Stop Me If You Think You’ve Heard This One Before: The Stranglehold of the ‘Gender Fraud’ Narrative

Over the last couple of years, I have written a series of articles addressing the issue of so-called ‘gender fraud,’ and opposing criminal prosecution on this basis. As recently as December of last year, I sought to take this prosecutorial practice to task in the context of the conviction of trans man, Kyran Lee,[[1]](#footnote-1) and before that Gayle Newland,[[2]](#footnote-2) whose eight year sentence shocked the nation.

I concluded the Kyran Lee piece with an ethical call, a plea for cisgender people to protest more vociferously regarding state intrusion into the lives of trans and gender queer people on the basis of a deception claim. I entertained the hope that the next witch hunt waiting to happen might be averted. Sadly, that hope has proved forlorn. Instead, it would seem that we are, much like Bill Murray, caught in a perpetual Groundhog Day - a cis and heteronormative ground zero.

Jason (Jennifer) Staines is the latest trans man to be convicted of sexual offences on the basis of ‘gender fraud.’ On Wednesday, he was sentenced by Judge Barry Cotter, at Bristol Crown Court, to 39 months in prison. In criticising prosecution in this case, I confine my remarks to two of the three complainants, the second and third. In relation to these complainants, Staines was, according to some media reports, convicted of two and three counts of sexual assault respectively. Given that the facts suggest penetrative sex (use of a prosthetic device), some convictions might have been for the more serious offence of assault by penetration (indeed, *The* *Telegraph* reports that two charges did relate to this offence, though no indication is given as to whether such charges were confined to a single complainant).[[3]](#footnote-3) Even if Staines was not charged with the more serious offence, it would seem that he could have been on the evidence. In any event, these uncertainties make no difference to the objections to prosecution that I shall make.

Before turning to consider the prosecutions based on the facts surrounding the interactions between Staines and complainants two and three, I recognise that the first complainant was at the relevant time only 12 or 13 (there appears to be uncertainty on this point, though this age distinction is not without significance in criminal law) (Staines was 17). While it is unclear as to the offence actually charged,[[4]](#footnote-4) it is clear that Staines knowingly engaged in sexual activity with a child (it seems that this was confined to kissing), and indeed one considerably below the age of consent. In relation to this complainant, Staines was also convicted of an offence relating to indecent images of a child, though it is again unclear precisely which offence he was convicted of, or what exactly he did in relation to photographic images.[[5]](#footnote-5) This article, in no way, defends or condones Staines’ behaviour in relation to complainant one. Whether a defendant is transgender or cisgender, he is rightly prosecuted in such circumstances.

In relation to complainants two and three however, both of whom were 17 at the time of the alleged offences (Staines was 21 and 22 respectively), it is highly unlikely that prosecutions would have been brought had the defendants been cisgender. After all, in such circumstances, the only possible basis for apparently consensual sex to be challenged would be the use of a prosthetic device without the complainant’s knowledge. While conviction on this basis is possible, and perhaps legitimate even in transgender cases, it is clear that the prosecution of Staines is, like earlier cases (*R v Gemma Barker* [2012], *R v Chris Wilson* [2013], *R v Justine McNally* [2013], *R v Gayle Newland* [2015], *R v Kyran Lee (Mason)* [2015]), based on, and motivated by, the claim that the defendant performed gender in a manner at odds with ‘true’ gender identity, and that this kind of ‘deception’ is of a fundamental kind serving to vitiate consent.

In other words, we are back in familiar territory. As with previous defendants, the media have portrayed Staines as ‘posing,’ as being in ‘disguise,’ and the complainants as having been ‘duped’ or ‘tricked.’[[6]](#footnote-6) This is hardly surprising given that prosecution itself proceeds precisely from this premise. And yet, once again, the facts do not support this narrative. For, like Wilson, McNally and, most recently, Lee, Staines asserted a male identity. That is, the defendant considers himself to be a man, ‘suffering’ from gender dysphoria.[[7]](#footnote-7)

While Staines, and at least some of the defendants in the cases already referred to, are portrayed asdeceptive, we are left with an unavoidable and apparently inconvenient fact: the relevant legal gap between the complainant’s assumption regarding the defendant’s gender identity AND his actual gender identity does not exist. Rather, upon ‘discovery’ of Staines’ gender history, the complainants concluded that he was not a man because they understood ‘man’ to mean, and to be exhausted by, the class of men we now refer to as cisgender.

And here lies the problem: the CPS continue to privilege cisgender interpretations of gender in deciding whether to bring sexual offence prosecutions. What this amounts to, is an insistence that the sexual autonomy of cisgender people, even in the context of desire-led intimacy between adults, trumps the right of others to determine their own gender. In robbing transgender and gender queer people of self-definitional agency, at least in the realm of criminal law, we have produced a situation where rape becomes divorced from consent and desire, and complainant ‘distress’ becomes an after the fact experience only possible from a position of power, that is, the cisnormative and state-sanctioned power to name others, to ontologically wound. This simply will not do in a liberal society.

Accordingly, we need to challenge the idea that sexual autonomy be viewed as an absolute right. For some, this is tantamount to heresy or rape apologia. However, this is not a time for reticence, not while the attrition against trans and gender queer kids continues unabated. Sexual autonomy, as apparently understood by the CPS and by those who helped shape prosecutorial policy in this area, renders sacred the subjective experience of complainants, even to the point of denying others the capacity for self-determination. When all is said and done, being true to yourself, that is, living an authentic life in the face of a disbelieving, hostile, and frequently violent world is not, and should never be viewed as, deceptive. This is a line in the sand we simply must draw. In the meantime, let us prepare for the next, seemly inevitable, encounter between ‘deviant’ youth and the Witchfinder General.

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1. <http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud> [↑](#footnote-ref-1)
2. <http://www.newstatesman.com/politics/feminism/2015/09/theres-more-meets-eye-case-gayle-newland> [↑](#footnote-ref-2)
3. <http://www.telegraph.co.uk/news/uknews/crime/12202567/Woman-abused-three-young-girls-by-pretending-to-be-man-with-prosthetic-penis.html> [↑](#footnote-ref-3)
4. Presumably s. 9, or if the complainant were 12 years old, then perhaps s. 7 of the Sexual Offences Act 2003. [↑](#footnote-ref-4)
5. The charge was most likely, ‘Possessing an Indecent Photograph of a Child,’ contrary to s. 160 of the Criminal Justice Act 1988. [↑](#footnote-ref-5)
6. See, for example, <http://www.dailymail.co.uk/news/article-3506395/Woman-23-jailed-posing-man-called-Jason-online-sex-teenage-girls-convincing-one-victim-doesn-t-accept-duped.html> [↑](#footnote-ref-6)
7. <http://ukcriminallawblog.com/jennifer-staines-woman-jailed-for-posing-as-a-man-to-get-sex/> [↑](#footnote-ref-7)