

PARADOXES OF HEALTH AND EQUALITY: WHEN A BOY BECOMES A GIRL

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ABSTRACT

This paper is about an unusual child custody dispute between the parents of a six-year-old child and the child welfare services of Franklin County, Ohio. The conflict emerged when the child’s parents complied with their male child’s professed desire to be treated as a girl by attempting to enroll the child in the first grade as a girl. The paper treats this case as an exemplary test-case of contemporary co-dependence between scientific-medical discourse and liberal-rights discourse. The paper analyzes the positions of the two sides of the custody dispute according to the classic modern distinction between mind and body. On the one hand, the child’s parents alleged that the child should be treated as a girl, because the child’s ‘true self’ in his/her effeminate mind. On the other

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hand, the child-welfare services counter-claimed that the child should be treated as a boy, because the child's 'true self' is located in the male body. The paper investigates the ways that each side attempted to justify its position in light of current debates regarding the foundation of 'gender-identity.' In particular, the paper focuses on medical-scientific theories about 'psychosexual development' that appeared in the US around mid-century and appeared in this case as legal claims about standards of parenthood such as 'best interest,' and parental 'neglect' and 'abuse.' The paper then focuses on the potential of liberal rights discourse, and specifically sex discrimination law to free individuals from institutional gender enforcement. The paper agrees that sex discrimination law can often produce satisfactory results, such as granting this child the liberty of free gender expression. However, the paper also critically analyzes sex discrimination law as a discourse that often reflects rather than rejects rigid mental health definitions of modern scientific discourses. In conclusion, the paper points to the limited horizons of rights as a liberating force, and demonstrates the need to think beyond rights in feminist and queer legal theory.

INTRODUCTION

Via the medium of families, though not at their initiative, a system of control of sexuality, an objectivisation of sexuality allied to corporal persecution, is established over the bodies of children. But sexuality, through thus becoming an object of analysis and concern, surveillance and control, engenders at the same time an intensification of each individual's desire, for, in and over his body [Michel Foucault].¹

In the fall of 2000, six-year-old male Zachary from a small town in Ohio, claimed that s/he was a girl and requested, from now on, to be called Aurora.² When the child's parents honored this unusual wish and made efforts to make official the child's feminine identity, the case turned into a custody battle between the parents and the state of Ohio. Although the child was occasionally treated as a girl at home from the age of two, the attempt to register the child in public school *as a girl* motivated the state dissolution of this family. At the conclusion of this legal dispute, the child was removed to foster care, with the expressed hope of future prosperity as a normal male boy.³

Can a parent be legally required to control the gender of a child? Do parents have a legal duty to raise a particular type of adult citizens? What is the legal justification of a

¹ MICHEL FOUCAULT, *Body/Power*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977* 55,56-57 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon 1980).

² John Cloud, *His Name is Aurora*, *TIME*, Sept. 25, 2000, at 90.

³ *Id.*

forced disintegration of a family? Is Gender Identity Disorder (GID) a personal-mental problem as suggested by the Diagnostic and Statistical Manual of Mental Disorders (DSM)?⁴ Or is it a social problem? Should adults who cross gender be treated differently from children? And finally, does talking about rights such as equality or liberty provide adequate options for resistance for those who seek it? This paper will try to address these issues, raised by this unusual legal dispute between parents who believed that they should raise their child as a girl, and state action that concluded otherwise.

This case is obviously not about a typical American child raised by typical American parents (*i.e.* males raised as boys and females raised as girls). After reading the facts of the case, one may reason that however tragic or wrong this case may have turned out, it is not really about *society* as a whole, but about one bizarre unique incident. One may therefore classify the issue purely as a human rights issue, or as a test case of state tolerance towards nonconforming citizens. Although the case could plausibly be treated as all the above, this is *not* the direction that I pursue here. My hope in this paper is to show, by closely reading this specific case, how it is only through the structure of ‘the other’ that we can learn what society is. It is the *abnormal* that shows us what is *normal*. It is the ill that shows us the healthy. It is the boy that shows us the girl. Or to use Jacques Derrida’s language, the structure of the legal sign in our case is determined by the trace or track of an ‘other,’ which is forever absent.⁵ The absent in our case is the normal, healthy child. And so although the subject matter of this paper is a very unusual child, the paper is an attempt to understand an imagined average normal child. In the following reading of the case, the other that I seek to

⁴ 4 *Diagnostic and Statistical Manual of Mental Disorders*, AM. PSYCHIATRIC ASS’N (1994).

⁵ See JACQUES DERRIDA, OF GRAMMATOLOGY 27-65 (Gayatri Spivak trans., Johns Hopkins University Press 1982) (1976).

analyze is *not* this male child who wanted to be a girl. The other is a normal male child who wants to be a boy.

Two disciplines dominate this legal affair: (1) *scientific-medical* theories about the mental health of the child, and; (2) *liberal-legal* theories about equality that were raised as resistance by the child's parents and their allies. Thus the paper proceeds as follows. In the *first* section of this paper I portray the story of this child as local and national press told it to the public. In the *second* section I analyze the medical and legal narratives that the sides offered to interpret the child and justify their opposing legal positions. I show that the lynchpin of the state approach was that the child's 'true self' is reflected in the *apparent male body*, and that the parents challenged this reading by locating the child's 'true self' in the *invisible feminine mind*. I argue that although these two positions are located at two ends of a mind-body dichotomy, they paradoxically support and constitute each other. The *third* section is a critique of the discourse of rights. This section offers two possible readings of the case as *sex discrimination*. I argue that in articulating a sex discrimination claim here, we are once again bound to the same problematic mind-body dichotomy. Modern science structures the way modern rights are perceived. More specifically, I show that a reading of the case as '*gender discrimination*' locates the self in the 'body,' and that reading the case as '*transgender/transsexual discrimination*' locates the self in the 'mind.' In the concluding section, I reflect on this analogy between the liberal anti-discrimination narratives and the scientific medical narratives, using Nietzsche's critique of the relations between science and liberalism.

I. GOVERNANCE THROUGH FAMILIES: THE CASE OF $A \rightarrow Z$

Much of this potential harm is predicated on the child's future exposure to or knowledge of the media reports or his future knowledge that the community neither accepts him or his family, but labels and ostracizes them.⁶

From being the plexus of a complex web of relations of dependence and allegiance, the family became the nexus of nerve endings of machinery that was exterior to it [Jacques Donzelot].⁷

On September 25, 2000, Time magazine introduced Aurora Lipscomb's story to the national public in an article entitled, *His Name Is Aurora*. Cloud reported that, "after struggling with their six year-old's nonconforming gender behavior for years, Sherry and Paul Lipscomb decided a few months ago to treat their little one like a girl, at least at home. In kindergarten last year, he was Zachary, but after school, she was Aurora."⁸

As we will later see, the naming of this child was a key contested issue in this affair. Various discourses assigned different names and classifications to the child. To signify this fluidity of signification I will call the child $A \rightarrow Z$ (Aurora to Zachary).⁹

Cloud described $A \rightarrow Z$'s early years:

Even before her son turned two, Sherry Lipscomb noticed that he wasn't like other boys. When she took him shopping, he would go gaga at sparkly dresses. He would toss his baby blanket around his head like a wig and prance on the balls of his feet. Around age 3, he announced one day that when he married his friend Emily, they would both wear red wedding gowns at the ceremony.¹⁰

By the time the child was six year old, the Lipscombs decided to let $A \rightarrow Z$ be a girl in the public sphere:

Over the summer, when the child asked to have pierced ears and announced to neighbors, "I'm a girl," the Lipscombs came to believe that it was wrong

⁶ Kevin Mayhood, *Judge Orders Boy's Parents to Keep Quiet in Gender Case*, COLUMBUS DISPATCH, Sept. 21, 2000, at 1D (citing judge's justification for the gag order on the case).

⁷ JACQUES DONZELOT, *THE POLICING OF FAMILIES* 91 (Robert Hurley trans., John Hopkins University Press 1997) (1979).

⁸ Cloud, *supra* note 2.

⁹ I am grateful to Professor Janet Halley for suggesting this sign.

¹⁰ Cloud, *supra* note 2.

not to “let Aurora express her gender in public,” as Paul says. So with the help of a Cleveland, Ohio, support group for transgendered people, they hired an attorney to seek a legal name change for their child. And last month they informed the school principal that it was Rori who would be enrolling, not Zach. After the Lipscombs met with the principal, an anonymous tipster contacted the Franklin County Children Services agency, which swiftly asked a court to remove the minor from the home.¹¹

The Time article was preceded by a series of local reports on the case that closely followed the story as it developed. The first article, entitled *Couple Fights for Son, 6, They Say is a Girl at Heart*, reported that temporary custody was awarded to Franklin County Children’s Services (FCCS) in a preliminary hearing at the Franklin County Court.¹² The Lipscombs accentuated the medical diagnosis of Gender Identity Disorder (“GID”), and insisted on turning their child over to social workers before cameras at a local TV news station. Their attorneys immediately filed an objection to the Magistrate’s decision. The FCCS alleged that the Lipscombs neglected the child’s medical and psychological needs, and that the child was dependant and in need of government intervention. Kevin Mayhood reported for the *Columbus Dispatch*:

The parents of the boy could be pushing him to act like a girl to gain attention and sympathy for themselves, a lawyer argued in Franklin County Juvenile Court yesterday. “There is a suspicion of Munchausen syndrome by proxy,” said Rebecca Steele, a public defender appointed to represent the best interests of the child.¹³

At this point, the affair became significantly more complicated when Paul Lipscomb, A→Z’s father, confessed that he also suffered from Gender Identity Disorder. He explained, “I didn’t ask for it and neither did she,” and recalled that he was beaten as a child when he tried to express femininity, and that now he wishes to give his child “all the freedoms I

¹¹ *Id.*

¹² Encarnacion Pyle & Misti Crane, *Couple Fights for Son, 6, they Say is a Girl at Heart*, COLUMBUS DISPATCH, Aug. 26, 2000, at 1A.

¹³ Kevin Mayhood, *Child’s Sex-Role Disorder Contested*, COLUMBUS DISPATCH, Sept. 13, 2000, at 1A.

didn't have."¹⁴ So if to this point it was assumed that a married heterosexual couple raised this boy-girl, this new discovery of the father's professed disorder suggested other ways of perceiving this unusual family. Specifically, this opened the door to the possibility that the father's problematic masculinity may have caused the child's similar disorder. A Juvenile Court Magistrate granted FCCS temporary custody until the matter would be concluded in trial.

A. The Gag Order: Violence and Forgetfulness

Judge Lias issued a gag order on the case, prohibiting all parties from talking in public about the specifics and merits of the case.¹⁵ In that ruling, judge Lias ordered that the child should not be shown to the media nor media reports be shown to the child. She reasoned:

It is clear that there is great danger of potential future harm to this child during these proceedings. Yet, much of this potential harm is predicated on the child's future exposure to or knowledge of the media reports or his future knowledge that the community neither accepts him or his family, but labels and ostracizes them.¹⁶

How does the above statement justify the restriction on freedom of speech granted by the First Amendment? The above text does not specify why or how publicity of the media reports is perilous to the child or anyone else. Perhaps we can try to explain the logic of this danger, as a moment that must be forgotten, because it is the moment in which a specific subject ($A \rightarrow Z$), or at least the subject's gender was formed in law. I will explain this idea using Derrida's *Force of Law*.¹⁷ In *Force of Law*, Derrida discusses the significance of

¹⁴ Kevin Mayhood, *Parents in Gender-Identity, Custody Dispute Now At Odds*, COLUMBUS DISPATCH, Sept. 19, 2000, at 2C.

¹⁵ Mayhood, *supra* note 6. Although directed at all parties, the main subjects of the gag order, as the title of the report indicates, were Paul and Sherry Lipscomb, who had willingly given interviews on local, national and international television, including *Good Morning America*, as well as the local and national press.

¹⁶ *Id.*

¹⁷ JACQUES DERRIDA, *Force of Law: The "Mystical Foundation of Authority,"* in ACTS OF RELIGION 228 (Gil Anidjar ed., Routledge 2002) (1990).

violent historical moments in which modern legal orders are often constituted. Derrida discusses the *preservation* of legal systems through *forced* institutional forgetfulness of bloody violent beginnings:

The foundation of all states occurs in a situation that one can thus call revolutionary. It inaugurates a new law; it always does so in violence, *Always*, which is to say even when there have not been those spectacular genocides, expulsions or deportations that so often accompany the foundation of states, great or small, old or new, right nearby or very far away.¹⁸

Thus the greatest fear, according to Derrida, for a legal system is the deconstruction of its legitimizing moments:

These moment, supposing we can isolate them, are terrifying moments because of the sufferings, the crimes, the tortures that rarely fail to accompany them, no doubt, but just as much because they are in themselves, and in their very violence, uninterpretable or undecipherable.¹⁹

I am drawing this analogy between the formation of a legal system and the formation of a child's gender, because as ideological structures, both the law of a state and the coherence of mind and body in gender systems, desperately need forgetfulness or erasure of the fact that they are not natural, and that there are *other possibilities*. The constituting moment can be devastating not only because victims are acknowledged ($A \rightarrow Z$ in our case), but also more importantly because such moments expose the history of the order, the non-naturalness, and the fragility of what seeks self-preservation. Thus, in order to perceive sex and gender identifications of 'normal' children as the only possible and natural conditions, we need to forget this moment of formation. In Derrida's words:

But it is in law, what suspends law. It interrupts the established law to found another. This moment of suspense, this *epokhe*, this founding or revolutionary moment of law is, in law, an instance of nonlaw. But it is also the whole history of law.²⁰

¹⁸ *Id.* at 269.

¹⁹ *Id.*

²⁰ *Id.*

Likewise, the danger that the gag order signals in our case is *not only* that $A \rightarrow Z$ and his/her family were victimized by state violence through the operation of family law. The even greater danger brings us back to our initial question, posed in the beginning of the paper, regarding the meaning of the normal normative child. Derrida argues that law is possibly suspended when its violent history challenges its own legitimacy, and that a deconstructive moment of *non-law* emerges. Similarly, seemingly natural, narrow interpretations of bodies and sexualities may lose their legitimacy as 'natural' once their normative aspect is exposed. The existence of such incidents as $A \rightarrow Z$ in public memory exposes the normative (as opposed to natural) aspect of gender. Sex and gender may suddenly parade as *social norms* instead of natural law if the case is not gagged. In analogy to Derrida's moment of nonlaw, we may call this a moment of *nongender*, in the sense that it is a historical moment when laws of gender are no longer justified just because they are manifested in all 'normal' people in the same way. Instead, in this historical-legal moment of nongender, sex and gender are exposed as *interpretations of norms*. Misinterpretations such as $A \rightarrow Z$'s are penalized. The fact that the law violently forced $A \rightarrow Z$ into boyhood can be a moment of nongender that exposes how *everybody else* is normalized into one mode of interpretation. In other words, the danger is not the existence of an eccentric peculiar other ($A \rightarrow Z$), but the fragility of the ordinary child, of the normal self. Summing up, the preservation of gender as a coherent system of interpretation requires *forgetfulness of the case of $A \rightarrow Z$* , not for the sake of $A \rightarrow Z$, but for the sake of $A \rightarrow Z$'s always absent other, the normal child. In the same way, as we can clearly see in the judge's justification above, the danger certainly applies at the personal level of $A \rightarrow Z$. To maintain the new self (a normal boy) as a legitimate self, the moment of force (when the self desired something different) must be forgotten.

As mentioned above, there was no clear justification for the necessity of the gag order. However, Justice Lias mentioned one clear concern that is worth mentioning here. The child, according to the above text, may be harmed if s/he learns in the future that s/he and her family had been *labeled and ostracized by the community in the past*. The logic of this concern seems to be that A→Z's behavior led to public ridicule, and future *knowledge about this ridicule* could lead the child to embarrassment, shame or other negative feelings that the gag order seeks to shelter the child from. This obviously assumes a future normative boy-man, looking back at a past in which he was not so normal, and was in fact ridiculed and shamed by an entire community. The possibility that this individual will after all defy male identity is not taken at all into account. Furthermore, even if the future A→Z is imagined as a 'normal' boy-man, there are obviously other possible responses to past ridicule, such as indifference, pleasure, anger or counter-judgment of the mocking community. And so such future knowledge may not be harmful at all.

Ironically, the coverage of the gag order itself by the media constitutes the condemnation that it seeks to prevent. Thus in a way, the gag order serves a double purpose by creating both the judgment, the ridicule, and the shame on the one hand, and on the other hand, the 'protection' from such future harms. Likewise, the gag order performs a double gesture by silencing the case, but at the same time signaling to parents the risk of raising non-conforming children.

The dispute ended when the sides, guided by mediators, reached an agreement whereby the child would remain in foster care, and the Lipscombs would have separate, supervised visits.²¹ Judge Kay Lias accepted the plan and praised the mediation.²²

²¹ Kevin Mayhood, *Parents, County Reach Agreement in Gender Case*, COLUMBUS DISPATCH, Nov. 23, 2000, at 1C.

²² *Id.*

B. Closure: the Reformed Kid

One year following the mediation agreement that terminated the Lipscombs' parental rights, a locally published news report, titled *Boy Forced to Act as Girl Thriving in Foster Family* attempted to provide a closure of the case:

The boy, now 7, has chosen to go by his given name, not the girl's name he had been called at his parents' Northeast side home. 'He's making friends; he's running, playing, hopping, skipping, jumping, doing the normal kid things,' assistant Franklin County Prosecutor Terry Julian said, 'He's being a kid.' (" ... ") During weekly visits, the father and son go to a park to play together, catch frogs in a pond and do other typical father son things, said Kara Morgan, the father's Columbus attorney. His mother is nurturing during her weekly visits, Morgan said. 'She cooks with him and just mothers him', Morgan said. 'What they have now is a little boy who has peer acceptance and approval, and just like water on parched earth, he's soaking it up.'²³

I mentioned above that a significant location of struggle in this case was about the naming of this child. In the final media coverage of the case the problematic of naming the child comes into full play. The above passage opens with an informative account about the child's current condition. In the first gesture of naming, the child emerges in the text as *a boy*. This classification is presented as timeless, neutral and objective. The prior conflicts about the meanings of the child seem to be left out. An alternative framing could have represented that the agency *claims* that this is a boy, but that there were opposing claims. Thus, instead of 'the boy,' the child could have been referred to as the boy who was or wanted to be a girl, or as the girl who was transformed into a boy. But instead, the claim as it was brought here has no future, present or past. In fact, the claim that this was a boy is not framed as a claim, but more as a transcendent referent.

Interestingly, the child seemingly regains agency in this closure, one year after the conclusion of the legal drama. Agency surfaces in the phrase that the child has now chosen

²³ Kevin Mayhood, *Boy Forced to Act as Girl Thriving in Foster Family*, COLUMBUS DISPATCH, Sept. 23, 2001, at 1C.

to go by his 'given name.' The child, whose wishes had been ignored so far was suddenly granted the liberty to choose a name. There is no clear explanation as to why the child's choice to be called Aurora was ignored as opposed to the later choice to go by the 'given name.' Perhaps the latter part of the sentence ("not the girl's name he had been called at his parents' Northeast side home") addresses this paradox. By referring to Aurora as 'the girl's name that he had been called at his parents' home, the text hints that the child had no real choice before. He had been called Aurora, yet he himself did not choose that name. But when he did practice true choice, he had chosen his 'given name,' Zachary. More explicitly, when his 'choice' corresponded with what he was called by his foster parents, it was conceived as real, implying that the name used by the Lipscombs could not have been a result of his real choice.

The term 'given name', may offer an alternative explanation for this paradox of choice. Who was the giver of this 'given name'? At what point in time was this name given? The logical explanation is that the 'given name' was the name on the child's birth certificate: Zachary. The givers in this case are the Lipscombs. Yet, throughout the seven years, the child was given names more than once. Perhaps the 'given name' was not the birth certificate name, nor the name that the child chose at the age of two, but the name that the state gave the child. Although this name corresponded with the birth certificate name, it was in essence different. A 'chosen name' must meet the name accepted by the state for one's choice to be followed.

If the 'given name' (Zachary) indeed corresponded with the name given by the parents at birth, who used the girl's name at the parents home, and why? Why would the parents give a child a name, and then call the child by a different name? In other words, if we read 'the given name' as Zachary, and the 'name he had been called at his parent's

home', as Aurora, we are left with no agent taking responsibility for the choice to call the child Aurora. If both Aurora and her parents chose the name Zachary, when and by whom was the name Aurora chosen? Unless we locate a third party in the household (who used the name 'Aurora', despite the wishes of all parties), we are doomed to a paradoxical loop between the child's so called 'choice' to the child's so called 'given name.'

In the next sentence, the text describes the actual activities that Zachary is now engaged in: "[h]e's making friends; he's running, playing, hopping, skipping, jumping, doing the normal kid things." From a boy in the first sentence, Zachary is transformed into a kid in the next sentence. What can we make of this gender-neutral signifier, 'kid'? Is there a difference between a boy and a kid? Was boyhood not claimed just in the previous sentence? The report becomes even more puzzling when it describes the child's activities: running, playing, hopping, skipping jumping, etc. All these activities can be interpreted in various contradicting ways, depending on the imaginative reader. For instance, how does Zachary run? Like a football jock or hysterically with his arms flopping in the air? What does he play? Does he have Barbie dolls in his backpack? Does he jump rope? And most disturbingly, why does this kid hop and skip? Is he a sissy? Is he teased for it? Does he enjoy it?

The child's new relationship with the Lipscombs is portrayed in the passage as what was lacking in the past. The Lipscombs seem to finally be doing parenthood right. The father's weekly visits are described as a mutual therapeutic process where the father and son 'do typical father son things' together, such as frog catching in the pond.²⁴ Their male bonding through masculine activities emphasizes the father's healing masculinity, and the reformed father and son establish a mutual relationship.

²⁴ *Id.*

In contrast, the child's new relationship with Sherry Lipscomb is basically represented as a one-way flow of actions. She nurtures and he receives.²⁵ Unlike the father and son who catch frogs together, the mother and son do not nurture each other. The child does not do anything to or with his mother, with one exception: the child cooks with his mother! In a child-mother relationship that is thoroughly set as passive, this one feminine activity seems to have slipped into the text. This makes one wonder if the kid cooks like he skips and hops. Does this text really demonstrate such a success with $A \rightarrow Z$ as it claims?

Finally, the closure reaches its climax with a touching metaphor: "Just like water on parched earth, he's soaking it up."²⁶ Director Jamie Babbit's satirical feature film, *But I'm a Cheerleader* depicts a rehabilitation camp, called 'True Directions,' where concerned parents send lesbian and gay adolescents.²⁷ In 'True Directions,' the queer teens experience intensive heteronormative training. In a scene titled "graduation," the boys and girls graduate as newly reformed heterosexuals. The new heterosexuals parade in blue suits and pink gowns to receive their symbolic trophy, a wedding statue. While one of the fresh graduates is willingly kidnapped by his boyfriend and is passionately kissing him, the ceremony continues. The proud parents cheer the new heterosexual kids, as the exaggerated scene demonstrates that nothing really changed. This scene and $A \rightarrow Z$'s closure share the hope that reformation can work, and that new heterosexuals will emerge. However, both texts also embody the possibility of subversion.

²⁵ *Id.*

²⁶ *Id.*

²⁷ BUT I'M A CHEERLEADER! (Lions Gate Films 2000).

C. *A→Z's Family in a 'Disciplinary Society'*²⁸

Via the medium of families, though not at their initiative, a system of control of sexuality, an objectivisation of sexuality allied to corporal persecution is established over the bodies of children.²⁹

The family today is clearly a crucial setting for supervision and control of children.

In *The Policing of Families*, Jacques Donzelot, following Foucault's elucidation of 'disciplinary society,' studied the development of the modern family as a supervising tool in modern states.³⁰ Donzelot describes a severe weakening of the pre-modern independent family, and an overall transition from government of families to government *through* the family. He argues that with the appearance of the new form of government, the old form of family lost its authority and became colonized.³¹ He named this, *familialism* and *familization*, a process in which the family fades into the background, "overshadowed by another, the social, in relation to which the family is both queen and prisoner."³² Hence, although the power of the family was undermined, "familialism was the locomotive to which all the elements of today's policy in matters of sexuality, reproduction, and education were progressively attached."³³ On the one hand, the family is perceived as a 'private sphere'

²⁸ I take the term "disciplinary society" from Foucault, who defined modern age as an age of social control. In a nutshell, Foucault, using the image of the Panopticon (a ring shaped building in the middle of which there is a yard with a tower at the center, where prisoners can be under surveillance at all times), describes modern society in which individuals, especially children, are under constant supervision of authorities such as schoolteachers, physicians, psychiatrists, social workers, who practice power over them. See MICHEL FOUCAULT, *Truth and Juridical Forms*, in 3 ESSENTIAL WORKS OF FOUCAULT 1954-1984: POWER 1, 58-59 (Robert Hurley trans., James Faubion ed., The New Press 2000) (originally delivered as a lecture at the Pontifical Catholic University of Rio de Janeiro in 1973).

²⁹ FOUCAULT, *Body/Power*, *supra* note 1, at 56.

³⁰ DONZELOT, *supra* note 7.

³¹ *Id.* at 103 (claiming that, "a paradoxical result of the liberalization of the family, of the emergence of children's rights, of a rebalancing of the man-woman relationship: the more these rights are proclaimed, the more the strangle hold of a tutelary authority tightens around the poor family. In this system, family patriarchalism is destroyed only at the cost of a patriarchy of the state").

³² *Id.* at 7.

³³ *Id.* at 198. Donzelot focuses on familialism or familization in two different settings. First, he argues that in the nineteenth century an alliance between the medical profession and the mother of the bourgeois family developed, which was profitable to both parties, because "owing to the increased importance of maternal functions, he [the doctor] conceded a new power to the bourgeois woman in the domestic sphere. It became evident as early as the end of the eighteenth century that this alliance was capable of shaking paternal authority." This alliance allowed the direct interventions of the doctors and the educators in the family, through the mother. *Id.* at 20. Second, Donzelot emphasizes the new emerging disciplining practices of the juvenile courts, which were a mechanism not of pronouncing judgment but rather of examining and disciplining the youth and their families. *Id.* at 110. Donzelot describes this as an "evaluation that becomes

where individuals are ‘free’ and the government should very carefully interfere, but on the other hand many micro-mechanisms of power, of supervision developed for surveillance over the family, such as social workers, teachers, doctors and courts.

Back to our case, in the specific encounter between the state and the family, $A \rightarrow Z$'s family can generally be viewed as a prisoner and not a queen. In the next section we will see how medical and legal discourses debated this case through the distinction between mind and body. But at this point I should underscore one issue. Foucault and Donzelot are important for understanding why and how the court system and the public do not generally hear many cases such as this one. Foucault explains the operation of modern power through many mechanisms, most of which are *not legal by nature*. Many forms of power today produce the body of a child and his/her gender and sexuality, such as television, advertisements, films, the web, school, parents, doctors, etc. None of these were successful in turning $A \rightarrow Z$ into a boy. Thus, the sword of the sovereign, through the law, stepped in when all else failed, and terminated the child-parent relationship. For most children, gender normalization into society rarely occurs in the courtroom. It is left to the other disciplines. Most parents and caregivers willingly participate in the act of child subjugation, and thus there is no need for state ‘intervention’ for gender normalization.

As I pointed out in the context of the gag order, this case offers us valuable insight about the ‘normal’ child as much or perhaps more than the ‘abnormal’ child. Things are always constituted by their contrast with what they are not, *i.e.* by ‘the other.’ The case of $A \rightarrow Z$ as an extreme case where all disciplines collapsed in turning this male child into a boy reflects the safety of the normally gender subjugated subjects from legal subjugation.

prosecution subsequent to sentencing, but by another name. It is the same educators, the same social assistants, the same psychologists who, after the trial, visit the family, intervene with regard to the child, and send regular reports to the judge recommending, on the basis of their impressions, that the measure be extended or transformed.” *Id.* at 111.

However, the normal child *is* present when it is reflected in ‘failures’ in subjugation, such as $A \rightarrow Z$, where law and science discourses seize the ‘abnormal’ subject for better discipline. $A \rightarrow Z$ ’s legal discipline betrays the normal child, thus reflecting Nietzsche’s suggestion that, “the laws do not betray what a people is but rather what appears to be its foreign, strange, uncanny, outlandish.”³⁴

In *The Politics of Truth*, Foucault defines critique as follows:

[A]bove all, one sees that the core of critique is basically made of the bundle of relationships that are tied to one another, or one to the two others, power, truth and the subject. And if governmentalization is indeed the movement through which individuals are subjugated in the reality of a social practice through mechanisms of power that adhere to a truth, well then! I will say that critique is the movement by which the subject gives himself the right to question truth on its effects of power and question power on its discourses of truth (“...”) critique will be the art of voluntary insubordination (“...”) [c]ritique would essentially insure the desubjugation of the subject in the context of what we could call, in a word, the politics of truth.³⁵

It seems that for Foucault critique presupposes a voluntary and critical subject, who clearly sees the oppressive norm, yet voluntarily chooses to disobey it. Critique is somewhat portrayed as the opposite motion to what Foucault has called, *governmentalization*.

Governmentalization is allegedly the sum total of oppression (through mechanisms of power that adhere to a truth), and critique is a counter-movement of the subject itself by questioning the power, the knowledge, of the subjugating discourses. However, in our case it may be imprecise to label $A \rightarrow Z$ as a critiquing subject, because we do not know how conscious his/her transgression was. What if the child really did think that s/he was a girl, and did not ‘understand’ what society makes of his/her male body? In this case, can we really say that $A \rightarrow Z$ had questioned the ‘politics of truth’? What level of consciousness, if

³⁴ FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 58 (Bernard Williams ed., Josefine Nauckhoff trans., Cambridge University Press 2001) (1882).

³⁵ MICHEL FOUCAULT, *What is Critique?*, in *THE POLITICS OF TRUTH* 23, 31–32 (Lysa Hochroth trans., Sylvere Lotinger & Lysa Hochroth eds., Semiotext(e) 1997) (This essay was originally a lecture given at the French Society of Philosophy on May 1978).

any, is necessary to qualify as a desubjugated subject? Does our gap about the child's agency disqualify the case as critique? If knowledge and truth are set in social discourses, and disruption is valuable, what is the role of individual agency? In the next sections I try to answer these difficulties. I will argue that this case is composed of a chain of conceptual oppositions that depend and constitute each other, and that existing legal language of rights reflects rather than subverts the current 'politics of truth.'

II. LAW AND HEALTH: PARADOXES OF TRUE LOCATION OF THE SELF

Behind knowledge, at the root of knowledge, Nietzsche does not posit a kind of affection, drive, or passion that makes us love the object to be known; rather, there are drives that would place us in a position of hatred, contempt, or fear before things that are threatening and presumptuous.³⁶

What is this child? Is it a boy or a girl? The legal and medical classifications of the child emerged from bodies of knowledge about sex and gender that developed in the 20th century. In $A \rightarrow Z$'s regulation we find reflections of historical medical and scientific debates about sex and gender. The custody debate involved two conflicting legal positions: (1) $A \rightarrow Z$'s parents legitimately treated the child as a girl/transgender, and thus $A \rightarrow Z$ should remain in their legal custody, or; (2) the parents acted improperly by failing to conform their child's behavior, and the state should take over the custody of the child. However, the legal custody debate was argued on top of a preceding level regarding the meanings of $A \rightarrow Z$. Where is $A \rightarrow Z$'s 'true' location? Is it the male body or the effeminate mind?

Generally, the complaint filed by the FCCS against the Lipscombs alleged that $A \rightarrow Z$ is in the body, and that this is a mentally ill *boy*, who is pushed by the parents to act as a girl.³⁷ According to this reading, the true $A \rightarrow Z$ is in the body, and although $A \rightarrow Z$ may *act* like a girl, in reality, this *is* a boy. In contrast, the child's parents and their allies argued that

³⁶ MICHEL FOUCAULT, *Truth and Judicial Forms*, *supra* note 28, at 11-12.

³⁷ Mayhood, *supra* note 14.

A→Z was *not* a boy. They provided narratives that presented *A→Z* as girl, transgender or transsexual. The child's mother, for example, claimed that this is a typical little girl, "who likes dressing up in frilly gowns, earrings and pretty shoes and playing with Barbie dolls."³⁸ The National Transgender Advocacy Coalition (NTAC) press release described *A→Z* as a "transgender" child, reporting that, "Franklin county Children's Services have removed a 6-year-old child from the parents for the sole offense of being transgendered."³⁹ Similarly, a self identified transsexual who characterized *A→Z* as a transsexual individual like herself, explained, "you see, I, too, am transsexual-two years post-op, male to female ("...") my heart goes out to these parents, their child and their attorney."⁴⁰ These approaches attempted to shift focus from the *body* to the *mind*. While the state focused on the child's *body* as the site of *truth*, these competing narratives offered other explanations.

The main distinction at the core of the custody debate is one between *mind* and *body*. More distinctions are attached to this main mind/body dichotomy, most significantly, nature/nurture, male/female and ill/healthy. The mind/body distinction is essentially what defines the case as problematic: in a male child with feminine identity, we have a body that supposedly contradicts a mind. *A→Z*'s body was fully intelligible as male, and his/her mind was fully intelligible as feminine. It was the combination that made *A→Z* a social-legal-scientific riddle. The main assumption of the mind/body distinction, as it appeared in *A→Z*'s case, is that the body and the mind are two distinguished locations of a person. The body and mind each begin where the other ends. They are opposites that are defined by the lack of the other. One's lack signifies the other's presence.

³⁸ Encarnacion Pyle & Misti Crane, *supra* note 13.

³⁹ *TG Child Removed From Family by Ohio Courts*, National Transgender Advocacy Coalition Press Release, Sept. 4, 2000, at <http://www.ntac.org/pr/000904child.html>.

⁴⁰ Encarnacion Pyle, *Many Rally To Parents' Side*, COLUMBUS DISPATCH, Sept. 13, 2000, at 2A.

Ohio law on the termination of parental rights framed the formal legal custody debate over A→Z. Under Ohio law, parental rights may be terminated by a juvenile court on complaint of anyone who has the knowledge of a child who appears to be abused, neglected, or dependent. Accordingly, FCCS filed a complaint against the Lipscombs, alleging that: (1) the Lipscombs neglected the child's medical and psychological needs, and; (2) the child was dependent and in need of state intervention. The formal legal debate was about the proper interpretation of these two behavioral standards of parental care: *neglect* and *dependency* as defined under Ohio law.⁴¹ Generally, the basic distinction between these two types of claims is that 'neglect' faults the parents while 'dependency' suggests that the parents are not in a condition to take care of the child. In our case the issue was whether or not the Lipscombs, in their specific approach to their child's alleged Gender Identity Disorder neglected their child, and whether the child should be relocated in foster care. In other words, beyond judging the parental conduct of the past, the dispute was also about the future placement for the 'best interest' of the child. The terms 'neglect,' 'dependency,' and 'best interest' thus provided the legal framework for the competing sides of the custody dispute.

Beyond the core disagreement about mind/body, let us first see some grounds that the competing sides (parents v. state) shared. At the core of the competing translations of A→Z we find two points of agreement. *First*, the sides to the debate openly expressed the idea that A→Z was unique due to his/her incoherence or contradiction of mind and body. Namely, the sides agreed that this child's (male) body and (feminine) mind really stand in contradiction. *Second*, it seems from the presented arguments that the sides also assumed that any child's gender should generally *not* be a matter of parental choice. We will see that

⁴¹ OHIO REV. CODE ANN. §2151.

for the parents, $A \rightarrow Z$'s identity was perceived as a result of *nature*, while for the state, $A \rightarrow Z$ is a boy that should be raised as a boy, and no one can *choose* otherwise. Unlike general parental rights regarding a child such as choosing education, religion and language, here the sides seem to agree that a parallel right to choose gender identity does not exist. The debate took place under the axiom that males should be raised as boys, and females as girls, and that there is no parental right to choose gender. Therefore, for both sides this child was perceived as different, other, an accident or abnormality.

Based on the core assumptions of the sides we can now classify four main points of disagreements and debate between the sides:

(1) True Self: Assuming that there is a contradiction between the two poles, mind and body, the sides debated where the child's 'true self' is truly found. Which of the two existing signals is more indicative of the child's true self, the body that signifies maleness, or the mind that signifies femaleness?

(2) Cause: Assuming the mind/body contradiction, the sides debated what *caused* the child's feminine identification (mind). The parents claimed 'nature,' while the welfare agency counterclaimed, 'nurture.'

(3) Trap: Assuming the mind/body contradiction, and based on the debate whether nature or nurture caused it, the sides debated which of the two locations is the child's true trap, the mind or the body. The parents claimed that the body was the child's trap, and the state counterclaimed, that the mind should be changed to correspond with the body.

(4) 'Best Interest': In light of all the above, the sides debated the future 'best interest' of the child.

I will now show how each side articulated its position.

A. *The Welfare Agency: Self in Body*

1. Location of the 'True Self:' the Body

The distinction between mind and body led the sides to prefer one category to the other, and to advocate a hierarchy between the two categories. The welfare agency advocated the hierarchy that the body (and not the mind) is where the true sex of A→Z is really located. Thus, the assault on legal parenthood was based on the claim that although A→Z thought that s/he was a girl, the child was in fact a boy. As claimed by the public defender, the boy was “pushed to act like a girl” by the parents.⁴² According to this reading, despite a temporary confusion, the ‘true self’ is sited in the child’s male body. The child may act like a girl, but in reality, this is a boy. The child’s feminine mind is pathological, a disorder that does not reflect the child’s true self, and must be cured through state intervention. Summing up, this position seeks a strict correlation between the sex and gender. Sex and gender in this claim collapse into the child’s male body, making A→Z a boy.

2. Cause: Mind Determined by Nurture

In the complaint against the Lipscombs, the FCCS noted that the parents did not appear to be able to recognize that some of the child’s behavior may be attributed to the home environment.⁴³ Likewise, the public defender explained that ‘Munchausen parents’ often “make their children ill or create symptoms to gain attention for themselves.”⁴⁴ In other words, according to this claim A→Z did not identify as a girl as a consequence of *nature*, but as a result of disastrous nurture by egocentric parents seeking fame for

⁴² Mayhood, *supra* note 13.

⁴³ Encarnacion Pyle & Misti Crane, *supra* note 12.

⁴⁴ Mayhood, *supra* note 13.

themselves. It was allegedly the Lipscombs' fault that the child misconceived himself as a girl. The child's GID condition is a symptom of problematic rearing practices, and not of the child's nature.

The claim that the child's parents were at fault raises fundamental questions about the development of 'gender.' Since the 1950's sex researcher John Money and collaborators developed a theory of 'psychosexual differentiation,' which is central for understanding the position adopted by the FCCS in our case. Money sums up the theory as follows:

The predominant part of gender-gender identity differentiation receives its program by way of social transmission from those responsible for the reconfirmation of the sex of assignment in the daily practices of rearing. Once differentiated, gender identity receives further confirmation from the hormonal changes of puberty, or lack of confirmation in instances of incongruous identity. With the initiation of parenthood, the whole program is set in motion yet once again, as a new generation comes into being.⁴⁵

Money's thesis of psychosexual development stresses that women and men are socially reared into 'gender roles.'⁴⁶ Men and women are produced through early social rearing to masculinity and femininity.⁴⁷ In our case, the FCCS contended that the child's parents failed in this process of social rearing the child to proper masculinity. Thus oddly enough, the FCCS approach, which locates the child *in the body*, is based on Money's theory that, as we have just seen, locates gender (the mind, the social) higher up in the hierarchy, above factors related to the body.⁴⁸

⁴⁵ See JOHN MONEY & ANKE EHRHARDT, *MAN & WOMAN BOY & GIRL 4* (Johns Hopkins University Press 1972); See also RICHARD GREEN, *THE "SISSEY BOY SYNDROME" AND THE DEVELOPMENT OF HOMOSEXUALITY* (Yale University Press 1987).

⁴⁶ Money defines 'gender role' as "everything that a person says and does, to indicate to others or to the self the degree that one is either male, or female, or ambivalent; it includes but is not restricted to sexual arousal and response; gender role is the public expression of gender identity, and gender identity is the private experience of gender role." MONEY, *supra* note 45, at 4.

⁴⁷ See MONEY, *supra* note 45, at 117-145 (concluding that, "Children growing up in a culture differentiate a gender identity free from ambiguity if the adults of that culture, especially those closest to them, transmit clear and unambiguous signals with respect to the procreative nucleus of gender dimorphic behavior, no matter what the signals with respect to peripheral options may be").

⁴⁸ It should be noted however that Money did not negate the existence of other influences on the development of 'gender identity.' He especially mentions hormones and claims that hormones do not automatically determine the

When applied to the case of A→Z, Money's theory in fact supports intensive masculinization of the child as early as possible. In fact, Ken Zucker, a leading expert in the field of unconventional gender behavior in children,⁴⁹ echoed Money's psychosexual theory in interviews regarding the case of A→Z.⁵⁰ Despite never meeting A→Z, Zucker characterized the child as a member of a troubled family. He explained that, "There's a lot of pain in many of these families, and part of the way the child has dealt with the pain is to have this fantasy solution."⁵¹

Zucker also encourages parents and their children to understand that 'gender roles' are not rigid, and that young children can remain boys and girls even if they do not *fully* conform to gender norms.⁵² Zucker expressed hope that by expanding current gender conception in these children and parents, sex-reassignment surgery later in life can be reduced.⁵³ These expressed hopes to 'save' children from transsexual surgeries and identifications reflect the double sword of Money's psychosexual differentiation theory. Seemingly liberal-tolerant progressive language is applied to achieve normalization and differentiation between two categories (male and female). Namely, Zucker (and Money) is willing to undo strict gender expectations in order to prevent (or 'save' from) sex/gender crossing, which is presumably bad. To reassure us that kids can be *different* and still not cross the real lines between male and female, man and woman, a seemingly liberal position is presented. However, this tolerance is dominated by the greater cause of maintaining the distinction between boy and girl. This approach allows children to be as weird as they wish.

dimorphism of gender identity but have *some influence* on patterns of behavior such as tomboyish behavior in girls, and the opposite in boys. MONEY, *supra* note 45, at 4.

⁴⁹ Zucker manages a Child and Adolescent Gender Identity Clinic at the Clarke Institute of Psychiatry, Toronto, Canada.

⁵⁰ *Father: Son Suffers From Gender Identity Disorder*, DAYTON DAILY NEWS, Sept. 18, 2000; Cloud, *supra* note 2.

⁵¹ *Id.*

⁵² Cloud, *supra* note 2.

⁵³ *Id.*

It stretches the gender categories up until that dangerous abstract point when the category (boy, girl) ceases to exist and is substituted for a new one.

3. Trap: $A \rightarrow Z$ is Trapped in the Wrong Mind

The FCCS took the position that the child's feminine mind was caused by nurture. A clear legal position follows this assertion. If the child is indeed a boy who is wrongly 'nurtured' into girlhood, i.e. into the *wrong mind*, it means that the child was legally neglected by the parents and/or legally dependent (in need of state intervention). In other words, the child is tragically a boy with a girl's mind, and should therefore be nurtured back into boyhood. Male identity must be correctly reconstructed. As the parents failed to socialize the child correctly, the legal standards of neglect and dependency had allegedly been triggered. The parents, according to this position, maliciously or negligently *trapped* this male child in the wrong feminine mind. This trap can be removed, according to the FCCS, by removing $A \rightarrow Z$ to more adequately socially adjusted caregivers.

4. Legal 'Best Interest': Going with Body

In accordance with the location of the child in the body, and with the child's trapped mind, the child's legal 'best interest' was clearly to be transferred to foster care, where the true male self would fully emerge. The FCCS advanced four related views: (1) $A \rightarrow Z$'s true self is in the body and not in the mind; (2) $A \rightarrow Z$'s feminine gender identification (mind) is the result of problematic parental nurture, and there is nothing natural about it, and; (3) as a result of nurture and not nature, $A \rightarrow Z$ is trapped in a wrong and incorrect mind. Accordingly; (4) the child's 'best interest' is to be a boy, and the only way to cure the child is by the termination of parental rights and assignment of new parents.

B. Parents and Allies: Self in Mind

The child's parents and allies offered counter-narratives to all the above theories regarding: (1) the location of the child's 'true self'; (2) the reason for the location of the 'true self'; (3) the child's trap, and; (4) the child's legal 'best interest.'

1. Location of the 'True Self': the Mind

The common theme for those who generally supported the child's parents and viewed the state's legal action as an unjustified act of violence was the claim that A→Z was not really a boy but something else. They claimed that the child's true self was not in the male body, but in the effeminate mind.

The child in this narrative is perceived as transgender, transsexual or a girl. The basic assumption in these approaches is that the child's outer appearance cannot be viewed as the location, the sign, of the child's 'true self.' So while the FCCS focused on the child's body as the site of truth, these competing narratives focused on the mind as the location of the 'true self.'

2. Cause: Mind Determined by Nature

The parents and their allies advanced the theory that A→Z's feminine identification was connected with the child's nature or fate. As Paul Lipscomb clearly expressed, "I didn't ask for it and neither did she."⁵⁴ The general idea is that the child was either born or just is this way, and should be raised according to his/her nature. The child's mother, for example, explained, "it is much easier to squelch it and not let her be what she is supposed to be."⁵⁵ Likewise, the couple's transsexual identified attorney explained, "it wasn't a matter of this

⁵⁴ Mayhood, *supra* note 14.

⁵⁵ Mayhood, *supra* note 13.

child, who is so young, innocent and barely able to choose what she wants for dinner, choosing to be a girl. She's just manifesting her personality."⁵⁶

Just as mental health experts supported the opposing position, this approach was also supported by some of the experts cited by the press. For example, a mental health nurse who runs a Washington support group for parents with non-conforming gender, opined, "I think it's just the way they are born."⁵⁷ And the director of child and adolescent psychiatry at the Ohio State University School of medicine added that, "most people have a very clear-cut sense of gender from an early age. As toddlers, individuals identify a gender and then spend the remaining years being socialized to fit societal expectations that go along with it."⁵⁸

The basic theme in these approaches is that the mind, the child's inner self, signals the true essence of $A \rightarrow Z$, and it is *not a matter of choice or nurture*. Instead, it is caused by something else that cannot be controlled or known in advance. In other words, if there is no choice or control over gender identification, the conceptual or linguistic default is to call such a thing fate, nature or even god. Summing up, according to this narrative, $A \rightarrow Z$'s feminine identification is not determined by nurture, *but by nature*. Thus responsible parents should support the child in what s/he is supposed to be, in what the child naturally is.

3. Trap: $A \rightarrow Z$ is Trapped in the Wrong Body

Following the idea that the child's true self is in the mind, $A \rightarrow Z$'s body was perceived as a trap. The title *Couple Fights for Son, 6, they Say is a Girl at Heart* reflects this 'trapped soul' narrative.⁵⁹ Likewise, Paul Lipscomb, rejecting the idea that $A \rightarrow Z$'s body should determine the child's identity explained that, "it feels like you are in the wrong

⁵⁶ Encarnacion Pyle & Misti Crane, *supra* note 40.

⁵⁷ *Father: Son Suffers From Gender Identity Disorder*, *supra* note 50; Cloud, *supra* note 2.

⁵⁸ Encarnacion Pyle & Misti Crane, *supra* note 40.

⁵⁹ Encarnacion Pyle & Misti Crane, *supra* note 12.

body.”⁶⁰ This narrative may seem puzzling in $A \rightarrow Z$'s case, as there is no indication in the texts that the child actually displayed any dissatisfaction with or future plans to change the body. However, for many transsexuals in the 20th century, the ‘true,’ ‘inner’ and ‘trapped’ self refers to a core identity that summarizes the story of life.⁶¹ $A \rightarrow Z$, according to this narrative, is a boy who possesses the soul of a girl. The outer body thus becomes $A \rightarrow Z$'s trap, *and not* the signifier of true identity. Accordingly, there is also a right body for $A \rightarrow Z$: a female body.

4. Legal ‘Best Interest’: Going with Mind

Summing up, $A \rightarrow Z$ parents and their allies opposed the three main arguments brought by FCCS, by claiming: (1) $A \rightarrow Z$'s true self is in the mind and not in the outer appearance of the body; (2) $A \rightarrow Z$'s feminine mind is not the result of problematic parental nurture, but of the result of nature, and; (3) $A \rightarrow Z$ is trapped in a wrong or incorrect body. The sum of these counter-claims paved the way to the legal claim that the child’s legal ‘best interest’ is to stay with the Lipscombs who respect and support the child’s feminine gender identity, her ‘true self.’

C. Conclusion: Deciding Between Essentialism and Constructionism

The mind/body distinction is often cited as a typical problem, separating the essentialist from the constructionist. While for the essentialist, the body is a real space that can be interpreted directly through the senses, for the constructionist the body is not simply

⁶⁰ Mayhood, *supra* note 13.

⁶¹ For an extensive discussion of trapped soul transsexual narratives *see, e.g.*, JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSSEXUALITY* 67-77 (Columbia University Press, 1998); *See also* JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* 130-167 (Harvard University Press 2002)(describing the evolvement of the medical practice of “sex change” in the United States in the 1950’s and 1960’s as transsexual patients insisted on their right to determine their own sex and to alter their bodies to fit their minds); *See also* BERNICE HAUSMAN, *CHANGING SEX: TRANSSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER* 141-175 (Duke University Press 1995 (concluding that transsexual autobiographies reveal how the body, with its original sex becomes abject through the inability of the transsexual subject to make that body signify gender appropriately within existing gender codes, and that for these autobiographers “sex change” makes the body intelligible at last).

there and is always subject to sociopolitical determination. In *Essentially Speaking*, Diana Fuss argued that the strength of the constructionist position is its insistence on the production of social categories such as ‘the body.’⁶² This strength, however, “is not built on the grounds of essentialism’s demise, rather it works its power by strategically deferring the encounter with essence, displacing it, in this case, onto the concept of sociality.”⁶³ In other words, claiming that the body is embedded in the social does not immediately preclude essentialism.

In the two above positions that seek to translate $A \rightarrow Z$ (self in body v. self in mind), we find kinship of essentialism and constructionism. It seems on its face that the ‘self in body’ position is a typical essentialist claim, and that a constructionist counter-claim would locate the ‘self is in the mind,’ claiming that the self is socially constructed. But at this point things get confusing. The essentialist position becomes constructionist and vice versa. I will explain.

In the essentialist ‘self in body’ position $A \rightarrow Z$ appears as a boy due to male biology. But to explain why $A \rightarrow Z$ thinks or fantasizes that s/he is a girl, this narrative leaps into a constructionist mode, inspired by John Money’s ideas about gender and about the development of the gendered mind. At the core of Money’s constructionist approach is the idea that for healthy psychosexual development, there must be a match, as early as possible, between mind and the body.⁶⁴ Nurturers, according to this theory are supposed to be kind of matchmakers between mind and body. This matchmaking was pronounced a failure in $A \rightarrow Z$ ’s case, and legally speaking, the Lipscombs’ parenthood was classified as neglectful.

⁶² DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* 5 (Routledge 1990).

⁶³ *Id.* at 6.

⁶⁴ See MONEY, *supra* note 45, at 14-15 (emphasizing that it is important for children to be reared to know their visible sexual anatomy, and that ideally, the child should also learn about the reproductive roles of the sex organs, to be able “to look forward with approval to the proper use of their own, when the time is right”).

Far from being essentialist, this claim that $A \rightarrow Z$'s 'feminine mind' was nurtured, constructed, mutable, falls under classic constructionist thought. While the true location of the self, i.e. the child's body, is stable and essential, the trap- the mind, is flux and mutable.⁶⁵ And this false yet crucial *non*-location of the true self, the mind, is in a way, a trap that bad nurturing and bad social construction, caused. The essentialist 'nature' position on *location* changes in a new constructionist 'nurture' position of *reason/causality*.

The reverse slip from constructionism to essentialism is professed in the opposite side of the debate. Here we find a reversed blend of essentialism and constructionism. The position that A to Z 's 'true self' is his/her mind or identification appears as a constructionist approach. But as Fuss cautioned, "there is no compelling reason to assume that the natural is, in essence essentialist and that the social is, in essence, constructionist."⁶⁶ As I emphasized above, the parents/allies repeatedly claimed that A to Z 's feminine identification was not determined or affected by environment or by rearing. 'Sex identity,' according to this approach, *is not social* but natural. It is allegedly 'just the way' A to Z is, and there is no point in trying to change this. The mind, in other words, is a very solid, natural location. Unlike the 'self in body' position, this self in mind position is pessimistic when it comes to changing the mind.

The 'body,' however, is a different story. This approach is 'constructionist' towards the 'body.' Similar to the opposing position, the location of the self (the mind) is stable and essential, while the non-location of the self (the body, the trap) is flux and mutable. And from this logic follows the opposing legal position that the non-location of the self (the

⁶⁵ It should be noted here that the application of Money's theory in this case is especially interesting because the theory was produced for very different groups of people, intersex and transsexual individuals, but not children with cross-gender identifications.

⁶⁶ Fuss, *supra* note 62, at 6.

body) is a trap, and that the child's 'best interest' is with those who recognize his/her male body (and not his female mind) as a trap.

Summing up, I have emphasized three basic assumptions shared by the two rival approaches. *First*, there is an essential and a non-essential location of the self (state-body is essential, mind is non-essential, parents- vise versa). *Second*, the non-essential location (state- mind; parents-body) constitutes a trap for $A \rightarrow Z$. *Third*, the child's 'best interest' is to be with legal guardians who acknowledge the trap (the non-location of the self), and encourage the child to overcome it. The child's parents claimed that the 'best interest' of the child was to overcome the body trap, while according to the state the 'best interest' was to overcome the mind trap. Accordingly, if the trap was in the mind, the child's 'best interest' would be with new parents, away from mind spoiling parents. These new parents would allegedly provide the child with nurture that corresponds with his/her true location of the self (the body). But if the trap was in the body, and the 'true self' was in the child's mind, the child's 'best interest' would be with the parents who respect his/her true self.

We have seen that one of the crucial debated issues in the case of $A \rightarrow Z$ was regarding the *cause* of the child's split between the mind and the body. While the child's parents insisted that it was *nature* that turned their child's mind effeminate, the FCCS claimed that it was *environment and education*. These two positions about the source of 'gender identity' reflect historical and ongoing debates among sex researchers and scientists regarding the source of gender. While some researchers focus on the social, environmental aspect of gender, others attempt biological explanations.

I will argue here that as decision makers and policy makers, in cases such as $A \rightarrow Z$'s, the choice between these two sources of gender (biology v. environment) has a decisive impact on the results. More specifically, the claim that 'gender identity' is a result of

biology, be it genitals, gonads, chromosomes or hormonal exposure is *strategically* more helpful for parents and rights advocates than the theory that ‘gender identity’ is the result of the environment or of social behaviorism. The obvious reason for this claim is that while parents can be faulted for nurture, they cannot be for nature. But first I will elaborate the historical and current appearances of this debate about the foundation of gender.

Generally, the ‘inner-self’ is a modern development that is not necessarily related to questions about sex, gender and sexuality. It is a broad liberal idea that Charles Taylor has described as a key characteristic of modernity, owed in large to the 18th century thought of Rousseau. Taylor summarizes this new idea that emerged in early modernity:

This is the powerful moral ideal that has come down to us. It accords moral importance to a kind of contact with myself, with my own inner nature, which it sees as in danger of being lost, partly through the pressures toward outward conformity, but also because in taking an instrumental stance toward myself, I may have lost the capacity to listen to this inner voice. It greatly increases the importance of this self-contact by introducing the principle of originality: each of our voices has something unique to say. Not only should I not mold my life to the demands of external conformity; I can’t even find the model by which to live outside myself. I can only find it within.⁶⁷

The idea of a gendered inner-self emerged in the second half of the twentieth century in the US to explain sex behavior through a theory of *immutable gender identity*. Through the study of intersexuality, scientists adopted a concept of “psychological sex.” The new theory about sex supposed that unlike the body, an adult’s “psychological sex” could not be changed. Psychological sex was later labeled “gender role and orientation” and “gender identity.”⁶⁸ The reasons for ‘normal’ development of ‘gender identity’ became a source of concern and immense debates for scientists and sex researchers. While in the 1950’s some endocrinologists viewed psychological sex as a result of a hidden physical genetic or

⁶⁷ CHARLES TAYLOR, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 30 (Amy Gutmann ed., Princeton University Press 1994).

⁶⁸ For comprehensive historical background on the development of the term gender see JOANNE MEYEROWITZ, *supra* note 61, at 98-130.

endocrine condition, others turned to environmental explanations. In the mid to late 1950's, John Money, Joan Hampson and John Hampson, from Johns Hopkins University, published a series of articles on intersexuality.⁶⁹ They generally confirmed and supported the findings on the *environmental origins* of psychological sex. They speculated that gender arose from a process similar to imprinting, in which young animals reacted to environmental incentives that then structured their stable social behavior.⁷⁰

The significance of this behavioral approach is that it views the *adult* body as flexible, but the *adult mind*, the sense of self, as solid. Thus the focus became the management of *children*, whose mind was, according to this theory, not yet solid and could still be correctly socialized. The discovery that adults may develop 'gender identities' that do not correspond with their body raised an anxiety about how to socialize children to avoid such conditions.⁷¹ In the 1960's, influenced by this theory of psychosexual development, psychologists and psychiatrists developed treatment programs for the early conditioning of children to appropriate gender behavior.⁷² We can now see that the FCCS claim in our case, regarding the negative parental influence on A→Z reflects this gender normalizing approach. The claim that A→Z's parents failed in the socialization of A→Z assumes that gender is mostly learned through a child's interaction with his/her environment.

⁶⁹ John Money, *Hermaphroditism, Gender and Precocity in Hyperadrenocorticism: Psychologic Findings*, 96 BULL. J. HOPKINS HOSP. 254 (1955); John Money et al., *Imprinting and the Establishment of Gender Role*, 77 AM. MED. ASS'N ARCHIVES NEUROLOGY & PSYCHIATRY 333-336 (1957).

⁷⁰ *Id.*

⁷¹ For critique of this rigid and normalizing effect of this psychosexual development theory in psychological and psychoanalytic discourses, see, e.g., MEYEROWITZ, *supra* note 61, at 128 (pointing out that while today the concept 'gender' is associated with feminism, in the early 1960's the concept gender raised totally different issues. Doctors, researchers and commentators did not question the need to maintain gender differences, but instead they developed treatment programs to inspire masculinity in boys and femininity in girls); See also EVE KOSOFSKY SEDGWICK, *How to Bring Your kids Up Gay*, in TENDENCIES 154-16 (Duke University Press 1993) (arguing that following the American Psychiatric Association's publicized 1973 decision to de-pathologize homosexuality from its next Diagnostic and Statistical Manual, DSM III, parent and teacher anxiety became focused on preventing the *becoming of* adult homosexuals).

⁷² For representative examples of this normalizing attitude in psychology and psychiatry, see, e.g., RICHARD GREENE, *supra* note 45, at 370-375 (concluding that the link between femininity in boyhood and homosexuality in manhood is explainable within either psychoanalytic or social learning context, and urging parents to accept their own hatred of their effeminate sons as a desire to protect their child from peer group cruelty); MONEY, *supra* note 45, at 145 (concluding that children differentiate a gender identity free from ambiguity only if the adults, especially those closest to them, transmit "clear and unambiguous signals with respect to the procreative nucleus of gender dimorphic behavior").

Meanwhile, since the 1960's, scientists and researchers continued to search for *biological* explanations for gender differentiation, focusing efforts on the invisible parts of the body, especially genes, prenatal and neonatal exposure to hormones, and the neurophysiology of the brain.⁷³ Notably among such efforts, in 1997, sex researchers Milton Diamond and Keith Sigmundson reported the outcome of John/Joan's female assignment as a failure.⁷⁴ Since then, the John/Joan case has been accentuated by many biologically oriented scientists and the popular press, to support a rebuttal of John Money's environmental model, and more generally on theories that view gender as cultural.⁷⁵ David Reimer (Joan/Joan) lost his penis in 1966 in a botch circumcision when he was eight months old. Soon after, John Money convinced Reimer's parents that their child would be better off raised as a girl. Money periodically examined Reimer in comparison with the child's identical twin brother.⁷⁶ Upon discovery of this secret personal history, Reimer transitioned from female back to male at the age of fourteen. He underwent penis reconstruction and married a woman whose children he adopted.⁷⁷ On May 4th, 2004 David Reimer took his life.⁷⁸ For many scientists, John/Joan's perceived biological male brain serves as *prima*

⁷³ E.g. MONEY & EHRHARDT, *supra* note 45, at 95-114 (surveying studies on fetally androgenized genetic females conducted in the 1960's by himself and colleagues, Money concluded that "The most likely hypothesis to explain the various features of tomboyism in fetally masculinized genetic females is that their tomboyism is a sequel to a masculinizing effect on the fetal brain. This masculinization may apply specifically to pathways, most probably in the limbic system or paleocortex, that mediate dominance assertion, and, therefore, manifests itself in competitive energy expenditure." *Id.* at 103). For a recent example of this approach see, e.g., William G. Reiner & John P. Gearhart, *Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned to Female Sex at Birth*, 4 NEW ENG. J.MED. 333-341(2004) (citing a line of studies that demonstrate that androgens have long been thought to influence prenatal and post pubertal brain development, and that the ability of androgen to act on tissues in utero could affect subsequent sexual identity).

⁷⁴ Milton Diamond & Keith H. Sigmundson, *Sex Reassignment at Birth: Long Term Review and Clinical Implications*, 3 ARCHIVES PEDIATRICS & ADOLESCENT MED. 298-304 (1997) (following up on the classic case reported in pediatric psychiatric literature, known as the John/Joan case, and exposing that the subject later rejected the female sex of rearing).

⁷⁵ *Id.* See also William G. Reiner, *To Be Male or Female- That is the Question*, 3 ARCHIVES PEDIATRICS & ADOLESCENT MED. 224-225 (1997) (arguing that the John/Joan case attests to the necessity of unraveling the neuroscientific foundations of the sexual brain).

⁷⁶ For John Money's report of the John/Joan case see MONEY & EHRHARDT, *supra* note 45, at 118-125 (concluding that parents indeed have different behavioral criteria and affect on boys and girls, and that gender conforming is sometimes openly reinforced while at other times it is more subtle).

⁷⁷ For David Reimer's biography see JOHN COLAPINTO, *AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL* (HarperCollins Publishers 2000).

⁷⁸ *David Reimer*, 38, *Subject of the John/Joan Case, Dies*, N.Y. TIMES, May 12, 2004, at 21A.

facie evidence of malicious victimization by the medical profession, and specifically by John Money. As expressed by William Reiner, a sex researcher at Johns Hopkins hospital:

In the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the “correctness” of sexual function, for this is neither a question of morality nor of social consequence, but on that path most appropriate to the likeliest psychosexual developmental pattern of the child. In other words, the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain. If the brain knows its gender independent of social-environment influences, then we need to be able to predict what that gender is.⁷⁹

However, while Reiner suggests that the John/Joan case demonstrates that only a study of a child’s hormonal brain can correctly guide our way into the predictable future, others have offered critique of this trend of presenting John/Joan as medical proof of inherent biological differences between the sexes.⁸⁰

As we have seen, these debates among scientists and sex researchers about the source of gender in childhood directly impact cases such as *A→Z*’s. As Judith Butler has suggested, John/Joan serves as an ‘allegory for transsexuality,’ since he has quite often been presented as wrongfully dislocated in the wrong (female) body, and in need of hormonal treatment.⁸¹ The question becomes, given these ongoing debates, and our inability to solve them in litigation, should we *strategically* choose to support the approach that will yield the desired legal results?

⁷⁹ William Reiner, *supra* note 75, at 225. See also Hazel G. Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?* 7 MICH. J. GENDER & L. 1, 62 (2000) (concluding that, “Waiting to see what the child desires is the most sensible approach because, as it has been often stated: the most important sex organ is between the legs rather than between the legs”).

⁸⁰ E.g. Judith Butler, *Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality*, 7.4 GLQ: J. LESBIAN & GAY STUD. 621, 628 (2001) (analyzing Joan/Joan’s personal post-transition narrative, and suggesting that paradoxically, “to return to who he is, he requires—and wants, and gets—a subjection to hormones and surgery. He allegorizes transsexuality to achieve a sense of naturalness. And this transformation is applauded by the endocrinologists on the case, since they understand his appearance now to be in accord with an inner truth. Whereas Money’s institute enlists transsexuals to instruct Joan in the ways of women, and *in the name of normalization*, the endocrinologists prescribe the sex change protocol of transsexuality to John for him to reassume his genetic destiny, *in the name of nature*”).

⁸¹ *Id.*

It seems that for parents, such as $A \rightarrow Z$'s, who need socio-legal approval for raising young 'transgender' children, biological essentialist explanations about gender identity as imprinted in the brain may prove more efficient. Recently the 'sexual brain' biological approach was vigorously emphasized in a case resembling $A \rightarrow Z$. A young girl, who had always expressed a desire to be a boy, adopted a male identity with full parental encouragement and support. Only in this case, the parents were applauded on national TV for accepting their young boy, Hal (formerly called Hallie).

On May 12th, 2004 the *Oprah Winfrey Show* hosted what Oprah called '*Transgender Children and their Parents*'.⁸² Echoing the 'self in mind' approach with a special focus on the above biological essentialist theories about the brain, children and parents explained how they felt that they had always felt trapped *in the wrong body*. Oprah offered and promoted a seemingly progressive and supporting agenda, urging all parents in the audience and at home with cross-gender children to accept their children as they *are*. As in $A \rightarrow Z$'s case, the 'trapped soul' narrative dominated the voices in support of accepting parents. On its face, this seems like a better approach for feminist, queer and transgender politics. Instead of encouraging anxious parents to hate their children and fight them, parents are directed to treat their 'transgender' child with love and support.

It should be noted here that in comparing Hal's case to $A \rightarrow Z$, both the class and normativity of the parents cannot be overlooked. Thus one may understandably believe that the dissimilar results of the two cases can be explained solely by the professional, educational and normative performance of Hal's parents in contrast with $A \rightarrow Z$ seemingly 'dysfunctional' family. This may be true. However, my point here is that we should also pay attention to the slightly different rhetoric that justified the 'trapped soul' narratives in

⁸² *The Oprah Winfrey Show: The 11-Year Old Who Wants a Sex Change* (ABC television broadcast, May 12, 2004) (transcript on file with the author).

$A \rightarrow Z$'s case in comparison with Hal. I argue that although *being in the wrong body* and the claim that this is the child's immutable essence were brought up in both cases (Hal and $A \rightarrow Z$), the justification provided for these children's gender crossing was in fact different. I will explain.

In $A \rightarrow Z$'s case the parents and their advocate claimed that the child was in the wrong body, and that s/he was born like that.⁸³ No explanation was offered as to *how or why a child is born with the 'wrong' body*. The scientific 'proof' about the hormones in the brain was not brought forward to support the legal argument. In a way, this resembles the general liberal theme quoted above from Charles Taylor about authenticity of liberal subjects. The biological approach was not fully argued in $A \rightarrow Z$'s case, thus opening the door for the state's opposing constructionist environmental approach. So while Taylor's general account of an inner self may be enough to support children's rights claim such as going to a different school, or a different hairstyle, this general inner truth does not seem enough to justify choosing a new gender. It seems that a more convincing 'objective' argument was required to justify *why* $A \rightarrow Z$ needed to be a girl. But since no solid location for this inner self was offered in $A \rightarrow Z$'s case, the counter-argument that the child's 'inner self' was a result of purely environmental upbringing won as the more convincing of the two.

Hal's case presented another rhetoric. The 'self in mind' approach was supported by 'objective' scientific evidence. The claim that the child was born like that was supported by the thesis that the *human brain* determines gender identity. The repeated assertion on the show was that 'transgender' children are *born* transgender, and that the explanation for their condition *is in their brain*. Therefore parents should be encouraged to support 'transgender'

⁸³ See, e.g., Mayhood, *supra* note 13.

children to avoid depression and even suicide. The only expert that appeared on the show, underscored the ‘sexual brain’ narrative, explaining:

If the child is transgendered, they’re transgendered (“ ... ”) there’s really nothing you can do to change that, no is there anything you’ve done to cause that (“ ... ”) it occurs in the womb. The research so far shows that it occurs in the first trimester. Something happens whereas the brain develops in one direction and the body in another (“ ... ”) so it’s much easier to change the body; we can’t change the brain.⁸⁴

Thus unlike $A \rightarrow Z$ ’s case, in which the state’s ‘self in body’ narrative triumphed, here ‘self in mind’ was on top. Hal’s parents received the ‘good parents’ award for complying with nature. Note that here the environmental model of gender development was apparently neglected in favor of the biological model of brain development. So while this celebration of ‘transgender’ children and their parents appeared very progressive and liberal, we should keep in mind that it succeeded because it had a scientific base. Thus a successful legal claim in such cases may need to take the essentialist approach that somewhere in our brain the signs of gender are waiting to be found. Liberal ideas joined with scientific proof can legitimize boys who are girls, girls who are boys, and those who are in-between. In the next and final section I address this covenant between modern law and science in an analysis of $A \rightarrow Z$ in the context of sex discrimination.

III. EQUALITY: THE PRODUCTION OF NORMALITY IN SEX DISCRIMINATION

The will to equality is the will to power- the belief that something is thus and thus (the essence of *judgment*) is the consequence of a will that as much as possible *shall be equal* [Friedrich Nietzsche].⁸⁵

All thought, judgment, perception, as comparison has as its precondition a ‘positing of equality,’ and earlier still a ‘*making equal*’ [Friedrich Nietzsche].⁸⁶

⁸⁴ *The Oprah Winfrey Show*, *supra* note 82.

⁸⁵ FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 277 (Walter Kaufman ed., Walter Kaufman & R.J. Hollingdale trans., Vintage Books 1968) (1901). Emphasis in original text.

⁸⁶ *Id.* at 273-274.

We have just seen that a contemporary progressive approach to transchildren and their families may actually be based on hard scientific ‘proof’ about what the child *really* is, arriving from the human brain. At this point, I will show that rights, and specifically sex discrimination law, does not offer a way out of this marriage of modern law and science. To the contrary, available sex discrimination law *reflects the same debates and paradoxes* that we have seen in the former section. Thus in cases such as *A→Z*’s, political-legal resistance through equal protection laws will necessarily take the form of the mind/body, male-female distinctions, thus making law and science different manifestation of one theme.

To briefly locate *A→Z*’s case in identity politics, it should be noted that despite the fact that the case brought up pressing questions of gender regulation that are of great interest to feminist, gay, lesbian, bisexual and transgender politics and advocacy, the case was advocated primarily by transgender/transsexual organizations. Perhaps this can be explained, to a certain extent, by the relative separatism in the women’s and gay liberation movements since the early 1970’s. Elizabeth Grosz, for example, has alleged that, “presuming that biology or sex is a fixed category, feminists have tended to focus on transformations at the level of gender. Their project has been to minimize biological differences and to provide them with different cultural meanings and values.”⁸⁷ Thus, for example, within the women’s movement, feminists harshly critiqued male to female (MTF) transsexuals who expressed femininity (a sign of women’s oppression) and female to male (FTM) transsexuals who expressed masculinity (a sign of male supremacy).⁸⁸ In this general context, *A→Z*’s case was taken up by transgender and transsexual identified organizations.

⁸⁷ ELIZABETH GROSZ, *VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM* 17 (Indiana University Press 1994).

⁸⁸ See e.g., MEYEROWITZ, *supra* note 61, at 259-260 (stressing that the peak of the animosity between feminists and Male to Female transsexuals came with Janice Raymond’s 1979 book, *The Transsexual Empire: The Making of the She-Male*, where she critiqued MTFs who identified as lesbian-feminist for masculine invasiveness and the colonizing of female bodies, and appropriation of female souls).

A. *Reading A→Z as Sex Discrimination*

As the custody dispute was developing, A→Z's parents threatened to file a federal 'sex discrimination' claim against the Westerville school district and Children's services. However, the case ended in mediation and the suit was never filed. Nonetheless, the possibility of a sex discrimination suit in our case must be examined. What effect would a sex discrimination claim have? How would a turn to equality operate in relation to the conceptual paradoxes I raised above?

Sex discrimination in *A to Z's* case would mean either: (1) that the child's right to *express* femininity in public had been breached (hereinafter: "gender discrimination"), and/or; (2) that the child suffered discrimination as a *member* of a larger group of people, a minority of transgender/transsexual people, a class of people that *should* be protected under sex discrimination law (hereinafter: "transgender/transsexual discrimination"). The first option includes 'gender' as a kind of expression that somehow falls within the category of 'sex.' In essence, under this approach females can *act* masculine, and males can *act* feminine, yet they are still girls and boys. In contrast, the second option includes transsexual/transgender as a *kind* of sex or protected group. So 'sex' *as an act* means something that you *do* and is called 'gender.' As an *identity* 'gender' is a certain something that you *are*, your identity: man, woman, transsexual, transgender, black, gay, a Jew, and so on. It is a state of being.⁸⁹

We will see how in the case of A→Z, this act/identity framework that defines equality, is already deeply conceptually embedded in the body/mind distinction. More specifically, *acts* of gender as a protected category echoes the 'self in body' approach, and transsexual/transgender *identity* as a protected category echoes the 'self in mind' approach.

⁸⁹ I need to clarify here that I do not take acts and identities to be unproblematic distinct categories. Instead, I am using the act/identity distinction to underscore two common ways of speaking the language of discrimination.

I will demonstrate this observation by analyzing each of the two ends of the spectrum separately.

1. Gender Discrimination- Self in Body

A focus on acts of gender means that $A \rightarrow Z$'s 'feminine' acts (dress, manners, etc.) should be protected. The legal sign of 'discrimination' holds both the assumption and possibility of non-discrimination. Therefore, reading $A \rightarrow Z$'s case as gender discrimination would mean that although $A \rightarrow Z$ is male in body, s/he should be allowed to *act* feminine.

Like any other equality claim, this claim needs some 'other' to contrast with $A \rightarrow Z$'s discriminated acts. The 'other' to A to Z 's claim, the one who is allegedly under non-discrimination, is the female body performing acts of femininity or male body performing masculinity. The alleged reason for discrimination here is the combination of $A \rightarrow Z$ male body and female acts, a combination that should allegedly be *tolerated* in a liberal non-discriminating democracy. This 'other' (the female child performing femininity or the male child performing masculinity) is absent in the sign of 'gender discrimination' of $A \rightarrow Z$, and at the same time constituted by this absence. So paradoxically, $A \rightarrow Z$'s 'gender discrimination' claim at the same time constitutes and seeks equality with, some 'true feminine body.' That absent feminine body is not only the source of $A \rightarrow Z$'s gender equality, *but more importantly, its effect*. The feminine body originates in the sign that seeks to equate $A \rightarrow Z$, *as male*, to the feminine body.

Summing up, if the discrimination claim is articulated in this manner, $A \rightarrow Z$ is perceived as a *boy* who wants to act as a *girl*, the state of discrimination being that boys should be allowed to *pretend* to be girls, wear effeminate apparel, play with dolls, etc.

Ironically, this gender discrimination claim assumes and reflects the welfare agency

position that the child is really *in the body*, and contradicts the point made by the parents/allies, *i.e.* that $A \rightarrow Z$'s real or true self is in the mind, and not in the body. As I showed above, in the mind/body competition, the parents carried the brief for mind, claiming that $A \rightarrow Z$ is *not* a boy who can *express femininity* and that the child's mind makes the child a *real* female or transgender/transsexual. So the gender discrimination claim in our case would place the parents/allies in self-contradiction with prior conceptual claims.

2. *Transgender/Transsexual Discrimination- Self in Mind*

And what happens when on the act/identity spectrum, the emphasis is on identity? Such a claim would mean that this child *is* altogether something else. The claim is that $A \rightarrow Z$ is *really* a transgender/transsexual individual. And so this means that we should look to the child's mind for true being, and to the body for false being (the child's 'trap'). The 'truth' claim here is that transgender/transsexual is a description of the child's 'true self' and not merely of his/her acts or behavior. And so the right to 'equal protection' means that this inner-truth, this identity, should be protected instead of changed and reformed into another identity (that of a male-boy). $A \rightarrow Z$ allegedly has (or should have) the right *to be* and/or to be protected *as* transgender or transsexual. In contrast with the 'gender discrimination' narrative, this approach locates $A \rightarrow Z$ in the mind, and claims the right to be *who you are*, which is where your mind is.

In the 'gender discrimination' claim $A \rightarrow Z$'s body v. acts provide the key for discrimination, and the 'other' originated by the sign of discrimination is the true female or male body. In contrast, the absent 'others' in the 'transgender/transsexual discrimination' claim are the non-transgender minds or 'identities:' minds that correspond with female bodies. So the focus in 'transgender discrimination' is not on the appearance of the body,

but on the self-perceived 'identity.' It is not the female-child body, but the girl as 'identity,' as difference.

3. Conclusion: Equality as Knowledge

Behind knowledge, at the root of knowledge, Nietzsche does not posit a kind of affection, drive, or passion that makes us love the object to be known; rather, there are drives that would place us in a position of hatred, contempt, or fear before things that are threatening and presumptuous [Michel Foucault].⁹⁰

The language of discrimination and equality produces what is perceived as normal in a given time and place. Depending on how the discrimination sign is articulated, the other that is allegedly its outside is born, *originated within, in the name of equality*. Therefore positing $A \rightarrow Z$ as equal demonstrates Nietzsche's incite that, "[a]ll thought, judgment, perception, as comparison has as its precondition a 'positing of equality,' and earlier still a 'making equal'."⁹¹ The knowledge produced by the equality discourse about $A \rightarrow Z$ would be the child's *other*: the 'true' feminine body (the other of 'gender discrimination') and/or the true feminine identity (the other of 'transgender discrimination'). And thus at the root of the knowledge of sex discrimination, as Nietzsche warned us, we find not love for the object, but hatred, contempt and fear of $A \rightarrow Z$.⁹² $A \rightarrow Z$ as the object of hatred, contempt and fear becomes the cause of a normal female bodies and normal feminine identities.

In this context, the media gag order, granted by the judge on the case,⁹³ can now be interpreted as putting the sign of $A \rightarrow Z$ under erasure, *before* exposing its contradicting effects-normal versus abnormal children. Such erasure from the media and public knowledge eliminates the sign (the unintelligible boy-girl), while maintaining and naturalizing its effects, normal children. The sex discrimination discourse may also be

⁹⁰ MICHEL FOUCAULT, *supra* note 28, at 11.

⁹¹ NIETZSCHE, *supra* note 85, at 273-274. Emphasis appears in original text.

⁹² MICHEL FOUCAULT, *supra* note 28, at 11.

⁹³ Mayhood, *supra* note 6.

counterproductive in that it seeks to *liberate* $A \rightarrow Z$, yet at the same time it may have a similar effect as the gag order that seeks to *erase* the child. Both liberation and erasure of the abnormal individual have the effect of socially defining who the normal child is.

B. The Problem with Rights and the Possibility of Legal Events

It is not through recourse to sovereignty against discipline that the effects of disciplinary power can be limited, because sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society [Michel Foucault].⁹⁴

The mode of the event is the problematic. One must not say that there are problematic events, but that events bear exclusively upon problems and define their conditions (“...”) [t]he event by itself is problematic and problematizing [Gilles Deleuze].⁹⁵

We have seen in previous sections that the problematic mind/body distinction tags along into the language of rights and becomes the core of possible discrimination claims. A successful discrimination claim must theoretically be based on the same or on similar suppositions of mind and body. Thus rights do not disrupt the mind/body opposition, but rename it, re-enforce it. If the language of sex discrimination produces normality at the same time that it seeks to liberate oppressed subjects, what kind of legal action, if any, can produce resistance to subjugation? Is there a way out of this loop? This, I believe, is the main anxiety about rights that Foucault expresses above and also in the following passage:

[I]n our own times power is exercised simultaneously through this right and these techniques and that these techniques and these discourses, to which the disciplines give rise invade the area of right so that the procedures of normalization come to be ever more constantly engaged in the colonisation [sic] of those of law. I believe that all this can explain the global functioning of what I would call a *society of normalization*.⁹⁶

⁹⁴ MICHEL FOUCAULT, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, *supra* note 1, at 108.

⁹⁵ GILLES DELEUZE, *THE LOGIC OF SENSE* 54 (Constantin Boundas ed., Mark Lester trans., Columbia University Press 1990) (1969).

⁹⁶ *Id.* at 107. The emphasis appears in the original text. Foucault further elaborates the problem of resistance through rights: “The developments of medicine, the general medicalisation [sic] of behaviors, conducts, discourses, desires etc., take place at the point of intersection between the two heterogeneous levels of discipline and sovereignty. For this reason, against these usurpations by the disciplinary mechanisms, against this ascent of a power that it tied to scientific

The problem is that when we try to liberate $A \rightarrow Z$ by means of equality, we use language of rights that disturbingly resembles the narratives that insist on locating the child either in the mind or in the body. Thus both discourses produce similar effects, similar others. Are there other ways to resist subjugation?⁹⁷

In *The Logic of Sense*, French post-structuralist Gilles Deleuze offers a compelling reading in Lewis Carol's *Alice's Adventures in Wonderland* to demonstrate a transition of thought from the 'state of affairs' to the 'event.'⁹⁸ Deleuze critiques the modern search for the false depth of the human, arguing that an enormous potential for new sense is found in nonsense and the paradox. An event, for Deleuze, is a historical moment when new sense is produced to replace the old. It is a turning point, a point of fusion, condensation, hope and anxiety that should not be confused with a specific person or occurrence.⁹⁹ The event occurs when there is a paradox and nonsense, and it reflects the production of new sense, by signifying that there is a social problem. The problem that events reflect is one of social intelligibility and a rupture in intelligibility out of which a new way of thinking emerges. It is a moment of displacement of sense and nonsense. The production of sense occurs with the event.¹⁰⁰ As an example, Deleuze shows that as Alice's perception of self is destabilized, she begins to understand the significance of the surface, of words and linguistic structures.¹⁰¹ Only at the point of the paradox, Alice is able to understand and produce *new*

knowledge, we find that there is not sole recourse available to us today, such being our situation, except that which lies precisely in return to a theory of right organized around sovereignty and articulated upon its ancient principle." *Id.* at 107-108.

⁹⁷ Wendy Brown has offered a problematization of identity politics by reading identity politics as a psychological reflection of Nietzschean *ressentiment*. Brown sees in the contemporary mobilization of rights claims, a troubling directing or channeling of individual feelings of *ressentiment* towards the other, the perceived injurer. She ties this to *slave morality*, and concludes by suggesting a move from politics of *being* to politics of *wanting*. WENDY BROWN, *Wounded Attachments, in STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 52-76 (Princeton University Press 1995). I need to clarify here that unlike Brown, my turn to Nietzsche and Deleuze on this point is structural/conceptual and not a psychological.

⁹⁸ GILLES DELEUZE, *supra* note 95, at 4-11

⁹⁹ *Id.* at 54.

¹⁰⁰ *Id.* at 19.

¹⁰¹ Consider for example the following dialogue between Alice and the Pigeon.
Alice: "But I'm *not* a serpent, I tell you!" "I'm a----I'm a----"

sense. Following Nietzsche, Deleuze urges us to see that sense is produced at the surface of things, in words, and *not in the search for the true meaning of life, god or man.*¹⁰² Thus today's task is not to understand the true meaning of sex, or the true reason for sex, gender or sexuality, but to promote events, change meanings and produce new sense, freedom and strength.¹⁰³

How can this theory of the event provide resistance in cases such as ours? How can feminist and queer legal theory contribute to transforming cases such as $A \rightarrow Z$'s into legal events? I have underscored the paradoxality of locating $A \rightarrow Z$ in the mind or in the body, and that any truth claim regarding where or what the child really is, reflects the position that it contradicts. I believe that a legal search for the *truth* of this child's 'inner self' cannot produce a legal event. Such a search for truth makes law a natural extension of modern science, and another force of subjugation. Can legal theory reject the search for depth and become a significant site in the production of new sense and events? $A \rightarrow Z$'s case underscores the relationship between the state, the family and the regulation of subjects through the family. A sex discrimination claim in our case, attempts an *equation* between the child as a legal subject and an imaginary group of normal (non-transgender) children. In such cases, rights claims such as sex discrimination often do not address the larger questions of subject formation, because they offer theories about the 'true self' of a *specific litigant*

Pigeon: "Well! *What are you?*" "I can see you're trying to invent something!"

Alice: "I—I'm a little girl"

("...")

Pigeon: "You're a serpent; and there's no use denying it. I suppose you'll be telling me next that you never tasted an egg!"

Alice: "I *have* tasted eggs, certainly... but little girls eat eggs just as much as serpents do, you know."

Pigeon: "I don't believe it...but if they do, why, then they're a kind of serpent: that's all I can say." LEWIS CAROL, ALICE IN WONDERLAND 56 (New American Library 2000) (1865). In this example, Alice struggles against an accusation of being a serpent. Alice, under the assumption that little girls can't be serpents, insists that the accusation of being a serpent is false. But for the pigeon, egg eaters are serpents, and so little girls must be kinds of serpents. The pigeon, whose eggs are eaten by someone, does not produce the difference between a girl and a serpent, as it is useless. For the pigeon, the other is any someone who eats your eggs. For Alice, the other is the animal, which you eat or play with, but cannot *be* a little girl.

¹⁰² *Id.* at 72 ("If there is an author for whom the death of God or the free fall of the ascetic ideal has no importance so long as it is compensated by the false depth of the human, by bad faith and *ressentiment*, it is indeed Nietzsche").

¹⁰³ *Id.* at 73.

before the court. Instead of problematizing sex, gender, family and state, and underscoring nonsense and paradox, sex discrimination claims frequently need to present coherent subjects, thus reinforcing existing truths about what humans *really are*. The theoretical focus of the sex discrimination claim, in our case, echoes the scientific debates about the truth of humans. Summing up, in an attempt to rethink and suggest feminist and queer legal strategies we may consider strategies to produce as much new sense as possible. Perhaps we should celebrate rather than avoid paradox and nonsense. In this paper, using the model of $A \rightarrow Z$, I have attempted to do this by exposing the co-dependency of the opposing claims (self in mind v. self in body), and that of modern law and science.

IV. CONCLUSIONS: 'WILL TO HEALTH' AS 'WILL TO EQUALITY'

Thus there are innumerable healths of the body; and the more one allows the particular and incomparable to rear its head again, the more one unlearns the dogma of the 'equality of men,' the more the concept of normal health, along with those of a normal diet and normal course of an illness, must be abandoned by our medical men. Only then would it be timely to reflect on the health and the illness of the *soul* and to locate the virtue peculiar to each man in its health-which of course could look in one person like the opposite of health in another [Friedrich Nietzsche].¹⁰⁴

I have argued so far that $A \rightarrow Z$'s discrimination claim must depend, at least to some extent on mind-body assumptions, derived from the human sciences that discipline and normalize the modern subject. I suggested that alternative forms of resistance are necessary, and that such resistance would ideally produce events and challenge social intelligibility. One of my main goals has been to underscore the fact that the medical debates and the equality debates depend on similar premises.

Through a reading of Nietzsche's enigmatic aphorism above, I will attempt a closure of this fascinating intersection of law and science in the case of $A \rightarrow Z$. In the above passage,

¹⁰⁴ FRIEDRICH NIETZSCHE, *supra* note 34, at 117.

Nietzsche links the two modern discourses of equality and science together, claiming that ‘will to health’ and ‘will to equality’ are in fact two expressions of the same desire. What does this mean? How can we talk about seemingly universal concepts such as equality and science through language of desire? Nietzsche challenges this idea of objective, scientific health of the body, by referring to ‘innumerable healths of the body.’¹⁰⁵ There is not one, but many healths that a body can have. Counter-intuitively, Nietzsche argues against the idea of one concept of health by suggesting that one should allow the *particular and incomparable* health to rear its head again, as we *unlearn* the dogma of equality of man. In other words, the beliefs that all men are equal, and that a healthy body has one and only one objective meaning, produce similar effects, because they come from similar modern axioms. Unlike typical medical ideas, a healthy body in this text is *specific* and *not universal*. A healthy body, for Nietzsche is particular and incomparable to other bodies. But is this not what we would call under current medical definitions, a sick body? Nietzsche’s aphorism produces an event, a paradoxical moment, nonsense, by flipping the illness/health distinction. He rhetorically stays within the body/soul, healthy/ill oppositions, linking the body with medical-health discourses, and claiming that the body should be kept away from normalizing medical diagnosis. As long as the body is the subject of investigation, the soul will *remain* ill. Likewise, when we seek equality instead of peculiarity, the soul remains ill. Only after we abandon the normalizing ideas about health and equality it would be timely to reflect on the health and illness of the *soul*. In the realm of soul, peculiarity, bizarreness, queerness, originality, is what Nietzsche calls health! All other is illness. The abnormal soul is the healthy soul and normal soul is ill. The point is that this strategic use of paradox

¹⁰⁵ *Id.*

results in the collapse of the categories, and possibly in the production of new sense, beyond health and illness, and beyond equal and unequal.

I have attempted in this paper a reading of $A \rightarrow Z$ within the concepts of mind and body, equal and unequal, normal and abnormal, in the hope that at the end the categories in the mind of the reader would crumple. I have attempted to show that the state's 'will to health' approach that sincerely attempted to cure $A \rightarrow Z$ by normalization, and 'will to equality' approaches that attempted to liberate $A \rightarrow Z$, were in fact more similar than contradictory. Thus my main objective in this reading has been to *unlearn* both the 'dogma of equality' and the 'concept of normal health,' by exposing the paradoxical grounds on which both 'will to equality' and 'will to health' are based.

Summing up, this paper examined the case of $A \rightarrow Z$ through liberal rights discourse and medical discourses. We have seen that one discourse normalized $A \rightarrow Z$ into mental health, and the other normalized the child into equality. These are the same drives with different name. The important part is that in both the health and rights discourses, to be a spoken, intelligible subject, the child was subjected to, normalized and subjugated by, the linguistic assumptions of the discourse, *i.e.* the assumptions that define $A \rightarrow Z$ and other transchildren as 'male' in body but 'female' mind (or the other way around).

Accordingly, since in $A \rightarrow Z$'s case the opposing parties were holding on to two sides of the same distinction, I have shown that the main assumptions *remain* even when victory shifts and 'mind over body' approaches defeat the 'body over mind' approaches. I have argued that conceptually there is no significant difference between arguing that one is in the mind, and arguing that one is in the body. Therefore, the claim that $A \rightarrow Z$ is really a girl and the claim that s/he is really a boy are conceptually the same. Perhaps the sameness of these approaches (body over mind v. mind over body) is clarified if we look at both cases ($A \rightarrow Z$

and Hal) not as ends but as symptoms or producers of one effect, the normal child. Hal and A→Z were both perceived as different from normal kids. *Difference* constitutes both health and equality discourses about such children, and there is no ‘health’ or ‘equality’ for A→Z or Hal without difference from the other so called ‘normal’ kids. While these discourses signify and claim A→Z and Hal’s true deep essence and false essence, we should not overlook these children’s always present-absent other, the normal child that A→Z and Hal are not- the normal child whose body allegedly *fits* the mind. ‘Transgender’ children are perceived as *different* either due to their mind *or* body, either by fault of *nature* or of *nurture* But the effect remains the same. All in all, both rights and health discourses look for a kind of depth in understanding so called ‘transgender’ kids and also in so called ‘normal’ children. As Derrida has shown, and Judith Butler has reemphasized in the case of gender,¹⁰⁶ this absence does not merely reflect an imitation of an absent origin. Instead, that origin (the normal-healthy child) is never constituted in this paper or in general except by the non-origin-by these so-called ‘transchildren,’ or in Derrida’s words, “the trace, which thus becomes the origin of the origin.”¹⁰⁷ A→Z and Hal are the origin of all normal children.

On the first day of Barbri, a New York bar preparation course, an advisor tried to calm hundreds of anxious fresh law-school graduates at the peak of subjugation into legal thinking. He explained, “you want to review the materials at least five hours a day,” “you want to pace yourself, as this is a marathon, not a sprint.” Interestingly, in the English language, the phrase ‘you want to’ is used when giving advice to another person. I have suggested in this paper that science and law sometimes operate in a similar ‘you want’ manner. They both posit assumptions, and communicate to us where we are (mind or body),

¹⁰⁶ Judith Butler, *Imitation and Gender Insubordination*, in THE GAY AND LESBIAN STUDIES READER 307-318 (Henry Abelove et al eds., Routledge 1993).

¹⁰⁷ JACQUES DERRIDA, *supra* note 5, at 61.

what it means (that we are boys or girls), and what we want (rights, equality). Assuming an inner-self-mind, and a distinct external, apparent body, scientific debates focus on the source, *the why*, of 'gender identity.' Under similar assumptions about bodies, minds and identities, equal rights are advocated. The critique of these assumptions echoes my personal disbelief in equality or in an inner gendered self. I am aware however, that many people really want and experience an inner-outer distinction, discrimination and true belief in human rights. The goal of this paper was not to discourage such beliefs, but to attempt to understand the many paradoxes in what we are supposed to know and want.