-the-concept-of-woman-will-cause-unintended-harms> [<https://perma.cc/FZA3-JHJR>]. This term ignores the trans women who experience themselves as having been gender female from their first breath, although many understand their gender(s) temporally in diverse terms.

²² This is *Bostock*’s fundamental ruling. See *Bostock*, 140 S. Ct. at 1741.

²³ See *id.* at 1742-43.

²⁴ *Id.* at 1759 (Alito, J., dissenting).

²⁵ See MACKINNON, *supra* note 7, at 5-11.

nondiscrimination.²⁶ This breakthrough is one of the ways the *Bostock* decision reaches beyond gender neutrality's fictions to pierce society's facts. It offers promise for prohibiting sexual harassment of bisexuals. Title VII now covers trans people, along with lesbian women and gay men, discriminated against as such in employment. No one has explained how this hurts other women.

The second argument, the anti-stereotyping approach, is a form of liberalism. Women and men are equally sex-stereotyped. The substantive content of those stereotypes is far from equal, but that is not anti-stereotyping's principal concern. This approach dips a toe into a bit of social content by noticing that trans people, when treated unequally as transgender, are considered inadequately masculine or inadequately feminine. A trans woman is considered a feminine man, hence not conforming to social standards of manhood (continuous with, say, femmes), and a trans man is considered a masculine woman, hence not conforming to social standards of womanhood (continuous with the many forms of female masculinity²⁷). Their gender presentation is punished for not fitting society's rigid standards for the sex they were assigned at birth, or the gender they are otherwise living. Sex stereotyping, when a job qualification but irrelevant to the job, is legally sex discriminatory.²⁸ Sex stereotypes are overgeneralizations that outliers should not have to conform to. The fewer outliers it takes to show that a generalization is overgeneralized, the more sex equality protection the category is considered to have.²⁹

The anti-stereotyping approach, while addressing one real engine of sexism, sets itself more strongly against illusions than realities, in that it prohibits punishing those who don't fit a picture of a sex, rather than those who are routinely denigrated and devalued for fitting that picture. As with most liberal approaches, it prioritizes exceptions, elites, those few who meet the dominant standards (e.g., females who meet male dominant standards), doing little to nothing for those members of subordinated groups for whom the subordinated stereotype has been made to be real, which is most of us. If anything, as far as I can see, within its limits, extending this approach to trans people strengthens rather than weakens it for all women, underlining stereotyping's arbitrariness in new ways, specifically assisting gender nonconforming women.³⁰

²⁶ *Bostock*, 140 S. Ct. at 1742-73, 1748.

²⁷ See generally FINN MACKAY, *FEMALE MASCULINITIES AND THE GENDER WARS: THE POLITICS OF SEX* (2021).

²⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989).

²⁹ See Catharine MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 6 (2011) ("The more pervasive the reality of sex inequality is, the fewer outliers will be permitted in reality, so the more that reality will look like a sex-based difference, mapping itself onto (the social idea of) sex as such, which it will be increasingly rational for law to ignore as it ascends the tiers of scrutiny.").

³⁰ *Bostock* does not address discrimination against nonbinary persons as such, but it could arguably be developed in an appropriate case to cover them with a beefed up anti-stereotyping analysis on a basis logically analogous to protection of atheists under Title VII's prohibition against religious

Third, seeing anti-trans treatment as sex discriminatory substantively focuses on what makes men considered socially superior to women and women inferior to men, in dynamic hierarchical social strata driven by sexualized misogyny.³¹ This approach does need feminism. Under male dominance, in transitioning, trans women lose status, trans men gain it. Trans women are doubly intersectionally discriminated against as women and as trans, triply if of color. Trans men, although their gendered social standing is documented to be improved,³² may be seen as lesser men the ways gay men and racially subordinated men often are. Trans women, as women, become newly sexualized as targets for incursion, abuse, and devaluation;³³ trans men, as men, no longer occupy that social location, except to the extent they may continue to appear to the male gaze as feminine men, marked by femininity for sexual and other violence (especially dangerously if it is “discovered” that they have female genitalia). In addition, when trans women have not had genital surgery (some do, many do not), they in addition become targets for violent attack by men who find their own sexual orientation challenged by “discovering” they are having sex with, or upskirting, a person with a penis (the penis as often the center of attention). Lacking a sex equality analysis, the legal result can allow trans panic murders, for instance.³⁴ If adopting this pathbreaking approach to trans rights would harm non-trans women, I haven’t seen the analysis or evidence for it.³⁵ Foregrounding gender hierarchy and sexualized misogyny, as the substantive analysis does, could benefit all women.

As one example, the politics of prostitution, which affect women in vast numbers, are newly clarified when seen through a substantive sex inequality lens. Currently, especially in the United Kingdom, but also

discrimination. For further helpful discussion, see Jessica Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 951-63 (2019).

³¹ See Catharine A. MacKinnon, *Equality*, 149 DAEDALUS 213, 215 (2020) (describing “hierarchically imposed sexuality” as the substance of “the inequality of sex”). See generally Catharine A. MacKinnon, *A Sex Equality Approach to Sexual Assault*, 989 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 265 (2003) (arguing for the application of sex equality analysis to sexual assault); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431 (2016) (taking sex equality approach to rape law).

³² See, e.g., KRISTINE SCHILT, JUST ONE OF THE GUYS: TRANSGENDER MEN AND THE PERSISTENCE OF GENDER INEQUALITY 161 (2011) (“As men at work, some [trans men] benefit from . . . the advantages that men in general gain from the subordination of women—particularly educated, white [trans men] who physically pass as men. These changes . . . reflect the outcome of changing social locations within a racialized gender system.”).

³³ See SERANO, *supra* note 19, at 253-63; SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 15, 133-34, 198-204 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/LDG3-N744>]; see also *id.* at 159-64 (discussing the correlation between trans identity and employment in what the report terms “sex work”).

³⁴ See generally Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411 (2020).

³⁵ Correctly applying individual criteria of danger of being harmed/danger of doing harm, as adopted in the federal prison context, FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT, TRANSGENDER OFFENDER MANUAL 5-7 (Jan. 13, 2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf> [<https://perma.cc/DX8K-G6QR>], could guide decisions in other congregate settings.

elsewhere, many who understand that trans people are members of their identified genders find this position antithetical to understanding that “sex work”—a cover-up euphemism for prostitution—is neither sex nor work, but rather sexual violation and exploitation.³⁶ Being strongly pro-trans and anti-prostitution, of which pornography is an arm, are seen as irreconcilable positions.³⁷ In light of feminist analysis, the reality that trans women are women, living women’s lives, oppressed as women—whether literally, stereotypically, most of all hierarchically—is consistent with the reality that prostitution is neither sex, in the sense of mutuality and pleasure, nor work, in the sense of productivity and dignity. The sexualization of trans people, particularly trans women—often through the misogynistic fantasy that the primary motivation for gender affirmation is to have sex with men (which they don’t have to transition to do)—with the equation of women’s sexuality with sexual abuse and exploitation as practiced in prostitution, makes trans-positive and prostitution-critical positions seem in tension.

Once both issues are examined through a feminist critique of sexualized misogyny—prostitution and other institutions of forced sex often being opposed both by feminist trans women and, actually, many in the feminist anti-trans group as well³⁸—their consistency becomes evident. The fact that many trans people have had to resort to prostitution both to support themselves and often to fund their transition evidences a commonality with the rest of women, sexually violated in institutionalized forms and discriminated-against based on sex and gender in the labor market and in health care.³⁹ The problem arises when anti-trans feminists fail to see this consistency with their anti-prostitution position, and pro-trans feminists miss the inconsistency with their pro-prostitution position. Each fails to recognize the implications of their own analysis, specifically how it supports a position they reject. If these issues were addressed rationally, this would be the end of this conflict.

The same people who contend being trans is not chosen, and therefore dignified and legally protectable, argue that prostitution is chosen and therefore dignified and legalizable. Funny how choice gives dignity and

³⁶ See generally Catharine A. MacKinnon, *Prostitution, Trafficking, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271 (2011).

³⁷ Although reduced to stereotyping, see, e.g., Holly Lawford-Smith, *What Is Gender Critical Feminism (and Why Is Everyone So Mad About It)?* (Nov. 24, 2021) <https://hollylawford-smith.org/what-is-gender-critical-feminism-and-why-is-everyone-so-mad-about-it> [<https://perma.cc/M53J-SSBD>] (“[Gender critical feminism] . . . because it is about sex, . . . clashes with gender identity ideology, . . . [Gender critical feminists] . . . see prostitution as the institutionalisation of one of the most pernicious sex stereotypes, namely that women are for sex with men, they campaign against policies that legalise or decriminalise prostitution.”); see also Julie Bindel, *Why is Prostitution Being Pushed on Young Trans People?* THE CRITIC (Mar. 16, 2022), <https://thecritic.co.uk/why-is-prostitution-being-pushed-on-young-trans-people>.

³⁸ See, e.g., Julie Bindel, *Prostitution Is Not a Job*, THE GUARDIAN (Apr. 30, 2018), <https://www.theguardian.com/commentisfree/2018/apr/30/new-zealand-sex-work-prostitution-migrants-julie-bindel> [<https://perma.cc/A7PA-JHY>]; see also LAWFORD-SMITH, *supra* note 2, 70-84 (discussing the harms of and objections to prostitution).

³⁹ See JAMES ET AL., *supra* note 33, at 12-14.

protectability in one setting and takes it away in the other. Both are backwards. Prostitution is a key institution of sex inequality, that is male dominance, thriving off deprivation of real choices. Trans identity challenges that very same sex inequality, its assertedly natural basis in particular, exercising and opening choices. Trans people do decide, in a real sense of choice, to transition or affirm an identity contrary to society's designation for them, swimming upstream against massive social currents, however limited their options, and however predetermined their gender may feel inside. Prostituted people of all genders, by contrast, are swept downstream by lack of choices. And nothing can diminish the human dignity of either group one iota, although both suffer the unequal harms of dignitary violations at the hands and in the eyes of a bigoted world.

Despite feminism having challenged biological determinism as the most basic premise of male supremacy for some time, the existence and increasing visibility of trans folk shows that feminism has yet to change society's (and apparently many feminists') fixation with nature as the basis for gender hierarchy. That trans people need to change their genders to live their lives makes stark the shortfall in feminism's practical realization of its central challenge.⁴⁰ Trans people do not need to make or defend a progressive contribution to gender politics to be entitled to change the way they inhabit gender. But they are clearly seeking to escape and redefine—change for themselves and often others like them—the same entrenched social regime that feminism, as a collective movement, seeks to change.

⁴⁰ Not all trans people transition to a binarily-defined gender. Some transition to a binary gender, some to agender, some to nonbinary, and more.

STRATEGIC PRAXIS