

SEX IS AS SEX

GOVERNING TRANSGENDER IDENTITY

SEX DOES SEX

PAISLEY CURRAH

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PREFACE

I live in New York State. In 2003, when I changed the sex marker on my driver's license, the state required applicants to "submit evidence of medical, psychological, or psychiatric evaluations, with a medical determination that one gender predominates over the other." The only evidence the DMV would accept was a letter signed by a "physician" on official letterhead.¹ I went in person to get the sex marker on my NY driver's license changed from F to M, and I came prepared with a letter from a surgeon attesting to my gender. But the whole thing almost fell apart when the DMV agent at the window disputed the validity of the letter. "The policy says this letter needs to be from a physician," the agent told me, "but this person says he's a surgeon." It took consults with two levels of supervisors and one phone call before the DMV workers could agree that a surgeon's letter would suffice. Once that had been settled, the sex marker attached to my record and on my license was changed.

What happened to me at the DMV could be described as a mundane instance of what T. Benjamin Singer called the "transgender sublime." During this transaction, the gender disorientation my application created was transposed onto confusion about medical credentials. Years ago, the presentation of a transgender figure—in a text, in person—would often induce a certain vertigo. In these moments, people unexpectedly confronted with a gendered figure who confounded everything they thought they knew about sex would find themselves at the edge of a precipice beyond which cognition fails: "The sheer variety of trans bodies and genders exceeds providers' cognitive capacity to comprehend them."² To illustrate this point, Singer—who spent years studying the provision of health care to transgender people, as well as training health care professionals about trans issues in the 1990s—recounted an incident involving a medical resident working in the emergency room of a large urban hospital. When a transgender woman with a broken arm came into the hospital's emergency room, the resident took one look

at her and announced that he could not set her arm because he hadn't received any medical training on transsexuality. For this resident, who undoubtedly had set and put casts on many broken limbs during his tenure in the ER, the gendered category crisis the patient triggered was so unsettling that it threw all that he knew into confusion, including the most routine of treatments.³ A broken arm is a broken arm regardless of a patient's gender presentation or genitalia or secondary sex characteristics, but the perplexed MD had lost—one hopes only momentarily—his ability to see that.

Readers habituated to assuming that gender depends on genitals at birth can also have a hard time making sense of accounts of people who move away from their assigned sex. At the very least, keeping track of who is a man and who is a woman can use up a lot of the brain's processing power, power that might be needed to engage with the argument itself. To illustrate: over a decade ago, a colleague in political science told me, over dinner, about an article he had recently reviewed for a journal and had recommended rejecting. He thought I would be interested in the topic since the article was about efforts to reform New York City's policy of issuing amended birth certificates with no sex markers at all to people who had transitioned. "It was impossible to follow," he told me. "From the very beginning, I couldn't keep track of who was a man, who was a woman, if a transsexual woman was a man or a woman." As it turned out, and as I told him, the article had been written by me and a coauthor. It surely wasn't perfect and perhaps it deserved to be rejected by the journal—as it indeed was. (It eventually found a home in a special issue of a feminist philosophy journal.) Our mutual chagrin dissipated after a discussion of the vagaries of academic publishing and more wine. But my colleague's grappling with the most basic building blocks of that particular research piece—individuals whose gender identities do not correspond to the sex they were assigned at birth—meant that he had little cognitive capacity left to allow him to pay attention to our actual analysis. In it, we had looked at the shifts in the legal, medical, and commonsense logics governing the designation of sex on birth certificates issued by the city of New York between 1965 and 2006. Based on archival and ethnographic research, we found that, in the initial policy iteration, the stabilization of legal sex categories was organized around the notion of "fraud"; in later policy discussions, "permanence" was the indi-

cium of authenticity. All that, though, was inaccessible to my reviewing colleague. We had lost him in the first paragraph, when the wheels of his brain began to spin out because of the strangeness of “transsexual woman.” (As I explain in more detail in the introduction, I use “sex” to refer to legal classifications.)

In the last few years, however, the gender competency of academics and the general public has improved dramatically. Moments of gender disorientation are becoming rarer. Even transphobic activists know the basic argot, although they may reference it only to dismiss the legitimacy of gender identity as a concept. On the progressive side, there is a veritable industry of diversity trainers specializing in transgender issues; and, as a result, college students, school teachers, social workers, and employees at large corporations are much more likely now to have attended a training session on “what transgender is.” In my own history as an activist and educator, I have conducted such sessions and written advocacy briefs. In them, I would carefully and slowly present key terms, provide concrete examples whenever possible, and dispel some of the strangeness of transgender experience by identifying possible moments in audience members’ own histories when they transgressed gender norms. In introducing the terms, I would lay the groundwork for “transgender” by first defining “gender identity” as one’s deeply held internal sense of being either male or female. (Back in the early aughts, when I was doing this sort of work, non-binary had yet to emerge as a gender identity.) I would explain that most people have a gender identity that is traditionally associated with the sex assigned to them at birth—that is, that infants identified as male develop a male gender identity and those identified as female develop a female gender identity. Then I would cite transgender activist and scholar Jamison Green to explain that “gender expression refers to all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns, and social interactions.”⁴ Following in the footsteps of so many others, I would say that transgender is usually defined in both broad analytic strokes and in reference to particular constituencies and practices. In its abstract sense, I would explain, transgender describes anyone whose gender identity or gender expression is not traditionally associated with the sex assigned to them at birth. To elaborate further, I might have cited Susan Stryker’s influential 1994

definition of transgender as “an umbrella term that refers to all identities and practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries.”⁵ Sometimes, I would add, the terms “gender non-conforming,” “gender different,” or “gender variant” are used instead of “transgender,” or as descriptive terms supplementing it. (I would probably feel compelled to add, parenthetically, that the older term “transsexual” emerged from medical discourses as a label, a pathologizing one, for people whose gender expression or identity is perceived to conflict with the sex assigned to them at birth, and who may want to undergo a process of “gender transition” that may or may not include gender-affirming medical interventions such as hormone therapy and different types of surgery.) Finally, I would talk about “cisgender” and “cissexual.” The neologism “cissexual,” Julia Serano explains, refers to “people who are not transsexual and who have only ever experienced their physical and subconscious sexes as being aligned,” while “cisgender” refers to “people who are not transgender.”⁶ These terms were introduced to name the previously unmarked normative category of non-transgender—some would use the adjective “accidental” here—men and women.⁷ Were I to do such trainings now, there would be a lot more words and definitions.

These excursions into “Trans 101” do much to lessen or even prevent the confusion that can result when the old common senses of sex come unglued. But there are also real disadvantages to making the oddness of gender transition and gender fluidity more familiar. Providing pat definitions of words connected to minoritizing views of sex and gender, perhaps including an extensive glossary of terms in an appendix and containing all of this under the ever-more-domesticated label of transgender, tends to settle meanings that, for some purposes, should be left unsettled. David Valentine argued as far back as 2007 that “transgender” might accomplish too much: “The capacity to stand in for an unspecified group of people is, indeed, one of the seductive things about ‘transgender.’ . . . Indeed, that ‘transgender’ can stand both as a description of individual identity and simultaneously as a general term for gendered transgressions of many kinds makes it almost infinitely elastic.”⁸ No doubt assembling so many particular practices and identities together under the broad concept of transgender provides a certain intelligibility to all kinds of gender non-normativity.

But this contrived boundary drawing comes at a cost. Distinctions related to gender—between men and women and non-binary people, between masculinity and femininity—get erased when transgender and cisgender are set against each other in the ultimate Manichean dualism.⁹ One effect of centering the trans-cis divide is to make misogyny and sexism more difficult to see.¹⁰ Another is to inhibit our understanding of more specific transphobic tropes, such as those that circulate in the conservative rhetoric around trans women in women’s bathrooms.¹¹ The reification of transgender also obscures differences of race, ethnicity, class, region, age, (dis)ability, and immigration status. The distinct characteristics of communities that have emerged out of very different contexts; the messy contingencies of history; the specific relations of individuals and communities to larger processes producing hierarchies of race, class, gender, and nation; the endless lexical productivity of language and the proliferation of identities it enables—all that disappears in the service of the conceptual uniformity of the neatly demarcated box.

This book doesn’t deliver a “Trans 101.” I certainly don’t want to befuddle readers unfamiliar with the ins and outs of gender non-normativity and gender transition, but neither do I want to clear up the confusion by providing pat accounts of clearly limned categories like *transgender*, *cisgender*, and *non-binary*. And for those very familiar with transgender issues, I want to make the category’s coherence, even intelligibility (the assumptions about community, identity, and the categories of both transgender and cisgender) a bit more strange and unfamiliar. If we decide in advance what male, female, and X (non-binary) mean before turning to the empirical situation—regardless of whether we imagine sex as referring to gender identity or to the sex assigned at birth or to current genital configurations—it becomes harder to concentrate on *why* distinct state actors define sex differently, and to figure out what those differences make possible. Moreover, placing so many different ways of failing to conform to gender norms under a conceptually smooth category of transgender gets in the way of identifying specific forms of exclusion that affect people under the “umbrella” differently.

Similarly, if we begin with the assumptions that there is this singular entity called *the state* and that it often misclassifies transgender people because of transphobia, it will be more difficult to understand at a more granular level the differences between state actors—for example, New

York State's Department of Motor Vehicles and its Department of Corrections. Working on this book has required holding off the move from the specific, apparently anomalous, case to a generalized theory of states and sex classification. An empirical case might be a particular application of a policy on sex definition at a particular agency at a particular moment in time; a general theory might attempt to set out a globalizing account of the relation between the more conceptually coherent categories of *sex* and *the state*. Because coming up with a generalizable theory could get in the way of understanding the policy differences, I stay close to the details and defer turning to these larger analytical categories and coming to theoretical closure for as long as possible.

The work of states is to make distinctions among people, objects, and actions. Governments pass statutes, executive agencies create formal or informal rules and policies for enforcing those statutes, and courts decide if a statute contravenes a state or the federal constitution, or if a regulatory policy adequately adheres to the meaning of the statute. Often, the distinctions seem unfair to some—bailing out banks but not individuals, for instance. But the charge of unfairness depends on assuming that the particular people, institutions, or actions share an important commensurability, or sameness. But that commensurability, that sameness, is not a “truth,” but an argument. If justice as equality means, as Aristotle suggested, that like cases ought to be treated alike, the question begs another question.¹² What cases, situations, individuals are alike? Or, as Aristotle put it, “inequality or equality of *what?*” Much of the stuff of politics is taken up with challenging those distinctions, with asserting that two things, people, events share a certain *whatness* in the relevant characteristic, or at the very least an equivalence. Or that they don't.

There is something about sex classification that make different sex reclassification policies seem not just unfair, but contradictory, even paradoxical. Perhaps because sex is thought to be prior to or outside of politics, unearthing its production as a legal classification seems qualitatively different than thinking through the politics of many other sorts of classifications. Or maybe because M and F have been defined in relation to one another, as each other's constitutive opposite, the different rules for classification appear paradoxical. Even people not cognizant of or interested in transgender recognition claims find it absurd that two “alike”

individuals—both assigned male at birth, with female gender identities and identical histories of body modification—end up with opposite sex classifications from different agencies. Or when the *same* individual has Fs on some state-issued documents and Ms on others. Most trans rights advocates would argue that it's not only inconsistent but unjust when two individuals who have the same gender identity—regardless of the state of their body or the history of its modification—are assigned different sex markers. In this book, however, I don't center arguments about what the state *ought to do* for sake of consistency and fairness in sex designation. (If we're talking *shoulds*—*of course*, state actors should classify sex according to gender identity, including non-binary gender identities. *Of course*, governments *should* get out of the business of defining, classifying, and recording Ms, Fs, and Xs. But states are not moral beings, they are mobile technologies for arranging difference, distributing pain and pleasure.) The approach is not to focus on the injustice of the inconsistencies but on why they exist in the first place.

Ultimately, I hope the arguments I present won't just better our understanding of states' decisions about sex, but also inform a politics that challenges these injustices. It's not my intention to fall down the rabbit hole, never to emerge from the fact/right abyss, to permanently foreclose making the impossible and yet necessary jump from the is to the ought on the matter of legal enactments of sex. But it is my contention that we need to understand at a much more historical and granular level what states are, what they do, and the effects of particular rules, laws, and policies on sex. Rather than being a minor matter of housekeeping, an agency's rule for sex reclassification might be more deeply implicated in the agency's specific governance project than is immediately obvious. Failing to apprehend how a state actor's rules for deciding who is M and who is F further its work—for example, tracking the movement of individuals or forging fictions of family and inheritance through the regulation of parenting and marriage—could make it more difficult to recognize its investment in a particular policy. Moreover, calling for uniform criteria for sex classification across all forms and levels of government or for its elimination across the board as a classificatory scheme assumes that sex does the same thing in every location. Grand, large-scale accounts of sex and the state depend on assuming a sameness to sex or a singular rationality to state actors, decisions, and projects. We

don't know what a politics of resistance would look like until we understand what it is we're resisting.

* * *

A note on language: in a different monograph, central terms (such as “sex,” “gender,” “male,” “female,” “biological”) would demand a settled and consistent usage across the chapters. But since much of this book concerns battles over meaning, providing static definitions assumes a consensus that does not yet exist.¹³ Additionally, *transgender* is asked to do a lot of work in this book. Transgender as an ever-expanding signifier is discussed at more length in the introduction and conclusion. Because transgender refers to anyone whose gender identity—one’s internal sense of oneself as male, as female, as both, as neither—does not correspond to social expectations for the sex they were assigned at birth, I also understand *transgender* to include both binary and non-binary people. In some of the situations I write about, that someone could be something other than male or female was not imagined as a possibility by the policymakers. Sometimes it would be more accurate to replace “trans” or “transgender person” with phrases like, “someone whose gender identity is not traditionally associated with the sex assigned to them at birth,” because the individual I am writing about might not identify as transgender. But that is too clunky and so most of the time I use *trans* or *transgender*, interchangeably. Occasionally, I substitute *gender non-normative* as an overarching category. I use *transsexuality* and *transsexual* when discussing twentieth-century medicalized constructions of people whose gender identity is not traditionally associated with the sex assigned at birth and who desire transition-related medical interventions. Transsexuality, later “gender identity disorder” and now “gender dysphoria,” pathologizes those whose gender was or is unexpected in one way or another. That medical discourse certainly does not account for those who did not desire to change their bodies and/or who rejected the gender binary. These constructions also marginalized those whose class position, (dis)ability, race, ethnicity, or culture of origin did not correspond with Euro-American white bourgeois gender norms.

What this book is not about: except for the discussion in chapter 5 of the role incarceration plays in mainstream trans rights discourse and in the economy, the book is focused on sex reclassification and related

questions. It does not pay a great deal of attention to nondiscrimination law and policy. The analysis is limited to policies in the United States and makes no claim that it can be exported to other places. It is not a handbook for trans rights advocates or policymakers—Shannon Price Minter and I created such a publication decades ago.¹⁴ Nor does it address the question of intersexuality and the law, which has been the subject of excellent scholarship by Julie Greenberg and others.¹⁵ Finally, it makes no attempt to set out a foundation for sex reclassification claims or to justify the existence of transgender people. Generally, publications in the Trans 101 genre and introductions to texts on transgender issues often begin by invoking people born with intersex conditions, various forms of “third sex” and gender non-conforming individuals in non-Western cultures, and/or the social construction of gender and sex. However, I question the perceived necessity of explaining that sex is not always perfectly dimorphic at birth, that every culture has some form of gender crossing, that sex is an effect of gender, in order to justify the acceptance of people who move away from the sex they were assigned at birth. Some or even all or some of these assertions may be right. But what if they’re not? If some form of gender crossing at one place and time had no bearing on a different form of gender non-normativity in another place and time; if there were no connections between intersex people and transgender people; if what we call gender identity turns out to have a material foundation in the body for some but not for others—would that somehow invalidate the existence of people whose self-avowed gender identity or gender expression has no bearing on the biological circumstances of their birth? Instead of establishing an ontological foundation for sex reclassification—as if the presence of gender non-normative people requires a justification or even an explanation—this book explores the rationales of governance for deciding when and where what sex you are.

Introduction

“A transsexual fled a Brooklyn courtroom in tears yesterday after recounting how she was menaced in the Barbie aisle by baseball bat-wielding employees of a Toys ‘R’ Us in Bensonhurst.”¹ So opens a 2000 *New York Daily News* story on a discrimination lawsuit brought by three transgender women. In December 2000, the three were harassed and threatened by employees who called the women “fags,” “fucking faggots,” “homos,” and “disgusting transvestites,” according to the victims’ complaint. A week later they returned to the Brooklyn store for their Christmas shopping. This time about eight employees, including the two brandishing baseball bats, threatened the women with “imminent bodily injury” and tried to chase them off the premises. The women filed a complaint with New York’s Human Rights Commission, and the store offered them each a \$100 “Geoffrey the Giraffe” gift certificate. The plaintiffs, described by their attorney as “preoperative transsexuals,” refused and sued for damages in federal court. They claimed that Toys “R” Us had violated New York City’s human rights law by discriminating against them based on sex, gender, gender identity, and perceived sexual orientation.² During the jury trial, Toys “R” Us put up a vigorous defense. “Given who they are and what they look like,” a Toys “R” Us spokesman said, “comments get passed to them in the rough-and-tumble world of walking around the streets of New York and going about their business.”³ The jury found in the transgender women’s favor, but awarded them only one dollar each in damages. One sympathetic juror later said that anything more than that would have resulted in a hung jury. Despite the evidence, some jurors were put off by the “transgenderism” and found the women “sick” and “disgusting.”⁴

This story captures the gender crosscurrents of that turn-of-the-century moment. Three people whose female gender identity and feminine gender expression confounded the social expectations for people assigned male at birth were hounded out of a space well-known for its

policing of the gender binary. Toys “R” Us, like most retailers of the time, had separate pink and blue aisles for toys—and actually posted signs to designate certain aisles as being for girls and boys—to make it very clear who should be playing with what. The Barbie Bungalow Beach House that one of the plaintiffs wanted to buy for a young relative belonged, according to these norms, in the girls’ aisle. The trans women shopping in the store, the company spokesperson’s comment implied, did not belong in that aisle, in the store, or really in any public place—or at least they should not expect to be free from harassment should they venture out. The case got very little attention outside of the LGBT press. At that time, only a handful of jurisdictions included gender identity in nondiscrimination ordinances, and most jurisprudence on the subject had yet to recognize that such discrimination is a type of sex or gender discrimination.⁵

More than two decades later, the situation looks very different. Many large stores have gotten rid of the girls’ and boys’ toy aisles and have even stopped using toy gender categories online. While discrimination against transgender people continues and may even have grown because of heightened visibility, incidents like the one at Toys “R” Us now are likely to result in mainstream news coverage, declarations of solidarity from cisgender people on social media, petitions, even boycotts. Seventy-two percent of millennials support nondiscrimination laws that include transgender people.⁶ Toys “R” Us declared bankruptcy in 2018, but many other retailers, including Target, Walgreens, and Barnes & Noble, have policies allowing individuals to use the bathroom corresponding with their gender identity. While polls consistently show the public to be evenly divided on whether or not trans people should be able to use the bathroom that corresponds to their gender identity, women and younger people were much more likely to be in favor of allowing trans people access.⁷ In 2014, *Time* magazine ran a cover story proclaiming that the “transgender tipping point” had been reached.⁸ In 2015, the *Washington Post* changed its style guide, adopting the singular “they” as its preferred gender-neutral pronoun.⁹ Pride Month in 2016 saw Goldman Sachs flying the pink, white, and blue transgender flag outside its Manhattan world headquarters and Pentagon officials announcing the end of the ban on transgender people serving in the armed forces. Although the ban was restored a year later by President Trump,

the ban on transgender people serving openly in the armed forces was ended (a second time) in 2021.¹⁰ In 2017, Virginian Danica Roem became the first out transgender person in the United States to take office in a state legislature.¹¹ By 2019, if any of the plaintiffs in the Toys “R” Us lawsuit had been born in New York City, they would have been able to change the sex designation on their birth certificates to M, F, or X—regardless of whether or not they had modified their bodies through surgery or hormone therapy. (In this book, “sex” refers to classifications of male or female backed by the force of law. I use “gender” when discussing shared, though often contested, norms, narratives, practices, and conventions that arrange bodies, identities, roles, and expressions in hierarchies of difference based on binary notions of male/female, man/woman, and masculinity/femininity. The next chapter will discuss these choices in more depth.) In the 2020 general election, six transgender candidates were elected to statewide offices.¹²

In popular culture, at colleges and universities, in large cities and small towns, and in social service agencies, schools, and state governments, people living in a gender not associated with the sex assigned at birth and others who express gender in ways that fail to conform to social expectations have been transformed from deeply pathologized yet fascinating objects of curiosity to people worthy of toleration, understanding, acceptance, and political equality. Of course, this acceptance is not evenly diffused throughout the population, nor, at the time of writing, has it been translated into nondiscrimination laws in every jurisdiction, the universal reform of sex classification rules, or full-throttled social acceptance. Nonetheless, the transformation in the last two decades has been striking.¹³

Trans and queer institutions, the mainstream media, and many if not most trans people understand this social movement for equality as a new(ish) entrant in the longstanding battle over the politics of identity. Diverse constellations of gender non-normative people who were all but socially illegible in the early 1990s have now been forged into a represented and representable transgender community. One of the mechanisms for this unification has been the concept of *transgender*, which purports to contain all forms of non-normative gender difference. In the 1990s, the term “transgender umbrella” emerged as an educational device to represent all the many different forms of gender non-normativity

extant at any one time and place. T. Benjamin Singer recounts seeing an early training document that pictured “a hand-drawn umbrella with an open canopy stretched over a now dated set of terms: ‘crossdresser (‘drag’), ‘transvestic fetishist,’ ‘transvestite,’ ‘transgenderist,’ ‘transsexual’ and ‘man/woman.’”¹⁴

Since then, the transgender umbrella has become a machine of perpetual expansion, generating a seemingly endless proliferation of practices and identities. Susan Stryker uses “transgender” to “refer to people who move away from the gender they were assigned at birth.” That includes people who “feel strongly that they properly belong to another gender through which it would be better for them to live” as well as those who “simply feel the need to challenge the conventional expectations bound up with the gender that was initially put upon them.”¹⁵ The category thus brings together, at times uneasily, both ascriptive and performative notions of identity/subjectivity: people who understand themselves as having been born in the wrong body find themselves working alongside those who reject the gender binary altogether.¹⁶ Certainly, the transgender umbrella hides fundamental disagreements among those it shelters—about sex, gender and the gender binary, transition, the ontological status of the body, the fixity of gender, and the effects of a medical model of transgender identity. But the political benefits of aggregating cannot be denied. When the Centers for Disease Control allowed the question “Do you consider yourself to be transgender?” to appear on large-scale state health surveys, the responses led to an estimate of 1.4 million adults in the “transgender population” in the United States.¹⁷ Earlier estimates had put the trans population at about half of that.¹⁸

It is the politics of identity that makes it possible for this “myriad of alterities” to be seen as a coherent political force—a cacophonous crowd, to be sure, yet one that is still imagined as moving forward together under the protective carapace of transgender.¹⁹ In this way, the transgender community becomes visible against the backdrop of the civil rights tradition in the United States. While political organizing under the rubric of trans became visible to community members in the 1990s with the emergence of grassroots groups such as Transsexual Menace and Transgender Nation, a successful movement organized around identity needs to be seen by and intelligible to an outside audience. The accelerating usage of “transgender” in major newspapers attests to its growing

recognition after the turn of this century: “transgender” did not appear once before 1995; it appeared nine times by 1999 and two million times by 2003. Similarly, a Google search for “transgender” in March 2004 generated over eight hundred thousand hits; my search in August 2021 generated over 170 million.²⁰ Without the transgender nomenclature, the jumble of uneven advances in a wide variety of settings (different agencies, different branches of government, different jurisdictions) addressing very different legal areas (identity documents, discrimination, family law, incarceration, immigration, etc.) and involving different sorts of gender non-normativity (hewing to or rejecting the gender binary, for example) would not have hypostasized into a larger phenomenon. But with the term, these successes are written into a new chapter in the story of progress that underwrites the liberal worldview in the United States: a previously disdained social group’s slow but (in hindsight) inevitable triumph over an oppression enforced by the state and made possible by widespread social animus.

However, it would be a mistake to assume the (relative) success of the trans rights movement was entirely—or even mostly—a result of self-generating momentum. My proposition, counterintuitive though it may seem given the dominance of the identity politics narrative recounted above, is this: the achievements of the movement organized under the political category of *transgender* do not justify using that category as its own self-explanatory tool. Notwithstanding the genesis stories of new social movements and the rhetoric of activists, in fact the transgender movement did not pull itself up by its own bootstraps—especially on the question of states and sex classification. Over the course of the twentieth century, the law’s use of classification regimes to treat people differently diminished as a result of the civil rights movement and of the expanding capacity of apparatuses of domination to manage inequality outside the formal sphere of the law. Gender had been gradually *disestablished* from the state during this period, culminating in the *Obergefell* decision in 2015 when the Supreme Court ruled that state bans on same-sex marriage were unconstitutional.²¹

Sex Changes

In 1994, Idaho resident Jane Jones was arrested and briefly imprisoned for the crime of “false personation.” The police had come to her home with a search warrant in the course of investigating her husband for writing bad checks. When the officer looked over her papers during the search, he discovered a contradiction between the identity information on her driver’s license (“John,” male) and her marriage certificate (“Jane,” female). Her husband might have been writing bad checks, but it was Jane, the officer decided, who had committed fraud. She was charged with “marriage under false personation,” an assault, according to her arrest warrant, “against the peace and dignity of the State of Idaho.”²² Who was this person—Jane or John? For the Idaho deputy sheriff, Jane was John. As a man, John was in a same-sex marriage, which meant in 1994 it wasn’t a marriage at all: at the time, the state of Idaho did not allow an individual to marry someone of the same sex. Jane, the woman who answered the door and let the officer into her home, lacked the identification documents she needed to support her claim to being a member of the female sex. Despite identifying as a woman and consistently being perceived by others as a woman, despite using a different name and presenting herself as a woman—despite, in fact, modifying her body so that it aligned with her gender identity—she had an M printed on her ID by the Idaho Department of Motor Vehicles, which became the pivotal fact in this unfortunate incident. Once her husband’s alleged check kiting drew legal attention to the couple, the awareness of a gap between her identity documents and her self (her “personation”) could be explained only as some sort of fraud.²³ Jane—or rather John, in the eyes of the police officer—was pretending to be someone she wasn’t.

Who gets to decide whether the woman who spent the night in an Idaho county jail is a man or a woman? The individual who identifies as a woman? The individual who signed the marriage certificate attesting to her status as female? The police officer who sees the “M” on the driver’s license he’s holding in his hand? In one sense, everyone is free to decide what gender they are, and to make judgments about the gender of others. Just as the police officer who arrested her is free to think of himself as male, Jane is free to think of herself as a woman, to present herself publicly as a woman, and to change her name through a court

order or, in states that honor the common law tradition of using the name one “goes by,” by taking on a new name. In a different context—were he to pass Jane on the street, say—the sheriff’s deputy might have concluded, based on an almost unthinking microsecond-long reading of the cultural insignia of gender Jane presented, that she was female.²⁴ While both Jane and the deputy can make judgments about Jane’s status as a man or a woman, it was the deputy’s decision that was backed by the force of law. Jane might identify as a woman and exist as a woman socially. But in this case, the sex classification on her driver’s license, a state-issued identity document, trumped her presentation and self-understanding as a woman. She spent a night in jail because of the discrepancy.

The conundrum I take on in this book is this: sex changes. By “sex changes,” I am not speaking of the less-than-respectful label for those who have transitioned, or the old-fashioned term for gender affirmation surgery. I mean, instead, that an individual’s *designation* as F or M can shift. When some individuals cross borders, walk into a government office to apply for benefits, get a driver’s license, go to prison, sign up for Selective Service, get married, or have any interaction with a state agency, their sex classification can switch from male to female, from female to male, and even, in a handful of jurisdictions and situations, from M or F to non-binary. Even within a single jurisdiction, almost every particular state agency—from federal to municipal—has the authority to decide its own rules for sex classification. And, to complicate matters even more, both state and federal judges have found that one’s sex classification for some social functions may not hold for others. The lack of a universal standard for classifying people as male or female means that some state agencies will recognize the new sex of people who change it while some will not. For most people—those many refer to as “cisgendered”—this lack of uniformity doesn’t present a problem.²⁵ For others, it does. In New York City, for example, the policy of homeless shelters is to house people according to their gender identity. The state’s corrections system, on the other hand, usually bases the distinction between men and women on external genitalia. Most people who identify as a sex different from the one assigned to them at birth do not have surgery to change their genitals. If a transgender woman housed in a women’s shelter were to be arrested, in jail she would be housed with

women but possibly in a special transgender unit.²⁶ If she were convicted and sentenced and sent upstate to a corrections institution, she would very likely find herself in a men's prison.²⁷ While a Republican Party resolution holds that sex begins at conception, even a Republican president could not make that position the uniform law of the land across these United States.²⁸ There has never been a consistent, universal policy regarding reclassifying the sex of the people who move away from the sex they were assigned at birth.

For people whose deeply held internal sense of themselves as male or female does not align with the sex assigned to them at birth, how their sex is designated depends on criteria for sex classification used by the particular government agency in question. And one of the central arguments of this book is that those criteria often depend on what the particular agency does—regulate marriage and families, make decisions about property, track births and deaths, provide residents with identity documents, house the homeless, regulate the professions, ensure the security of air travel, or incarcerate populations. Sex classification becomes a malleable instrument of governmentality, threaded through an apparently endless number of apparatuses at every level of government, from department of motor vehicles policies, to case law on marriage, parenting, and inheritance, to rules regarding incarcerated prisoners. For transgender people, the immense number of state institutions defining sex in the United States has ensnared us in a Kafkaesque web of official identity contradiction and chaos. In Idaho, for example, Jane could have changed the sex classification on her driver's license if she had wanted to negotiate the bureaucracy and give officials at the Department of Motor Vehicles a letter from a physician documenting the history of her body and her gender identity. But until 2018 the Idaho Office of Vital Statistics would not change the sex classification on the birth certificates they issue.²⁹ So an Idaho resident who was also born in the state might have, for the majority of her life, carried a driver's license with an F on it in her wallet and kept a birth certificate listing her as M tucked away in a drawer in her home.

In the past, people who presented themselves as a sex that was not the one assigned to them at birth have been cast as frauds by the mainstream media, by policymakers, and by perpetrators (and their defenders) of violence against transgender people (and their defenders). In

1965, officials in New York City decided that the “public interest for the protection against fraud” justified a policy pronouncement against sex reclassification on birth certificates issued by the city.³⁰ In this report, the possibility that a transsexual woman—a male in the eyes of its authors, as well as in the eyes of physicians and psychiatrists—would find an unwitting man to marry stood out as the most worrisome possibility. In the case of murder and assault, the “transgender panic” defense—e.g., “I didn’t know she had a penis until we started having sex”—is meant to amplify a jury’s impression that transgender people are frauds.³¹ In 2008, two candidates who lost a primary election in Georgia to a transgender woman, Michelle Bruce, went to court to contest the results. “Mr. Bruce misled the voters into believing that he was a female,” argued their attorney.³² However, while the idea of fraud continues to circulate in the popular imaginary, transgender people have rarely been arrested for “false personation” or “fraud,” as Jane was. Instead, the *disjunction* between the sex one believes oneself to be and the sex a state institution says one is has been the vehicle for taking away rights and privileges that are distributed based on sex: before bans on same-sex marriage were declared unconstitutional, for example, such marriages were declared invalid and wills were voided. Parental relationships were, and in some jurisdictions can still be, permanently severed and jobs have been lost as a result of transitioning. In addition, incarcerated trans people are segregated according to genital status in the vast majority of state and federal prisons and municipal jails, causing untold danger, discomfort, and distress.

Much of the debate on state sex classification appears to depend on identifying which is the most objectively true definition of sex: (1) sex is the physical state of the characteristics associated with sex and identifiable on or in the body at the time of one’s birth; (2) sex is genitals; (3) sex is gender identity. The working definition of sex used in this book, however, is this: sex is whatever an entity whose decisions are backed by the force of law says it is. In short, in examining state decisions on sex classification, in this book I focus not on *what sex is* but on *what it does*. This means not starting with the claim that sex has been misclassified or that the rules of sex classification are contradictory. It looks like a contradiction when one individual is simultaneously classified as M and F by different government agencies. It looks like a contradiction when

a bearded, balding, only slightly paunchy middle-aged man like myself is classified as F, while the bearded, balding, paunchy middle-aged man standing in line next to me is M. But in letting go (at least provisionally) of the assumption that there is any *there* there, any whatness to (legal) sex apart from what the state says it is, the contradiction evaporates. The official sex designation—more precisely, the M, the F, or more recently the X—stamped on documents or coded in records becomes the only true thing we know. Then, an analysis can focus not on what sex really is, or what it should be, but on what it does, what it accomplishes, what it produces.

Sex Reclassification Is Not Just for Transgender People; Gender Equality Is Not Just for Feminism

The issue of sex reclassification might appear to be of interest only to people who disagree with the M or the F stamped on their identity documents. Certainly, the number of people who find their sex misclassified by state actors is a very small proportion of the general population. In utilitarian logic the problems of bigger groups usually matter more than those of smaller groups. Perhaps the single most common question that journalists and policymakers ask transgender rights advocates is “Just how many transgender people are there?” That is an impossible question to answer accurately both for reasons of methodology (how do researchers identify people in this position when coming out as transgender carries great risks?) and epistemology (what are the metrics of “transgender?”).³³ Yet, because policymakers and journalists demand an answer, transgender advocates try to provide one. If the legal regulation of sex appears to affect only a tiny (but vocal) segment of the population, why should it be of concern to the vast majority of the (non-transgender) public who live in the commonsense world of gender, where fetuses have gender reveal parties and infants are easily labeled male or female at birth and inevitably grow up to be men or women? In terms of scholarship, how could looking into state decisions and policies on sex reclassification possibly add to the pressing research agenda of the critical/theoretical left, which includes investigations of popular sovereignty and constitutive exclusions, the nation and narratives of cultural reproduction, surveillance and the securitization of risk,

apparatuses of governmentality and biological citizenship, the neoliberal political project, and the escalation of income inequality?

With a little category shifting, queer theorist Eve Sedgwick's work can help explain the connection between the sexually misclassified and everyone else. Examining the divide between homosexuality and heterosexuality, Sedgwick identifies two contradictory ways of understanding the distinction. The "minoritizing" approach constructs the problem as one of "active importance primarily for a small, distinct, relatively fixed homosexual minority." In contrast, the "universalizing" view sees this divide "as an issue of continuing, determinative importance in the lives of people across the spectrum of sexualities."³⁴ If we transpose the terms of Sedgwick's analysis so that *transgender/non-transgender* takes the place of *homosexual/heterosexual*, the minoritizing view would understand state rules for sex classification as harmful only to a very small and distinct population of people. It's only the peculiar anomaly of transgender people—the disjunction between the sex we think we are and the sex that state actors say we are—that puts us in the unlucky position of having to carry around a piece of government-issued paper that might have the wrong sex marker written on it. In this approach, the plight of transgender people is an unanticipated remainder of processes that are unremarkable in every other way. According to this framework, the policing of sex definitions does not pose problems for the vast majority of people: those who develop and hold fast throughout their life course to a gender identity that conforms to expectations for the sex stamped on their birth certificate. The minoritizing perspective, understandably adopted by many transgender rights advocates, thus takes on the vernacular of identity politics.³⁵ A specific subset of people comes forward to claim that their group has been denied equal treatment under the law and to seek redress.

From the universalizing perspective, however, the problem is not limited to the particular situation of transgender people—though our situation highlights it. Its effects reach people whose sex designation is and has always been "traditionally associated with" their gender identity, whose classification as M or F is consistent across all government agencies, and who cannot imagine that the accuracy of their sex classification might ever be vulnerable to future state decisions. Identity documents that do not *misclassify* the sex of individuals and that allow access to

sex-segregated institutions are also products of state systems for classifying sex. Indeed, the barriers to sex reclassification that transgender people face reinforce the credibility of sex as a metric of identity for everyone. The legitimacy of the majority's sex classifications, which most have probably never questioned, is made possible by erecting obstacles to others' requests for reclassification; the vulnerability of "transgender" individuals subtends the perceived invulnerability of everyone else on that score. This elementary point—that there is no "us" without a "them"—is the organizing principle of many genres of critical scholarship, including disability studies, race and ethnic studies, colonial and postcolonial theory, feminist theory, queer theory, and sexuality studies. But in examining state constructions of sex, it's important to underline this point as explicitly as possible. While scholarship and teaching have shown that the binaries of masculinity/femininity, able-bodied/disabled, heterosexuality/homosexuality, and white/nonwhite result from social, legal, and ideological processes rather than inherent differences, when it comes to M and F classifications it can be particularly difficult to displace the idea that male and female really do mean something and are not primarily words with legal effects.

For a long time, analyses of state constructions of sex have tended to stick to either the particular or the general framework. Rarely did thinking about sex and states cross these boundaries. The particularistic approach centered the details of sex definition; the more general approach focused on how states use gender to distribute rights and resources. One could, with a little wedging, suggest that most transgender work in legal studies exemplified the former approach while feminist scholarship mapped onto the latter. Like the proverbial ships passing in the night, investigations into states and sex definition had not been in conversation with research on gender and distributive justice. Scholarship and advocacy about transgender rights (including some of my own previous work) have hewed closely to the language of recognition, focusing on the special case of sex misclassification. A little bit of tinkering with the rules—perhaps the adoption of a uniform standard for all jurisdictions and state functions, or even the disestablishment of sex altogether—and the unfairness is reformed away. While it is essential for transgender rights advocates to seek short-term fixes to the problems of sex classification, in the longer term we need to advance a critical framework

that identifies the scale of the problem and the historical formations that have produced it.³⁶

Feminist scholarship, by comparison, is all about understanding how gender operates as a foundation for a host of other social arrangements—not just marriage, but the family, private property, and citizenship.³⁷ But almost all that scholarship has traditionally taken the categories of M/F as given a priori when examining how states use them to distribute rights and resources.³⁸ The situation faced by transgender people becomes, once again, an anomaly. Rather than understand how the deviant case of the sexually misclassified might actually structure the normal situation, the issue devolves into the problem of sex misclassification suffered by a small band of gender nonconformers, or “transsexual menaces.”³⁹ What’s more, the differing criteria for sex definition from agency to agency, from court to court, from jurisdiction to jurisdiction, and from one social function to another, which should be recognized by scholars as a wellspring of data, have either been overlooked or examined as only illogical discrepancies in the classification of transgender people. Examining those differences in sex definition could do much to help us understand how gender works in particular contexts to distribute inequality. Such an understanding might also support, and occasionally challenge, theories of gender justice and histories of state-sponsored gender discrimination. Thus far, neither research on the ins and outs of sex classification policies nor work on gender as a distributive mechanism for states has examined how these issues are not just connected but mutually constitutive. In this book, my aim is to show the necessity of integrating the minoritizing (transgender) and universalizing (gender) approaches to the study of state constructions of sex and the politics of trans politics. What sex turns out to mean, legally, will often depend on what it has done or what it continues to do for particular state projects, and how that work is imbricated in other processes involved in the giving and taking of money, pleasure, liberty, health, and life. This slippage should be of interest not only to scholars. If the trans political movement fails to challenge the larger asymmetry of power in gender relations that is responsible for cementing sex into the legal structures in the first place and is now responsible for continuing gender subordination outside the legal sphere (such as pay disparity and the structures of work and family life) that disproportionately affect women, it will indeed turn out to have

been nothing more than a minoritizing, single-focused, limited political project.

Undoing Transgender

It may seem untimely to fold up the proverbial transgender umbrella at the very moment of its accession into the storied history of social movements in the United States. Indeed, *transgender* convenes most, though not all, of the legal phenomena under examination in the following chapters. But it doesn't explain them. Though *transgender* may be at a moment of heightened legibility in popular culture, *transgender* itself is not a coherent object of analysis for an investigation into sex classification policies. Historically, these rules were not put in place to target transgender populations. Nor were they an expression of transphobia. Rather than taking *transgender* as the rubric for policies that negatively impact transgender people and examining many different policy positions—both the wins and the impediments—together as metrics of the progress of this group, this book turns to the granular, the nitty-gritty, the particular legal constructions over any generalized trend. In doing so, other fault lines are made visible. Instead of seeing these changes as necessarily part of a drama that climaxes in a decisive thematic moment—the transgender tipping point reached, the last legal obstacle downed—the focus turns to discrete elements, which are not assumed to simply be gears meshing to propel the putative trans rights movement to its goal. Though they may seem counterintuitive at first, the readings of the case law, administrative policy, legislation, and movement strategies do not always treat the trans-vs.-cis analytic paradigm as key to understanding how policy differences between trans and cis have emerged and to identifying solutions to end this formal inequality. Identifying transphobia as the global explanation for policies that harm people whose gender identity doesn't correspond with the traditional expectations for those of their birth sex makes it more difficult to see these policies in light of distinct histories and governing rationales of different regulatory realms: marriage, parenting, and family law; identity documents and the surveillance state; incarceration and criminal justice.

Given the centrality of the trans-cis paradigm at the present moment, then, there is a good case to be made for adopting a less familiar

approach, as others have done. For example, in his work on blackness and “transness,” C. Riley Snorton avoids defaulting to the cisgender-transgender binary; indeed, his project is to show “how the condensation of transness into the category of transgender is a racial narrative.”⁴⁰ In this book, a close study of government rules for sex reclassification reveals how sex has been operationalized differently and how those policies produced different effects. Reading these tangled rules about sex with and against each other reveals incongruities that disrupt the notion that the policy issues affecting sex reclassification should be thought of as a single problem with a single trajectory. Rules and policies regarding definitions of M or F classification that are thought to be about “transgender people” often have had much more to do with the specific context, with the role of the person being classified—worker, incarcerated person, parent, spouse, voter, social service client—than with any larger scientific or philosophical position on what “sex”—as in male or female—really is. More fundamentally, the precise way “sex” is regulated in each of these contexts has often been deeply connected to the distribution of economic, racial, and social inequality, though those connections are not always obvious. Identifying the exclusions wrought by states’ police power to define sex as a problem of *transgender* exclusion obscures the work that sex has done, and in some cases is still doing, to produce inequality in concert with other social and economic markers such as race and class.

It is undeniable that the political category of transgender brought the rights claims of gender non-normative people into public consciousness. Its successes in the first two decades of the twenty-first century in making compelling arguments for state recognition have been remarkable. As the rationales for the necessity of distinguishing between men and women have fallen away, and continue to do so, arguments based on the new identity category of transgender have filled the void—so much so that earlier feminist understandings of the effects of that distinction seem quaint, or even unrecognizable to progressive millennials and Gen Zers. But if the effects of the category and of the new social movement it constitutes are seen from a different angle, the work the category does in obscuring economic inequality as well as other forms of social inequality becomes more visible. *Transgender*, as a unifying yet abstract appellation, projects a clarity that does not account for the differences in how

sex classification and gender are made to matter in different concrete situations. In fact, its widespread usage may obscure the fact that sometimes transgender status per se is not the sole or even primary cause of the physical, social, and economic vulnerabilities many gender non-normative people experience. As longtime trans rights advocate Shannon Minter suggests, the impetus in trans activism to understand “so many issues, like incarceration, violence, workplace discrimination, and schools, through a trans-only lens has obscured much more determinative and systemic inequities, mostly around race and gender, and led trans advocates too often to miss the forest for the trees.”⁴¹ This book takes a harder look at the role that *transgender* is now beginning to play as a political category unto itself.

In queer and trans studies, revealing the traditions, institutions, and practices that make gender normativity and heteronormativity seem natural is now considered fundamental to any serious project outside of the hard sciences. But proponents and theorists of transgender movements for justice have generally paid much less attention to denaturalizing states and markets.⁴² *The state* does not spring fully formed out of the heads of classical liberal theorists and the men who put those ideas to paper as materializations of the idea of popular sovereignty and the rule of law; it is not the benevolent night watchman who has unfortunately neglected to keep up with contemporary theories and enactments of gender identities. Nor does *the state* come into being in a singular extraordinary declaration that marks a collision between fact and right. In fact, in the territories that constitute what is now known as the United States, the institutions of government and the legitimacy that appears to saturate them take shape through the slow accretion of regularized practices of governing. The fictions that underwrite essentialist understandings of gender and resistance to transgender rights claims—that everyone is either male or female, that gender cannot or should not change, that an individual’s gender is easily known by the insignia of genitalia—are now widely recognized as such in trans activist circles.⁴³

But the fictions that have helped create the current situation of vast disparities in the vulnerability of individuals to early death and severe income inequality—that laissez-faire is not planned, that free markets are self-regulating, that social relations are fundamentally economic relations, that colonial power relations are a thing of the past, that work

justly reflects one's value as a citizen, and that to be self-actualized is to be an ever-improving productive employee/innovator, an "entrepreneur of the self"—are much less likely to be challenged in these same circles. This constricted vision on the part of many trans advocates is likely a consequence of larger political shifts in the late twentieth century. Transgender rights advocacy and scholarship began to flourish at a time when broader visions of social justice were being eclipsed by representational politics. The rise of the US culture wars of the 1980s, which centered on the morality of changing sexual and gender norms, largely coincided with the dismantling of the Great Society programs, the marketization of social goods, and the political project of neoliberalism.⁴⁴ In the fog of the battle for the "soul of America," demands for distributive justice and the quest for recognition have become more disconnected than ever. In its pure form, the latter reinforces the status quo rather than challenging the morality of the maldistribution of vulnerabilities to poverty, disease, violence, and early death.

Precisely how demands for economic justice should be linked to desires for full inclusion in the body politic is contested. Leftist critics of identity politics suggest that its very logic—that identity-based groups are the "fundamental units of political consciousness and action"—leads it to devolve into nothing more than a kind of interest-group pluralism. Sectoring the population based on difference prevents the formation of a collective political movement that could, in Adolph Reed's words, unite to "directly challenge the current power relations." Identity politics, he suggests, "is not an alternative to class politics; it is a class politics, the politics of the left-wing of neoliberalism."⁴⁵ Indeed, making representation the metric of fairness and equality (Goldman Sachs flies the transgender flag!) propels inclusion in a way that dovetails neatly with the diversity, equity, and inclusion industry and the corporate culture that sustains it, and puts questions of larger structural transformation to the side. A diminishing number of stern leftists decry identity politics altogether, especially that practiced by sexual and gender minorities, as only epiphenomenal to class struggle, a distorted byproduct of the oppressive social relations of production that wrongly directs attention to securing equality in law, politics, and culture. Others on the left see the naming of identity-based exclusions as a necessary corrective to the false universalism of past leftist projects. Such an approach insists that

identity-based oppressions and socioeconomic status cannot and should not be analyzed as separate phenomena, that structures such as racism and patriarchy are not secondary to class, and that all are woven so deeply together—but differently, depending on the historical context—that no grand theory of the relations among them is possible. Given the many sites and kinds of power structures, the study of sex reclassification requires jettisoning assumptions about what the state is. It's also imperative to look more closely at the effects of a politics organized around transgender identities. In both efforts, we need to understand how these phenomena link with state and nonstate processes that allocate inequality.

From Residual Category to Proxy in the Gender Wars

That so many different agencies have overlapping jurisdiction on the matter of sex classification is not the only problem. The lack of consistency also stems from the impossible purity of categories themselves.⁴⁶ First, the abstract and apparently simple distinction between male and female conceals the history of colonial violence embedded within it. María Lugones identifies the biological dimorphism of the gender binary as a nonuniversal product of the “light side of the colonial/modern organization of gender”: the modern European binary constructions of male/female that replaced older narratives around the beginning of the early modern era developed against and through colonial processes of racialization. Gender itself, then, is a “colonial concept.”⁴⁷ As a technology of power, the gender binary reflected what we now recognize as emergent white supremacism. Similarly, Kyla Schuller points out that “binary sex does not exist in parallel or intersecting dimension with race. Rather, the rhetoric of distinct sexes of male and female consolidate as a *function* of race.”⁴⁸ The analytic neatness of a putatively universal M-F binary is belied by history.

It is also undone by the concrete empirical messiness warranted, ironically, by the flowering of the science of sex in the last half century.⁴⁹ In the present moment, any one of many properties associated with gender could be chosen as the definitive one in sex classification in law and policy. Moreover, even those attributes—sex chromosomes, gonadal sex, sex hormone patterns, internal nongonadal sex organs, genitalia,

secondary sex characteristics, gender of rearing, and gender identity—tend not to be binary but either continuous or non-binary. While the science of sex has historically played a fundamental role in securing a wide range of social and biological attributes to a natural M/F dualism, it's also true that the science undermining the neatness of the distinction was never entirely dismissed. In recent years, such work has moved to the forefront. Although it has yet to dislodge completely the older binary paradigm, its trajectory is clear: the more the science of sex advances, the less unitary and untroubled sex becomes.⁵⁰

In the thousands of policies and laws that draw distinctions between men and women, however, that uncertainty vanishes. The M-F systems of sex classification in administrative apparatuses have a rigidity never entirely supported by the science, and now increasingly less so. While, in the past, mainstream medical discourse could be reliably counted on to justify the state's employment of binary sex difference in furthering particular ends, there is now a growing tension between the law and the science of sex. This tension is perhaps most visible in court cases on the matter of sex classification. More and more, the expert witnesses on the side of the trans party, arguing for the malleability of sex or the adoption of gender identity as the criterion for sex classification by the state, are better credentialed and have a higher status in the medico-scientific social world than the experts on the other side, arguing that the sex assigned at birth should be one's legal sex for life or that transition is not complete without genital surgery. Before the latter half of the twentieth century, objections to the classifications were generally limited to intersex individuals.⁵¹ But with the innovations in hormone therapy and gender-affirming surgery in the twentieth century, an increasing number of people began to seek identity documents and state recognition of their new gender.⁵² Initially, officials responded to these requests on an arbitrary and case-by-case basis, but as the numbers grew, agencies and then courts—when individuals challenged agency denials—had to come up with definitions for male and female for the purposes of sex reclassification. For example, in 1965 New York City's commissioner of health noted that the department had had four requests for sex reclassification on birth certificates; two had been denied and two had been approved. With the fifth request, this official decided the city needed a more systematic approach and sought the advice of medical experts.⁵³

Across the United States, government actors filled these definitional voids with a range of responses. Some held that the M or F assigned at birth could not be changed in these records and on identity documents. Others based reclassification on proof of gender-affirming surgery, chromosomes, and, more recently, gender identity as vouched for by a medical professional.

From the vantage point of the transgender political movement, obstacles to sex reclassification are at worst symptoms of ill will toward trans people and at best intentional neglect of our needs. However, the transphobia animus argument needs to be supplemented by an account that takes a longer historical view. That there has never been a uniform policy governing who is male and who is female is not the result of intentional hostility toward people called transsexual in the twentieth century or transgender in the twenty-first. Instead, those groups inhabited, and still continue to inhabit in many jurisdictions and agencies, what Susan Leigh Star and Geoffrey C. Bowker call residual categories, “that which is left over after a classification is built.”⁵⁴ The borders of categories come into sharp relief in response to an unanticipated or abnormal situation not imagined in the first instance. Initially set out in the abstract, a category is fully defined only *ex post facto*, when its interior is made visible after a particular case troubles its assumptions and becomes its constitutive outside, a remainder that turns out to have been necessary to maintain the neatness and order of the classification system. Of course, the occupants of this residual category produced by a binary sex classification scheme are not entirely outside the system. Those whose gender identity is not traditionally associated with the sex assigned to them at birth do have sex classifications on their identity documents—but it may not be the desired classification.

Until recently, the obstacles that trans people faced with regard to sex classification were effects of gender-based oppression. In European and, later, American legal traditions, gender difference was codified in laws designed to limit the rights and resources available to white women. From coverture to inheritance laws to the inability to vote to exemptions in the criminal sphere for marital rape, the law’s distinctions illustrated how deeply patriarchal norms were incorporated into state structures.⁵⁵ With regard to some laws, such as those governing divorce and child support—requiring husbands or fathers to provide for

ex-wives and children—the distinction did disadvantage men, though for the purpose of protecting the public fisc, not redistributing wealth to women. For enslaved people in the United States, state-mandated gender difference operated differently, functioning in the service of slavery and white supremacy.⁵⁶ With the end of slavery and the slow and uneven dismantling of laws that used racial categories to further white supremacy, the administration of state-sponsored race discrimination shifted to operate through facially neutral social and economic policies that had racially disparate effects, usually intentionally so.⁵⁷ As a result, formal sex classification systems are now race neutral on their face, even as the effects of bad sex reclassification policies disproportionately harm Black, Indigenous, and other people of color, those living in poverty, and undocumented migrants.

Over the course of the twentieth century, the machinery of state-sanctioned gender discrimination was slowly and unevenly dismantled in the United States. By the turn of this century, states still distinguished between men and women in registration for Selective Service, in combat roles in the military, in facilities traditionally segregated by gender, in restrictions on abortion rights, and in laws that limited marriage to heterosexual couples.⁵⁸ But in the first decades of the twenty-first century, all combat roles in the armed forces had been opened to women by 2015, and a bill introduced in the Senate in 2016 mandating that eligible women also register for Selective Service garnered a considerable amount of bipartisan support.⁵⁹ In 2015, the Supreme Court decided that the state institution perhaps most responsible for maintaining gender subordination, marriage, could no longer be limited to opposite-sex couples—though the rationale for the decision focused on sexual orientation discrimination rather than gender discrimination.

It's no accident that claims for recognition put forward by those outside the traditional gender binary entered the mainstream as state-mandated gender inequality was in its death throes. Certainly, a minoritizing identity politics neatly packaged as transgender rights is partly responsible for these successes. In a larger sense, however, the achievements so far (and those yet to be realized) have also been made possible (and will be made possible, as barriers to reclassification still in place fall in the future) by feminism. Over the course of the twentieth century, the now much-maligned classically liberal branch of feminism succeeded in

lowering the stakes for sex reclassification. Although governments continue to classify people as M or F, the consequences of sex classification now matter much less because an F designation can no longer be used to curtail civil and property rights, to deny equal access to education and the professions, or to enforce heteronormativity through bans on same-sex marriage. It is precisely because there is so much *less* at stake in sex classification than there used to be that, by the third decade of this century, policymakers and judges have less reason to deny reclassification requests and reforms, or to erect obstacles, such as genital surgery requirements. (That said, in chapter 5 I will show how, even now, decisions about sex designation still depend to some degree on the particular state project at issue.)

Social constructionist feminist contributions to the transgender rights project are more widely acknowledged, possibly because where those in the millennial generation have encountered feminism it has likely been of the Butler variety. By loosening the ties between bodies and identities and by showing that gender norms are effects of power, not of biology, these theoretical insights made various forms of gender non-normativity legible as a failure to comply with the gender binary. Many of those who see themselves as born in the wrong body have not signed on to this particular theoretical project, but even arguments based on the medical model of transsexuality now describe gender identity—to be sure, still a scientific concept, though grounded in psychology rather than biology—as the primary indicator, rather than any material aspect of the supposedly sexed body. Obstacles to sex reclassification have historically been the result of the imbrication of gender subordination with state structures, and the headway made so far has been partially the outcome of feminist work to dismantle those legal barriers—to disestablish state-supported, historically normative gender arrangements. The defenders of traditional gender arrangements have lost the ability to use government to enforce the exclusion of women from the public sphere and their relegation to second-class status in family life. To be clear, this is not to suggest that gender subordination is a thing of the past—far from it. This particular structure of authority and domination, however, no longer finds formal support in the law—with the exception of laws governing abortion rights, which are discussed in the conclusion.

However—we now find ourselves in a new political moment, one in which transgender rights have been enrolled in the newest eruption in the culture wars, which some had hoped had been brought to an end with *Obergefell*. By the second decade of this century, transgender had shifted from a largely off-the-radar residual category, bobbing along in the wake of a much larger movement for gender equality before law, to the newest proxy in the arguments over culture and belonging. While the *formal* allotment of rights and resources based on gender has ended, its precondition—the ability of governments to distinguish between men and women, and to use their police powers (the sovereign capacity to ensure the safety, health, and welfare of the population) to classify sex in order to decide who is a man and who is a woman—remains part of the legal architecture. From a spate of bathroom bills in state legislatures—none of which passed or stayed passed—to a new round of anti-trans bills in 2021 aimed at preventing medical professionals from providing gender-affirming care to transgender teens and trans girls from participating in girls' sports, transgender people have become a focus of ire from the conservative movement, increasingly vulnerable in red states though seemingly protected in blue ones.⁶⁰ As part of this onslaught, at the federal level the Trump administration reversed many of the transgender-friendly administrative rules and regulations instituted by the Obama administration. Under Trump, the Department of Education withdrew Obama-era interpretations of Title IX allowing access to bathrooms and locker rooms based on gender identity. It also challenged the Obama administration's inclusion of gender identity in provisions against sex discrimination in health care and insurance coverage. And of course, President Trump announced, via tweet, that transgender people would no longer be able to serve in the military.⁶¹ Within the first months of his administration, President Biden began to reverse these Trump administration policies.

While trans advocates across the United States engage in battles over sex definition, access to sex-segregated spaces, and medical treatment, their opponents see themselves as also resisting much broader social forces. Conservative opposition to reforming sex classification policies reflects animus against transgender people, to be sure. But it also indexes a much larger anxiety about the changes feminism has wrought and the

effects of what many of those on the religious right are beginning to call “gender ideology.” Outside of restrictions on abortion, it’s no longer politically feasible for conservatives to contest the victories of liberal feminism in ensuring equality before the law. Still, gender subordination remains one of the organizing principles of domestic life, the workplace, and cultural production. The persistence of that form of domination—what political theorist Corey Robin calls “the private life of power”—outside the equalizing gaze of the state is something conservatives and all those who benefit from it are eager to maintain. Ventriloquizing this position, Robin writes: “Cede the field of the public, if you must, stand fast in the private. Allow men and women to become democratic citizens of the state; make sure they remain feudal subjects in the family, the factory, and the field.”⁶² Debates about sex reclassification and access to gender-segregated spaces, alongside laws restricting abortion rights, give conservatives the opportunity, increasingly rare after the gains of liberal feminism, to make arguments that resonate both ways. It allows them to re-prosecute the gender wars in the legal arena. It also uses the institutions of government to put state actors’ imprimaturs on traditional visions of normative gender, from deputizing individuals to dispute someone’s gender in public spaces to using the bully pulpits of state legislatures to instruct the public on womanhood and manhood. Sex classification policies, while most certainly public, are also intrusions into the innermost sanctums of the private sphere. Indeed, what could be more intimate than being able to use the bathroom without fear of harassment? Even as one’s status as male or female or non-binary no longer carries distributive consequences—in that states cannot deny a right or responsibility based on it—the police powers of the state can still be wielded to decide precisely what sex is and, in so doing, enforce traditional gender norms.⁶³

Book Overview

First, a word about the framework. The book adopts what is a heterodox method for transgender studies, which, despite a collective antinaturalism, is nevertheless an identity studies field and as such has consolidated around the category of *transgender*. First, it toggles the focus from those

harm to the institutions doing the harming. Second, it abandons the default assumption that transphobia is the cause of policies that harm trans people. Third, it does not assume that the misrecognition of transgender people constitutes a singular phenomenon. Instead I examine the policies and decisions that constitute these injustices separately. The method in this book is to start with apparently contradictory sex reclassification policies or decisions and then, instead of amalgamating them into a global explanation of transphobia, to separate the strands and push on them to reveal the particular rationalities at play. By decentering animus against gender transgression as a cause of injustices, this approach suggests an alternative “history of the present.”⁶⁴ Instead of exposing unfair decisions and policies as appendages of an imagined hydra that is transphobia, I turn my attention to the inconsistencies between decisions and rules for sex reclassification at one time, and try to figure out what accounts for them. Why are some institutions more open to sex reclassification than others? Why for some purposes, and not others? What accounts for so many different metrics for sex reclassification? Unlike a true Foucauldian genealogical investigation that traces discontinuities and the effects of contingent events over time, my analysis is more synchronic than diachronic. For the most part, I do not narrate transgender quest for justice chronologically. I do not explain discrepancies between policies as the result of differences between early adopters or holdouts, of lags in the acceptance of changes in the hegemonic medical model of transsexuality and gender identity in particular places. Instead, I hone in on the period when these inconsistencies in sex classification were at their extreme. But rather than simply seeing an individual classified as both male and female as representing a contradiction, a paradox, a bureaucratic mistake, and calling for that injustice to be rectified, I suggest such a situation seems paradoxical only if one assumes that state decisions about sex index something outside or before the decision itself, something that should be consistent regardless of the particular governing apparatus that decides. For the purposes of understanding these rationalities, it’s necessary, at least provisionally, to let go of any notions about what M/F/X actually are, or how they *should* be defined. This is not to suggest that there aren’t injustices in the here and now to be rectified. But it is to suggest that replacing a

conceptual apparatus that centers the harms suffered by *individuals* to one that centers different technologies of governance might make visible the historical formations that factored into their production.

Chapter 1 sets the stage for these analyses. Because much of the debate on state sex classification appears to depend on identifying the most objectively true definition of sex or gender—both words are used in legal classification systems—this chapter presents an overview of the possibilities: sex is the physical state of the characteristics associated with gender and identifiable on or in the body at birth; sex is genitals; sex is gender identity. It then presents a justification for the working definition of sex used in this book: sex is whatever an entity whose decisions are backed by the force of law says it is. In examining state decisions on sex classification, it might be more useful to direction our attention not to what sex *is*, but what it *does*.

Chapters 2 and 3 turn our attention to the state. Just as the singular motif of the wronged transgender subject is displaced in this project as the analytical starting point, so too is a too-singular notion of the state. Turning the state into a thing, as we have turned sex into a thing, makes us oblivious to the messiness of the phenomena under discussion and masks how states come into being through the accretion of practices, conventions, and citations. This twinned approach to sex and states makes it possible to trace how apparently contradictory classifications in fact advanced different state projects. Chapter 2 focuses on the story of the traditional version of popular sovereignty and the civil rights tradition, distilled into something resembling a civics lesson account of sovereignty and the power to classify and exclude. This approach comes with a built-in justification for rejecting individuals' challenges to sex misclassification: sex is cast as an inalienable property of the individual, before and outside of politics and therefore not subject to revision. But the internal logic of this pre-political justification for exclusion eventually becomes the basis for inclusion. The abnormal characteristic that defined the exclusion in the first place—having a gender identity that does not conform to expectations for the sex one was assigned at birth—becomes, over time, the basis for inclusion. Much transgender rights advocacy and doctrinal legal analysis of the problem are pinned to the popular sovereignty story and depend on asserting that gender identity is inalienable, immutable.

Chapter 3 presents two alternative ways of understanding the politics of sex classification. The first alternative, enunciated in the theoretical register of deconstruction, reads the momentous yet arbitrary decisions on sex classification as exemplars of the paradox of law. M or F is a decision underwritten by violence, not an announcement of a fact. (“It’s a republic,” the Founders declare; “It’s a boy,” the doctor announces.) Rather than the perfect correspondence between the people and the governing authority they erect described in the story of popular sovereignty, the state comes into existence only through exclusions present at recurring founding moments. Classifications backed by the force of law are understood as the outcome of political processes of exclusion and distribution, not external to them. Decisions about sex classification are not the result of a rule being applied to a particular case, but moments in which the particular case generates the exception that constitutes the rule. The paradox of law approach reminds us of the impossibility of securing M or F to a person except through constitutive violence. It also illustrates the centrality of the anomalous case, in this case the occupants of the residual category created by the sex binary, to understanding the presumable universalizing categories of M and F. The second alternative approach to the popular sovereignty narrative accounts for contradictory decision-making on sex classification at different agencies, in different jurisdictions, and at different levels of government. Because there are many distinct state actors creating rules for defining sex, it’s not that useful to direct all our attention to *the* state; instead, understanding sovereignty as encircled by, or folded into, processes of governmentality might be more useful. Rather than focusing mostly on a singular constitutive exclusion, this approach considers sex classification in relation to traditional police powers and administrative apparatuses.⁶⁵ This approach also decenters the primacy of the state. The second alternative account reflects a Foucauldian disposition; what I’m calling the deconstructive account tends to center a single big-bang moment of violence, when force takes on the mantle of right.⁶⁶ Of course, it’s not a matter of either/or. Issues of sex classification and reclassification show how both accounts matter: every time a sex is assigned and written on a birth certificate form, every time visible genitals determine a prisoner’s placement in a sex-segregated prison, it’s both an example of the slow drip of dispersed and plural disciplinary powers abiding in a wide range of

governing apparatuses—and the constitutive violence of naming, backed by the force of law.

Chapter 4 unpacks one of the apparent contradictions in the sex classification policies of the recent past: why were some people who were allowed to change their sex classification on their identity documents found to have a sex “fixed at birth” for the purposes of marriage? This chapter suggests that this is not so much a perplexing contradiction as an expression of different projects: one centered on recognition and the other on distribution, or, to understand it another way, one enunciated in the register of states and spatial logics of control and the other in the language of narrative, nation, property, and temporality. Incongruities in sex designation help us understand the larger processes that marry territory to people, link state with nation, and connect the administrative imperative to recognize the individuals inhabiting its territories with national distributive projects organized around the family, private property, and race. This chapter also addresses the purported antagonism, asserted by some left critics, between identity politics and economic justice.

In chapter 5, “Incarceration, Identity Politics, and the Trans-Cis Divide,” I turn my attention back to the movement that grew (partly) out of the residual category created by the sex binary and solidified into an identity politics organized around the transgender umbrella. This chapter looks at the situation of transgender prisoners in the United States. The analysis here centers on the “freeze-frame” policy, which mandates that prisoners be maintained at the stage of gender transition they were in when they became incarcerated. It reads that policy in relation to the temporal flows of civil society and to the novelistic trope of heterosexual romance. The chapter then shows how trans rights discourse on nondiscrimination and inclusion resonates with the neoliberal emphasis on work, productivity, and market rationality. Ultimately, it suggests that the transgender-cisgender binary, the grid of intelligibility that so dominates trans studies and advocacy, in many cases obscures more than it reveals, including differences of class, race, and even gender. By working through this question at a more granular level, it shows these policies connect to other forms of displacement and how they nestle into the larger operations of power and the distribution of violence and inequality.

The conclusion considers the political juncture in which we now find ourselves. On the one hand, the loose coherence that once defined transgender is giving way to a more universalizing gender chaos—and I use “chaos” here approvingly—because of the seemingly innumerable ways of moving away from the sex assigned at birth and the growing number of people disinclined to attach strongly to one side or the other of the gender binary. We are very close to the moment when the gender binary will be disestablished from most projects of governing. On the other hand, transgender no longer occupies a liminal space left over from the legal disenfranchisement of women: it is now a specific target of those who traffic in moral panics. The right-wing attack on transgender people is increasingly articulated as objections to the de-binarizing “gender ideology” it sees as providing a foundation for the separation of bodies from gender roles, expressions, and identities. The attacks on those who have succumbed to “gender ideology,” however, are not limited to transgender people—we are just the most obvious manifestation of the disorder it has wrought.