

# The Gender Box

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When I was born . . . the doctor confidently declared, "It's a girl." That might have been the last time anyone was so sure.<sup>1</sup>

## I. INTRODUCTION

It is almost impossible to interact with other people without knowing their gender. Indeed, our lives are so highly gendered that gender becomes an invisible assumption which orders our lives. We use the correct bathroom,<sup>2</sup> buy the appropriate clothing, and probably never hesitate to declare ourselves either male or female. But what happens when gender is not that clear? What happens when the boxes we force people into begin to blur or disappear altogether?

The city of Colorado Springs, Colorado faced these questions in 1994. Sean O'Neil,<sup>3</sup> a biological woman, passed as a teenage boy and en-

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1. LESLIE FEINBERG, *TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL* 3 (1996).
2. What bathroom to use is a monumental issue for people who do not fit neatly into either the male or female box. This difficulty was underscored by Patricia Williams, a law professor whose transsexual student was not allowed to use either the male or female bathroom by fellow students after a sex change operation. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 122-23 (1991). The societal belief that each one of us has a "correct" bathroom was highlighted by the 1990 prosecution of a woman who used the men's bathroom at a concert because the line was too long for the women's bathroom. As this case illustrates, the societal commitment to separate bathrooms is very strong; the trial reportedly cost the city of Houston \$10,000. See *Woman is Acquitted in Trial for Using the Men's Room*, N.Y. TIMES, Nov. 3, 1990, at A8. Another illustration of the strength of "urinary segregation" is that the fear of unsegregated bathrooms was an argument used to defeat the Equal Rights Amendment to the Constitution in the late 1970s. See GINETTE CASTRO, *AMERICAN FEMINISM: A CONTEMPORARY HISTORY* 208 (Elizabeth Loverde-Bagwell trans., 1990).
3. Out of respect for Sean's self-identity, I will refer to Sean as Sean O'Neil, not Sharon Clark (Sean's given name), and will use male instead of female pronouns.

gaged in numerous romantic relationships with teenage girls. Before the girls and their parents knew that Sean was a biological woman, the relationships were called teenage love. After they found out, the relationships were called rape.<sup>4</sup> Although what resulted was a rape case that was eventually plea bargained, the rape charge was more about punishing the transgression of gender than about punishing acts which were viewed as rape.<sup>5</sup> The case underscores the societal and legal investment in a bipolar gender system which perpetuates and legitimates homophobia and trans-phobia.<sup>6</sup>

In Part II of this article, I discuss the bipolar construction of sex and gender. I also examine how this bipolar construction intertwines sex, gender, and sexual orientation and why pulling apart these concepts is so important. Part III provides a brief overview of the history of transsexualism and rise of the Transgender Movement. In Part IV, I outline some societal tools used to keep people inside the gender box. Although there are a multitude of societal tools, I focus on five: the medicalization of gender, homophobia, the regulation of appearance, violence against gender transgressors, and the societal and legal control of identity and language. I then show, in Part V, how each of these tools was used in the Sean O'Neil case. I conclude with a discussion of how the court in the O'Neil case addressed transgression of the gender box and suggest ways that courts can better address this issue in the future.

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4. The girls repeatedly stated that they were unaware that Sean was a biological girl. See Reporter's Transcript of Preliminary Hearing, *People v. Clark*, No. 94CR3290 (Colo. 1994) at 36–37, 50, 52 [hereinafter Preliminary Hearing]. However, this may be uncertain. It is conceivable that the girls knew that Sean was a biological girl but did not want to acknowledge this to themselves or the public.

5. The assertion that this case is really about gender and not rape is not intended to belittle or dismiss the experiences of the teenage girls involved in this case. As a feminist and a former rape crisis counselor, I am very aware that rape is an epidemic in this country and that women rarely fabricate such stories. My natural instinct is to believe a woman who says she was raped. However, I am also queer and believe that what was going on here was more than an allegation of rape. This case involves homophobia and transphobia as well. It is my hope that the competing tensions of my three identities, feminist, rape crisis counselor, and lesbian identified bisexual, will help me analyze this case without denigrating the experiences of the women involved. This article will not address the many complex legal issues surrounding the construction of rape in this case. See *infra* note 124.

This article is also influenced by the fact that I do not identify as a transgendered person. Although there are many ways in which I step outside the gender box, being transgendered is not part of my identity and I have never experienced the world through this lens. My perspective as an outsider influences and directs my analysis of this case. Further, this is not a neutral case analysis. I am very supportive of the transgender civil rights movement and hope this article will be a contribution to their struggle for liberation. The concept of transgenderism will be explained later in the article. See *infra* Part III.

6. See *infra* Part II.

## II. THE GENDER BOX: SEX, GENDER, AND SEXUAL ORIENTATION

[O]ur entire Western system of thought is based on binary opposition; we define by comparison, by what things are not.<sup>7</sup>

When it comes to sex, gender, and sexual orientation, Western culture assumes that sex, gender, and sexual orientation are fused and that they essentially, necessarily, and naturally relate to one another.<sup>8</sup> Western culture also traditionally assumes that the relationship between sex, gender, and sexual orientation creates two mutually exclusive results, male and female.<sup>9</sup>

These two assumptions create a "gender box"<sup>10</sup> into which every human being is supposed to fit neatly.<sup>11</sup> The box creates two realities. If your sex is male, your gender is masculine, and you are sexually attracted to women. Similarly, if your sex is female, your gender is feminine, and you are sexually attracted to men. While there are two results, the gender box is equally confining for men and for women. The rules of gender dictate that you must be in one box or the other; you cannot be in the middle and you cannot be in both at the same time.<sup>12</sup> As transgender activist Leslie Feinberg explains, "the . . . dominant view [is] that woman and man are all that exist, and that there is only one way to be a woman or a man."<sup>13</sup> Unfortunately, the gender box is inadequate and poorly designed.

7. Ruth Gibian, *Refusing Certainty: Toward a Bisexuality of Wholeness*, in CLOSER TO HOME: BISEXUALITY AND FEMINISM 3, 5 (Elizabeth Reba Weise ed., 1992).

8. See GORDENE OLGA MACKENZIE, TRANSGENDER NATION 14 (1994).

9. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996).

10. The idea that gender is a box that society places people into is borrowed from a poem by Susan Carlton, speaking about how society forces bisexual people into the boxes of "heterosexual" or "homosexual":

We can help you. Just step over here to this  
Nice little box we have for you. That's it, step inside. Cozy,  
Isn't it? There now, we'll just put on this lid nice  
And tight. If you breathe real  
Shallowly, there should be just enough air  
To live on.

Susan Carlton, *This Poem Can Be Put Off No Longer*, in BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT 14, 16 (Lorraine Hutchins & Lani Kaahumanu eds., 1991).

11. Society's need to categorize people is long standing. Placing people into categories serves a number of purposes. Categorization helps us understand the world and makes us feel safe and in control of our surroundings. See Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305, 321-22 (1990). Categories have also historically been used as a means of oppression. As Ruth Colker notes, however, categorization also serves useful purposes by allowing people to form and unite around a particular identity and providing a means through which society can address past wrongs. An example of this second useful purpose is affirmative action. See RUTH COLKER, HYBRID: BISEXUALS, MULTI-RACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 6-8 (1996).

12. See Anne Fausto-Sterling, *How Many Sexes Are There?*, N.Y. TIMES, Mar. 12, 1993, at A29 [hereinafter *How Many Sexes Are There?*].

13. FEINBERG, *supra* note 1, at xii.

The range of human possibilities extends far beyond that recognized by the gender box. For each concept—sex, gender, and sexual orientation—I will briefly explain why the relationship between the concepts and the resulting polarization is false.

“Sex” refers to a person’s biological sex.<sup>14</sup> The declaration of one’s sex is usually made upon birth by a doctor based on a visual assessment of the external genitalia.<sup>15</sup> Although it is commonly assumed that there are only two sexes, male and female, biological research suggests that there are not two polar categories of sex, but rather a continuum of sexes with people distributed across the spectrum.<sup>16</sup>

Two pieces of evidence strongly support the continuum theory. The first supportive piece of evidence is the existence of intersexuals, formerly called hermaphrodites, whose reproductive structures are so ambiguous that they are neither exclusively male nor exclusively female.<sup>17</sup> Second, it is possible for a person to be sexed as two different sexes by using different classification systems.<sup>18</sup> A classic example of this is Olympic sex typing which can result in the disqualification of women with female external genitalia and non-XX chromosome configurations.<sup>19</sup>

Whereas “sex” is a biological difference between women and men, “gender” is the social meaning attached to those differences.<sup>20</sup> Gender therefore operates to predetermine the choices, social rewards, and safety available in one’s life. Social rewards are stratified.<sup>21</sup> Just as there are as-

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14. See HOLLY DEVOR, *GENDER BLENDING: CONFRONTING THE LIMITS OF DUALITY* vii (1989).
  15. See *id.* at 9; see also Edward S. David, Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 292 (1975).
  16. See generally Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCI., Mar.–Apr. 1993, at 20.
  17. See JOHN MONEY & ANKE A. EHRHARDT, *MAN AND WOMAN, BOY AND GIRL: THE DIFFERENTIATION AND DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY* 285 (1972). There are also several chromosomal conditions, such as Turner’s Syndrome (XO chromosome arrangement resulting in a female body type but lacking female sex organs), Androgen Sensitivity Syndrome (XY arrangement resulting in female external genitalia but male internal sex organs), and Klinefelter’s Syndrome (two or more X chromosomes and one Y chromosome), resulting in varying degrees of male and female genitals and secondary sex characteristics. See DEVOR, *supra* note 14, at 7–9. Although intersexuals exist naturally, their existence is hidden and repressed by medical intervention which acts surgically to create “male” or “female” bodies from ambiguous bodies at an early age. See Ellen Barry, *United States of Ambiguity*, BOSTON PHOENIX, Nov. 22, 1996, at 6; *How Many Sexes Are There?*, *supra* note 12, at A29.
  18. Common ways to classify people according to sex are by chromosomes, hormones, external genitalia, and reproductive organs.
  19. See Julia Cream, *Re-Solving Riddles: The Sexed-Body*, in *MAPPING DESIRE: GEOGRAPHIES OF SEXUALITIES* 31, 35 (David Bell & Gill Valentine eds., 1995).
  20. Discussions of the relationship between sex and gender are voluminous. Unfortunately, a comprehensive discussion of the biological explanations for gender is beyond the scope of this article. For a comprehensive analysis of how biological determinations impact on the social construction of gender, see generally ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT MEN AND WOMEN* (1985).
  21. Adrienne Rich defines patriarchy as:  
 [A]ny kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms. . . . Such group organization has existed so long that al-

sumed to be only two sexes, male and female, there are also assumed to be only two genders, masculine and feminine.<sup>22</sup> These categories are mutually exclusive; any attempt to place oneself in some middle category results in stigmatization.<sup>23</sup>

The construction of gender and sex in American culture requires that there be conformity between gender and sex; all males must have a masculine gender and all females must have a feminine gender.<sup>24</sup> Gender is so ingrained that it is only noticed when someone transgresses gender boundaries.<sup>25</sup> Stepping outside a socially defined gender box immediately causes discomfort.<sup>26</sup>

While gender is a social status that may be attributed to a person by society, it may also be self-attributed.<sup>27</sup> Despite the idea that gender is fixed, we are continually creating and recreating our gender through our words, actions, dress, and relationships.<sup>28</sup> Femininity and masculinity are not fixed concepts; the conceptual boundaries of femininity and masculinity shift as society shifts.<sup>29</sup> The concept of gender changes from one historical period to another. A feature considered feminine in one time period or culture may not be considered feminine in a later time period or different culture.<sup>30</sup> For example, at the turn of the century, boys wore pink and girls wore blue.<sup>31</sup> Today, pink is the "girl" color and blue is the "boy" color.<sup>32</sup> While what is considered masculine and feminine may change, the idea that they are two polar, mutually exclusive categories remains constant.

Sexual orientation is linked to both sex and gender.<sup>33</sup> If you are a male, you are supposed to find women sexually attractive, while if you are

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most all written history, theology, psychology, and cultural anthropology are founded on its premises and contribute to its survival.

ADRIENNE RICH, *ON LIES, SECRETS, AND SILENCE* 78 (1979).

22. See DEVOR, *supra* note 14, at vii. For an in-depth analysis of the social construction of gender, see SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* (1993).
23. See MACKENZIE, *supra* note 8, at 14.
24. See *id.* at 14, 23; Victoria Prince, *Seventy Years in the Trenches of the Gender Wars*, in *GENDER BLENDING* 469-70 (Bonnie Bullough et al. eds., 1997).
25. See ZACHARY I. NATAF, *LESBIANS TALK TRANSGENDER* 22 (1996).
26. See *id.* For example, I recently attended an investigative conference at the Massachusetts Commission Against Discrimination involving a woman with a beard who was denied a pastoral internship in a hospital. One of the reasons stated for the denial was a concern that she would not be accepted by patients and family members because of her beard. This clearly raised an equal protection violation because men with beards were readily accepted for employment at the hospital. The beard was only an issue because it was a masculine gender marker on a woman.
27. See DEVOR, *supra* note 14, at vii.
28. See MACKENZIE, *supra* note 8, at 14.
29. See ROBERT J. STOLLER, *PRESENTATIONS OF GENDER* 11 (1985).
30. See NATAF, *supra* note 25, at 10; DEVOR, *supra* note 14, at 7.
31. See MARJORI GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY I* (1992).
32. See *id.*
33. See MACKENZIE, *supra* note 8, at 14.

a female, you are supposed to find men sexually attractive.<sup>34</sup> Stepping outside this social construction is considered deviant and has far-reaching social and legal ramifications. However, neither a person's sex nor gender determines who that person will find sexually attractive.

### III. STEPPING OUTSIDE THE GENDER BOX: TRANSEXUALISM AND TRANSGENDERISM

Despite Western culture's insistence that congruity between sex and gender is natural, there are cultures which allow people to mix and match sexes and genders. Some non-Western cultures have an "intermediate gender status or third gender category."<sup>35</sup> In fact, transgendered persons in other cultures were revered and believed to have magical powers.<sup>36</sup>

Although transgendered individuals have probably existed since the beginning of time,<sup>37</sup> it was not until the middle of the twentieth century that the idea of transsexuals entered the American consciousness.<sup>38</sup> The well publicized sex change operations of Christine Jorgenson in 1952 and tennis star Renee Richards in 1976 prompted American interest in transsexuals and sex reassignment surgery.<sup>39</sup>

The colloquial definition of a transsexual is a person "born in the 'wrong' body," either a man trapped in a woman's body or a woman trapped in a man's body.<sup>40</sup> Medically, transsexuals are understood to be biologically normal members of a given sex who in all social aspects belong to the other gender and take steps to alter their bodies to match their gender.<sup>41</sup> Richard Green and John Money, leaders in the field of transsexual research, offer a slightly different definition:

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34. See *id.* at 13.

35. NATAF, *supra* note 25, at 13.

36. See MACKENZIE, *supra* note 8, at 47. An in-depth discussion of the historical and cross-cultural aspects of transsexualism is beyond the scope of this article. Many books and articles have explored the history and occurrence of transsexualism in different cultures. To gain a general understanding of the cross-cultural history of transsexualism, see VERN L. BULLOUGH & BONNIE BULLOUGH, *CROSS-DRESSING, SEX, AND GENDER* (1993); FEINBERG, *supra* note 1; *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* (Gilbert Herdt ed., 1994). To gain an understanding of transsexualism within specific cultures, see Evelyn Blackwood, *Sexuality and Gender in Certain Native American Tribes: The Case of the Cross-Gender Female*, in *FEMINIST FRONTIERS II: RETHINKING SEX, GENDER, AND SOCIETY* 142 (Laurel Richardson & Verta Taylor eds., 1986); *BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY* (Julia Epstein & Kristina Straub eds., 1991).

37. See NATAF, *supra* note 25, at 9.

38. Since the 1950s, transsexualism has captured the American imagination. See MACKENZIE, *supra* note 8, at 110–11 (noting appearance, in 1953, of a transsexual on a talk show). Talk shows in particular have been active in cultivating this interest, albeit in a highly voyeuristic sense. See *id.* at 112–18. Since 1992, transsexual issues have been highlighted 69 times on seven different talk shows. See List from Video Archives ((800) 367-8433).

39. See Douglas K. Browell, Comment, *M.T. v. J.T.: An Enlightened Perspective on Transsexualism*, 6 *CAP. U.L. REV.* 403, 403 (1977).

40. MACKENZIE, *supra* note 8, at 14.

41. See DEVOR, *supra* note 14, at 20.

[B]ehaviorally, it is the act of living and passing in the role of the opposite sex, before or after having attained a hormonal, surgical, and legal sex reassignment; psychically, it is the condition of people who have a conviction that they belong to the opposite sex and are driven by a compulsion to have the body, appearance, and social status of the opposite sex.<sup>42</sup>

Although there is no definitive reason for transsexualism, theories have attempted to ascribe it to everything from an imbalance of prenatal hormones to poor mothering.<sup>43</sup> Traditional explanations often conceptualize transsexualism as a psychological disorder with biological origins that has a surgical treatment, namely surgery to change the body to match the mind.<sup>44</sup> Therefore, much of the literature on transsexualism focuses on it as a biological and psychological problem and proposes medical cures.<sup>45</sup> Regardless of the reasons for transsexualism, the result is that the transsexual is diagnosed with a psychological disorder.

In 1973, the term "gender dysphoria" was coined as a "blanket term covering not only transsexuals but other individuals with so-called gender identity disorders who requested sex-reassignment surgery."<sup>46</sup> Also in 1973, the American Psychiatric Association removed homosexuality from the third edition of its Diagnostic and Statistical Manual of Mental Disorders.<sup>47</sup> In 1980, "transsexualism" was added to the DSM,<sup>48</sup> and in 1993, "transsexualism" was changed to "Gender Identity Disorder."<sup>49</sup>

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42. TRANSSEXUALISM AND SEX REASSIGNMENT 487 (Richard Green & John Money eds., 1969). Transsexualism is also defined as "a disorder of gender identity. Persons with this problem feel a lack of harmony between their psychological sex and their anatomical sex." Harry Benjamin, *Transsexualism*, 73 AM. J. NURSING 457 (1973). Transsexualism should not be confused with transvestitism, which is the desire to dress in the clothes of the opposite sex, often for arousal or achievement of orgasm, see TRANSSEXUALISM AND SEX REASSIGNMENT, *supra*, at 487; but with no desire to physically alter one's body.
43. See CAROL RIDDELL, DIVIDED SISTERHOOD: A CRITICAL REVIEW OF JANICE RAYMOND'S 'THE TRANSSEXUAL EMPIRE' 4 (1980).
44. See generally MACKENZIE, *supra* note 8, at 60.
45. See *id.* at 28, 57-65. An in-depth discussion of the biological and psychological causes of transsexualism is beyond the scope of this article. For a better understanding of the phenomenon of transsexualism from this perspective, see TRANSSEXUALISM AND SEX REASSIGNMENT, *supra* note 42; RICHARD F. DOCTER, TRANSVESTITES AND TRANSSEXUALS: TOWARD A THEORY OF CROSS-GENDER BEHAVIOR (1988); ANNE BOLIN, IN SEARCH OF EVE: TRANSSEXUAL RITES OF PASSAGE (1988); BRYAN TULLY, ACCOUNTING FOR TRANSSEXUALITY AND TRANSHOMOSEXUALITY (1992). For a comprehensive discussion of the female-to-male transsexual, see LESLIE MARTIN LOTHSTEIN, FEMALE-TO-MALE TRANSSEXUALISM: HISTORICAL, CLINICAL, AND THEORETICAL ISSUES (1983).
46. MACKENZIE, *supra* note 8, at 16.
47. See *id.* at 28; NATAF, *supra* note 25, at 37.
48. See MACKENZIE, *supra* note 8, at 69; NATAF, *supra* note 25, at 11.
49. The diagnostic criteria for Gender Identity Disorder are:  
 (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

Once a person is diagnosed with Gender Identity Disorder, the focus shifts to the medical aspects of the problem. Attempting to change transsexuals' minds to match their bodies is unsuccessful and fruitless.<sup>50</sup>

Because transsexuals were traditionally conceptualized as suffering from a mind/body disharmony, theorists felt the solution or treatment should be altering the body through hormones and surgery.<sup>51</sup> Although sex change operations began to appear in the late 1800s,<sup>52</sup> it was not until the mid-1960s that Johns Hopkins University opened the first official gender identity clinic.<sup>53</sup> There were forty gender identity clinics across the United States by the mid-1980s.<sup>54</sup>

The goal of transsexual surgery is to create new male or female bodies, but the results are mixed. In many cases the transsexual is promised results that the sex reassignment surgery cannot provide. Male-to-female transsexuals are often promised working genitals so real that even a gynecologist would not be able to detect the surgery. Female-to-male transsexuals are offered a penis which often cannot function sexually or pass urine. The surgery for female-to-male transsexuals is a difficult and risky procedure.<sup>55</sup> A frequent result of medical intervention through hormones

(4) intense desire to participate in the stereotypical games and pastimes of the other sex

(5) strong preference for playmates of the other sex

In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions 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 stereotypical male 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 to normative female clothing.

In adolescents and adults, the disturbance is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g. request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex.

(C) The disturbance is not concurrent with a physical intersex condition.

(D) The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 538-39 (4th ed. 1994).

50. See David, *supra* note 15, at 293. This shift from regarding transsexualism as a psychological problem to regarding it as a medical problem is thought to benefit the transsexual. Given the stigma attached to mental health problems and the moral disapproval faced by anyone stepping outside the gender box, one proponent of surgery for transsexuals claims that "[i]t is better to have a medical problem than a moral or psychological problem." MACKENZIE, *supra* note 8, at 20.
51. See MACKENZIE, *supra* note 8, at 58.
52. See NATAF, *supra* note 25, at 10.
53. See MACKENZIE, *supra* note 8, at 58.
54. See *id.* at 68-69.
55. See *id.* at 18.

and surgery is to create "intermediate bodies" that are neither exclusively male nor exclusively female.

In contrast to the medical conception of transsexualism as a psychological and biological problem, feminists have traditionally viewed transsexualism as a societal problem resulting from the strict imposition of gender roles. Feminists have leveled many criticisms against sex reassignment surgery, including: the health risks of surgery, the perpetuation of dependence on a patriarchal medical establishment, the possibility that other people who violate the rules of gender will be forced into surgery, the idea that bodily integrity is being violated by surgery, and the fear that surgery represents the victory of consumer capitalism and misogynistic body images.<sup>56</sup> Transgendered people who choose surgery may be viewed as apolitical.<sup>57</sup> They are making a personal choice, not challenging gender role oppression.<sup>58</sup> Therefore, transsexuals are reproducing gender stereotypes by trying to pass.<sup>59</sup> Feminists also assert that promises to transsexuals of working genitals from sex reassignment surgery reinforce the idea that to be a man or a woman, it is the genitalia, particularly the penis, that matter.<sup>60</sup>

The legal response to transsexualism has generally concerned itself with questions of legal identity. As Browell stated, "[t]ranssexualism is important not only as a medical phenomenon, but also as a source of complex legal questions."<sup>61</sup> Legal questions include the following: after sex reassignment surgery, what is the legal sex of a transsexual? can transsexuals change their legal names after surgery? can transsexuals get new birth certificates after surgery? new driver's licenses? can transsexuals marry? whom may they marry?<sup>62</sup> It is interesting that most legal commentary on transsexualism has conceptualized the issue as a medical and

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56. See NATAF, *supra* note 25, at 43. Rosemary Auchmuty explains that "a feminist argument proposes that it's actually in the government's interest to provide these operations . . . they would rather have transsexuals than lesbians and gays. They would rather have people fitting into heterosexual society." *See id.*

57. *See id.* at 26.

58. *See id.*

59. *See id.* For a more in-depth discussion of the radical feminist response to transsexualism, see JANICE RAYMOND, *THE TRANSEXUAL EMPIRE* (1979), wherein Raymond critiques not only the medical construction of transsexualism but transsexuals themselves for reproducing stereotypical gender roles and invading women's spaces.

60. *See* MACKENZIE, *supra* note 8, at 18.

61. Browell, *supra* note 39, at 404.

62. This article is less concerned with the answers to these various questions than it is with the reasons why these are the questions asked and why the answers to these questions matter so much. The answers to these questions will not be explored as such. For a general discussion of the legal sex of transsexuals and other legal questions facing transsexuals, see Gail Brent, *Some Legal Problems of the Postoperative Transsexual*, J. FAM. L. 405 (1972); Browell, *supra* note 39; David, *supra* note 15; John P. Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282 (1967-68); Michele S. Matto, *The Transsexual in Society*, 10 CRIMINOLOGY 85 (1972); Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963 (1971); Terrence Walton, *When Is a Woman Not a Woman?*, 124 NEW L.J. 501 (1974); Mary Beth Walz, *Transsexuals and the Law*, 5 J. CONTEMP. L. 181 (1979).

legal one, not as a socio-political one, thus leaving complex questions of gender and power unexplored.<sup>63</sup>

The current rise of the transgender movement will force society to confront these previously unexplored questions. Although the transgender movement is not monolithic, it marks the conceptual switch from transsexualism as a medical issue to transsexualism as a civil rights and political issue. Transgenderists challenge the idea that there must and should be conformity between sex, gender expressions, and gender identity.<sup>64</sup> The word "transgenderist" was first used by Virginia Prince, a long-time gender activist, to describe people who live full time in the gender opposite their anatomy.<sup>65</sup> However, "transgender" is now being used as an umbrella term to identify everyone who challenges the boundaries of sex and gender.<sup>66</sup> The rise of the transgender movement has resulted in an increase in the number of educational and grassroots organizations across the country.<sup>67</sup>

These many organizations are challenging the medical, legal, and feminist constructions of transsexualism. In response to the medicalization of transsexualism, many transgender activists are petitioning the American Psychiatric Association to remove Gender Identity Disorder from the DSM.<sup>68</sup> In response to feminist critiques of transgenderism, transgender activists have added their voices to the academic debate<sup>69</sup> and produced a magazine dealing with transsexualism and feminism entitled *TranSisters: The Journal of Transsexual Feminism*.<sup>70</sup> The transgender community is also fighting for respect and recognition in the legal system by challenging the system to take violence against transgendered individu-

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63. However, two very recent articles have looked at the social and political implications of transsexualism. See Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"?*, 8 HASTINGS WOMEN'S L.J. 1 (1997); Hasan Shafiqullah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195 (1997).

64. See MACKENZIE, *supra* note 8, at 3.

65. See *id.* at 2; FEINBERG, *supra* note 1, at x.

66. See FEINBERG, *supra* note 1, at x. It is also important to note that within the transgender community itself there is sometimes a tension between those who wish to medically alter their bodies to fit their gender and those who do not. The words used to describe a person sometimes depend on this distinction.

67. These organizations range from educational, such as The American Educational Gender Information Service, The International Foundation for Gender Education, and The Renaissance Education Association, to the supportive, such as The East Coast Female-to-Male Group, FTM International, and Minnesota Freedom of Gender Expression, to political direct action, such as The Transsexual Menace and TGR! Transgender Rights. See FEINBERG, *supra* note 1, at 171-75.

68. See *Transactivists Protest APA, IN YOUR FACE*, Summer 1996, at 2.

69. See generally RIDDELL, *supra* note 43, at 172; Sandy Stone, *The Empire Strikes Back: A Post-transsexual Manifesto*, in *BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY*, *supra* note 36, at 280.

70. *TranSisters* is a "non-profit quarterly magazine on issues of transsexuality from a feminist perspective. [It is d]esigned to promote dialog between the TS community and feminist communities and to foster feminist consciousness within the TS community." See FEINBERG, *supra* note 1, at 179.

als seriously<sup>71</sup> and by producing original documents regarding the legal rights for transgendered people, such as the International Bill of Gender Rights.<sup>72</sup> By adding their voices, transgendered people are changing, challenging, and broadening the gender debate.

#### IV. SOCIETAL TOOLS USED TO KEEP PEOPLE INSIDE THE GENDER BOX

##### A. Medicalization of Transsexualism

The medicalization of transsexualism and transgenderism perpetuates the idea that one's sex and gender must agree.<sup>73</sup> In both intersexuality and transsexuality, the cure is surgery, and the demand for sex and gender congruence is not questioned.<sup>74</sup> Indeed, to accept the idea that one can be born in the "wrong body," one must first accept the idea that there is a "right body" for the particular behavior and expression. This idea is based on the assumption that masculine behavior is only acceptable in a masculine body and feminine behavior is only acceptable in a feminine body.<sup>75</sup> Therefore, "we must seriously question whether transsexualism is a 'disease' requiring medical intervention or whether it is a cultural symptom of the dis-ease evoked by challenging the traditional Western sex and gender code."<sup>76</sup>

In essence, the medicalization of transsexualism makes it a personal disorder instead of a cultural disorder.<sup>77</sup> Seen in this light, gender clinics operate more to assuage society's discomfort with transgenderism than to help their clients.<sup>78</sup> Since these clinics often see sexual orientation and gender as fused, an underlying goal of gender clinics is also to reproduce heterosexuality.<sup>79</sup> Often, transsexuals need to assert a sexual interest in

71. See *infra* Part IV.D (discussing violence against gender transgressors).

72. The International Bill of Gender Rights was first adopted in 1993 at the International Conference on Transgender Law and Employment, Inc. held in Houston, Texas. See FEINBERG, *supra* note 1, at 165. See also NATIONAL CENTER FOR LESBIAN RIGHTS, A LEGAL GUIDE TO CHILD CUSTODY FOR TRANSEXUAL AND TRANSGENDERED PARENTS (1998).

73. The assertion that the medicalization of transsexualism and transgenderism works to keep people inside the gender box is not to suggest that people should not have access to medical intervention. It is only to suggest that medical treatment should not be the *only* option for such individuals.

74. See COLKER, *supra* note 11, at 117-18. The medical establishment also provides a medical solution for intersexed individuals. This treatment of intersexuals, the medical alteration of their genitals at birth and the assignment of a gender, is now being challenged by intersexual activists. See generally Barry, *supra* note 17, at 6; Monika Bauerlein, *The Unkindest Cut: Why Must We "Fix" Hermaphrodites?*, UTNE READER, Sept.-Oct. 1996, at 16.

75. See MACKENZIE, *supra* note 8, at 61-62.

76. *Id.* at 60.

77. *See id.* at 6.

78. *See id.* at 22-23. See also *supra* note 49 (listing diagnostic criteria for Gender Identity Disorder).

79. "Gender clinics reinforce conventional, conservative, stereotypical gender behavior and notions of unambiguous, fixed and constant gender identity when the experience of most transgendered people is that identity evolves." NATAF, *supra* note 25, at 20-21. See also Vernon A. Rosario II,

the "correct sex"; they must move toward exclusive heterosexuality in order to obtain surgery.<sup>80</sup>

Categorizing transsexualism as a mental disorder is a way to control transsexuals and elicit sympathy from society. This categorization works to control transsexuals, making them dependent on the medical establishment.<sup>81</sup> Such a classification also works to elicit sympathy and tolerance from society, though not necessarily acceptance, because an individual diagnosis is less threatening to the gender order than suggesting that people should be free to mix and match their sex and gender. Recognizing the negative impact of the medicalization of transsexualism, a movement has arisen within the transgender community to depathologize transsexualism and to declassify Gender Identity Disorder as a mental disorder.<sup>82</sup>

### B. Homophobia<sup>83</sup>

Homophobia is another tool used to keep people within the bipolar gender boxes through "the presumption and prescription that erotic interests are exclusively directed to the opposite sex."<sup>84</sup> Stepping outside the mandate of heterosexual attraction, whether in appearance or practice, is often the cause for name calling, job loss, and sometimes violence.

Early conceptions of transsexuality promoted heterosexism and homophobia. Researchers attempted to distance transsexualism from homosexuality by stating that "the transsexual is not a homosexual" and "the transsexual seeks sexual relationships as a member of the opposite

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*Trans (Homo) Sexuality?: Double Inversion, Psychiatric Confusion, and Hetero-Hegemony, in QUEER STUDIES: A LESBIAN, GAY, BISEXUAL & TRANSGENDER ANTHOLOGY 35 (Brett Beemyn & Mickey Eliason eds., 1996).*

80. See COLKER, *supra* note 11, at 91. Before transsexuals are accepted for sex reassignment surgery, they must tell a series of stories which justify their need for treatment. The medical establishment dictates what is an "acceptable story." Transsexuals learn early on what the appropriate answers are to questions such as "whom are you sexually attracted to?" and "when did you know you were in the wrong body?" See NATAF, *supra* note 25, at 20–21.
81. However, some transgender activists disagree with the idea that the medicalization of transsexualism makes them any more dependent on the medical establishment than the average person. See RIDDELL, *supra* note 43, at 183.
82. See NATAF, *supra* note 25, at 11. Such a move is controversial within the movement because a medical diagnosis helps obtain insurance coverage for hormone treatments and surgery. The result of declassifying may be that surgery will no longer be covered without a diagnosis. Ways of declassifying without losing insurance benefits are being explored. A possible solution to this dilemma is to classify surgery as cosmetic, but maintain insurance coverage. See MACKENZIE, *supra* note 8, at 44; *Transactivists Protest APA*, *supra* note 68. See also Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, in TENDENCIES 154 (1993).
83. I think that the best definitions of homophobia and heterosexism are offered by Audre Lorde, *Scratching the Surface: Some Notes on Barriers to Women and Loving*, in SISTER OUTSIDER 45, 45 (1984). Lorde defines heterosexism as "[t]he belief in the inherent superiority of one pattern of loving and thereby its right to dominance" (emphasis omitted) and homophobia as "the fear of feelings of love for members of one's own sex and therefore the hatred of those feelings in others" (emphasis omitted). *Id.*
84. Sylvia A. Law, *Homosexuality and the Meaning of Gender*, WIS. L. REV. 187, 196 (1988).

sex."<sup>85</sup> Transsexuals often, though not exclusively, develop sexual interests in persons of the same sex but opposite gender role, thereby leading to the presumption that transsexuals are straight men and women inside the wrong body. For this reason, transsexuals often do not identify as homosexual but rather as heterosexual.<sup>86</sup> Gender clinics have actively encouraged transsexuals not to identify as homosexual and in some cases have denied treatment to transsexuals who did not identify as heterosexual.<sup>87</sup> Assertions that transsexuals are not homosexuals are less threatening in the context of a homophobic society with rigid gender composition. While such assertions may be effective if one's goal is to gain acceptance for transsexualism, this is at the expense of the battle against homophobia.

The legal response to transsexualism exacerbates this homophobia. If a transsexual has been married before sex reassignment surgery, that marriage is considered null and void since both parties are now legally the same sex. After surgery, transsexuals are allowed to marry a member of their now opposite sex, which they would not have been permitted to do pre-surgery.<sup>88</sup> This practice fails to disrupt the social order by continuing to uphold the illegitimacy of a marriage between members of the same sex.

The new diversity of sexual orientations within the transgender community contradicts the paradigm that equates gender identity with sexual orientation.<sup>89</sup> The rise of the Transgender Movement has encouraged transgendered individuals to explore and define their sexual orientation themselves, rather than have it dictated to them by gender clinics.

### C. Regulation of Appearance: Cross-Dressing

Rules against cross-dressing are a form of gender policing which strengthen gender norms by reinforcing a bipolar understanding of appropriate attire for women and men.<sup>90</sup> It is commonly understood that there is a particular and distinct style of dress for women and another for men, and that one gender is not supposed to wear the style of the other. The women's movement made it easier for women to wear what was formerly designated as "masculine" clothing, but there is still stigma and danger for those who cross-dress, particularly for men who wear women's clothing.

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85. David, *supra* note 15, at 292.

86. See Browell, *supra* note 39, at 406; DEVOR, *supra* note 14, at 20. See also WILLIAMS, *supra* note 2 (recounting an interaction with a transsexual student who insisted that she was not a homosexual). Harry Benjamin is credited with the idea that sex reassignment surgery transforms "unacceptable homosexuals" into acceptable "transsexual heterosexuals." See MACKENZIE, *supra* note 8, at 75-78.

87. See *supra* note 80 and accompanying text.

88. See Browell, *supra* note 39, at 423-26.

89. See NATAF, *supra* note 25, at 33.

90. See COLKER, *supra* note 11, at 110.

The punishment for not wearing gender or sex appropriate clothing is harsh, often leading to arrest, physical violence, loss of children, and loss of jobs.

Until recently, many states, cities, and towns had laws or ordinances against cross-dressing.<sup>91</sup> Violation of a cross-dressing ordinance was cause for arrest, imposition of a fine, and perhaps even police violence. It was not uncommon, and perhaps still is not uncommon, for cross-dressers to be arrested, beaten, and raped for not wearing articles of clothing appropriate to their biological sex.<sup>92</sup> Although the trend is for courts to find general statutes against cross-dressing invalid as unconstitutionally vague or invalid as applied to particular defendants, it is still possible for someone to be prosecuted for cross-dressing under vagrancy statutes.<sup>93</sup> Prosecution under cross-dressing laws reproduced gender dimorphism; saying you were undergoing treatment for transsexualism and that dressing as the opposite gender was part of your treatment provided a defense to the ordinances.<sup>94</sup> This exemplifies the medical and legal systems working hand-in-hand to maintain gender dimorphism. Although a medical diagnosis helped some transgendered individuals avoid criminal prosecution, people who wanted to dress in the clothing of the opposite gender but also wished to remain the same biological sex had no recourse.

Courts may deny child custody or visitation rights to a parent who cross-dresses. While there is generally no per se rule against cross-dressing, some courts view cross-dressing as a factor that weighs against the parent.<sup>95</sup> The justification for such a holding is that the court must protect the best interests of the child, which are served by providing the child with a proper role model. In cases involving cross-dressing parents, courts sometimes conclude that a proper role model is one who models gender-appropriate dress and behavior.<sup>96</sup>

It is legal for an employer to fire an individual for cross-dressing. Courts often see dress as a trivial matter and something not worthy of their involvement. Courts have consistently refused to apply Title VII,

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91. It is impossible to know how many localities continue to have cross-dressing ordinances, particularly since most ordinances are local laws. See MARY ELIZABETH, *LEGAL ASPECTS OF TRANSEXUALISM* 15–20 (1990). It is reported that as of 1977, ten states had laws against cross-dressing. See Browell, *supra* note 39, at 411.

92. See MACKENZIE, *supra* note 8, at 49.

93. See Michelle M. Gee, *Validity of Law Criminalizing Wearing Dress of Opposite Sex*, 12 A.L.R. 4th 1250, 1250–53.

94. See ELIZABETH, *supra* note 91, at 20.

95. See *id.* at 27.

96. See COLKER, *supra* note 11, at 93–94. This role model analysis is also present in some custody cases involving gay, lesbian, and bisexual parents. The most famous example of this is probably the Sharon Bottoms case, where a Virginia judge denied a lesbian mother custody of her child solely because her lesbianism would not provide the child with a proper role model. See *id.* at 95–98.

which mandates non-discrimination in employment, to cross-dressing cases, claiming that dress has nothing to do with sex and is in fact trivial.<sup>97</sup>

Radical feminists have argued that cross-dressing does not challenge gender oppression or dimorphism, but merely recreates the existing gender categories.<sup>98</sup> Cross-dressing, however, challenges *how* people are assigned to these categories—if men can pass as women and women can pass as men, gender would seem to be an artificial construct.<sup>99</sup>

#### D. Violence Against Gender Transgressors

People who challenge the bipolar gender world face both physical and psychological violence.<sup>100</sup> Women are subjected to misogynistic violence when they cross the line of appropriate behavior for women. Gays and lesbians face homophobic violence for violating the line of sexual orientation. Transgendered people face violence for crossing the gender line as well. Though there are elements to this violence that are misogynistic and homophobic, the violence is also motivated by transphobia.<sup>101</sup>

Perhaps the most famous example of violence against a transgendered individual was the rape and murder of Brandon Teena, male transsexual, in Nebraska in 1993.<sup>102</sup> Brandon passed as a man until he was arrested for check forgery. The police discovered that he was biologically female and released this information to a local paper. One week after his arrest, he was raped and assaulted by two men whom he later identified. However, rape charges were not filed by the police until after Brandon's murder by these same men one week later.<sup>103</sup> Riki Anne Wilchins described the violence faced by transgendered people at a vigil held for Brandon: "Our bodies are the battlegrounds where a war to regulate and control gender expression is increasingly being fought."<sup>104</sup>

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97. See *id.* at 109.

98. The strongest articulation of this belief is probably by Janice Raymond, *The Politics of Transgenderism*, in *BLENDING GENDERS: SOCIAL ASPECTS OF CROSS-DRESSING AND SEX-CHANGING* 215, 222 (Richard Ekins & Dave King eds., 1996) (stating "[t]he new gender outlaw is the old gender conformist, only this time we have men conforming to femininity and women conforming to masculinity").

99. See MACKENZIE, *supra* note 8, at 49; see also NATAF, *supra* note 25, at 42 (explaining that transgendered individuals have the power to uphold or break down gender constructs because their existence reveals that gender is not natural).

100. See MACKENZIE, *supra* note 8, at 23.

101. For a moving and in-depth account of the violence faced by transgendered people, see LESLIE FEINBERG, *STONE BUTCH BLUES* (1993). Though this is a novel, it clearly depicts the violence and rape experienced by those who cross gender barriers.

102. See Donna Minkowitz, *On Trial: Gay? Straight? Boy? Girl? Sex? Rape?*, 26 *OUT* 99, 100 (1995).

103. See Davina Anne Gabriel, *Background on the Murder of Brandon Teena* (last modified May 27, 1995) <<http://www.ftm-intl.org/pub/pub/News/Bran/bran.bkgr.html>>.

104. Riki Anne Wilchins, *Brandon Teena Vigil Statement* (last modified May 27, 1995) <<http://www.ftm-intl.org/pub/pub/News/Bran/stamnt.riki.html>>.

Unfortunately, the murder of Brandon Teena is not the only example of violence against transgendered people. The Summer 1996 issue of *In Your Face*, a newsletter produced by GenderPac, lists seven separate murders of transgendered people simply for being transgendered.<sup>105</sup> The violence faced daily by transgendered individuals is often rendered invisible by reporting and tracking systems. For example, the recently enacted Hate Crimes Statistics Bill excludes tracking violence against transgendered individuals unless the violence is prompted by a belief that the individual is also gay or lesbian.<sup>106</sup> To better track violence against transgendered individuals, there are currently two national transgender violence studies underway. It is hoped that the information gathered from these studies will help in lobbying efforts to have violence against transgendered persons included in future amendments to the Hate Crimes Statistics Bill.<sup>107</sup>

Fear of violence is often a reason that transgendered individuals “pass” as a member of one sex or the other and do not let their sex and gender incongruity be known. While the Transgender Movement encourages people to be “out and proud” rather than “passing,” being out and proud is a dangerous and courageous decision due to the violence transgendered people face.<sup>108</sup>

### E. Social and Legal Control of Identity and Language

External control of an individual’s identity, whether by the medical establishment, legal system, popular media, or society in general, is yet another way to enforce the boundaries of the gender box. Language is vital in creating our perceptions of ourselves and others. As one commentator pointed out, “language does not simply communicate the link between one’s sex and one’s gender identity: it *constitutes* that link.”<sup>109</sup> Unfortunately, the language we have is gender and sex dimorphic, which reinforces the idea that there are only two sexes and two genders. Opposing terms such as male and female, his and hers, and Mr. and Mrs. all reinforce the two gender system. There is a dearth of words that are gender neutral or middle-gendered.<sup>110</sup>

105. See generally *IN YOUR FACE*, Summer 1996.

106. See *Hate Crimes Bill Omits Transpeople Again*, *IN YOUR FACE*, Summer 1996, at 3.

107. See *Two National Trans Violence Studies Launched*, *IN YOUR FACE*, Summer 1996, at 2.

108. See NATAF, *supra* note 25, at 29.

109. Barbara Fried, *Boys Will Be Boys Will Be Boys: The Language of Sex and Gender*, in *BIOLOGICAL WOMAN: THE CONVENIENT MYTH* 47, 49 (Ruth Hubbard et al. eds., 1982).

110. Despite the lack of words in popular use for the middle-gendered, there is a list on the internet listing twenty-three different names for individuals between male and female from various cultures around the world. See Jamie Walker, *Other Words for the Other-Gendered* (last modified on Feb. 22, 1995) <[ftp://ftp.u.washington.edu/public/sfpse/transgen/history.txt](http://ftp.u.washington.edu/public/sfpse/transgen/history.txt)>. Martine Rothblatt offers gender neutral twists on formerly gendered words. For example, she suggests replacing “hers” for his or her, “heesh” for he or she, and “hirm” for her or him. She also suggests replacing the titles Mr., Mrs., and Ms. with the gender generic Pn. (person). She also discusses how

Although there are a multitude of ways in which identity is externally imposed, I am focusing on only three ways society externally imposes identity: through the medical system, through the legal system, and through the media. The medical establishment has imposed identity on transgendered people by defining transgendered individuals, creating many words to identify transgendered people, such as transsexual, transvestite, male-to-female, female-to-male, and hermaphrodite.<sup>111</sup> The medical community has also created words to define transgendered people, such as Gender Identity Disorder and gender dysphoria.<sup>112</sup> A final way that the medical community has imposed identity on transgendered individuals is through the rigid standards of gender identity clinics for sexual orientation and transgendered behavior.<sup>113</sup> In essence, the medical community has been effective in telling transgendered people how to define themselves, rather than asking transgendered people to explain their self-identity.

The legal system is also powerful in externally defining transgendered people. The most basic way that the legal system imposes identity is by asking the question: what sex is someone after sex reassignment surgery? The answer to this legal question dictates where people can go to the bathroom, who they can marry, whether they can be drafted, and a host of other rights and privileges. The legal system also has imposed identity by making transgendered existence a crime through cross-dressing laws.<sup>114</sup> Finally, the legal system creates and imposes identity by the way in which lawyers and judges discuss the lives of transgendered people in the courtroom. For example, the prosecutors in the Brandon Teena trial continually referred to Brandon as "she" and "Teena" despite the fact that this was not Brandon's self-identity.<sup>115</sup>

Finally, the media is active in externally imposing identity on individuals. Through the way stories are reported, the straight press frequently imposes its own identity on people who are trying to create a new identity. For example, the straight press referred to Brandon Teena as "she" and referred to him as a "cross-dressing lesbian," even though he identified as a man and did not identify as a lesbian.<sup>116</sup> Often the words "transgendered" or "transsexual" did not even make it into articles.

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advances in cyberspace may free us from the gender box, as you are unable to gauge a person's gender unless they tell you; and who is to say they are telling the truth! See MARTINE ROTHBLATT, *THE APARTHEID OF SEX* 127-29, 149-53 (1995).

111. See MACKENZIE, *supra* note 8, at 43.

112. See *supra* notes 47-50 and accompanying text.

113. See *supra* note 88 and accompanying text.

114. See *supra* Part IV.D.

115. See Robin Diane Goldstein, *Report on Brandon Teena Murder Trial Demonstration* (last modified May 27, 1995) <<http://www.ftm-intl.org/pub/pub/News/Bran/Kcj/begin.html>>.

116. See NATAF, *supra* note 25, at 29. Another example of how language can deny a person's identity occurred at a vigil for Brandon Teena. A speaker referred to Brandon as "Teena Brandon." When a member of the audience shouted "Brandon Teena" in response, the speaker replied, "Brandon Teena, Teena Brandon, what's the difference?" Many activists left the vigil in protest.

The impact of externally imposed identity is that “when people refuse to believe your account of your own gender experience, your sense of authenticity and sanity is badly shaken time and again.”<sup>117</sup> The Transgender Movement has reacted to the oppression of externally imposed identity by validating and promoting self-identity.

Since language is key to the construction of self-identity, the Transgender Movement has created new language and has rejected oppressive language. Just as the gay and lesbian community has rejected medically generated terms like “homosexual” for self-definition, the transgender community has rejected medical terms like “transvestite,” “transsexual,” and “hermaphrodite” in favor of self-generated terms like “cross-dresser,” “transgendered,” and “intersexual.”<sup>118</sup> The creation of new language is a continuing and ongoing process because language itself is often imperfect. Even some self-generated terms, such as cross-dresser, male-to-female transsexual, or female-to-male transsexual, reinforce the idea that there are only two gender options.<sup>119</sup> The transgender community also uses language to poke fun at the medicalization of their lives. For example, a newsletter from Texas is titled “Gender Euphoria,” a play on the antiquated term “gender dysphoria.”<sup>120</sup>

The power of self-identity is reflected in how the Transgender Movement interacts with other movements, most notably the gay and lesbian movement and the feminist movement. The Transgender Movement has challenged the gay and lesbian movement for inclusion in the larger queer community. Such challenges range from demands to add “transgender” to the phrase “gay, lesbian, and bisexual,” to demands for inclusion in the gay and lesbian civil rights agenda.<sup>121</sup> Challenges to the feminist movement also involve demands for inclusion. For example, transgendered individuals challenged the “womyn born womyn” policy at the Michigan Women’s Music Festival, a women-only feminist music festival which excluded male-to-female transsexuals.<sup>122</sup> Since transgendered people challenge the very notion of what it means to be a woman, they challenge the feminist movement itself.

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See Robin Diane Goldstein, *Report on Brandon Teena Murder Trial Demonstration* (last modified May 27, 1995) <<http://www.ftm-intl.org/pub/pub/News/Bran/Kcj/because.html>>.

117. NATAF, *supra* note 25, at 16.

118. See generally MACKENZIE, *supra* note 8, at 29.

119. See FEINBERG, *supra* note 1, at xi.

120. See MACKENZIE, *supra* note 8, at 16.

121. Many gay and lesbian civil rights organizations, such as the Lambda Legal Defense Fund, Gay and Lesbian Alliance Against Defamation, and the ACLU Gay Rights Project, do not represent transgendered people in civil rights cases, claiming their focus is on sexual orientation. See *Civil Rights Roundtable: Coming Around?*, IN YOUR FACE, Summer 1996.

122. See NATAF, *supra* note 25, at 36, 43; Riki Anne Wilchins, *The Menace in Michigan: For the First Time in Its 19-Year History, the Michigan Womyn’s Music Festival Admits Transsexuals*, THE VILLAGE VOICE, Sept. 6, 1994, at 41.

## V. THE SEAN O'NEIL CASE

### A. The Story

From January of 1993 through October of 1994, Sean O'Neil dated four teenage girls, two of them at the same time, in the town of Colorado Springs, Colorado. At the time of the relationships, Sean was eighteen to nineteen, and three of the four girls were under fifteen. In September of 1994, Sean was served with a restraining order after making threatening phone calls to one of his girlfriends. At the time of service, Sean was frisked by a police officer who discovered a Colorado identification card bearing the name "Sharon Clark." In response to this, the police officer obtained a court ordered gynecological exam for Sean, which sexed him as female. Sean never denied being a woman to the police, though there is various testimony that he denied this to some of the girls he had been dating both before and after his arrest.

Andrea,<sup>123</sup> the teen who obtained the restraining order against Sean, reacted violently upon hearing that Sean was actually a biological woman. As a result, charges of sexual assault and criminal impersonation were filed against Sean. Sexual assault is normally understood to mean sexual contact without consent. However, in this case, there was consent at the time of actual contact. The argument put forth here was that there was no informed consent because the girls would not have consented to sexual contact had they known that Sean was a woman. In effect, gender deception became sexual assault.<sup>124</sup>

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123. The decision of whether to name the teenage girls involved in this case is a difficult one. The common practice of not naming rape survivors is done to protect the survivors' privacy. However, the flip side of this decision is perhaps to promote the idea that the survivor should be ashamed. Ultimately, I have chosen not to identify three of the girls because they did not put themselves into the public eye. I have chosen to identify Andrea by name because she chose to identify herself in both an OUT article and on *The Jerry Springer Show*.

124. See Minkowitz, *supra* note 102, at 100. This construction of sexual assault is not new. Radical feminists have argued that if a lesbian identified transsexual sleeps with another lesbian without telling the woman of her transsexuality, then it is rape.

Although sexual assault is the central legal issue in this case, a comprehensive analysis of sexual assault, consent, and statutory rape is beyond the scope of this article. That said, there are some interesting questions related to this case which should be mentioned.

First, should society recognize deception as a grounds for sexual assault? The ramifications of this might be that any withheld information could be grounds for charging rape. For example, if a person decides to sleep with someone believing she is not married, and later finds out that she is married, that could be rape. If one sleeps with someone only to find out later that she has had breast augmentation surgery, that could be rape.

Second, even if society decides that some deceptions amount to rape and others do not, what will be the guiding principle for this demarcation? What will be the articulated reason for "gender deception" amounting to rape and other forms of deception not resulting in rape? The danger is that any articulated reason could reinforce gender polarity by suggesting that gender is something static and knowable—that all people know what their gender is, and that every lover has a right to know this gender. The assumption is that gender is a material element for selecting a sexual partner. This then leads to sticky issues about who gets to define a person's gender, and obliterates the notion of passing. For example, what if a light skinned black person passes as a white person and engages in sexual relations with a white person? Is it rape if the white person

In November of 1994, Sean, Andrea, Andrea's mother, Sean's best friend Justin, and Justin's parents all appeared on *The Jerry Springer Show*.<sup>125</sup> Shortly thereafter, on December 22, 1994, a preliminary hearing was held. At this hearing three of the girls testified that their contact with Sean was consensual when they thought he was a boy.<sup>126</sup> One of the girls testified to having sexual intercourse with Sean fifty-one times in a period of five months. This same teen testified that she performed oral sex on Sean twice.<sup>127</sup> There was also testimony at the Preliminary Hearing that two of the girls saw Sean's breasts and thought he was just fat.<sup>128</sup>

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only engages in sex with other white people and would never have engaged in sex with a black person? Although this analogy may seem far-fetched because we no longer think of race as a determinate factor for relationships, one could imagine that this argument might have been conceivable before the *Loving v. Virginia* decision, which struck down miscegenation laws. See *Loving v. Virginia*, 338 U.S. 1 (1967). This, of course, is an imperfect analogy and is solely meant to encourage thought. It is not intended to minimize the very real distinctions between gender and race. For a general discussion of the dangers of making analogies between race and other social constructions, see generally Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397.

Finally, even if society accepts the idea that there will be circumstances in which deception is rape, there will be a problem of unequal enforcement of this law because of the homophobia and transphobia that exists in our culture. People who dance on the edge of the gender box, specifically transgendered persons and gays and lesbians, will be in the most danger of prosecution because being out is not safe for them.

My point in raising these questions is to encourage an on-going dialogue of these issues. I do not propose to have answers to these very complicated questions, but I do think they should be considered. I also do not want to deny the girls' very real feelings of deception and pain. I think it is important to recognize that these girls felt violated. I think there is an argument that what Sean did was devastating on an interpersonal level. However, I think we need to hold this judgment within its social context. We need to question the extent to which these feelings are socially constructed and the difference between behavior which is displeasing and behavior which is criminal.

125. See *The Jerry Springer Show: My Boyfriend Is a Girl* (television broadcast, Nov. 21, 1994) [hereinafter *Jerry Springer*]. It is interesting that there was no mention of the rape charges on the show, although the charges were filed at this time and the show was taped only a month before the Preliminary Hearing. Further, defense counsel for Sean stated that Sean was represented by another public defender at the time of the show and that he would never have allowed Sean to appear on the show. See Telephone Interview with William Martinez, Defense Counsel for Sean O'Neil (Nov. 27, 1996) [hereinafter *Martinez Interview*]. Andrea's appearance on the show was apparently recommended by her therapist and endorsed by her mother. See Reporter's Transcript of Sentencing Hearing, *People v. Clark* (No. 94CR3290) at 41 [hereinafter *Sentencing Hearing*].

The voyeuristic and sensationalist nature of television talk shows is apparent to anyone who has the occasion to watch one. It seems that these shows thrive on conflict between their guests, and in some instances, instigate this conflict. In particular, *The Jerry Springer Show* appears to thrive on conflict. For a discussion of the potentially destructive nature of talk shows, see generally Jeanne Albronda Heaton & Nona Leigh Wilson, *Tuning into Trouble*, Ms., Sept.-Oct. 1995, at 45. Despite the criticisms that can legitimately be leveled at television talk shows, what happened on *The Jerry Springer Show* is important to a discussion of this case. The show allows us to see the participants interact with each other. Like it or not, people use talk shows to communicate with each other and larger society.

126. See Preliminary Hearing, *supra* note 4, at 5, 8, 36-37, 56.
127. See *id.* at 59-61, 65-66. Another girl involved reportedly had sexual intercourse with Sean 120 times. See *Martinez Interview*, *supra* note 125. The extent of the sexual contact that occurred between Sean and the girls is contested. The official information available about the extent of the sexual contact comes from the Preliminary Hearing, at which Sean did not testify. There are several ways one could make sense of the seemingly incredible claim that the girls had heterosexual intercourse with Sean and did not suspect he was a girl. If the sex actually took place, one

After the Preliminary Hearing, the charges against Sean were amended to include "sexual abuse as a pattern of abuse."<sup>129</sup> The charge of "sexual abuse as a pattern of abuse" carries a mandatory prison sentence of ten years for each count. Therefore, if Sean were convicted, he would serve three ten-year sentences (one ten-year sentence for each of the three counts), two of which would run consecutively. Sean was facing a minimum of twenty years in jail if convicted of the amended charge. The amendment to the charge not only changed the sentence, but also changed the elements of proof. Now the prosecution would only need to prove age difference and sexual contact. Consent would no longer be an issue. Under these circumstances, the defense determined that Sean's best outcome would result from a plea bargain, and Sean agreed to plead guilty to second degree sexual assault.<sup>130</sup>

Between the Preliminary Hearing and the Sentencing Hearing, the defense was contacted by several members of the transgendered community. James Green, director of FTM (Female-to-Male) International, a support organization for female-to-male transsexuals,<sup>131</sup> and Tonye Barreto-Neto, a deputy sheriff in Florida and director of Transgender Officers Protect and Serve (TOPS),<sup>132</sup> both offered their support and advice. They ultimately testified in support of Sean at the Sentencing Hearing. In addition, the courtroom was filled to capacity<sup>133</sup> by members of the transgendered community there to show support for Sean.<sup>134</sup> After testimony from a psychiatrist who treated Sean, the two transgender activists, a victim, and two parents, the court sentenced Sean to 90 days in jail and six

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explanation is that Sean was incredibly skilled at hiding his true sex and that the girls were incredibly sexually naive. This would be the prosecution's theory. Another plausible explanation is that the girls knew what was going on but were unwilling to admit it to themselves. They may also have been unwilling to acknowledge publicly that they knew Sean was a "girl" out of fear of being called lesbians. It may also be possible that the sexual acts never took place, but were stories created retroactively to fit what the prosecutor and parents wanted to hear.

128. See Preliminary Hearing, *supra* note 4, at 28, 39-40.

129. See Providency Hearing Transcript, *People v. Clark* at 1 (Nov. 27, 1995).

130. See Martinez Interview, *supra* note 125. Martinez also suggested that the parents' influence in this case may have contributed to the prosecutor's decision to amend the charges. Under a victim's rights amendment to the Colorado Constitution, prosecutors are now obligated to inform victims' families of all aspects of a criminal case involving bodily harm. This gives families considerable influence over the direction of cases. Martinez suggested that the prosecution's case was not very strong but that the pressure from the parents to prosecute was intense. Given this situation, the prosecutor may have amended the charges to force a plea and avoid a trial. In other words, the amendments may have been more the result of parental pressure on the prosecutor than a result of the merits of the case. See *id.*

131. See Sentencing Hearing, *supra* note 125, at 49.

132. See *id.* at 78, 91-93.

133. See *id.* at 1.

134. Members from a number of grassroots groups, including, FTM International, TOPS, Transsexual Menace, Menace-Men, Lesbian Avengers, Bi-Net USA, and Ground Zero, demonstrated outside the courthouse and attended the Sentencing Hearing. See *Sean O'Neil Given 90 Days by Colorado Judge*, IN YOUR FACE, Summer 1996, at 4.

years probation.<sup>135</sup> Sean served his sentence in the El Paso County Women's Jail.<sup>136</sup>

The consequences of Sean's plea bargain, even though considered a victory by the defense and the transgender community,<sup>137</sup> are difficult for Sean. Due to Sean's conviction for sexual assault in the second degree, he will need to register as a sex offender in Colorado under its sex offender law<sup>138</sup> and he will probably need to register with any other state to which he moves having a similar law. In short, this case will follow him around for the rest of his life.

## B. How the Societal Tools Used to Keep People Inside the Gender Box Were Used in This Case<sup>139</sup>

### 1. Homophobia

Homophobia played a vital role in the prosecution of Sean for rape throughout the case. The geographical backdrop for this case was Colorado Springs, Colorado. While homophobia and transphobia exist across the United States, there are indications that Colorado Springs is more homophobic than the average American city. Colorado Springs is home to the organization that sponsored Amendment 2, the anti-gay initiative ruled unconstitutional in *Romer v. Evans*.<sup>140</sup> Amendment 2 passed in Colorado Springs in 1992 by the greatest margin in the state.<sup>141</sup>

The impetus for the charges seems to be homophobia, not objection to sexual assault. Sean's girlfriends testified that all contact, *at the time of contact*, was consensual. It was only after the girls found out that Sean was actually a biological woman that sexual assault charges were filed. There were suggestions that the parents of the girls were the ones deciding to file the charges after learning that their daughters were "with another girl."

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135. The terms of Sean's probation included mandatory therapy, no unsupervised contact with females under 17 with the exception of his sisters, mandatory reporting of any romantic relationship to a therapist and to his probation officer, payment of a sexual offender and advocate surcharge, and assignment to a special offenders probation officer. *See* Sentencing Hearing, *supra* note 125, at 130, 137-38.

136. *See* Martinez Interview, *supra* note 125.

137. *See* Sean O'Neil Given 90 Days by Colorado Judge, *supra* note 134, at 4.

138. *See* COLO. REV. STAT. ANN. § 18-3-4.12.5 (West 1989). This statute requires that any person convicted of sexual assault in the second degree register with the local law enforcement agency within seven days of becoming a permanent or temporary resident of that community. Failure to register is a class two misdemeanor. A person required to register may petition for discontinuation of the requirement twenty years after the person has been released from the jurisdiction of the court. *See id.*

139. I am not discussing the tools in the same order that I originally discussed them. *See infra* Part IV. I am discussing them in the order that seems to make the most sense in promoting an understanding of the case.

140. 116 S. Ct. 1620 (1996).

141. *See* Minkowitz, *supra* note 102, at 142.

These parents seemed to fear that the contact meant their daughters were lesbians.<sup>142</sup>

The charges themselves, four felony counts, also seem driven by homophobia. The defense attorney believes that similar charges would not have resulted if this case had involved a nineteen-year-old boy and a fourteen-year-old girl. A similar situation involving what is perceived as "heterosexual contact" usually results in a misdemeanor or no charges at all.<sup>143</sup> As Deputy Sheriff Tonye Barreto-Neto, a defense witness, testified:

[T]his case would never ever have been facing 32 years in prison if the issue here wasn't some homophobia or transphobia. And the fact that Sean anatomically is a female, because if it were a 19 year old boy and a 14 year old girl—and I deal in child abuse and I deal in these cases all the time—they never really get to court. And if they do, they're misdemeanors.<sup>144</sup>

Homophobia also surfaced in the actions of Sean and several of the other teens involved in this case. Both Justin and Andrea had reactions to Sean that showed a discomfort with homosexuality. When asked on *The Jerry Springer Show* how he felt when he found out Sean was actually a girl, Justin said, "I mean what am I going to tell my kids? Yeah, I grew up, my best friend was a faggot?"<sup>145</sup> Upon finding out that Sean was a girl, Andrea threw a set of keys at a police officer and had to be restrained by two officers.<sup>146</sup> Andrea's violent reaction may also be the product of homophobia. The reaction could be a result of feeling deceived, yet it might also be the result of a culture that abhors homosexual relationships. In other words, Andrea's response might not have been to the deception itself, but to people finding out she had been dating a woman, particularly given the intense homophobia existing in high school.<sup>147</sup>

The teens also evidenced a fear of being labeled gay. On *The Jerry Springer Show*, Andrea stated that she had been called a lesbian by other teenagers and said, "Sometimes I think, 'Am I a lesbian?' I am hoping it is not true."<sup>148</sup> In response to Andrea questioning her own sexuality, Sean said, "I don't like the way that she thinks that way, because it's not. How

142. See *Sean O'Neil Given 90 Days By Colorado Judge*, *supra* note 134, at 4; Minkowitz, *supra* note 102, at 142; Martinez Interview, *supra* note 125.

143. See Sentencing Hearing, *supra* note 125, at 121–22. The fact that there were multiple victims involved in this case may indicate that even if the relationships were viewed as heterosexual by the legal system, misdemeanors might still have been charged. However, the defense believes that the zeal to prosecute would have been absent had this been a heterosexual relationship. See Martinez Interview, *supra* note 125.

144. Sentencing Hearing, *supra* note 125, at 94.

145. *Jerry Springer*, *supra* note 125.

146. See *id.*

147. There is speculation that Andrea knew all along that Sean was a woman. She was very emotionally attached to Sean, as evidenced by her repeated attempts to contact him after his arrest and her statement to a judge issuing a restraining order against her that she loved Sean and she was not staying away from him. See Martinez Interview, *supra* note 125.

148. *Jerry Springer*, *supra* note 125.

could she question herself when she sat there and thought I was a boy? I mean how could she question herself? I mean no one would think she was or call her that [a lesbian], and if they did, they're wrong."<sup>149</sup>

Sean said his relationships were heterosexual several times during *The Jerry Springer Show*. He defended himself most clearly with the comment, "To me it was just a boy-girl relationship."<sup>150</sup> Sean conceptualizes his own sexuality as a heterosexual male, as revealed by the following statement, "I don't think that I am a lesbian. No, I am not. I don't think I am. I actually see myself as a man."<sup>151</sup>

The comments of the teens regarding sexual orientation clearly indicate the social stigma attached to being gay. Of course, Sean has the power to define his experience and sexual orientation for himself. He truly believes that he was engaged in heterosexual relationships. In a society where sexual orientation was unimportant, classifying the relationship as homosexual or heterosexual would probably be irrelevant. The fact that so much time and energy is devoted to determining the sexual orientation of those in the relationship indicates the intense pressure to be heterosexual.

## 2. Medicalization of transsexualism

The medicalization of transgenderism was evident throughout this case. On *The Jerry Springer Show*, several audience members suggested that Sean needed psychiatric help, as did Springer himself. Neither "transgender" nor "transsexual" was ever mentioned on the show, and people declared that Sean had a "problem."<sup>152</sup> Conceptualizing the problem as Sean's meant that no one discussed the conflation of sex and gender.

Reliance on the medicalization of transgenderism was important to the court's understanding of the case. The defense relied on medicalization to explain Sean's actions,<sup>153</sup> and utilized a psychiatrist, Dr. Muller, who testified that Sean had Gender Identity Disorder.<sup>154</sup> Dr. Muller defined Gender Identity Disorder and its treatments for the court, explaining that Sean was psychologically male and physically female. The therapist described this crisis as being "a male somehow buried in a woman's body."<sup>155</sup>

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149. *Id.*

150. *Id.*

151. *Id.*

152. See *Jerry Springer*, *supra* note 125. Sean's treatment by the show was considered so atrocious that the Gay and Lesbian Alliance Against Defamation (GLAAD), a gay and lesbian civil rights organization in Washington, D.C., urged people to write to Springer and express their outrage. See *Battering a Transsexual*, GLAAD NEWSL. (last modified Jan. 1995) <<http://www.qrd.org.org/qrd/orgs/GLAAD/general.information/newletter-01.95>>.

153. See Martinez Interview, *supra* note 125.

154. See Sentencing Hearing, *supra* note 125, at 8.

155. *Id.* at 16.

Dr. Muller identified treatment for Gender Identity Disorder as surgery and hormones.<sup>156</sup> Although Dr. Muller acknowledged that people live in society successfully without surgery, his focus was still on surgical intervention.<sup>157</sup> Dr. Muller also discussed sex reassignment surgery's attention to how people deal with themselves, not how people deal with society.<sup>158</sup> Interestingly, although sex reassignment surgery is presented as a personal experience, in a world demanding congruity between sex and gender and enforcing gender polarity, a sex change alters not only how the individual deals with society, but also how society deals with the individual.

At the Sentencing Hearing, Judge Pelican asked whether it was possible to make the psyche and the body congruent, thus indicating that congruity between sex and gender was an underlying presumption. Dr. Muller responded that he was not aware of any situations where this had been successful and reiterated that the treatment option of choice was to surgically create anatomical congruence with psychology.<sup>159</sup> Therefore, a medical model of transsexuality was advanced by the defense. The court was not to see this as a problem of societal intolerance of gender and sex incongruity. Instead, the court was encouraged to see this as Sean's problem for which he would receive treatment.

There are at least two reasons why the defense chose to medicalize Sean's condition. First, it is less threatening to say that Sean has a medical problem which can be addressed with medical intervention than it is to assert that we live in a society which oppressively demands sex and gender congruity.<sup>160</sup> Second, courts are reluctant to deal with societal problems and feel more comfortable addressing individual situations. Courts are also unlikely to respond positively to arguments that society is responsible for personal behavior. Courts prefer that individuals take responsibility for their actions.<sup>161</sup> Thus, the defense did not overtly argue that society was responsible for Sean's "deception," but instead stated again and again that Sean was genuinely remorseful for his actions.<sup>162</sup>

156. See *id.* at 21. In response to a question about whether a sex change is the treatment of choice for Gender Identity Disorder, the therapist responded, "Yes, that's the definitive one. Some people unfortunately can't afford it or the surgery is too daunting. But, yeah, that's that's the only real remedy here." *Id.*

157. See Sentencing Hearing, *supra* note 125, at 21. Dr. Muller stated that sex reassignment surgery creates "anatomical congruence with the psychology." The underlying assumption is that this congruence is necessary.

158. See *id.* at 23.

159. See *id.* at 24-25.

160. The argument that it is easier to deal with an individual problem than a societal problem is also addressed by Raymond in *THE TRANSEXUAL EMPIRE*, *supra* note 59, at 120-53, in her analysis of transsexualism.

161. See Martinez Interview, *supra* note 125.

162. See *id.* Sean's remorse was also evident on *The Jerry Springer Show*. Sean apologized numerous times to Andrea. See *Jerry Springer*, *supra* note 125. The defense actually entered into evidence a copy of the tape to show the judge that Sean was sorry for his actions. See Sentencing Hearing, *supra* note 125, at 117-18.

In this case, the court's discomfort in dealing with social issues was evidenced by the comments Judge Pelican made at the end of the Sentencing Hearing:

I hope that there's nothing perceived in this sentence as was intimated and I don't question genuinely held beliefs of the witnesses that testified that this is somehow homophobic, a word that I'm not altogether clear about in terms of either its definitions as its use in popular culture or as applied to specific situations. When I read it, I know what I think people mean when they say it, but I'm not sure that they know what they mean. It's not about transgender issues generally in this community. This isn't a forum, at least isn't a forum in which sentences are lobbied for. Rather, I hope it is a sentence which is consistent with the way a 19-year-old perpetrator of at least sexual contact, by a plea of sexual intrusion, would be dealt with involving a 13-, 14-, 15-year-old person regardless of the gender of any of those people. It is not about pedophilia. Again, I'm not exactly sure what that word means. People use it all the time. It's not about being gay or lesbian or anything like that, words commonly used. And I certainly trip over those in my everyday language. I'm not sure that I'm correct in terms of how I use those . . .<sup>163</sup>

Judge Pelican did not want to deal with the difficult issues of homophobia, transphobia, or lesbian, gay, or transgendered lives. Instead, he wanted to make clear that he made a "legal" decision, one which would apply to any person, regardless of gender, who was involved in a similar situation. Given this statement, it seems a smart, strategic choice on the part of the defense to argue for the medicalization of transsexualism.

### 3. Control of appearance: cross-dressing

The control of appearance and regulation of cross-dressing also played a part in this case. Sean's clothing provided the basis for the girls' belief that Sean was a biological male. Time and again when the prosecutor asked the girls at the Preliminary Hearing what made them believe Sean was a boy, they mentioned his clothing.<sup>164</sup> Andrea stated on *The Jerry Springer Show* that she believed Sean was a boy because of his clothing. She asked the audience more than once if they thought Sean looked like a boy. Jerry Springer reinforced this assessment by asserting at the beginning of the show that Sean's clothes made him look like a boy.<sup>165</sup> These statements are indicative of the presumption that "our entire external presentation to the world too often functions like a billboard advertising our anatomical sex."<sup>166</sup>

163. Sentencing Hearing, *supra* note 125, at 134–35.

164. See Preliminary Hearing, *supra* note 4, at 8–9, 50.

165. See *Jerry Springer*, *supra* note 125.

166. MACKENZIE, *supra* note 8, at 13.

The prosecution was initially responsible for the focus on appearance by framing the case as one of deceit and by charging Sean with criminal impersonation. Despite defense efforts to explain the negative impact of a rigid dress code, including Barreto-Neto's testimony that he had been jailed more than once for wearing women's clothing,<sup>167</sup> it is apparent that Judge Pelican accepted the importance of appearance when he declared at the Sentencing Hearing that "what this case is about is deceit."<sup>168</sup>

Although Sean's clothing was not the only aspect of his outward appearance that led people to believe he was a boy, his clothes played a large role.<sup>169</sup> Gender specific clothing is important if reliance on this is strong evidence that one was trying to "pass" as the other gender. The power and danger of this conception are articulated by Riki Anne Wilchins of the Transsexual Menace: "If you look androgynous and someone wants to claim that you're passing yourself off as the other gender, you've just committed a felony."<sup>170</sup>

#### 4. Violence against Sean

Violence for breaking the gender rules was an ever present force throughout this case and Sean's life. Sean came from a violent home. His father, who believed that Sean was a lesbian, beat him for his transgression.<sup>171</sup> After appearing on *The Jerry Springer Show*, Sean was beaten by a group of teenagers.<sup>172</sup> Sean's friends threatened violence when they found out Sean was a girl. Andrea said that she wanted to kill Sean when she found out that he was actually a woman. When Justin was asked on *The Jerry Springer Show* what his reaction was to finding out that Sean was a woman, he said, "I wanted to kill him."<sup>173</sup>

The people involved in this case undoubtedly felt deceived. However, there was something more going on here than just a reaction to deception. The violent reactions occurred because Sean crossed the gender barrier. Unfortunately, violence against people who cross the gender line

167. See Sentencing Hearing, *supra* note 125, at 93-94.

168. *Id.* at 135.

169. There is evidence that the teens involved also believed Sean to be a boy because he "acted like a boy," meaning that he engaged in the same kinds of conversation and found the same things interesting as other teenage boys. Justin explicitly stated this on *The Jerry Springer Show*, "We would talk about the exact same things: hockey, sex, everything." *Jerry Springer*, *supra* note 125.

170. Minkowitz, *supra* note 102, at 146. Wilchins is a co-founder of Transsexual Menace, "a growing group of Transgendered (and Non-transgendered) people who see problems and want to find solutions." Transsexual Menace, *Who Are We?* (last modified Mar. 21, 1997) <<http://www.apocalypse.org/pub/tsmenace/source/who.html>>. Wilchins prefers the spelling "transsexual" to the more common "transsexual." See Anne A. Lawrence, *Too Radical: The Writings of Riki Anne Wilchins* (last modified Jan. 12, 1998) <<http://www.mindspring.com/~alawrence/tooradical.html>>.

171. See Sentencing Hearing, *supra* note 125, at 3-4.

172. See Minkowitz, *supra* note 102, at 146.

173. *Jerry Springer*, *supra* note 125.

is often tolerated and encouraged in society. For example, the audience at *The Jerry Springer Show* reacted with laughter and applause when people threatened violence against Sean.<sup>174</sup>

### 5. Social and legal control of identity and language

A central piece to this case was the struggle for external control of language and Sean's identity. Language was a tool used to either deny or defend Sean's self-identity. Language was also used to reinforce each side's theory of the case. In essence, there was a not-so-subtle battle over language and identity in the courtroom.

Three forces exerted control over Sean's identity: the legal system, the medical establishment, and the media. The prosecution argued that this case was about improper sexual relations, not transgenderism.<sup>175</sup> The refusal to acknowledge Sean as transgendered was reinforced by the prosecution referring to Sean with feminine pronouns and referring to him as "Sharon" and "Ms. Clark." Not only did the prosecution refuse to see Sean as transgendered, but it also often refused to see Sean as a person. Once, the prosecutor referred to Sean as "it," a pronoun normally reserved for inanimate objects.<sup>176</sup> The external imposition of Sean's identity as female led to the prosecution's construction of the case as one about deceit.<sup>177</sup>

The medical establishment actively constructed Sean's identity by diagnosing him with a mental disorder, Gender Identity Disorder.<sup>178</sup> The local media also externally imposed identity on Sean. Of the six newspaper articles reporting on this case, none referred to Sean as transgendered, and all referred to Sean as "Sharon" and with female pronouns.<sup>179</sup> In addition, *The Jerry Springer Show* failed to acknowledge the complexity of Sean's self-identity, repeatedly referred to Sean as a woman, and never referred to him as transgendered.<sup>180</sup>

174. *See id.*

175. *See* Sentencing Hearing, *supra* note 125, at 108.

176. *See id.* at 111. While prosecutors may regularly try to dehumanize criminal defendants, the use of the pronoun "it" seems particularly blatant, even if used only once. The rest of the time, the prosecutor alternated between female and male pronouns.

177. The prosecution was not alone in thrusting an identity on Sean; court personnel participated in this as well. An example of this occurred when I called the court for a transcript of the Preliminary and Sentencing Hearings. During conversation with the court stenographer, I was informed that the Sentencing Hearing transcript would be very long due to the number of people who attended the hearing. I responded that I was aware that a number of grassroots transgendered activists attended the hearing. There was a long pause, after which the stenographer said, "Well, I don't know what you call them. We call them he-shes."

178. *See supra* text accompanying notes 40–51, 154.

179. *See* Dick Foster, *Woman, Accused of Playing Boyfriend to Girls, to Stand Trial*, ROCKY MOUNTAIN NEWS, Dec. 24, 1994, at A12; *Girl, 15, Finds 'Boyfriend' is a Woman*, ROCKY MOUNTAIN NEWS, Nov. 5, 1994, at A8; *Plea Deal*, DENVER POST, Oct. 21, 1994, at B5; *Plea Deal Made in Sexual Assault*, DENVER POST, Nov. 29, 1995, at B4; *Sex Case Suspect Seeks Deal*, ROCKY MOUNTAIN NEWS, Oct. 21, 1995, at A8; *Sex Impersonation Charged*, NAT'L L.J., Jan. 9, 1995, at A10.

180. *See Jerry Springer*, *supra* note 125.

The defense alone seemed concerned with honoring Sean's self-identity. Although the defense explicitly asserted that the case was about love, not gender,<sup>181</sup> the actions of the defense and defense witnesses clearly indicated that the case was indeed about gender. The defense referred to Sean with masculine pronouns and called him "Sean," thus reinforcing the idea that Sean's identity was male.<sup>182</sup> Transgender activists filled the courtroom to capacity,<sup>183</sup> assisted the defense attorney with constructing a case theory, and testified at the Sentencing Hearing, thereby helping the court understand Sean's self-identity.

Although the defense clearly indicated Sean's remorse for his actions, it also tried to help the court understand that Sean's self-identity led him to believe he was not deceiving anyone; he was merely being himself. The testimony by Tonye Barreto-Neto was an attempt to help the court understand self-identity as opposed to imposed identity. Barreto-Neto talked about being arrested for "... appearing in public disguise[d]. Disguised as what? Gee, I was disguised as myself. I didn't know that was a disguise."<sup>184</sup>

Finally, the actions of several entities involved in this case reveal a tension between imposing an identity on Sean and accepting his self-identity. First, the court itself seemed torn. On the one hand, Judge Pelican imposed an identity on Sean by referring to him with feminine pronouns and calling him "Sharon" and "Ms. Clark." Judge Pelican's very understanding of the case, that it was about deception, indicated an imposition of identity. However, Judge Pelican also affirmed Sean's identity by recognizing the harm that would come to Sean if he was forced to serve his jail time in a women's prison.<sup>185</sup> The girls involved also struggled with Sean's self-identity as it contrasted with an imposed identity. On several occasions the girls asserted that they saw Sean as a boy, not a girl. Andrea in particular asserted this on *The Jerry Springer Show*. Justin also asserted that he saw Sean as a boy.

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181. "This case is really not about gender, it's not sexual preferences. Frankly, Judge, what this case is about is love." Sentencing Hearing, *supra* note 125, at 5.

182. "Your Honor, we call Sean Sean and we use masculine pronouns for Sean, not out of some confusing desire to make the court question what his gender is. We do it simply out of respect for Sean. And that's all this case is about." *Id.* at 6.

183. "The record should show that this is a full courtroom of the largest courtroom we have in this building." *Id.* at 1. For a list of activist organizations that were represented at this hearing, see *supra* note 134.

184. Sentencing Hearing, *supra* note 125, at 94.

185. "I'm going to impose a sentence of 90 days in the El Paso County Jail. And I'm going to stay execution of that sentence until I can satisfy myself that we have a place to confine you which is adequate to do the job but doesn't cause some cruel or unusual difficulty for you." *Id.* at 131. Ultimately, Sean served his sentence in the women's jail, in which he had been housed on previous arrests. See Martinez Interview, *supra* note 125.

## VI. LOOKING TOWARD THE FUTURE: THE LEGAL SYSTEM AND THE GENDER BOX

As the analysis of this case suggests, society goes to great lengths to enforce the boundaries of the gender boxes and to punish those who step outside. Homophobia, violence, regulation of appearance, medicalization, and the external control of identity were all used to punish Sean for stepping outside his gender box. Although the defense in his case attempted to educate the court about transgendered lives, it stopped short of completely challenging the social construction of gender.

So what is the solution to gender bipolarity in a gender bipolar world? Should the category of gender be eliminated altogether? This is perhaps a goal for some point in the future, but realistically, this cannot happen anytime soon. Ruth Colker suggests that it is *bipolar* categories, not categories per se, which hurt the people in between.<sup>186</sup> If you are unfortunate enough to be left out of one of the existing categories, society and the courts do not know what to do with you. You simply fall through the cracks. Although categories have historically been used to oppress people, Colker suggests that we not abandon categories altogether, as they may be useful in some instances and need not perpetuate subordination.<sup>187</sup>

Colker suggests that to move away from categories, we should encourage storytelling as a way to understand a person's situation.<sup>188</sup> The importance of this strategy was recognized and utilized by the defense in this case. The two transgendered activists who testified gave context to the medical testimony of the defense's therapist. These men helped the court understand what it is like to live as a transgendered person.<sup>189</sup> The prosecution objected to the storytelling testimony, ostensibly on the grounds of relevancy, but more likely out of a fear that the testimony would help the court better understand Sean's situation, rather than relying on stereotypes and misunderstandings.

Sean's case not only highlights the importance of storytelling, but also reveals the importance of grassroots movements in shaping the outcome of court cases. The Transgender Movement was vital to this case from beginning to end. Activists helped the defense attorney develop a theory of the case and strategize a way to present it to the court. Activists also packed the courtroom, giving the judge the dual message that real people were affected by his decision and that he was going to be accountable for his ruling. Despite Judge Pelican's insistence that his decision was

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186. See COLKER, *supra* note 11, at xi-xii. Colker calls people who lie between polarized legal categories "hybrids."

187. See *id.* at 6.

188. "Categories suggest stasis whereas storytelling reflects our changing life experiences." *Id.* at 19. The importance of storytelling to the outcome of cases is also recognized by a growing body of critical legal theory.

189. See Sentencing Hearing, *supra* note 125, at 47-108; Martinez Interview, *supra* note 125.

not colored by the sea of supporters in the courtroom, he could not have been immune to the implications of their presence. For marginalized members of our society, the importance of grassroots movements cannot be underestimated.

There are no easy answers to the multitude of questions raised by this case. What this case does seem to indicate is the importance of storytelling and political movements in helping courts step outside socially constructed gender boxes. It also highlights the importance of trying to create a society where transgendered people are able to claim their identities without risk of physical, psychological, or economic violence. Despite the prosecution's efforts to paint Sean as an evil sexual predator, in reality, the real risk of rape is probably *of* transgendered people, not *by* transgendered people. As Kate Bornstein, a lesbian transsexual activist, observed, "Gender terrorists are those who . . . bang their heads against a gender system which is *real* and *natural*; and who then use gender to terrorize the rest of us. These are the real terrorists: the Gender Defenders."<sup>190</sup>

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190. KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 71-72 (1994).