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FORCING BOYS TO BE BOYS: THE PERSECUTION OF GENDER NON-CONFORMING YOUTH

PATIENCE W. CROZIER*


Abstract: Christina Hoff Sommers’ book, The War Against Boys: How Misguided Feminism is Harming Our Young Men, complains of an educational system bent on feminizing boys and reconceptualizing gender by erasing differences between boys and girls. In doing so, Sommers assumes that gender is exclusively binary. The experiences of gender non-conforming youth in schools and the legal system highlight a reality Sommers ignores. This Book Review explores the experience of youth who do not conform to the stereotypical male model and, in turn, suffer severe harassment and discrimination. The stories of four gender non-conforming youth elucidate how schools remain primary enforcers of a binary gender system that fails to address the needs of many. This Book Review concludes that the strides being made in the legal system to expand notions of gender-appropriate behavior and to recognize individual identity contrast starkly with the lack of progress in schools. While the legal system offers hope for gender non-conforming youth, schools must soberly begin to address their adherence to a gender model that has punitive effects on those labelled “different.”

[O]ne of the more agreeable facts of life is that boys will be boys.1

In her new book, The War Against Boys: How Misguided Feminism is Harming Our Young Men, Christina Hoff Sommers fears for American boys.2 She fears that by trying to foster gender equality, U.S. schools,


2 See id. at 13, 172, 211.
the Department of Education, education scholars and society in general have flipped a "gender switch" and initiated a broad-based campaign to feminize boys. In concluding "[i]t's a bad time to be a boy in America," Sommers relies on two assumptions that are clearly unwarranted when one considers the experiences of gender non-conforming youth. First, she assumes that there exists an exclusively binary system of gender—that boys and girls form two sharply distinguishable groups and that all youth fall into one of those two categories. Second, she assumes that U.S. schools are destroying this binary gender system.

The experiences of gender non-confirming youth disprove Sommers' two assumptions. This Book Review challenges both the idea that there exists an exclusively binary gender system and that schools have eroded it. To the contrary, U.S. schools still impose and strictly enforce on youth Sommers' rigidly divided conception of gender. This strict adherence to maintaining clearly defined gender categories fosters intolerance that has proven to have a deleterious effect on biological boys who do not conform to American society's conception of gender norms.

5 See id. at 15, 44, 99.
6 Id. at 13.
7 See QUANG H. DANG, SAN FRANCISCO HUMAN RIGHTS COMMISSION, INVESTIGATION INTO THE NEEDS OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND QUESTIONING YOUTH 4–5 (1997) (discussing the experience of lesbian, gay, bisexual, transgender, queer, and questioning youth (LGBTQQ)).
8 See SOMMERS, supra note 1, at 87. Nowhere in the book does Sommers note anything about LGBTQQ youth. See generally id.
9 See id. at 98–99.
11 See Arriola, supra note 8, at 448–49; Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 ARIZ. L. REV. 265, 275 (1999).
This Book Review’s exploration into the gender non-conforming youth experience will prove how invested our society remains in forcing boys to fit into a stereotypical male model. Part I discusses how Sommers’ presumed two-gender system does not reflect reality and ignores many people who do not conform to this rigid binary model. Part II explores the school experience of gender non-conforming youth to elucidate how entrenched boy/girl gender roles remain in the school system and how the boys who transgress the boundaries of these roles, rather than the “normal” boys for whom Sommers fears, are the ones in true danger. Part III discusses how the state reinforces gender borders through the legal system by punishing gender transgressions and supporting parental and medical efforts to pathologize gender non-conforming children. Part IV highlights three youth cases that underscore the painful reality facing gender non-conforming youth in school and the importance of moving away from a rigid two-gender system. Two of these cases serve as signals of hope that the legal system can expand American society’s vision of gender beyond a binary model and, in doing so, protect our youth by allowing self-identification and self-expression to prevail over Sommers’ promotion of stereotypical norms and fear of difference.

I. BACKGROUND: WHAT IS A BOY?

A. Gender Reality

American society assumes that there are two sexes, male and female, and flowing from those two sexes are two genders, masculine and feminine, and that all people fall into one of those two closely linked categories. Sex refers to whether a person is male or female

12 See John Cloud, His Name is Aurora, TIME, Sept. 25, 2000, at 90–91; Sacha Pfeiffer & Mac Daniel, Court Rules Brockton Boy Can Dress as Girl at School, BOSTON GLOBE, Oct. 13, 2000, at 1.
13 See Greenberg, supra note 9, at 275, 325–27. See generally Sommers, supra note 1.
14 Arriola, supra note 8, at 448–49; Kelli Kristine Armstrong, Note, The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools, 24 GOLDEN GATE U. L. REV. 67, 75 (1994) (citing a study of the American Pediatric Association which found that one out of three gay male teens has attempted suicide).
15 See Miye A. Goishi, Note, Unlocking the Closet Door: Protecting Children from Involuntary Civil Commitment Because of Their Sexual Orientation, 48 HASTINGS L.J. 1141, 1153, 1163 (1997); Schaffner, supra note 10, at 51–52.
17 See Patricia A. Cain, Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law, 75 DENV. U. L. REV. 1321, 1332–33 (1998); Mary Coombs, Sexual Dis-Orientation:
based largely on anatomical factors such as external genitalia. Gender refers to the characteristics associated with masculinity and femininity. Gender is commonly understood to flow from biological sex. Gender can therefore be understood as the performance of one’s sex, and as such, society links gender to, and often sees gender as interchangeable with, sex. Sexual orientation can be seen as one manifestation of gender, as one manifestation of the performance of one’s sex. In a system that presumes the binary nature of sex and gender, the two genders complement each other in a manner that compels heterosexuality. Men properly perform their gender role by having sex with women and vice versa. This vision of sex, gender and sexual orientation presumed by American society establishes a rigid binary model.

An exclusively binary model does not reflect reality. The existence of transgender people for whom sex and gender are not linked proves that a rigid binary system comprises an unhelpful framework. Transgender persons have a gender identity that differs from that which is usually understood to result from biological sex. For example, a person born biologically male can have a deeply felt internal sense of being female and live in society as a female. The transgender experience demonstrates that gender identity is not necessarily connected to biological sex. Transgender people thus undermine the idea that there exists one, perfect, binary model of gender.


18 See Cain, supra note 17, at 1332; Greenberg, supra note 9, at 271–74.
19 See Greenberg, supra note 9, at 274.
20 See id.
21 See id. at 274; Shafiqullah, supra note 17, at 225.
22 See Vanessa H. Eisemann, Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment, 15 Berkeley Women’s L.J. 125, 151–54 (2000).
23 See Coombs, supra note 17, at 235–36.
24 See Eisemann, supra note 22, at 153.
25 See Cain, supra note 17, at 1324; Shafiqullah, supra note 17, at 220–22.
26 Cain, supra note 17, at 1332–33; Greenberg, supra note 9, at 275, 325–27; Shafiqullah, supra note 17, at 195–96.
27 See Greenberg, supra note 9, at 278, 325–27.
28 See id.
29 Jamison Green, Introduction to CURRAH & MINTER, supra note 10, at 4; see Shafiqullah, supra note 17, at 196.
30 See Coombs, supra note 17, at 237–44.
31 See id. at 265–66.
tersex people further challenge the binary presumption. One to four percent of people are born intersexed—with biological features that cannot be clearly categorized as male or female. By not falling into one discrete category, intersex people undermine the idea that there are only two distinct sexes.

When one considers the experience of transgender and intersex people, it becomes clear that a binary system of gender ignores the experiences of many people and that sex and gender are better viewed along a continuum. There exists a wide range of possibilities for the overlapping and intertwining of sex, gender, gender identity and sexual orientation and many ways to transgress the boundaries of a rigid two-gender framework. Those who identify as transgender, intersex, or as having a non-heterosexual sexual orientation such as bisexual, gay or lesbian all transgress the boundaries of a two-gender system by not performing some aspect of the role society has deemed appropriate to their gender. Regardless of a person's self-identity, American society views those who fall outside the artificially rigid borders of how men and women are supposed to look and behave as gender non-conforming. Because a binary system does not reflect reality, it requires vigorous and destructive policing. Core societal institutions, such as schools and the legal system, have been central to enforcing and perpetuating gender borders. Only recently has the legal system begun to understand and protect gender non-conforming people. U.S. schools, however, are resisting such improvements.
B. Espousing Irrelevant Borders

Sommers loses credibility from the outset because she promotes a rigid two-gender model and ignores the existence of gender non-conforming youth. Throughout her book, she makes sweeping assumptions of the different needs of boys and girls. For example, she asserts that “[b]oys everywhere need structure, phonics, diction, grammar, and a competitive environment.” To prove the innate, hardwired differences between boys and girls she references how toy stores have different sections for boys and girls; “[f]or boys, gadgets and action are the things, while girls prefer dolls, glamour, and playhouses. . . . Being differently talented and differently driven, the sexes have characteristically different behavior preferences.” Sommers’ vision embodies the assumptions of Western culture that sex, gender and sexual orientation all relate and create two mutually exclusive categories: male and female.

Sommers’ espousal of a binary gender system is eased by her total disregard for children who do not fit into the binary mold. In a book focused on the nature of boys, girls and their differences, it is surprising that Sommers ignores the existence and experience of youths who transgress gender boundaries. Nowhere in the text or the notes does Sommers address issues facing gender non-conforming youth. By ignoring the existence of gender non-conforming youth, Sommers can ignore the reality they witness: that society, especially as manifested in schools, has not in fact shed its adherence to rigid

44 See generally SOMMERS, supra note 1; Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1 (1995); Greenberg, supra note 9.
45 See generally SOMMERS, supra note 1.
46 Id. at 173.
47 Id. at 87–88.
48 Nye, supra note 35, at 228. See generally SOMMERS, supra note 1.
49 See generally SOMMERS, supra note 1.
50 See generally id. For example, Sommers makes two oblique references to boys being freer to speak and reflect in all-male settings because their masculinity is not at risk and they will not have to fear looking like “sissies.” See id. at 162, 174. Beyond these two mentions, Sommers does not address homosexuality or gender identity anywhere in her book. See generally id. Homosexuality, sexual orientation or gender identity do not even appear as topics in the index. See id. at 239–51. These omissions seem shocking in a book devoted to how schools deal with gender and gender equality. See DANG, supra note 5, at 4–5. See generally SOMMERS, supra note 1. This Book Review focuses on boys in particular who, because they are gay, are perceived to be gay, are transgendered or just do not fit into a stereotypical male role, are seen as gender non-conforming.
51 See generally SOMMERS, supra note 1.
boy/girl gender roles and that not every boy and girl fits into the "natural" categories Sommers exhorts us to embrace anew.52

Sommers' binary vision of gender fuels her fear that boys in U.S. schools are being steered away from their "natural" roles.53 She claims that programs promoting gender equity in schools are no more than efforts to reconstruct boyhood.54 These programs, she believes, emphasize activities at which girls excel at the expense of traditional boy activities.55 By pushing boys away from their "natural" roles, U.S. schools are silencing and psychologically harming a generation of boys.56 Sommers therefore begs society to "relearn what previous generations never doubted: that boys and girls are different in ways that go far beyond the obvious biological differences."57 She urges that we return to recognizing, enforcing, and realizing the glory in keeping boys and girls in their differently defined spheres.58 There is nothing fluid about gender, according to Sommers.59 The U.S. educational system is destroying a generation of boys by disregarding the benefits of masculinity and forcing them to be like girls.60 Sommers urges society to leave boys alone to pursue their "natural" masculine pursuits.61 Sommers is far from being a lone voice fighting against an uncontrollable tide moving towards a world of feminized boys;62 in fact, her view of a two-gender society is the same one enforced by schools and parts of the American legal system.63

II. GENDER NON-CONFORMING YOUTH IN SCHOOLS: BOTH INVISIBLE AND TARGETED BY THE ENFORCEMENT OF A BINARY GENDER MODEL

Gender non-conforming youth would likely find the school environments Sommers describes to be figments of an overactive imagina-

52 See Nye, supra note 35, at 255. See generally Sommers, supra note 1.
53 See Sommers, supra note 1, at 98–99.
54 See id. at 44.
55 Id. at 84.
56 See id. at 98, 133.
57 Id. at 209.
58 See Sommers, supra note 1, at 98, 211–12.
59 See id. at 75, 98, 134.
60 Id. at 84, 98.
61 Id. at 212–13.
62 See generally id. Throughout the book, she claims to be the only person who is fighting for boys rather than seeing boys negatively and working towards changing them. See generally id.
63 See Arriola, supra note 8, at 448; Greenberg, supra note 9, at 267, 270.
Sommers criticizes schools and gender equity experts for reconstructing gender and feminizing boys. Schools, however, remain primary believers in and perpetuators of the two-gender framework. School environments are intensely hostile to boys who express feminine characteristics and do not fit into the "normal," masculine, sports-focused boy stereotype. Coming to terms with sexual and gender identity in U.S. schools is a terrifying process for most youth because the school environment is rife with heterosexism, homophobia and transphobia. While it is true that girls can be starkly punished for transgressing their prescribed gender role, girls often have more room to explore where they fall along the gender continuum. Society has grown relatively accustomed to girls who wear pants, are tomboys or are extremely athletic. Society does not allow boys the same degree of latitude in outward appearance and behavior.

Because of the intense homophobia and transphobia present throughout American society, gender non-conforming youth comprise a minority youth population invisible to family, peers, and schools—the main support systems for youth. While coming to terms with sexual identity is challenging and stressful for all adolescents, this period can be especially straining for gender non-conforming youth because of the negative anti-gay messages that pervade in the media, religious settings, the home and school. Schools largely ignore the unique challenges facing gender non-conforming students and can be reluctant to provide services designed to meet their needs. Schools decline to provide adult counselors for sexual

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64 See DANG, supra note 5, at 52-55; SOMMERS, supra note 1, at 44.
65 SOMMERS, supra note 1, at 44.
66 See Arriola, supra note 8, at 448; Eisemann, supra note 22, at 149-58.
67 Arriola, supra note 8, at 448, 449, 462.
69 Arriola, supra note 8, at 461-62.
70 See id.; Good Morning America: Interview with Dr. Laura Berman (ABC television broadcast, Sept. 18, 2000) [hereinafter Berman Interview].
71 See Berman Interview, supra note 70.
72 Sonia Renee Martin, Note, A Child's Right to Be Gay: Addressing the Emotional Maltreatment of Queer Youth, 48 HASTINGS L.J. 167, 167-68 (1996); see Arriola, supra note 8, at 452.
73 See DANG, supra note 5, at 4; Goishi, supra note 15, at 1149.
74 DANG, supra note 5, at 52; Goishi, supra note 15, at 1149.
75 DANG, supra note 5, at 52.
minority youth,\textsuperscript{76} to include discussions in classes of diverse sexual orientations and gender identities,\textsuperscript{77} and to support student groups designed to provide crucial psychological support.\textsuperscript{78} Even a progressive school system such as the San Francisco Unified School District fails to provide adequate resources for its gender non-conforming population.\textsuperscript{79} Despite the increase in national concern over school violence, school administrators often leave rampant violence against gender non-conforming students unchecked.\textsuperscript{80} A number of needs go dangerously unmet in our nation's schools.\textsuperscript{81}

If they somehow emerge from invisibility into school consciousness, gender non-conforming youth are often targeted for abusive and prejudicial treatment.\textsuperscript{82} Negative treatment manifests in homophobic and transphobic remarks, violence, and efforts to undermine support groups.\textsuperscript{83} A recent Gay, Lesbian and Straight Education Network Survey found the educational environment to be harsh and intimidating for gender non-conforming students.\textsuperscript{84} Over ninety percent of gender non-conforming youth reported frequently hearing homophobic slurs in their schools.\textsuperscript{85} Sixty-nine percent reported personally experiencing some form of harassment or violence in school.\textsuperscript{86} Two out of five of the youth surveyed did not feel safe at school because they identify as bisexual, lesbian, gay or transgender.\textsuperscript{87} In addition, many students did not feel comfortable confiding in school administrators.\textsuperscript{88} Even those who take the courageous step to alert school officials, students like Jamie Nabozny, do not get the crucial protection they deserve.\textsuperscript{89}

Jamie Nabozny, a gay high school student in Wisconsin, faced numerous assaults by his peers, but the school principal he told did

\textsuperscript{76} See id. at 54.
\textsuperscript{77} Arriola, supra note 8, at 452.
\textsuperscript{78} See Dang, supra note 5, at 54; Armstrong, supra note 14, at 85–87, 89–91.
\textsuperscript{79} Dang, supra note 5, at 53.
\textsuperscript{80} Id.; Sommers, supra note 1, at 139; Arriola, supra note 8, at 451.
\textsuperscript{81} See Dang, supra note 5, at 53; Arriola, supra note 8, at 451.
\textsuperscript{82} Goishi, supra note 15, at 1149.
\textsuperscript{83} Dang, supra note 5, at 52, 53; Armstrong, supra note 14, at 85–87, 89–91, 93–94.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
nothing to halt the violence.\textsuperscript{90} In fact, after running to the school principal to report male students who had just committed a mock rape on him, Jamie was told that "boys will be boys" and that he should expect such treatment because he was openly gay.\textsuperscript{91} The lack of support from those in positions of authority who are supposed to be worthy of trust isolated Jamie and aggravated the pain and humiliation inflicted by his peers.\textsuperscript{92} The lack of school action contributed to Jamie's numerous suicide attempts and to his decision to leave school.\textsuperscript{93}

While some schools are guilty of not intervening to stop harassment of gender non-conforming youth, others actively create a hostile environment for these students.\textsuperscript{94} The actions of the Salt Lake City School District (SLCSD) show how far some districts will go to keep LGBTQQ student organizations unwelcome and unrecognized.\textsuperscript{95} Rather than allowing a Gay/Straight Alliance (GSA) to form at the school, the SLCSD initially enacted a ban on all non-curricular clubs.\textsuperscript{96}

The experiences of gender non-conforming youth such as Jamie Nabozny expose the fallacy of Sommers' vision of the state of boys in U.S. schools.\textsuperscript{97} Sommers criticizes schools for policing stereotypical male behavior and denying male biology by forcing boys away from competitive, aggressive, masculine pursuits.\textsuperscript{98} By trying to defy the natural state of boys, she says, schools are making boys miserable.\textsuperscript{99} She bemoans an increasing de-emphasis on recess, a time she finds

\textsuperscript{90} Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).
\textsuperscript{91} \textit{Id.} at 451.
\textsuperscript{92} See \textit{id.} at 451–52.
\textsuperscript{93} See \textit{id.}.
\textsuperscript{95} See Broberg, \textit{supra} note 94, at 87. The school district chose to litigate rather than allow a GSA to form at the school. See generally East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District, 81 F.Supp.2d 1166 (D. Utah 1999).
\textsuperscript{96} Press Release, Lambda Legal Defense and Education Fund, Students and Salt Lake City School Board End Feud over Gay-Supportive Clubs (Oct. 6, 2000), \textit{available at} http://www.lambdalegal.org. Lambda reported that "[t]he Salt Lake City School Board has decided to change its policy and allow the [gay] clubs to meet at schools in the Salt Lake City School District." See \textit{id. This decision brought to a close two lawsuits challenging the School District's discriminatory policy. There were forty-six non-curricular groups banned in an effort to stop the GSA from meeting. See \textit{id.}
\textsuperscript{97} See \textit{DANG, supra} note 5, at 4. See generally \textit{SOMMERS, supra} note 1.
\textsuperscript{98} SOMMERS, \textit{supra} note 1, at 84, 133.
\textsuperscript{99} \textit{Id.} at 133.
critical for male roughhousing and bonding. Jamie Nabozny was mock-raped, urinated upon, and beaten for being gay, for not fitting into the role of heterosexual, sports-playing boy. It is hard to believe the boys championed by Sommers are the ones at risk when one considers the frightening dangers facing boys who do not conform to society’s conception of a typical boy. To the contrary, gender non-conforming boys risk violence, harassment, and ridicule on a regular basis; they are the ones who warrant concern.

III. THE STATE: GENDER BORDER POLICE

Looking beyond the school environment, the experience of gender non-conforming youth in the legal system further proves that society is still strictly reinforcing, not reconstructing, gender borders. Rather than supporting the radical reconstruction and feminization of boys, as Sommers charges, the state is yet another, and perhaps the most powerful, protector of the two-gender framework. While municipalities and a few states across the United States are moving towards greater recognition and protection on the basis of sexual orientation and gender identity, there is still a long way to go toward full acceptance and integration of gender non-conforming people.

The legal system, through inattentive courts and the overreaction of the juvenile justice system, not only negatively impacts gender non-conforming youth but plays a key role in enforcing gender borders for all of society. For example, in 1996, assault was a more common cause of arrest for girls than boys, while more than half the juveniles arrested for prostitution were male. A scholar studying female delinquency believes that this trend in punishing boys who commit historically feminine crimes and girls who exhibit aggressive male behavior marks a new trend in the legal system: the punishment of gender transgression.

100 Id. at 95.
101 See Nabozny v. Podlesny, 92 F.3d 446, 451–52 (7th Cir. 1996).
102 See id. See generally SOMMERS, supra note 1.
103 See Nabozny, 92 F.3d at 451–52; Arriola, supra note 8, at 449.
104 See Schaffner, supra note 10, at 51–52, 61–62; infra discussion Part IV.A–B.
105 Greenberg, supra note 9, at 270–71, 325–37.
106 CURRAH & MINTER, supra note 10, at 15–17. As of February 2000, twenty-six municipalities included protections for transgender people in their civil rights statutes. Id.
107 Martin, supra note 72, at 179; Schaffner, supra note 10, at 51; Sullivan, supra note 89, at 39.
108 Schaffner, supra note 10, at 51.
109 Id. at 51–52.
Through this type of gender reinforcement in the legal system, the state often compounds the pain of gender non-conforming youth by condoning abusive parental actions based on homophobia and transphobia.\textsuperscript{110} Sadly, parents are not immune from the homophobia and transphobia rampant in society.\textsuperscript{111} Negative parental reaction to a child’s coming out is far too common; thus the family environment can become yet another source of rejection and isolation for the LGBTQ youth.\textsuperscript{112} In some instances, parents cannot cope and seek outside, psychiatric “help,” including involuntary commitment, to transform their child into one who adheres to the well-established gender system.\textsuperscript{113} Parents desiring to reshape their child into a heterosexual, gender-appropriate role often find support in the medical and legal establishments.\textsuperscript{114} While the American Psychiatric Association removed homosexuality from their list of mental disorders in the early 1980s, they swiftly added a new category that left the door wide open to continue to oppress and forcibly mold gender non-conforming youth: Gender Identity Disorder.\textsuperscript{115}

Gender Identity Disorder (GID) first appeared in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM-III) in 1980 and supplanted the diagnosis of homosexuality to pathologize gender transgressions.\textsuperscript{116} A “strong and persistent cross-gender identification” and a “persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex” comprise two of the four main criteria for the diagnosis.\textsuperscript{117} The presence of GID in the current DSM-IV-TR as a mental disorder allows parents and the medical community to stigmatize gender non-conforming youth and to seek “treatment” in the hopes of preventing the onset of transex-

\textsuperscript{110} Martin, supra note 72, at 172, 179.
\textsuperscript{111} Goishi supra note 15, at 1138 & n.3, 1149; Martin, supra note 72, at 172–74.
\textsuperscript{112} Martin, supra note 72, at 169, 170, 172.
\textsuperscript{113} Goishi, supra note 15, at 1160.
\textsuperscript{114} See id.
\textsuperscript{116} Shafiqullah, supra note 17, at 199; Denny, supra note 115, at 9. The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Health Disorders, regularly updated, are “the end result of a systematic, comprehensive empirical review of the psychiatric literature and as such contain the most up-to-date information available to assist the clinician in making a differential diagnosis.” AM. PSYCHIATRIC ASS’N, DSM-IV QUESTIONS AND ANSWERS, available at http://www.psych.org (Feb. 24, 2001).
ualism and homosexuality.\footnote{118} GID is used more often against boys than girls;\footnote{119} boys in gender identity clinics outnumber girls five to one.\footnote{120} The greater number of boys being treated for gender disorders is another example of the stricter enforcement of gender roles for boys.\footnote{121}

When a breakdown occurs in the parent-child relationship, parents often turn to the state.\footnote{122} Parents unable to accept their children’s homosexuality or transgenderism can seek to place their children in foster care or involuntarily commit them for psychiatric “treatment.”\footnote{123} Gender non-conforming youth are increasingly subject to involuntary commitment by parents who are turning to school and legal systems just as confused as they are.\footnote{124} A GID diagnosis is often used by parents and accepted by the legal system as a worthy means to intervene with children in the hopes of preventing the onset of homosexuality or transgenderism.\footnote{125} Gender non-conforming youth often enter the system through the filing of Persons in Need of Supervision (PINS) petitions.\footnote{126} PINS petitions allow parents to enter their habitually disobedient children into the foster system.\footnote{127} Unfortunately, once they are involved in state systems, there is a lack of services designed to help gender non-conforming youth deal with the problems and struggles they face.\footnote{128}

Gender non-conforming youth are particularly vulnerable in the area of civil commitment because of judicial deference to the rights of parents.\footnote{129} The U.S. Supreme Court, in precedents such as \textit{Parham v. J.R} and \textit{Troxel v. Granville}, has recognized a virtually unqualified protection of parental autonomy concerning the upbringing of children.\footnote{130} The Court recently asserted that the parental interest in “the

\begin{itemize}
\item \footnote{118} Arriola, \textit{supra} note 8, at 460.
\item \footnote{119} Id. at 461.
\item \footnote{120} Daniel Goleman, \textit{The 'Wrong' Sex: A New Definition of Childhood Pain}, N.Y. TIMES, Mar. 22, 1994, at Cl.
\item \footnote{121} See \textit{id}.
\item \footnote{122} Goishi, \textit{supra} note 15, at 1160–61, 1163.
\item \footnote{123} Id. at 1160; Sullivan, \textit{supra} note 89, 41–42.
\item \footnote{125} Arriola, \textit{supra} note 8, at 460; Aarons, \textit{supra} note 124, at 2.
\item \footnote{126} Sullivan, \textit{supra} note 89, at 41–42.
\item \footnote{127} Id. at 41.
\item \footnote{128} Id. at 46, 47.
\item \footnote{129} Goishi, \textit{supra} note 15, at 1163.
\end{itemize}
care, custody, and control of their children is perhaps the oldest of
the fundamental liberty interests recognized by this Court."131 This
deerence to parental authority and the continuing pathologizing of
homosexuality and transgenderism mean that gender non-
conforming youth remain at great risk for the damaging effects of in-
voluntary commitment.132

IV. HYPOCRISY IN OHIO, HOPE IN MASSACHUSETTS AND MINNESOTA

A. Gender as the Last Straw in Ohio

Judicial deference to parental autonomy falls away when parents
transgress societal norms by resisting attempts to force gender non-
conforming children into a rigid two-gender mold.133 One family in
Ohio is learning first hand just how invested the state remains in
maintaining rigid gender boundaries.134 Six-year-old Aurora Lips-
comb, born Zachary, began expressing herself as a girl in behavior
and dress at two years of age according to her parents Sherry and
Paul.135 The Lipscombs are admittedly far from the stereotypical per-
fected family.136 Aurora has serious medical and behavioral problems.137
Parents Sherry and Paul face significant challenges of their own; both
are bi-polar and have been experiencing marital difficulties.138 Sherry
and Paul voluntarily began working with Franklin County Children
Services in an effort to confront these challenges.139

Sherry and Paul decided in August 2000 to allow Aurora to pre-
ent as a girl in all aspects of her life.140 The Lipscombs therefore at-

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131 Troxel, 120 S.Ct. at 2060.
132 Goishi, supra note 15, at 1163, 1175–76; see DANG, supra note 5, at 58.
133 See Cloud, supra note 12, at 90–91.
134 See id.
135 Good Morning America: Interview with Sherry Lipscomb (ABC television broadcast, Sept.
19, 2000) [hereinafter Lipscomb Interview]. There are many troubling aspects of this still
unresolved case; however, it remains true and salient that the Ohio court handling the case
reacted swiftly to remove Aurora from her home situation only when gender transgression
came into play. Cloud, supra note 12, at 90–91.
137 Id. Aurora Lipscomb has been diagnosed with Asperger’s Syndrome (which is re-
related to autism), bi-polar disorder, obsessive-compulsive disorder, and gender identity dis-
order. Id.; Lipscomb Interview, supra note 135.
138 See Cloud, supra note 12, at 90.
139 Id.
140 Id. Thus I will address her as Aurora.
tempted to enroll their child in McVay Elementary School as a girl.\footnote{id.; Encarnacion Pyle & Misti Crane, Couple Fights for Son, 6, They Say Is Girl at Heart, COLUMBUS DISPATCH, Aug. 26, 2000, at 1G.} An anonymous “tipster” notified Children Services that Aurora would attend school as a girl despite being a biological boy.\footnote{See Cloud, supra note 12, at 90.} Children Services immediately removed Aurora from her home and placed her in foster care.\footnote{Lipscomb Interview, supra note 135.} While working through the earlier Lipscomb family problems, the County never questioned the Lipscomb’s rights to retain custody of their child.\footnote{Cloud, supra note 12, at 90–91.} It was only when the Lipscombs sought to enroll Aurora in school as a girl that the state revoked custody.\footnote{See id.} It is troubling that the state trusted Sherry and Paul to handle their child’s problems as long as they conformed to societal norms.\footnote{Troxel v. Granville, 120 S.Ct. 2084, 2060 (2000); Cloud, supra note 12, at 90–91.} At the first sign of gender transgression, however, the state stepped in to challenge a long-standing tradition in the United States: the right of parents to raise their children as they wish.\footnote{See Nye, supra note 35, at 255; Goishi, supra note 15, at 1163.}

In the Lipscomb case, the state reversed its usual role of giving parents considerable autonomy in the raising of children; this reversal is telling of the gender paranoia, rigidity and anxiety deeply embedded in our legal system and institutions.\footnote{Arriola, supra note 8, at 460; see discussion supra Part III.} As seen in Part III, the state usually supports a GID diagnosis as an excuse to force therapy on the child and thereby prevent transexualism and homosexuality.\footnote{Goishi, supra note 15, at 1163.} The state usually defers to parents, even when they threaten the liberty of their children through involuntary commitment; this deference allows the further enforcement of strict gender borders.\footnote{See Troxel, 120 S.Ct. at 2060; Cloud, supra note 12, at 90–91.} However, when parents use a GID diagnosis and their parental autonomy to assist their child in transgressing gender borders, the state reaction is strikingly different and appears hypocritical.\footnote{Pyle & Crane, supra note 141, at 1G.} Children Services seems to be avoiding any discussion of gender and asserts Aurora has been wrongly diagnosed with GID.\footnote{Id.} Children Services prefers instead to belabor the “severe mental health issues” of the couple.\footnote{Id.} The Lipsombs clearly have a troubled family history filled with com-\footnote{Id.; Encarnacion Pyle & Misti Crane, Couple Fights for Son, 6, They Say Is Girl at Heart, COLUMBUS DISPATCH, Aug. 26, 2000, at 1G.}
plex issues in need of attention.\textsuperscript{154} It is possible that Aurora's GID diagnosis is premature or even wrong altogether.\textsuperscript{155} It is disturbing, however, that the family's problems were never severe enough to implicate custody until Sherry and Paul tried to enroll their child in school as a girl.\textsuperscript{156} The actions of Children Services, sanctioned by the court, show how a state will go to great lengths to keep intact the gender borders of boy and girl with no one in between.\textsuperscript{157}

The implications of this state action are profound. Aurora faces the fear and confusion of being taken from her parents and entrusted to a foster family whom she does not know.\textsuperscript{158} By allowing gender non-conformity to be the last straw to provoke taking custody of Aurora, Ohio communicates a message of intolerance and fear.\textsuperscript{159} The state action could threaten the ability of families to deal with difficult issues of gender identity on their own and to create a supportive environment for their children.\textsuperscript{160} Ohio reminds us that we are still living with rigid boy/girl roles; we do not need to return to them as Sommers urges.\textsuperscript{161}

\textbf{B. Protecting Identity in Massachusetts}

In stark contrast to the case of Aurora Lipscomb, the case of Pat Doe, an eighth-grade student in Brockton, Massachusetts, shows how the legal system can and should step in to stop the enforcement of borders harmful to transgender youth.\textsuperscript{162} Fifteen-year-old Pat Doe is biologically male but identifies as a female and has been diagnosed with GID.\textsuperscript{163} Pat began expressing her female gender identity by wearing female attire to school in 1999, but her gender expression was met with disapproval and scorn by school officials.\textsuperscript{164} School officials repeatedly sent her home to change her clothes and suspended her for

\textsuperscript{154} See Cloud, supra note 12, at 90–91.
\textsuperscript{155} See id.
\textsuperscript{156} See id.
\textsuperscript{157} See id.; Berman Interview, supra note 70.
\textsuperscript{158} See Lipscomb Interview, supra note 135.
\textsuperscript{159} See generally Cloud, supra note 12; Lipscomb Interview, supra note 135.
\textsuperscript{160} See Cloud, supra note 12, at 90–91.
\textsuperscript{161} See id.; Berman Interview, supra note 70.
\textsuperscript{163} Yunits, No. 00–1060–A, slip op. at 1. Thus I will address Pat Doe using female pronouns.
\textsuperscript{164} Id. at 2, 7.
using the girls' bathroom, which she used to preserve her safety. When school officials told Pat she could not enroll in school in Fall 2000 if she wore women's clothing, her grandmother sued.

A Massachusetts Superior Court recently found that the school's actions constituted a violation of freedom of expression and sex discrimination. The court rejected the argument that the school was simply trying to control behavior that creates discomfort for other students and thus disrupts the learning environment of the school. The court found that wearing women's clothing was crucial to Pat's identity and that the school may not punish her for expressing herself as a female. The court in this case refused to enforce adherence to rigid gender roles urged by the school by recognizing Pat's right to carve out an identity free from interference. The court recognized the importance of embracing diversity in schools and respecting each individual child. Thankfully, the court's expansive view of gender and individuality won out over the calls of the school and angry parents seeking to force Pat to dress as a boy. Upon hearing the court's decision, one mother commented, "[i]n my opinion I don't think it's right. ... If [Doe] wants to be treated fairly he should wear men's clothes to school." She even gave her son permission to beat up Pat if Pat touched him. One wonders how Sommers can fear for a society intent on feminizing boys considering the venom of such parents openly espousing violence to enforce gender borders.

C. Recognizing Gender Role Stereotyping in Minnesota

The case of Jesse Montgomery provides another example of a court recognizing and stepping in to halt discrimination against a

165 Id. at 2, 3.
166 Pfeiffer & Daniel, supra note 12, at 1.
167 Id.
168 Yunits, No. 00–1060–A, slip op. at 7, 10–11.
169 Id. at 8.
170 Id. at 6, 9.
171 See id. at 15.
172 See id.
174 Pfeiffer & Daniel, supra note 12, at 1.
175 See id.
176 See id. See generally Sommers, supra note 1.
youth persecuted for gender non-conformity. After enduring eleven years of verbal and physical abuse in the schools of one Minnesota district, Jesse brought suit under Title IX, the Minnesota Human Rights Act and the Equal Protection and Due Process Clauses of the United States and Minnesota Constitutions alleging the district failed to protect him from students who had harassed him on the basis of his gender and perceived sexual orientation.

The student harassment Jesse endured escalated over the years. His peers inflicted verbal abuse from the time Jesse began kindergarten. Jesse heard taunts of, "'faggott*[sic],' 'fag,' 'gay,' 'Jessica,' 'girl,' 'princess,' 'fairy,' 'homo,' 'freak,' 'lesbian,' 'femme boy,' 'gay boy,' 'bitch,' 'queer,' 'pansy,' and 'queen'" on a daily basis. Physical violence began in the sixth grade and worsened in high school. His peers punched and kicked him, tripped him in the halls, super-glued him to his seat, and threw objects at him. The physical harassment was also sexual in nature. Students frequently grabbed Jesse's inner thighs and buttocks. One student in particular targeted Jesse with sexually harassing physical conduct:

[O]ne of the students grabbed his own genitals while squeezing plaintiff's buttocks, and on other occasions would stand behind plaintiff and grind his penis into plaintiff's backside. The same student once threw him to the ground and pretended to rape him anally, and on another occasion sat on plaintiff's lap and bounced while pretending to have intercourse with him.

The students who physically harassed him were all male. Jesse responded to the constant tormenting by often staying home from school and by avoiding the cafeteria, the bathroom, the school bus and intramural sports. Because the district failed to respond to his

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178 See id. at 1083.
179 Id. at 1084.
180 Id.
181 Id.
182 Montgomery, 109 F. Supp. 2d at 1084.
183 Id.
184 Id.
185 Id.
186 Id. at 1084–85.
187 Montgomery, 109 F. Supp. 2d at 1084 n.3.
188 Id. at 1085.
complaints regarding the unflagging abuse, Jesse transferred school districts in the tenth grade.\textsuperscript{189}

The U.S. District Court for the District of Minnesota denied the district's motion for judgment on the pleadings and denied in part their motion for summary judgment.\textsuperscript{190} In its opinion, the court recognized the role of gender stereotyping and gender policing as discriminatory and wrong by allowing Jesse to proceed with his Title IX claim.\textsuperscript{191} While the court found the district correct in asserting that Title IX does not cover sexual orientation discrimination,\textsuperscript{192} the court found that the conduct described by Jesse was discrimination on the basis of sex that does in fact fall under the statute's rubric.\textsuperscript{193} The court recognized that his peers harassed Jesse for not conforming to their idea of masculinity; "the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy."\textsuperscript{194} The court applied reasoning from Title VII precedents to find that "discrimination based on a failure to meet stereotyped gender expectations" constitutes discrimination because of sex and therefore is actionable under Title IX.\textsuperscript{195} By refusing to accept the district's arguments that only sexual orientation discrimination was implicated by the student's conduct, the court rightly saw the nature of the conduct and interpreted Title IX more expansively to protect Jesse against harassment for gender non-conformity.\textsuperscript{196} Jesse can now proceed with his Title IX claim and thus hold the district accountable for not stepping in to prevent the harsh enforcement of the gender roles Sommers fears have vanished.\textsuperscript{197}

\textbf{CONCLUSION}

Sommers' \textit{The War Against Boys} misses the story of the real war against boys and instead supports the ongoing war being waged by schools and some courts to retain rigid gender boundaries.\textsuperscript{198} Boys

\textsuperscript{189} Id. at 1085–86.
\textsuperscript{190} Id. at 1102.
\textsuperscript{191} Id. at 1089–1093, 1098–1100.
\textsuperscript{192} Montgomery, 109 F. Supp. 2d at 1089–90.
\textsuperscript{193} Id. at 1090–93.
\textsuperscript{194} Id. at 1090.
\textsuperscript{195} Id. at 1090–92.
\textsuperscript{196} See id. at 1089–93, 1098–1100.
\textsuperscript{197} See Montgomery, 109 F. Supp. 2d. at 1089–93, 1093–96, 1098–1100. See generally Sommers, supra note 1.
\textsuperscript{198} See generally Sommers, supra note 1; Arriola, supra note 8.
who play sports and rough house, who must sit through gender equity seminars and forgo recess, are not the ones for whom society need fear. Rather, the boys who transgress accepted boundaries of maleness and experience pervasive violence, persecution and reconstruction are the ones in desperate need of society's attention.

Sommers' conclusion that schools and society must allow "boys to be boys" does not provide a useful answer to the profoundly difficult questions of how to create an environment of equality and respect in schools and society as a whole. If allowing "boys to be boys" means embracing a broader definition of boyhood and encouraging youths to explore and determine their own identity, then perhaps this old adage could transform society. Allowing "boys to be boys" could be the solution, but not if we remain faithful to Sommers' vision of a two-gender, homophobic and transphobic world that is currently embodied in our core societal institutions.

The experiences of youths like Jamie, Aurora, Pat and Jesse prove how invested schools remain in maintaining stereotypical gender roles. Schools are not on a unified mission to feminize boys and reconceptualize gender by erasing the differences between boys and girls. Gender roles are taught and policed in schools. It is unfortunate that schools remain so focused on enforcing a binary system of gender when not everyone fits into that mold. The rigid binary system leaves too many children out, unprotected and alienated when they are just as "normal" as the next kid.

Sommers' misguided beliefs about the exclusively binary nature of gender and the state of gender in our nation's schools should not cloud the reality that there are boys in need in U.S. schools. Yet, there remain many questions about how to expand ideas of gender and to protect gender non-conforming boys. Signs of hope that society can embrace a more expansive vision of gender and gender roles emerge.

199 See Arriola, supra note 8, at 448.
200 Id. at 448, 459.
202 See Arriola, supra note 8, at 469–70; Greenberg, supra note 9, at 325–27; Nye, supra note 35, at 256.
204 See Arriola, supra note 8, at 447–48, 468–70; Ruskola, supra note 43, at 271.
205 See Arriola, supra note 8, at 447–48.
206 See id. at 468–70.
207 See id.
from experiences in the family and the legal system. Increasing family awareness and support can do much to change the experiences of gender non-conforming youth.\textsuperscript{208} The family atmosphere can provide a level of emotional support critical for healthy development.\textsuperscript{209} In addition, the family can serve as a bulwark against the interest of the state in maintaining rigid and destructive gender boundaries.\textsuperscript{210} Pat Doe and Jesse Montgomery initiated lawsuits with the support of family behind them.\textsuperscript{211} Gender non-conforming youth and their families can expand how schools and the legal system view gender by fighting together against discrimination.\textsuperscript{212}

Surprisingly, it is the legal system that has begun to lead the way to expanding society's vision of gender by finding creative ways to protect gender non-conformity.\textsuperscript{213} While diagnosing children with GID wrongly pathologizes gender non-conformity,\textsuperscript{214} the story of Pat demonstrates that a GID diagnosis can help gender non-conforming youth until society embraces a more expansive vision of gender.\textsuperscript{215} A GID diagnosis has the potential to serve positive ends for gender non-conforming youth when it is used to support their plight to remain true to their self-identity.\textsuperscript{216} A GID diagnosis can serve as evidence that youth cannot live healthfully in the role assigned according to their biological sex.\textsuperscript{217} Courts are beginning to recognize the subtleties in questions of gender. The court deciding Jesse's case understood the difference between persecution for not conforming to his gender role and persecution for his perceived sexual orientation.\textsuperscript{218} The courts in the cases of Pat Doe and Jesse Montgomery recognized that these youths were being persecuted because they do not conform to society's vision of what it means to be a boy.\textsuperscript{219}

\textsuperscript{208} See Martin, \textit{supra} note 72, at 168–69, 174.
\textsuperscript{209} See id.
\textsuperscript{212} See \textit{generally Montgomery}, 109 F. Supp. 2d at 1081; Cloud, \textit{supra} note 12, at 90–91.
\textsuperscript{213} See \textit{generally Montgomery}, 109 F. Supp. 2d at 1081; Cloud, \textit{supra} note 12, at 90–91.
\textsuperscript{215} See \textit{Arriola}, \textit{supra} note 8, at 465; Denny, \textit{supra} note 115, at 9.
\textsuperscript{216} See \textit{Yunits}, No. 00–1060–A, slip op. at 2, 6; Arriola, \textit{supra} note 8, at 468–70; Goishi, \textit{supra} note 15, at 1158–59; Cloud, \textit{supra} note 12, at 90–91.
\textsuperscript{217} See \textit{Yunits}, No. 00–1060–A, slip op. at 2, 6; Cloud, \textit{supra} note 12, at 90–91.
\textsuperscript{218} See \textit{Montgomery}, 109 F. Supp. 2d at 1087, 1089–93.
\textsuperscript{219} See id. at 1090; \textit{Yunits}, No. 00–1060–A, slip op. at 10–12.
While it is encouraging that the legal system is beginning to recognize and protect gender non-conformity, schools must join in these efforts. Profound and enduring change in how gender should be viewed and how difference should be respected will not occur without major alterations to what society teaches children. Law comes in too late, after too much harm has been done, and when destructive lessons have already been learned. Schools must take the lead in allowing youth to define themselves and supporting youth as they proceed through difficult transitions. The focus must shift away from fear of divergence from the rigid gender borders Sommers espouses and toward addressing the dangerous problems of persecution, violence and isolation that threaten the very lives of gender non-conforming youth. Schools must respect the individual rather than reinforce a role and must stop ignoring the experiences and needs of countless gender non-conforming youths.

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220 See Montgomery, 109 F. Supp. 2d at 1090; Yunits, No. 00-1060-A, slip op. at 10–12.
221 See Arriola, supra note 8, at 451–53; Eisemann, supra note 22, at 160.
222 See Arriola, supra note 8, at 452, 468, 470; Greenberg, supra note 9, at 326–27.
223 See DANG, supra note 5, at 4–5; Arriola, supra note 8, at 452, 470. See generally Sommers, supra note 1.
224 See Arriola, supra note 8, at 469–70.