

## “If Sex Is Not a Biologic Phenomenon”

In 1965, a woman petitioned New York City’s Bureau of Records and Statistics to change the M on her birth certificate to an F. “Anonymous” had done everything she could to function socially as a woman: she had had her gender identity affirmed by a medical professional; she had passed the “real life” test, required at the time, to live as a woman for two years; she had undergone gender-affirming medical care.<sup>1</sup> But the M remained on her birth certificate. With an M on her birth certificate, Anonymous’s ability to move through the world as a woman would inevitably be compromised.

This was not the first time the city had been asked to change an M to an F on a birth certificate. The director of the Bureau of Records and Statistics had responded positively to three earlier requests, basing his decision on lab tests (later described as “very tenuous”) that had been submitted, indicating hormone levels in what was thought to be the appropriate range for women.<sup>2</sup> At the fifth request from a transsexual individual, however, the official balked. What had been a few odd cases, mere bureaucratic blips, now seemed to augur a larger trend. The director asked for policy guidance from the Board of Health, which has jurisdiction over the New York City Health Code, including rules for birth certificates. Members of this appointed board were confused about what to do. According to their head, George James, the commissioner of health, the members “felt rather strongly that they were getting involved with a very deep and serious situation.” James decided to commission “an exhaustive inquiry into the subject” by asking an ad hoc committee of medical experts, convened by the New York Academy of Medicine, to investigate the problem and to recommend how to respond to requests like these. Should the city change the sex classification on the birth certificates of transsexual individuals? If the M or F on a birth certificate is a “biologic fact and represents the situation at the time of birth,” James asked in his letter to the physicians’ committee, why change it? But, he

went on, "if sex is not a biologic phenomenon, then what would the implications be if the Board of Health permitted a psychological determination of sex to be the compelling issue. On what basis would it hear testimony along this line and how make [*sic*] a decision?"<sup>3</sup> In other words, what evidence would be required to ensure that suspicious bodies, or bodies with suspicious histories, would not confound various state projects organized around gender? Over the next five decades, the initial "sex cannot change" policy was amended four more times.

This chapter uses these discussions about sex reclassification on New York City birth certificates—spanning five decades—to limn one of the central arguments of this book: while ideas about what sex is may appear to guide sex reclassification policies and proposals for reforming them, considerations about what sex does for different governing apparatuses have often played a far bigger role in determining the rules. Because so much of the debate on state recognition has been thought to center on the definition of sex, however, I review a series of "what sex is" positions—sex is attached permanently to the body at birth; sex is genitals; sex is gender identity; sex is nothing but a proxy for gender, which is itself an effect of power arrangements—and their corresponding approaches to the problem of sex reclassification. The chapter then counters these positions with the argument that fixating on what sex "really is" hinders our ability to understand why it is operationalized differently in particular circumstances. Thus, for the purposes of *this* project, F and M and X do not designate properties. They do not signify gender identity, or the sex assigned at birth, or the configurations of a "post-transition" body. They are simply what is recorded after a decision has been made by state bureaucracies and judges. They are ink shapes on paper, the electrical on/off pulses of binary codes in administrative records. Although they are arbitrary, they are backed by the force of law. Certainly, in many sex reclassification debates, as we will see in the following chapters, judges' and policymakers' arguments have usually been clothed in the mantle of sex definition. But making sense of the apparent contradictions between these policies requires looking at the effects of particular rules for sex reclassification. The chapter's last section suggests that sex is better conceptualized as plural, rather than as singular because questions of sex classification cannot be disentangled from thinking about states and governance; this chapter focuses on sex, while chapters 2 and 3 focus on states.

## New York City: Five Decades of Debates over Sex Classification

Back to 1965: the committee met twice that year before deciding to recommend that the sex classification on birth certificates should not be changed. Significantly, the committee, composed entirely of medical doctors, spent most of its time considering "the legal aspects of a change of sex." The legal implications, the committee found, would include allowing marriage between a transsexual woman and a nontranssexual man, changing draft status, denying or providing access to benefits, and enabling individuals to obtain passports with the new sex classification.<sup>4</sup> The committee concluded its report—widely cited in many court decisions on the issue of sex classification in the following decades—with the assertion that "male-to-female transsexuals are still chromosomally males while ostensibly females." It went on: "The desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."<sup>5</sup> The commissioner of health followed the committee's recommendations: as a matter of policy, transsexual people would not be able to have their sex changed on birth certificates issued by the city. Anonymous's petition was denied, and that decision was affirmed by an appellate state court.<sup>6</sup> In 1971, this policy was somewhat reformed: instead of outright denial of these requests, the city would issue new birth certificates with *no* sex designation.<sup>7</sup> This change came about because the New York Civil Liberties Union had pushed the Board of Health to allow the new sex designation to appear on the certificate. But since birth sex was "a matter of record," eliminating it altogether, declared one member of the Board of Health, was "as far as we can go."<sup>8</sup> To be eligible for this "no sex" certificate, an individual would need to submit a psychiatric evaluation affirming that he or she represented a "true case of transsexualism," a report of the "convertive surgery" that had taken place, a "post-operative examination signed by the surgeon," and a court order granting a name change. Individuals would have to prove not only that their genitals had been reconstructed (phalloplasty for men or vaginoplasty for women) but also that they had been sterilized through surgery (a hysterectomy for those assigned as female at birth, an orchiectomy for those assigned male at birth). Only after satisfying all these conditions would they be eligible for this new "no sex" certificate.<sup>9</sup> At the time, the policy was among the most liberal in the United States.

By the turn of this century, however, most US states had changed their sex reclassification policies for birth certificates. If individuals could supply evidence of “sex change surgery,” most states would issue new birth certificates listing the reclassified sex.<sup>10</sup> (New York City sets its own policies on birth certificates separate from the rest of New York State. For other jurisdictions, birth certificate policy is set at the state or territory level.) The city was again an outlier, but this time its policy lagged behind that of forty-six state jurisdictions. By the early 2000s, its “no sex” birth certificate was only one step ahead of the three jurisdictions that outright refused to change the F or M on birth certificates: Ohio, Idaho, and Tennessee. Even more ostensibly conservative states such as Alabama, Missouri, Virginia, and Arkansas would reclassify an individual’s sex provided they satisfied the surgery conditions. In 2005, finding itself in the rearguard of sex classification, the New York City Bureau of Vital Statistics revisited the policy, convening a second panel of experts. This time, the committee included transgender health care experts and transgender rights advocates, as well as surgeons and psychiatrists not considered allies. I was a member of that committee. Of the committee members not on the city’s payroll, most worked hard to convince policymakers to drop the requirement for genital surgery—indeed for any modification of the body at all. (It was not a surprise that the two urologist surgeons on the committee did not, preferring a genital surgical standard.<sup>11</sup>) We argued that transition was an individualized process and that gender identity, not genitals, should determine sex classification. Initially, the Board of Health appeared willing to adopt the recommendation and went so far as to promulgate it for public comment. But after other city agencies weighed in against the proposal, it was withdrawn by city officials. Instead, the policy adopted matched those of most other jurisdictions at the time: only those who could prove they had had genital surgery could change the sex marker on their birth certificates.<sup>12</sup>

Transgender rights advocates sued the city a few years later, claiming that its policy requiring individuals who want to change the sex classification on their birth certificates to submit evidence of genital surgery is “arbitrary, capricious, discriminatory, and otherwise unlawful.” The Transgender Legal Defense and Education Fund contended that sex is “the sex of their brain—an immutable, intrinsic sense of being physically

male or female." The brief drew on a host of medical, scientific, and psychological findings, including the American Psychological Association's statement contending that identity documents should be consistent with an individual's "gender identity and expression."<sup>13</sup> The city's stated reasons for keeping the policy in place were "irrational," the advocates argued. In 2014 the lawsuit was made irrelevant when the New York City Council passed legislation, with the support of a new Democratic mayoral administration and the Board of Health, that made it possible for people born in the city to change the sex marker on their birth certificate to have it correspond to their gender identity. Individuals requesting these changes would not be required to have undergone medical treatment of any kind, though they would have to provide an affidavit from a physician, nurse practitioner, or physician's assistant attesting to the change. (By March 2017, more than seven hundred people had changed the sex marker on their birth certificate since January 2015, the effective date of the 2014 legislation. When the surgery requirement was in place, only about twenty people did so per year.)<sup>14</sup> In 2018, New York City also added a non-binary gender category of X and removed the requirement for a medical affidavit.<sup>15</sup> Now those born in New York City need only submit their own affidavit to change the sex marker on their birth certificate to F, M, or X.

From this account, one might think that trans advocates and the city spent five decades arguing over the most accurate definition of sex. But while the former group was marshalling evidence about what sex "really is," representatives of the latter were concerned with the consequences of changing the rules. The debate over sex took place in two different registers—the advocates' register of expertise and truth, and the bureaucrats register of governing and politics. The assumption that sex reclassification policies should be based on the correct definition of sex (whether that definition indexes common sense or contemporary medical knowledge) was belied by policymakers' stated concerns about the effects of changing the definitions. During the 1965 policy deliberations, the director of the city's Bureau of Records and Statistics wrote to the National Center for Health Statistics, a division of the federal Department of Health, Education, and Welfare, asking for guidance on the question of sex classification. In researching a response to this question, the recipient of the letter, the chief of the Registration Methods Branch,

consulted "a number of security and non-security agencies in the Federal Government for their viewpoints." This official found that "this has been a long-term and difficult problem for them as well." The federal government could not provide any guidance to the city on the question, he concluded, "since various agencies carry out differing responsibilities the problems which confront them vary." In fact, "the more we delved into the problem, the more the ramifications that cropped up."<sup>16</sup> Officials at some agencies were more concerned with identity management and ensuring a perfect correspondence between an individual and their records over their life span; officials at agencies that distributed benefits based on gender were worried about how individuals who changed their sex would unsettle their work. In other words, there could be no unified policy on the matter of sex reclassification because each state agency would have to investigate the effects of sex reclassification policies on its own work. Similarly, when in 2006 city officials decided against making gender identity the effective criterion, it was because the "potential impacts of these proposed changes would be more complex and far reaching than we anticipated." Worried about "ramifications beyond its intended purposes" in schools, housing, workplaces, and prisons, they left a surgery standard in place.<sup>17</sup> In response to claims made in the 2011 lawsuit that the surgery requirement was irrational, city lawyers noted that while other documents, such as driver's licenses issued by the state of New York, United States passports, and even other jurisdictions' birth certificates may use different criteria to classify people as F or M, "the existence of different approaches to similar problems does not render an agency's rule irrational."<sup>18</sup> In other words, the rationality of each agency's approach to sex classification depended on its remit, not what sex is in itself. In the syntax of the city's structures of governance, sex was a mobile property—dependent not on what it is, but what it does.

By 2014—the year that body modifications were effectively removed as requirements for sex reclassifications in both the city and the state—sex had been decommissioned in some matters of governance. This victory, which made gender identity the effective standard for birth certificate reclassification, was not simply the result of an agreement between advocates and the city about the ontological foundation of sex. Instead, contingent events made it possible to override some of the particular governing rationalities of the different agencies with regard to reclassify-

ing sex: the election of a progressive mayor in 2013, the growing visibility of the transgender rights movement, and, most importantly, the legalization of same-sex marriage in New York State in 2011. Indeed, the issue of same-sex marriage had been raised in discussions several times at the city level. In 1966, the possibility that a transsexual person might use a new birth certificate to marry—and hence “fraudulently” enter into an opposite-sex marriage—was a constant worry, as documented in the meeting minutes of the New York Academy of Medicine’s ad hoc committee.<sup>19</sup> By 2006, without the requirement of body modification, which policymakers had almost universally taken to be a guarantee of a transition and its permanence, they worried that one half of a gay or lesbian couple—presumably both of whom were cisgender, though that assumption was only implicit—would simply change the F or M on their birth certificate and present that when applying for a marriage license.<sup>20</sup> But the question of ersatz heterosexual marriages was rendered moot when the ban on same-sex marriage was ended in New York State in 2011. Now sex could take on a new role in the political algorithms of governance. Instead of functioning as a large-scale technology for the management of distributive injustice through institutions such as marriage, sex reclassification policy could evolve into a vehicle of contemporary identity politics. It has now become a political tool in blue states for recognizing the particular needs of the constituency identified as transgender and in red states for inciting an ugly culture war. Indeed, in New York City the rhetoric in support of making gender identity the only necessary condition for changing one’s birth certificate highlighted the needs of a particular group; it did not mark this change as a step in the universal dismantling of the system for sex classification. For example, the mayor at the time, Bill de Blasio, announced his support of the change this way: “Transgender and gender non-conforming New Yorkers deserve the right to choose how they identify and to live with respect and dignity.”<sup>21</sup> In other parts of the United States, transgender identity politics has been operationalized by the right wing very differently. Transgender people have been targeted as frauds, potential sex offenders, and dupes of “transgender ideology.”<sup>22</sup>

Certainly, the reforms addressed the very pressing needs of both binary and non-binary trans people, people whose inability to negotiate identity bureaucracies, unnoticeable and quotidian to cisgender people,

creates barriers to their participation in social, economic, and civic life. But meeting the needs of transgender people born in the city did not constitute a fundamental reimagining of what M, X, or F is meant to signify. If the operative definition of sex had been revisited, no newborn would have an F or M or X on their birth certificates; sex markers would be added later, when children were old enough to have and to know their gender identity, whether it be F, M, or non-binary.<sup>23</sup> Or there would be no sex designation for anyone. But as a vestige of the original governing architecture, traditional notions of sex remain baked into the system. No longer a tool for allocating rights and resources, it serves as the "common sense" universalizing backdrop against which the seemingly particular claims of self-identified trans and non-binary people—estimates suggest that 0.58 percent of the US adult population identifies as transgender<sup>24</sup>—are played out. While the universalizing and largely unexamined biopolitical technologies of sex classification have long been a necessary mechanism for the state-sponsored oppression of women, the issue of sex *reclassification* had appeared to be a concern limited to transgender people.

I've been using the old-fashioned and awkward word "sex" to talk about government decisions to classify individuals as male or female. Why use "sex" and not "gender"? Among feminist theorists, since the 1980s "gender" has won almost universal acceptance as the most apt term to describe the norms that govern relations between men and women. When one sees "sex" and "gender" used together, often the former signifies bodily difference and the latter refers to the social norms that make those differences matter.<sup>25</sup> The use of "sex," especially when it's not accompanied by "gender," can signal the worldview that understands sex as a naturally occurring attribute of the body that accounts for differences in the identities, roles, and expressions of boys and girls, men and women, masculinity and femininity. But that's not my intention here. While lay conceptions of sex assume there's no gap between the word and what it signifies, there is no clear agreement among feminist and transgender scholars and activists, and among policymakers and judges, about what sex means or what the terms of the binary that subtends it (male and female) mean. In the past I've used "gender" to describe the laws, rules, and policies relating to M/F classifications. In this book "sex" is used—partly because "sex" appears more often than "gender" in



policies and decisions (because they were created before "gender" was in wide usage), and partly because its outmoded awkwardness makes it stand out as a placeholder word.

With that stipulation, I can assert this: the working thesis of this book is that the only thing we can say for sure about what sex means is what a particular state actor says it means. Unlike the definitions put forth by individuals or circulated by activists and researchers, state declarations of sex are backed by the force of law. When you're arrested for "false personation," when your parental relationship with your children is permanently severed, when your marriage is declared void, when you arrive at your polling place only to be denied the right to vote, when you lose your benefits as a surviving spouse—all because of what a judge or a policy or an identity document says your sex is—then the definition matters. For my purposes here, sex is not a thing, a property, or a trait, but the outcome of decisions backed by legal authority. And its meaning changes. This is not to say that the actual body does not come into it. In state rules on sex classification, evidence of material characteristics—penises or vaginas, XX or XY chromosomes, breasts or beards—can still determine whether one is male or female for state purposes. But, leaving aside for a moment the materiality of letters and affidavits, *which* material is material is not consistent. In adopting *for this particular project* the methodological axiom that sex does not exist in itself, as an already given thing, I am not saying that sex does not matter. Indeed, its very production as a legal category is all about making it matter—a lot.

To understand how sex is brought into being and made to bear a lot of weight for state projects, we might think of it as a "transactional reality." Foucault identifies civil society, madness, and sexuality as "transactional realities" that, "although they have not always existed are nonetheless real, are born precisely from the interplay of relations of power and everything which constantly eludes them, at the interface, so to speak, of governors and governed." Because sex has been so thoroughly naturalized and for so long, for many it may be harder to suspend one's disbelief and think of sex as a transactional reality than it would be to think of civil society or madness or sexuality that way.<sup>26</sup> But that there are different iterations of this particular transactional reality—for example, one institution decrees a person is M, another decides the same person is F—might make the proposition a little easier to accept, at least provi-

sionally. I also opt to deploy sex as the shifting placeholder instead of gender because gender *does* mean something: decades of scholarship and activism have created a shared, though not uncontested, body of historical knowledge about the ways norms, narratives, practices, conventions, and laws have arranged bodies, identities, roles, and expressions in hierarchies of difference. I want to reserve the use of gender for thinking about these processes. As I will show in the chapters that follow, ideologies of gender certainly undergird state determinations of "male" and "female." The effects of gender, however, are not contained within legal architectures. They exceed, even envelop, them. By now there has been a great deal of thought on the relationship between gender and sex, from early second-wave feminism's understanding of sex as a biological status and gender as a set of social arrangements and practices to Judith Butler's observation that sex "will be shown to have been gender all along."<sup>27</sup> Instead of looking at the ways gender brings sex into being, this work centers the relationship between sex and states. This is indeed a partial project: legal enactments of sex are still enclosed within the architectures and narratives that regulate gender outside of the law. But moving the spotlight from the *gender/sex* relation to the *state/sex* relation may bring to light aspects of state formation, sovereignty, and governmentality that a too-quick dismissal of the juridical-political realm might overlook.

Sex is a legal effect. Were I a positivist political scientist, I would posit sex as the dependent variable and the state as the independent variable. It would not be a problem that sex is not known in advance, outside of the circumstances in which it's generated. As the independent variable, however, the state should be operationalized with a clear account of what it is and what it is not. After all, it's impossible to solve an equation without *any* absolute values; something has to be known. But the proposition that sex is manufactured in and through regulations, formal and informal policies, judicial decisions, and legislative enactments does not actually mean that the state is fixed in place, still and hard as a monument. To naturalize is to characterize a product of social or political process as existing prior to them—in short, to describe an effect as a cause and to place that cause before or outside human culture. The idea that sex is natural, for example, is still relatively hegemonic in the popular imaginary. In denaturalizing sex, however, it's important to resist

the temptation to renaturalize something else, in this case the state, by putting it on the same foundational footing that nature used to occupy. Sex may be a product of state actions, but that does not require us to think of the state as an edifice with absolute values and clear boundaries limned in advance. Nor, as Mariana Valverde suggests, does it require us to treat state actors like the proverbial closed "black boxes" of social theory: institutions as closed machines that produce outputs—in our case, decisions about what sex is—but that conceal from view what went into making them.<sup>28</sup>

### *The "What Sex Is" Approach to the Problem of Sex Classification*

The last five decades have seen radical shifts in the common sense of sex. The position that it is not possible to change from M to F, from F to M, or from either to X, was taken as uncontestable as recently as the 1960s. In an article published in 1967, ethnomethodologist Harold Garfinkel coined the phrase "the natural attitude" to describe the view that "members of the normal population . . . are essentially, originally, in the first place, always have been, and always will be, once and for all, in the final analysis, either 'male' or 'female.'"<sup>29</sup> That attitude was evident in the categorical denial of the possibility of changing one's sex by the New York Academy of Medicine's ad hoc committee on birth certificates. To do so, these medical experts opined, would constitute fraud.<sup>30</sup> Since that time, however, the social consensus that sex is fixed forever at birth has unraveled and it is not likely to reconsolidate around a single metric, given the diversity of views on the matter. Indeed, even social conservatives tacitly admit that the criteria for assigning the categories of M or F is now a political question when they seek laws that would settle the question of sex classification. Most state entities that classify people according to M/F now allow one to amend the sex assigned at birth, though many still require body modification as surety. Even as social conservative groups reignite the culture wars with the specter of "men" in women's bathrooms, by 2015 half of the millennial generation, according to one poll, agreed that gender is a spectrum, not a binary.<sup>31</sup> The once-undeniable public fact of sex as easily and objectively knowable has lost its authority; the common sense of sex will never be made whole again, if it ever was. In its place, some positions establish the body

as the basis or verifier of M/F, while others attribute that role to the mind. And some see the M/F distinction as inherently groundless. In the table below, I’ve aligned each understanding of sex with a particular policy preference on sex reclassification. This table reduces a fluid range of positions enunciated across a number of discourses in very different contexts to four bare-bones categories. With apologies for the violence this boundary drawing does to nuance, this heuristic is meant to orient readers who are not in the relatively small population of people who spend a lot of time thinking about sex reclassification policies.

TABLE 1.1. Theories of sex and their corresponding positions on sex (re)classification				
What sex is	Sex is determined at birth, sex is determined at conception, and/or sex is defined by reproductive capacity	Sex is constituted by or verified by genitals	Sex is gender identity: male, female, or non-binary	Sex is an effect of gender norms
Position on sex reclassification	No re-recognition after initial sex assignment	Recognition should follow evidence of gender-affirming surgery	Recognition of F/M/X should follow declaration of gender identity	F/M/X classification for all should be ended
Held by	Social conservatives; “traditional common sense”	Postwar twentieth-century sexology	Mainstream transgender rights advocates; contemporary medical experts; liberal/doctrinal approach	More gender-radical trans advocates; constructionists

Over time, the consensus represented in the first column has come apart, supplanted by newer ways of conceptualizing M and F. This is not to predict a trajectory that ends with trans communities moving beyond the liberal framework of recognition to the position that all governments’ systems for sex classification should be abolished. Older common senses of sex as set at birth or by current genital configuration continue to resonate and justify some policy choices on sex classification.<sup>32</sup> For example, in 2016, a Texas judge blocked the Obama administration’s rules allowing trans students to use the bathroom associated with their gender identity, with this justification: “It cannot be disputed that the plain meaning of the term ‘sex’ in Title IX was meant to refer

to “the biological and anatomical differences between male and female students as determined at their birth.”<sup>33</sup> In fact, it can be disputed, and it is. Indeed, in the adjacent area of sex discrimination law, in 2020 Justice Neil Gorsuch found that an employer who summarily fired a transgender woman when she announced her intent to transition had violated a statute banning sex discrimination.<sup>34</sup> But despite intense conflicts about chromosomes, genitals, gender identity, and the impossibility of securing the relation between signifier and signified, all four positions are enunciated as conflicts about what sex is or what it is not.

The next position in the “what sex is” chart holds that one’s genitals anchor the distinction: a man will possess a penis, a woman a vagina. As Suzanne Kessler and Wendy McKenna demonstrated in 1978, genitals are taken as “the essential sign of gender.”<sup>35</sup> This logic underpins the second approach. Indeed, it was so hegemonic that it was unremarked upon outside sexology and related sciences of sex—that is, until questions about sex reclassification were thrust into the popular imaginary. When that happened, suggestions that genitals might not be the most apt metric for sex classification were initially met with ridicule—and continue to be in some precincts. For example, when the New York City Board of Health invited public comment on the 2006 proposal for amending sex classification on birth certificates—with no requirement for genital surgery if it passed—one member of the public asked, “How might it be possible for someone with male genitals to now be listed as being female? Is everyone expected to be blind?”<sup>36</sup> In Congress, a bill that would ban discrimination based on gender identity, among other things, has been consistently blocked by Republicans. Yet even when Democrats controlled both the houses, the bill repeatedly faltered on the rocky shoals of sex as genitals. Should transgender women be able to change in the women’s locker room if they haven’t had genital surgery? Even the House’s onetime champion of gay rights, Massachusetts Democrat Barney Frank, had in 1999 objected to classifying people other than by the shape of their genitals. “Transgendered people want a law that mandates a person with a penis be allowed to shower with women,” Frank said, explaining his objections to legislation supported by transgender communities.<sup>37</sup>

Significantly, gender-affirming surgery as a metric does not always reflect the preferences of or economic constraints on trans people. Num-

bers are difficult to come by, but it appears that a minority of those in the United States who move from their assigned sex at birth into another gender have the genital surgeries often taken in popular discourse to be the litmus test for sex—vaginoplasty or phalloplasty.<sup>38</sup> While many trans people did not want such surgeries, and others could not have them because of medical conditions that make surgical intervention risky, the vast majority of people simply could not afford it. Until state Medicaid policies, private insurance companies, and providers governed by the Affordable Care Act began to cover transition-related health care in the second decade of this century, a body modified through “sex change surgery” was one also mediated through class. When prohibitively expensive genital surgery was required, as it was and still is in some contexts, access to large sums of money effectively became a prerequisite for change of sex classification. This argument, however, did not prevail during the era when surgery policies were dominant. Most policymakers preferred to isolate the attributes chosen for classifying F/M from the social conditions that determined whether or not one could access the technologies necessary to produce them. The discussions were limited to “what sex is,” putting socioeconomic status outside the boundaries of those deliberations.

By the mid-1990s, most transgender advocates in the United States had largely coalesced around the third position: that the state’s referent for F or M should be gender identity, not any characteristics of the body. The “International Bill of Gender Rights,” a document drafted by a handful of transgender women in the United States in the mid-1990s, called for the right to define and express one’s own gender identity, “regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role.”<sup>39</sup> The “sex is gender identity” argument begins by explaining that most people develop a gender identity—a deeply felt sense of oneself as male or female—that conforms to social expectations for assigned sex at birth. An infant assigned male at birth based on a physician’s visual examination of the genitalia will most likely develop an identification as a boy/man. But some people turn out to have a gender identity *not* traditionally associated with their birth sex. In that case, gender identity ought to trump the sex assigned at birth. Neither the body nor any of its constituent parts should be the criterion for sex reclassification. If people assigned male at birth modify their bodies to align with a fe-

male gender identity, for example, advocates stress that those changes are made *because of* gender identity.

These arguments developed incrementally over time, and with heavy reliance on the expertise of medical professionals sympathetic to the community.<sup>40</sup> When the goal was to reform policies that did not allow any change from the M or the F assigned at birth, arguments grounded demands for sex reclassification in the classic transsexual narrative introduced in the United States with the press coverage of Christine Jorgensen's "sex change" in 1952: that sex can change, with the efforts of surgeons and endocrinologists, supported by proper (and heterosexual) gender comportment. But even the medical professionals who in the twentieth century had jealously guarded the morphological gates to gender transition eventually came to realize that the "fierce and demanding drive" of transsexual men and women for recognition meant that "psychological sex"—what we now call gender identity—was more intransigent than biology. In her history of transsexuality in the United States, Joanne Meyerowitz explains how psychologists and psychiatrists came to recognize the relative immutability of gender identity: "the mind—the sense of self—was less malleable than the body."<sup>41</sup> Penises and vaginas, beards and breasts, cannot be the basis for M and F classifications—they can be created or made to disappear, after all. Medical interventions such as genital surgery become "gender-affirming," not gender changing in themselves. Even policymakers' rhetoric justifying the requirement for genital surgery oscillates between understanding genital reconfiguration as *verifying* that change and *constituting* that change. Individuals may want to modify their body to bring it into alignment with their conception of themselves, but what one *thinks*, not the body one *has*, is most fundamental and sets in motion any other changes that might follow. Jennifer Germon aptly summarizes the psychological position on the primacy of gender identity that is now hegemonic in the field: "Where there is a mismatch between identity and morphology the body must always give way to the psyche, to identity, to gender."<sup>42</sup>

In the specialized realms of the medical sciences, then, having a gender identity not associated with the sex assigned at birth—which had been the necessary condition for the surgical and hormonal interventions that were thought to begin the transition process—eventually became the sole attribute that should be the basis for one's classification

as male or female, regardless of body modification. Indeed, as medical gatekeepers moved away from the position that surgical interventions are necessary, transgender advocates were able to rely on these experts more and more to advance the case for gender identity as the metric for sex classification, the third column in the above chart. Advocacy arguments are now saturated with this type of authoritative discourse. Indeed, it has become commonplace in trans legal advocacy and education to explain that "gender is what's between your ears, sex is what's between your legs." For example, the ACLU argued in one case that "it is well established in the scientific community that gender identity is the most important among the nine factors making up a person's sex."<sup>43</sup> The force and history of cultural scripts that present gender as an effect of a naturally sexed body once made exporting gender identity from its origin in psychological discourse to the realm of public policy a hard sell. For example, in 2001 the constitutionality of a local law in Kentucky banning discrimination based on gender identity was challenged as "inherently unintelligible" and "unconstitutionally vague."<sup>44</sup> Now, of course, along with "gender expression," the term "gender identity" is ubiquitous in nondiscrimination laws and jurisprudence, and easily rolls off the tongues of judges and progressive elected officials.

While the link between biological sex and social/psychological gender was being severed in the psychological sciences,<sup>45</sup> earlier generations of feminist scholars were engaged in the related project of decommissioning biological sex from its role as authorizer of women's subordination. Because the putative existence of natural sex differences had justified the inequality of women in the domestic, economic, and public spheres for millennia (what Engels referred to as "the world historical defeat of the female sex"), the crucial contribution of much feminist research in the 1970s and 1980s was to demonstrate that the traffic between nature and culture flowed in the other direction. The acceptance of inequality between men and women had required smuggling contemporary gender norms into accounts of natural sex difference. Exposing gender roles and norms as social artifacts and identifying the foundational role that those norms played in institutions from marriage to the military gave the women's liberation movement the footing it needed to demand an end to culturally and legislatively mandated limits to women's rights as self-governing subjects. But even as the domain of biological sex shrank,



the immutability of the F/M binary went largely unquestioned. In her genealogy of the concept of gender, Germon notes that "feminism's ambivalent relation to the category of sex and its seeming reluctance to critically engage with the matter of matter meant that the binary logic so central to sexological and medico-scientific understandings of gender, sex, and sexuality was reinforced."<sup>46</sup> As a result, most liberal feminist projects called for an end to any number of gendered social and legal codes, but challenging states' powers to police the boundary between male and female through sex reclassification policies was usually not among them. While there were more points of agreement between feminism and the incipient transsexual rights movement in the 1970s and 1980s than has generally been acknowledged,<sup>47</sup> mainstream feminist organizations did not begin to call for reforms to sex reclassification until the early aughts—and at the time that signaled ally-ship with trans communities more than a rethinking of sex classification as a technology of governing.

The fourth position holds that, since sex is an effect of gender, the government should simply get out of the business of classifying it at all. Propelled by the claim of deconstructionists that language does not represent the world we know but creates it, eventually sex is understood as an artifact of gender—or at least as knowable only through gendered discourse. Historians such as Thomas Laqueur, biologists such as Anne Fausto-Sterling, and psychologists such as Suzanne Kessler—and, of course, Judith Butler—have all argued that the meanings we attach to sex do not, indeed cannot, reflect the materiality of the phenomenon. Laqueur summarizes this position: "The nature of sexual difference is not susceptible to empirical testing. It is logically independent of biological facts because already embedded in the language of science, at least when applied to any culturally resonant construal of sexual difference, is the language of gender."<sup>48</sup> For Judith Butler, the question of whether there is "a physical body prior to the perceptually perceived body" is unanswerable. Butler argued that the repeated acts of gender performance—dress, movement, voice, affect—taking place in a context of constitutive constraint do not reflect the ontological truth of sex as a fixed, stable, natural, or a priori fact, but in fact produce it. She explains, "This production of sex as prediscursive ought to be understood as the effect of the apparatus of cultural construction designated

by *gender*.”<sup>49</sup> If sex is an effect of systems of gender norms and arrangements, the classification of sex—based on bodily characteristics or on gender identity—has no foundation outside the milieus that give rise to the norms.<sup>50</sup> Some liberal feminists viewed the denaturalizing of sex as undermining political projects organized in the name of women.<sup>51</sup> But many feminist and trans thinkers and activists, coming of age during and after the poststructuralist revolution, saw it as emancipatory: no longer could—or rather, should—the strictures of science or nature be used to dictate how women ought to behave. Nor should they be used to police the border between F and M, and feminine and masculine. For example, as far back as 2003, trans activist Dylan Vade suggested that because “sex is gender pretending to be objective scientific truth,” it should be displaced. Vade offers the term “gender galaxy” instead: “The gender galaxy is not a cute fanciful construct that leaves in place ‘sex’ as truth. It displaces sex. Sex is gone. All that is left is the gender galaxy.”<sup>52</sup> Similarly, Heath Fogg Davis argues that “lack of an ‘objective, socially agreed-upon test for determining who is male and who is female’ means that ‘we should do away with the vast majority of sex classification policies.’”<sup>53</sup>

### Injustices and Inconsistencies

To be an advocate for people seeking sex reclassification is to necessarily adopt the ontological givens of the classical liberal ethos that sustains the mainstream American political imaginary—the individual, the neutral umpire state, and the social contract that binds the two. On this view, the problem to be fixed inheres in the relationship between the individual and their government, which has failed to correctly identify one of their attributes. Sex misclassification is seen as an injustice of misrecognition. Not only does this framework underwrite most advocacy done on behalf of transgender people in general and individual plaintiffs in particular, it also animates a great deal of research on gender identity and the law, and was instrumental in developing the doctrinal framework hegemonic in law reviews, which will be discussed in the next chapter.

This approach has been subject to sustained and rigorous critique by those who argue that a certain domesticated form of selfhood is produced when states address individuals and when individuals recognize

themselves in this addressing—"interpellate" is the term used in social theory to describe this relationship. From this perspective, those seeking to reform sex reclassification policies are merely insisting that the addressing be more accurate. Aren Aizura observes that the focus of traditional trans rights advocates begins and ends with a "critique of the legal mechanics of fixing the 'truth' of gendered bodies."<sup>54</sup> Dan Irving recommends that we question "the theoretical and political implications of putting forward individualistic strategies of sex/gender self-determination, especially within the contemporary neoliberal context, where the minimalist state and a free-market economy demand individual self-sufficiency."<sup>55</sup> Dean Spade describes "formal legal equality as a window dressing for harmful and violent political and economic arrangements," and suggests we "move from demands for recognition and inclusion in law to demands for material changes to our lives."<sup>56</sup> In short, the quest for inclusion through recognition might constitute "political emancipation," but that is not, Marx reminds us, the same as "human emancipation."<sup>57</sup> Critics of a politics centered on individual rights understand that it's necessary to do two things at once: to support liberal demands and to acknowledge their limits. Trans people, especially those lacking the privilege that economic security and whiteness bestow, do not have the luxury of not having the identity documents they need to work, to consume, to access public services and benefits, and even to protest their own disenfranchisement. Yet, over the medium and long term, what disadvantages the majority of trans people the most is not transphobia but the structures and processes of late racial capitalism: the use of incarceration as a system of social control, a minimum wage lagging far behind a living wage, a privatized health care system, and government policies bent on maintaining a carbon-based infrastructure, among other things.

In some trans publics, the critique of the liberal approach has been conflated with the constructionist position. What is taken to be a revolutionary or at least subversive stance on gender is falsely equated with a more radical stance toward the state, capital, and the racialization of vulnerability. Rejecting gender norms is assumed to index a broad spectrum of radical positions; adhering to them is assumed to reflect an attachment to status quos of all kinds. But being "against" gender normativity doesn't *necessarily* entail a broader radical politics. It's a his-

torical and logical error to assume the unmooring of sex is necessarily part and parcel of resistance to the escalating inequalities that make life increasingly miserable for greater and greater segments of the population. In the same vein, the assimilationist charge made within queer and trans communities has been directed at those who understand their identity as something they were born with and whose gender politics—apart from transitioning from one gender to the other—is thought to be fundamentally normative.<sup>58</sup>

Certainly, the move away from facile analogies (for example, sexism is “like” racism) or the cumulative framework (for example, oppressed as queer *and* as poor) toward an understanding of gender, race, class, and other social locations as mutually constitutive has been important and necessary to identity-based studies. But that doesn’t mean, for example, that processes of gendering and racialization are identical. Or that the system that produces class differences is the same as, or operates perfectly in sync with, the formation of hierarchies of sexuality-based difference. As Wendy Brown points out, “Not simply the content but the modalities of power producing gender, race, or caste are specific to each production—the mode of production and dimensions of state power that produce class, and the discourses and institutions of normative heterosexuality that produce gender, are largely noncomparable forms and styles of power.”<sup>59</sup> Certainly, race, gender, class, sexuality, and present-day coloniality should not be made abstract, each term extracted from its contingent enmeshment with others. Sometimes, however, that analytical starting point devolves into an assertion of equality between forms of oppression and a default mutuality, which is not borne out by history. For example, as I will suggest in chapter 5, the gradual and piecemeal unmooring of the categories of male and female might well be a sign not of the political potency of purportedly radical gender politics but of the diminishing salience of gender as a mechanism for maldistribution, at least for white people.

Since any single binary definition (e.g., genitals at birth, chromosomes, gender identity) cannot account for everyone, some who hold the constructionist position argue that the state should just end the practice of classifying people as M, F, or even X, altogether. With no consensus on what sex is, the logic goes, it shouldn’t be recorded or listed on documents. Undergirding this is the assumption that states classify only that

which is "objectively" there. But distinguishing between kinds of people or kinds of activities and backing up those distinctions with the force of law makes those distinctions very real, at least in their effects.<sup>60</sup> Indeed, legislating difference is the central activity of the accretion of laws, rules, institutions, norms, and forces loosely sedimented together and commonly thought of as "the state." One could say—and indeed some have—that establishing all manner of differences is what brings states into being.<sup>61</sup> Merely pointing out that sex lacks an objective foundation will not bring about the collapse of the classification system or the power of states to establish and maintain categories. Of course, calling out states for what they *should* and *should not* do can be a rhetorically powerful and movement-building incitement to justice. Reinforcing that gesture, however, by looking at how particular sex classification policies might further different state projects, from surveillance to incarceration to nation-building, can deepen our understanding of how sex classification has been enrolled in governance. The task at hand, then, is to disaggregate what's been cast as the *singular* issue of sex reclassification policy, as if all bad policies ultimately sprung from the same monstrous (and transphobic) hydra and all good ones from pure, untethered, objectively true reason. Any analysis that assumes sex reclassification is one problem with one solution will not be able to identify the logic of different, even contradictory, rationalities at play. Such an approach hypostasizes the state as a conceptual and ahistorical unity. Recall, from earlier in the chapter, that trans advocates in the birth certificate lawsuit claimed that the contradictory rules for sex reclassification among city agencies rendered them all, collectively, "arbitrary" and "capricious." Attorneys for the city responded by pointing out that "the existence of different approaches to similar problems does not render an agency's rule irrational."<sup>62</sup> Each agency's policy for deciding who was male and who was female depended on the particular agency's work, not on some abstract notion of sex itself.

One way to distinguish injustices and inconsistencies is to see them spatially. The vector of inconsistency can be imagined as vertical: it concerns the relation between an individual and a state actor. Here the inconsistency—the injustice—inheres in the mismatch between the M or F on a person's identity papers and their gender identity. In those cases, even everyday transactions can lead to moments of vulnerability.

As one woman explained to New York City legislators in 2001: "I do not suffer from gender dysphoria. I suffer from bureaucratic dysphoria. My ID does not match my appearance. I worry every time I apply for a job, every time I authorize a credit card check, every time I buy a plane ticket, every time I buy a beer at the corner deli. I have changed my name but my gender continues to be officially and bureaucratically M."<sup>63</sup> The transgender rights movement's advocacy has been largely oriented around this vertical axis, attempting to resolve the injustice of sex misclassification by particular government agencies. The movement has made real progress in the first two decades of the twenty-first century. The departments of motor vehicles in most states have created policies that allow people to change the sex classification on their driver's licenses. As a result of court rulings or policy changes at the administrative level, by 2021 only one state, Tennessee, does not allow individuals to change the sex on their birth certificate. The US Department of State rules for US passports now require only an affirmation of gender identity accompanied by an affidavit from a physician, although the language is intimidating: "Had appropriate clinical treatment for gender transition to the new gender of either male or female."<sup>64</sup> But there have also been some tremendous losses, most notably when the sex classification issue has been raised in the context of incarceration or parenting. Before the Supreme Court's decision in *Obergefell v. Hodges*, several appellate courts had ruled that, for purposes of marriage, sex is determined at birth or by external genitalia. (This will be discussed in chapter 4.) And many penal institutions remain resistant to any suggestion that prisoners be segregated according to anything but external genitalia, as discussed in chapter 5.

The second vector of inconsistency is horizontal: it refers to a lack of uniformity *between* state policies and decisions on sex reclassification. Here the inconsistency inheres not in a clash between an individual and the government agency that misclassifies them, but in the differences between entities that make decisions backed by the force of law with regard to the criteria they rely on for sex designation. (And even with agencies that have the same policies, what must be provided as evidence to meet the policy's criteria can differ.<sup>65</sup>) For the purposes of this analytical framework, I am not particularly interested in the individual—or the "subject." Rather than centering on the differences between the in-

dividual and the state, I focus on the differences between state actors. From this perspective, individuals fade into the background, figuring not as actors but as the acted upon. As the individual recedes, so does sex itself. In its place, state actions—rules, regulations, decisions, policies, laws—take center stage: the focus becomes not what sex is, but how states produce it, and what effect those decisions have. Second, rather than understanding the problem as one of injustice and prescribing a solution for how states “ought to” define sex, or “ought to” refrain from classifying sex at all, I defer shifting, as much as possible, from describing the current situation to prescribing the solution for it. Moving too quickly from the “is” to the “ought” means that we don’t spend enough time trying to figure out what particular systems of sex classification do. Instead of positing the differences as discrepancies, I try to understand how they’re not. The different metrics for sex are telling, and much is lost when those differences are summarily portrayed as irrational vestiges of social structures long past or as effects of transphobia. The project here is not to resolve the disorder of sex classification, but to pull it apart even more and use it to figure out at a very molecular level what these different sets of criteria accomplish.