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Noa Ben-Asher

Elisabeth Haub School of Law at Pace University

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Essay

Paradoxes of Health and Equality: When a Boy Becomes a Girl

Noa Ben-Asher[†]

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.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

[†] J.S.D. Candidate, NYU School of Law. LL.B., 1999, Bar Ilan University School of Law; LL.M., 2001, NYU School of Law. I am indebted to Professor Peggy Davis and Professor Chris Straayer for their supervision, insights and care throughout this project. Professor Janet Halley has offered me the gift of mentorship for which I am deeply grateful. I would also like to thank Professor Lisa Duggan, Professor Mattias Kumm and Professor David Richards for their valuable comments on earlier versions of this Essay. Maya Steinitz, Yair Sagy, Shmuel Leshem, Christine Bateup, Seval Yidirim, Zvi Triger, Nico Krisch, Arianne Barzilay, Tal Tirosh, Brian Schusterman and the participants of the J.S.D. workshop at NYU School of Law have kindly engaged with various drafts of this project and provided thoughtful feedback and intelligent critique. The editors at YJLF have engaged in an inspiring dialogue with me in preparing this text for publication. Of course, without Shelly Grizim the joy of unlearning is unimaginable.

1. MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977* 56-57 (Colin Gordon ed., Pantheon 1980). [hereinafter Foucault, *Power/Knowledge*].

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

conclusion of this legal dispute, the child was removed to foster care, with the expressed hope that the child would enjoy future prosperity as a normal male boy.³

Can a parent be legally required to control the gender of a child? What is the legal justification of a forced disintegration of a family? This Essay 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 a state agency that insisted on a masculine upbringing as a boy. .

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 any of the above, this is *not* the direction that I pursue here.

My hope in this Essay is to show, by closely reading this specific case, how through the structure of "the other" we can learn about what is normal. To use Jacques Derrida's language, the structure of the legal sign in this case is determined by the trace or track of an "other," which is forever absent.⁴ 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. The absent in this case is the normal, healthy child. And so although the subject matter of this Essay is a very unusual child, the Essay is an attempt to make sense of the average normal child. Thus in the following reading of the case, the "other" that I seek is not a male child who wanted to be a girl. The "other" is a "normal" male child who wants to be a boy.

Since language and naming are central themes in this Essay, I must first clarify my own. I read this specific case from a feminist-queer perspective, in search of meanings and legal-linguistic structures of the body and the mind. The biological/social dichotomy, and its sex/gender manifestation has been problematized in feminist theory since the 1990s, most notably in the works of Judith Butler and Eve Kosofsky Sedgwick.⁵ Drawing on this critical tradition, while also using the language of "sex" (to name the biological aspect of sex) and "gender" (to name the social aspect of sex), I seek to undermine the sex/gender and the biological/social distinctions. Thus in this Essay, the terms "male" and "female" describe what are perceived as "biological" bodies.

3. *Id.*

4. See JACQUES DERRIDA, OF GRAMMATOLOGY 61 (Gayatri Spivak trans., Johns Hopkins University Press 1982) (1976).

5. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 3-44 (Routledge 1990); EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (University of California Press 1990).

Accordingly, the terms “feminine” and “masculine” describe what is perceived as “social” behavior, and also to describe self-identifications (i.e. feminine self-identification, masculine self-identification).

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 Essay proceeds as follows. In Part I, I portray the story of this child as local and national press told it to the public. In Part II, 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. Part III is a critique of the discourse of rights. This Part 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.”⁶ In the concluding Part, 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→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.⁷

6. The terms “transgender” and “transsexual” are used in various ways in numerous discourses. From a clinical perspective, the current fourth edition of the DIAGNOSTIC AND STATISTICAL MANUAL DISORDERS (DSM) has dropped the term “transsexualism” as a diagnostic category and replaced with “Gender Identity Disorder.” The definition, however, remains the same. Task Force on DSM-IV, Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 532-538 (4th ed. 1994). In contrast, “transgender” is not recognized as a diagnostic category, and frequently medical and psychological discourses read it the same as “transsexual.” In reaction to clinical discourses, transsexual and transgender identified persons have come up with diverse languages of identification. For example, some view the use of a single *s* spelling of the word *transsexual* as a first step of resistance to medical pathologizing discourses. For an in-depth discussion of such “transdiscourses,” see JASON CROMWELL, *TRANSMEN AND FTM’S: IDENTITIES, BODIES, GENDERS AND SEXUALITIES* 19- 30 (University of Illinois Press 1999).

7. 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).

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.⁸

On September 25, 2000, *Time* 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."⁹

As we will later see, the naming of this child was one of the most contested issues 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).¹⁰

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.¹¹

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 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.¹²

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

9. Cloud, *supra* note 2.

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

11. Cloud, *supra* note 2.

12. *Id.*

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.¹³ The Lipscombs accentuated the medical diagnosis of "Gender Identity Disorder" (GID),¹⁴ 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.¹⁵

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

14. DSM-IV, at 537-538, supra note 6, defines Gender Identity Disorder as follows:

A. A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex). In children, the disturbance is manifested by four (or more) of the following:

- (1) repeatedly stated desire to be, or insistence that he or she is, the other sex
- (2) in boys, preference for cross-dressing or simulating female attire; in girls, insistence on wearing only stereotypical masculine clothing
- (3) strong and persistent preferences for cross-sex roles in make-believe play or persistent fantasies of being the other sex
- (4) intense desire to participate in the stereotypical games and pastimes of the other sex
- (5) strong preference for playmates of the other sex. . .

B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex. In children, the disturbance is manifested by any of the following: in boys, assertion that his penis or testes are disgusting or will disappear or assertion that it would be better not to have a penis, or aversion toward rough-and-tumble play and rejection of male stereotypical toys, games, and activities; in girls, rejection of urinating in a sitting position, assertion that she has or will grow a penis, or assertion that she does not want to grow breasts or menstruate, or marked aversion toward normative feminine clothing.

15. Kevin Mayhood, *Child's Sex-Role Disorder Contested*, COLUMBUS DISPATCH, Sept. 13, 2000, at 1A. Munchausen by proxy syndrome was first described in 1977. It is a form of child abuse in which a parent, typically a mother, fabricates data about the health of her child or intentionally makes the child ill. This form of abuse is different from other types of child maltreatment in that the abusive parent is almost always female, there is usually no indication of a problem in the family, and the abusive behavior is premeditated and not impulsive or in reaction to the child's behavior. See e.g., Mary Bryk & Patricia Siegel, *My Mother Caused My Illness: The Story of a Survivor of Munchausen by Proxy Syndrome*, 100 PEDIATRICS 1-7 (1997). For a critical discussion of this syndrome see MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 121-122 (1995) (arguing, in the context of the social construction of maternal deviancy, that this doubtful syndrome significantly allows women who are generally perceived as "good" mothers to be cast as

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 didn't have."¹⁶ 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: Memory 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.¹⁷ According to the gag order, the child should not be shown to the media nor media reports be shown to the child. Judge Lias 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.¹⁸

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 claim seems to be that *A→Z*'s behavior led or may lead 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 text assumes a future normative boy-man, looking back at a past in which he was ridiculed and shamed by an entire community. The possibility that as an adult *A→Z* will after all reject a masculine identity is not taken at all into account. Furthermore, even if the future *A→Z* is perceived as a "normal" boy-man, there

abusive and dangerous to their own children, thus making the idea of "model motherhood" appear suspicious in and of itself).

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

17. Mayhood, *supra* note 7. 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 to the local and national press.

18. *Id.*

are other possible responses to past ridicule, such as indifference, pleasure, anger or counter-judgment of the mocking community.

More importantly, the above text reflects a basic paradox that the gag order and the case as a whole signify. The gag order signifies both memory and forgetfulness. On the one hand, the gag order is an official order to erase the details of the case from both public and personal memory. On the other hand, the press coverage of the case, including the language of the gag order itself, serves as a clear stop-sign to parents who support children in unusual interpretations of sex and gender.

1. The Need to Forget

At the level of public memory, it seems that the danger that the gag order signals brings us back to the initial question, posed in the beginning of the Essay, regarding the meaning of the normal normative child. Normal interpretations of bodies and genders (i.e. normal male-masculine-boys and normal female-feminine-girls) may be destabilized once their normative aspect is exposed. The existence of incidents such as $A \rightarrow Z$ in public memory may expose normative (as opposed to natural) aspects of sex and gender. Sex and gender may suddenly parade as social norms if the case is not gagged. Thus, in this violent legal moment sex and gender can be exposed as interpretations of norms. The fact that the law violently forced $A \rightarrow Z$ into boyhood may expose how everybody else is normalized into one mode of interpretation of bodies. In other words, the danger here is not the existence of an eccentric peculiar "other" ($A \rightarrow Z$), but the fragility of the ordinary child, of the normal self. The preservation of sex and gender as coherent and "natural" is supported by forgetfulness of the case of $A \rightarrow Z$, —by erasing the trace of $A \rightarrow Z$ from public memory not only for the sake of $A \rightarrow Z$, but also for the sake of $A \rightarrow Z$'s always absent other, the normal child. Similarly, this perception of 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.

2. The Need to Remember

The coverage of the case and the gag order by the media also constitutes condemnation by presenting the case as something that the child is better off not knowing. In this context, the gag order serves a double purpose by creating the judgment, the ridicule, and the shame on the one hand, and on the other hand, by offering "protection" from such future harms. The gag order performs a double gesture by silencing the case, and at the same time signaling the risk of raising non-conforming children. It operates as a type of warning sign for

parents to remember, and a type of conflict eraser, to enforce public forgetfulness about the production of sex and gender.

B. Closure: the Reformed Kid

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.¹⁹ Judge Kay Lias “accepted the plan and praised the mediation.”²⁰ 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 and 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 just soaking it up.”²¹

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.

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

20. *Id.*

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

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 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 chose 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?” 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, in essence it was 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, the question of who used the girl’s name at the parents’ home remains. 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.”²² From a boy in the first sentence, Zachary is transformed into a kid in the next sentence. What can we

22. *Id.*

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 contradictory 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.²³ Their male bonding through masculine activities emphasizes the father's healing masculinity, and the reformed father and son establish a mutual relationship.

In contrast, the child's new relationship with Sherry Lipscomb is basically represented as a one-way flow of actions. She "nurture[es]" and he receives.²⁴ 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. 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 just soaking it up."²⁵ 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.²⁶ 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. One of the fresh graduates is willingly kidnapped by his boyfriend and is passionately kissing his captor, yet the ceremony continues. The proud parents continue to cheer the new heterosexual kids. As the exaggerated scene demonstrates, nothing really has 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.

23. *Id.*

24. *Id.*

25. *Id.*

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

C. *A→Z's Family in a "Disciplinary Society"*²⁷

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.²⁸

The family today is 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.²⁹ 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.³⁰ The family fades into the background, "overshadowed by another, the social, in relation to which the family is both queen and prisoner"- a process Donzelot labels familialism and familization.³¹ 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."³² On the one hand, the family is perceived as a "private sphere" where individuals are "free" and the government should very carefully interfere. On the other hand, many

27. I take the term "disciplinary society" from Foucault, who characterized modern age as an age of social control. 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 a modern society in which individuals, especially children, are under constant supervision and power of authorities such as schoolteachers, physicians, psychiatrists, social workers. See MICHEL FOUCAULT, 3 ESSENTIAL WORKS OF FOUCAULT 1954-1984: POWER 1, 58-59 (James Faubion ed., Robert Hurley trans., The New Press 2000). [hereinafter FOUCAULT, ESSENTIAL WORKS].

28. FOUCAULT, POWER/KNOWLEDGE, *supra* note 1, at 56.

29. DONZELOT, *supra* note 8.

30. *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 patriarchy is destroyed only at the cost of a patriarchy of the state").

31. *Id.* at 7.

32. *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 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.

micro-mechanisms of power and of supervision developed for surveillance over the family- such as social workers, teachers, doctors and courts.

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, identifications and desires of a child, such as television, advertisements, films, the web, school, parents, doctors, etc. None of these were successful in turning *A*→*Z* into a boy. Thus, the sword of the sovereign, through the law, stepped in only when all else failed, and terminated the child-parent relationship. For most children, normalization 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 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. Through the press, readers received the warning signal regarding “inappropriate” parenthood what is normal and what is abnormal. But at the same time, the case did not enter any official legal archives, and was left as a signal only through the press. Control mechanisms operated via the welfare agency and the press that covered the case, including the gag order itself.

In addition to the paradoxical aspect of the gag order, discussed in the previous section, the case of *A*→*Z* also reflects the safety and distance of normally subjugated children from such legal acts of subjugation. Normal children are not separated from parents by the state like this child was. However, the normal child *is* nonetheless present when he or she is reflected in “failures” in subjugation, such as *A*→*Z*, where legal and scientific discourses seize the “abnormal” subject for better discipline. The normal child is present in the case of *A*→*Z* because he or she is allegedly free from this type of state police and regulation. Summing up, *A*→*Z*’s discipline by the state 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.”³³

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

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

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, well then! Critique will be the art of voluntary insubordination. . . . Critique would essentially insure the desubjugation of the subject in the context of what we could call, in a word, the politics of truth.³⁴

Critique, for Foucault, the opposite motion to governmentalization. Governmentalization is the sum total of mechanisms of power that adhere to a truth, and critique is a counter-movement of the subject itself by questioning the power the knowledge- the subjugating discourses. In the following sections I will explore this hypothesis of desubjugation through the case of $A \rightarrow Z$. I will examine the limits of rights as a method of critique, and question the possibility of destabilization of the "politics of truth" through existing rights discourse. I will argue that this case is composed of a chain of conceptual oppositions that depend and constitute each other, and that the 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.³⁵

Is this child 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 twentieth 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/transsexual/transgender, and thus $A \rightarrow Z$ should remain in their legal custody, and; (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 feminine 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

34. MICHEL FOUCAULT, THE POLITICS OF TRUTH 32 (Lysa Hochroth trans., Sylvere Lotinger & Lysa Hochroth eds., Semiotext(e) 1997).

35. FOUCAULT, ESSENTIAL WORKS, *supra* note 26, at 11-12.

the parents to act as a girl.³⁶ 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 $A \rightarrow Z$ was *not* a boy. They provided narratives that presented $A \rightarrow Z$ 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."³⁷ The National Transgender Advocacy Coalition (NTAC) press release described $A \rightarrow Z$ 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."³⁸ Similarly, a self identified transsexual who characterized $A \rightarrow Z$ 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."³⁹ 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, feminine/masculine, 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. $A \rightarrow Z$'s body was fully intelligible as male, and his/her mind was fully intelligible as feminine. It was the combination that made $A \rightarrow Z$ a social-legal-scientific riddle. The main assumption of the mind/body distinction, as it appeared in $A \rightarrow Z$'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.

Ohio law on the termination of parental rights framed the formal legal custody debate over $A \rightarrow Z$. 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.⁴⁰ Generally, the basic distinction

36. Mayhood, *supra* note 16.

37. Pyle & Crane, *supra* note 13.

38. Press Release, National Transgender Advocacy Coalition (Sept. 4, 2000) at <http://www.ntac.org/pr/000904child.html>.

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

40. OHIO REV. CODE ANN. §2151.03, 2141.04.

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 this 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 and state) shared. At the core of the competing translations of $A \rightarrow Z$ we find two points of agreement. First, the sides to the debate openly expressed the idea that $A \rightarrow Z$ 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 stand in contradiction. Second, it seems from the presented arguments that the sides also assumed that any child’s sex or gender should generally not be a matter of parental choice. This no-choice assumption was addressed from different perspectives. For the parents, $A \rightarrow Z$ ’s feminine identification was perceived as a result of nature. For the state, $A \rightarrow Z$ was a male child that should be raised as a boy, and no one can choose otherwise. Unlike with general parental rights regarding choice of education, religion and language for a child, here the sides seem to agree that a similar right to choose sex or gender for a child does not exist. The debate took place under the axiom that generally males should be raised as boys, and females as girls, and that there is no parental right to choose otherwise. 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 femininity?

(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 $A \rightarrow Z$ is really located. Thus, the assault on legal parenthood was based on the claim that although $A \rightarrow Z$ 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.⁴¹ 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. Sex and gender in this claim collapse into the child’s male body, making $A \rightarrow Z$ a boy.

2. Cause: Mind Determined by Nurture

The FCCS claimed 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.⁴² Likewise, the public defender explained that “Munchausen parents” often “make their children ill or create symptoms to gain attention for themselves.”⁴³ According to these claims $A \rightarrow Z$ did not identify as a girl as a consequence of *nature*, but as a result of disastrous nurture by egocentric parents seeking fame for themselves.

Since the 1950s sex researcher John Money and collaborators developed a theory of “psychosexual differentiation.” 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

41. Mayhood, *supra* note 15.

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

43. Mayhood, *supra* note 15.

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.⁴⁴

Money's thesis of psychosexual development stresses that women and men are socially reared into "gender roles."⁴⁵ Men and women are produced through early social rearing to masculinity and femininity.⁴⁶ In *A→Z*'s 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 *the mind higher* up in the hierarchy, above factors related to the body.⁴⁷ When applied to the case of *A→Z*, Money's theory supports intensive masculinization of the child as early as possible. Ken Zucker, a leading expert in the field of unconventional gender behavior in children,⁴⁸ echoed Money's psychosexual theory in interviews regarding the case of *A→Z*.⁴⁹ Zucker characterized the child as a member of a troubled family, explaining 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."⁵⁰

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.⁵¹ Zucker expressed hope that by expanding current gender conception in these children and parents, sex-reassignment surgery later in life can be reduced.⁵² These expressed hopes to "save" children from transsexual surgeries and identifications reflect the double sword of Money's psychosexual differentiation theory. Seemingly liberal-

44. See JOHN MONEY & ANKE A. EHRHARDT, *MAN & WOMAN BOY & GIRL 4* (1972); See also RICHARD GREEN, *THE "SISSEY BOY SYNDROME" AND THE DEVELOPMENT OF HOMOSEXUALITY* (1987).

45. Money and Ehrhardt define "gender role" as "[e]verything 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 44 at 4.

46. See *Id.* at 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").

47. It should be noted however that Money and Ehrhardt did not negate the existence of other influences on the development of "gender identity." They especially mention hormones and claim that hormones do not automatically determine the dimorphism of gender identity but have *some influence* on patterns of behavior such as tomboyish behavior in girls, and the opposite in boys. *Id.* at 4.

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

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

50. *Id.*

51. Cloud, *supra* note 2.

52. *Id.*

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 behavioral expectations in order to prevent (or “save” from) sex/gender crossing, which is presumably bad. However, this tolerance is dominated by the greater cause of maintaining the distinction between boy and girl. This approach stretches the 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→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 feminine mind, and should therefore be nurtured back into masculinity. 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→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 his true masculine self would fully emerge.

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 feminine mind.

The child in this narrative is perceived as transgender, transsexual or a girl. The basic assumption 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 $A \rightarrow Z$'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."⁵³ 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."⁵⁴ Likewise, the couple's transsexual identified attorney explained, "it wasn't a matter of this 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."⁵⁵

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."⁵⁶ 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."⁵⁷

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. 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's mind 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.⁵⁸ Likewise, Paul Lipscomb, rejecting the idea that $A \rightarrow Z$'s body should determine the child's identity

53. Mayhood, *supra* note 16

54. Mayhood, *supra* note 15.

55. Encarnacion Pyle & Misti Crane, *supra* note 37.

56. *Father: Son Suffers From Gender Identity Disorder*, *supra* note 49; Cloud, *supra* note 2.

57. Pyle & Crane, *supra* note 42.

58. Pyle & Crane, *supra* note 13.

explained that, "it feels like you are in the wrong body."⁵⁹ 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 twentieth century, the "true," "inner" and "trapped" self refers to a core identity that summarizes the story of life.⁶⁰ $A \rightarrow Z$, 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

The sum of these counter-claims paved the way for the legal claim that the child's legal "best interest" is to remain with the Lipscombs who respect and support the child's feminine identity and "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 a simple fact 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."⁶¹ 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."⁶² 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

59. Mayhood, *supra* note 15.

60. For an extensive discussion of trapped soul transsexual narratives *see, e.g.*, JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSEXUALITY* 67-77 (1998); *See also* JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 130-167 (2002) (describing the evolvement of the medical practice of "sex change" in the United States in the 1950s and 1960s 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: TRANSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER* 141-175 (1995) (concluding that transsexual autobiographies reveal how the body, when 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).

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

62. *Id.* at 6.

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 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.⁶³ Nurturers, according to this theory are supposed to be 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.

Far from being essentialist, this claim that $A \rightarrow Z$ ’s “feminine mind” was nurtured, constructed, and 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 in flux and mutable.⁶⁴ 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 $A \rightarrow Z$ ’s “true self” is his/her mind or identification initially 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.”⁶⁵ As I emphasized above, the parents/allies repeatedly claimed that $A \rightarrow Z$ ’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” $A \rightarrow Z$ 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 in flux and mutable. And from this logic follows

63. See MONEY & EHRHARDT, *supra* note 44, 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”).

64. 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.

65. FUSS, *supra* note 61, at 6.

the opposing legal position that the non-location of the self (the body) is a trap, and that the child's "best interest" is with those who recognize his/her male body (and not his feminine 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- vice 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 (the mind).

We have seen that one of the crucial debated issues in the case of $A \rightarrow Z$ was about 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 faulted 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, based on the work 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 principal 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.⁶⁶

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."⁶⁷ "Normal" development of "gender identity" became a source of concern and immense debates for scientists and sex researchers. While in the 1950s some endocrinologists viewed psychological sex as a result of a hidden physical genetic or endocrine condition, others turned to environmental explanations.⁶⁸ They generally confirmed and supported the findings on the environmental origins of psychological sex, and 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.⁶⁹

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. The focus thus 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 bodies raised an anxiety about how to socialize children to avoid such conditions.⁷⁰ In the

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

67. For comprehensive historical background on the development of the term gender see JOANNE MEYEROWITZ, *supra* note 60, at 98-130.

68. See, e.g., John Money et al., *Imprinting and the Establishment of Gender Role*, 77 AM. MED. ASS'N ARCHIVES NEUROLOGY & PSYCHIATRY 333-336 (1957).

69. *Id.* *Imprinting and the Establishment of Gender Role*.

70. For a critique of this rigid and normalizing effect of this psychosexual development theory in psychological and psychoanalytic discourses, see, e.g., MEYEROWITZ, *supra* note 60, at 128 (pointing out that while today the concept "gender" is associated with feminism, in the early 1960s 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 KOSOFKY SEDGWICK, *How to Bring Your kids Up Gay*, in TENDENCIES 154, 154-64 (1993) (arguing that following the American Psychiatric Association's publicized 1973 decision to de-pathologize homosexuality from its next Diagnostic and Statistical

1960s, influenced by this theory of psychosexual development, psychologists and psychiatrists developed treatment programs for the early conditioning of children to appropriate gender behavior.⁷¹ We can now see that the FCCS claim in this case, regarding the negative parental influence on $A \rightarrow Z$, reflects this gender-normalizing approach. The claim that $A \rightarrow Z$'s parents failed in the socialization of $A \rightarrow Z$ assumes that gender is primarily learned through a child's interaction with his/her environment.

Meanwhile, since the 1960s, 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.⁷² Notably among such efforts, in 1997, sex researchers Milton Diamond and Keith Sigmundson reported the outcome of John/Joan's feminine assignment as a failure.⁷³ 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.⁷⁴ 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.⁷⁵ Upon discovery

Manual, DSM III, parent and teacher anxiety became focused on preventing the *becoming of* adult homosexuals).

71. For representative examples of this normalizing attitude in psychology and psychiatry, see, e.g., RICHARD GREEN, *supra* note 44, at 370-75 (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 44, 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").

72. E.g. MONEY & EHRHARDT, *supra* note 44, at 95-114 (surveying studies on fetally androgenized genetic females conducted in the 1960s 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*, 350 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).

73. Milton Diamond & Keith H. Sigmundson, *Sex Reassignment at Birth: Long-term Review and Clinical Implications*, 151 ARCHIVES PEDIATRICS & ADOLESCENT MED. 298 (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).

74. *Id.* See also William G. Reiner, *To Be Male or Female- That Is the Question*, 151 ARCHIVES PEDIATRICS & ADOLESCENT MED. 224 (1997) (arguing that the John/Joan case attests to the necessity of unraveling the neuroscientific foundations of the sexual brain).

75. For John Money's report of the John/Joan case see MONEY & EHRHARDT, *supra* note 44, at 118-25 (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).

of this secret personal history, Reimer transitioned back to a masculine identity at the age of fourteen. He underwent penis reconstruction and married a woman whose children he adopted.⁷⁶ On May 4, 2004 David Reimer took his life.⁷⁷ For many scientists, John/Joan's perceived biological brain serves as *prima 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.⁷⁸

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.⁷⁹

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

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

77. *Obituary, David Reimer*, 38, *Subject of the John/Joan Case*, N.Y. TIMES, May 12, 2004, at A21.

78. William Reiner, *supra* note 74, at 225. See also Hazel Glenn 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, 63 (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 ears rather than between the legs").

79. See 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*").

dislocated in the wrong (female) body, and in need of hormonal treatment.⁸⁰ 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?

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 successful. 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 masculine 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.⁸¹ 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 $A \rightarrow Z$'s, both the class and normativity of the parents cannot be overlooked. 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.. However, we should also pay attention to the slightly different rhetoric that justified the "trapped soul" narratives in $A \rightarrow Z$'s case in comparison with Hal. I will 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.

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.⁸² 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

80. *Id.*

81. *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).

82. See, e.g., Mayhood, *supra* note 15.

argument. This resembles the general liberal theme reflected in Charles Taylor's above text 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. 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 sex or 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 appeared at the time to be the more convincing of the two.

Another rhetoric was used to describe Hal's case. 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" 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, nor 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.⁸³

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. While this celebration of "transgender" children and their parents appeared very progressive and liberal, we should also keep in mind that it succeeded because it had a scientific base. Therefore, 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

83. *The Oprah Winfrey Show*, *supra* note 81.

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

*[T]he 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.*⁸⁴

All thought, judgment, perception, as comparison has as its precondition a “positing of equality,” and earlier still a “making equal.”⁸⁵

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. At this point, I will show that rights, and specifically sex discrimination law, do 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 $A \rightarrow Z$ ’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’s of one theme.

What is presently referred to as “identity politics” emerged in the US in the 1980s when organizations dedicated to rights-claiming appeared out of the disintegrating social movements of the 1960s and the 1970s.⁸⁶ To briefly locate $A \rightarrow Z$ ’s specific case in identity politics, it is noteworthy that despite the fact that the case brought up pressing questions of sex and 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 1970s. 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

84. FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 277 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1968) (1901).

85. *Id.* at 273-274.

86. For a recent critical analysis of the disintegration of the social movements into a culture of neoliberalism, see LISA DUGGAN, *THE TWILIGHT OF EQUALITY NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* (2003).

meanings and values.”⁸⁷ Likewise, in an examination of the development of the “gender” concept, Donna Haraway has argued that in many cases the idea of gender gave rise to feminist scholarship that is inattentive to the discursiveness of the categories sex and nature, and mainly to the fact that scientific discourse constructs its objects of knowledge.⁸⁸ Thus, for example, within the women’s movement, feminists harshly critiqued male-to-female (MTF) transsexuals who expressed femininity (a sign of female oppression) and female-to-male (FTM) transsexuals who expressed masculinity (a sign of male supremacy).⁸⁹ In this general context, $A \rightarrow Z$ ’s case was taken up by transgender and transsexual identified organizations.

A. Reading $A \rightarrow Z$ as Sex Discrimination

As the custody dispute was developing, $A \rightarrow Z$ ’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 this case should be considered. What effect would a sex discrimination claim have? How would a turn to equality operate in relation to the conceptual paradoxes raised above?

Sex discrimination in $A \rightarrow Z$ ’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”).⁹⁰ 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,

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

88. DONNA HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 138 (1992).

89. See, e.g., MEYEROWITZ, *supra* note 60, at 259-60 (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 Raymond critiqued MTFs who identified as lesbian-feminist for the invasiveness, the colonizing of female bodies, and the appropriation of female souls).

90. Generally, American courts dealing with sex discrimination law are not always coherent in theorizing “sex” and “gender.” For some examples of critical discussions on meanings of sex and gender in the discrimination context see Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE* 80 (Wendy Brown & Janet Halley eds., 2002) (critiquing a feminist model of discrimination that defines “gender” as the outcome of men using sexuality to make themselves superordinate); Vicky Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683 (1998) (arguing that the focus of harassment law should not be on sexuality as such, but on conduct that consigns people to gendered work roles that do not further their own aspirations or advantage); Katherine M. Franke, *What’s Wrong With Sexual Harassment?* 49 *STAN. L. REV.* 691 (1997) (arguing that sexual harassment is wrong because of the gender norms that it reflects and perpetuates stereotypical gender norms).

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: transsexual, transgender, black, gay, Jewish, and so on. It is a state of being.⁹¹

We will see how in the case of $A \rightarrow Z$, 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. 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 $A \rightarrow Z$'s claim, the one who is allegedly under non-discrimination, is the female body performing acts of femininity or male body performing masculinity. The reason for discrimination here is the combination of $A \rightarrow Z$'s male body and feminine acts, a combination that should allegedly be tolerated in a liberal non-discriminating democracy. This “other” (the female-born child performing femininity or the male-born 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 female body.” That absent female body is not only the source of $A \rightarrow Z$'s gender equality, but more importantly, its effect. The female body originates in the sign that seeks to equate male born $A \rightarrow Z$ with it.

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,

91. 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.

and not in the body. As I showed above, in the mind/body competition, the parents argued that true self existed in the 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 girl, transgender or transsexual. So the gender discrimination claim in this 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 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 (as opposed to 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," feminine 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 feminine "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.⁹²

92. FOUCAULT, *ESSENTIAL WORKS*, *supra* note 27, at 11.

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 idea that "[a]ll thought, judgment, perception, consisted as comparison, has as its precondition a "*positing* of equality," and earlier still a '*making* equal.'"⁹³ 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 $A \rightarrow Z$.⁹⁴ $A \rightarrow Z$ 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, that the judge granted on the case,⁹⁵ can now be interpreted as erasing the sign of $A \rightarrow Z$, *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 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 the normal child.

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

[I]t 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.⁹⁶

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.⁹⁷

93. NIETZSCHE, *supra* note 84, at 273-74. Emphasis appears in original text.

94. FOUCAULT, *ESSENTIAL WORKS*, *supra* note 27, at 11.

95. Mayhood, *supra* note 7.

96. FOUCAULT, *POWER/KNOWLEDGE*, *supra* note 1, at 108.

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

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 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*.⁹⁸

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?⁹⁹

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."¹⁰⁰ 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

98. FOUCAULT, POWER/KNOWLEDGE, *supra* note 1, 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 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 is tied to scientific knowledge, we find that there is not solid recourse available to us today, such being our situation, except that which lies precisely in the return to a theory of right organized around sovereignty and articulated upon its ancient principle." *Id.* at 107-108.

99. 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, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 52-76 (1995).

100. GILLES DELEUZE, *supra* note 97, at 4-11.

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.¹⁰¹ 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.¹⁰² Deleuze demonstrates how as Alice's perception of self is destabilized, she begins to understand the significance of the surface, of words and linguistic structures. 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——"

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."¹⁰³

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. Only at the point of the paradox is Alice able to understand and produce *new 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.¹⁰⁴ Thus today's task is not to understand the true

101. *Id.* at 54.

102. *Id.* at 19.

103. LEWIS CAROL, *ALICE IN WONDERLAND* 56 (New American Library 2000) (1865).

104. DELEUZE, *supra* note 97, 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.").

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.¹⁰⁵

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 this 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 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. 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 Essay, 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.¹⁰⁶

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

105. *Id.* at 73.

106. FRIEDRICH NIETZSCHE, *supra* note 33, at 117.

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. 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), 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.

$A \rightarrow Z$'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. This Essay examined the case of $A \rightarrow Z$ through liberal rights discourse and medical discourses, and we have seen that while one discourse normalized $A \rightarrow Z$ into mental health, the other normalized the child into equality. These are the same drives with different names. 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). The child welfare agency's "will to health" attempted to cure $A \rightarrow Z$ by normalization, and transgender advocacy's "will to equality" claimed to liberate $A \rightarrow Z$ through rights. These two modern drives to health and equality are in fact more similar than contradictory because the opposing parties in $A \rightarrow Z$'s case promoted two co-dependent poles of the mind-body distinction. Significantly, the same mind-body distinction remained intact even when victory shifted in Hal's example and the "mind over body" approaches defeated the "body over mind" approaches. This shift in victory but not in concept is not shocking because the medical debates and the equality debates depend on the idea that the mind and the body are two distinct human attributes, its derivative popular thesis that sex (the body) and gender (the mind) are naturally distinct categories, and finally the liberal belief that inclusion and rights such as equality can cure social and legal wrongs.

In the passage above, 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."¹⁰⁷ There is not one, but many healths that a body can have. Counter-intuitively, Nietzsche argues against the idea of one concept of health

107. *Id.*

by suggesting that one should allow the “particular and incomparable health to rear its head again,” as we “unlearn the dogma of the equality of man.”¹⁰⁸ 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 will it then be timely to reflect on the health and illness of the soul.

In the realm of soul, peculiarity, bizarreness, queerness, and originality is what Nietzsche calls health! All other is illness. The abnormal soul is the healthy soul, and the normal soul is ill. The point is that this strategic use of paradox results in the collapse of the categories. It may possibly result in the production of new sense, beyond health and illness, and beyond equal and unequal.

$A \rightarrow Z$ and Hal can be read as symptoms or producers of one effect: the normal child. Hal and $A \rightarrow Z$ were both perceived as different from normal kids. Difference constitutes both health and equality discourses about such children. There is no “health” or “equality” for $A \rightarrow Z$ or Hal without difference from the other so called “normal” kids. While these discourses signify and claim $A \rightarrow Z$ and Hal’s true deep essence and false essence, we should not overlook these children’s always present, always absent other, the normal child that $A \rightarrow Z$ 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. The effect is an absent normal child who is therefore not the origin of the abnormal child but its paradoxical result. As Derrida has shown, and Judith Butler has reemphasized,¹⁰⁹ the other, the trace, the perceived non-origin ($A \rightarrow Z$), does not merely reflect an imitation of an origin. Instead, that origin (the normal-healthy child) is never constituted except by the non-origin—by these so-called “transgender” children. In Derrida’s words, “the trace, which

108. NIETZSCHE, *supra* note 33, at 117.

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

thus becomes the origin of the origin.”¹¹⁰ $A \rightarrow Z$ and Hal are the origin of the origin, the trace, of all normal children, because the investigation of their difference through medical and legal discourses underscores what and who is allegedly not different. A child who is allegedly not different, not scrutinized, not talked about, is thus originated in the discussion of the abnormal. Alternative forms of resistance in legal theory may destabilize the rigid social legal language that defines the subject. A critical-legal intervention in a case such as $A \rightarrow Z$'s can be achieved in multiple ways that would ideally produce an event and challenge social intelligibility. Thinking beyond a rights regime, a legal event can offer resistance not through inclusion, sameness and equality, and not by locating the “true self” in any fixed inner or outer location. It would perhaps celebrate the paradoxical moment of the event by underscoring a more radical version of liberty that is divorced from equality. For example, a critical legal intervention would perhaps take up, as Wendy Brown has suggested, a language of wanting (“I want”) instead of a language of being (“I am”).¹¹¹ Thus perhaps instead of claiming that the child *is* a boy or a girl, critical resistance would emphasize the child's liberty and desire (“she wants”) instead of the child's fixed position (“s/he is”).

In the process of unlearning equality and health through this specific child who wanted to be a girl, resemblance, dependence, and dual reinforcement of liberalism and science emerged in many paradoxical forms. My focus on this unique case echoes Nietzsche's call to neglect concepts of normality (“normal health,” “normal diet” “normal course of an illness,” and also equality), so that eventually the particular and the “*incomparable*” can rear its head again. Indeed, as we unlearn dogmas of “equality of men” and “normal health,” the visibility and incomparability of $A \rightarrow Z$ can develop into a social-legal event.

110. JACQUES DERRIDA, *supra* note 4, at 61.

111. Brown, *supra* note 99, at 75.