

Part One

Transgressive Bodies

Chapter 1

Binary Identities and the Construction of Privileged versus Transgressive Bodies

Introduction

Power and privilege are allocated to those “bodies that matter” based on various physical traits including race, sex, sexual orientation, and the intersectional dynamics of these attributes.¹ As such, one of the biggest obstacles for trans rights activists and allies is persuading the public, legislators, and the courts that *all* trans bodies—as opposed to promulgating a transnormative politics of rights that privileges white transgender bodies—matter and are worthy of legal protection. Yet, as this chapter endeavors to make clear, U.S. Supreme Court justices historically have preferred the parsimony of binary categories of identity and regularly issue decisions that create and/or reify dichotomous groups of people. More often than not, differences are operationalized as binaries that work in effect to privilege one group at the expense of another (e.g., male/female, white/not white, gay/heterosexual). While these dichotomies are social constructs, they have been politically and legally operationalized as immutable characteristics that effectively reify power differentials in American society. Yet, this either/or approach to American civil rights jurisprudence is distinctly anti-intersectional and forces individuals to locate themselves in socially constructed diametrically opposed categories of identity—one is either Black or white, heterosexual or gay, male or female—which is not only an inaccurate description of many individuals’ identities but works as a powerful privileging mechanism for some bodies as well.

At the same time, however, the Black, women’s, and gay rights movements often have seen their greatest successes when they are able to cast questions about civil rights as debates about the legitimacy of state and/or

state-sanctioned discrimination between two groups of individuals where one group is targeted for differential treatment on the basis of a single and shared immutable characteristic. Most recently, the gay rights movement's arguments that gays and lesbians have a same-sex sexual orientation not a sexual preference, and that consequently states cannot deny same-sex couples access to the civil institution of marriage that is open to opposite-sex couples, proved to be a persuasive political and legal argument culminating in the U.S. Supreme Court's decision in *Obergefell v. Hodges* (576 U.S. ___ [2015]) declaring state prohibitions on same-sex marriages unconstitutional. The majority opinion, however, validated the binary operationalization of sexual orientation that consistently has informed the justices' gay rights jurisprudence. In this instance, a majority of the justices determined that it is unconstitutional to deny same-sex couples access to the social, legal and economic benefits that accrue to married heterosexual couples, thereby following a pattern in which major civil rights victories validate and perpetuate the binary construction of identities.

This chapter explores the role that the courts play in the sociolegal construction of binary identities, and how the white/not-white, heterosexual/gay, and male/female binaries effectively create and perpetuate hierarchical categories of identity in relation to one another. This oversimplification of the complexities and nuances of individuals' identities works to privilege, marginalize, and erase different individuals based on whether or not they can be located within these binaries and, if so, where they are situated. These norms prove to be especially problematic for individuals located at the intersection of various categories of identity such as genderqueer and trans people of color as well as those with fluid sexual and gender identities.

As such, the analysis in this chapter begins with a discussion of how traditional rights jurisprudence is commensurate with the sociolegal construction of binary identities as a privileging mechanism in the contemporary United States. Then, specific attention is focused on the U.S. Supreme Court's role in the social construction of whiteness and the myriad ways in which the white/not-white dichotomy works to empower white individuals by designating nonwhite individuals as transgressive Others. Next, a review of the Supreme Court's validation of sexual orientation as both a binary and an immutable characteristic (e.g., gays and lesbians are "born that way") demonstrates how this jurisprudence limits the legibility of those bodies that are not easily located in the gay/heterosexual binary. Finally, the sociolegal construction of the male/female binary is examined

in depth because this dichotomy works in myriad ways to restrict the legibility of trans bodies. Notably, the current trans rights litigation strategy, which is premised on situating discrimination against trans individuals in employment and education in the existing prohibitions on sex discrimination in Title VII of the 1964 Civil Rights Act and Title IX, risks reifying the sex binary in problematic ways by privileging those who can “pass” versus those who are marked as gender nonconforming members of their sex as assigned at birth. Recognizing the binary operationalization of immutable categories of identity as a successful and viable tactic in civil rights litigation suggests that a trans politics of rights is likely to be predicated on the sociolegal construction of a gender binary (cisgender/transgender) and the demand that an individual’s right to transition to their right sex be legally validated. Yet, as the analyses below demonstrate, binary categories of identity are highly problematic because they are inaccurate and simultaneously work to mark some bodies as legible and privileged and other as illegible and transgressive.

The Sociolegal Construction of Binary Identities in the United States

Social and legal constructions of binary identities operate as tools of social control that privilege those “bodies that matter.”² The creation and reification of binary identities may lend parsimony to legal proceedings, but simultaneously they work to maintain the power of privileged bodies in myriad ways because dichotomous identities help to “divide and rule” and mitigate the threat that a unified populace poses to the oppressors’ hegemony.³ Furthermore, the binary construction of identities distinguishes among those who are unmarked and have their identities universalized and those who are marked and find that their identities are particularized:

The difference between self-abstraction and a body’s positivity is more than a difference in what has officially been made available to men and to women, for example. It is a difference in the cultural/symbolic definitions of masculinity and femininity. Self-abstraction from male bodies confirms masculinity. Self-abstraction from female bodies denies femininity. The bourgeois public sphere is a frame of reference in which it is supposed that all particularities have the same status as mere

particularity. But the ability to establish that frame of reference is a feature of some particularities. Neither in gender nor in race nor in class nor in sexualities is it possible to treat different particulars as having merely paratactic, or serial, difference. Differences in such realms already come coded as the difference between the unmarked and the marked, the universalizable and the particular. . . . The bourgeois public sphere has been structured from the outset by a logic of abstraction that provides a privilege for unmarked identities: the male, the white, the middle class, the normal.⁴

In this way, the privileges that accrue to unmarked identities are not correlated with identity whereas the costs that are imposed on marked bodies are understood to reflect their particularities and abnormalities. These distinctions insulate the beneficiaries of the binary construction of identity from interrogation within and by the public as “[t]he powerful are in this way discursively normalized, naturalized, while the dominated appear as mutants, disabled.”⁵

Similarly, consistent with the idea that “the master’s tools will never dismantle the master’s house,” a review of landmark litigation in the areas of Black, gay, and women’s civil rights demonstrates how the legacies of racism, homophobia, and sexism are reproduced when those bodies that matter are the same individuals tasked with managing challenges to the dominant norms that validate their own power and privileges.⁶ When courts validate social constructs as immutable characteristics, these innate physical markers sanction the perpetuation of stereotypes that are then used to further substantiate the intractable differences between identity groups. The mutually constitutive relationship among legal meaning and individual and social identities facilitates processes of governmentality and makes it exceedingly difficult for transgressive bodies to challenge governing norms.⁷

Successful civil rights litigation strategies historically have been predicated on socially constructed binaries—whites and Blacks, whites and nonwhites, men and women, gays and heterosexuals, etc.—that are then validated as real constructs via legal decisions and legislation. In this way, binaries that are themselves social constructs are validated as legal categories that work to privilege some at the expense of others. As such, it seems evident that those with power are invested in the maintenance of binary identities predicated on immutable characteristics and the legal

validation of these binaries, and this is enhanced when “the dominators try to present themselves as saviors of the women and men they dehumanize and divide.”⁸

Yet, it is precisely because these legal victories are significant, end de jure discrimination, and mandate the expansion of rights under the law—e.g., ending segregation in education in *Brown v. Board of Education* (347 U.S. 483 [1954]), declaring prohibitions on same-sex sodomy unconstitutional in *Lawrence v. Texas* (539 U.S. 558 [2003]), and recognizing marriage equality in *Obergefell v. Hodges* (576 U.S. ____ [2015])—that it is difficult to criticize these cases. These legal victories are exalted as validation that the state is capable of eradicating past wrongs and/or expanding the realm of rights to include new identities and groups while simultaneously eliding the myriad forces of governmentality that continue to operate on marginalized and intersectionally subjected populations after these landmark cases are decided. Furthermore, these binary categorical distinctions are understood as efficacious in legal decisions because the law is often operationalized as a mechanism for neatly distinguishing between right and wrong, criminals and victims, and so on. Yet, the courts’ emphases on immutable characteristics and dependence on binary categories are not innate to the legal system or happenstance. These norms are instrumental in maintaining a system that identifies some as “beings for others.” An alternative approach would seek to validate individuals as “beings for themselves,” but this requires challenging the system itself because

the oppressed are not “marginals,” are not people living “outside” society. They have always been “inside”—inside the structure which made them “beings for others.” The solution is not to “integrate” them into the structure of oppression, but to transform that structure so that they can become “beings for themselves.” Such transformation, of course, would undermine the oppressors’ purposes.¹⁰

As such, any attempt to dismantle the governing binaries is likely to meet with systemic resistance.

Before one can entertain how making the case for the fluidity of gender and a spectrum of gender identities challenges the structures of oppression and has the potential to enable oppressed individuals the freedom to be “beings for themselves,” it is first necessary to examine the structures that must be transformed in pursuit of change. In particular,

the courts' reliance on immutable characteristics and binary categories of identity has had significant ramifications that work in effect to erase the identities of individuals who do not fit into binary categories, and creates a politics of division that reifies the power and privilege of those in the dominant binary identity categories at the expense of others. In this way, these legal tools produce and regulate persons and populations.¹¹ As such, the success of political and legal arguments predicated on binary identities reflects the challenges and limitations of advancing civil rights claims in the American political and legal systems. While the Black, gay, and women's rights movements have achieved great success in the courts, the legal constructions of race, sexual orientation, and sex come with costs, and the same will be true if civil rights advancements for trans individuals are predicated on a binary construction of gender identity.

Race: The Construction of Whiteness

Throughout U.S. history it has been "critical to define who was 'white' and on what grounds."¹² In Ian Haney López's *White by Law* (2006), he examines the role that the courts have played in the construction of race throughout U.S. history. López explains:

First, the courts constructed the bounds of Whiteness by deciding on a case-by-case basis who was *not* White. Though the prerequisite courts were charged with defining the term "white person," they did not do so by referring to a freestanding notion of Whiteness. No court offered a complete typology listing the characteristics of Whiteness against which to compare the petitioner. Instead, the courts defined "white" through a process of negation, systematically identifying who was non-White. . . . In this relational system, the prerequisite cases show that Whites are those not constructed as non-White.¹³

López proceeds to identify the courts' assignment of value to these two categories—whites are superior and nonwhites are inferior—as their second major contribution to the construction of race through law.¹⁴ The legal construction of race validates and perpetuates the social construction of a binary racial identity whereby whites are privileged and recognized as legitimate bodies and nonwhites are designated as inferior marginalized transgressive bodies.

This two-step process by which courts (1) decide who is *not* white, and (2) assign value to the categories of white and nonwhite is evidenced in the following quote from the U.S. Supreme Court's decision in *Plessy v. Ferguson* (163 U.S. 537 [1896]):

Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach and take a seat in another assigned to persons of the colored race.¹⁵

First, the Court clearly identifies Homer Plessy as nonwhite despite the fact that he identifies himself as seven-eighths white and one-eighth Black. The Court's decision makes clear that Plessy does not have the power to articulate his racial identity because that authority rests with the state to determine "the race to which he belonged."¹⁶ Second, the Court legitimates that individuals who are not white may be forced to utilize separate accommodations thereby marking them as inferior. Despite protestations to the contrary, there is little doubt that the separation of whites from nonwhites was intended to maintain the power and privileges of the former relative to the latter. The Court's confirmation of the "one drop rule" plays a significant role in the creation of the racial binary by ensuring that multi- and biracial individuals will be located in the category of nonwhite thereby restricting who is allowed to identify as white. Justice Brown's majority opinion in *Plessy v. Ferguson* (163 U.S. 537 [1896]) demonstrates the extent to which the racial binary is understood as a given: "A statute which implies merely a legal distinction between the white and colored races" is legitimate because this distinction "is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color."¹⁷ In addition, this holding

confirms that those with power and authority—law enforcement officers, lawmakers, judges—will determine who is white and who is not white.

Throughout the twentieth century, the Black civil rights movement utilized various means of political and legal mobilization and protest to advance the interests of Black communities and challenge de jure segregation and discrimination on the basis of race. Notably, the Black civil rights movement successfully challenged de jure segregation when the U.S. Supreme Court pronounced that “in the field of public education, the doctrine of ‘separate but equal’ has no place.”¹⁸ Yet, even the landmark civil rights decision *Brown v. Board of Education* (347 U.S. 483 [1954]) long celebrated as *the* breakthrough in the battle for Black civil rights is predicated on and validates the binary operationalization of race, and the legal and political developments that followed did not challenge the sociological construction of race as a binary identity. Instead, the U.S. Supreme Court’s *Brown* opinion depended on and revalidated the race-binary that had been crafted and codified into law in earlier cases—e.g., in *Plessy v. Ferguson* (163 U.S. 537 [1896]), the Court wrote that “[w]e consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of *the two races* stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it”¹⁹—by explaining that “[s]egregation of *white and colored children* in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”²⁰

The creation of two races—“whites” and “coloreds”—is more than simply an oversimplification that ignores the abundance of racial and ethnic identities. It is also a social construct parading as biological fact. “The insistence that ‘white persons’ constitute a natural grouping prohibits at the level of basic assumptions any exploration of the social origins and functions of Whiteness, rendering its socially mediated parameters invisible and impossible to discern correctly.”²¹ By identifying individuals as either “white” or “colored,” the hegemonic power of law works to privilege those who fit in the category of “white” while continuing to designate any and all individuals who do not fit into that category as “colored” and inferior. In this way, “Ontology does not allow us to understand the being of the black man, since it ignores the lived experience. For not only must the black man be black; he must be black in relation to the white man.”²²

Furthermore, the practice of defining those who are nonwhite in relation to those who are white works in effect to locate multiracial individuals in the category of nonwhite.²³ The law's inability to recognize the complexity of racial identities denies recognition to those individuals who are multiracial and/or intersectionally identified and perpetuates a mechanism for assigning privilege and power. Courts have long resisted the recognition of complex and dynamic identities forcing, for example, Black women to litigate employment discrimination cases as sex *or* racial discrimination but not both. This practice is grounded in the binary assumptions that work in effect to systematically erase Black women and their unique experiences as Black women from the legal lexicon and deny them access to legal remedies.²⁴ The same is true for other intersectionally identified individuals including trans people of color, as the analyses in forthcoming chapters will make clear.

As such, the sociolegal construction of a race binary privileges those who are identified as white while systematically marginalizing and stigmatizing nonwhite individuals. It does this by creating a fictitious racial category and giving those with power and privilege the authority to act as gatekeepers and determine who will be identified as white in practice and in law. In this way, the racial binary is both fluid—the categories of white and nonwhite change throughout U.S. history—and fixed—the authority to determine who is white and nonwhite rests in the hands of the few. As such, race becomes a mechanism for distributing benefits and costs across society in ways that work to maintain the power and privilege that accrues to those bodies and persons that matter while simultaneously stereotyping and ostracizing those who fail to conform with privileged norms and values even after civil rights victories in the courts and legislatures.

While *de jure* racial discrimination is outlawed, it is the process of marking certain bodies as permanently transgressive via forces of governmentality that aids in the maintenance of the racial binary today. Socio-economic, cultural, and legal factors interact as tools of oppression and perpetuate systemic racism, but blame and a failure of responsibility are projected onto those individuals who are unable to overcome the powerful forces of governmentality working against and on their bodies. In this way, for example, Black bodies are marked as transgressive bodies—it is their failure to comply with the established rules and norms that locates them outside of the system as opposed to a systemic failure—rendering them vulnerable to economic exploitation, police harassment, violence, and execution. This gross mischaracterization and stereotyping of Black

individuals (as well as other individuals and populations designated as “not white”) works to maintain the racial binary and the power and privileges that accrue to white individuals while simultaneously absolving those with power of their complicity in the maintenance of ongoing racial hierarchies. Thus, it is essential to understand that the race binary is not merely an antiquated legal holdover, but rather a contemporary privileging mechanism that is utilized to manage populations, distribute power, and enable violence.

Sexual Orientation: Born This Way

The mainstream gay rights movement successfully co-opted the legal strategies utilized by the Black civil rights movement. Liberal gay rights groups emphasized litigation as a valuable form of legal mobilization and argued that discrimination on the basis of sexual orientation should be recognized as a violation of constitutional guarantees because sexual orientation is a fixed identity and not a preference.²⁵ Notably, the liberal gay civil rights movement’s argument that gays and lesbians have an immutable same-sex sexual orientation as opposed to a sexual preference has proved to be a persuasive political and legal argument in favor of extending civil rights protections and marriage equality to gays and lesbians. By analogizing sexual orientation to other “immutable” characteristics such as race and sex, gay rights groups utilized a legal strategy modeled on the successful tactics of prior civil rights movements. This argument aided in the construction of a heterosexual/gay binary and proved to be a persuasive tool for changing public perceptions thereby creating opportunities for legal change and confirming the efficacy of the politics of rights.

In fact, the Court’s rapidly evolving gay rights jurisprudence can largely be attributed to the justices’ growing recognition and acceptance of an immutable binary sexual orientation. In 1986, in *Bowers v. Hardwick* (478 U.S. 186), a majority of the justices dismissed that Georgia’s antisodomy statute violated the privacy guarantees of the U.S. Constitution finding that the legislative authority of the state to regulate immoral conduct trumps one’s personal sexual preferences.²⁶ Yet, just a few years later in *Romer v. Evans* (517 U.S. 620 [1996]), the justices concluded that Amendment 2 to the Colorado Constitution, which denied “protected status” to individuals on the basis of their “homosexual, lesbian or bisexual orientation,”²⁷ violated the Constitution’s guarantees of equal protection because it “identifies

persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”²⁸ Writing for the majority, Justice Kennedy explained that animus toward a class of people on the basis of a “single trait” does not constitute a legitimate government interest thereby indicating both a move away from the moral justifications accepted in *Bowers* and a simultaneous step toward recognizing sexual orientation as an individual characteristic instead of a preference.²⁹ In addition, while Amendment 2 was added to the Colorado Constitution via popular referendum in response to various municipal codes that attempted to protect individuals from discrimination on the basis of their sexual orientation broadly defined (e.g., the city of Boulder, Colorado, ordinance stated “the choice of sexual partners, i.e., bisexual, homosexual or heterosexual”),³⁰ Justice Kennedy reduced sexual orientation to a binary and explicitly excluded bisexual orientation from his analysis when he wrote: “Amendment 2 . . . prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as *homosexual persons or gays and lesbians*.”³¹

The justices further validated the binary construction of sexual orientation in *Lawrence v. Texas* (539 U.S. 558 [2003]) when they determined that a Texas law prohibiting sodomy between “same-sex” participants but not “different-sex” participants violated the Constitution by depriving “homosexuals” of the same liberty protections extended to “heterosexuals.” Finally, in the U.S. Supreme Court’s decision in *Obergefell v. Hodges* (576 U.S. ___ [2015]), Justice Kennedy stated that “sexual orientation is both a normal expression of human sexuality and immutable,” and in doing so provided definitive legal support for the idea that sexual orientation is an innate and fixed characteristic.³² Furthermore, throughout the majority opinion, Kennedy repeatedly refers to same-sex couples in relation to opposite-sex couples as follows: “Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”³³ This holding is firmly grounded in the gay/heterosexual binary and validates the pursuit of homonormativity as a viable political and legal mechanism for advancing gay rights.³⁴ In this way, dominant groups and elite actors (in this case Supreme Court justices) are able to signal that a gay politics of rights “that does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them,

while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption” has the greatest likelihood of success in the American legal system.³⁵

While these gay rights cases are substantive victories, they are not without costs. Operationalizing sexual orientation as a heterosexual/gay binary excludes bisexuals and individuals who reject this type of classification in favor of more dynamic and fluid sexual orientations and preferences. Much like the sociolegal construction of race, the sociolegal construction of sexual orientation ignores the complexity and fluidity of identities. In this way, the sexual orientation binary posits “gays” as a cohesive group of individuals when in fact the LGBTQ community is comprised of complex and diverse individuals with varying sexual identities, orientations, and preferences. In particular, this essentialism and the practice of analogizing race and sexual orientation “erases the ways that legal and social structures work together and against the people who live at those intersections—queer people of color.”³⁶ While this legal strategy may have been successful, it comes with significant costs for those who are gender fluid, bisexual, and or intersectionally identified as well as individuals who are not interested in or able to enter into a homonormative lifestyle.³⁷ In practice, many individuals are located outside of the sociolegally constructed heterosexual/gay binary.

For example, while marriage equality is often celebrated as the pinnacle achievement of the gay rights movement, in practice it sanctions that those gay and lesbian couples willing to enter into same-sex marriages predicated on heterosexual norms may under the best circumstances be deemed legitimate citizens with the associated socioeconomic and legal benefits whereas those who aspire to alternative lifestyles, domestic partnerships, or are unable to wed will continue to be excluded from the privileges that accrue to those who are married.³⁸ Yet, in spite of this legal victory, privileged elites and government actors are still able to act as gatekeepers and police access to and the distribution of benefits via formal laws and practices of governmentality. For example, gays and lesbians who are able to marry remain economically, legally, and physically vulnerable given that many states still lack laws prohibiting discrimination on the basis of sexual orientation, resulting in an entire class of “fragmented citizens.”³⁹ Furthermore, human resource directors, state legislators, local bureaucrats, and so on continue to exercise outsized influence on the lives of many gays and lesbians in spite of the aforementioned rights victories,⁴⁰ and the implementation of marriage equality has been accompanied by unintended

consequences including the elimination of recognition for domestic partnerships in some states and private workplaces.⁴¹ As such, the practice of marking certain gay and lesbian bodies as transgressive continues in spite of rights recognition for “homosexuals,” and those bodies that cannot be located squarely in a hetero or homonormative lifestyle continue to be rendered illegible.

Sex: The Immutability and Exclusivity of Male and Female

Much like the sociolegal constructions of race and sexual orientation, the male/female dichotomy is a sociolegal creation.⁴² At the same time, however, the categories of male and female are among the most powerful privileging and organizing mechanisms in contemporary American society and law. Sex, understood as an unambiguous characteristic assigned at birth, informs society’s and the legal system’s operationalization of gender—the masculine versus feminine binary are “expressive attributes of ‘male’ and ‘female’ ”⁴³—and sexual orientation—the homosexual/heterosexual binary is created in relation to one’s sex: “[H]omosexuals’ are oriented or attracted to individuals of the same sex, while ‘heterosexuals’ prefer to have sexual relationships with members of the ‘opposite’ sex.”⁴⁴ Similarly, the male/female dichotomy informs transgender identity as well. Transgender individuals are defined as those individuals who seek to identify as the opposite gender of the sex they were assigned at birth. Thus, transgender individuals regularly are referred to as male-to-female or female-to-male reflecting how they have now transitioned into their right gender.

Furthermore, even individuals operating outside of the confines of the sex binary are still defined in relation to it. For example, “bisexuals’ are those relatively unusual individuals who are attracted, or could be, to persons of ‘either’ gender. . . . Even ‘intersexual’ persons—individuals who do not conform to ‘either’ sex because they demonstrate physical characteristics of ‘both’—are defined with reference to this binary scheme.”⁴⁵ As such, it is clear that the sex binary is one of the most powerful tools for assigning and regulating identity, as indicated by the fact that numerous other identities often are the derivatives of sex. As Butler explains, “The notion that there might be a ‘truth’ of sex, as Foucault ironically terms it, is produced precisely through the regulatory practices that generate coherent identities through the matrix of coherent gender norms.”⁴⁶

In addition to being erroneously understood as an immutable and unambiguous characteristic, sex has been operationalized by the courts as a distinguishing characteristic that allows and, in some instances, requires differential treatment of males and females consistent with the law. While laws that classify and/or treat individuals differently on the basis of race are subject to the most exacting judicial review because there are nearly no compelling reasons for treating individuals differently on the basis of their race, laws that treat individuals differently because of their sex are not subject to the same rigorous review. Throughout history, the courts have upheld laws that treat individuals differently on the basis of sex for a variety of reasons including “woman’s physical structure” and the fact that “healthy mothers are essential to vigorous offspring,”⁴⁷ women’s central role in “home and family life,”⁴⁸ and the belief that women’s presence in certain domains may lead to “moral and social problems,”⁴⁹ or sexual assaults.⁵⁰ While the courts have largely abandoned many of these stereotypical and antiquated assumptions about women’s roles in the private versus public spheres, differential treatment of men and women continues to be legal in those instances in which the courts find that men and women are not “similarly situated.”⁵¹ This standard continues to operate as a tool for distinguishing between men and women based on both physiological differences as well as stereotypical assumptions about caregiving and parenting. For example, as recently as 2001, in *Nguyen v. INS* (533 U.S. 53), the U.S. Supreme Court upheld more onerous citizenship requirements for illegitimate children born on foreign soil to American male citizens than illegitimate children born on foreign soil to American female citizens, a precedent that was finally overturned in 2017 in *Sessions v. Morales-Santana* (582 U.S. ___) when the Supreme Court determined that this differential treatment is based on outdated gender stereotypes thereby violating the Constitution’s equal protection guarantees.

Thus, while protectionist legislation has been subject to greater legal scrutiny in recent decades as women integrated the workforce, politics, and public spaces, stereotypical and essentialist assumptions about males and females continue to inform the courts and U.S. law and policy. Despite significant advancements in women’s rights, the belief that there are two sexes and that they are fundamentally and physiologically different, and hence may under certain circumstances be treated as such under the law (e.g., sex-specific statutory rape laws, accommodations for maternity leave as opposed to parental leave, the military draft, regulation of women’s reproductive rights as well as fetal protection laws) distinguishes sex from race (and possibly sexual orientation moving forward). The continued

affirmation by the courts that there are innate differences between the two sexes reifies the immutable sex binary on a regular basis.

Much like the sociolegal construction of race and the continued policing of the boundaries of whiteness, the sociolegal construction of sex and the emphasis on its immutability and the innate differences between males and females work to police the boundaries of Man and Woman beyond the law. As Butler reminds us, “The foundational reasoning of identity politics tends to assume that an identity must first be in place in order for political interests to be elaborated and, subsequently, political action to be taken. My argument is that there need not be a ‘doer behind the deed,’ but that the ‘doer’ is variably constructed in and through the deed.”⁵² Just as white individuals are invested in maintaining the power and privileges that accrue to them as a result of the race binary, men and women are invested in the sex binary. Notably, men benefit from protecting the boundaries of “male” so that they may continue to benefit from the de jure and de facto privileges that accrue to men despite the advances of the women’s movement.⁵³ In addition, men are invested in having a clearly marked class of women who are sexually available to men and prepared to bear children and act as mothers.⁵⁴

At the same time, women are invested in the maintenance of the category of “female” as well. Throughout U.S. history, the “logic of essentialism” has informed discussions and analyses of sex and gender including the various women’s rights movements.⁵⁵ The essentialist tendencies of the mainstream white women’s movements have been well documented by Black, Latina, and lesbian feminist theorists who draw attention to the diversity of women’s experiences based on one’s race, ethnicity, immigrant status, sexual orientation, intersectional identities, and so on.⁵⁶ In practice, however, many women continue to be the beneficiaries of essentialist assumptions that are mapped onto the a priori sex binary. As Fuss explains, “For the essentialist, the natural provides the raw material and determinative starting point for the practices and laws of the social. For example, sexual difference (the division into ‘male’ and ‘female’) is taken as prior to social differences which are presumed to be mapped onto, *a posteriori*, the biological subject.”⁵⁷ As such, for better or for worse, some women continue to benefit from certain privileges and concessions that accrue to women based on stereotypes about their physical differences from males as well as those that derive from the mythology of the cult of true womanhood and the accompanying stereotypes about femininity and domesticity.⁵⁸ In this way, the policing of the boundaries of “woman” works to maintain those accommodations.

At the same time, the policing of the boundaries of “woman” distinguishes those female “bodies that matter” from those that are outside of the bounds of womanhood, and implicates the racial, heteronormative, and class dimensions of the “logic of essentialism” that privilege some women and not others. This process regularly reifies femininity as the measure of a real woman in order to ostracize women who deviate from these expectations. For example, women who are perceived as being too masculine historically have been excluded from the category of “real woman,” including women of color and lesbians.⁵⁹ Similarly, trans exclusionary radical feminists (TERFs) have worked to exclude transwomen from “women’s” spaces, organizations, and events based on the belief that “real women” are born with vaginas.

Questions and stereotypes about the intersections of race, femininity, and sexuality are especially pervasive in contemporary athletics as demonstrated by the ongoing fervor over South African runner and 2016 Olympic 800-meter gold medalist Caster Semenya and whether or not she is a “real woman.” Semenya, like many Olympic athletes before her, has been subject to extensive sex testing since her breakout performance at the 2009 world track and field championships because she is perceived as “‘being too fast and supposedly too masculine’ by Western standards.”⁶⁰ The policing of masculine women competing in the Olympics has evolved from visual inspection of one’s genitalia to chromosomal testing to the current procedures that utilize measures of testosterone to determine one’s eligibility to compete as a woman.⁶¹ The ongoing criticism of Semenya’s participation in the women’s 800-meter track and field event cannot be disaggregated from sexism, racism, or homophobia, and exemplifies the ways in which race, sexuality, and sex intersect to privilege some women and certain conceptions of womanhood over others. This policing of the boundaries of “woman” works to privilege those women deemed to be appropriately feminine and attractive and often favors white heterosexual women. The Polish runner Joanna Jozwik, who placed fifth in the 800-meter event at the 2016 Olympics, stated that she “feels like a silver medalist” suggesting that the second and third place finishers—Black women from Burundi and Kenya respectively—also are not “women,” and then went on to say “I’m glad I’m the first European, the second white” to finish the race.⁶² The policing of female masculinity works to reify “the versions of masculinity we enjoy and trust; many of these ‘heroic masculinities’ depend absolutely on the subordination of alternative masculinities.”⁶³ In this way, masculinity continues to be associated with maleness and female masculinity is obfuscated and erased.⁶⁴

Similarly, the privileging of feminine women works to the detriment of those masculine women located at the intersection of gender stereotypes and sexual orientation. The history of the women's liberation movements and the "lavender menace" is well documented, but these antagonisms remain today in both similar and different manifestations. The stereotype that all lesbians are dykes, and are therefore too masculine to be included in the category of woman, works to marginalize these individuals⁶⁵ and has perpetuated a myth that masculine lesbians are not feminists or are not women.⁶⁶ At the same time, Halberstam writes, "female masculinity is generally received by hetero- and homo-normative cultures as a pathological sign of misidentification and maladjustment."⁶⁷ When heteronormative forces of governmentality are utilized to police the category of woman, those women who are lesbians, bisexuals, masculine, or women of color are removed and intersectional subjection is left unacknowledged.

The reality remains that as long as certain men and women benefit from the artificial categorical distinctions between male and female there will be resistance to acknowledging the complexities of sex and gender. As such, the courts' facilitation of the "logic of essentialism" aids in the maintenance of the sex and gender binaries by reifying the belief that women are unified by a shared biology, characteristics, and experiences that are distinct from and/or defined in opposition to men. This approach and positioning inevitably informs the current discourse surrounding trans rights, and raises questions about how a trans politics of rights is similar or dissimilar to prior civil rights movements. While many trans activists reject the suggestion that gender should be understood as a fixed and immutable characteristic, as evidenced by the analysis to follow, extant legal doctrines and constitutional jurisprudence validate the efficacy of litigation strategies predicated on binary and immutable categories of identity.

Conclusion

Throughout U.S. history, the courts have played an important role in the creation and implementation of binary categories of identity. By linking the viability of rights claims under the law to the immutability of binary characteristics, judges have empowered both state and social actors to police the boundaries of identities in order to allocate costs and benefits. As long as these sociolegal constructs are treated as biological or natural facts, it is difficult to challenge and dismantle the hierarchies that are created on the scaffolding of the politics of identity. Recognizing that these dyads are

fictions and work to the detriment of many individuals, the social and legal opposition to the deconstruction of binary categories of identity is not about biology, but rather reflects the power struggles between bodies that matter and transgressive bodies that have been systematically marginalized in order to reify the regulatory norms of race, sex, and sexual orientation.

Those with power are likely to resist efforts to challenge the existing identity binaries because they benefit from the systemic enforcement of sexed, raced, and intersectionally subjective body politics. In particular, the sex binary operates as a powerful privileging and organizing binary because it is understood as being based on immutable characteristics, and it is the foundation by which other identities are constructed including gender, sexual orientation, and transgender identity. The maintenance of the sex binary privileges some at the expense of others, informs the construction of other privileging binaries, and works as a powerful force of governmentality via *de jure* regulations and *de facto* policing of sex. Yet, an accurate understanding of gender undermines the governing sex binary and offers an explicit challenge to sociolegally constructed binaries that could work to expose these dichotomies as fictitious constructs that empower the few to determine the identities and destinies of the many, and work to maintain the privileged position of those bodies that matter. In order to truly eradicate discrimination on the basis of race, sex, sexual orientation, and gender identity, it is necessary to validate the complexities of these identity categories. This requires recognizing how and why categories of identity are socially constructed, multiple, and/or fluid as opposed to binary and immutable, and overlap and intersect in significant ways with one another as well as formal and informal mechanisms of power.

Recognizing the challenges that confront trans individuals seeking to litigate cases and/or pursue legislative change by advocating for the application of prohibitions on sex discrimination to trans individuals and the limitations of advocating for prohibitions on discrimination on the basis of a gender binary, the chapter that follows makes the case that understanding gender identity as a complex fluid characteristic is a more desirable alternative than working within the conventions of binary rights claims because the former opens the door for a more complex and nuanced understanding of identity including intersectional analyses. An accurate understanding of gender identities and how they interact with other facets of identity is an essential first step in facilitating transformative change because complex and fluid conceptions of gender liberate individuals from the binary politics of right sex and challenge a fundamental hegemonic organizing and privileging mechanism.