2002

Gender Contests

Susan Frelich Appleton
Washington University in St. Louis School of Law, appleton@wustl.edu

Gender Contests

Susan Frelich Appleton, JD, AB

Ms. Appleton is Associate Dean of Faculty, and Lemma Barkeloo and Phoebe Couzins Professor of Law, Washington University School of Law, St. Louis, MO. Address for correspondence: Susan Frelich Appleton, Washington University School of Law, One Brookings Dr, St. Louis, MO 63130. E-mail: appleton@wulaw.wustl.edu.

Transgender issues have come out of the closet. Popular culture, law, and medicine all have begun to confront challenges to the conventional understanding of sex as a fixed, dichotomous, male–female paradigm. It seems fitting for a journal designed to focus on gender-specific issues to consider how both sex and gender are becoming explicitly contested matters. At the end of the day, however, this exploration provides a cautionary tale, not only about our compulsion to impose a universal system of classification, but also about the perils of paternalism, family secrets, and fascination with genetic determinism. In addition, this area offers an opportunity for medical experts to serve as a helpful and important force for change—mediators between evolving social norms and the law, which famously clings to the past.

To be sure, many people find unfathomable challenges to the basic organizing principle that sex and gender assignment represent. Even progressive gender politics, such as the struggles for women's equality and gay rights, typically assume a threshold ability to identify males and females. Given the way we take these categories for granted, choosing the best terminology proves difficult, although sex usually is "considered a strictly anatomical category," while gender is "used as a category of self- and/or social identification."[1]

In recent years, nonetheless, the general public has had numerous opportunities to become acquainted with both real and fictional individuals of uncertain classification. To cite some notable examples, best-selling novelist Chris Bohjalian's *Trans-Sister Radio*, published in 2000, tells a sweet romantic story about Dana, born a man but later identified as a woman with some help from hormonal therapy and sex-reassignment surgery. The same year, actress Hilary Swank won critical acclaim and an Oscar for her brilliant cinematic portrayal of Brandon Teena, an anatomical female living as a male, in the brutal and gripping *Boys Don't Cry*. *The New York Times Magazine* recently published one account of a transgendered "war widow" (whose lover was killed in an act of antigay violence) and another about a transgendered middle-school student (a girl "passing" as a boy).[2] Other media have featured a Florida student who dresses in male attire and is suing her school district to overturn a yearbook photo rule that requires off-the-shoulder drapes for girls and coats and ties for boys.[2] Cable television's Discovery Channel and ABC's *20/20* both recently covered intersexed babies and the controversy about "corrective" surgery for those with ambiguous genitalia.[3]

As these references indicate, challenges to the traditional understanding come from two main sources: *transgendered* individuals or *transsexuals* (those whose self-identity and physical sex at birth diverge), and *intersexed* individuals (those who are born with ambiguous genitalia or unusual chromosomal composition, or who have a physical condition such as androgen insensitivity syndrome, resulting in an outward appearance inconsistent with chromosomal sex). Although transgendered and intersexed persons arguably complicate the ordinary concepts of sex and gender in different ways, in the final analysis both demonstrate that multiple factors contribute to "maleness" and "femaleness," inviting the possibility

that one person might have attributes from both categories and defying an immutable either–or approach to classification.

Because the law (often several years behind popular culture) rarely addresses the meaning of *male* and *female*, a recent inheritance case from Kansas, *In re Estate of Gardiner*,[4] generated considerable attention. After Marshall Gardiner died without a will, his estranged son, Joe, challenged the inheritance claim of J'Noel Gardiner, whom Marshall had married a year before his death. Joe argued that J'Noel, a postoperative male-to-female transsexual, could not legally have married a man and, hence, could not inherit Marshall's estate as his widow. J'Noel counter-argued that her post-surgical anatomy and her gender identity made her a woman, as reflected by her Wisconsin birth certificate, which had been amended by the state pursuant to a court order to identify J'Noel as female.

The trial court considered J'Noel a male because of identification based on external genitalia at birth and ruled the marriage invalid under Kansas' "opposite-sex" requirement for spouses. When J'Noel sought review, however, the court of appeals, which criticized the trial court for using a "rigid and simplistic" test for sex,[5] adopted a much more flexible and nuanced approach. After surveying the handful of prior cases and relying on a recent law review article by Professor Julie A. Greenberg,[6] the appeals court noted eight different criteria that might be used to classify an individual as *male* or *female*: "chromosomal makeup, . . . gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity."[7] This court remanded the case to the trial court for consideration of these different criteria in determining J'Noel's sex.

But Joe prevailed on appeal to the Supreme Court of Kansas. For the state's highest court, which decided the case in March 2002, the ordinary dictionary definitions of *sex*, *male*, and *female* do not include transsexuals. Hence, when the Kansas legislature, by statute, limited marriage to couples of the "opposite sex" and expressed a strong policy for recognition of only those marriages between a man and a woman, it contemplated "a biological man and a biological woman" and implicitly excluded transsexuals.[8]

Gay rights advocates and other civil libertarians contend that such reasoning might provide a foothold for recognition of same-sex marriages. If the United States Constitution guarantees a right to marry, as the United States Supreme Court has stated in several landmark cases,[9] then how can transsexuals like J'Noel exercise this right? In Kansas, J'Noel, who looks, acts, and feels like a woman (and has a Wisconsin birth certificate identifying her as such), cannot legally marry a man, so presumably she must marry a woman. Yet, in Wisconsin, must she marry a man? Perhaps, advocates of same-sex marriage contend, compromising the "opposite-sex" requirement for lawful spouses offers the only escape from this definitional and legal dilemma.

Perhaps a more fundamental question, however, is whether the search for *legal* definitions of *sex*, *gender*, *male*, and *female* makes sense. Yet, if the law should borrow definitions used elsewhere, then what is the most authoritative source? What role should medicine play?

There are two contrasting stories about the contributions of physicians in this area. On the one hand, some physicians provide enormous assistance to their transgendered and intersexed patients who wish to become more male or more female, performing and improving sex-reassignment surgery, prescribing hormonal treatments, and providing essential counseling. Certainly, without medical intervention, J'Noel would have remained "trapped" in the male body of her birth and might never have enjoyed the intimate relationship she shared with Marshall.

On the other hand, others in the medical profession take an approach as "rigid and simplistic" as that which was criticized by the court of appeals in *Gardiner*. Advocacy and support groups, such as the Intersex Society of North America (ISNA) and several former patients, criticize some physicians for treating the birth of every intersexed baby as an emergency; for insisting that every infant *must* be categorized either as male or female at birth or as soon thereafter as possible; for pressuring parents to consent to treatment (including surgery) to make the infant fit the chosen category; and

for recommending a paternalistic and secretive approach that withholds from patients their own medical histories even as they mature.

ISNA urges, instead, preliminary gender assignment, but delayed treatment until such children can consent to surgery themselves—a patient-centered approach in place of the concealment-centered (or parent-centered) approach traditionally practiced.[10] Such groups have gone far in publicizing the real harms of cosmetic genital surgery, which often impairs sexual response, fails to create the promised "normal" appearance, communicates shame about the patient's genitalia of birth, and conflicts with the patient's later gender preference.[11] Here, well-intentioned parental consent is not a reliable proxy for the young patient's own eventual choice, and even a good-faith effort to promote the infant's best interest can later prove irreversibly wrong.

In one illustration that takes the traditional approach to an extreme, a mother who steadfastly refused to consent to feminizing surgery for her intersexed child learned that the physician performed it anyway during what she was told would be only a biopsy of his undescended testicle, which was removed despite a pathology report showing no disease.[12] Of course, the most well-publicized case of medical excesses designed to assign a gender to an unwitting patient involved the man we now know as David Reimer. The story, fully reported in 2000 in John Colapinto's *As Nature Made Him: The Boy Who Was Raised as a Girl*, is now familiar. David was originally "Bruce," an identical male twin who lost his penis in infancy during a circumcision accident in 1996. His devastated parents accepted the expert advice of Johns Hopkins physician, John Money, who persuaded them that their son could become a virtually normal daughter with the removal of his testicles, appropriately gendered childrearing, and eventual hormonal treatments. Dr. Money found this case to be an ideal application of his theory that "nurture"—not "nature"—determines gender, and emphasized that for a successful reassignment, the truth must never be disclosed to Bruce, who was renamed Brenda. Despite early scientific literature touting the success of Brenda's reassignment and the validation of Money's theory, the reality was quite dreadfully different. Reimer, who later reported that he was never comfortable as a female, had a miserable childhood.

Yet, the initial claims of success acquired a life of their own, generating scholarly analyses in many different fields that presented gender entirely as a social construct. For example, in Family Law, a law school course I have taught for over 25 years, three different editions of one of the leading textbooks included an excerpt from Dr. Money's report to invite discussion of the purpose of marriage laws that require one male and one female or two parties of the opposite sex.[13] His study suggested that anyone can be a male or a female with appropriate medical assistance and social support.

Reimer made the decision to resume a male identity at age 14, and later he went public with his version of the story. Some authorities invoked the case to establish the significance of "nature" over "nurture"—a position quite in keeping with the recent attention the Human Genome Project has given to claims of biological causation for various human preferences, behaviors, and diseases. Such arguments, however, emphasize one aspect of Reimer's history, while ignoring arguably equally important elements. Apart from the gender reassignment that is blamed for making his childhood so miserable, the secrecy his parents were instructed to maintain must have enormously burdened the emotional climate in which he was reared. And imagine the guilt his parents must have felt about the botched circumcision. Further, Reimer acknowledges that the frequent, intrusive, and unexplained medical examinations that Dr. Money required made him feel like a freak.[14] Even apart from Money's failure to disclose the experimental nature of the treatment and to obtain adequate ethical review, his approach became undeniably paternalistic, if not self-serving and opportunistic, once his visits with Reimer indicated serious problems. In short, the claims for biological determinism attributed to this case overlook the misdeeds, mistakes, and emotional baggage that contributed to Reimer's horrible suffering.

Today, some medical professionals are adopting a more open, flexible, and patient-centered approach to

intersexed children and to gender identity in general. For example, although the American Academy of Pediatrics says that the "diagnosis and prompt treatment [of intersexed infants] require urgent medical attention,"[15] other authorities have called for delayed surgery in individual cases, or a moratorium on such surgery in general, pending a comprehensive assessment of outcomes from past interventions.[16] In the absence of evaluation of previous results, informed consent to such treatment remains impossible.

What do evolving medical attitudes about sex and sexual ambiguity mean for courts and legislatures, which must resolve issues like J'Noel's right to inherit as a widow? In fact, the limited case law reveals three different stances, and all three give health care professionals key roles to play.

First, some cases (like *Gardiner* in the Kansas Supreme Court) use a rule that the information entered on the birth certificate at the time of birth determines one's sex as a matter of law. These cases reject any connection between physician-made anatomy that was constructed in sex-reassignment surgery and treatment, and the patient's "true" sex. Yet, even here health care professionals play a significant role. They ordinarily complete the birth certificate (whether the newborn has "normal" or ambiguous genitalia), and they set the standard for what information is used: a visual inspection of genitalia versus a chromosome test.[17] Further, the rise of prenatal chromosome testing suggests the possibility that physicians will increasingly see situations in which the prebirth test result and the postbirth visual inspection do not match.

On closer analysis, however, these same cases reflect a second approach. They do not foreclose all change, for they concede that the legislature might choose to reclassify transsexuals or to amend the marriage laws to include transsexuals (and presumably intersexed persons).[18] Yet, statutory reform seems unimaginable without physicians playing a pivotal role, offering expert testimony in legislative hearings and otherwise educating lawmakers on any possible need for change.

The third approach, exemplified by the court of appeals in *Gardiner*, looks to modern medical understandings of sex and gender and views such issues as questions of fact, not law. Fact questions require evidence to resolve them, and such evidence would necessarily include examination and cross-examination of physicians as expert witnesses. One case relies explicitly on the results of medical intervention, stating that, "If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of the marriage to the sex finally indicated."[19]

For physicians credibly to exercise the authority that the law seems poised to delegate to them, retrospective empirical studies evaluating different treatment approaches, deliberation, and standard-setting by interdisciplinary groups attuned to the ethical issues presented, and the full participation of patients familiar with their own medical histories all will be necessary. Doctors can play a significant role in law reform here, but only if they first address the problems now becoming apparent in the traditional practice of sex assignment.

References

1. Dreger AD. *Hermaphrodites and the Medical Invention of Sex*. Cambridge, MA: Harvard University Press; 1998:10. As Dreger notes, definitions of *male* and *female* are contextual, "specific to time and place." Id. For example, even with a focus on biological attributes alone, one could not consider chromosomes until the development of a test for them.
2. See France D. An inconvenient woman. *The New York Times*. May 28, 2000: §6, at 24 (describing how a preoperative male-to-female transsexual publicly said she is male to make the case that antigay hostility in the military caused her lover's murder); Denizet- Lewis B. About a boy who isn't. *The New York Times*. May 26, 2002: §6, at 30 (describing a 13-year-old who is secretly a girl but living as a boy); "Fox on the Record" with Greta Van Susteren, June 20, 2002 (interviewing a student and her attorney, who are bringing a sex discrimination lawsuit against Tampa High School for yearbook attire requirements).
3. See "Is it a boy or a girl?" Discovery Channel. First aired March 2000; "Intersex Babies: Controversy Over Operating to Change Ambiguous Genitalia." *20/20*. ABC News. April 19, 2002. See also "Gender Unknown." Discovery Health Channel. First aired January 2001.
4. The opinion of the court of appeals is reported at 22 P.3d 1086 (Kan. Ct. App. 2001). The opinion of the Kansas Supreme Court is reported at 42 P.3d 120 (Kan. 2002).
5. 22 P.3d at 1110 (referring to test used in Littleton v. Prange, 9 S.W.3d 223 [Tex. App. 1999]).
6. Greenberg JA. Defining male and female: Intersexuality and the collision between law and biology. *Ariz Law Rev* 1998;41(2):265-328.
7. 22 P.3d at 1110.
8. 42 P.3d at 135.
9. Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional antimiscegenation statute); Zablocki v. Redhail, 434 U.S. 374 (1978) (holding unconstitutional restrictions on marriage licenses for applicants with unmet support obligations or children likely to become public charges); Turner v. Safley, 482 U.S. 78 (1987) (holding unconstitutional restriction on prisoners' marriages).

10. See Dreger AD. Top ten myths about intersex. ISNA News. February 2001: at 3, 4. Available at: http://www.isna.org/newsletter/feb2001/feb2001.html#008. Accessed July 30, 2002.
11. See www.isna.org. Accessed July 23, 2002; Is it a boy or a girl? supra note 3 (including interviews with Cheryl Chase and other ISNA leaders).
12. This is the case of Patrick Harmon-Smith in Florida. See Lehrman S. Sex police. Available at: http://www.salon.com/health/feature/1999/04/05/sex_police. Accessed July 30, 2002; "Gender Unknown," supra note 3.
13. See Areen JC. *Family Law: Cases and Materials*. Boston, MA: Foundation Press; 1978:30-33; Id., at 24-26 (2nd ed., 1985); Id., at 30-33 (3rd ed., 1992). But see id., at 46 (4th ed., 1999) (reporting more recent evidence showing failure of Money's approach in Reimer's case).
14. See Medical change picks up speed. ISNA News. February 2001: at 2 (quoting Reimer). Available at: http://www.isna.org/newsletter/feb2001/feb2001.html#002. Accessed July 30, 2002.
15. American Academy of Pediatrics Committee on Genetics. Evaluation of the newborn with developmental anomalies of the external genitalia. *Pediatrics* 2000;106(1 Pt 1):138-142 (policy statement). See also Guidelines for referral to pediatric surgical specialists. *Pediatrics* 2002;110(1 Pt 1):187-191 (policy statement recommending for intersex infants comanagement "from the outset by the primary care pediatrician and a pediatric urologist or surgical specialist"); "Is it a boy or a girl?" supra note 3 (interviewing Kenneth Glassberg, MD).
16. See eg, Creighton S, Minto C. Managing intersex. *BMJ* 2001;323:1264-1265; Kipnis K, Diamond M. Pediatric ethics and the surgical assignment of sex. *J Clin Ethics* 1998;9:398-410.
17. See eg, Littleton v. Prange, 9 S.W.3d 223, 233 (Tex App.) (Lopez J, dissenting), *cert. denied*, 531 U.S. 872 (2000).
18. See *Gardiner*, 42 P.3d at 136-37; *Littleton*, 9 S.W.3d at 230.
19. M.T. v. J.T., 355 A.2d 204, 210-211 (N.J. Super. Ct. App. Div. 1976).

UPCOMING EVENTS

OCTOBER 25-27, 2002

2nd World Congress on Men's Health
Vienna, Austria
Sponsors: International Society of Men's Health, Medical Faculty, University of Vienna
Ph: 43-140-400 / 2292
Fax: 43-140-400 / 2285
office@wcmh.info

NOVEMBER 6-9, 2002

10th National Conference on Obstetric and Gynecologic Issues in Women's Health Care
Maui, HI
Sponsor: Symposia Medicus
Ph: (800) 327-3161
info@symposiamedicus.org

NOVEMBER 15, 2002

Gender Differences in Pain - The Gap: 9th Annual Interdisciplinary Women's Health Research Symposium
Baltimore, MD
Sponsor: The Women's Health Research Group, University of Maryland
Ph: (410) 706-2866
whrg@epi.umaryland.edu

NOVEMBER 21-24, 2002

World Foundation for Medical Studies in Female Health Annual Clinical Conference
Washington, DC
Sponsor: World Foundation for Medical Studies in Female Health
Ph: (516) 944-3192
kyasas@aol.com

DECEMBER 1-4, 2002

5th Congress of the European Society for Sexual and Impotence Research
Hamburg, Germany
Sponsor: European Society for Sexual and Impotence Research
Fax: 49-40-35-015-917
ESSIR@wtnet.de

DECEMBER 13-15, 2002

35th Annual New York Cardiovascular Symposium
New York, NY
Sponsors: New York Cardiological Society of the New York State Chapter, and the American College of Cardiology
Ph: (301) 897-5400, ext. 694
resource@acc.org

MARCH 28, 2003

6th Annual Men's Health Conference
Baltimore, MD
Sponsor: Johns Hopkins Medical Institutions
Ph: (410) 955-2959
Fax: (410) 955-0807
cmenet@jhmi.edu

APRIL 2-5, 2003

2nd International Conference on Osteoporosis in Men
Genoa, Italy
Sponsor: Aristea Group
Ph: 39-010-583-224
Fax: 39-0-105-531-544
benvenuto@aristea.com

MAY 19-20, 2003

4th Annual Conference on Gender-Specific Medicine
Washington, DC
Sponsors: The Partnership for Gender-Specific Medicine at Columbia University, and the Office of Research on Women's Health at the National Institutes of Health
http://partnership.hs.columbia.edu

Please send the date and name of your event, location, sponsor, and phone/fax number or e-mail address to: Ellen Falkenstein, *The Journal of Gender-Specific Medicine*, Office Center at Princeton Meadows, Building 400, Plainsboro, NJ 08536, or e-mail info to efalkenstein@mmhc.com.