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# **A Case of Gender Governance:**

## **The Family Court of Australia's Regulation of Young People's Gender Affirmation**

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# Abstract

Legal institutions govern gender: they shape and regulate how their subjects can be gendered and, in doing so, control how gender can manifest. This thesis interrogates how the Family Court of Australia governed gender through its regulation of young people's gender-affirming hormone use. Between 2004-2017, in Australia, people younger than eighteen needed to obtain authorisation from the Family Court before they could use hormones manually—that is, before they could use hormones other than those that their bodies produced automatically—to affirm their gender. By analysing the 76 “reasons for judgment” that judges published in response to applications for this authorisation, this thesis explicates how the Court judged the legitimacy of its subjects' manual hormone use. My analysis finds that the Court's judgments were structured by three primary categories of discourse: discourses on the ontology of gender, the epistemology of gender, and the teleology of manual hormone use. Upon interrogating each discourse in turn, I argue that the Court's judgments tethered the legitimacy of its subjects' manual hormone use to the promise that this would help them to become normatively gendered. In this way, the Court's regulation worked to ensure that subjects could only use hormones manually to avert, rather than affirm, manifestations of queerness. By launching a critique of the Court's discourses on ontology, epistemology, and teleology and the mechanism of gender governance that they enacted, this thesis contributes to the broader scholarly project of documenting and challenging the means through which States curb the possibilities for queer modes of life.

# Acknowledgements

Like all modes of knowledge production, this thesis was a collective endeavour. As such, I want to acknowledge at least a few of the many relations that made this thesis possible. Foremost, I acknowledge that I wrote this thesis on the unceded lands of the Wurundjeri people of the Kulin Nation. The Wurundjeri people are the sovereign custodians of the lands on which I live and work. That sovereignty is indelible. I pay my respects to their elders—past, present, and emerging—and extend those respects to all Aboriginal and Torres Strait Islander peoples. The time for decolonisation is now.

This dissertation was supported by an Australian Postgraduate Award and took place within a University that relies upon public funding. As such, this thesis owes its existence to public investment in critical social scholarship of this kind. In the current political climate, these kinds of investments are under threat. Yet, critical knowledge production is vital for any society's well-being. I hope that this thesis testifies to that vitality and the value of continuing to invest in it.

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# Chapter One

## *Introduction*

I am a normal, cheerful, confident girl and I know who I am. It's just that my exterior, doesn't mirror my interior. I want my body to develop alongside my peers, and I want my body to match who I really am; a girl. It is simple, however it frustrates me deeply that I have to go to court *to be who I am*. It frustrates me that anyone has to endure this. It shouldn't be the court's decision. It is my body, and only I have the right to decide what goes into it. It is acceptable for my family or the experienced doctors to advise me, but in the end, it should all be up to me. However, this right has been taken completely out of my hands. Not only have I experienced much anxiety about almost going into male puberty 4 years after I started puberty blockers, but I have absolutely no control over my body. It is you that has control, so I implore you to let me start [hormone] treatment. Then, *I can be who I am*, without this worry hanging over me.

— Jamie in *Re Jamie*<sup>1</sup>

<sup>1</sup> *Re Jamie* (2015) ¶84. All emphasis in quotes from Court judgments is mine. Judgments cited in footnotes will refer only to the name of the case unless it is necessary to use the publication year to differentiate between multiple cases of the same name. The full citation details for all cases cited are listed in appendix one. Each case is labelled conventionally with reference to a pseudonym that represents the subject concerned. The Family Court uses pseudonyms to protect the anonymity of the young people that it engages with. In this case, the Court gave Jamie permission to identify herself as the subject of these cases if she wished to. She has thereafter identified herself as Georgie Stone (see further R. Robertson 2019).

Subjectively, we ask: Who can I become in such a world where the meanings and limits of the subject are set out in advance for me? By what norms am I constrained as I begin to ask what I may become? . . . Another way of putting this is the following: “what, given the contemporary order of being, can I be?”

— Judith Butler (2004b, 57–58)

In Australia, between 2004 and 2017, people younger than eighteen years of age needed to obtain the Family Court’s authorisation before they could use hormones manually to affirm their gender.<sup>2</sup> This meant that young people could only use hormones other than those that their bodies produced automatically once they had applied to the Family Court and convinced it to declare that their desire to do so was legitimate. Jamie, in the quote above, gives a powerful account of what this regulation held at stake. Jamie was one of the first young people to apply for this authorisation, and this quote comes from an affidavit that she submitted to the Court upon her third attempt at doing so. There, she condemned the Court’s regulation as an injunction upon her ability to *be* a girl. Jamie was already a girl, of

<sup>2</sup> I use the term “gender affirmation” in a broad sense to signify practices that assert, and in doing so enact, ways of *being* gendered (for a general discussion of this concept, see Sevelius 2013). Meanwhile, I use the terminology of “manual hormone use” to refer to the practice of acquiring and introducing synthetic hormones to a body that does not produce those hormones automatically. I have made this distinction for a few reasons. First, hormones participate in the constitution of gendered bodies and subjectivities regardless of whether they are introduced to the body manually or arise in it automatically (Oudshoorn 1994; C. Roberts 2007; Irni 2013; 2017; R. Lane 2009; Gill-Peterson 2014; C. Roberts and Cronshaw 2017; Jordan-Young and Karkazis 2019). It is important to emphasise this to avoid perpetuating the misconception that it is only those who use hormones manually that use hormones to affirm their gender. Moreover, people who inhabit many different identities and bodily configurations use hormones manually and automatically to affirm their gender. This point matters because the misconception that those who use hormones manually are exceptional is often cited to delegitimise and dehumanise those who engage in this practice (Garrison 2018). Yet this point also matters in the context of this thesis because it was specifically the *practice* of manual hormone use that the Court was regulating rather than any particular category of persons who might engage in that practice. Indeed, the population of young people that applied to the Court for authorisation to use hormones manually inhabited a diversity of identities and bodily configurations and as such to talk about this group of people as necessarily sharing anything other than a desire to engage in this practice would be to erase this diversity.

course: she insisted that she *is* a girl and that she *knows* she is a girl, and rebuked any suggestion that the Court could change that. The problem, as Jamie identified it, was not that the Court had the power to determine *whether* she was a girl. Rather, the problem was that the Court had the power to control *how* Jamie could be a girl. The problem was that Jamie could not be the *kind* of girl that she wanted to be without the Court's approval. "It frustrates me deeply," she wrote, "that I have to go to court *to be who I am* . . . It shouldn't be the court's decision . . . It should all be up to me."

This thesis interrogates the power that Jamie confronted in her affidavit—that is, the power that the Court wielded, through its regulation of manual hormone use, to control how its subjects could *be* gendered. In the coming chapters, I examine *how* the Court enacted this mode of control, delineate which kinds of gendered beings the Court sought to realise, and challenge the discursive mechanisms it used to regulate gender *via* its arbitration of manual hormone use. By way of introduction, this chapter recounts the history and legal architecture of the Court's regulation of manual hormone use and discusses the factors that motivated my examination of it. My analysis then unfolds substantively from chapter two, where I develop a framework for conceptualising the power that the Court wielded in these cases as a manifestation of what I call *gender governance*.

## Background: The Legal Architecture of Gender Governance

The Family Court's regulation of young people's gender-affirming manual hormone use came into effect in 2004 as a consequence of *Re Alex*.<sup>3</sup> This case concerned thirteen-year-old Alex, who had been assigned female at birth and wanted to use testosterone manually to affirm his identity as male. In Australia, a medical

<sup>3</sup> Hormones can be used for many different purposes (Oudshoorn 1994; C. Roberts 2007; R. Lane 2009; Irni 2013). Oestrogen, for instance, is commonly used for contraception and to alleviate the symptoms of menopause. However, the legal regulations that I am concerned with in this thesis were only concerned with the manual hormone use for gender affirmation. This meant, for instance, that young people with bodies that could produce oestrogen automatically did not have to seek Court authorisation to use synthetic oestrogens for contraceptive purposes.

prescription is required to access this class of hormones.<sup>4</sup> So, before Alex could acquire them, he had to meet with medical practitioners, obtain a diagnosis of “gender identity disorder” (now also known as “gender dysphoria”), and receive clinical approval to use hormones as a means to ‘treat’ that condition. Yet Australian Family Law rendered Alex, then thirteen years of age, too young to authorise his own ‘medical treatment.’<sup>5</sup> Typically, Alex’s parents would have held the power to authorise medical treatment on his behalf. However, Alex was a ward of the state, and the Department of Health and Community Services, acting as his legal guardian, was uncertain whether it could authorise this kind of ‘medical treatment’

<sup>4</sup> Australian law regulates hormones like testosterone and oestrogen as prescription medicines (see the Therapeutic Goods Administration website, <https://www.tga.gov.au/how-therapeutic-goods-are-regulated-australia>). To obtain a prescription to use hormones for gender affirmation a person must be willing and able to successfully navigate onerous, gender normative, and pathologising medical and psychiatric assessments (for discussion, see Spade 2003; Latham 2017b; 2017a; 2019; Davy 2015; Sennott 2011; Lev 2006; Inch 2016; Butler 2004b; Ault and Brzuzy 2009; Davy, Sørlie, and Suess Schwend 2018; Drescher 2015; Suess, Espineira, and Walters 2014; Suess Schwend et al. 2018; Yost and Smith 2014). Since the publication of the fifth edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) in 2013, “gender dysphoria” is the schema that medical professionals in the anglophone world use most often to conceptualise this kind of pathology (Duschinsky and Mottier 2016). Yet during the period examined in this thesis (2004–2017) the diagnostic categories advanced by the American Psychiatric Association in the DSM shifted. For this reason the Court uses different terminology at different points in time. Gender dysphoria evolved from the preceding category of “gender identity disorder,” which was first defined in the third edition of the DSM (American Psychiatric Association 1987) and persisted in the fourth (American Psychiatric Association 1994). The shift to gender dysphoria, which shifts the object of pathologisation from its subjects’ identity to an experience of distress that is associated with that identity, came about after substantial intra-disciplinary debate among psychologists and psychiatrists as well as external pressure from activists and advocates (Drescher 2010; 2015). The other dominant diagnostic framework cited in these cases comes from the tenth edition of the World Health Organization’s (1994) *International Classification of Diseases* (ICD-10) which included the categories of “transsexualism” and “gender identity disorder.” These categories have subsequently been replaced in the eleventh edition (ICD-11) by categories of “gender incongruence” (World Health Organization 2018).

<sup>5</sup> The *Family Law Act* 1975 grants parents the power and responsibility to consent to medical treatments on behalf of their children except in circumstances where that child has developed sufficient ability to make their own decisions. A young person’s ability to consent to their own medical treatment has been determined in common law by the standard set in a 1985 House of Lords (UK) decision entitled *Gillick v West Norfolk and Wisbech Area Health Authority*. This decision held that a person under the age of eighteen can authorise their own medical treatment in circumstances where a medical practitioner assesses that “he or she fully comprehends the nature and consequences of the procedure proposed.” This is commonly referred to as “*Gillick* competence” and is generally considered to arise around the age of sixteen (Telfer et al. 2017, 17; Cave 2014). See Swain (2012) and Nicholson and Harrison (2000) for an overview and history of the Family Court of Australia and the Family Law Act.

on his behalf. As such, the Department asked the Family Court to clarify its authority, and *Re Alex* arose thereafter.<sup>6</sup>

In *Alex*, the Court responded to the Department's query by classifying manual hormone use as part of a special class of medical procedures that are always beyond the power of parents/guardians to authorise on a child's behalf. Chief Justice Nicholson made this designation by citing an earlier High Court decision known as "Marion's case."<sup>7</sup> Marion's case set a precedent regarding the limits of parental powers to consent to medical procedures on their children's behalf. It involved "Marion," a 14-year-old intellectually disabled child who was under her parent's full-time care. Marion's parents asked that the Court declare it lawful for them to consent to Marion's sterilisation (hysterectomy and ovariectomy) on her behalf or grant judicial authorisation in the alternative. Marion's parents argued that sterilisation was needed to stop Marion's menstruation, which was causing her significant psychological distress, and to prevent unwanted pregnancy, which they believed Marion would find traumatic. The High Court responded by declaring that a parent could not consent on their child's behalf to medical procedures that were "non-therapeutic," "irreversible," and where there is a "likely possibility of a wrong decision being made." The Court thus declared that judicial authorisation must be sought for any such "special medical procedures."

Nicholson's decision in *Alex*, by framing manual hormone use as a "special medical procedure" per the designation offered in Marion's case, instituted a requirement that young people obtain the Court's authorisation before they use hormones manually to affirm their gender. This authorisation could come in one of two forms. First, the Court could establish that the applicant had the capacity to consent to this 'treatment' themselves—what the common law describes as "*Gillick* competence"—in which case the Court's responsibility to arbitrate decision-making

<sup>6</sup> For a more comprehensive discussion of *Alex*, see Eithne Mills (2004).

<sup>7</sup> *Re Alex* ¶152-3, 176. The formal title of "Marion's case" is *Department of Health & Community Services v JWB & SMB*.

would abate.<sup>8</sup> Or, alternatively, the Court could declare that manual hormone use was in an applicant’s “best interests,” in which case the Court would be satisfied that the ‘right decision’ was being made. Alex was able to convince the Court of the latter, and as such, the Court authorised him to use hormones manually thereafter.<sup>9</sup>

The Court’s decision in *Alex* was eventually challenged by Jamie and her family several years later. They first applied to the Court for authorisation to commence gender-affirming ‘treatments’ in 2011 when Jamie was ten years old. In doing so, they submitted one of the first applications for this authorisation since *Alex*.<sup>10</sup> Jamie and her family brought an application to the Court because her body had begun to produce testosterone and the prospect of her body changing as a result was causing her immense distress. As such, her parents, with guidance from a team of medical practitioners, decided to commence gender-affirming medical treatment in line with international best practice guidelines.<sup>11</sup> This meant that she was to begin passage through a three-stage model of treatment, where “stage one” involves hormone suppression from pubertal onset, “stage two” involves hormonal gender affirmation from age 15-16, and “stage three” involves surgical procedures, which practitioners typically offer from age 18.<sup>12</sup>

<sup>8</sup> The Family Court’s role in arbitrating hormone “treatment” was grounded in its *parens patriae* (‘parent of the nation’) or “welfare” jurisdiction. This jurisdiction gives the Court the power to act as the ultimate guardian of any child’s wellbeing and to make orders that supersede the interests of other parties in the best interests of the child. A declaration of *Gillick* competence displaces the Court’s *parens patriae* jurisdiction and authorises the applicant to use hormones manually because in this circumstance the Court does not have the responsibility or jurisdiction to intervene as the child is able to exercise their own capacity to consent.

<sup>9</sup> This was in-line with the medical standard of not commencing hormones until around the age of sixteen (Telfer, Tollit, et al. 2018; World Professional Association for Transgender Health 2011). The judgment records “that when Alex is older, the question of whether the analogue is administered alone or in combination with testosterone is a matter for the treating clinicians and, of course, Alex.” *Re Alex* ¶242.

<sup>10</sup> Between *Alex* and *Jamie* there were four applications to the Court for authorisation to use hormones manually for gender-affirmation: *Re Brodie*, *Re Bernadette*, *Re O*, and *Re Rosie*.

<sup>11</sup> This three-stage model was instituted as standard practice in Australia in accordance with international *Standards of Care* (World Professional Association for Transgender Health 2011, 10–20; The Harry Benjamin International Gender Dysphoria Association 2001, 9–11). This model was eventually adapted in Australian *Standards of Care* in 2017 (Telfer et al. 2017).

<sup>12</sup> According to the Australian *Standards of Care*, puberty suppression is prescribed to “relieve[] distress for trans adolescents by halting progress of [unwanted] physical changes” while “the adolescent is given time to develop emotionally and cognitively prior to making decisions on

Jamie's parents first applied to the Court in *Re Jamie* (2011) to request the power to consent on Jamie's behalf to stages one and two. The Court assessed that stage one was in Jamie's best interests at the time and as such authorised its administration. The Court refused to authorise stage two, however, stating that it could not yet determine Jamie's best interests regarding this form of treatment because Jamie, then ten years old, would not progress to that stage for several years. Thus, with Jamie not yet able to demonstrate *Gillick* competence, and with her best interests not yet determinable, Jamie and her family were told that they would have to re-apply for authorisation to administer stage two several years later.

Jamie's parents appealed the Court's decision in *Re Jamie* (2011) to the Full Court of the Family Court in *Re Jamie* (2013). They argued that Nicholson erred in *Alex* by classifying gender-affirming treatments as a "special medical procedure" that was outside parental powers to authorise. On this basis, they argued that the Court did not have the jurisdiction to intervene in these matters.<sup>13</sup> The Court agreed regarding stage one, conceding that puberty-blockers are within the scope of parental powers to authorise because they do not carry a "significant risk" that a "wrong decision" might be made.<sup>14</sup> It justified this assertion on the basis that

gender affirming hormone use which have some irreversible effects" (Telfer et al. 2017, 15). Stage one is usually prescribed from pubertal onset, and clinicians often monitor their patient's pubertal status to ascertain when pubertal suppression should be commence. For stage two, meanwhile, the Australian *Standards of Care* state that the aim is "to feminise or masculinise a person's appearance by inducing onset of secondary sexual characteristics of the desired gender" (Telfer et al. 2017, 16). Professional guidelines typically recommend that this stage of 'treatment' begins around the ages of 14-16, which is when medical practitioners generally consider young people to be able to give informed consent (Telfer, Tollit, and Feldman 2015; Nahata, Chelvakumar, and Leibowitz 2017). When deciding whether to recommend hormone use, medical practitioners are advised to take into account "the nature of the history and presentation of the person's gender dysphoria, duration of time on puberty suppression for those undertaking stage one treatment, co-existing mental health and medical issues and existing family support" as well as "the biological, psychological and social costs to the adolescent of delaying treatment" (K. R. Craig and Biro 2011). Stage three, or surgical procedures, might include chest ("top") and/or genital ("bottom") surgeries. Medical practitioners sometimes offer chest surgeries during adolescence but usually postpone genital surgeries until adulthood (World Professional Association for Transgender Health 2011, 58-61; Telfer et al. 2017, 25; Milrod 2013; Colebunders, De Cuypere, and Monstrey 2015, 228-29).

<sup>13</sup> This is a concise overview. For more detail on the legal architecture of these cases and the arguments delivered, see the analyses provided by Strickland (2014), Kelly (2014b; 2014a), Bell (2015), Parlett and Weston-Scheuber (2004), and Eithne Mills (2004).

<sup>14</sup> *Re Jamie* (2011) ¶193.

puberty-blockers are “for the treatment of a malfunction or disease” and are “reversible” in their effects.<sup>15</sup> The Court reaffirmed its position regarding stage two, however, maintaining that Court authorisation must remain for manual hormone use because it is “irreversible” in its effects and there is a “significant possibility of a wrong decision being made” where “the consequences of a wrong decision are particularly grave.”<sup>16</sup> This decision meant that Jamie and her family would have to apply to the Court a third time, once Jamie could conclusively demonstrate *Gillick* competence. Jamie and her family eventually submitted this application in 2015 when Jamie was fifteen years old. Finally, in this case, Jamie won the Court’s authorisation, demonstrating to it that she indeed had the capacity to consent to this ‘treatment’ herself.

In the years following *Jamie*, the Court’s role in arbitrating young people’s manual hormone use received extensive criticism in the public sphere. The young people and families who were forced to apply to the Court condemned it for imposing a tremendous financial burden upon them, and for forcing them to undergo a distressing, stigmatising, disempowering, and demeaning experience (Kelly 2016; Telfer, Kelly, et al. 2018; M. Williams, Chesterman, and Grano 2014; J. Hughes 2017; Australian Human Rights Commission 2015, 47; Riggs, Bartholomaeus, and Sansfaçon 2020). On these grounds, Jamie and her mother, identifying themselves as Georgie Stone and Rebekah Robertson respectively, developed a public platform to criticise the Court’s role in arbitrating young people’s manual hormone use and to campaign for legislative reform to end its oversight.<sup>17</sup> Many of the medical and legal professionals that were assisting young people in

<sup>15</sup> Re Jamie (2011) ¶179.

<sup>16</sup> Re Jamie (2013), ¶196. Jamie’s parents also questioned whether the capacity to consent could be determined by medical practitioners instead of the Court, but the Court held that its conception of risk extended to decisions regarding “the child’s capacity to consent to the treatment” and therefore that only the Court would be able to make such determinations.

<sup>17</sup> Rebekah has recounted her experiences surrounding the *Jamie* cases as well as of becoming a public advocate in a memoir (R. Robertson 2019). In the years following *Jamie*, Rebekah and Georgie appeared in numerous current affairs programs and print media specials to advocate for the rights of trans and gender diverse young people and to call for the Court’s oversight to be removed (Cohen and Scott 2014; Steve Jackson 2016; “Australian Story: About A Girl” 2017; Sargeant 2016; A. Phillips 2017; Atkinson 2016; Sainty 2016; Jenan Taylor 2016; Kermond 2015; G. Stone 2017; Telfer, Kelly, et al. 2018; McVeigh 2016; Lavigne 2017).

applying for Court authorisation also condemned this process as redundant, onerous, and detrimental to the well-being of the young people in their care (Telfer, Tollit, and Feldman 2015; Telfer, Kelly, et al. 2018; J. Hughes 2017). The Australian Human Rights Commission (2015, 47–49) echoed these criticisms in its report on sexual orientation and gender identity rights. Meanwhile, scholars subjected the Court’s decisions in *Jamie* and *Alex* to jurisprudential, philosophical, as well as social and political critique (E. Mills 2004; Kelly 2014a; 2014b; 2016; J. Hughes 2017; Bell 2015; Strickland 2014; M. Williams, Chesterman, and Grano 2014; Marsh 2013; Kennedy 2008; Nakata 2015; Costello and Duncan 2006; Atkins 2005a; Baron 2005).

Several Family Court judges also denounced the Court’s role in arbitrating manual hormone use in their official commentary upon such cases.<sup>18</sup> In *Re Flynn*, for instance, Justice Berman described the requirement that young people obtain a Court order to authorise their manual hormone use as “a time consuming, expensive and stressful hurdle in the path of young people who are seeking [medical] treatment.”<sup>19</sup> Justice Tree wrote a lengthy and evocative criticism of the Court’s arbitration of manual hormone use in his judgment in *Re Lucas*, calling “for statutory intervention in order to undo the consequences of *Re Jamie*.”<sup>20</sup> Rebuking the requirement that young people apply to the Court for authorisation, Tree asked:

What other section of our youth is required to endure such an ordeal to attain the corporeal manifestation of their identity? What purpose is there in making them and their loved ones do so, particularly at such a fraught time of their lives? . . . As if the general turmoil and challenges which being a teenager in our modern world generates are not enough, the additional burden of requiring an already vulnerable and highly-marginalised group to individually litigate to vindicate their identity seems inhumane. No other group of adolescents is required to do so.

<sup>18</sup> In addition to the statements quoted below, see Justice Berman in *Re Flynn* ¶24–28; Justice Bennett in *Re Martin* ¶11–12, *Re Harley* ¶11, 42–45, and *Re Tahlia* ¶11; Justice Cronin in *Re Shay* ¶13; Justice Watts in *Re Logan* ¶6–16, and Justice Tree’s comments throughout *Re Lucas*.

<sup>19</sup> *Re Flynn* ¶15.

<sup>20</sup> *Re Lucas* ¶73.

Having already traversed a far more difficult path than many of their peers, it can only serve to further increase their burden.<sup>21</sup>

The Court eventually retracted its role in arbitrating manual hormone use in *Re Kelvin* (2017). *Kelvin* began as an ordinary case regarding one young person's request for authorisation to use hormones manually. However, *Kelvin* assumed greater significance when it was referred to the Full Court of the Family Court by the presiding Justice Watts.<sup>22</sup> Watts, while delivering his judgment on *Kelvin*, noted several inconsistencies in the delivery of orders in similar cases. On this basis, he raised multiple questions of law that, in his view, required clarification from the Full Court. Within his array of questions, Watts implored the Court to reconsider the procedural nature of its intervention as well as whether its oversight was necessary at all. The Full Court responded by declaring that it would no longer claim the power nor the responsibility to arbitrate whether a young person could use hormones manually in all but exceptional circumstances.<sup>23</sup> The Court justified this reassessment by arguing that "legally relevant factual differences" had arisen since *Jamie*, including "advances in medical science regarding the purpose for which the treatment is provided, the nature of the treatment, and the risks involved in undergoing, withholding, or delaying treatment."<sup>24</sup> Justices Thackray, Strickland, and Murphy, summarising their position, wrote:

<sup>21</sup> *Re Lucas* ¶10, 4.

<sup>22</sup> Watts referred this case to the Full Court as a 'case stated.' A case stated is an unusual legal procedure in which a Family Court judge refers a case to the Full Court of the Family Court in the event that "a question of law arises which the Judge and at least one of the parties wish to have determined" before the case is resolved (*Family Law Act* 1975, s.94a). A case stated functions somewhat like an appeal but is initiated by a judge before a decision is made rather than by a party to the case in the aftermath of a decision.

<sup>23</sup> The Court declared that it could not intervene in circumstances where "the child consents to the treatment and the parents and the medical practitioners are in agreement." *Re Kelvin*, headnote. However, the Court maintained that it had a role to play "where there is a genuine dispute or controversy as to whether the [hormone] treatment should be administered; e.g., if the parents, or the medical professionals are unable to agree." *Re Kelvin*, ¶167.

<sup>24</sup> *Re Kelvin* (2017), headnote. Justices Thackray, Strickland, and Murphy elaborate further on this position later in the judgment, writing that "It is readily apparent that the judicial understanding of Gender Dysphoria and its treatment have fallen behind the advances in medical science . . . *Re Jamie* can be viewed as being decided at a particular point in time, and at a particular stage in the development of legal principle, and even more importantly of medical science. It would not be heresy to suggest that, in relation to stage 2 treatment, *Re Jamie* would be decided differently today." *Re Kelvin* ¶152, 165.

[W]hy should the family of a child in one wing of the Hospital be forced to come to court before recommended medical treatment commences when the family of a child in another wing of the Hospital is not required to do so, in circumstances where both forms of treatment carry a significant risk of making the wrong decision as to a child's capacity to consent and with both forms of treatment the consequences of a wrong decision are particularly grave[?] . . . The issue we must determine is whether the law should now require such a filter in cases of Gender Dysphoria, when no such filter is required in most cases involving other medical conditions.<sup>25</sup>

On this basis, the Court claimed that it could now depart from its earlier decision in *Jamie* and consider manual hormone use to be a standard medical procedure that does not require judicial orders to authorise.<sup>26</sup>

## Project Outline

In this thesis, I will argue that the Family Court's regulation of young people's gender-affirming manual hormone use was a mechanism of *gender governance*. As I will explain in detail in chapter two, this means that I consider the Court's regulation of manual hormone use to be one instance, among many, where a governing institution worked to control how its subjects could *be* gendered and, as such, how gender *itself* could manifest. As such, three primary aims animate this thesis. First, this thesis aims to establish a theoretical basis for analysing such a mode of regulation as an instrument of gender governance. Second, it aims to interrogate the mechanics of this particular mode of gender governance: that is, to delineate how the Court governed gender through its regulation of manual hormone use, to reveal

<sup>25</sup> Re Kelvin ¶116, 119.

<sup>26</sup> This argument means that *Kelvin's* emancipatory effects depend upon the ongoing pathologisation of young people's manual hormone use. Much has been written about the harms that arise from the use of pathologisation to legitimise manual hormone use (Spade 2003; Butler 2004b, chap. 4; Lev 2006; Burke 2011; Sennott 2011; Suess, Espineira, and Walters 2014; Davy 2015; Inch 2016; Latham 2017b; Davy, Sørli, and Suess Schwend 2018). I discuss this literature and its significance for these cases in more detail in chapters five and six.

the boundaries that it constructed to arbitrate the possibility and legitimacy of different modes of being gendered, and to expose the mechanisms through which it sought to enforce those boundaries. Finally, it aims to provide a critique of these machinations and the restraints that they engendered.

The Court's regulation governed gender by affecting which subjects could use hormones manually and the conditions under which they were able to do so. In this sense, the Court's regulation governed gender in a range of ways. It governed gender, for instance, by enacting a range of barriers that inhibited, if not prevented, its subjects from using hormones manually in their youth. These barriers arose because a viable application to the Court required a subject to have a vast array of social, emotional, and financial resources at their disposal (Marsh 2013; Strickland 2014; Kelly 2016; Telfer, Tollit, and Feldman 2015; Telfer, Kelly, et al. 2018; Riggs, Bartholomaeus, and Sansfaçon 2020). For instance, to apply to the Court, a young person needed to be willing and able to secure the support of their parents/guardians to do so, to be willing and able to secure the approval of medical practitioners to use hormones manually, as well as to have access to the social and financial capital necessary to obtain legal representation. They also needed to be willing and able to endure the social and emotional burden that an application to the Court entailed. All of these barriers are extremely difficult to traverse and each carries a unique set of regulatory conditions and liabilities (Kelly 2016; Telfer, Kelly, et al. 2018; Riggs, Bartholomaeus, and Sansfaçon 2020). These barriers were insurmountable for most young people, and hence most young people were denied, either tacitly or otherwise, the ability to use hormones manually in their youth.<sup>27</sup> Accordingly, the Court rendered most young people unable to manifest the forms of gender that those hormones might have helped them to realise. Yet, the importance of these governing effects notwithstanding, this thesis does not examine the modes of governance that the Court enacted by *denying* its subjects the ability to use hormones manually.

<sup>27</sup> Or, to be more precise, denied the ability to use hormones manually *legally* in their youth. There have been accounts of young people acquiring hormones illegally because they were not able to access the Court (Kelly 2016, 125; Telfer, Kelly, et al. 2018, 1097; Cohen 2016; Steve Jackson and Berkery 2017).

Instead, my investigation concerns the modes of governance that it enacted by regulating which kinds of gendered beings its subjects could *affirm* through manual hormone use.

Thus, my analysis focuses on how the Court governed gender in the manner that it authorised, rather than prevented, manual hormone use. Instead of examining the governing effects that arose from the Court's efforts to *impede* its subject's ability to use hormones manually, this thesis examines how the Court governed through the conditions that it constructed to *allow* manual hormone use to occur. In this way, my analysis is concerned with how the Court's regulation governed gender by controlling which kinds of gendered beings could come into being through manual hormone use. It examines how the Court governed gender by regulating how it could manifest *through* manual hormone use. In this sense, it is concerned with the *constitutive* effects of the Court's regulation—that is, the control it exerted over gender's *creation*—rather than merely the repressive or oppressive effects that it inflicted upon gendered beings that were already existing. This mode of analysis is pertinent because the Court authorised *all but one* of the young people that applied to it to use hormones manually.<sup>28</sup> This point bears repeating: *only one* of the young people that applied for the Court's authorisation to use hormones manually had their application denied entirely. However, as I will show throughout the chapters to come, the Court only ever authorised its subjects to use hormones manually

<sup>28</sup> The Court declined to authorise manual hormone use in three cases: *Re Jamie* (2011), *Re Jamie* (2013), and in *Re Jan*. As noted earlier, Jamie was eventually successful in achieving authorisation to use hormones manually in *Re Jamie* (2015). Jan was the only young person who applied to the Court but never received authorisation. In *Re Jan*, Justice Gill held that there had been insufficient evidence presented to the Court to confirm the existence of gender dysphoria and therefore to authorise its treatment in the form of gender-affirming hormones. Gill summarised (¶21-22): "I have at best, a hearsay recital in the broadest of terms of a person who had the primary responsibility of bringing the diagnosis and the only person with the apparent qualifications to diagnose, and that is Dr K. I have no affidavit from Dr K and no report from Dr K. In circumstances where the endocrinologist attributes this primary role of diagnosis to the psychiatrist and I do not have that before me, I am not prepared to make the key finding that is foundational to the treatment. In the absence of the evidence of the psychiatrist, I am unable to make the key finding that is necessary, and that is that Jan suffers from gender dysphoria, and so the evidence, as presented before me on the application, was insufficient to establish the case." Jan did not apply to the Court a second time. Yet, having been seventeen years and eleven months of age at the time of her hearing, Jan may have gone on to authorise her own 'medical treatment' upon turning eighteen shortly thereafter.

according to strict and normative criteria. As such, this thesis interrogates the criteria that the Court constructed to determine the legitimacy of its subjects' manual hormone use. These criteria, I will argue, worked to ensure that only certain kinds of gendered subjects were able to use hormones manually, and ensure that subjects could only use hormones manually to manifest certain kinds of gendered beings. My contention, as such, is that the Court's authorisation of manual hormone use functioned as an instrument of gender governance—working to shape how subjects could *be* gendered and thus how gender could manifest—even while it presented as benevolent and facilitative.

In setting out to interrogate how the Court governed gender *affirmatively* in this sense, this thesis seeks to answer two key questions. The first is descriptive. It asks: under what conditions did the Court allow its subjects to use hormones manually? In asking this question, this thesis seeks to identify the criteria that the Court used to judge the legitimacy—and thus arbitrate the possibility—of its subject's manual hormone use. The second question is expository and follows from the first. It asks: how did the conditions that the Court constructed to arbitrate manual hormone use govern gender? To ask how these conditions governed gender is also to ask: how did those conditions affect the kinds of gendered beings that manual hormone users could *be*? What ways of being gendered did the Court allow its subjects to realise through manual hormone use? Or, inversely, what kinds of gendered beings did these conditions work to prevent, if not eliminate? And, in effect, how did these conditions affect the way that gender could manifest?

## **Rationale**

By interrogating the Family Court's regulation of young people's gender-affirming manual hormone use as a *case of gender governance* I am working to advance the broader project of feminist, queer, and trans critique. Critique, generally conceived, is a mode of inquiry that aims to both describe how power is organised and enacted as well as diagnose the inequitable or harmful social conditions that arise from particular expressions of power (see Kellner and Lewis 2007). Morris (2011, 499)

describes critique in these terms as a social and political project that works to reveal “the processes and conditions of domination and oppression, guided by the human interest in liberation.” Hence, critique does not intend merely to observe social reality but also sets out to understand how social forms are realised, to identify the processes that underpin their manifestation, and most importantly, to evaluate the relations that they produce. As Alvesson and Sköldbberg (2009, 144) attest, critique involves “critically disputing actual social realities” rather than simply bearing witness to them.

The imperative to critique arises from the confluence of three interdependent arguments (see Kellner and Lewis 2007; Morris 2011). First, that the social world is structured by power relations that can be configured unjustly and have the capacity to harm. Second, that scholarship is a social practice that emerges from, takes place within, and is involved in (re)producing that structure. And third, that if social research cannot be separated from but is instead engaged in constructing the world that it studies, and if that world is riven by unjust power relations, then social research ought to work to interrogate and rearrange those power relations to operate more justly. As such, the telos of critique, or the end that motivates its undertaking, is the production of knowledge about pathological social structures that can be used to challenge or transform those structures. As Morris (2011, 498) put it, critique “does not treat [harmful social] conditions as factual ‘givens’ but rather as circumstances to be abolished.”

Feminist, queer, and trans scholars take up the imperative to critique in relation to gendered power relations specifically. They do so because gender is one of the most dominant apparatuses of social organisation and control (Acker 1992; Lorber 1994; Risman 2004; P. Y. Martin 2004; R. Connell 1987; Butler 2004b). Gender structures subjectivities, life-courses, institutions, and social orders. In doing so, gender stratifies the possibility and livability of different modes of life (Butler 2004b). Gender is also entangled with and involved in producing myriad forms of violence and domination, manifesting across multiple ontological strata. For this reason, feminist, queer, and trans scholars use critical modes of inquiry to explicate gendered arrangements of power and to diagnose their role in enacting gendered

harms, inequalities, and modes of social control (Ramazanoğlu and Holland 2011; M. Ball 2014; Stryker 2006).

Feminist, queer, and trans scholars share a similar critical project in this respect.<sup>29</sup> They all strive to expose, as well as develop strategies to disrupt, the processes that unevenly distribute the possibility and livability of different modes of life along gendered lines. They all work to identify and challenge the mechanisms that regulate how subjects can *be* gendered, confine subjects to certain modes of being gendered, and arbitrate the possibilities that inhere in the modes of gendered life that they sanction, if not enforce. And, they all labour to reveal and contest the structures that constrain life *through* gender: that is, the structures that support lives that denote proximity to gender's normative centre and that work to impede if not render impossible modes of life that exceed those normative boundaries. In doing so, feminist, queer, and trans modes of critique strive toward a similar end: a world that is more livable with, through, or without gender. They advance, either tacitly or explicitly, upon the promise that critique will help to destabilise the regulatory mechanisms that force subjects to live out certain modes of gendered life and that restrict their possibilities for living otherwise. And they hope, in turn, that that destabilisation might help to ameliorate harm, realise change, affirm difference, and bring about more just futures. In this sense, feminist, queer, and trans modes of critique are simultaneously deconstructive and affirming: they are spurred to depose the strictures of the present by the promise of the new (see Muñoz 2009; Ahmed 2017).

This thesis works to advance a critical project of this kind on multiple fronts. Centrally, by interrogating the Family Court's regulation of manual hormone use as a *case of gender governance*, this thesis joins with a chorus of feminist, queer, and trans

<sup>29</sup> That is, despite their diverse and often fiercely contested ontological, epistemological, and axiological foundations (Bettcher 2019; see Namaste 1996b; 2009; Stryker 2004; 2006; 2007; Romero 2009; Marinucci 2010; Bettcher 2007; 2014; Namaste 1994; Heyes 2003; S. Stone 2006; Whittle 2006b; R. Connell 2012; A. Enke 2012b; Awkward-Rich 2017; Ahmed 2016; Hines 2019; Chu and Drager 2019; C. Williams 2020). In making this point my intention is not to efface the significant and ethically consequential differences between different paradigms of feminist, queer, and trans thought but to establish this project as advancing a coalitional agenda—just as the scholars that I cite above have done.

scholars whose work aspires to challenge gender normativity. Yet, by offering a fine-grained analysis of this specific legal regime, this thesis makes a unique contribution toward these ends. It promises insight into the architecture of this particular governance mechanism, to be sure. But in doing so, this thesis also promises to deliver a blueprint that charts how gender governance can operate as well as the processes through which it can come into being and carry out its ends. The Court's regulation of manual hormone use was one site where the possibility and permissibility of different forms of gendered life were regulated, and it is, therefore, a site where the mechanisms involved in that regulation can be studied. An analysis of the Court's regulation is an opportunity to observe how gender governance can be achieved, how mechanisms of gender governance can be formulated, and how they can work to control how subjects can be gendered. I hope that this blueprint will prove useful for tracking the operation of gender governance in other contexts as well. In this sense, this thesis aspires not only to expose and challenge this particular governing mechanism but also to provide resources for identifying and challenging similar mechanisms at work beyond this case's purview.

While there is a panoply of governing mechanisms that warrant analysis, the Family Court's regulation of manual hormone use commands my attention for several reasons. First, while it was in play, the Court's regulation was one of the most powerful and prominent examples of a state-legal institution using its regulatory capacities to manage its subjects' possibilities for gendered life. One way to illustrate this point is to observe the devastating effects that this regulation inflicted upon those that had to navigate it (Kelly 2016; Telfer, Kelly, et al. 2018; M. Williams, Chesterman, and Grano 2014; J. Hughes 2017; Australian Human Rights Commission 2015, 47; R. Robertson 2019; Riggs, Bartholomaeus, and Sansfaçon 2020). The young people and families who had the means to apply for the Court's authorisation have described that process as brutal in its emotional, social, and economic effects. They have also condemned the Court for dispossessing them of the power to make decisions about *who* and *how* they were able to be, and for illegitimately claiming that power as the State's prerogative. Moreover, while the Court's oversight was in place, the public sphere fielded stories about the harms that

the Court wreaked upon those that wanted to use hormones manually but were structurally denied the opportunity to apply for its authorisation to do so (Tollit et al. 2019; Telfer et al. 2017; Riggs, Bartholomaeus, and Sansfaçon 2020; Kelly 2016). By making manual hormone use inaccessible, the Court made inaccessible a practice that can be vital for some people's well-being, self-actualisation, and in many cases, for their survival (Giordano 2013; 2014; Abel 2014; Drescher and Pula 2014; Strauss et al. 2017, 58–59; Olson et al. 2015; Durwood, McLaughlin, and Olson 2017; Priest 2019). The Court's regulation of manual hormone use also caused harm by constructing manual hormone use as illegitimate until proven otherwise and thus by stigmatising those that wanted to engage in that practice as abnormal, risky, and in need of the state's supervision (Kelly 2016; Riggs, Bartholomaeus, and Sansfaçon 2020). These points highlight that the Court's regulation of manual hormone use had a powerful impact on those that it affected. In doing so, they also highlight the need for that institution to be subjected to critique. As Butler (2004a, xii) suggests, the event of injury brings with it the responsibility to "reflect upon injury, to find out the mechanisms of its distribution." This is to say that harm carries an ethical demand to understand how it was enacted so that those processes can be redressed and so that we can "start to imagine a world in which that violence might be minimized" (Butler 2004a, xii).

The prominent position that the Court's regulation of manual hormone use held in public discourse also demonstrates that an interrogation of it is salient. Throughout its operation, the Court's regulation was embroiled with—and in many ways came to metonymise—a broader set of contestations over which kinds of gendered beings there ought to be, the processes through which they ought to manifest, and the relations they ought to enact. The Court's regulation, along with its germinal issue of young people affirming a gender other than that which they were assigned at birth, has occupied a central position in debates regarding same-sex marriage, for instance. During the Australian government's national postal opinion survey on same-sex marriage in 2017, the conservative "no" movement weaponised trans and gender non-conforming young people in its campaign materials by depicting them as a deplorable and inevitable consequence of a society

that drifts from normative heterosexuality (Gerrard 2020; Law 2017; A. L. Stone 2018; Gray, Reimers, and Bengtsson 2020). Similar rhetoric arose in the controversy surrounding the national sexuality and gender-focused education and anti-bullying program entitled “Safe Schools.” Conservative critics of “Safe Schools” accused it of peddling a morally corrupt “radical gender ideology” which, in their view, amounted to “rainbow indoctrination,” and aimed to propagandise young people into adopting non-normative gender and sexual identities and practices (Law 2017; Carden 2019; McKinnon, Waitt, and Gorman-Murray 2017; Wescott 2020; J. D. Thompson 2019). This rhetoric has found a voice in contemporary feminist debates regarding the legitimacy of gender-affirming care for young people as well (Serano 2019).<sup>30</sup>

In Australia, young people’s use of gender-affirming technologies has also been a significant site of contestation in itself. Indeed, the Australian public sphere has been saturated with commentary on the topic in recent years. The bulk of this commentary has come from conservative pundits who have accused medical professionals and parents of forcing gender-affirming technologies on young people against their will (for example, see Bye 2019; Devine 2017; Josh Taylor 2019; Sydney Morning Herald 2020). In 2019, for instance, the conservative broadsheet newspaper *The Australian* published a series of editorials on “Gender Issues” that promulgated “concerns” regarding gender-affirming medical care and a suite of other legislative changes that sought to recognise trans and gender diverse identities (for example, see *The Australian* 2019; B. Lane 2019a; 2019b; 2019c; Urban 2019; Moore 2019). These articles attacked the medical system for giving young people access to gender-affirming hormones, including with inflammatory headlines such as “Gender

<sup>30</sup> Some of the cases that I analyse in this thesis have received direct attention in these debates. For instance, Jeffreys (2006) described Nicholson’s decision in *Re Alex* to allow manual hormone use as “judicial child abuse.” Jeffreys reasoned that this was an apt way to describe this case on account of it causing “irreversible changes in the girl child’s body that will harm her physical and mental health and are likely to lead to social and emotional isolation.” I will not engage directly with Jeffreys’ view on these cases nor on issues of gender identification. Nor will I engage substantively with similar arguments leveraged by self-identified “gender critical” feminists. There is a wealth of literature that has already engaged with and refuted these arguments and I would direct any interested reader to these works instead (Serano 2007; S. Stone 2006; A. Enke 2012b; Bettcher 2016; Heyes 2003; Whittle 2006b; R. Connell 2012; McQueen 2016b; C. Williams 2016; 2020; Ahmed 2016; Hines 2019).

Reassignment? They're Castrating Children" (Oriel 2019). This commentary was fearmongering and wilfully misinformed, yet nonetheless compelled the federal Minister for Health Greg Hunt to ask the Royal Australasian College of Physicians to conduct "a national inquiry into the safety and ethics of medical treatment for the rising number of trans-gender-identifying children and adolescents" (Tomazin 2020).

These controversies over trans and gender non-conforming young people and their access to gender-affirming technologies are international in scope. In recent years, trans and gender non-conforming young people have been subjected to unprecedented visibility and scrutiny throughout the West (Meadow 2018; Travers 2018). In her ethnographic work on trans children, Meadow (2018, 2–3) observes that "from medical journals to neuroanatomy labs, from mainstream magazines to personal parenting websites, from churches to college classrooms . . . doctors, psychiatrists, politicians, parents, and journalists are all talking about transgender children." This amplification of attention has been so intense that Drager (in Chu and Drager 2019, 104) went as far as to declare that "We are in the era of the trans child." There has been an avalanche of media attention regarding trans and gender non-conforming young people, stoking both fascination and fear (Kelso 2015; Owne 2016; Lovelock 2017b). At the same time, the number of young people who are receiving medical care for "gender dysphoria," and who are pursuing medically-assisted gender affirmation, has risen exponentially throughout the West and continues to rise (Tollit et al. 2019; Chen, Fuqua, and Eugster 2016; H. Wood et al. 2013). It is perhaps now more possible than ever to *be* a trans and/or gender non-conforming child. Yet, at the same time, that positionality is perhaps more fiercely contested than ever.

These controversies over trans and gender non-conforming young people are part of a much broader set of struggles that are currently being waged over the legitimacy and possibility of different modes of gendered life. There are similar discourses at work in the rise of international "anti-gender" movements, for instance (Case 2019). Enlivening these movements, Pope Francis wrote an open letter in 2016 that decried what he called "gender ideology," sought to reassert the exclusive

possibility of two genders, and sought to demonise those that neglected to conform to such definitions (Vaggione 2020). “Anti-gender” movements, promulgating Francis’ agenda, are enjoying increasing levels of success worldwide, and the contestations that animate them have come to play a significant role in constituting, reinforcing, or undermining state authority (Corredor 2019; Morán Faúndes 2019; Butler 2019b; 2019a; Case 2019; Vaggione 2020; Martinsson 2020). In recent years, conservative and right-wing political parties across the world have incited and leveraged opprobrium toward gender non-conforming people to consolidate political power and have used that power to marginalise gender non-conforming people further. And again, similar rhetoric has experienced a resurgence within certain quarters of feminist discourse (Ahmed 2016; Hines 2019; C. Williams 2020).

The Family Court’s regulation of manual hormone use should also be seen as a reflection of a global trend toward the intensification of legal regulations regarding trans, gender diverse, and gender non-conforming people. Many of these legal regulations concern gender-affirming technologies specifically (International Bar Association 2014). There is an abundance of legal mechanisms around the world that tightly control access to gender-affirming technologies, especially for young people, and similar governing mechanisms to the one that I study in this thesis are coming into being, if not intensifying in their regulatory reach, at present.<sup>31</sup> Yet there are numerous other examples of this trend as well. In the United States, there have been a plethora of legal contestations regarding trans, gender diverse, and gender non-conforming people’s access to bathrooms (Wuest 2019; Fleming 2018; Bader 2018). Additionally, between 2017–2020 the Trump administration enacted several

<sup>31</sup> For instance, in December 2020, the High Court of the United Kingdom handed down a judicial review of the legality of gender-affirming medical treatments in *Bell v Tavistock*. The Court declared that there was significant uncertainty regarding whether minors could consent to gender-affirming medical care and thus that they may need to seek authorisation from the Court before being able to commence these ‘treatments.’ This decision may lead to a mode of legal regulation that is nearly identical to the one that I study in this thesis. Indeed, the High Court’s decision relied upon the same common law conception of young people’s capacity to consent to medical treatment that the Family Court of Australia relied upon, namely the *Gillick* standard. Similar ordinances have been emerging in other jurisdictions as well. For instance, as of 2020, at least five states in the USA have debated bills that propose to make it illegal for medical practitioners to prescribe or carry out gender-affirming care for minors (*The Economist* 2020a; 2020b).

executive orders that sought to erase or denigrate the existence of trans people. For instance, the Trump administration banned trans people from serving in the military (McIntosh and Hellman 2019; Embser-Herbert 2020; Coppola 2020). It also dismantled Obama-era affordances that made it possible for the State to recognise its subject's gender identity as different from their sex assigned at birth (E. L. Green, Benner, and Pear 2018; B. Williams 2019). Similar ordinances passed in Hungary in 2020 to prevent citizens from changing the gender marker listed on their birth certificates and other identification documents (Milton 2020). Meanwhile, in the United Kingdom, there have been acrimonious debates surrounding proposed revisions to the Gender Recognition Act which would emphasise self-identification as grounds for trans and gender diverse people to obtain legal documentation that affirms their gender (Miles 2018). These debates have also played out in Australia in 2019 when proposed changes to remove gender from birth certificates in some states became a national election issue that was fiercely opposed by the incumbent Prime Minister Scott Morrison (Australian Associated Press 2018; Castricum 2018).

States have intensified their regulation of trans, gender diverse, and gender non-conforming lives through a range of 'inclusive' legal arrangements as well. In recent years, states around the world have advanced a range of policy agendas that seek ostensibly to enfranchise trans, gender diverse, and gender non-conforming people. In the context of the United States, Taylor, Lewis, and Haider-Market (2018) have called this shift "the remarkable rise of transgender rights." Internationally, an increasing number of countries have debated if not passed legislation to protect and recognise trans and gender diverse people, including anti-discrimination legislation and legislation that makes it possible to obtain legal recognition for a gender other than that which was assigned at birth (Chiam, Duffy, and Gil 2017). There have also been shifts in international law to recognise and protect trans and gender diverse people, exemplified foremostly by the development and expansion of the Yogyakarta Principles (Otto 2015; O'Flaherty 2015). Each of these shifts has expanded the legal boundaries that regulate the legitimacy and possibility of different modes of gendered life. In doing so, each shift has enhanced the safety and viability of lives lived at the edges of those boundaries. However, critical legal and trans scholars have

also pointed out that the regulatory instruments that advance such ‘inclusive’ agendas nonetheless promulgate a range of discourses and practices that constrain how subjects can be gendered (Beauchamp 2019; H. F. Davis 2017; Spade 2015; 2012; Whittle 2002; Currah 2003; Currah, Juang, and Minter 2006). Thus, even while the 21st century has been, as Ellison et al. (2017, 162) suggests, “characterized by the scaling up of legal protections, visibility, rights, and politics centred on transgender people,” it has also been a time when legal regulations governing the legitimacy and possibility of different modes of gendered life have proliferated and intensified.

When the Court’s regulation of manual hormone use is understood as part of this broader context, it becomes clear that it was not a discrete entity but an expression of a diffuse set of social and political conditions that very much remain in play. The contestations that I have just outlined illustrate that although this particular mode of legal regulation is no longer in effect the forces that produced it are enduring if not expanding in influence. The Court’s regulation of manual hormone use was one instance, among many, where a state institution was involved in contesting the legitimacy and possibility of different modes of being gendered, and where that contestation centred upon the lives of trans, gender diverse, and gender non-conforming people. In this way, the Court was one node of an extensive network of governing institutions. Its regulation of manual hormone use was always part of a much broader set of relations, entwined with, wrought by, and involved in constituting a much larger whole. Indeed, as I will show, many of the discourses that animated the Court’s machinery of governance circulate in other regulatory settings as well. Hence, the Court’s regulation of manual hormone use is important to examine not only because of the power that it wielded on its own terms or the harms that it inflicted as a result. It is also important to examine because it was a powerful conduit for a much broader set of governing dynamics. As such, the analysis that I offer here endeavours to speak not only about the governing dynamics that animated this particular mechanism but also to speak *through* this case study about the range of governing dynamics that surrounded and flowed through it. The Court’s regulation of hormone use may have been only one stitch in a vast tapestry of

regulatory arrangements. But, by picking at this stitch, I hope to help trigger a broader set of unravellings.

## Chapter Summary

My analysis of how the Family Court governed gender through its regulation of young people's gender-affirming manual hormone use will unfold over five chapters to come. As a first step toward realising this end, chapter two develops a conceptual framework for identifying the phenomenon that I am calling gender governance. To do this, I synthesise insights from feminist, queer, and trans literatures to conceptualise the nature of gender and to formulate a theory of how gender can be governed. I then situate my concept of gender governance in relation to feminist and queer legal, socio-legal, and criminological scholarship to outline how legal institutions like the Family Court can act as gender governance mechanisms.

Chapter three builds upon the conceptual foundations laid in chapter two by developing a methodology to investigate *how* the Court governed gender through its regulation of manual hormone use. To do this, I first outline the case study research design that I developed to structure my analysis before detailing how and why I chose to conduct a discourse analysis of judicial "reasons for judgment" as a way to study how the Court arbitrated its subjects' manual hormone use and as such governed their gender. In this chapter, I also describe the critical legal theoretical framework that informed my approach to reading these texts and give an overview of the "toolbox" of discourse analysis techniques that I utilised in my analysis. At the end of this chapter, I also install an important ethical framework to structure the critique that I offer of the Court's reasons for judgment in the proceeding chapters.

In chapters four through six, I unpack the details of the analysis that I carried out based on the methodology that I outlined in chapter three. Overall, these chapters analyse how the Court judged the legitimacy of its subjects' manual hormone use, the conditions that these judgments imposed upon their subjects' ability to use hormones manually, and as such, the nature of the mechanism of gender governance that the Court constructed therein. My analysis reveals that the

Court drew from a narrowly circumscribed inventory of criteria—which is to say that the Court recited the same discourses repeatedly through its judgments—to legitimise manual hormone use in each of the seventy-six cases that I analysed. The Court used three primary categories of discourse to arbitrate the legitimacy of its subjects' manual hormone use. These categories consisted of (1) statements about the *ontology* of gender—that is, about what gender *is*, (2) statements about the *epistemology* of gender—that is, about how the Court could secure *knowledge* about gender, and (3) statements about the *teleology* of manual hormone use, through which the Court constructed the realisation of a normatively gendered subject as the outcome that justified and legitimised manual hormone use.

Collectively, these discourses on ontology, epistemology, and teleology were the three key elements that constituted the Court's machinery of governance. By circumscribing the conditions under which the Court's subjects could use hormones manually, these discourses worked to ensure that only certain kinds of subjects could use hormones manually and that only certain kinds of gendered subjects could emerge as a consequence. This means that these discourses worked to control which possibilities for being gendered were realisable through manual hormone use, and as such, to control how gender itself was able to manifest. As such, chapters four, five, and six each address one of these categories in turn. In each chapter, I describe the key discourses that comprised each of these categories and show how each of those discourses contributed to the Court's machinery of gender governance.

Chapter four focuses on the Court's ontology of gender. It examines how the Court used assertions about what gender *is* to arbitrate the legitimacy of its subjects' manual hormone use. There, I show that the Court legitimised its subject's manual hormone use on the basis of two kinds of ontological claims: (1) that gender is an essence, and as such that a subject should be able to use hormones manually to corporeally affirm that essence, and (2) that gender is a practice, and that a subject should be able to use hormones manually to secure the intelligibility of their gendered practice. These claims contributed to the Court's machinery of governance in the same way, their incommensurability notwithstanding, as both claims were invested in the production of subjects whose genders were transparent,

incontrovertible, and most importantly, unchanging. In this way, the Court's discourses on ontology, in both permutations, worked to ensure that its subjects could only use hormones manually to affirm rather than challenge the apparent immutability of their gender.

Chapter five focuses on the Court's epistemology of gender. It examines how the Court used assertions about the origin, nature, validity, and possibility of knowledge about gender to arbitrate the legitimacy of its subjects' manual hormone use. There, I show that the Court required its subjects to demonstrate two different kinds of knowledge as a condition of legitimacy: "introspective knowledge," which consisted of knowledge that a subject had generated about their gender through reflexive self-examination, and "extrospective knowledge," which consisted of knowledge that spectators had generated about that subject's gender 'from the outside.' The Court required its subjects to prove valid introspective and extrospective knowledge simultaneously as a condition of having their manual hormone use authorised. Each kind of knowledge exerted a unique set of governing effect, instituting modes of self-governance and social governance respectively. Yet they also governed collaboratively, because both discourses on epistemology worked to ensure that subjects could only use hormones manually to affirm a form of gender that in some sense they were already *known* to be.

Chapter six focuses on the Court's teleology of manual hormone use. It examines the assertions that the Court made regarding the 'ends' that manual hormone use could accomplish and how the Court used those assertions to arbitrate the legitimacy of its subjects' manual hormone use. There were six key 'ends' that, in the Court's view, legitimised manual hormone use: (1) mental health, (2) happiness, (3) assimilation, (4) sexuality, (5) adulthood, and (6) mind-body alignment. In interrogating each of these ends, I challenge the Court's argument that they represented neutral conceptions of 'the good' and show instead how they were each invested in the production of a gender normative subject. As such, by tethering the legitimacy of manual hormone use to its promise to achieve these ends, the Court ensured that its subjects could only use hormones manually as a means to achieve gender normativity.

By interrogating these discourses and the conditions that they constructed to arbitrate manual hormone use, this thesis aims to identify which kinds of gendered subjects the Court sought to manifest and as such to delineate which kinds of gendered subjects it sought to prevent or eliminate. It is in this way that this thesis intends to show how the Court's regulation of hormone use functioned as a mechanism of gender governance. As such, I argue that even while the Court used its discourses on ontology, epistemology, and teleology primarily to *legitimise* its subjects' manual hormone use—given that the Court authorised its subjects to use hormones manually in all cases but one—this practice of legitimation simultaneously produced alternative modes of manual hormone use as illegitimate. Thus, I argue that when the Court asserted that manual hormone use was legitimate according to specific ontological, epistemological, and teleological precepts the legitimacy that it conferred was premised upon the construction of certain forms of gender as real and desirable and the rejection of others as unreal, impossible, unworthy, or undesirable. As I have said, this argument builds upon a long history of feminist, queer, and trans work that has revealed and challenged governance mechanisms like this in the past. To begin, then, I will take that history as my point of departure in the next chapter.



# Chapter Two

## *Gender Governance*

This chapter develops my concept of gender governance. In chapter one, I said that this thesis aims to interrogate how the Family Court of Australia governed gender through its regulation of young people's gender-affirming manual hormone use. As a first step toward accomplishing this end, this chapter draws from a range of disciplinary literatures to conceptualise gender governance, first by synthesising a notion of what gender is, and second, by theorising how gender can be governed. In the first section, I turn to feminist, queer, and trans theories to help me conceptualise gender as a mode of being that is socially located, regulated, and enacted. Then, in the second section, I engage further with feminist, queer, and trans literatures to argue that gender can be, and is, governed by institutions that regulate how it can be enacted. To elaborate, I survey the vast field of research concerned with tracing and challenging the forces involved in the production and regulation—that is, the governance—of gender. Given that my case study examines legal power specifically, in this section I pay particular attention to feminist, queer, and trans legal, socio-legal, and criminological insights. Upon formulating a general conception of gender governance and tracing the various ways gender governance has been studied, this chapter demonstrates how this thesis emerges from and contributes to a broad field of inquiry concerned with describing and challenging institutional modes of gender governance.

## Gender

The meaning of the term ‘gender’ shifted and expanded substantially in the 20<sup>th</sup> century. Until the mid-20th century, ‘gender’ was used almost exclusively to refer to masculine and feminine grammatical forms (Janssen 2018, 2149; Meyerowitz 2008, 1353; J. W. Scott 1986, 1053). In the mid-20<sup>th</sup> century, however, ‘gender’ began to be used to describe the masculine and feminine attributes of persons.

‘Gender’ was first used to describe a feature of human beings in medical, psychiatric, and sexological discourses in the United States in the 1950s (Repo 2016). Meyerowitz (2002, 99–100) has shown how this conception of gender emerged first from debates between scientists studying intersexuality as a way to describe an individual’s deeply rooted sense of “psychological sex.” The psychologist and sexologist John Money was the first to use gender in this way (Meyerowitz 2002; Repo 2016). At the time, Money was developing clinical programmes aimed at the social integration and surgical normalisation of intersex children. He developed his concept of ‘gender’ because he needed a way to refer to “all those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively” (Money 1955, 15; see also Money and Ehrhardt 1972). As such, Money and his colleagues formulated “gender” as a way to conceptualise and classify the psychological and behavioural characteristics that they considered most appropriate for persons of a given biological sex. Money wrote that he chose the term gender “so as not to confuse the sex of the genitalia and their activities with nonerotic and nongenital sex roles and activities that are prescribed culturally and historically” (Money 1973, 398). Accordingly, Money did not conceive of gender as a natural mode of being but as a socially achieved disposition that was not reducible to or caused by biological forces. Gender, in Money’s use, thus referred to a mode of social practice that conformed to the norms and expectations attached to a subject’s assigned sex. This formulation was important for Money and his colleagues because it functioned to support and strengthen the various regimes of normalisation and control that they had designed to maintain those norms (Janssen 2018; Meyerowitz 2008; Repo 2016, chap. 1; Fausto-Sterling 2000; Kessler 1998).

The psycho-medical formulation of gender has been instrumentalised as a tool for social control since its inception. As Meyerowitz (2002, 100) notes in her history of transsexuality, the conceptual apparatus of 'gender' was foundational to the emergence of a paradigm, spearheaded by Money and his colleagues, of "conservative clinical treatment that attempted to contain unconventional gender behaviour and dispel the uncertainties concerning sex." In this context, gender worked in service of clinical interventions that aimed to ensure the 'correct' socialisation and integration of 'patients' whom clinicians feared might otherwise manifest a 'deviant' form of gender. Gender provided clinicians with a language and schema with which to conceptualise the ideals that their interventions could aspire to achieve. In this way, gender was centrally involved in the creation and operation of regulatory mechanisms that worked to ensure the realisation of those ideals. Observing gender's development in this setting, Repo (2016, 24–25) argues that gender "emerged as an apparatus of biopower." For Repo (2016, 24–25), "gender was born in the clinic" *specifically* "to discipline the reproduction of life," and as such was always-already "embedded in [...] logics of social control."

Robert Stoller's (1968) work, which was the first to propose a distinction between gender and sex, exemplifies how gender was instrumentalised for normalisation. Stoller introduced the term "gender identity" to psychiatric discourse and established the first "gender identity" clinic in the United States. Meyerowitz (2002, 100) writes that Stoller's clinic explicitly "aimed to reinforce the traditional norms of gender in children who defied them." She explains (Meyerowitz 2008, 1354):

Stoller was not a feminist. In fact, he worried about the erosion of gender roles and the developmental disturbance of "gender identity," the new term he coined for "psychological sex." He and his colleagues . . . worked to instill masculinity in feminine boys and femininity in masculine girls. If gender was mostly socially constructed, then someone, they reasoned, had to repair it when it was improperly built.

In the 1970s and 1980s, feminists began to develop an analogous articulation of gender as an institutionally mandated mode of being (Firestone 1970; Oakley 1972;

A. Dworkin 1974; G. Rubin 1975; Kessler and McKenna 1978; West and Zimmerman 1987; MacKinnon 1987; R. Connell 1987). However, feminists at this time used the term ‘gender’ to challenge the processes of normalisation and control that sexologists had coined it to reinforce (Repo 2016, chap. 1). Simone de Beauvoir (1953) laid the groundwork for feminist conceptualisations of gender in *The Second Sex*. de Beauvoir argued against the notion that one’s *being* of a given gender (although she did not use that term) was natural or inevitable but the *effect* of adhering to the socially determined conditions of what a man or woman could be (see further Butler 1986). This is a point that she captured in her now-famous assertion that “One is not born, but rather becomes, a woman” (de Beauvoir 1953, 301). de Beauvoir thus stated that one’s status as a man or woman is not an inevitable feature of biological difference but a continuous process of *becoming* that is socially rendered. In the succeeding years, feminists inspired by de Beauvoir’s anti-essentialist stance began to use the term gender to describe the process of “becoming” that she had discerned. In this context, gender came to function as a way to name and criticise “socially constructed sex differences” the hegemonic system of social relations that mandated and hierarchised different modes of being for men and women and distributed social, political, and economic resources accordingly (Meyerowitz 2008, 1353).

These debates culminated in a feminist (re-)theorisation of the sex/gender distinction which Stoller had inaugurated. Feminists defined “sex” as the ostensibly innate biological differences between men and women and distinguished this from “gender” which they used to refer to the social construction and hierarchisation of those differences (Meyerowitz 2008; Vigoya 2016). Gayle Rubin (1975, 179) argued, for instance, that feminists ought to label fixed biological difference sex and use gender to describe the “socially imposed division of the sexes.” Gender then came to service feminist conceptualisation of gender “roles”—a term describes the range of behaviours and attitudes that are generally considered acceptable, appropriate, or desirable for people based on their actual or perceived sex (Vigoya 2016). On this point, radical feminists like Kate Millett argued that the different characters of male and female subjectivity could be accounted for as “the sum total of the parents’, the peers’, and the culture’s notions of what is appropriate to each gender by way of

temperament, character, interests, status, worth, gesture, and expression” (Millet 1970, 31). Implicit in these conceptualisations was the notion that gender is a socially classified as well as mandated mode of being that subjects are trained to enact through coercive socialisation practices.

In many ways, the early feminist and sexological formulations of gender were structurally similar. Both discourses used the term gender to describe a behavioural and psychological disposition that was considered appropriate or desirable for people of a given sex. Feminists and sexologists also agreed that this disposition was neither natural nor inevitable but needed to be learned, practised, and enforced institutionally. They disagreed, however, on gender’s desirability. While sexologists deployed gender mostly as an instrument to service the production of normatively gendered subjects, feminists used gender as an instrument to diagnose and disrupt it. The feminist position was based on the assessment that hierarchical power differentials were embedded in and reproduced by the creation of masculine and feminine gender roles. On this basis, feminists identified the production of gender as a process that emerged from and reinforced patriarchal power relations (MacKinnon 1987; A. Dworkin 1974; Firestone 1970; R. Connell 1987; Bartky 1990).

Gender thus became a vital conceptual tool in feminist scholarship and activism. In second-wave feminist theory, for instance, the sex/gender distinction helped feminists to *refute* the sexist claim that power inequalities between men and women are derived naturally from biological differences (Oakley 1972; G. Rubin 1975; Firestone 1970). Gender also helped feminists of this era to track how scientific and popular discourses on biological sex are mobilised to naturalise gendered hierarchies. And, gender helped to reveal how the masculine and feminine gender “roles” that men and women occupy are produced through processes of socialisation rather than the products of nature.

Feminist scholarship since the 1970s has continued to develop its account of the social production of gender. Predominantly, these developments have been informed by and mirrored advances in broader theories of social construction. In the late 1970s, for instance, Kessler and McKenna (1978) formulated in their influential ethnomethodological account of how gender is enacted through symbolic

attribution. Gender, as Kessler and McKenna's show, is a property that is *ascribed* to subjects through interpretive acts, rather exclusively generated or contained within those acts. West and Zimmerman (1987) advanced the notion that gender is an "interactional achievement" further in their ethnomethodological work on gender, introducing the idea that gender is a kind of "doing." They summarise their argument as follows:

[We] propose an ethnomethodologically informed, and therefore distinctively sociological, understanding of gender as a routine, methodical, and recurring accomplishment. We contend that the "doing" of gender is undertaken by women and men whose competence as members of society is hostage to its production. Doing gender involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine "natures." When we view gender as an accomplishment, an achieved property of situated conduct, our attention shifts from matters internal to the individual and focuses on interactional and, ultimately, institutional arenas. In one sense, of course, it is individuals who "do" gender. But it is a situated doing, carried out in the virtual or real presence of others who are presumed to be oriented to its production. (West and Zimmerman 1987, 126).

As such, in West and Zimmerman's view, gender ought to be understood as "an emergent feature of social situations" and *not* as "a property of individuals." For them, gender is "both as an outcome of and a rationale for various social arrangements, and as a means of legitimating one of the most fundamental divisions of society" (West and Zimmerman 1987, 126). These conceptualisations of gender as socially constructed have continued to be influential in feminist work in the 21<sup>st</sup> century. Since, there has been an abundance of scholarship dedicated to tracing the processes involved in the social production of gender as well as to evaluating the effects that arise from those modes of production (see further Messerschmidt 2009; R. Connell 2009; C. Connell 2010; Westbrook and Schilt 2014).

Judith Butler's (1999; 1993; 2004b) theory of gender as performative has been particularly influential in feminist theory since the 1990s and is the primary influence on the way that I conceptualise gender here. Butler builds upon the social constructionist theories of gender that preceded her, rejecting in tandem the notion that gender is a natural property of human beings. Butler agrees, as well, that gender is an emergent feature of social practice and relations. Butler also sees gender as a kind of activity: it is, in her view, something that human beings *do* rather than are. Butler's account is specific, however, in how it theorises the nature the practices that produce it.

Butler explains that the power of actions to produce gender is due to their performative properties, specifically. Drawing on the concept of performativity articulated in speech-act theory (J. L. Austin 1975; Derrida 1976), Butler (1999, 179) argues that human beings enact gender by citing—through their speech, behaviour, styles of dress and presentation, and so forth—socially and historically established norms. It is the ongoing citation of such norms that, for Butler, produce gender by order of signifying “the illusion of an abiding gendered self.” Butler thus sees gender as constituted through signification—that is, by performing one's being in ways that are culturally coded as expressing it. In this sense, Butler argues that being a given gender is fundamentally an interpretive accomplishment.

Butler thus accounts for the production of gender as a combined achievement of action and discourse. This means that gender is not a universal, natural, or immutable phenomenon. Instead, it is an effect produced by the conduct and interpretation of performative acts rendered through a socially and historically specific “grid of cultural intelligibility” (Butler 1999, 194). This grid structures the legibility of a subject's acts as expressions of a preceding gendered self. Explaining further, she writes that “Such acts, gestures, enactments, generally construed, are performative in the sense that the essence or identity that they otherwise purport to express are fabrications manufactured and sustained through corporeal signs and other discursive means” (Butler 1999, 173). For Butler, then, gender does not exist except as an effect of the practices that enact it, as well as the symbolic norms that those practices cite. In this way, Butler's work extends earlier feminist theorisations

of gender because it understands gender as the effect rather than the cause of social action.

Citation alone cannot produce gender, however. Instead, in Butler's view, gender requires *constant* and *repetitive* citation to actualise. As she states, "performativity must be understood not as a singular or deliberate 'act,' but, rather, as the reiterative and citational practise by which discourse produces the effects that it names" (Butler 1993, 2). One of the ways that she develops this point is to pick up on the notion of becoming that de Beauvoir (1953, 267) presented in her claim that "One is not born, but rather becomes, a woman." In considering this statement, Butler (1999, 143; see further 1986) discerns that:

[I]f gender is something that one becomes—but can never be—then gender is itself a kind of becoming or activity, and that gender ought not to be conceived as a noun or a substantial thing or a static cultural marker, but rather as an incessant and repeated action of some sort.

In this sense, there is no *being* to gender, only a perpetual *becoming* that is realised through action. As such, Butler argues that gender only emerges when a subject's repetition and reiteration of gendered norms allow a sense of stability, permanence, or essence to appear. She describes gender accordingly as the effect of "a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance" (Butler 1999, 43–44). Gender, then, is not an essence, substance, or 'thing' in Butler's view, but an emergent property of "*sustained* social performance" the legibility of which depends upon prevailing discursive norms.

Butler's theory thus holds that gender does not have a fixed ontology. This is because human beings cannot be inherently or immutably gendered if gender is an effect that depends upon the performance of culturally and historically mediated signifying practices. Moreover, if gender is contingent upon practice then it cannot have a discrete, homogeneous, or universal form. This is because if gender is contingent upon practice then its nature will change depending upon the nature of the practices that produce it as well as the nature of the schema invoked to give those practices meaning.

Gender also cannot have a fixed ontology because it requires constant reiteration. As Butler (1993, 2) explains, gender's dependence upon repetition means that the production of gender "is never quite complete." Moreover, making use of Derrida's (1976; 1978) concept of iterability, Butler (1993, chap. 3) clarifies further that the citation of gender norms, as is the case with citations in general, cannot perfectly recreate but can only ever simulate the norms that govern its actualisation. In her view, "bodies never quite comply with the norms by which their materialization [as gendered] is impelled" (Butler 1993, 2). This bears relevance for the ontology of gender. If the nature of gender depends upon the significations that enact it, and if those significations can only ever be approximate, then those significations will necessarily remake gender over time. Accordingly, Butler (1993, 94) notes that:

[P]erformativity cannot be understood outside of a process of iterability, a regularized and constrained repetition of norms. And this repetition is not performed by a subject; this repetition is what enables a subject and constitutes the temporal condition for the subject. This iterability implies that "performance" is not a singular "act" or event, but a ritualized production, a ritual reiterated under and through constraint, under and through the force of prohibition and taboo, with the threat of ostracism and even death controlling and compelling the shape of the production, but not, I will insist, determining it fully in advance.

Importantly, Butler stresses that a performative conception of gender does not posit that gender is a characteristic or effect of individuals. Instead, one of the points that Butler has emphasised throughout her oeuvre is that gender is necessarily and fundamentally social. This means that gender cannot be reduced to an individual or personal practice, identity, or experience. She offers multiple reasons for this. First, she suggests that gender does not actualise as the effect of *any* set of actions but only actions that reproduce and cite culturally available norms. And norms, as Butler points out, are inherently social phenomenon; they are instituted, negotiated, and reproduced through the regulation and repetition of social interactions. As she writes (Butler 2004b, 7):

One only determines “one’s own” sense of gender to the extent that social norms exist that support and enable that act of claiming gender for oneself. One is dependent on this “outside” to lay claim to what is one’s own. The self must, in this way, be dispossessed in sociality in order to take possession of itself . . . Indeed, individuals rely on institutions of social support in order to exercise self-determination with respect to what body and what gender to have and maintain, so that self-determination becomes a plausible concept only in the context of a social world that supports and enables that exercise of agency.

As such, for Butler, gender “consists in a reiteration of norms which *precede, constrain,* and *exceed* the [individual] performer” (Butler 1993, 234). This means that when subjects are enacting gender they are always, as Butler (2004b, 1) puts it, “acting in concert.”

Butler also points out that the citational practices that produce gender likewise depend upon social relations. This is because citation depends upon language, symbolisation, and discourse, all of which are inherently intersubjective phenomena. As such, Butler argues that *being* gendered is always dependent upon as well as an expression of a subject’s relations with others. Crystallising this point, Butler (2004b, 1, 16) writes that:

[O]ne does not “do” one’s gender alone. One is always “doing” with or for another, even if the other is only imaginary. What I call my “own” gender appears perhaps at times as something that I author or, indeed, own. But the terms that make up one’s own gender are, from the start, outside oneself, beyond oneself in a sociality that has no single author (and that radically contests the notion of authorship itself) . . . We try to speak in ordinary ways about these matters, stating our gender, disclosing our sexuality, but we are, quite inadvertently, caught up in ontological thicket and epistemological quandaries. Am I a gender after all? And do I “have” a sexuality? Or does it turn out that the “I” who ought to be bearing its gender is undone by being a gender, that gender is always coming from a source that is elsewhere and directed toward something that is beyond me, constituted in a sociality I do not

fully author? If that is so, then gender undoes the “I” who is supposed to be or bear its gender, and that undoing is part of the very meaning and comprehensibility of that “I.”

Thus gender, for Butler, is never something that an individual ‘is,’ ‘has,’ or ‘owns.’ Instead, gender is always a collective enterprise. It is something that subjects collaboratively produce and thus share with the social.

In Butler’s wake, feminist theory has continued to develop its account of the social production of gender. One of these lines of scholarship has worked to build a framework for analysing gender as a social institution rather than as a property of individuals (R. Connell 1987; Acker 1992; Lorber 1994; Risman 2004; P. Y. Martin 2004; Ridgeway and Correll 2004). To view gender as an institution is to conceive it, as Mantzavinos (2011, 400) defines, as a system of “normative social rules . . . [that are] enforced either through the coercive power of the state or other enforcement agencies that shape human interaction.” Lorber (1994, 1, 5–6) offers a robust account of this perspective, writing that:

gender [is] a process of social construction, a system of social stratification, and an institution that structures every aspect of our lives . . . [G]ender [is] an institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, is built into the major social organizations of society, such as the economy, ideology, the family, and politics, and is also an entity in and of itself.

Thus, in Lorber’s view, seeing gender as a social institution entails apprehending: For Lorber, the conceptual architecture offered by the term “institution” thus makes it possible to consider how gender functions as a feature of social organisation, stratification, and control that operates above the level of the individual. Raewyn Connell (1987) advanced a similar perspective. For Connell, gender is the product of institutionalisation processes that facilitate as well as constrain different modes of social practice along gendered lines. In doing so, these institutions give rise to a “gender order.” Ridgeway and Correll (2004) have also argued that gendered beliefs, ideologies, patterns of behaviour, and so forth must be conceptualised as a social system. In their view, there is no other way to account for the fact that over time

gendered practices become patterned and institutionalised to form macro-level social-structural phenomena. Accordingly, they hold that gender must be understood to operate beyond the conceptual level of individual identities or roles and must instead be conceived as a phenomenon that is institutionalised through collective social interaction.

The notion that gender is a social institution is now a cornerstone of feminist theory. By studying gender as a social institution, feminists have been able to track the complex and varied forces involved in the production and maintenance of gendered social orders on a macroscopic scale (Risman 2004). In particular, examining gender as a social institution has provided a means to study gender as a set of social processes that produce patterned and hierarchised modes of human behaviour and social interaction as well as mechanisms for ensuring compliance to and the reproduction of these modes. As Patricia Yancey Martin (2004, 1259) asserts, conceptualising gender as a social institution has become indispensable for feminist projects as it works “to stop the widespread reduction of gender to individual, psychological, biological, or other micro phenomena in scholarship and popular culture” and highlights its complex structural constitutions and effects instead. Moreover, once gender is understood to be a social institution, it becomes possible to connect an individual’s gendered identities and experiences to the broader social forces involved in their production, maintenance, and regulation. It is upon this foundation—upon understanding gender as a social institution that consists of, but is not reducible to, individual instances of gendered practice—that my conceptualisation of gender governance is built.

## **Gender Governance**

Having developed a sense of what gender ‘is’ in the previous section, in this section I turn to consider how gender can be governed. Governance, as it is generally construed, refers to the organised use of power to direct, manage, control, or influence the actions or affairs of a person, population, or institution (Dean 2010, chap. 1). Bevir (2012, 1) defines governance concisely along these lines as “processes

of rule wherever they occur.” As such, it is common to speak of many forms of governance. Scholars have examined corporate governance, environmental governance, global governance, information governance, land governance, and public governance, to name only a few (see Bevir 2011). Despite the diverse nature of these paradigms, they each use the term governance to describe a system of power that has been exerted over some entity and to organise investigations into that system’s effects. To speak of *gender* governance in this mode would thus be to speak of the organised use of power to direct, manage, control, or influence gender.

Building upon the sexological and feminist articulations of gender that I have just described, it is possible to say that gender *itself* is a form of governance. Both sexologists and feminists have used the term ‘gender’ to describe either the processes or product of a certain kind of regulation. In both contexts, gender has been used to refer to a set of norms that subjects are socialised into recreating or a mode of being the nature and realisation of which depends upon the performance of certain norms. As such, both schools of thought have seen gender as something that comes into being as the consequence of a subject being directed, managed, controlled, or influenced in some way. Gender, in this sense, is both one of the ways that human beings *are governed* as well as something that is produced *as an effect of* governance.

Yet gender *itself* can also be governed. This is because if, following Butler and others, gender’s existence depends upon performative acts—and if its ontology depends upon and is produced by those acts—then gender can be governed by controlling which kinds of acts subjects can perform to enact it. Moreover, if gender is the effect not only of action but also of the discursive norms that those actions cite—as Butler also argued—then gender can be governed via forms of regulation that circumscribe the discursive resources that subjects have available to them to cite. Put simply; if gender is produced through social action, then gender can be governed through the regulation of social action. Conversely, if gender were an essence—that is, if gender were a universal, natural, or immutable phenomenon—then it could not be governed. This is because if gender were an essence, it would always exist in the same form, independent of and unaffected by human activity. Gender can only be governed, then, because it is contingent.

I use the term ‘gender governance,’ then, to refer to an organised use of power that works to control gender *by controlling how it can be enacted*. In this sense, gender governance does not only act *upon* gender. Instead, gender governance is inseparably part of gender’s production. This is because if gender is constituted through socially meaningful action—and indeed, if the existence of gender *depends upon* and is *structured by* social action—then controlling how subjects can enact gender will not only affect the viability of genders that are already in existence. Rather, it will also affect whether certain kinds of gender can actualise at all. Butler (2004b, 41) has written about this dynamic in her consideration of gendered regulations, writing that:

the term “regulation” appears to suggest the institutionalization of the process by which persons are made regular. Indeed, to refer to regulation in the plural is already to acknowledge those concrete laws, rules, and policies that constitute the legal instruments through which persons are made regular . . . But for gender to be regulated is not simply for gender to come under the exterior force of a regulation. If gender were to exist prior to its regulation, we could then take gender as our theme and proceed to enumerate the various kinds of regulations to which it is subjected and the ways in which that subjection takes place. The problem, however, for us is more acute. After all, is there a gender that preexists its regulation, or is it the case that, in being subject to regulation, the gendered subject emerges, produced in and through that particular form of subjection? Is subjection not the process by which regulations produce gender?

Thus, for Butler, gender is produced and structured by regulatory forces and not merely restricted or controlled by them.

Following in Butler’s stead, if gender governance can refer to forces that control how gender can be enacted, then it should not be studied only as an oppressive force that constrains forms of gender that are already manifest. Gender governance ought to be understood instead as simultaneously generating and delimiting the conditions of gender’s possibility. This means that gender governance works to shape the way

that gender can manifest as well as prevent the manifestation of forms of gender that do not conform to its expectations. To examine gender governance, then, is to investigate both the repressive and constitutive effects of gendered regulations simultaneously. It is to interrogate how subjects are governed *through* gender, how subjects' genders are governed, and the limits of possibility that structure gender *itself*.

### **Investigating Gender Governance: A Sketch of the Field**

If gender governance consists of regulations that control how subjects can enact gender, then it is possible to identify many mechanisms of gender governance. Indeed, feminist, queer, and trans scholars have shown that there is an abundance of systems that work to control how gender can manifest, to ensure that certain forms of gender do not manifest, and to institute corrective or punitive measures when a form of gender manifests that does not conform to its expectations. Thus, before turning to examine how the Family Court's regulation of manual hormone use governed gender in subsequent chapters, in the remainder of this chapter I sketch some of the diverse governing mechanisms that feminist, queer, and trans scholars have engaged with before turning to consider specifically the governance mechanisms that they have identified as operating through law. These insights are important to consider because they illustrate how the particular mechanism that I am concerned with in this thesis constitutes part of a broader network of governing apparatuses. As such, they also illustrate how the investigation that I launch here fits in to a broader field of inquiry concerned with gender governance.

#### *Intersections of Governance: Feminist, Queer, and Trans Articulations*

Despite its considerable diversity, feminist, queer, and trans scholarship in the 20<sup>th</sup> and 21<sup>st</sup> centuries have shared a concern with documenting, examining, and challenging the various mechanisms through which gender is produced, regulated, and governed. These fields of inquiry have interrogated a vast range of institutions—the family, religion, the economy, education, politics, sciences, medicine, the military,

media, art, popular culture, and many others (L. Disch and Hawkesworth 2016; M. Evans et al. 2014; Stryker and Whittle 2006; Stryker and Aizura 2013b; McCann and Monaghan 2019). In doing so, feminist, queer, and trans scholars have revealed and worked to disrupt the role that these institutions play in producing and regulating gender as well as gendered systems of social control. As such, they have argued that these institutions constitute and are constituted by forces that shape the kind of gendered subjects that their subjects are able to be, and as such that shape the way that gender can manifest. These institutions consist of, and enforce, an array of mechanisms that produce and police the boundaries of legitimate gender, punish or prohibit transgression, and as such, govern the legitimacy and possibility of different ways of being gendered. It is to this literature that I now turn to illustrate how this project is informed by and seeks to advance a long history of feminist, queer, and trans engagements with the phenomenon that I call gender governance.

A substantial amount of this work has taken place within the field of trans studies. Deploying a range of theoretical and methodological tools, scholars in trans studies have revealed how a vast array of institutions contribute to the erasure, suppression, regulation, or negation of trans existences (see generally Stryker and Whittle 2006; Stryker and Aizura 2013a). In doing so, trans studies scholars have shown that the gender norms that structure various spheres of social life denigrate trans lives and produce forms of violence that work to censure, if not extinguish, those lives. Indeed, Bettcher has argued that the examination of these annihilative structures is central to the project of trans studies. On the question of what philosophy can offer trans studies, Bettcher (2019, 651) writes:

How do I make sense, for example, of being assaulted in the middle of Santa Monica Boulevard by someone who wanted to prove I was really a man? Why do people want to kill us? WTF? Seriously—WTF? We trans people live an “everyday” shot through with perplexity, shot through with WTF questions. We live in the WTF. We did not need philosophy to uncover its perplexity. It was already there. If philosophy is going to give us anything at all, it had better be answers or at least some partial, provisional illumination. Otherwise, it cannot help us.

In this sense, trans studies is centrally concerned with gender governance. One principal aspect of its mission, at least for the time being, is to interrogate and undermine the various social forces that seek to produce a world without trans articulations of gender in it.

In working to illuminate what Bettcher eloquently describes as “the WTF,” trans studies scholars have revealed and confronted the oppressive, and thus governing effects that gender norms render upon trans people in a great range of institutional spheres. For instance, trans studies scholars have shown how the ontological and epistemological structures of medical practice work to either exclude trans people from access to medical care, including gender-affirming medical care, or funnel trans lives toward hetero- and gender normative ends (Prosser 1998a; Spade 2003; S. Stone 2006; Latham 2017a; 2017b; 2019; Inch 2016; Davy 2015; Davy, Sørliie, and Sues Schwend 2018; Davy 2016). In a similar vein, trans studies scholars have identified how the ontological and epistemological structures of academic knowledge production, including the ostensibly critical knowledge production that takes place in feminist and queer disciplines, has been involved with and has supported the subjugation, if not the destruction, of trans realities (Namaste 1996a; 1994; 2009; S. Stone 2006; Serano 2007; Bettcher 2014; 2019; R. Connell 2012; Heyes 2003; Whittle 2006b; Awkward-Rich 2017; Ahmed 2016; C. Williams 2020). There is also an abundance of work that has taken place at the intersection of trans and cultural studies which has traced how cultural discourses work to efface, undermine, or threaten trans realities, as well as encourage trans people to capitulate to prevailing gender norms (L. Jones 2019; J. F. Miller 2019; J. Phillips 2006; Barker-Plummer 2013; Bivens 2017; Halberstam 2005; Lovelock 2017b; 2017a; Kelso 2015; Owne 2016). Similarly, criminological scholars have argued that the intense risk of violence that trans people face in their everyday lives—as well as the violence that criminal justice systems deliver in responses to trans experiences of harm—functions as a disciplinary device that seeks to both punish and ‘correct’ gender non-conforming modes of being (Lombardi et al. 2002; Moran and Sharpe 2004; Stotzer 2009a; Stanley and Smith 2011; Jauk 2013; Buist and Stone 2014; Perry and Dyck 2014; Jamel 2017; Krell 2017; Fernández-Rouco et al. 2017; Griner et al. 2017; Boukli and Renz

2018; Salamon 2018; Hoxmeier and Madlem 2018). Thus, trans studies has exposed a panoply of governing mechanisms that work to prevent or punish trans modes of being and thus shape the kinds of gendered beings that are able to manifest.

Similar efforts to track and challenge the various forces involved in the constitution and regulation of gender have been pursued in feminist and queer disciplines as well (Stryker 2006). There is a wealth of scholarship that has examined how race functions as one of the many mechanisms through which gender is produced, and thus governed, for instance. Black feminist scholarship has made this point, arguing that gender cannot be understood as independent from race, and thus that race is a central force involved in the production of gender (P. H. Collins 2000b; 2000a; P. H. Collins and Bilge 2016; Crenshaw 2019; A. Davis 1982; hooks 1984; 2015; Lorde 1984). As such, Black feminists have tracked a range of processes involved in the racialisation of gender and the gendering of race. In doing so, they have shown that race is intimately and inextricably involved in gender's production and regulation. Indeed, Black feminist scholars have shown that the racialisation of gender happens inside of feminist theory itself, observing that racial hegemonies have been built into, yet effaced within the discipline, which remains dominated by white middle-class perspectives (see hooks 2015; Moreton-Robinson 2000 in particular).

In building a theory of a universal women's experience, white feminist theories have contributed to the marginalisation and thus regulation of women of colour by effacing the specificity of their experiences of womanhood and the racialized nature of their gender-based oppression (P. H. Collins 2000a; 2004; hooks 1984; Lorde 1984). Black feminist scholars have thus theorised the ways that racism, sexism, and other structures of difference work in coalition to produce a particular modality of gendered experience for Black women and women of colour that is categorically distinct to that inhabited by white women. As such, Black feminist theorists thus asserted that the category of woman cannot be understood without reference to its plural articulations through race, as well as other modes of social stratification such as class (A. Davis 1982). These assertions contributed to the development of the now canonical concept of intersectionality in feminist theory, pioneered by Kimberlé

Crenshaw (Crenshaw 2019; see further P. H. Collins and Bilge 2016; Grzanka 2014; Yuval-Davis 2006; Cho, Crenshaw, and McCall 2013; McCall 2005; Shields 2008; J. C. Nash 2008; Brah and Phoenix 2004; Garry 2011). This notion has been extended in trans of colour critique to show how the racialisation of gender non-conformity has exerted a range of regulatory effects that shape the trajectory and livability of trans lives (Ellison et al. 2017; Snorton 2017; Gill-Peterson 2014; 2018). Intersectionality, at its core, thus offers a way to conceptualise how a multiplicity of forces coalesce to enact different modalities, and hierarchies, of gender.

After receiving its nascent articulations within the field of Black feminist thought in the 1980s, an intersectional conception of gender—that is, a conception of gender that expounds its production and governance by a multiplicity of social forces—has been expounded from several other perspectives as well. Muslim feminist scholars, for instance, have challenged monolithic conceptions of gender and gender-based oppression alongside Black feminist scholars. In their work, they show not only how different forms of gender are forged at the intersection of race, ethnicity, and religion, but also how the construction of gender as singular has been involved in the subjugation, dehumanisation, and disempowerment of non-Western women and women of colour (Mohanty 1984; Mojab 2001; Afshar, Aitken, and Franks 2005; Zine 2006; Scharff 2011; Mahmood 2012; Miró 2020; Ghumkhor 2020). They argue, therefore, that universal conceptions of gender are not only incorrect but also exert an oppressive and thus regulatory force.

Postcolonial and Indigenous theorists have also analysed how patriarchal, racist, and colonial structures of power combine to govern gender itself, as well as to govern *through* gender. Postcolonial feminist theorists have shown, for instance, that imperial and colonial regimes produce normative conceptions of gender as a way to justify violence, dispossession, and exploitation (McClintock 1995; Stoler 1995; Spivak 1996; Manderson 1997; Nagel 1998; Burton 1999; Lohse 2004; Lugones 2007; Ghosh 2008; Patil 2017; Hinchy 2019; J. Barker 2017; Kapur 2005; 2015; Spivak 2003; Puar 2007). In doing so, they have explicated the interdependence of patriarchy, race, colonialism in producing an oppressive gendering of Indigenous peoples (Moreton-Robinson 2000; Hernández Castillo 2010; Suzack et al. 2010; J. Green 2007;

Mohammed 1998; Fredericks 2010; Bastian Duarte 2012; Hames-García 2013; Murib 2018; Rifkin 2016; Lohse 2004; Morgensen 2012a; 2012b; 2010; Aboriginal Health Council of South Australia 2019). Along these lines, Indigenous feminists have written about the specificity of Indigenous women's experience of gendered regulations as arising at the intersection of patriarchal, racial, and colonial powers simultaneously (Moreton-Robinson 2000; Pettman 1992; J. Green 2007; Suzack et al. 2010) This means that colonialism is deeply involved in gender's production and thus produces different modes of gender and gender-based oppressions for its subjects depending upon their relationship to colonial power. Colonialism, in this sense, consists of a range of gender governance mechanisms, just as gender governance has supported the broader operations of colonialism.

Masculinities studies has also identified a range of forces involved in the governance of men. The foundational work in this field has argued that there are multiple versions of masculinity, each of which are forged at the intersection of various social, temporal, and cultural junctures (Gutmann 1997; Pascoe 2003; M. S. Kimmel, Hearn, and Connell 2004; R. Connell 2005; R. Connell and Messerschmidt 2005; E. Anderson 2009; Coles 2009; M. Kimmel 1996; M. Kimmel and Messner 2010; T. Edwards 2006; Brod and Kaufman 1984; Rotundo 1993). Masculinities studies, as a whole, thus offers a complex illustration of the heterogeneous forces involved in the constitution and regulation of masculine modes of being and their place in the broader field of gendered relations. In doing so, it has also shown that masculinities can be and are enacted by diversely configured bodies and people who practice and/or embody diverse modes of gender identification (Halberstam 1998a; Maltz 1998; H. Rubin 2003; Schilt 2006; Latham 2016; Heinz 2016; Aboim 2016; Gottzén and Straube 2016; Abelson 2019). Along these lines, scholars in this field have also drawn upon and extended Black feminist theory to show how masculinity is also augmented by processes of racialisation (Staples 1982; Stecopoulos and Uebel 1997). As such, masculinities studies has demonstrated that masculinity is a site where various processes converge to produce, regulate, and normalise gender relations.

A great deal of feminist, queer, and trans scholarship has also explicated how cultural constructions of the body can influence the production and regulation, and therefore the governance, of gender. These literatures have examined the diverse effects that different discursive constructions of the body can have upon gendered embodiment, as well as how gendered social relations can affect the material and discursive makeup of the body. The social construction of the body has long been a concern in feminist scholarship for this reason (see Brownmiller 1984; Bartky 1990; Bordo 1993; 1999; Butler 1993; Grosz 1994; Shildrick 1997). Indeed, entire fields of feminist theory have been organised around different modes of interrogating the material-discursive production of the body and the role that such constructions play in constituting, supporting, and maintaining gender-based hierarchies and systems of social control (Clough 2012; K. Cleary 2016). In dialogue with this literature, critical intersex scholarship has been particularly incisive in discussing the role that cultural discourses on the body can play in enacting and disciplining gendered subjectivities. For critical intersex scholars, gender is neither determined nor exhausted by bodily morphology and function, but can share complex relationships with it (G. Davis 2015; Holmes 2008; 2009a; Karkazis 2008; Kessler 1998; Morland 2009; 2016; Preves 2003; 2000; Schuller 2017). A similar point has been made at the intersection of feminist, queer, and disability studies, which has shown that corporeal configuration and capacity is involved in producing and regulating gender (Wendell 1989; Lloyd 1992; Gerschick 2000; Lloyd 2001; Garland-Thomson 2005; McRuer 2006; Pieri 2019; E. Clare 2015; Yergeau 2017; Puar 2017; 2015; Sherry 2004; Shifrer and Frederick 2019). Scholars in this tradition have highlighted the gendered regulatory effects that bodily norms impose upon disabled people, showing that the performance of a legible gender often requires a configuration of bodily morphology and capacity that is not distributed universally. Gendered bodily norms contribute, as such, to the social exclusion of, and opprobrium directed toward, disabled bodies, because if successful performances of gender require certain modes of embodiment and comportment, then there are certain kinds of bodies that will be always-already in breach. Meanwhile, trans literatures have grappled with the complex relationship between the material-discursive constitution of bodies and the possibilities for sexed

and gendered embodiment that map onto and augment those constructions (H. Rubin 2003; Salamon 2010; Aboim 2016; P. Elliot and Roen 1998; Schrock, Reid, and Boyd 2005; Xiang 2018; Davy 2016). Collectively, these literatures demonstrate that the body, in its diverse material and discursive manifestations, exerts a governing effect upon gender, even while gender is involved, inversely, in the body's production.

Feminist, queer, and trans scholars have also traced the constitutive, and therefore governing, effects that sexual regulations enact upon gender. The notion that sexuality is a key feature of gendered relations has been central to feminist theorising since the second wave (Sullivan 2003, chap. 7). Indeed, the claim that sexuality is the key force, if not the defining force, involved in the production of gender is central in the radical feminist tradition. MacKinnon (1987) argues, for instance, that gender emerges from the sexualisation of female subordination and male dominance. Queer theorists, meanwhile, have most often agreed with the radical feminist claim that sexuality is constitutive, at least in part, of gender (Marinucci 2010). Yet, queer theorists have examined gender more expansively through the lens of sexuality to argue that the relationship between the two institutions can assume heterogeneous forms and as such be enmeshed within and work to enact a diverse range of power relations (Sullivan 2003; G. Rubin 2012; Nicholas 2014). Nonetheless, the argument has been made from both quarters that sexuality not only plays a key role in the production of gender, but also that gender can be governed *via* the regulation of sexuality. Further still, queer of colour critique, in pointing out that the relationship between gender and sexuality is augmented by racialisation, has shown that sexuality can affect the constitution of gender as an assemblage of forces and thus is never acting alone in its governing effects (Anzaldúa 2007; Roderick A Ferguson 2003; 2018; E. P. Johnson and Henderson 2005; E. P. Johnson 2016; Muñoz 1999; Puar 2007; A. Smith 2010; Stockton 2006).

### *Law as an Instrument of Gender Governance*

Law is among the most powerful institutions of gender governance. For this reason, law has long been a central object of inquiry in feminist, queer, and trans scholarship.

As such, I will now turn to discuss some of the core contributions that have arisen from feminist, queer, and trans interrogations of law to highlight the insights they bring to understanding the role that legal power plays in the production and regulation of gender.

Law is, in a foundational sense, a governing institution. By definition, it is a tool that States and other parties use to direct, control, manage, and order their populations (A. Hunt and Wickham 1994; Rose and Valverde 1998; Tadros 1998; Davies 2017, chap. 1). Law is a system of rules and practices that are backed and enforced by a governing authority and which work to shape human conduct and relations in accordance with the interests of that governing authority (Deflem 2008, chap. 1; Davies 2017, chaps. 1, 9; Tamanaha 1995; A. Hunt 2002b). Donald Black (1983) made this argument, defining law simply as “governmental social control.” Deflem (2008), in his review of the theoretical foundations of the sociology of law, also conceptualised law in this way. The sociology of law, according to Deflem (2008, 6), defines its object of inquiry as “an institutionalized complex of norms that are intended to regulate social interactions and integrate society.” There is, therefore, no law without governance.

Gender is a primary target of and vehicle for legal power, and gender is, therefore, both an instrument and effect of legal governance. This is a point that has been made by feminist legal scholars, who have extensively studied how law governs its subjects *through* gender (Fineman 2009a; Davies and Munro 2013; J. A. Williams 2016; MacKinnon 1989; Smart 1989; P. Williams 1989). Feminist legal studies emerged, as Fletcher (2002, 135) explains, because feminists observed that “legal rules presented obvious barriers to women’s free and equal participation in society.” To this end, feminists argued that legal regimes were a key force in enacting and supporting gendered hegemonies and gendered regimes of control, particularly through their regulation of citizenship and public participation, reproductive rights, social and economic rights, sexual relations, and family relations (Levit and Verchick 2016). For this reason, many scholars have argued that gender is a structuring feature of States and the legal institutions that they enact (MacKinnon 1989; Pateman 1988; Parashar, Tickner, and True 2018; Nagel 1998). Indeed, on this basis MacKinnon

(1989), argued that law *itself* is an expression of gendered power relations, and as such, that legal institutions such as marriage, the family, and property rights are patriarchal constructs that advance masculine interests.

Later, post-structuralist and postmodern feminists began to conceptualise law as playing a role in the *production* of gender. As such, feminists turned to study how gendered positionalities are constituted and enforced through legal power, instead of merely examining the law's differential privileging or oppression of different kinds of gendered subjects (Frug 1995). Feminists in this tradition held that if gender is constituted through discursive practices, as Butler and others argued, then legal discourses on gender, imbued as they are with legal power, will be one of the key mediums through which gender is enacted. Accordingly, postmodern feminist legal scholars have investigated how legal speech acts are involved in the production and imposition of various kinds of gendered subjectivities at a range of sites (Chunn and Lacombe 2000). These investigations have argued that categories such as 'man' and 'woman' are legal *fictions*—that is, phantasms established in legal discourse that do not 'authentically' represent any external or objective reality—and has shown how these categories become actualised through legal enforcement.

Many of the insights of feminist legal theory have been taken up and expanded within queer legal theory as well. Queer legal theorists have examined how law produces and enforces normative gender categories through the regulation of sexual practices, for instance (Valdes 1995; Cossman 2004; Kepros 1999). They have also pointed out that legal regimes codify, reward, and enforce specific kinds of human relationships, life-courses, and social orders in ways that orient subjects toward the recreation of heterosexual, and thus gender normative, modes of being (Fineman, Jackson, and Romero 2009; Moran 2002; Stychin 2003; Bernstein, Marshall, and Barclay 2009). Fineman (2009b), for instance, has traced law's role in delineating the boundaries of, and supporting the social supremacy of, the heterosexual family, which she argues is "the most gendered of all social institutions." She writes that (Fineman 2009b, 46):

legally constructed image[s] express[] a vision of the appropriately constituted family ... the characterisation of some family groupings as

deviant legitimates state intervention and regulation of relationships well beyond what would be socially tolerated if directed at more traditional family forms.

As such, for Fineman, law plays a powerful role in establishing, stabilising, and reinforcing the heterosexual family as a social institution. By making this argument, Fineman joins with a chorus of other queer legal theorists to argue that the production of sexual and gender identities in law functions as a way of crafting categories of subjects that can be used to govern them (see Beger 2002 for an overview).

Queer legal theorists have shown that one of the key ways that States control, normalise, and regulate gender and sexuality is through the production of legal ‘knowledge’ about those categories (Neal 1996). Moran (2002), for instance, has argued that law is one of the dominant institutions involved in the production of sexual identities for this reason. He writes that (Moran 2002, 299):

law [is] a context in which identity is given form and meaning in societies . . . Lesbian and gay sexualities are not so much outside the law, and as such something the law might respond to, but something always already in the law as a social and political practice, generated through legal categories and legal practices.

Fineman (2009a) follows Moran in detailing the core tenets of the queer legal project, arguing that one central feature of a queer legal analysis is a focus on how legal practice works to produce ‘knowledge’ about queer subjects. She argues that law is an interpretive and therefore cultural practice, which produces the boundaries of the normal and legitimate, and as such “designates the deviant” (Fineman 2009b, 46).

In line with such queer critiques of legal knowledge production, an abundance of literature has examined how law governs gender through identity classificatory processes (McGrath 2009; Currah 2003; Spade 2008; Westbrook and Schilt 2014; Hutton 2017; Currah and Moore 2009; van der Ros 2017; O’Flaherty 2015; Harris 2012; Scherpe 2011; Sørli 2015; Dunne 2017a; Repo 2019). Until recently, liberal democratic legal institutions have largely precluded their subjects from being able to

register in law a sex or gender other than that which they were assigned at birth (Spade 2008; Hutton 2017; Currah and Moore 2009). Several scholars have studied how legal institutions have policed the boundaries of sex/gender recognition, as well as access to the various legal rights and entitlements that that recognition confers, in ways that have defined trans people as naturally and inevitably confined to their sex designation as assigned at birth (Meadow 2010; Sharpe 2007b; 2002b; Cowan 2005; Sharpe 2002a; Hutton 2017; Forbes 2014; Whittle 2002; Currah 2003; H. F. Davis 2017). Whittle (2002), drawing on his experiences of having to navigate such regimes as a transgender man, has written about the disciplinary power that these legal constructions wield. He states, plainly: “I face an inadequate legal framework in which to exist. . . [transgender people] are simply ‘not’ within a world that only permits two sexes, only allows two forms of gender role, identity or expression” (Whittle 2002, 1). For Whittle, these regimes do not only suppress or erase forms of gender that already exist; they also make the manifestation of certain modes of gendered being compulsory and subject those that do not comply to violence. Baars (2019), noting this effect in a range of legal judgments, describes this as “law’s gendering function,” whereby law works to produce subjects that are knowably sexed and gendered according to predetermined intelligibility criteria.

Meadow (2010) has made a similar argument about the production of legal gender categories. For Meadow, law is not only one of the primary institutions involved in producing meaning about gender; it is also one of the primary institutions of “gender accountability” in contemporary liberal democratic societies. Law maintains a grip on social gender relations, in Meadow’s view, by creating the need to account for one’s gender to state institutions. This is because legal classification regimes are involved both in the production and institutionalisation of gender, as well as in policing and coercing compliance to the normative strictures of gender’s institutionalised forms. Meadow points out that this allows the State, through law, to govern gender relations more broadly. As she writes (Meadow 2010, 816):

[Institutional] gendering processes reinforce the dialogic relationship between legal and social classifications and demonstrate the active role

played by the state in constructing gender categories themselves and in maintaining the gender order.

Spade (2008; 2012; 2015) has likewise criticised legal gender classification schemes for their governing effects. For Spade (2008), the legal documentation of gender consists, primarily, of “strategies of surveillance and governance.” This is because legal gender classifications allow States to manage and control their populations *through* gender by allowing them to determine category membership and to allocate rights and responsibilities on this basis. Throughout his work, Spade has shown that those who are unrecognisable within State-legal classificatory schemes—that is, subjects that in Spade’s terms are rendered “impossible”—are both excluded by the State and denied access to the benefits of State-legal inclusion. Thus, Spade (2015, 73) argues that State-legal constructions of gender “sort the population into those whose lives are cultivated and those who are abandoned, imprisoned, or extinguished.”

Feminist, queer, and trans legal scholars have also identified gender governing effects in the panoply of legislative arrangements that have emerged in Western nations in the 21<sup>st</sup> century to enfranchise transgender people with various legal rights. This work has critiqued legal instruments such as the Gender Recognition Act in the United Kingdom to show how such regimes are premised upon and operate in the interests of reinforcing gender normativity (Burgess 2009; Grabham 2010; Sharpe 2007b; 2007a; 2009; Sandland 2005; Cowan 2005; Miles 2018; McQueen 2016a; Hines 2013; Tirohl and Bowers 2006; Whittle 2006a). Burgess (2015) argues, for instance, that the legal regulation of gender identity represented by institutions such as the Gender Recognition Act can have a subjugating effect upon gender minorities. This is because, as Burgess (2015, 524) states, these legal instruments set up a “scene of recognition” where the State has the power to determine “not only who counts as a man or woman—that is, who can take up a defined legal status or lay claim to rights as a man or woman—but, also, what it means to be a man or woman.” Meanwhile, Otto (2015) has argued that international legal arrangements that seek to facilitate transgender inclusion have been and continue to be dominated by a “(bio)logic” that positions transgender people inside of restrictive male/female

binaries and an understanding of gender as socially constructed on top of an immutable biological base of sex. She argues on this basis that the production of gender in international law works to “materialise, naturalise, regulate, and discipline sexed bodies and identifications” (Otto 2015, 301). Collectively, these analyses assert that even those legal orders that have been enacted ostensibly to facilitate the ‘inclusion’ of transgender people into the legal order have worked to secure compliance with prevailing gender norms rather than facilitate the realisation of alternative possibilities.

Sexual citizenship literature has similarly identified a range of mechanisms through which legal regimes tether State-afforded rights and responsibilities to a subject’s capacity and willingness to participate in certain kinds of sexual, and thus gendered, relations (Richardson 2000; 2017; Duggan 1994; Cossman 2007; D. Evans 1993; see also Riseman 2019). Moran (1996) argues, for instance, that the legal classification of gender and sexuality is a tool that States use to define, through exclusion, the ‘good citizen.’ Gender and sexuality function, in this way, to determine who is a citizen and who is not, and who is deserving of rights and who is not. Thus, in Moran’s view, the legal construction of gender and sexuality plays a central role in constituting the State itself. As such, queer engagements with law join with postmodern feminist theories in identifying how legal institutions are involved in the production, and not just repression, of gendered subjects. They argue that legal constructions have constitutive and performative power to constitute subjectivities, rather than simply oppress or control them.

Yet queer legal theorists have also pointed out that legal institutions not only nudge subjects toward heterosexual and gender normative life-courses but also punish and subjugate the manifestation of modes of being that do not conform to these normative strictures. As Romero (2009, 191) writes, queer legal theory regards “the State as a substantial source of danger for queer communities.” In short, this is because enacting a mode of gendered or sexual being that does not conform with legal categories of normality invariably means being subject to State-sanctioned forms of violence and social exclusion. The State and its legal apparatus has been and remains one of the most powerful institutions involved in the perpetration,

justification, and incitement of violence against queer peoples by defining and policing the norms against which queerness is defined (Warner 1995; Leckey and Brooks 2010; Hiner and Garrido 2019; Gledhill 2014). As such, law governs gender not only by producing discursive norms but also by coercing if not enforcing compliance with those norms.

Accordingly, feminist, queer, and trans legal scholars have interrogated the governing effects that arise from many kinds of legal orderings. They have shown how legal regimes shape the kinds of gendered subjects that their subjects can be by regulating the kinds of sexual practices and relations that their subjects can enact (Sharpe 2002a; Harding 2010; Stychin 2003; Ehrlich 2009; Waites 2005; Fischel 2016). Legal regimes also govern gender by regulating human relationships in ways that institute and reinforce gender normative social orders, for instance in their construction of marriage and family relations, as mentioned (Santos 2013; Harding 2006; Pichardo 2011; Sharpe 2012; Butler 2004b, chap. 5). The legal structures that provide for social security and welfare also play a role in enacting and controlling gender norms. This is because they help to maintain, as Orloff (1996, 51) identifies, “the sexual division of labor, compulsory heterosexuality, gendered forms of citizenship and political participation, ideologies of masculinity and femininity, and the like” (see also Fraser 1994; Orloff 1993). Legal institutions also produce and regulate their subject’s gendered subjectivities by establishing and influencing economic and labour relations, for instance through laws that regulate property ownership, inheritance, employment, parental and caring entitlements, discrimination protections, and so forth (Suk 2010; Beiner 2005; Fredman and Fudge 2013; Fudge 2013; Fudge and Vosko 2001; Kmec and Skaggs 2014). Laws also govern access to public spaces in ways that enact gender norms, for instance by regulating and enforcing sex segregation in bathrooms (Cavanagh 2010; Bader 2018; Dalton 2007; Fleming 2018; Wuest 2019).

Feminist, queer, and trans scholars have identified the workings of gender governance at many other legal sites as well. There is a vast literature that examines how the legal regulation of international mobility is structured by, and thus involved in reproducing, gender norms, for instance (Bruce-Jones 2015; Vogler 2016;

McDonald-Norman 2017; Fernandez 2018; Beauchamp 2012; 2019; Collier and Daniel 2019; Clarkson 2019; Mai and King 2009; D. A. B. Murray 2014; Shakhshari 2014; Vogler 2019; Raj 2016a; 2016b; 2016c; 2017; Mole 2018; Hertoghs and Schinkel 2018; Camminga 2019; Dawson 2018; 2019; Koçak 2020; Heimer 2020). Global mobility depends upon gender conformity in part because immigration and asylum laws facilitate the movement of people whose gender is presented and documented in line with prevailing norms, and restrict, impede, or prevent the movement of those who breach these norms. The laws that govern medical practice also play a role in reproducing gender normative subjects. To name just one example of this, critical intersex scholars have pointed out the gender-normative effects that arise when legal institutions support the surgical normalisation of intersex infants. In such instances, medical practitioners carry out invasive, irreversible, painful, potentially sterilising, stigmatising, and harmful surgeries upon intersex infants, with the law's blessing, merely because those bodies are seen to breach gender normative imaginaries of the 'correctly' sexed body (Garland and Travis 2020; Greenberg 2012; Pikramenou 2019; Holmes 2009b). In a similar vein, the legal regulation of reproductive rights has also been involved in governing gender. This has been the case when States, through law, have made contraception and abortion inaccessible if not illegal (McLaren and McLaren 1997; Stetso 2001; Htun 2003), when they have made reproduction more accessible to heterosexual and cisgender people (Mamo 2013; Mamo and Alston-Stepnitz 2015; Santos 2013; Carastathis 2015; Leibetseder and Griffin 2018; 2020), and when they have required their subjects to undergo sterilisation as a condition of having their affirmed gender legally recognised (Repo 2019; Carastathis 2015; Dunne 2017a; 2017b; Alaattinoğlu and Rubio-Marín 2019; Honkasalo 2018; Lowik 2018).

The criminal law and the criminal justice system that administers it is also a powerful site of gender governance. Feminist, queer, and trans criminologists have studied how gender organises the operation of the criminal justice system on all levels and have revealed that that system discriminates against and punishes more harshly those that breach gender norms (Oparah 2012; Lindevaldsen 2012; Lee 2008; Vitulli 2013; Erni 2013; Sumner and Jenness 2014; Sumner and Sexton 2016; Pemberton 2013; Moran and Sharpe 2004; Miles-Johnson 2015; Stanley and Smith

2011). On this basis, feminist criminologists have long argued that the criminal justice system is a central force in the production and maintenance of gendered hierarchies (Smart 1995; Renzetti 2013; Heidensohn 2012; Chesney-Lind 2006; Chesney-Lind and Morash 2013). Similarly, queer criminologists have argued that the differential treatment LGBT people receive from criminal justice systems is both the product of, as well as involved in the reproduction of, the categorisation of gender and sexual non-conformity as aberrant (Woods 2014; Dwyer, Ball, and Crofts 2016; M. Ball 2016; M. Ball et al. 2019; Russell 2019; Boon-Kuo, Meiners, and Simpson 2018; Nadal 2020). As such, queer criminologists point out that the criminal justice system plays a key role in producing queer people *as* queer by labelling certain gendered and sexual practices as deviant and thus by subjecting those who engage in such practices to State-legal censure, surveillance, regulation, and punishment (M. Ball 2016).

Collectively, these literatures show that legal institutions, through a variety of mechanisms, produce and enforce certain modes of *being* gendered. They impose regulations that work to ensure that subjects can only enact gender in circumscribed ways, and as such, that only certain kinds of gendered subjects can manifest. They also institute imperatives that render particular modes of being gendered compulsory and compel subjects to become gendered in ways that conform to preordained standards of legitimacy. In these ways, these literatures have shown that law is a key instrument of gender governance.

### **A Case of Gender Governance: Situating the Present Inquiry**

Throughout this chapter I have shown that what I am calling ‘gender governance’ has been a central concern in feminist, queer, and trans scholarship. Scholars in these traditions have interrogated a vast array of gender governance mechanisms, replete as they are throughout the social world. Legal institutions have been a key focal point for such inquiries, given that legal regimes can and do wield immense power to shape how gender can manifest.

This thesis aims to contribute to the understanding of gender governance that this past literature has advanced. It intends to do so by examining how the Family Court of Australia governed gender through its regulation of young people's gender-affirming manual hormone use. In this sense, this thesis analyses the Family Court's regulation of manual hormone use as *a case of gender governance*. By conceptualising the Court's regulation in this way, I argue that it worked to control gender in both its individual and collective manifestations. It was one instance, alongside those that I have discussed throughout this chapter as well as many others, where an institution sought to regulate how its subjects could enact gender, how its subjects could *be* gendered, and as such, how gender could manifest.

My aim with this thesis is to reveal *how* the Court governed gender and to subject that mode of governance to critique. I want to identify which forms of gender the Court's regulation sought to realise and which it sought to prevent. I want to delineate the processes through which the Court sought to accomplish those ends. And, most importantly, I want to challenge the boundaries that the Court constructed therein to confine subjects to certain modes of being and to restrict which forms of gender subjects could bring into being. By revealing how this mode of governance was enacted, and by criticising the techniques it used to regulate how its subjects could enact gender, this case study contributes to the larger scholarly and political project of charting and unpicking the ways in which gender is governed and operates as a system of governance. In doing so, this thesis intends to highlight how this mode of governance effected the organisation of human relations through gender, as well as how it delimited the ways its subjects could manifest their existence through gender. In this way, this project is feminist and queer at its core.

## **Conclusion**

Overall, this thesis aims to interrogate how the Family Court governed gender through its regulation of young people's gender-affirming manual hormone use. In this chapter, I took the first step toward accomplishing this end by laying the theoretical groundwork necessary to support such an investigation. In doing so, I

have conceptualised the nature of gender as a mode of being that is enacted in social practice. I have also argued that institutions—including legal institutions like the Family Court—can govern gender by regulating how it can be enacted. In building these conceptualisations, I have surveyed a vast field of research that has been concerned with gender governance, in its myriad forms. I have shown, too, how this project is built upon and seeks to advance a strong tradition of feminist, queer, and trans work, particularly as it concerns the power of law to govern gender as well as govern *through* gender. Now that this theoretical groundwork has been established, I turn in the next chapter to outline the methodological foundations needed to support such an investigation and the methods that I devised on this basis. At the conclusion of the next chapter—that is, once both the theoretical and methodological foundations for this project have been laid—the proceeding three chapters will carry out the analysis that these preceding chapters set up.



# Chapter Three

## *Methodology*

This thesis analyses how the Family Court governed gender through its regulation of young people's gender-affirming manual hormone use. In chapter two, I established the theoretical groundwork necessary to support this analysis by conceptualising the nature of gender and how it can be governed. I argued that gender is a mode of being that is enacted in social practice, and as such that legal institutions like the Family Court can govern gender by regulating how it can be enacted. Building upon these foundations, this chapter outlines the methodology that I developed to analyse *how* the Family Court governed gender through its regulation of young people's gender-affirming manual hormone use.

This chapter proceeds in three parts. First, I outline this project's case study research design and how it structured my approach to analysis. In the second section, I detail why I chose to analyse the Court's reasons for judgment as a means to study how it governed gender in these cases. In this section, I also outline the theoretical framework, informed by critical legal theory, that informed my approach to reading these legal texts. Then in the third and final section, I discuss my approach to analysis and critique, which was guided by the principles of discourse analysis and made use of resources from critical, feminist, and queer theories. In this section, I make a note on the ethics of interpretation and critique that have grounded my analysis.

## Case Study Research

This thesis is a case study investigation into gender governance which takes the Family Court's regulation of young people's gender-affirming manual hormone use as its object of inquiry. According to Simons (2009, 3), case study research is "a study of the singular, the particular, the unique" as opposed to the ordinary, general, or universal. The "particularity" that this thesis interrogates is the *particular* mechanism of gender governance enacted by the Court's regulation of manual hormone use. It is *not* a study of gender governance *in general*; rather, the aim of this kind of inquiry, as Simons' (2009, 3) elaborates, is "to explore the particularity [and] uniqueness" of this specific mechanism.

## Conceptualising the Case

Taking the Family Court's regulation of young people's manual hormone use as a case study first requires delimiting the boundaries of "the case" so that it can serve as an object of inquiry (Platt 2007; Yin 2013; Harvey 2009). While the boundaries of a case are often difficult to define (Ragin and Becker 1992; Abbott 1992), the boundaries of this case are defined somewhat naturalistically. The Family Court's regulation of young people's manual hormone use was defined formally by the ordinary operation of the Australian legal system. In this sense, it consisted of a relatively discrete assemblage of legislative directives, common law, Court proceedings, judgments, and other procedural artefacts. Embedded within this overarching case are the individual *legal* cases which arose regarding each young person's request for authorisation to use hormones manually. These separate legal cases might be called embedded "instances" (Yin 2013) or "sub-units" (Stake 2006) that collectively constitute the overarching case. I have studied the overarching case of the Family Court's regulation of manual hormone use by analysing the details that are unique to each of these sub-units, while also examining the relationships, patterns, variations, and so forth that exist between each of them through comparison and meta-theorisation. This two-level approach means that this study

might be described as a multiple-case or collective case design (A. J. Mills, Durepos, and Wiebe 2010; Yin 2012; 2013; Stake 2006), and this has been instrumental to generating the empirical findings that follow in this dissertation's coming chapters.

### Why case study research?

Case study research is suited to the study of gender governance for several reasons. First, case study research's idiographic nature (Yin 2013, 13) serves the study of gender governance because gender governance is a phenomenon that is constituted by diverse, mutable, and context-dependent social processes. In chapter two, I conceptualised gender governance as a family of social processes that generate normative ontologies of gender. These social processes do not seem to have a universal structure or form. Rather, feminist and queer scholarship has traced how gender governance assumes diverse forms and produces diverse effects depending upon the conditions of its enactment. Particular orders of gender governance might thus be described as "bounded systems" (Ragin 2004). They are each *unique* and *complex* clusters of co-occurring and interlocking social phenomena, including events, structures, individual actors and actions, institutions, as well as the interactions between each of these components. As such, it might be accurate to conceive of the existence of multiple "bounded systems" of gender governance, each of which assumes a unique form and produce a unique set of effects as they unfold in diverse contexts. As such, studying gender governance will likely be better served by an idiographic approach, as this allows for attending to the *particularity* of the forms and the specific sites where it is generated (Yin 2013, 13).

Idiographic modes of inquiry are also favoured in queer analyses of gender. This is because idiographic inquiry is more compatible with the ontological, epistemological, and political premises of queer theory than its nomothetic counterpart (Schilt, Meadow, and Compton 2018, 3; Brim and Ghaziani 2016, 16; Browne and Nash 2010). Queer scholars have argued that when applied to gender the practices of generalisation and categorisation that define nomothetic inquiry are premised upon and performatively reinforce the assumptions (a) that universal laws

govern the nature of gender, and (b) that gender can and should be studied as a discrete, immutable, and universalisable set of forms (for discussion, see Browne 2010; Grzanka 2016; J. M. Ferguson 2013; Doan 2016; Baumle 2018; McCann 2016; Ruberg and Ruelos 2020). These premises are both metaphysically suspect as well as socially and politically hostile from the vantage point of queer theory. Moreover, they have supported efforts to delegitimise or justify and enact violence upon gender and sexual minorities in research contexts and beyond (Grzanka 2016; Schilt and Lagos 2017; Doan 2016; De Block and Adriaens 2013; Prosser 1998b; Weeks 2000; Butler 1999; Namaste 2009; Bettcher 2014).

The second reason that I adopted a case study approach to investigate gender governance is that it enables “holistic” or “in-depth” inquiry (Bromley 1986; Yin 2013). Case study research is particularly suitable for this end because it supports the generation of a detailed and holistic account of the case—that is, of this particular instance of gender governance—by paying attention to the various relationships between the parts that comprise the system as a whole and how those parts constitute it (Byrne 2009). Yin (2018, 333) advocates for this approach, arguing that as the social world consists of “many more variables of interest than data points” case study method’s emphasis on holistic and in-depth accounts allows researchers to “go beyond the study of isolated variables” to access better the complexity of the reality that they are investigating. As such, a case study research design has allowed me to produce a detailed, thorough, and comprehensive account of the way that the Family Court’s governance of gender operated in these instances.

Case study research is also valuable for the study of gender governance because it facilitates a naturalistic mode of inquiry (Yin 2013, 13; Stake 1995; Gerring 2007). Authentically studying gender governance requires a naturalistic approach because it is a phenomenon that is produced *contextually* by social processes that are dynamic and mutable. Case study research fulfils this requirement because it analyses phenomena as they are produced in their “real-world context” (Bromley 1986). Mabry (2008, 215) has argued, for instance, that case study research attends to the fact that “social reality is . . . complex, dynamic, and context-dependent . . . by allowing the researcher to attend to and appreciate the complexity of social

phenomena in their social context.” In this instance, case study research allows me to study the mechanism of gender governance that the Court enacted in the environment in which it was enacted. It thus provided an up-close account of the processes involved in the construction of this mechanism two ways: first, because it facilitated an analysis of materials that the Court generated naturalistically as part of its everyday operation, and second, because the Court also defined the boundaries of this “case” naturalistically. This also means that this case meets the criteria for the kind of semi-closed and semi-autonomous system that is most suitable for case study research (Yin 2013; Stake 1995).

Following a case study research design means that this thesis does not intend to produce generalisable findings. Case study approaches, because of their emphasis on particularity, have been criticised for failing to be generalisable (Platt 2007; Gerring 2007). However, from a queer vantage point, the fact that case study research does not intend to be generalisable supports, rather than undermines, the quality of this research. Queer scholarship is suspicious of the claims to universality that are entrenched in the value of generalisability (Compton 2018). Moreover, queer researchers often oppose generalisation because they see generalisation as an effect or instrument of power—for instance by erasing, ignoring, or diminishing the specificity and significance of minoritised sexual and gendered practices. Indeed, a focus on generalisability and other traditionally valued ways of appraising research quality have been used historically to delegitimise the study of queer people, experiences, and the discourses that govern them (Baumle 2018; Compton 2018; Fish and Russell 2018; Doan 2016; Grzanka 2016).

As such, this thesis aims to be “instrumental” rather than generalisable. Following Stake’s (1995) use of the term, this means that this thesis intends “to give insight into an issue, or refine a theory”—or, that it intends to be illustrative rather than exhaustive. This illustration might prove to be a valuable resource for future inquiries into gender governance via “analytic generalisability” (Yin 2012)—that is, it might assist theory-building about how gender governance operates, and help to assert the significance of that operation. Or, it might be useful for its “revelatory quality,” to use Gillham’s (2003, 101–2) phrase. Gillham (2003, 101–2) elaborates that

“the meticulous description of a case can have an impact greater than almost any other form of research report.” To make this point, he uses the example of how “[t]he death of a [single] vulnerable child” can capture public interest that “may lead to major changes in legislation or the organization of care systems.” In these instances, Gillham (2003, 101–2) asserts that “[t]he case is inarguable: *it happened*, and something must be done.”

## **Analysing Legal Texts**

As I have stated, this thesis aims to interrogate how the Family Court governed gender by controlling the conditions under which its subjects were *allowed* to use hormones manually. To explicate these conditions, I analysed the entire corpus of “reasons for judgment” that the Court published in the wake of cases regarding a young person’s request for authorisation to use hormones manually. Reasons for judgment are a constitutive feature of the Australian common law system, and in Australia judges and other judicial officers are typically obliged to author and publish judgments for every case that they resolve (Beck 2017; M. Kirby 1994). These judgments conform to a standard structure and format, outlining the nature of the orders being sought, the relevant legal principles and issues of law at stake, the background of the case, the evidence presented and the facts that were established, the legal arguments raised in connection to those facts, the decision reached, and a discussion of how the facts of the case support that decision (Olsson 1999). In the two sections below, I outline the rationale that supported my analysis of judgments, the procedure I followed in sampling them, as well as the theoretical framework that I brought to my interpretation and analysis of them.

### **Rationale**

I decided to analyse the Court’s reasons for judgment for a few related reasons. The first relates to the constitutive role that language plays *in general* in the production and exercise of legal power. Language is one of the primary vehicles, if not *the*

primary vehicle, of legal power. This is because law is fundamentally discursive in nature: it is generated, enforced, contested, reproduced, and transformed through language (Sarat and Kearns 1994; Constable 2014b; Dolin 2007; M. Freeman and Smith 2013; Galdia 2014; Goodrich 1987; Mellinkoff 1963; Constable 2014a; Tiersma 1999; J. B. White 1985b; Hutton 2009; Marmor 2014; Hanne and Weisberg 2018b; Shuy 2015). Dolin (2007, 2) summarises this contention succinctly:

[L]aw is inevitably a matter of language. The law can only be articulated in words. While the order of a court will be imposed on the body or the property of the parties to the case, it will originally have been spoken as a sentence.

Rock (2011, 138) puts this in similarly deft terms:

Language sets up law, defining offences, obligations and rights and presenting these for legal specialists and for members of society who decide whether to live by law's words or face consequences also stated in language . . . Law is also conducted, enforced, indeed brought into existence through language. In police stations, courts and prisons, for example, law moves off the page and into people's lives[.]

As such, if language is one of the primary vehicles, if not *the* primary vehicle, through which legal institutions like the Family Court exercise power, then language must also be one of the primary vehicles, if not *the* primary vehicle, through which they govern gender.

On this basis, reasons for judgment are an apt site to analyse how the Court governed gender through its regulation of manual hormone use because they are one of the most central and powerful mediums through which legal discourses are enacted (Robert A. Ferguson 1990; Wetlaufer 1990; Solan 1993; Levinson 1996; Gewirtz 1996; Level 1996; Leubsdorft 2001; Popkin 2007). In common law systems judgments are one of the most significant conduits of legal power; these judgments, therefore, will have played a significant role in constituting both the law itself as well as the form of gender governance that that law enacted. James Boyd White (1985a, chap. 6) has written about the central role that judgments play in constituting the legal world in these terms, noting that “if it is not in principle or practice reflected

in a judicial opinion, some would say, it is not the law” (J. B. White 1985a, 110). Gewirtz (1996, 10), too, has written about the dominant role that judgments play in legal discourse, noting that the interpretations of law rendered by judgments “have authority the way no literary critic’s interpretation of a primary text can, even if that critic’s interpretation becomes the dominant one [because] they become binding precedents with legal authority.” As such, if legal power has been used to govern gender in these cases, and if judgments are a key force involved in enacting that legal power, then an analysis of judgments promises insight into the nature of that form of governance as well as the processes through which it was produced.

Yet more than this, the Court also governed gender *directly* through these judgments. This is because it was within these judgments that the Court constructed the conditions of legitimacy that arbitrated its subjects’ ability to use hormones manually. In giving their reasons for judgment, judges are required to offer a detailed and ostensibly coherent explication of ‘the facts’ of a case and account for how those facts contribute to that case’s resolution (Leubsdorft 2001; Hanne and Weisberg 2018a; M. Kirby 1990). As such, judgments present the Court’s *argument* for the validity of the decision it has reached. This means that in its judgments the Court was required not only to state but also to argue for the validity of the criteria that it constructed to judge the legitimacy of its subjects’ manual hormone use. As such, an analysis of these judgments promises *direct* insight into how the Court governed gender through its regulation of manual hormone use as it was the content of these judgments that determined how the Court’s subjects could enact it.

That judgments are a primary site where the Court constructed the conditions that governed its subjects’ ability to use hormones manually to affirm their gender also means that it is a primary site where these conditions can be scrutinised. The practice and consequence of crafting such explanations are, as numerous scholars have pointed out, inevitably rhetorical (Robert A Ferguson 1990; Sarat 2016; Singer 1983; Stern 2018; Brooks and Gewirtz 1996; Wetlaufer 1990; Harrington, Series, and Ruck-Keene 2019). The rhetorical nature of judgments means that an analysis of judgments can reveal the structure of the Court’s truth claims as well as the processes through which those truths are constructed. An analysis of judgments can therefore

engage both with the nature of decisions—that is, *what* was decided—as well as with *how* these decisions were made, justified, and explained within legal discourse. Judgments are therefore useful to analyse because they promise insight into the rhetorical architecture of the legal power involved in enacting a mechanism of gender governance, and as such insight into the architecture that comprises that mechanism itself.

Judgments are also an important site for analysis because they are involved in the production of legal power more broadly. Many scholars have argued that judgments are one of the primary mediums through which judicial authority is produced. Popkin (2007, 1) argues, for instance, that “The judicial opinion is the public face of the judiciary” and as such that they perform a legitimising function for legal institutions by “project[ing] judicial authority to the external public.” Singer (1983, 23) reasons on this point that for the sake of their legitimacy judges must be seen to decide cases fairly, ‘judiciously,’ and “in such a way as to satisfy the public sense of justice.” To illustrate this, Singer (1983, 22) proposes a rhetorical question, asking what would happen to the legal system if it were widely known “that judges decide cases regularly by flipping coins?” Indeed, the role that reasons for judgments play in this respect is one of the factors that has motivated a great deal of research into their effects on the public’s perception of the legitimacy and veracity of legal decision making (see Scurich 2018 for a review). On this basis, legal judgments are important to analyse not only because they act as the vehicles through which law exercises power over gender, but also because they are part of the discursive apparatus that grants law the power to produce and regulate gender in the first place.

I also chose to analyse reasons for judgment because they represent the perspective and actions of the Court as an institution. This is important for my analysis because I want to focus on how the Court *as an institution* worked to govern gender rather than focus on the perspectives or contributions of any individual or sets of individuals. Judgments speak for the Court as an institution in multiple ways. First, they are constructed as such by the Australian legal system which, following the common law tradition, treats reasons for judgment as comprising the voice of the Court rather than the opinion of an individual judge. This notion can be found

in some of the common law's most foundational jurisprudence, such as in Sir William Blackstone's formative treatise, published in 17<sup>th</sup>-century England, which referred to judges as the "living oracles" or "mouthpieces" of law (Blackstone 1765, 69; for analysis, see Davies 2017, 41). This notion endures in contemporary legal positivism and formalism (Posner 2008; Gilmore 1979), as well as in popular legal understanding. As Popkin (2007, 1, my emphasis) explains, judgments are generally considered to be "a written, signed, and (except in unimportant cases) publicly reported opinion that *speaks for the court*" on any given matter.

Judgments also work to represent the Court as an institution by order of what James Boyd White (1985a, chap. 6) describes as their "many-voicedness." This means that while judgments are constructed to give the impression of having been written by a sole author, the composition of these texts is, in fact, a collective endeavour by necessity. Judgments are not produced by any individual but require—that is, could not exist without—and emerge as the result of collaboration and dialogue between multiple actors. Leubsdorft (2001, 447–49; see also Levinson 1996) makes this point eloquently:

A judicial opinion tells many stories and speaks with many voices. It is less a single and anonymous utterance of the law than a condensed quarrel, less a line than a knot. It is precisely that complexity that enables it to absorb and seek to resolve a variety of conflicts: conflicts between parties, between social interests, between judges, between justice in the individual case and general rules of law . . . The structure of an opinion is therefore [...] composed of its stories and voices and their relationships.

This "many-voicedness" is readily apparent in the judgements that I analysed. They frequently cite affidavits and oral submissions from parents and family members, friends and community members, teams of medical professionals (physicians, paediatricians, endocrinologists, psychologists, psychiatrists, and more), legal professionals, as well as the young people concerned, and they often do so verbatim. It would therefore be misguided to analyse a judgment as if its authorship could be reduced to any individual because these texts contain, quite literally,

multiple authors. However, it would also be a mistake to examine judgments as ‘forums’ where multiple discrete voices are expressed. As Robert Ferguson (2001, 447) explains, despite the diversity of perspectives that they contain, judgments speak with a “monologic voice” that “works to appropriate all other voices into its own monologue . . . [and] to subsume difference in an act of explanation and a moment of decision.” As such, it is most apt to consider reasons for judgment as speaking in the voice of the Court as an institution: that is, as containing and as constituted by a plurality of voices who nonetheless speak with one voice. To speak of “the Court” as the author of these judgments is thus to speak both of the assemblage of actors whose collective interactions have generated them as well as the institution that is produced and which speaks monologically as a result.

### Data Collection and Sampling

Family Court judgments are readily accessible. Australian law requires judges to author and publish judgments for each case they resolve and as such most if not all of the cases that the Court heard regarding a young person’s request for authorisation to use hormones manually for gender affirmation should be represented by a corresponding judgment (Beck 2017; M. Kirby 1994). Since 2007, the Family Court has submitted most of its judgments to the Australasian Legal Information Institute (AustLII) to be published in full after they have been appropriately anonymised (Family Court of Australia 2016). AustLII provides free public access to these judgments via a searchable online database ([www.austlii.edu.au](http://www.austlii.edu.au)). For this reason, AustLII is the standard tool for legal research in Australia (Fong 2006). This means that via AustLII I had, in theory, access to an entire corpus of judgments that represented each case that the Family Court heard regarding the legitimacy of a young person’s manual hormone use.

To collect this corpus for analysis, I searched AustLII’s database for relevant judgments published between 2004 (when the Family Court heard the first case regarding the legality of a young person’s manual hormone use for gender affirmation in *Re Alex*) and 2017 (when the Court ended its arbitration over these

matters in *Re Kelvin*). I conducted this search in two stages. First, I searched for all cases that mentioned “gender identity disorder” or “gender dysphoria” and screened the results for relevant cases. These search terms captured the relevant cases because these were the diagnostic categories that the Court required its subjects to inhabit for it to treat as valid their application for access to gender-affirming hormones (see chapter one). Second, I used AustLII’s *LawCite* tool, which lists all cases that cite or are cited by a given judgment, to find any other relevant judgments that had cited or were cited by the judgments that I had found in the first stage. This was particularly useful regarding *Re Alex* and *Re Jamie* (2013) because the role that cases played in establishing and changing the state of the law meant that most if not all relevant cases cited these cases as precedential judgments.

The corpus that I collected from these two stages comprised 76 judgments in total. These judgments were varied in word count, ranging from 937–21,783 words. The average word count of judgments in this corpus was 4063, with a standard deviation of 2676, and a median of 3700.

### **Theoretical Framework: Critical Legal Theory**

My analysis of the Court’s judgments aimed to reveal how the Court judged the legitimacy, and as such arbitrated the possibility, of its subjects’ manual hormone use. Formally speaking, as I outlined in chapter one, there were two overarching criteria that the Court needed to address to either legitimise or refuse a young person’s request for authorisation to use hormones manually. First, the Court needed to establish whether an applicant had accomplished “*Gillick* competence”—that is, whether they had the capacity to consent to hormone ‘treatment’—in which case the Court’s jurisdiction over these matters would dissipate. And second, in cases where the Court could not establish the applicant’s *Gillick* competence, it needed to establish whether manual hormone use was in their “best interests.” As such, in each case where the Court was asked to determine the legitimacy of its subjects’ manual hormone use, it had to judge the nature of its subjects’ competence to consent as well as their best interests. From a formal legal standpoint, the Court ought to have

conducted this calculation empirically, rationally, and in line with prevailing legal principles.<sup>32</sup> In theory, this ought to have produced an objective judgment on the legitimacy of its subjects' manual hormone use as it arose on the basis of the '*fact*' of their competence to consent or best interests. The analysis that I offer in this thesis, however, proceeds from the presumption that an objective judgment of this kind is impossible. As such, my analysis intends to show how the Court's judgments on the nature of its subjects' competence to consent and best interests were *constructed* rather than *derived*.

The analysis that I offer here is grounded in the tenets of critical legal theory and the perspective that it provides on the nature of legal reasoning. First, my analysis operates on the premise that language, and therefore legal interpretation, is fundamentally indeterminate (Davies 2017, chaps. 5, 8; Constable 2014a; Goodrich 1990). Critical legal theorists, informed by structuralist and post-structuralist theories of language, have shown that legal language and legal interpretation is always capable of generating multiple meanings and therefore incapable of achieving fixed definitions. To support this point, critical legal scholars have shown that legal doctrines can and do produce vastly different interpretations depending upon the

<sup>32</sup> Formal legal analysis operates on the premise that law is a closed, objective, and rational system of decision-making (see Davies 2017, chaps. 2–3). Traditional legal theory asserts that judges can and do produce ideal interpretations of legal cases by conducting a neutral and scientific evaluation of how 'the facts' of a case ought to be interpreted with reference to existing doctrines to produce a truthful and objective account of the legal meaning of any given set of circumstances. The same principle is at the centre of legal formalism which became dominant in the Western liberal democracies in the early 20th century. Formalism imagines that judges resolve cases through the rational application of pre-existing legal rules in a mode of "mechanical jurisprudence" (Pound 1908, 605–8). In this view, cases are determined by a reasoned "fitting of the facts" to a rule of law in a way that adheres to the underlying logic of the legal system—a logic that is, in turn, discoverable through a legal practitioner's scientific study of the law (Posner 2008, 41; Leiter 2010, 111). This notion continues in contemporary legal positivism, which is reflected, for instance, in Ronald Dworkin (1982; 1986) model of law as a "seamless web" of legal principles, sewn from its history of decisions. In Dworkin's view, the role of the judge is to maintain the deep coherence of the system by determining all new principles in the manner that best supports the consistency and structural integrity of the web. For Dworkin, there is always one interpretation that is, at least in theory, more authentic or more accurate than its rivals. Several formal legal analyses of the Court's judgments in these cases have been published, including analyses that have criticised the Court's reasoning on formal legal grounds for having erred in legal reasoning (Parlett and Weston-Scheuber 2004; E. Mills 2004; Kelly 2014b; 2014a; Strickland 2014; Bell 2015).

social and historical context in which they are interpreted and the social and historical location of their interpreter. Moreover, they have argued that there is no objective or neutral way to determine which interpretation ought to prevail in any given setting, and as such, that the attribution of meaning that occurs in judicial judgment is a process governed by social and historical power relations rather than universal reason. According to critical legal theorists, these power relations affect how texts can be interpreted, the range of possible meanings that can be attributed to them, and in whose interests they are interpreted (Unger 1986; Davies 2020; Goodrich 1986; Neacsu 2000; Příbáň 2002). A critical legal analysis thus works from an interpretivist epistemology which, according to Howell (2013, 80), holds that “social and historical constituted power relations affect and mediate all ideas and thinking; values and facts can never be separated; [and] facts always contain an ideological dimension.” On this basis, critical legal theorists advocate for a method of reading legal texts as cultural artefacts the meanings of which are *produced* (rather than revealed) through inter-subjective meaning-*making* practices (Goodrich 1986; 1987; 1990). James Boyd White (1985b; 1985a), for instance, rejected the notion that legal meanings can be ‘discovered’ through formal interpretation practices and advocated instead for an understanding of legal texts as cultural products that are *composed* and whose meanings are *achieved* rather than given. “The life of the law,” according to White (1985a, 122), “is at its heart a life of *composition*: a life of *making* meaning with words about the world.”

In line with the critical legal stance on the indeterminacy of legal language, my analysis rests on the premise that the concepts of “*Gillick* competence” and “best interests” that the Court used to judge the legitimacy of its subjects’ manual hormone use do not have any fixed, ready-made, or essential form. This means that the Court could not have judged the legitimacy of its subjects’ manual hormone use objectively as there is no objective form of *Gillick* competence or best interests that could ground such a claim. The same principle applies to any ‘facts’ that the Court might have cited to establish *Gillick* competence or best interests in any given case, as if there is no external referent form of *Gillick* competence or best interests then there are no objective sets of facts that can establish the ‘truth’ of a subject’s *Gillick* competence

or best interests. Rather, the nature of *Gillick* competence and best interests, and as such the nature of the conditions under which the Court allowed its subjects to use hormones manually, will always be *established* contingently upon an *assertion* of facts which do not have any necessary foundation. Or, to put this in the language of critical legal theory, this means that when the Court established the nature of its subjects' *Gillick* competence and best interests, and the conditions that arbitrated their ability to use hormones manually therein, this was a process of *declaration* rather than *discovery* (Davies 2017, chaps. 5, 8; Constable 2014a).

Indeed, the meaning of best interests—especially as it has operated in legal, medical, and social work contexts—has been extensively criticised as subjectively determined. Numerous analyses of Courtroom decision-making and argumentation, statutes, and professional literatures have argued that the concept of best interests is vaguely and discretionarily defined in theory and practice, subjectively and inconsistently applied, the subject of post hoc rationalisation, defined with reference to the normative and prejudicial presumptions of a given time and place (Wayne 2008; Piper 2000; Salter 2012; Walker 1998; Carbone 2014; Hansen and Ainsworth 2009; Skivenes 2010; Dolgin 1996). Scholars have argued on this basis that best interests cannot be formulated objectively and as such that it is impossible to achieve consensus on what it means. Legal scholars have pointed out that the *Gillick* standard is similarly ambiguous and irrational, showing that its criteria for assessing competence are abstruse and inconsistently applied between cases and across jurisdictions (M. Freeman 2005; Cave 2014; Pilcher 1997; Perera 2008). On this basis, my analysis does not seek to identify the 'true' nature of *Gillick* competence or best interests, nor does it aim to 'diagnose' the misapplication of these concepts. Indeed, it rejects the notion that such an endeavour could be realised. Rather, my analysis seeks to interrogate *how* the Court established particular meanings around these terms. It asks, how did the Court *construct* its notions of *Gillick* competence and best interests, and how did it assert the legitimacy of those constructions?

In examining the meanings that the Court constructed to judge the legitimacy of its subjects' manual hormone use, my analysis also seeks to interrogate the political investments and consequences that followed from the establishment of those

meanings. In line with critical legal theory, my analysis is organised around the claim that law is inexorably political (Davies 2017, chaps. 5, 8). Law's political nature is in one sense due to its constitutive relationship with the State and its function as an instrument of State governance (A. Hunt and Wickham 1994; A. Hunt 2002b; Rose and Valverde 1998; Bourdieu 1987). As Wetlaufer (1990, 1545) identifies, law is "among other things, [...] the business of . . . deploying the awesome coercive powers of the state." Yet, law is also inexorably political due to the political nature of language itself. As Goodrich (1987, 1) writes language is not "a neutral instrument of purposes peculiar to the internal development of legal regulation and legal discipline" but a semantic system that is constituted by and thus inseparable from social and historical norms and values. These points taken together, legal interpretation is political because of its powerful "worldmaking" quality, to use Bourdieu's (1987, 838) term. As Sarat (2016, 2) notes, legal interpretation is "a place in which words take on a seriousness virtually unparalleled in any other domain of human experience." This is because legal language has a nearly unmatched *performative* power to *create* the realities that it names (Constable 2014b; Bourdieu 1987). Backed by the symbolic and coercive powers of the State, legal language has the power to create and structure States and to constitute the political communities that comprise them, for instance. It has the power to declare which of its subjects are citizens, adults, married, retired, alive, and dead—and those declarations become real as an effect of their articulation in legal discourse. This is what Constable (2014b, 2, borrowing from J. L. Austin 1975) means when she states that "law *does things* with words." It is also what Terdiman (in Bourdieu 1987, 809) means when he observes that law has the power to "make[] things true simply by saying them." For James Boyd White (1985a, 5), this feature of legal discourse means that it is one of the "compositional activities" that constitutes social reality and that is one of the key ways in which "we make ourselves in our speech and writing."

That legal language creates the social world, rather than merely describes it, means that it is always wielding normative power. Cover (1983) argued as such, contending that legal interpretation is an intrinsically normative exercise that seeks to control the nature of reality. For Cover (1983, 10) legal interpretation "requires that

one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'" As such, "the meaning of law," he suggests, "is determined by our interpretive commitments . . . [and] the normative universe is held together by the force of interpretive commitments" (Cover 1983, 7). Goodrich (1986) argues similarly that one of the primary functions of legal discourse is to privilege certain realities over others and to bring these sanctioned realities into being through the force of law. James Boyd White (1985b; 1985a) makes this point as well. For White, legal practice is, in essence, contestation over the legitimacy of competing representations of reality. Legal writing, he claims, is an exercise in asserting which forms of reality law should recognise and affirm and in securing *assent* to those assertions. It is in this sense that White (1985a) conceives of legal texts as "*socially constitutive literature*"—that is, that legal texts are oriented toward achieving the *production* of certain kinds of reality, rather than describing realities as they already are. Weisberg and Barricelli (1982, 150) offer a similar contention, describing legal reasoning as "formalized attempt[s] to structure reality through language."

Previous scholarship on both *Gillick* competence and the best interests standard has pointed out that their deliberations have been not only subjectively determined but constructed in service of particular social and political ideologies. King (cited in Hansen and Ainsworth 2009, 436) states, for instance, that in child welfare cases the concept of best interests has functioned as a "*tabula rasa* for adults, and in particular children's lawyers to inscribe, and so give legitimacy, to their beliefs as to what is good and right for the child and to impose their own agenda on the child's future." The use of best interests to secure or support particular social or political ends has been observed in many other contexts as well. It has been used in settler-colonial contexts such as Australia and Canada, for example, to justify the forced removal of Aboriginal children from their families and their internment in state 'care' (Snow and Covell 2006; Cassidy 2006; McComsey 2012; M. Long and Sephton 2011). Best interests has also been used to justify social services practices such as family reunification and preservation, and to promote cooperative ongoing post-separation parenting, based on patriarchal and heteronormative imaginaries of the ideal family in ways that have supported the continuation of child abuse and family violence

(Hart 2010). Similarly, scholars have noted that in family law the bulk of interpretations of best interests have been structured by gender normative assumptions that privilege the production and maintenance of the heterosexual nuclear family and denigrate the value of alternative family arrangements (Ritenhouse 2011; Ottosen 2006; Hosking and Ripper 2012; Scholz and Riggs 2014; E. S. Scott and Emery 2014).

The concept of *Gillick* competence has received similar criticisms in the scholarly literature. Some scholars charge *Gillick* with unintelligibility based on its track record of being discretionarily defined and applied (M. Freeman 2005; Perera 2008; Cave 2014). Others have argued that the conceptions of childhood, adulthood, and parenthood that it enacts arise from and invest in socially, culturally, and historically contingent norms that work to disempower young people (Cannell 1990; Nakata 2015, 102–34; Moran 1986; Pilcher 1997).

This means that neither best interests nor *Gillick* competence can function as objective arbiters of a young person's right to use hormones manually to affirm their gender, but that inevitably their interpretation in the context of these cases will have been invested in the production and maintenance of a certain kind of social and political order. As such, my inquiry seeks not only to describe how the Court constructed its criteria for judging a subject's capacity to consent to manual hormone use and their best interests concerning such hormone use, but also to consider what kind of world these criteria worked to bring into being. It asks, simultaneously: how did the Court construct notions of *Gillick* competence and best interests to judge the legitimacy of its subjects' manual hormone use, and what kind of social and political order did those judgments help to enact? To answer these questions, I turned to discourse analysis.

## **Discourse Analysis**

Based on the critical legal theoretical framework that I outlined above, my task was to identify how the Court constructed its judgments on the legitimacy of its subjects' manual hormone use and consider the social and political consequences entailed by

those constructions. The analytical strategy that I adopted to do this was discourse analysis. In this section, I describe the core features of my approach to discourse analysis and the steps that I took to conduct it.

## Rationale

Discourse analysis is a broad approach to the study of language and other symbolic phenomena (N. Phillips and Hardy 2002; Jørgensen and Phillips 2002; Rapley 2008; Keller 2013; Gee 2014a). ‘Discourse,’ in the context of ‘discourse analysis,’ refers to the total range of communicative practices that social actors use to construct the social world as well as the rules that structure, guide, and facilitate those practices. Analysing discourse in this context means the application of interpretive strategies and techniques to discourses to generate meaning and subject those meanings to critique. Keller (2013, 2–3) defines discourse analysis in this way, as a method for studying “the constitution and construction of the world in the concrete use of signs and the underlying structural patterns or rules for the production of meaning.” In this mode, for Keller (2013, 2–3), discourse analysis provides a method for investigating the production of “meaning systems/orders of knowledge, the social actors involved in this, the rules and resources underlying these processes, and their consequences in social collectivities,” and for analysing the “institutional regulations of declarative practices and their performative and reality-constituting power.”

Discourse analysis is an approach to the study of meaning that is well-suited to the task that I am performing in this thesis. Like critical legal theory, discourse analysis proceeds from the premise that an objective, authentic, or precise reading of a text is impossible due to the inherent indeterminacy of language. As such, in line with critical legal theory, a discourse analysis aims to understand *how* texts establish their meanings rather than declare the truth of a text’s meaning. It then moves to interrogate the effects that those meanings produce. This requires asking, as Buchanan (2000, 8) suggests, “how does it [the text] *work*?” It involves attending to what Willig (2014, 341) describes as “the constructive and performative properties of language” which invest discourses with the power to “*bring into being* the objects and

subjects about which they speak.” In this sense, discourse analysis resonates with the anti-foundationalist approach to the study of legal decision-making that I am undertaking here because it refuses to take concepts like *Gillick* competence and best interests as constructs that exist objectively and independently of their textual composition. Instead, it endeavours to understand how their meanings are enacted in texts as well as the effects that follow from the manner of their enactment.

Discourse analysis is also instrumental for the inquiry that I am conducting here because its tools target the political nature and effects of language use. Discourse analysis is explicitly concerned with identifying and explicating the ideological presuppositions that structure the possibility of meaning in any given text (Fairclough 1995; Wodak 2012). To this end, it considers how the ‘world-building’ power of discursive practices—that is, the role that discursive practices play in bringing *certain kinds* of realities into being—can work in service of normative ends (Lynch 2007). In this way, discourse analysis attends to the power that discourses wield to shape the social world, including the modes of subjectivity and social relations that comprise it, as well as the work that discourses perform to produce, limit, and distribute agency among the social actors that inhabit that world. Indeed, according to van Dijk (2015, 466), the fundamental purpose of discourse analysis is to study how “social-power abuse and inequality are enacted, reproduced, legitimated, and resisted” through language with the intent “to understand, expose, and ultimately challenge” those processes.

## **Procedure**

Discourse analysis does not offer a fixed set of methods, rules, or systems to facilitate its ends. Instead, it offers an overarching theoretical framework, a “toolkit” (Gee 2014b) for identifying patterns in texts, and a set of interpretive strategies and reflective questions to help readers to understand how texts are constructed and consider their effects (N. Phillips and Hardy 2002; Jørgensen and Phillips 2002; Rapley 2008; Keller 2013; Gee 2014a). As Potter (2004, 611) writes, “there is no single recipe for doing discourse analysis . . . Nevertheless, there are a number of ingredients

which, when combined together, are likely to produce something satisfying.” The recipe that I constructed for my ends consisted of two stages: a first stage of systematic coding, and a second stage of analysis and critique. In the next two sections, I outline the steps that I followed and the ingredients that I used in each stage in turn.

### *Stage One: Coding*

The first stage of my analysis involved coding each judgment in the corpus comprehensively using the qualitative research software NVivo. As is standard in qualitative data analysis, this consisted of two concurrent processes (Saldaña 2013, 9–11). The first process involved an intensive line-by-line reading of each judgment which generated or applied codes to each concept, topic, idea, event, subject, object, value, rhetorical or narrative feature, and so forth that appeared in the text (Saldaña 2013, 3). This first round of coding relied upon techniques from thematic analysis (Boyatzis 1998; Braun and Clarke 2006) to identify and catalogue the key elements of discourse that appeared and reappeared throughout the corpus as well as a range of broader qualitative coding strategies which helped me to identify and catalogue discursive features in the text that were not reducible to ‘themes’ (Saldaña 2013, chap. 3; Auerbach and Silverstein 2003). This involved coding manifest phenomena—that is, features that were directly observable in the text—as well as interpretations of any latent level phenomenon—that is, broader discursive patterns, rules, values, or associations that appeared to be supporting and implicit within the text (Boyatzis 1998). As my analysis progressed through the corpus of judgments, each time a discursive feature appeared or reappeared I would identify and catalogue it either under a novel or extant code with a “descriptive” label (Saldaña 2013, 58–59). This first round of coding generated an extensive catalogue of codes, the incidence of which varied from codes that captured only one line of text in one judgment to codes that captured extensive discussions across much of the corpus.

The second process, which ran concurrently with the first, involved reviewing, re-categorising, and hierarchically organising the catalogue of codes. This involved

developing higher-order schemata with which to re-organise and integrate codes with reference to the categorical, thematic, conceptual, and/or theoretical links that appeared between codes and across the corpus of judgments (Saldaña 2013, 9). Boyatzis (1998, chap. 6) describes this as the process of creating “conceptually organised clusters”—that is, organising codes into categories based on theoretical, conceptual, or empirical proximity. This involved restructuring, rearranging, re-evaluating, and reanalysing codes as new patterns and categories emerged, synthesising or abandoning codes as new orders of relevance appeared, drawing links between codes, and thinking through the relationships between codes (Saldaña 2013, chap. 5). This was an iterative process that helped me to refine the catalogue of codes gradually over time. Eventually, I found that Court’s judgments on the legitimacy of its subjects’ manual hormone use were structured by three primary categories of discourse: discourses on the ontology of gender, the epistemology of gender, and the teleology of manual hormone use. This is to say that the bulk of the Court’s reasoning, evidence, and discussion in these judgments circled around or directly concerned one of these overarching concepts. As such, each of the next three chapters, where I detail the findings of my analysis, is organised around one of these categories.

### *Stage Two: Critical Analysis*

After having produced a catalogue of codes, I moved to the second stage of analysis. This stage involved an analysis of the rhetorical structure, ideological presuppositions, and performative effects of the discourses that these codes contained. I made use of two reflective instruments, analytic memos and an analytical toolkit, to generate this analysis.

I began to write analytic memos as soon as I commenced the first round of coding, and I continued to practice memo writing throughout the data analysis and write-up phases of this project. These memos were the product of generative writing exercises that I used to inspire, organise, analyse, and record my thoughts about the data as they emerged. The purpose of analytical memo writing, as Saldaña (2013, 41)

attests, is to provide the analyst with the opportunity “to document and reflect on [their] coding processes and code choices; how the process of inquiry is taking shape; and the emergent patterns, categories and subcategories, themes, and concepts in [their] data” with the intent to provoke critical thinking and theory-building. I used analytic memos to reflect open-endedly about what I was finding and to practice reflexive critique as my ideas emerged and developed.

In addition to memo writing, I also constructed an analytic toolkit which consisted of a range of discourse analysis techniques that I compiled from several sources. These tools facilitated critical interpretation by highlighting specific features of the text and provoking a reflexive examination of that aspect of the text. My decision to construct and utilise an analytic toolkit was inspired by Gee (2014a; 2014b), who argues that discourse analysis is at its core “a set of tools with which to analyze language in use” (Gee 2014b, 1). Gee (2014a; 2014b) offers a range of his own tools for conducting such analyses, many of which I added to my toolkit.<sup>33</sup> Yet, I also collated a range of interpretive tools from discourse analysis literature more broadly (Kendall and Wickham 1999; Rapley 2008; Gibbs 2007; N. Phillips and Hardy 2002; Shuy 2015; Jørgensen and Phillips 2002; Arribas-Ayllon and Walkerdine 2008; Potter 2004; Scheurich and McKenzie 2000; Fairclough 1995; Keller 2013; van Dijk 2015).<sup>34</sup> I also incorporated tools from the tradition of critical theory and its attendant schools of critical discourse analysis which work to highlight the contingencies of a

<sup>33</sup> Gee (2014b) offers 28 analysis tools, organised into four categories: “language and context,” “saying, doing, and designing,” “building things in the world,” and “theoretical tools.” As Gee (2014b, 2) explains, these tools provide “specific question[s] to ask of data,” each of which “makes the reader look quite closely at the details of language . . . [and] connect these details to what speakers or writers mean, intend, and seek to do and accomplish in the world by the way in which they have used language.” Gee (2014a, chap. 3) also offers a range of tools that relate to what he describes as the “seven building tasks of language,” which ask analysts to identify how a given text works to establish significance, practices, identities, relationships, politics, connections, and sign systems and knowledge.

<sup>34</sup> Keller (2013, 72–74), for instance, provides a list of generative questions that he suggests analysts ask about their texts. These questions included, for example: “when does a specific discourse appear or disappear again,” “what categories of phenomena are thus constituted and how,” “what formations of objects, utterance modalities, concepts and strategies does a discourse contain,” “what are the rules of formation and the processes and modalities of structuring,” “what actors occupy the positions of speakers using what resources, interests, and strategies,” and “who are the bearers, the addressees and the audience of the discourse?”

texts' meanings and reveal the ideologies embedded within those meanings (Wodak 2012; Fairclough 1995; Locke 2004).<sup>35</sup> These additions were pertinent because, as Gee (2014b, 1) suggests, analysts should reappropriate tools from a range of sources to meet "the needs and demands of their own study."

To sharpen my analysis of the gendered ideologies embedded within these texts, I also incorporated a range of queer reading techniques into my toolkit. Queer theory offers a diverse range of tools for interpretive analysis which aim to track and challenge the normative production of gender and sexuality in discourse (Browne and Nash 2010; Schilt, Meadow, and Compton 2018; Ghaziani and Brim 2019; Brim and Ghaziani 2016). Instrumentalising post-structuralist and postmodern theories of language, queer reading proceeds from a rejection of the notion that gender and sexuality are universal, immutable, discrete, or natural forms. Queer analyses operate instead on the premise that gender and sexuality are contingent, ephemeral, and revisable products of discursive processes that are culturally and historically specific (Sullivan 2003). Grace (2012, 719) summarises this position accordingly:

Queer theory assumes a spectrum of fluid sex, sexual, and gender differences that are always in a state of becoming; being is never fixed and belonging is never a certainty. In a queer context, differences, representations, expressions, and desires are considered dynamic, multiple, and varied, which makes queer theory a volatile formation.

As such, insisting that there is no essential or objective set of gendered forms, queer reading aims to understand how normative conceptions of gender are *established* discursively (W. B. Turner 2000; Marinucci 2010).

Queer theory also provides a range of techniques for considering the effects that arise from different discursive renderings of gender. For instance, queer reading pays particular attention to identifying and challenging textual processes which seek to normalise and/or privilege specific modes of gendered or sexual expression. It is in this sense that scholars like Sullivan (2003, vi) advocate for the use of queer as a verb

<sup>35</sup> For example, I incorporated into my toolkit Fairclough's (1995) nine analytical properties of discourse. Fairclough argues that analysts ought to attend to vocabulary (including word meaning, wording, and metaphor), grammar (including modality, transitivity and theme), cohesion (connectives and argumentation), and text structure (interactional control).

to describe an *activity* which seeks “to makes strange, to frustrate, to counteract, to delegitimise, heteronormative knowledges, epistemologies and institutions, and the subjectivities and socialities that are (in)formed by them and that (in)form them.” In addition to such modes of deconstructive reading, queer reading also aims to affirm the existence and possibility of minority and/or anti-normative gendered and sexual expressions in a text (e.g. Sedgwick 1990). Overall, as Sharpe (2017, 422) writes, queer reading focuses on “challenging dominant and binary understandings of the categories of sex, gender and sexuality, deconstructing ideas of normalcy and deviance, defending desire and placing at the centre of analysis and critique, those located at the sexual and gender margins.”

To accomplish these ends, queer theory borrows a range of tools from post-structuralism to undermine the stability of discourses on gender and sexuality. For instance, queer analyses often incorporate deconstructive reading strategies, informed by Derrida (1976; 1978), which involve reading texts ‘against the grain’ to reveal the inherent instabilities and interdependencies of their meanings and the political implications carried by them. One such strategy that has been particularly useful in my work has been the concept of the ‘constitutive outside,’ which in the context of queer theory posits that the legitimacy of any given form of gender or sexuality requires the production of alternative forms that are cast as illegitimate (Fuss 1991). As Sullivan (2003, 51) summarises, this mode of deconstructive analysis aims to “highlight the inherent instability of the [given] terms, as well as enabling an analysis of the culturally and historically specific ways in which the terms and the relation between them have developed, and the effects they have produced.” Using the example of heterosexuality and homosexuality, she notes that:

[A] deconstructive reading of heterosexuality as something that has been represented as natural and/or original, discrete, and essential, would show that heterosexuality is dependent on its so-called opposite (homosexuality) for its identity. In other words, heterosexuality (and/or the ‘natural’) includes what it excludes (homosexuality and/or the ‘unnatural’); homosexuality is internal to heterosexuality (and vice versa) and not external to it as a humanist account of identity and

meaning would claim. The ‘two’, then, are never discrete, and thus the opposition no longer holds.

Giffney (2016, 8) also identifies this deconstructive reading technique as a core feature of queer analysis:

Queer theory exposes in its very figuration the way in which discourse flattens out phenomena in an attempt to make them into palatable, digestible sound bites. It exemplifies the contradictions nestling within concepts, the way in which meanings proliferate and spill out of terms the more we try to contain them; the impossibility of owning, or securing so-called proper definitions for, words and phrases.

I have used this tool to identify how normative conceptions of gender are produced in the Court’s judgments through the foreclosure of alternatives—that is to consider the exclusions that are inherent to any attempt that the Court made to establish certain forms of gender as legitimate, even with ostensibly ‘inclusive’ intentions.

Once I had compiled my toolkit, to put these tools into practice I organised them into an analytic table and then sieved my codes through that table. This table consisted of three columns, with the tools listed in the left column, room to record analytic notes in the right column, and room to collect illustrative quotes in the middle column. I then read the collection of quotes that I had assembled under each code through the lens of each of the tools that I had compiled in my toolkit. As I did so, I recorded any thoughts that arose in the table, along with the quote that triggered that thought. Gradually, the collection of thoughts and the number of quotes attached to each thought grew. This analysis produced a large number of reflective notes which, after I had conceptually thematised them, became the cornerstones of the analysis that unfolds in the proceeding three chapters.

## **An Ethical Orientation for Critique**

So far, this chapter has laid the methodological foundations for the analysis that develops throughout the next three chapters. Now, before I begin to explicate that analysis, I would like to install an ethical framework to preface the arguments that

are to come. The necessity of this framework owes to the ethical responsibility incumbent upon researchers to consider their work's potential to harm as well as its duty to ameliorate harm and contribute to the building of a more livable world (Shaw and Holland 2017; Brabeck and Brabeck 2009). This obligation is particularly pronounced in the context of this thesis, as it deals with a system that was explicitly concerned with governing the lives of trans, intersex, and gender non-conforming people whose livability has been structurally undermined generally, but also within academic discourse specifically.

The world that this thesis has emerged from, and into which it emerges, is intensely hostile to trans, intersex, and gender non-conforming people. Trans, intersex, and gender non-conforming people experience greater rates of interpersonal violence (including abuse, harassment, physical and sexual violence, homicide, as well as unwanted medical interventions), internalised violences (including those related to mental health, self-harm, and suicide), and are victimised by a range of structural violences that denigrate the economic, social, legal, and political status of gender non-conforming lives (Strauss et al. 2017; E. Smith et al. 2014; Couch et al. 2007; Hoxmeier and Madlem 2018; Wirtz et al. 2020; Fernández-Rouco et al. 2017; Griner et al. 2020; Temmerman et al. 2017; Ellis, Bailey, and McNeil 2016; Perry and Dyck 2014; Boza and Nicholson Perry 2014; Jauk 2013; Stotzer 2009b; Wyss 2004; Lombardi et al. 2002; Lozano-Verduzco and Melendez 2020; Hiner and Garrido 2019; Krell 2017; Boukli and Renz 2018). These violences are also distributed differentially according to age, class, race, indigeneity, disability, and many other modes of social stratification (Hodge 2015; R. Rosenberg 2017; Meyer 2010; Schares 2019; K. Brown 2004; S. C. Kerry 2014). Moreover, young trans, intersex, and gender non-conforming people—the focal group of the system of governance that this thesis studies—are particularly vulnerable to many of these forms of violence (Strauss et al. 2017; E. Smith et al. 2014; Veale, Watson, et al. 2017; Veale, Peter, et al. 2017; Rimes et al. 2017; Becerra-Culqui et al. 2018; Marx et al. 2020). That these violences attend trans, intersex, and gender non-conforming lives means that researchers in general—but particularly researchers whose work bears significance for those lives—have an ethical obligation to counteract the systems

that produce these violences, as well as contribute to building worlds that sustain and affirm the modes of existence that those violences work to extinguish (Shaw and Holland 2017; Brabeck and Brabeck 2009; Raun 2014; A. H. Johnson 2015; Galupo 2017; Namaste 2009; Bettcher 2019).

However, academic inquiry has consistently and often egregiously flouted its ethical obligation to trans, intersex, and gender non-conforming people. It has done and continues to do this by participating in the pathologisation, stigmatisation, delegitimation, erasure, and silencing of trans, intersex, and gender non-conforming people, as well as by participating in the perpetration and legitimisation of violence against them (R. Connell 2012; Prosser 1998a; Weeks 2000; Drescher 2010; 2015; Meyerowitz 2002; Schilt and Lagos 2017; shuster 2019; Namaste 1994; 1996b; 2009; Bettcher 2014; 2019; A. H. Johnson 2015; Raun 2014; Radi 2019; B. W. Vincent 2018; Awkward-Rich 2017; Ahmed 2016; De Block and Adriaens 2013; Hines 2019; McQueen 2016b; Serano 2007; Stryker 2007; S. Stone 2006; Siegel 2019; G. Beemyn 2019; Hale 2009; Bouman et al. 2018; Winter 2017; Latham 2017b; Davy, Sørli, and Süss Schwend 2018; Davy 2015; Sennott 2011; Morland 2009; Holmes 2008; Whittle 2006b; Holmes 2009a; see generally Stryker and Whittle 2006). These harms have been perpetrated in one way through the exclusion of trans scholars and depreciation of trans-centred or trans-led knowledge production in the academy (Siegel 2019; G. Beemyn 2019; Radi 2019; Stryker 2006; Stryker and Aizura 2013b; shuster 2019; Schilt and Lagos 2017; J. R. Johnson 2013; Chu and Drager 2019). The academy has also caused harm by producing, and in many cases valorising, work that has been explicitly pejorative of trans, intersex, and gender non-conforming people. This includes work that has held an ostensibly critical, feminist, queer, or emancipatory orientation. Trans scholars have shown that a vast swathe of feminist and queer scholarship, regardless of whether it has aimed to be pejorative or emancipatory, has excluded or objectified, instrumentalised, and helped to undermine the reality of trans, intersex, and gender non-conforming lives (Namaste 1994; 1996b; 2009; Bettcher 2014; 2019; Stryker 2007; R. Connell 2012; Serano 2007; Hines 2019; Awkward-Rich 2017). Feminist and queer social constructionist frameworks, like the one that structures this thesis, have played a particularly pronounced role in this,

having been used to denigrate and vilify trans, intersex, and gender non-conforming people by refuting their realities, constructing them as complicit in their subjugation, and charging them with the maintenance of patriarchal and hierarchical gender relations. This has most often been the case when these perspectives have been wielded by cisgender researchers and/or from cis-centric perspectives (Raun 2014; Galupo 2017; Namaste 1996b; Hale 2009; Namaste 2009; Bouman et al. 2018; Radi 2019; B. W. Vincent 2018; Macdonald 2013; Meadow 2016; A. Enke 2012a; 2012b; Stryker 2006). This history is not over; anti-trans discourses and practices are ongoing and are dominant in many academic fields (C. Williams 2016; Ahmed 2016; Hines 2019; Pitcher 2017; G. Beemyn 2019). As such, for academic inquiry concerned with trans, intersex, and gender non-conforming lives to be ethical, it must reckon with this history and context. It must also work to dismantle the structural properties of the academic field that are involved in enacting and facilitating violence against trans, intersex, and gender non-conforming people. And, it must rework the academic field in a way that affirms rather than undermines the livability of trans, intersex, and gender non-conforming lives.

Toward this end, I must work to ensure that the arguments that I offer here cannot be wielded to delegitimise and/or harm trans, intersex, and gender non-conforming lives. This is particularly important because the arguments that I offer in the coming chapters deconstruct and challenge a range of claims that the Court made regarding the ontological, epistemological, and teleological conditions that legitimise manual hormone use for gender-affirmation. These arguments should be both formulated and interpreted carefully given that similar arguments about gendered ontologies, epistemologies, and teleologies have been and continue to be wielded in academic discourses and beyond to delegitimise trans, intersex, and gender non-conforming realities and in doing so expose trans, intersex, and gender non-conforming people to the violences that attend lives marked as unreal (Bettcher 2019; Namaste 1996b; 2009; Bettcher 2007; 2014; Namaste 1994; Heyes 2003; Whittle 2006b; Awkward-Rich 2017; Ahmed 2016; C. Williams 2020). I must state clearly, then, that the critiques that I offer here *do not concern* the ontological, epistemological, and teleological discourses that trans, intersex, or gender non-

conforming people use to construct and assert the legitimacy of their own identities, experiences, practices, or modes of being. Nothing that I say in this thesis applies to the discourses that individuals and communities use to construct their gender or assert the legitimacy of the practices that they use to affirm their gender (on this point, see Bettcher 2009). This is because the discourses that I analyse in this thesis were *not spoken by individuals or communities*. Rather, the discourses that I analyse were *spoken by the Court*, from a position of power, and as such, the critiques that I offer here exclusively concern the *leveraging* of certain ontological, epistemological, and teleological discourses *by a governing institution for the purpose of governance*.

This point is particularly important to keep in mind when I discuss instances where the Court has appropriated discourses that trans, intersex, and gender non-conforming people have used and continue to use as instruments of self-understanding and self-affirmation in contexts beyond the Courtroom. And, it is especially important to remember this when I discuss instances where the Court ventriloquized its subjects to argue for the validity of its wielding of certain discourses as instruments for legitimising and thus arbitrating their manual hormone use. Indeed, one of the things that I have discovered in my analysis is that the Court often appropriated the discourses used by trans, intersex, and gender non-conforming people to assert the nature and legitimacy of their modes of being and transformed these discourses into instruments of governance.<sup>36</sup> Thus, there are crucial differences in the functions and effects of such discourses when they are wielded by individuals and communities to construct, articulate, and assert the legitimacy of their own identities, desires, and modes of being compared to when they are used by an external arbitrator to judge the legitimacy of those identities, desires, and modes of being and arbitrate the possibility of their affirmation. Attending to this difference, as Butler (2004b, 8, my emphasis) identifies, involves “distinguishing among the norms and conventions that *permit* people to breathe, to

<sup>36</sup> Institutions appropriating discourses that trans, intersex, and gender non-conforming communities have generated to serve for their own ends and transforming those discourses into instruments for governing those communities is a phenomenon that scholars have observed in other legal settings as well (Spade 2015; Currah, Juang, and Minter 2006; J. K. Taylor and Haider-Markel 2014; Sharpe 2002b; 2018).

desire, to love, and to live, and those norms and conventions that *restrict* or *eviscerate* the conditions of life itself.”

As such, my critique is concerned explicitly with tracking and challenging how the Court used these discourses to govern the gender of its subjects—and the gender of its trans, intersex, and gender non-conforming subjects specifically. This is to say that it is concerned with identifying and contesting the modes of gendered life that these discourses legitimised, and as such mandated, as well as the modes of gendered life that these discourses precluded. In this way, I share with Butler (1999, viii) the aim that she has described as driving her work on gender, which is:

to uncover the ways in which the very thinking of what is possible in gendered life is foreclosed by certain habitual and violent presumptions [. . .] to undermine any and all efforts to wield a discourse of truth to delegitimize minority gendered and sexual practices. . . . [to oppose] those regimes of truth that stipulated that certain kinds of gendered expressions were found to be false or derivative, and others, true and original [. . .] and to open up the field of possibility for gender without dictating which kinds of possibilities ought to be realized.

My aim, then, is to interrogate the discourses that the Court used to legitimise and thus arbitrate its subjects’ manual hormone use to reveal the investments that these discourses made in the production of certain kinds of gendered subjects. In doing so, this thesis calls into question the criteria that the Court imposed upon its subjects’ manual hormone use to affirm the legitimacy of using hormones manually for reasons that are rendered unintelligible or undesirable by the frameworks that the Court invoked here, as well as to assert the legitimacy of using hormones manually to affirm possibilities that these frameworks foreclose. I aim to contribute to the building of a world where trans, intersex, and gender non-conforming lives are more livable. As such, the arguments that I offer here ought not to be used to delegitimise different experiences or enactments of gender, nor should they be used to delegitimise any tools that individual might use to describe or justify their desires for various forms of gender-affirmation. My critique is oriented toward the production of possibilities, not the limiting of them.

## Conclusion

This thesis aims to interrogate how the Family Court governed gender through its regulation of young people's gender-affirming manual hormone use. In this chapter, I laid the methodological groundwork for conducting such an investigation. This has included a discussion of how and why I have conceptualised the Court's regulation as a case study, how and why I have taken the Court's reasons for judgment as my data source, how and why I have conducted a discourse analysis of these judgments, as well as a final note on the ethical imperatives that structure my critique. Now that these methodological foundations have been laid, the next three chapters—chapters four, five, and six—collectively describe the outcome of the empirical investigation that this chapter has set up.

As I stated earlier in this chapter, my analysis revealed that three primary categories of discourse—discourses on the ontology of gender, the epistemology of gender, and the teleology of manual hormone use—structured the Court's judgments on the legitimacy of its subjects' manual hormone use. As such, the next three chapters address each of these categories in turn. In each chapter, I describe the key discourses that comprised each of these categories as well as show how each of those discourses contributed, both individually and collectively, to the Court's machinery of gender governance. Overall, these chapters account for how the Court judged the legitimacy of its subjects' manual hormone use, the conditions that these judgments imposed upon their subject's ability to use hormones manually, and as such, the nature of the mechanism of gender governance that the Court constructed. To begin, the next chapter examines the Court's discourses on ontology.

# Chapter Four

## *Ontology*

This chapter interrogates the Court's ontology of gender. As I said in the last chapter, my analysis revealed that the Court's judgments on the legitimacy of its subjects' manual hormone use consisted of three primary categories of discourse. Ontology is the first of these three categories, alongside epistemology, which I will examine in chapter four, and teleology, which I will examine in chapter six. In interrogating the Court's ontology of gender, this chapter outlines the range of assertions that the Court made about what gender *is* and examines how it used these assertions to arbitrate the legitimacy of its subjects' manual hormone use.

The Court built its ontology of gender from a diverse set of discourses. Indeed, while the term 'gender' occupied a central position in the Court's judgments—appearing 1577 times throughout the 76 cases I analysed—the Court never stated *explicitly* what it considered gender to be. Instead, the Court advanced an ontology of gender *implicitly* by making statements *about* gender. These statements contained tacit suppositions about gender's nature, its defining properties and characteristics, the factors that produce it, and the conditions under which it can change.

The Court's statements about gender advanced two ontological claims. The two sections of this chapter examine each of these claims in turn. In the first section, I discuss how the Court advanced an ontology of gender as an essence. At these times, the Court suggested that gender is an immutable and innate property of human beings, and cited the existence of this essence *inside* its subjects as a factor that legitimised their manual hormone use. The Court thus advanced the view that manual hormone use could be legitimate if it would help a subject to manifest

externally a form of gender that was always-already manifest internally. In the second section, I discuss how the Court also argued that gender was enacted rather than essential. At these times, the Court spoke about gender as a practice, or as something that came into being as an effect of performative actions. The Court argued in these instances that gender was consequential rather than elemental, achieved rather than intrinsic, and something that one *does* rather than *is*. On the basis of these assertions, the Court argued that it was necessary to *secure* its subjects' performance of gender—that is, to ensure that its subjects enacted their gender consistently and correctly. And accordingly, the Court considered manual hormone use to be legitimate when it promised to stabilise its subjects' performance of gender such that their gender would *appear to be* immutable.

In the last section of this chapter, I examine these two ontological claims, both independently and collectively. The Court's ontology of gender might appear paradoxical: an entity cannot exist simultaneously as the product of action as well as independently of and prior to action. Yet despite their incommensurability, these claims were united in producing a series of governing effects. Both ontologies contributed to the Court's machinery of governance by tethering legitimate manual hormone use to the promise that this would affirm, rather than challenge, certain permutations of gender's ontology.

## **Gender is an Essence**

The Court advanced an essentialist ontology of gender in multiple ways throughout its judgments. This included through discourses that sought to establish gender as part of a subject's 'interior' or 'true self,' discourses that framed the relationship between a subject and their gender as a distal and empirical relationship between subject and object, discourses that imbued gender with agency, and discourses that framed their subject's gender as always-already manifest from an early age. In this section, I explicate each of these discourses in turn. In doing so, I show how the Court leveraged essentialist conceptions of gender to legitimise its subjects' manual

hormone use, and as such, how the Court made manual hormone use dependent upon the demonstration of an essential gender.

Spatial metaphor was one technique that the Court used to construct gender as an essence. With spatial metaphors, the Court endeavoured to locate gender ‘inside’ its subjects. In Eddie’s case, for instance, the Court framed manual hormone use as a practice that would help Eddie to express his “*inner* state of gender identity.”<sup>37</sup> In Tahlia, Harley, and Martin’s cases, gender was described similarly as an “*inner*, core identity.”<sup>38</sup> In Kate’s case, meanwhile, the Court argued that manual hormone use was justified because this would help her to “liv[e] true to her *inner* self.”<sup>39</sup> This notion of interiority also appeared in several instances where the Court used the figure of the ‘wrong body’ to conceptualise its subjects’ gender as internal.<sup>40</sup> The Court described Marley, Karsen, and Jordan as “trapped *in* a female body” or “trapped *in* a girl’s body,” for instance.<sup>41</sup> Kate appeared to the Court analogously as “a woman trapped *inside* a male body.”<sup>42</sup>

The Court used several other allegories to interiorise gender as well. For instance, it supported the legitimacy of both Harley’s and Martin’s manual hormone use by reporting that both had had an “enduring experience since very early childhood of [themselves] as a boy at [their] *core*.”<sup>43</sup> The same language appeared again in Eddie’s case, where the Court described his gender as “a *core* aspect of his essential personhood.”<sup>44</sup> In each instance, by locating gender at a subject’s ‘core,’ the Court advances a conception of gender as one of the innermost or central aspects of a subject’s being. The same notion was present in remarks about gender’s ‘depth.’

<sup>37</sup> Re Eddie (2017) ¶25. The similar phrase “inner gender identity” also appears in Re Drew ¶30; Re Chelsea ¶12; and Re Kelvin ¶35.

<sup>38</sup> Re Harley ¶50; Re Martin ¶41; Re Tahlia ¶42.

<sup>39</sup> Re Kate ¶46.

<sup>40</sup> The figure of the ‘wrong body’ has been used both historically and contemporarily to conceptualise and pathologise trans and intersex people (Bettcher 2014; McQueen 2014; Sullivan 2008; L. Hughes 2018; Engdahl 2014; Serano 2007, chap. 10). I discuss this figure in greater detail below, as well as in chapter six.

<sup>41</sup> Re Marley ¶14; Re Karsen ¶11; Re Jordan ¶16.

<sup>42</sup> Re Kate ¶10.

<sup>43</sup> Re Harley ¶31; Re Martin ¶18.

<sup>44</sup> Re Eddie ¶59.

Dale, for instance, was said to feel a “*deep* longing for male body features,”<sup>45</sup> while Flynn held a “*deep* belief that she is a girl.”<sup>46</sup> Likewise, Jaden’s desire to use hormones manually was narrated as arising from his “*deep* felt sense of the inappropriateness of living as a female.”<sup>47</sup>

This mode of spatialisation is a common feature of Western cultural constructions of self. It frequently appears in discourses that intend to establish a notion of the self as immutable and as comprised of a range of inherent properties (K. M. Kirby 1996; Rose 1991). These constructions typically posit a bifurcated model of the self, where the self consists of an intransigent split between its interior and exterior manifestations. In this telling, the ‘inner’ self consists of a subject’s reflexive self-consciousness while the ‘outer’ consists of a social performance of self to others. Within this framework, these two facets of selfhood are usually described as irreconcilable and as constituted by opposing characteristics. Thus, the ‘outside’ is constructed as a transient and ephemeral space which is visible to others and capable of producing ‘(mis-)representations’ of the self, while the ‘inside,’ is constructed as an opaque and immutable space of one’s ‘inner truth’ or ‘soul’ (K. M. Kirby 1996).

In the Court’s judgments, spatial constructions of this kind worked to establish an ontology of gender as an essence. Deploying these spatial rhetorics, the Court argued that gender was *not* of the ‘outside.’ Gender, the Court implied, does not inhabit a space that is transient and ephemeral. Rather, the Court wanted to establish a conception of gender as a feature of its subjects’ intransigent and eternal interior. And moreover, in the Court’s account, gender’s interiority also meant that it was potentially invisible. Often, gender was not apparent from the ‘outside.’ Indeed, it was often not apparent to subjects themselves.

These kinds of spatial rhetorics have been a common feature of contemporary Western liberal constructions of gender and sexuality, where they have worked analogously to shore up essentialist ontologies of the self. For instance, gender and sexual minority rights movements in the West have often leveraged discourses of

<sup>45</sup> Re Dale ¶64.

<sup>46</sup> Re Flynn ¶60.

<sup>47</sup> Re Jaden ¶19.

interiority to argue against the social, legal, and political exclusion of gender and sexual minorities (see Sullivan 2003, chap. 2; Warner 1999; D. Martin 2018). These campaigns have argued that it is unjust to discriminate against a social group based on a characteristic that is ‘internal’—or, in other words, congenital and immutable. Spatialisations of this kind also feature in contemporary practices of identity construction and disclosure regarding gender and sexuality. The figure of ‘the closet’ is a pertinent example of this. Before disclosing one’s identity, a subject is often said to be ‘*inside*’ the closet. Disclosure, inversely, involves either ‘coming *out*’ or being ‘*outed*.’ Queer theorists have argued that these spatial rhetorics invest in essentialist conceptions of gender and sexuality by implying that a subject’s gendered or sexual state of being precedes their enactment of that being (Butler 1999; 1991, 171–78; Fuss 1991; Sedgwick 1990; Rust 1993; Brumbaugh-Johnson and Hull 2019; Klein et al. 2015; van der Wal 2016; S. D. Clare 2017; M. A. Robertson 2016; L. Jones 2020) A similar notion is at work in ‘wrong body’ discourses. Engdahl (2014, 267) identifies how the ‘wrong body’ narrative relies upon a notion of gender as an essence, writing that:

The body is assumed wrong in relation to an inner, real, and authentic gender identity, thus giving the impression of an essence that the body constrains, producing a reified image of both body and self as static and separate entities and thereby correlating an essentialism of genital materiality that disputes the realness of transgender experience.

Sadjadi (2019) has observed the deployment of similar rhetorical strategies in clinical constructions of trans and gender non-conforming young people in the United States. She notes that the “current clinical enactment of gender identity has relied on processes of (psycho-) medicalisation, individualisation, thingification, and internalisation” which locate gender “in the inner depths of the self” (Sadjadi 2019, 104–5). Such accounts of gender “as a thing inside the brain of the individual” establish it, in Sadjadi’s view, as “an essence prior to (and even bereft of) . . . bodily and social production” (Sadjadi 2019, 120).

The Court also advanced a theory of gender essentialism in discourses that cited the need for a subject to manifest their “true self” as a factor that justified their

manual hormone use. This notion appeared in the Court's remarks about Martin, whose manual hormone use was framed as a necessary means for him to express "his 'true self'."<sup>48</sup> In Anita's case, meanwhile, the Court legitimised manual hormone use as a tool to help her to become a "more honest" version of her "true self."<sup>49</sup> Comparably, the Court legitimised manual hormone use for Kate because it expected that her "life would be much better as a girl as she would be living true to her inner self."<sup>50</sup>

The notion of the 'true self' that the Court deploys in these instances is another common Western cultural construction (Rose 1991; A. Elliot 2008). Like the spatial conceptions of the self that I have just discussed, the 'true self' offers an account of subjectivity that is similarly essentialist. The 'true self' is essentialist because it infers the existence of an enduring, immutable, and incontrovertible substance which acts as its referent. In this way, when the Court spoke of its subject's true self, it implied the existence of a discrete and stable entity called the self which consists, in part, of its gender. It suggested also that gender, as a property of this 'true self,' can be either concealed or made apparent in social practice, and that this will lead, respectively, to either the manifestation or suppression of the 'true self.' On this basis, manual hormone use became legitimate, in the Court's view, when it promised to facilitate the 'authentic' social presentation of a subject's 'true self.' In this mode, living 'authentically' requires that subjects render their 'inner truth' visible on the 'outside.' As such, by constructing gender as a property of the 'true self,' and by constructing manual hormone use as a means to facilitate a subject's authenticity, the Court suggested not only that gender is an enduring and immutable property of the subject but also that subjects ought to represent that self accurately to others. Indeed, the Court stated this explicitly on several occasions. In Andy's case, for instance, the Court constructed manual hormone use as a means to remedy the fact that Andy

<sup>48</sup> Re Martin ¶18.

<sup>49</sup> Re Anita ¶31.

<sup>50</sup> Re Kate ¶16.

did “not feel [...] able to be his authentic self.”<sup>51</sup> In Sara’s case, too, manual hormone use was justified as a means to help her to become “an authentic person.”<sup>52</sup>

Another way that the Court advanced an ontology of gender as an essence was by framing gender as a property of the self that is discoverable through introspection. This notion appears in Kelvin’s case, where the Court reported that Kelvin “was nine years old [when] he *discovered* the concept of transgender in a book and immediately identified with it.”<sup>53</sup> A narrative of discovery also appeared in Marco’s case where the Court quoted an affidavit from his father that described Marco’s gender as a “new identity that he *discovered* within.”<sup>54</sup> By using the language of ‘discovery’ in both instances, the Court suggests that Kelvin’s and Marco’s gender was always-already present and awaiting detection. In this way, the Court framed gender as an objective trait that existed prior to and independently of its subjects’ awareness of it.

Similar modes of representing gender as ‘discovered’ recurred throughout the Court’s judgments. In Sasha’s case, the Court noted that “Since *discovering* the existence of transgenderism at age 14, [Sasha] realised that this was what was happening to her.”<sup>55</sup> This statement implies that Sasha’s learning about “transgenderism” expedited her ability to *perceive* and *articulate* something about herself that was always-already the case. The Court told a similar story about Logan, who had been “aware of having female gender feelings since early in childhood although was unable to *recognise* these feelings as gender dysphoria since early in high school after reading more about this on the internet.”<sup>56</sup> Here, the Court framed the relationship between Logan and her gender using the terms of a subject-object distinction. By portraying Logan as having ‘recognised’ her gender, the Court implied that Logan’s gender was something that she encountered, interpreted, and classified.

<sup>51</sup> Re Andy ¶23.

<sup>52</sup> Re Sara ¶20.

<sup>53</sup> Re Kelvin ¶19.

<sup>54</sup> Re Marco ¶57.

<sup>55</sup> Re Sasha ¶32.

<sup>56</sup> Re Logan ¶64.

The subject-object distinction also appeared in other discourses regarding how subjects come to apprehend their gender. For example, in reporting that Harley “*experiences* himself to be male,”<sup>57</sup> that Sasha has a “female *sense* of identity,”<sup>58</sup> that Shane has “always perceived himself as a boy,”<sup>59</sup> and that Flynn “*sees* herself as a girl,” the Court repeatedly narrated the relationship between its subject and their gender as an empirical exchange between a subject and an object.<sup>60</sup> Each of these statements feature a subject (Harley, Sasha, Shane, or Flynn) that perceives, senses, experiences, or otherwise observes an object (gender) which is *apprehended* through that mode of observation. These constructions contribute to a conception of gender as an essence by objectifying gender—that is, by constructing it as an entity that exists prior to and independently of observation—and by asserting that knowledge about it can be generated empirically.

The Court inferred a similar kind of empirical relationship between its subjects and their genders by conceptualising that relationship as a mode of ‘belief.’ For instance, the Court described Kate as holding a “*belief* that she is a woman.”<sup>61</sup> Emery, meanwhile, held a “*belief* that he is male.”<sup>62</sup> Marco, too, was said to have “a *conviction* of being male.”<sup>63</sup> This framework of ‘belief’ appeared in the Court’s deliberations in *Re Jamie* (2013) as well. There, while pondering the circumstances under which the Court had the power to allow young people to use hormones manually, the Court cited a submission from an independent children’s lawyer which considered whether manual hormone use constituted altering “an otherwise healthy body’s functioning [...] to address a dissonance between a *belief* as to gender and the *actual* gender of the person.”<sup>64</sup> When a subject’s statements about their gender are constructed as beliefs in this way they appear as *representations* of reality rather than realities in themselves. ‘Belief’ suggests that the subject and their statements about their gender

<sup>57</sup> Re Harley ¶50. This phrase also appears in Re Martin ¶41.

<sup>58</sup> Re Sasha ¶41. A similar phrase also appears in Re Tara ¶19 and Re Darcey ¶27.

<sup>59</sup> Re Shane ¶15.

<sup>60</sup> Re Flynn ¶60.

<sup>61</sup> Re Kate ¶19.

<sup>62</sup> Re Emery ¶42. A similar construction of “belief” appears in Re Nadia ¶3.

<sup>63</sup> Re Marco ¶39.

<sup>64</sup> Re Jamie (2013) ¶36.

are separate from the reality that they seek to describe. As such, ‘belief’ depicts gender as an objective artefact which exists independently of any interpretations that might be formulated about it. Indeed, by describing its subject’s assertions about their gender as beliefs, the Court suggested that they are merely statements that the subject *supposes* to be true. In this sense, belief suggests that these subjects’ statements about their gender are *propositions* rather than *axioms*—that is, understandings which may be mistaken rather than self-evident truths. ‘Belief’ therefore infers a distinction between the subject’s conceptions of their gender and the reality of their gender by implying that those conceptions are fallible rather than constitutive. Indeed, the Court emphasised this distinction in Jamie’s case by explicitly differentiating its subject’s ‘*belief*’ from what may ‘*actually*’ be the case.

This distinction between belief and reality also underpinned the Court’s constructions of the ‘risk’ that a subject might “change [their] mind.”<sup>65</sup> Change of mind was one of the premier risks that threatened the legitimacy of manual hormone use, in the Court’s view. A distinction between belief (that is, the conception that they have in their ‘mind’) and reality was foundational to this change of mind discourse because a subject’s ‘belief’ about their gender needed to be revisable for a ‘change of mind’ to be possible. In this sense, the idea of a ‘change of mind’ suggests that subjects might encounter new evidence about their gender and shift their perspective on it accordingly. This construction implies that a subject’s gender exists independently of their conceptions about it and that they can only hold contingent knowledge about it. For this notion to work, there must be a set of mind-independent facts about the nature of a subject’s gender that can discipline the truth claims made about it.

The Court also constructed gender as an essence in discourses that attributed gender with agency. In several ways, the Court constructed gender as something that could act *upon* its subject. Gender, in the Court’s view, had the power to influence its subjects’ desires and encourage them to carry out certain practices. This was

<sup>65</sup> This phrase appears in Re Shane ¶28; Re Spencer ¶43; Re Ashley ¶29, 49; Re Julian ¶58, 61; Re Kate ¶51, 57; Re Emery ¶54; Re Kerry ¶68, 72; Re Shay ¶19; Re Jaden ¶48; Re Jan ¶12; Re Eddie ¶60; Re Hudson ¶25; Re Rae ¶18, 28, 46, 83.

apparent when the Court recounted that Dale had “displayed a *tendency* towards boys’ clothing from the age of four or five and *gravitated* towards friendships with boys around that same age.”<sup>66</sup> In Mitchell’s case, the Court wrote that “Mitchell was *drawn* to ‘boyish’ clothing.”<sup>67</sup> In both statements, gender appears to exert some kind of attractational force that can compel its subjects to enact certain kinds of behaviours and to participate in certain kinds of social relations. Similarly, to return to a statement I quoted earlier, the Court constructed gender as agentic when it described Sasha as having “discover[ed] the existence of transgenderism” and in doing so “realised that this was what was happening *to her*.”<sup>68</sup> In this statement, Sasha and her “transgenderism” appear as separate entities, and it is only her “transgenderism” that exercises agency. Sasha, in this construction, is beholden to her “transgenderism.” “Transgenderism” exerted its will *upon* her. It drove her, in the Court’s view, to act and feel like a girl, and to want to be a girl. Sasha had no will, desire, or control of her own.

A conception of gender as agentic also appeared in discussions regarding parental attempts to ‘correct’ their children’s gender non-conforming behaviours. The Court recounted in *Re Jamie* (2011), for example, that:

[Jamie’s mother] swore that she and her husband tried to reinforce Jamie’s masculinity, encouraging her to wear male clothing, have her hair cut short, and play with gender-neutral toys. She said that despite that, Jamie became “more insistent on identification with the female gender.”<sup>69</sup>

The Court recounted a similar story in Flynn’s case, noting that Flynn’s gender identity persisted despite the “well-meaning pressure placed upon [her] to engage in ‘male orientated activities’.”<sup>70</sup> Celeste’s gender was also framed as persevering despite parental efforts to suppress it. The Court wrote that Celeste’s “parents [had tried] to encourage Celeste to live more as a boy so that she would ‘fit in’ and not be bullied .

<sup>66</sup> *Re Dale* ¶39.

<sup>67</sup> *Re Mitchell* ¶9.

<sup>68</sup> *Re Sasha* ¶32.

<sup>69</sup> *Re Jamie* (2011) ¶13.

<sup>70</sup> *Re Flynn* ¶37.

.. but this was not successful.”<sup>71</sup> In each of these statements, the Court narrated its subjects’ genders as enduring *despite* the presence of external forces working to overpower it. These narratives suggest, as such, that gender is not only immutable but *insistent*.

An ontology of gender as essential also undergirds the Court’s suggestions that a subject’s gender emerged naturally at an early age. Statements of this kind were pervasive throughout the Court’s judgments. In at least ten cases, the Court noted in identical terms that its subject “identified as [fe/male] from an *early age*.”<sup>72</sup> Yet the Court made this suggestion in many other ways as well. In Spencer’s case, for instance, the Court recorded that Spencer had “maintained the wish to be a boy since early childhood.”<sup>73</sup> In this mode, the Court often framed its subjects’ styles of dress and behaviours as a child as expressions of their inherent gender. This was the case for Benjamin, who the Court described “as having always been a tomboy” and as “growing up with mostly male friends, and choosing to wear boyish clothing from an early age.”<sup>74</sup> The Court told a similar story about Rae, whose “gender-variant or gender-expansive behaviours were present since early childhood, and there has been no change over time.”<sup>75</sup> Daniel’s gender was evident, too, in his “early childhood years,” because “he was observed to be a child who enjoyed wearing clothing and playing with toys typically associated with boys.”<sup>76</sup> Martin also had “early interests [that were] stereotypically male orientated,” while Mitchell “since his early childhood [had] always been a ‘tom boy’.”<sup>77</sup> Mitchell also “had mostly male friends and preferred activities often associated with boys, such as football, basketball, Lego, video games and playing with action figures.”<sup>78</sup> Brittany, in contrast, “from an early age [...] would engage in activities more frequently associated with girls, and would

<sup>71</sup> Re Celeste ¶10.

<sup>72</sup> This statement appears in similar form in eleven cases: Re Ashley ¶2; Re Dale ¶2; Re Kaitlin ¶5; Re Julian (2015) ¶2; Re Leo, headnote; Re Harley ¶28; Re Jamie (2015) ¶43; Re Mackenzie ¶3; Re Pat ¶15.

<sup>73</sup> Re Spencer, headnote. A similar phrase appears in Re Logan ¶64.

<sup>74</sup> Re Benjamin ¶4.

<sup>75</sup> Re Rae ¶35.

<sup>76</sup> Re Daniel ¶8.

<sup>77</sup> Re Martin ¶14; Re Mitchell ¶7.

<sup>78</sup> Re Mitchell ¶7.

frequently wear her sister's clothing."<sup>79</sup> Gabrielle, too, "sought out feminine toys, for example Barbie dolls, and female dress-ups from an early age."<sup>80</sup> Conversely, the eternal nature of Adrian's gender was evidenced by the fact that "from early childhood [he] did not like dolls."<sup>81</sup>

The Court invested so deeply in a notion of gender as always-already manifest at an early age that it was willing to make ludicrous statements in support of it. In Colin's case, for instance, the Court reported that "From as early as nine months of age, Colin has identified and behaved as male rather than female."<sup>82</sup> I will return to consider what it could mean to 'behave as male' in chapter five, but for the moment I would like to question how 'male behaviour' could be identified in a nine-month-old child. At nine months of age, children have barely developed the motor skills necessary to crawl, or to pick up a toy (S. Johnson 2012). One might also wonder how a nine-month-old child was capable of conceiving *and* articulating the nature of their gender identity given that they would not yet have acquired language or the cognitive capacity to form symbolic thoughts (S. Johnson 2012). As such, the notion that Colin could have "identified and behaved as male . . . from as early as nine months of age" can only be sustained if gender has the power to express itself in a form that exceeded the confines of both cognitive and motor capacity.

Collectively, these statements worked to establish gender as an essence in two key ways. First, by temporalizing gender as always-already manifest from an early age, the Court suggested that its subjects' genders always existed prior to and independently of will and socialisation. As such, by identifying gendered practices as arising in the period of "early age," the Court asserted that these practices preceded both individual and collective choice. Gender thus appears not as a matter of desire, preference, or practice but as an inherent feature of a subject's personhood that acts upon them, even before they can observe it. Indeed, the Court implied as such in Marco's case, framing Marco's male identity as emerging *despite* the fact that

<sup>79</sup> Re Brittany ¶100.

<sup>80</sup> Re Gabrielle ¶11.

<sup>81</sup> Re Adrian ¶17.

<sup>82</sup> Re Colin ¶2.

“there was no pressure placed on Marco by his parents to conform to girl or boy expectations.”<sup>83</sup> This suggests that Marco’s gender emerged ‘naturally’ and was not subject to social shaping.

Second, these discourses support a conception of gender as an essence by implying that gender is an intrinsic feature not only of human subjects but of non-human objects as well. By citing its subjects use of certain behaviours, toys, desires, and articles of clothing as evidence of their inherent gender, the Court suggested that these artefacts also intrinsically contained or expressed that gender. Indeed, the Court’s belief in this connection of essences was so strong that it found the need to affirm the validity of Sasha’s interests *despite* their inability to demonstrate essential femininity, writing that “[Sasha] does retain an avid interest in metal music and video gaming *but* regards herself as being primarily female in nature at this time.”<sup>84</sup>

## Gender is Enacted

The Court constructed an ontology of gender as enacted alongside its constructions of gender as essential. When the Court spoke about gender as enacted it implied that gender was something that a subject performs, produces, or achieves—that is, something that one *does* rather than simply *is*. This section outlines the various discourses that the Court deployed to construct gender as enacted.

One of the ways that the Court advanced an ontology of gender as enacted was by describing its subjects’ gender as a social role that they were performing. The Court noted, for instance, that Christopher was “full-time living in the male role” and that Celeste had “fully transitioned to a female role in school and more broadly in society.”<sup>85</sup> Andrea, meanwhile, was “living more in the social role of female.”<sup>86</sup> Similarly, the Court described Marley as “enrolled as a boy,” and Mason as “enrolled

<sup>83</sup> Re Marco ¶16.

<sup>84</sup> Re Sasha ¶32.

<sup>85</sup> Re Christopher ¶19; Re Celeste ¶34.

<sup>86</sup> Re Andrea ¶63.

at his new school using his chosen male name.”<sup>87</sup> It was important in the Court’s view, too, that Marley and Jordan had both tried to change their gender designation on public documentation, such as on their birth certificate and Medicare card.<sup>88</sup> Likewise, the Court observed that Colin had “changed his name from [a female name] to Colin on the school records.”<sup>89</sup> In each of these statements, gender appears simply as a role that subjects fulfil. It is not an essence—it is something that one *acts as* rather than merely *is*. Subjects *become* gendered in these scenes by adopting and performing the institutional requirements of that gender. They are not inexorably gendered from the start.

The Court repeated the notion that gender is a role rather than an essence regularly in its judgments. It describes several of its subjects as wanting to use hormones manually as a means to fulfil their “wish[] to continue living in a [fe/]male role,” for instance.<sup>90</sup> In Kate’s case, meanwhile, the Court asserted that the purpose of manual hormone use was to “enable [Kate] to continue to affirm as a female and fully live in the female role.”<sup>91</sup> Conversely, the Court worried about the legitimacy of manual hormone use in Anita’s case because she “had not yet had the full real life experience of living in a female role.”<sup>92</sup> It was comforted, however, by a report that she was “actively pursuing” such a role.<sup>93</sup>

Gender also appeared in the Court’s deliberations as something that is socially attributed rather than essential. The Court noted, for instance, that “Jamie was *known* exclusively as a girl,” that Marco was “*regarded* as a male at school,” and that Ashton was “*known* to family and friends as male.”<sup>94</sup> It was important, also, that Harley had been “acknowledged as a boy by his peers, family and the broader

<sup>87</sup> Re Marley ¶22; Re Mason ¶12; The Court also mentioned the gender role that its subject had adopted in their enrolment at school in Re Anita ¶13; Re Christopher ¶13; Re Kaitlin ¶9; and Re Hudson ¶13. In Karsen’s case, the Court made the same point but via a negative framing, noting that Karsen had “hated” having been enrolled in an all-girls school: Re Karsen ¶1, 9.

<sup>88</sup> Re Marley ¶21; Re Jordan ¶11.

<sup>89</sup> Re Colin ¶31.

<sup>90</sup> Re Adrian ¶30; Re Celeste ¶36; Re Colin ¶51; Re Drew ¶25; Re Darcey ¶23; Re Oliver ¶19.

<sup>91</sup> Re Kate ¶49.

<sup>92</sup> Re Anita ¶22.

<sup>93</sup> Re Anita ¶22.

<sup>94</sup> Re Jamie ¶55; Re Marco ¶39; Re Ashton ¶2.

community.”<sup>95</sup> In these constructions, subjects *become* gendered by acting in a manner that secures their social attribution as such. Here, the Court conceptualised gender as something that comes into being when a subject fulfils the social role, or performs the social practice, that define that gender.

A theory of gender as enacted also undergirded the Court’s construction of its subjects as ‘tomboys.’ The Court described Ashton, Benjamin, Bobbie, Jordan, Julian, and Martin as having been recognised as “tomboys” while growing up.<sup>96</sup> The figure of the tomboy, as Abate (2011, 407) attests, is typically attributed to ‘girls’ who act like or “prefers the activities, toys, and usually attire of a boy” (see further Abate 2008; Halberstam 1998a, 186–93). The Court’s construction of its subjects as tomboys thus signals that they had achieved social recognition as being *boyish* in nature. Thus, to take Martin’s case as an example, when the Court observed that Martin “was always seen as a tomboy to others,” it suggested that Martin was already *successfully* enacting some kind of boyhood. This is to say that through the figure of the tomboy Martin had been *recognised*, to use Owain Jones’ (1999, 125) terms, as “a quasi, honorary boy” long before he had encountered the Court. In this context, it was important that Martin was *seen to be* masculine, and not important necessarily that he was *essentially* masculine in nature. Gender, in these accounts, is the performative effect of having acted in a way that achieved *recognition as being* of a particular gender.

The Court also framed gender as an *activity*, rather than an essence, in several ways throughout its judgments. This notion of gender as activity was articulated in one way through descriptions of gender as a kind of behaviour, or as something that behaviour engendered. Colin and Leo were both observed to have “behaved as male,” for instance.<sup>97</sup> Marco, too, had “had always behaved in a more male-typical manner.”<sup>98</sup> Similarly, Julian had “experienced his gender to be male [by] displaying behaviours such as destroying dolls instead of playing with them.”<sup>99</sup>

<sup>95</sup> Re Harley ¶31.

<sup>96</sup> Re Ashton ¶36; Re Benjamin ¶4; Re Bobbie ¶3; Re Jordan ¶13–4; Re Julian (2017) ¶10; Re Martin ¶18.

<sup>97</sup> Re Leo, headnote. The Court noted that Colin “behaved as male” on three occasions: Re Colin ¶2, 42, headnote.

<sup>98</sup> Re Marco ¶39.

<sup>99</sup> Re Julian ¶35.

Gender also appeared as an activity when the Court discussed it as something that subjects *live as* rather than simply *are*. The Court remarked, for instance, that Colin had “started to live as a male” and that Hudson “lives and is treated as a male.”<sup>100</sup> It also mentioned that Elliott had begun “to live as male at school and in the community” and that Julian “lives his social life as a young man.”<sup>101</sup> In other instances, the Court stated that Sasha had “started to live her life as a female full time” and that Tahlia “has transitioned to live as a girl.”<sup>102</sup> Likewise, the Court made an effort to record that Dale had demonstrated “the desire to live and be accepted as a member of the opposite sex,” and that Jaden “has done all he can to live life as male from age four.”<sup>103</sup> The Court also attended to the report that Shane “lives as male” and that he was “completely committed to living his life as a male.”<sup>104</sup> Each of these constructions suggest that gender is something that subjects vitalise. To *live as* a particular gender, in this sense, implies that one’s gender comes into being as a consequence of one living that gender. This living, in the Court’s account, is not a passive process but an *activity*. It is a form of *practice*, such that one becomes gendered if, and when, they enact that gender.

In other instances, the Court constructed a subject’s gender as a choice rather than an essence. The Court stated that Marco, for instance, had been “living full time in [his] chosen gender.”<sup>105</sup> Similarly, Hudson was said to have “decided that he wanted to change his name and gender,” while Jason “decided he would identify as a male.”<sup>106</sup> Eddie had also “decided that he needed to be a boy.”<sup>107</sup> In Jamie’s case, meanwhile, the Court framed manual hormone use as denoting “a choice of identity with concomitant lifestyle implications.”<sup>108</sup> In these scenes, the Court imagines

<sup>100</sup> Re Colin ¶31; Re Hudson ¶17.

<sup>101</sup> Re Elliot ¶8; Re Julian ¶2.

<sup>102</sup> Re Sasha ¶16; Re Tahlia ¶22.

<sup>103</sup> Re Dale ¶62; Re Jaden ¶38. The Court also frames Jaden’s gender as a mode of life when recounting that he “has lived life as male since he was eight years old” and that he experienced a “consistent and ardent desire to live as and be treated as male.” ¶11, 46.

<sup>104</sup> Re Shane ¶21, 43.

<sup>105</sup> Re Marco ¶12.

<sup>106</sup> Re Hudson ¶11; Re Jason ¶14.

<sup>107</sup> Re Eddie ¶25.

<sup>108</sup> Re Jamie (2015) ¶21.

gender to be the effect of deliberation. The subject is seen to produce their gender by assessing their options and selecting which gender they would prefer to be. Framing gender as a choice in this way controverts the claim that gender is an essence. If gender can be chosen then it cannot be immutable or intrinsic, not only because its form can be effected by will, but also because that choice can change.

And indeed, the Court discussed frequently, and at length, the possibility that its subjects might ‘change their mind’ about their ‘chosen’ gender. As I mentioned earlier, a change of mind was one of the premier risks that the Court considered to moderate the legitimacy of manual hormone use in these cases. The Court ruminated on this risk in Gabrielle’s case, worrying that “at some stage in the future [Gabrielle] may feel uncomfortable living as a female and wish to *change back* to being male” and that “continued treatment may make it difficult for her to feel confident that people will accept her *moving back* to a male role.”<sup>109</sup> To counteract this apprehension, the Court cited evidence from a child and family psychologist to argue that “In the extremely unlikely event that [Gabrielle] should *decide to change back* to being male, I believe she has the thoughtfulness and creativity to be able to manage possible de-transition comfortably.”<sup>110</sup> The same concern appeared in Flynn’s case where the Court considered the risks that may eventuate “if [Flynn] *decided to change back* to being a male.”<sup>111</sup> This concern was also noted in Rae’s case, where the Court worried that “If children have completely socially transitioned, they may have great difficulty in returning to the original gender role upon entering puberty.”<sup>112</sup> In Kerry’s case, meanwhile, the Court was comforted to learn that the effects of manual hormone use are “partially reversible” because this meant that “should Kerry change her mind she can return to her life identified as a boy.”<sup>113</sup> A subject’s ability to change their mind, and thus change their gender, was also inferred in Leo’s case, who the Court reported had “considered future desire to return to identifying as female was highly unlikely, but could acknowledge the possibility of

<sup>109</sup> Re Gabrielle ¶20.

<sup>110</sup> Re Gabrielle ¶20.

<sup>111</sup> Re Flynn ¶65.

<sup>112</sup> Re Rae ¶53.

<sup>113</sup> Re Kerry ¶68.

the same.”<sup>114</sup> This language of reversion appeared in at least five other cases as well, which reported in identical terms that their subject understood that they “could [choose to] not proceed with androgen therapy and return to a [fe/]male gender role.”<sup>115</sup> These statements suggest not only that gender is mutable but also that subjects can mould gender to their will. If gender were an essence, conversely, its nature would be fixed and it would, therefore, be insusceptible to any subjective whims.

## Ontological Governance

The preceding two sections have shown that the Court advanced two kinds of assertions simultaneously about the ontology of gender. Throughout its judgments, the Court spoke about gender as an essence—that is, as an immutable, intrinsic, and innate property of its subjects. But at the same time, the Court also suggested that gender was enacted rather than essential—that is, something that one *does* rather than *is*. These claims appear incommensurate at first glance: how could gender be, at once, essential and enacted? Yet, despite their ostensible contradictions, these claims collaborated in enacting a mechanism of gender governance.

The enforcement of these discourses constituted a kind of *ontological governance* over gender. This is because, as I argued in chapter two, gender does not have a fixed ontology. Rather, gender is a socially, culturally, and historically contingent phenomenon. Therefore, to require subjects to perform certain kinds of ontologies to use hormones manually is to exercise control over how gender itself can manifest. This is to say that these discourses, on account of the role that they played in arbitrating manual hormone use, did not merely describe the ontology of gender as it *is*. Rather, they were normative and performative statements that were involved in the production and regulation of that ontology. They held the power to determine what kinds of gendered beings were able to exist, and in doing so, were able to shape the nature of gender itself.

<sup>114</sup> Re Leo ¶44.

<sup>115</sup> Re Adrian ¶30; Re Celeste ¶36; Re Colin ¶51; Re Drew ¶25; Re Darcey ¶23; Re Oliver ¶19.

The final section of this chapter therefore now turns to discuss *how* the Court's discourses on ontology wielded this ontological power. I will discuss first the governing effects that arose from the Court's discourses on gender as an essence. Then, I will consider how the Court governed gender through its discourses on gender as enacted. Finally, I will show how these ontologies, despite their ostensible incommensurability, also worked together to produce shared modes of governance. It will be clear, then, that these discourses on ontology worked both independently and collaboratively to facilitate the Court's governance over gender.

### Governing Gender as an Essence

When the Court constructed gender as an essence, it argued that manual hormone use could be legitimate when it would help a subject to manifest a form of gender externally that was always-already manifest internally. This meant that the Court required its subjects to prove that their gender was essential to be able to use hormones manually. Consequently, the Court held that subjects should only use hormones manually to enact essential forms of gender. The Court's theory of gender essentialism thereby contributed to the Court's machinery of gender governance in several ways.

First, it meant that subjects needed to submit their 'interiors' to judicial scrutiny to be able to seek the Court's authorisation to use hormones manually. This is because if, as the Court argued, manual hormone use was legitimate only as a means to affirm a subject's essential gender, then the Court would always need to confirm the presence of that essence before it could declare that manual hormone use was legitimate. Accordingly, this discourse engendered a kind of 'surveillance of the soul,' rendering the Court responsible for ascertaining the 'truth' of its subjects 'inner depths' in order to make judgments about what they should or should not be allowed to do with their bodies, and consequently, which forms of gender they should be allowed to enact.

Second, the Court's constructions of gender as an essence, wielded as an instrument of judgment in this setting, required subjects to *perform* a particular kind

of gendered being to receive authorisation to use hormones manually. This is because an essential gender is not something that one can objectively prove. Rather, one can only ever achieve an *impression* that one possesses such an essence. This claim rests on the long history of feminist, queer, and trans challenges to essentialist conceptions of gender (A. Stone 2016; Stryker 2006). These works have argued that essentialist conceptions of gender's ontology are both historically and culturally contingent, as well as normative rather than descriptive. Butler (1999; 1993; 2004b; 2009) has taken this argument further to posit that ontologies *generally* are not given in reality but are human constructions that are rendered through socially mediated "schemas of intelligibility." Butler (2009, 2–4) elaborates thusly:

To refer to "ontology" in this regard is not to lay claim to a description of fundamental structures of being that are distinct from any and all social and political organization. On the contrary, none of these terms exist outside of their political organization and interpretation. The "being" of the body to which this ontology refers is one that is always given over to others, to norms, to social and political organizations that have developed historically . . . These normative conditions . . . produce an historically contingent ontology, such that our very capacity to discern and name the "being" of the subject is dependent on norms that facilitate that recognition.

An essential gender, in this sense, is not an objective state of being but a cultural artefact that is produced through socially and historically located significations. This point is evinced by the fact that gender essentialism is not a theory that is carried by all cultures, nor has it existed at all points in time (G. Herdt 1994; Nanda 2000; McNabb 2018). Moreover, the gender essentialisms that do exist in various cultures are not isomorphic in form (Schmidt 2010; Goel 2016; Valentine 2007; Frohard-Dourlent et al. 2020). In this light, an essential gender appears to be a personally and socially situated attribution that cannot be extrapolated objectively.

Thus, by arguing that manual hormone use was legitimate only as a means to affirm essential forms of gender, the Court required its subjects to present their gender in ways that were *intelligible as* essential. Accordingly, for a subject to appear

as if their gender is essential they needed to *perform* their gender in a way that conformed to the intelligibility criteria operating in that setting to render the signification of an essence possible. These intelligibility criteria are given by the discourses that I outlined in the first section of this chapter. These were the discourses that held that a subject could be judged to have an essential form of gender that warrants expression through manual hormone use if, for instance, they demonstrated that their essential gender was expressed from an early age; articulated their gender as an innate and immutable conception of a “true” self; subscribed to a conception of their gender as an interior reality; understood their gender as pre-existing their conceptualisation or observation of it; or, experienced their gender as exerting its will upon them.

The “schemas of intelligibility” that the Court invoked here to “recognise” its subjects’ essential genders circulate broadly in other contexts as well. Upon investigating these discourses at various sites, feminists have established their historical and cultural specificity and have criticised the political investments that they make therein. For instance, feminists have argued that the notion of interiority that the Court deployed—that is, the notion that gender is an essence that is located ‘inside’ its subjects—is specific to contemporary Western constructions of selfhood (K. M. Kirby 1996). Butler (1999, 171; see also 1993) criticised the interiorisation of gender along these lines, asking:

From what strategic position in public discourse and for what reasons has the trope of interiority and the disjunctive binary of inner/outer taken hold? In what language is “inner space” figured? What kind of figuration is it, and through what figure of the body is it signified? How does a body figure on its surface the very invisibility of its hidden depth?

Taking up these questions, Butler (1999, 32–33) argues that the idea of a “gender core” is “produced by the regulation of attributes along culturally established lines of coherence.” Thus, for Butler, the configuration of gender as an “inner depth” is discursive, political, and normative, rather than metaphysical. On this basis, Butler asserts that notions of interiority are the *effects* of gendered performances which,

when placed inside a particular cultural frame, produce the *impression* of an interior substance. As she writes (1991, 28):

[G]ender is a performance that produces the illusion of an inner sex or essence or psychic gender core; it produces on the skin, through the gesture, the move, the gait (that array of corporeal theatrics understood as gender presentation), the illusion of an inner depth. In effect, one way that gender gets naturalized is through being constructed as an inner psychic or physical necessity. And yet, it is always a surface sign, a signification on and with the public body that produces this illusion of an inner depth, necessity or essence that is somehow magically, causally expressed.

Thus, if conceptions of interiority structured the Court's identification of gendered essences, and if such conceptions of interiority are culturally and historically specific constructions rather than universal and objective truths, then the Court's judgments did not discover or reveal the true nature of its subjects' gender when it legitimised their manual hormone use on such grounds. Rather, that the Court used conceptions of interiority to establish its subjects as essentially gendered, and that it legitimised their manual hormone use on this basis, means that the Court required its subjects to perform, and thus re-enact, culturally and historically specific constructions of essential gender as a condition of being authorised to use hormones manually. Put simply, this means that the Court's discourses on essentialism required its subjects to enact *a particular kind* of gender in order to secure their intelligibility as essentially gendered, and therefore in order to achieve its authorisation to use hormones manually. Accordingly, the Court worked to ensure that subjects could only use hormones manually to reproduce the "schemas of intelligibility" that it used to interpret their gender as essential. When arbitrated by this ontology, manual hormone use could only be used to reproduce this specific mode of gender essentialism. This meant that these discourses worked to ensure that manual hormone use would only complement—and would certainly not challenge—gender essentialism.

This obligation to perform essentialism was governing in several ways. Primarily, it was governing because it forced its subjects to enact a mode of being gendered that was intelligible as essential, and to foreclose other ways of manifesting gender. Yet it was also governing because gender essentialism is itself a form of gender governance. The governing effects of essentialist ontologies of gender have been noted at many different sites in feminist, queer, and trans literatures. Butler (1999, 173–74), for instance, pointed out that the construction of gender as an interior essence renders invisible the various forms of regulation and control that produce and circumscribe the limits of gendered beings, writing:

If the “cause” of desire, gesture, and act can be localized within the “self” of the actor then the political regulations and disciplinary practices which produce that ostensibly coherent gender are effectively displaced from view. The displacement of a political and discursive origin of gender identity onto a psychological “core” precludes an analysis of the political constitution of the gendered subject and its fabricated notions about the ineffable interiority of its sex or of its true identity.

Clare (2017) identifies a similar dynamic at work in the kinds of “coming out” discourses that the Court included in its constructions of gender essentialism. For Clare (2017, 18), “coming out” narratives promulgate essentialist constructions of self that are “connected to neoliberal understandings of individuality and to the conservative notions of adjustment and adaptation that are central to neoliberal governance.” Thus, following Clare, to require subjects to inhabit an essentialist ontological position is to require those subjects to embed themselves into the various systems of control that are attached to that ontological position. Trans scholars have similarly shown how gender has played a key role in delegitimising and erasing the diversity, fluidity, and inimitability of trans experiences of gender, as well as in supporting repressive institutional responses to trans lives (Califia 2003; Stryker 1994; S. Stone 2006; Prosser 1998a; Spade 2006; Bornstein 1994; Feinberg 1998; Halberstam 2018). Extending this line of argument, many non-binary and genderqueer scholars have also criticised essentialist theories of gender for erasing the myriad ways in which experiences, embodiments, and identifications with

gender can modulate throughout a subject's life and across various social contexts (D. L. Stewart 2017; Corwin 2017; Bradford et al. 2019; Davy 2018; Galupo, Pulice-Farrow, and Ramirez 2017; Stachowiak 2017; Twist and de Graaf 2019; Vijlbrief, Saharso, and Ghorashi 2019; Barbee and Schrock 2019; Darwin 2020; Macdonald 2013; Garrison 2018).

The theory of gender essentialism is also involved in enacting gendered hierarchies and gendered regimes of social control more generally. For this reason, gender essentialism has long been a subject of feminist inquiry and critique (see A. Stone 2016). Feminists in this tradition have argued that gender essentialism works to support, maintain, and justify hegemonic and coercive gender orders. They have shown that it plays a role in supporting arguments regarding the natural and inexorable inferiority of women compared to men, for instance, on the basis of their ostensibly essential differences in physical, cognitive, and emotional constitution. Thus, by requiring its subjects to uphold this ontology, the Court forcibly recruited its subjects into perpetuating not only gender essentialism but also the broader regime of governance that that ideology supports.

Gender essentialism also exerts governing effects upon its subjects by requiring them to efface their capacity to change. This is to say that by making a performance of gender essentialism necessary, the Court required its subjects to repudiate the notion that gender is mutable or capable of being affected by personal or collective agency. This is because according to gender essentialism the transformation of gender is impossible. This theory holds that gender is an unalterable and intractable property which, as such, cannot be changed or chosen (A. Stone 2016). Indeed, this is a feature of essentialist theories of subjectivity in general, whereby in advancing a notion of the self as immutable and transparent, essentialism displaces alternative conceptions of the self as potentially dynamic and changing (Klein et al. 2015). Thus, the Court's wielding of an essentialist ontology was governing because it meant that hormones could only be used manually to enact forms of gender that appeared to be singular and immutable. This had a governing effect on subjects themselves by rendering any possibilities and desires for transformation and/or incoherence that they may hold incompatible with manual hormone use. Yet, it was also governing

because it required those subjects to participate in and uphold a discourse that abrogates change, agency, and the production of new possibilities regarding gender.

Gender essentialism is also involved in producing hegemonic gender orders by order of the hierarchy of ‘truthfulness’ or ‘authenticity’ that it constructs. According to the Court’s account of gender essentialism, manual hormone use became legitimate when it would be practiced to affirm a form of gender that was always-already manifest inside its subjects. This account infers that subjects who do not possess the requisite essences cannot claim the right to use hormones manually because in this context it would not have a legitimate purpose to serve. By wielding a theory of gender essentialism in this way, the Court produces the notion that subjects can perform genders that do not reflect their interior essences and which are, therefore, less authentic. As such, the theory of gender essentialism made it possible for the Court to deny the authenticity of a subject’s performance of gender—and thus the legitimacy of their manual hormone use as a means to affirm that gender—according to whether it interpreted their performance as signifying an essence. This has a governing effect, as neither the desire, ability, nor willingness to perform essentialism is universal. Thus, under this regime, a subject could have the authenticity of their gender, and their right to use hormones manually to affirm that gender, denied if they did not, could not, or would not signify the presence of an essence. This denial of authenticity can govern not only by preventing its subject’s access to the resources that a perception of authenticity provides; it can also govern by exposing subjects to the myriad forms of violence that accompany the manifestation of a gender marked as ‘not real’ (R. Connell 2012; Namaste 1996b; 2009; Bettcher 2007; 2014; 2019; Namaste 1994; Heyes 2003; Whittle 2006b; Awkward-Rich 2017; Ahmed 2016; C. Williams 2020).

### **Governing Gender’s Enactment**

The Court’s ontology of gender as enacted contributed to its machinery of governance in a similar way. In one sense, this ontology contradicted the essentialist ontology that I engaged with in the previous section. That is, if gender proceeds

rather than precedes action, as an ontology of gender as enacted suggests, then it cannot be essential. Such an account also suggests, contrary to an essentialist ontology, that the nature of a subject's gender may depend upon the practices they use to enact it. However, these ontologies were united in their governing effects, their ostensible contradictions notwithstanding. In both instances, the Court promulgated a set of discourses that worked to ensure that its subjects could only use hormones manually to manifest the kinds of gendered beings that conformed to its ontological preconceptions.

One way that the Court governed gender through its ontology of gender as enacted was by working to ensure that subjects could only use hormones manually to manifest forms of gender that either were, or at least gave the impression of being, intransient. For instance, an investment in intransience can be observed in the Court's argument that manual hormone use could be legitimate if this would help a subject to enhance the legibility of a gendered social role that they were already performing. This argument tethered the legitimacy of a subject's manual hormone use to the capacity of those hormones to enhance a subject's ability to enact, consistently and reliably, the social requirements attached to the gender they sought to affirm. This example illustrates how the Court's ontology of gender as enacted invested in the production of a form of gender that gave the *impression* of an essence, despite ostensibly advancing a conception of gender as contingent and mutable. As a consequence of this discourse what mattered was not *that* gender was enacted, but that gender was enacted *correctly*. It mattered not *that* gender was an achievement, but *whether* it was achieved. Thus, while these discourses contained the possibility of change, they were wielded in this context to prevent it. In this sense, the governing effects generated by the Court's ontology of gender as enacted mirrored those generated by its essentialist counterpart. Both discourses worked to ensure that its subjects' genders gave the impression of immutability.

Yet the Court's ontology of gender as enacted also produced unique forms of governance. These governing mechanisms worked to ensure that subjects could only practice gender in ways that the Court understood to be generative. This is because this discourse suggests that the realisation of gender depends upon successfully

inhabiting the social role that is attached to a given gender, achieving social recognition as being of a given gender, engaging in the kinds of activities that constitute a given gender, and generally ‘living as’ a given gender. Thus, while in such passages the Court held that gender is an accomplishment rather than an essence, it maintained that there were certain practices that subjects needed to perform in order to accomplish it. This discourse ensures that subjects could only use hormones manually to practice specific kinds of genders—that is, genders that maintained their attributed social role, social recognition, constitutive activities, and modes of ‘living.’<sup>116</sup> As such, this discourse held that subjects should only be able to use hormones manually to uphold normative modes of gendered practice. In this way, these discourses worked to force subjects to enact gender in ways that conformed to the Court’s preconceptions regarding what gendered practice does, or should, look like. And in doing so, they also worked to prevent subjects from using hormones manually to practice gender in ways that exceeded or challenged those preconceptions. Thus, put simply, the Court’s ontology of gender *as* enacted governed gender by regulating *how* gender could be enacted.

### Governing Essence and Performance

While both ontologies of gender contributed to the Court’s machinery of gender governance in their own ways, as I have just outlined, they also worked collaboratively to produce additional and auxiliary governing effects. These collective effects arose because the Court always wielded both discourses concurrently. In every judgment that I analysed, the Court legitimised its subject’s manual hormone use simultaneously with reference to their possession of a certain kind of essential gender as well as their ability to enact that gender performatively. The presence of a requisite essence was therefore not enough to justify manual hormone use in the Court’s view. Nor was it enough for a subject to be able to enact

<sup>116</sup> This is a form of governance that has been observed at other sites of gendered social control. Similar criticisms have been lodged against the “real-life test” that psycho-medical practitioners use to arbitrate trans and gender-diverse people’s rights to access various gender-affirming medical technologies, for instance (Levine 2009; H. Barker and Wylie 2008; Bockting 2008).

that gender ‘correctly.’ Instead, according to the Court, a subject needed to have both an essence *and* the capacity to successfully signify that essence *consistently* in social practice to be authorised to use hormones manually.

By tethering the legitimacy of manual hormone use to its subjects’ ability to demonstrate essence and performance simultaneously, the Court forced its subjects to maintain a normative relationship between these forms of gender *through* manual hormone use. To put this in the Court’s terms, this meant that subjects could only use hormones manually to produce isomorphic relationships between the ‘inner’ and ‘outer’ manifestations of their gender. Butler (1999; 1993) argues that this relationship, which she describes as “the heterosexual matrix,” is an organising feature of contemporary Western gender norms. Butler (1999, 194) defines the heterosexual matrix as:

a grid of cultural intelligibility through which bodies, genders, and desires are naturalized . . . that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable *gender* (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality.

Thus, Butler argues that an intelligible gender requires, according to contemporary Western norms, a subject’s ‘interior’ gender to be expressed corporeally through the configuration and comportment of their body. As such, by requiring its subjects to demonstrate an intelligible essence and performance at the same time, the Court worked to ensure that its subjects could only use hormones manually to produce forms of gender that complied with the heterosexual matrix. It sought to produce, in other words, subjects that were *not* queer.

The Court’s two ontologies also enacted a shared mode of governance by working collaboratively to intern gender into a state of singularity and stasis. These ontologies worked collaboratively toward this end by proffering simultaneously a conception of gender as an object that manifests in distinct, discrete, and universal forms. This notion appeared in the Court’s discourses on gender as an essence, where the Court implied that gender exists independently of and prior to a subject’s actions,

and always in an unmitigated form. It also appeared in the Court's discourses on gender as enacted, where the Court considered not only that certain actions can materialise an objective form of gender if performed successfully, but also that there is a discrete inventory of actions that must be practised before a given form of gender can come into being. The conception of gender as an object that these discourses build operated as a central feature of the Court's deliberations on the legitimacy of manual hormone use. This is because the Court used this conception to argue that the presence or absence of such objective forms of gender could determine the legitimacy of a subject's manual hormone use. These discourses thus collaborated in ensuring that subjects could only use hormones manually to affirm modes of gender that, in the Court's view, they were already *being*. Consequently, the Court's discourses on ontology, wielded as instruments of judgment, worked to preclude a subject from using hormones manually to affirm forms of gender that were not already manifest. As such, subjects could not use hormones manually to *become* gendered differently, or to enact new and different forms of gender. Under this ontological regime, subjects could only use hormones manually to manifest forms of gender that the Court considered to exist already. Thus, despite their apparent incommensurability, both claims about the ontology of gender were united in their governing effects. Both sought to establish and secure a unitary and stable ontology of gender, to cauterise the possibility of its subjects enacting gender otherwise, or indeed, of using hormones manually to enact modes of being that exceed the frame of gender entirely.

## Conclusion

This chapter has interrogated the range of ontological assertions that the Court used to arbitrate the legitimacy of its subjects' manual hormone use. As I have shown, the Court advanced two kinds of claims about the ontology of gender simultaneously: that gender is an essence, and conversely, that gender is enacted. I have argued throughout this chapter that both ontologies, in the form that they appeared in the Court's judgments, imagined, sought to protect, and sought to realise certain kinds

of gendered subjects. This meant that the Court required its subjects to uphold certain ontologies as a condition of being authorised to use hormones manually. Ontology, in this sense, played a key role as part of the Court's machinery of gender governance. By determining the conditions under which the Court's subjects could use hormones manually, the Court's ontology of gender worked to control how subjects could manifest their gender, and as such, to control which kinds of gendered beings would be able to come into being. These discourses therefore enacted a form of *ontological governance*, shaping not only how subjects could *be* gendered, but also how gender itself could manifest. Ontological governance was, in this way, a key part of the Court's overarching machinery of gender governance.

Now, having interrogated the Court's ontology of gender, I will turn in the next chapter to examine its epistemology. Epistemology, as I stated earlier, is the second of the three primary categories of discourse that the Court wielded to arbitrate its subjects' manual hormone use. In interrogating the Court's epistemology, I shift from examining how the Court wielded statements about the *nature* of gender to govern to examine how it used statements about how gender can be *known* to accomplish similar ends.

# Chapter Five

## *Epistemology*

This chapter interrogates the Court's epistemology of gender. Epistemology is the second of the three primary categories of discourse—alongside ontology, which I examined in chapter four, and teleology, which I will examine in chapter six—that the Court used to judge the legitimacy of its subjects' manual hormone use. The Court built an epistemology of gender by making assertions about the origin, nature, validity, and possibility of knowledge about a subject's gender. It used this epistemology to arbitrate manual hormone use by arguing that its legitimacy depended upon whether it would help a subject to manifest, affirm, or secure a gender that in some sense they were already *known* to be. As such, the Court's epistemological claims about gender were regulatory rather than descriptive, as they sought to ensure that subjects could only actualise forms of gender that affirmed rather than threatened their knowability within already-established epistemological frames.

The Court made two kinds of assertions about the epistemology of gender. This chapter consists of two sections which examine each of these epistemological claims in turn. In the first section, I discuss how the Court constructed and instrumentalised assertions about how its subjects knew their own gender—what I call 'introspective knowledge.' I call this form of knowledge 'introspective' because the Court considered it to exist *inside* its subjects and to arise from various processes of reflexive self-examination. In the Court's view, valid introspective knowledge was necessary to legitimise manual hormone use because manual hormone use was legitimate only when it would help a subject to manifest 'externally' a form of gender

that already existed ‘internally.’ As such, under the auspices of the Court, subjects could only use hormones manually to manifest forms of gender that could be expressed as introspectively ‘knowable’ in ways that the Court found credible.

In the second section, I interrogate the second category of assertions that made up the Court’s epistemology of gender—what I call ‘extrospective knowledge.’ Extrospective knowledge, in contrast to introspective knowledge, refers to a range of assertions that the Court made about how spectators could know a subject’s gender—that is, about how one’s gender could be known from the ‘outside.’ Valid extrospective knowledge legitimised manual hormone use, in the Court’s view, because this promised to ‘enhance’ a subject’s ability to present themselves as gendered in the way that they were already socially recognised as being. The Court’s discourses on extrospective knowledge consisted of seven kinds of assertions about how spectators could know a subject’s gender from the ‘outside’: by observing their diagnostic status, displays of affect and emotionality, behaviour, presentation, ability and willingness to pass, and propensity for homosocial bonds. In this section, I will examine each of these discourses and their governing effects in turn. Collectively, the Court’s discourses on extrospective knowledge contributed to its machinery of governance by working to ensure that its subjects could only use hormones manually to enact forms of gender that affirmed rather than threatened their social intelligibility.

Overall, the Court required its subjects to demonstrate both valid introspective and extrospective knowledge as a condition of having their manual hormone use authorised. As such, introspective and extrospective knowledge functioned independently and collaboratively to arbitrate the conditions under which the Court’s subjects could use hormones manually. This is to say that the Court’s epistemology of gender—in both its introspective and extrospective iterations—governed gender by (a) advancing the notion that there are objective ways to know it and (b) requiring the demonstration of such objective knowledge as a condition of receiving authorisation to use hormones manually. Both introspective and extrospective discourses worked, therefore, to ensure that subjects could only use hormones manually to affirm forms of gender that the Court could ‘know.’ And in

this way, both epistemologies contributed to the Court's machinery of gender governance, helping the Court to ensure that its subjects only used hormones manually to enact forms of gender that were always-already legible within the epistemological frames that it had sanctioned.

## Introspective Knowledge

The Court's discourses on introspective knowledge consisted of a range of assertions about how a subject could know their gender. Yet despite consisting of various claims, the Court's discourses on introspective knowledge all relied upon the presumption that gender is a discrete and knowable property of a discrete and knowable entity called the 'self.' The Court suggests as such when it states that Anita "regards herself as a female person,"<sup>117</sup> that Marco has "considered himself to be a boy since childhood" and "sees himself as being clearly male,"<sup>118</sup> and that Shane "always perceived himself as a boy."<sup>119</sup> In these accounts, the Court frames its subject as generating knowledge about their gender through reflexive self-examination. Each statement refers to a subject that has observed themselves and secured knowledge of their gender by doing so. The same frame appeared in Flynn's case, where the Court cited Flynn's psychiatrist to argue that "*she knows she is a girl*,"<sup>120</sup> as well as in Lucas' case, where the Court asserted that manual hormone use was justified because this would allow Lucas to "physically be the person *he knows himself to be*."<sup>121</sup> In both statements, Flynn and Lucas appear as the object and subject of knowledge simultaneously: their personal pronoun s/he functions both the one that knows ("s/he knows") as well as the one about which facts are known ("s/he is"). As such, the Court avers that knowledge about gender can be generated reflexively: that is, that a subject can produce knowledge about their gender when that always-already gendered subject takes themselves as an object of knowledge.

<sup>117</sup> Re Anita ¶21.

<sup>118</sup> Re Marco ¶39.

<sup>119</sup> Re Shane ¶15.

<sup>120</sup> Re Flynn ¶60.

<sup>121</sup> Re Lucas ¶9.

The Court also proffered the notion that knowledge about a subject's gender is introspective in nature in its discussions of gender as an identity. In the Court's judgments, gender often appeared as something that one *identified as* being rather than something one was being in themselves. The Court stated, for instance, that "Ashley was born a female but has identified as a male from an early age," and that Eddie "subjectively identified as a boy."<sup>122</sup> Elsewhere, the Court states that "Gabrielle is genetically male but identifies as a female person," that Jason "was born genetically female, but identifies as male," and that "Lincoln is genetically female but identifies as a male person."<sup>123</sup> Conversely, Nadia "never identified as male."<sup>124</sup> The act of identification that takes place in each of these statements referred to a way of *knowing* rather than *being* in the context of the Court's judgments. Indeed, the Court rarely, if ever, stated categorically that its subjects *were* boys, girls, men, women, or any other kind of gendered being. Instead, it implied that its subjects had *classified* themselves as fe/male *despite* having been born into a different gender. When the Court stated that its subjects were *born* fe/male, it suggested that their being fe/male was a fact derived from the objective circumstances of their birth. As such, when it then spoke of gender as a form of identification—and juxtaposed that identification distinctly from the fact of their gender at birth—it suggested that gender-as-identity is a subjective determination that counterposes the fact of one's gender as derived at birth. To identify, in this sense, is not to *constitute* but to *represent*.

The Court constructed its subjects as being able to 'access' and generate knowledge about their gender through a few key mediums, one of which was 'feelings.' In Flynn's case, the Court reported that Flynn "never *feels* she is a boy, but sees herself as a girl."<sup>125</sup> The Court thus infers either that gender has a sensational quality, or that subjects can access their gender through sensation. It follows, then, that if Flynn *is* a boy, then she *should* be able to feel that she is a boy. Conversely, this suggests that if Flynn's gender does not register to her through sensation, then there

<sup>122</sup> Re Ashley ¶2; Re Eddie ¶20.

<sup>123</sup> Re Gabrielle ¶1; Re Jason ¶1; Re Lincoln ¶1.

<sup>124</sup> Re Nadia ¶7.

<sup>125</sup> Re Flynn ¶60.

are grounds to question its nature. The Court advanced a similar epistemology of gender in Marco's case where it wrote that "[Marco's] *position* on his gender identity comes from his true feelings of disconnect between his female anatomy and male gender identity."<sup>126</sup> In this construction, Marco's knowledge of his gender—or, as the Court frames it, the "position" that he arrived at after extended observation—is both produced and verified by his "feelings." The Court narrated Logan's knowledge about her gender in a similar way, writing that she "was aware of having female gender feelings since early in childhood although was unable to recognise these feelings as gender dysphoria since early in high school after reading more about this on the internet."<sup>127</sup> In Kate's case, the Court affirmed the veracity of feelings as a means to know one's gender by inferring a necessary relationship between one's feelings about their gender and their gender expression. It did so by arguing that it was synchronous that Kate "has always *felt* like a girl and remembers 'dressing up' in stereotypical girls' clothing and adopting female roles during imaginative play as a younger child."<sup>128</sup>

In the context of the Court's judgments, the subject's reported feelings about their gender played a role in arbitrating the legitimacy of their manual hormone use. In Chelsea's case, for instance, the Court argued that her manual hormone use was legitimate because this would allow her to "becom[e] what she *feels* she truly is—a woman."<sup>129</sup> The same justification was offered for Sasha, for whom treatment would "enabl[e] a greater degree of psychological comfort as her body comes into line with her strong *sense* of being female in gender."<sup>130</sup> In Jason's case, meanwhile, the Court argued that manual hormone use was legitimate because he stated that he intended to use this to "bring [myself] up to the normal level of being a biological male, which is what I feel I am."<sup>131</sup> The Court treated Shane's assertion that he wanted to use hormones manually to "be the 16 year old guy I feel I am" as similarly legitimising.<sup>132</sup>

<sup>126</sup> Re Marco ¶48.

<sup>127</sup> Re Logan ¶64.

<sup>128</sup> Re Kate ¶58.

<sup>129</sup> Re Chelsea ¶8.

<sup>130</sup> Re Sasha ¶52.

<sup>131</sup> Re Jason ¶21.

<sup>132</sup> Re Shane ¶26.

In each instance, it was the connection between the subject's feelings about their gender and their desire to use hormones manually to affirm the corporeality of those feelings that the Court found legitimising.

The Court also instrumentalised experience as a medium through which its subjects could know their gender. The Court observed, for instance, that Tahlia had “experienced female identification since around the age of three or four years” and that Andrea had “experienced her gender to be female despite being born a male.”<sup>133</sup> The Court stated that Julian, likewise, “has experienced his gender to be male since early childhood,” and described Sasha, Xanthe, and Marco in identical terms as “experiencing a disjunction between [their] assigned gender and [their] experienced gender.”<sup>134</sup> Harley likewise had “a strong persistent and enduring experience since very early childhood of himself as a boy at his core.”<sup>135</sup> At the same time, Xanthe was said to have suffered from “having to deny and suppress [his] gender experience.”<sup>136</sup>

The Court's assertions about gendered “experience” functioned to arbitrate the legitimacy of manual hormone use in the same way as its assertions about gendered “feelings.” Xanthe's manual hormone use was justified, for instance, because it promised to reduce “the dissonance and disjunction between [his] assigned sex and [his] experienced and expressed gender.”<sup>137</sup> George's experience of gender also justified his manual hormone use, with the Court predicting that this would bring

<sup>133</sup> Re Tahlia ¶22; Re Andrea ¶43.

<sup>134</sup> Re Julian (2015) ¶35; Re Sasha ¶34; Re Xanthe ¶6; Re Marco ¶58. The language of an “incongruence between one's experienced/expressed gender and assigned gender” comes from the DSM-5's diagnostic criteria for gender dysphoria (American Psychiatric Association 2013, 452–453).

<sup>135</sup> Re Harley ¶31.

<sup>136</sup> Re Xanthe ¶23. *Re Xanthe* is the only judgment where the Court consistently chose to use a pseudonym and gendered pronouns that do not correspond with the gender identity of its subject. In almost all other instances, the Court used pseudonyms and pronouns that reflected its subjects' gender identity. Yet, in *Re Xanthe*, while the Court made it clear that the subject of the proceedings identifies as male, it referred to him using the feminine name Xanthe and the feminine pronoun ‘she.’ Misgendering is harmful (Kapusta 2016; Pitcher 2017; Ansara and Hegarty 2014; Benson 2020) and it is important to recognise that the Court enacted such a harm so that it can be criticised. However, to respect Xanthe's identity as it ought to be respected, I have amended the quotes that I have taken from *Re Xanthe* wherever necessary to recognise in my analysis that the subject the Court called Xanthe is male.

<sup>137</sup> Re Xanthe ¶25.

about a “reduction in the internal sense of desinence between his assigned sex and gender and his experienced and expressed gender.”<sup>138</sup> In Gabrielle’s case, meanwhile, the Court argued that it was “the intensity, consistency and persistence with which she has experienced her female identity” that legitimised her manual hormone use.<sup>139</sup> Yet by using the language of “intensity, consistency and persistence” in this instance, the Court signalled that it was not merely experience *itself* that was substantiating. Rather, the Court suggested that that experience must surpass a certain threshold of forcefulness to qualify as legitimising. However, the Court did not elaborate upon how one might establish the gauge of that threshold, nor did it clarify how one might measure gendered experience in such a way.

The Court’s discourses on introspective knowledge thus advanced a positivist-empiricist account of the nature of knowledge about gender. Through the language of “feelings” and “experience,” the Court suggests that a subject can generate and confirm knowledge about their gender empirically through sensate observations. The Court thus implies that gender impresses itself upon its subjects’ consciousnesses through their senses and that the senses, therefore, allow subjects to ascertain their gendered nature. In the Court’s view, this is a distinctly reflexive process: there is a gendered self that is both observing and being observed.

Another way that the Court advanced its conception of introspective knowledge about gender was by arguing that subjects can rationally derive knowledge claims about their gender. This notion appeared in statements that implied that the calibre of a subject’s intelligence mediated the veracity of their claims about their gender. For instance, the Court reasoned in that Lucas’ knowledge about his gender, and his decision to pursue manual hormone use as a means to affirm that gender, was valid because he “Has high intellect, sound insight and judgment, and has language skills within the average to above average range.”<sup>140</sup> The Court also considered Shane’s intelligence to be relevant in determining the legitimacy of his manual hormone use. In fact, the Court remarked upon Shane’s intelligence on six occasions and found

<sup>138</sup> Re George ¶14.

<sup>139</sup> Re Gabrielle ¶20.

<sup>140</sup> Re Lucas ¶49.

security in a report that he was perceived to be a “highly intelligent, thoughtful young man who . . . has a thorough appreciation for and insight into his condition.”<sup>141</sup> Ashley’s account of his gender was held to be reliable, meanwhile, because he “present[ed] in a mature, articulate and intelligent manner when discussing the issue of his gender dysphoria and possible treatment.”<sup>142</sup> The Court proffered similar reports about its subjects throughout its judgments, describing Jamie as “an intelligent, mature and confident person,” Dale as “an intelligent young man,” Sasha as “a very intelligent young person,” George as “highly intelligent,” Julian as “an intelligent boy” and Mitchell as “a bright young man who is able to demonstrate full understanding of the nature of the treatment.”<sup>143</sup> Both Kate and Emery were described as “intelligent and mature for [his/her] age,” with Kate further pronounced to be “a bright young person who appears to be of above average intelligence.”<sup>144</sup> That these assertions formed part of the Court’s reasoning process suggests that that the Court supposed that a subject’s claims about the nature of their gender were more reliable if that subject had been reported to be of high intelligence. Such a conception of knowledge about gender could only be feasible if knowledge about gender were understood to be qualifiable in such a way: that is, that more intelligent observers are more likely to produce more reliable conclusions about the nature of their gender. If the Court was deploying an ordinary understanding of intelligence in these settings, then it was implying that subjects can derive knowledge about their gender logically and through the application of reason. In making such a claim, the Court also suggested that subjects differ in their ability to make such judgments, and that those subjects who are less ‘capable’ of making such judgments may produce less reliable accounts about their gender.

The Court also tethered the legitimacy of its subjects’ claims about their gender to their purported capacity for rational decision making. For instance, Marco’s desire to use hormones manually was supported by a report that his “reasoning and

<sup>141</sup> Re Shane ¶8, 9, 36, 39.

<sup>142</sup> Re Ashley ¶38.

<sup>143</sup> Re Jamie (2015) ¶62; Re Dale ¶68; Re Sasha ¶35; Re George ¶1; Re Julian ¶42; Re Mitchell ¶38.

<sup>144</sup> Re Emery ¶42; Re Kate ¶19, 51. The Court mentions Kate’s intelligence on two further occasions as well: ¶46, 58.

decision-making process [was found] to be very sound in terms of identifying a problem such as his gender dysphoria and being able to look for and follow through with solutions to the problem.”<sup>145</sup> Jaden’s account of his gender was taken more seriously by the Court, meanwhile, because he was reported to “use discussion, debate and negotiation to solve problems.”<sup>146</sup> It was helpful for Christopher, too, that he was “very well-read and researched into the area of Gender Dysphoria and its treatments” and as such that he had “carefully considered his options.”<sup>147</sup> Similarly, the Court felt more able to accept Tara’s desire to use hormones manually as legitimate because she “finds out information for herself before coming to a decision and is then likely to discuss the information she has gleaned before making her own decision.”<sup>148</sup> Logan’s desire to use hormones manually was likewise supported by a report that she was both “well-informed” and that “Her reasoning for wanting to commence [manual hormone use] is clear and appears to be well considered and based on her emotional, psychological and social experiences of her gender incongruence.”<sup>149</sup> The Court also took seriously a report from Lincoln’s mother about his ability to engage in rational decision making:

The mother described Lincoln as: “a deep thinker [who] is not swayed by other people’s opinions.” She considered that he is willing to consult and ask for advice in appropriate circumstances. She was of the view that he “never makes sudden dramatic decisions but decides over time after discussion, after thinking through the pros and cons.”<sup>150</sup>

Valid knowledge about one’s gender appears in this framing to require that the subject apply their rational faculties to the process of observing and determining their gender. The Court did not make the nature of such rational processes clear. Yet, it suggested nonetheless that subjects who do not generate their accounts of their gender in ‘reasonable’ ways are less capable of producing knowledge about it. The

<sup>145</sup> Re Marco ¶48. Similar reasoning also appears in Re Ashley ¶47; Re Leo ¶35.

<sup>146</sup> Re Jaden ¶46.

<sup>147</sup> Re Christopher ¶55, 50.

<sup>148</sup> Re Tara ¶14.

<sup>149</sup> Re Logan ¶66.

<sup>150</sup> Re Lincoln ¶28.

Court inferred, as such, that less 'reasonable' subjects are less likely to hold a legitimate desire to use hormones manually.

### **Introspective Governance**

The Court's discourses on introspective knowledge governed gender by making the legitimacy of its subjects' manual hormone use conditional upon communicating to the Court that they 'knew' themselves to be gendered in ways that the Court found credible. As such, the Court held that its subjects should only use hormones manually to manifest forms of gender that were already introspectively 'known.' Subjects should *not* use hormones manually, the Court inferred, if they did not possess this introspective knowledge. And they certainly should not use hormones manually, in the Court's view, if they did not consider their gender to be introspectively knowable at all. This meant that the Court argued that manual hormone use should not—and worked to ensure that it could not—be used to manifest forms of gender that were not yet, or may never be, introspectively known. The Court's discourses on introspective knowledge were governing, therefore, for two reasons. The Court's discourses on introspective knowledge were *generally* governing, first of all, because they required subjects to practise an introspective mode of knowing gender *per se*. This was governing because gender is not epistemologically bound to introspection. Indeed, the idea that gender is an interiority or pre-personal essence is not practised by or present within all cultures (Nanda 2000; Besnier and Alexeyeff 2014). The notion that gender can be, or should be, introspectively known is likewise not intelligible within all cultures. Accordingly, it is not the case that the choice to use hormones manually must be compelled by a desire to affirm a form of gender that is already introspectively known. Rather, the reasons why one might choose to use hormones manually, either with or without any relationship to gender, are diverse, mutable, and contested (H. Rubin 2003; Valentine 2007; Shrage 2009; Wassersug et al. 2007; R. Lane 2009; Irni 2013; Gill-Peterson 2014; Davy 2016; Jordan-Young and Karkazis 2019; S. Rosenberg, Tilley, and Morgan 2019; Nieder, Eyssel, and Köhler 2020). Bornstein (1994, 8) made this point in her

treatise on gender non-conformity, writing that “Every transsexual I know went through a gender transformation for different reasons, and there are as many truthful experiences of gender as there are people who think they have a gender.”

Yet the Court’s discourses on introspective knowledge also governed more precisely because they required subjects to enact *a particular kind* of epistemological relationship with gender, and in doing so, preclude alternative modes of understanding, knowing, or practising gender that did not conform to certain stated conventions. The particular kind of introspective knowledge that the Court required its subjects to perform reflected liberal-humanist accounts of subjectivity. Liberal-humanist accounts of subjectivity have been a dominant feature of Western philosophical and cultural discourses since the Enlightenment. These accounts typically advance a conception of human beings as discrete and autonomous individuals who possess essential and universal attributes, such as the capacity to apprehend reality through the senses, and the capacity for reason (Atkins 2005b, chap. 1; Mansfield 2000, chap. 1). Such a conception of subjectivity carries with it a positivist epistemology which asserts that knowledge, including knowledge about oneself, must be derived either logically through the application of reason or empirically through the collection and analysis of sense data. Descartes (2008, first published 1641) laid the foundations for this mode of thought by arguing that knowledge depends upon the existence of a conscious “I” that is constituted *prior* to thought (“*cogito ergo sum*”) (for analysis, see Atkins 2005b, chap. 1). For Descartes, the thinking “I” is a fundamental *a-priori* without which knowledge would be impossible. In his view, this “I” is an essence that is constituted by its capacity to know—that is, by its ability to apply its faculties to make sense of the world. And, it is this capacity that makes the “I” the ground of knowledge as well as an instrument that makes knowledge possible. Since Descartes, a parade of Western philosophers have applied similar models of subjectivity to theorise how subjects can ‘know’ facts about themselves (see Atkins 2005b, chap. 4). Repeatedly, such theories have advanced a subject-object distinction whereby subjects can reflexively take themselves as an object of inquiry. These accounts imagine that subjects are conscious ‘I’s that can reflexively *apply* their senses and rational faculties to

themselves to generate knowledge about themselves. This process has often been formulated in much the same way that the Court framed Flynn's and Lucas' self-knowledge, which I mentioned earlier: that is, where the I functions as the object ("s/he is") and the subject ("s/he knows") of knowledge simultaneously.

The Court's account of introspective knowledge repeatedly cited this liberal-humanist conception of subjectivity and the positivist conception of self-knowledge that it carries. Firstly, it did so by suggesting insistently that gender is a discrete, objective, and observable property of the subject, and by inferring, as such, that gender is an inner state that precedes and exists independently from observation. Secondly, it did so by asserting, on this basis, that a subject could observe and identify their gender by either (a) empirically observing that gender through their senses and experiences, or (b) discerning the gendered nature of their experiences and sensations. In either case, the Court argued that different forms of gender invariably look or feel a certain way 'on the inside' and that subjects can discern this quality empirically.

Several governing effects arose from the Court's requirement that subjects construct introspective knowledge about their gender according to the strictures of a liberal-humanist and positivistic model of subjectivity. These governing effects arose because there are neither universal nor objective ways to understand or 'know' one's gender. As such, any impositions to the contrary will function as injunctions upon gender's inherent multiplicity. As I argued in chapters two and three, gender is neither an object nor a universal, intractable, or immutable property of subjects. Rather, gender is personally, socially, culturally, and historically contingent, and as such, any mode of knowing gender is subject to those contingencies. Accordingly, there are no sensations or experiences that are universally indicative or expressive of gender. Feminist theorists have argued this point for decades. From various theoretical vantage points and social locations, feminist theorists have argued that there is an innumerable plurality of gendered experiences, as well as relationships between gendered experience, identity, and embodiment, that take shape at different intersections of history, culture, and social location (J. W. Scott 1991; Moreton-Robinson 2000; Roen 2002; P. H. Collins and Bilge 2016). The experiences and

sensations that any individual might undergo in relation to their gendered subjectivity are also neither static nor discrete but capable of change over time and according to context.

Moreover, gender is not metaphysically required to be sensate or experiential. In fact, gender is not obliged to manifest as any kind of feeling at all. Gender already manifests in ways that are neither tethered nor reducible to sensation and experience. Many people do not experience or ‘know’ their gender through sensation, and there are also no objective set of facts to ground the assertion that authentic knowledge of gender *requires* sensation and experience. Rather, subjects practise knowing their gender in diverse, changing, yet always equally authentic ways (Erickson-Schroth 2014; Kuklin 2015; Davy 2016; Prosser 1998a; Salamon 2010; A. Austin 2016; Frohard-Dourlent et al. 2020). Furthermore, given that gender is ontologically indeterminate, as I argued in chapter two, it is possible to both imagine and bring into being new forms of gender that are bound to neither sensation nor experience.

The Court’s discourses on introspective knowledge were therefore disciplinary rather than descriptive. By making manual hormone use conditional upon introspective knowledge *per se*, the Court worked to ensure that its subjects could only use hormones manually to enact forms of gender that the Court could interpret as introspectively known. This condition worked to ensure that manual hormone use could only be used by subjects who practised a certain kind of epistemic relationship with gender. And in doing so, it also worked to ensure that subjects could only use hormones manually to manifest modes of being gendered that reflected the kinds of liberal-humanist conceptions of self that that epistemic relationship presupposed. Moreover, given that knowledge about one’s gender does not *require* sensation and experience—even while gender is expressed in the form of sensation and experience for some—by tethering the legitimacy of manual hormone use to the presence of sensate and experiential modes of self-knowledge the Court both coerced its subjects into practising these modes of self-knowledge and also worked to prevent its subjects from practising alternative ways of knowing. As such, the Court worked to ensure that hormones could only be used manually to affirm experiential, sensate, and interiorised forms of gender, and as such, to efface the possibility of forms of gender

that exceed these strictures or that exist on other planes entirely. In this way, the Court's discourses on introspective knowledge did not describe a reality in which the knowability of one's gender was *necessarily* grounded in sensation and experience but worked to ensure that the only gendered beings that manual hormone use could manifest were those that would affirm this to be true.

Importantly, these modes of governance did not concern their subjects' knowledge of themselves *per se* but their *performance* of that knowledge. This distinction owes to the fact that introspective knowledge, by definition, cannot be accessed externally. Only the subject that practises introspection can directly access the knowledge that that introspection produces (Bettcher 2009). As such, the Court could only judge how its subjects *communicated* their introspective knowledge. It could not know, of its own accord, the nature of the experiences, sensations, and so forth, that it saw as generating introspective knowledge. It could only draw *inferences* about the validity and integrity of that knowledge based on how it was recounted. As such, the Court's discourses on introspective knowledge were interpretations. Its discourses were, therefore, necessarily mediated by symbolisation, and as such subject to the constraints, distortions, and contingencies that symbolisation necessarily entails. The Court's governing apparatus was not concerned directly with the 'reality' of its subjects' self-knowledge, then. It was concerned only with observing whether that reality was performed in a manner that flattered the Court's conceptions of validity.

In this way, the Court's discourses on introspective knowledge established a mode of *internal* governance by requiring subjects to expose their self-knowledge to surveillance. By making the legitimacy of manual hormone use dependent upon the veracity of a subject's introspective knowledge, the Court transformed that knowledge into a site that it could and should scrutinise to determine that legitimacy. This surveillance required subjects to construct themselves as possessing introspective knowledge about their gender, and it required them to construct that knowledge in ways that conformed to the Court's criteria of validity. As such, the Court made it necessary for subjects to expose their sensations, experiences, and other modes of knowing their gender to the Court as a condition of being authorised

to use hormones manually. This mandate governed in one sense by pressuring subjects to know, feel, and experience themselves as gendered—as well as to know, feel, and experience that gender in circumscribed ways. Yet, this pressure to disclose was also a form of governance in itself. An array of queer and trans scholars have noted that transparency renders a subject vulnerable to various forms of social control. As van der Wal identifies (2016), having one's status as trans, intersex, or gender non-conforming disclosed opens them up to the various forms of surveillance and violence that such disclosures can entail, and marks those that do not do so as secretive, dishonest, and inauthentic. Clare (2017) makes a similar point regarding contemporary discourses on 'coming out.' In Clare's (2017, 18) view, the social obligation to 'come out,' which now surrounds non-heterosexual and non-cisgender subjects, "disciplines desires to fit existing categories of management and confinement and places queerness in a double bind wherein the queer subject is punished both for not being out enough and for being out." Thus by demanding transparency, the Court was also not only pressuring its subjects to shape their interiors in line with its directives; it also required its subjects to expose themselves to external governing forces and to allow those forces to act upon them.

Moreover, the fact that there are no universal or objective sensations or experiences that indicate gender also means that these terms can function as empty signifiers that support the Court's governing mechanisms. The fact that there are no essential feelings or experiences that can universally establish the nature of a subject's 'interior' gender means that the Court can only subjectively determine which feelings or experiences it will recognise as providing this evidence. This allows the Court to anoint a *particular* version of introspective knowledge as demonstrating gender legitimacy and thereby *wield* self-knowledge to exclude other possibilities for gendered subjectivity that do not align with the Court's understanding of 'real' self-knowledge. The Court's discourses on introspective knowledge thus claimed the power to construct which feelings and experiences count as evidence of a given form of gender and to use that construction to arbitrate its subjects' ability to use hormones manually. This discourse made it possible, therefore, for the Court to prevent subjects that did not 'feel' or 'experience' their gender in a way that it found

legible from being recognised as authentic and thus from being authorised to use hormones manually.

## **Extrospective Knowledge**

Alongside its discourses on introspective knowledge, the Court's epistemology of gender also consisted of a range of discourses on extrospective knowledge. Extrospective knowledge, as I stated in the introduction to this chapter, is the term I use to refer to a category of discourses that the Court deployed in its judgments to describe how spectators could know a subject's gender. The Court's discourses on extrospective knowledge consisted of six kinds of assertions about how spectators could know a subject's gender from the 'outside': by observing their diagnostic status, affect and emotionality, behaviour, presentation, efforts to pass, and homosociality. In this section, I examine each of these discourses in turn. In doing so, I show how each discourse worked to tether the legitimacy of a subject's manual hormone use to the promise that those hormones would help them to strengthen their recognition as being gendered in a way that they were already recognised as being. Extrospective knowledge contributed to the Court's machinery of gender governance in this way by working to ensure that its subjects could only use hormones manually to enact forms of gender that affirmed rather than threatened their social intelligibility.

## **Diagnosis**

Diagnosis, attributed in the form of gender dysphoria or gender identity disorder, was one of the key instruments that the Court used to assert knowledge about a subject's gender.<sup>151</sup> Indeed, the Court discussed how well its subject met the diagnostic criteria for gender dysphoria in every case that I analysed, and in many

<sup>151</sup> As noted in footnote 4, the Court's judgments refer to different diagnostic categories over time due to a shift in nosology between the fourth and fifth editions of the American Psychiatric Association's DSM-IV (1994) and DSM-V (2013). In the discussion that follows, I use gender dysphoria as an umbrella term to refer to both.

cases it explicated these criteria in full.<sup>152</sup> Many judgments also directly organised their exposition of evidence around these criteria, such that each criterion appeared as a sub-heading under which facts were explicated. As such, the capacity of the subject's gender to (a) be rendered knowable and (b) appear as real and valid according to these criteria became an index that the Court used to judge the legitimacy of their manual hormone use. In Martin's, Harley's, and Tahlia's cases, for instance, the Court explained that the legitimacy of manual hormone use arose because it "recognised and accepted the psychological and psychiatric origin of [their] condition."<sup>153</sup> The Court wrote in Flynn's case, too, that "[t]he underlying rationale" that supported young people's manual hormone use in these cases was "that gender dysphoria is in and of itself a medical disorder, illness or condition," and that "cross sex hormone treatment" is treatment "*for* gender identity dysphoria."<sup>154</sup>

The Court also deployed diagnostic categories metonymically to assert knowledge about a subject's gender. These metonyms appeared in one form where the Court used 'gender dysphoria' to signify and supplant various manifestations of gender non-conformity. For instance, in several cases, the Court framed its subjects' understandings and disclosures of their gender as regarding gender dysphoria specifically. The Court conceived of both Logan's self-recognition and disclosures of gender through the language of gender dysphoria, for instance, writing that:

[Logan] was aware of having female gender feelings since early in childhood although was unable to recognise these feelings as gender dysphoria since early in high school after reading more about this on the internet.<sup>155</sup>

And again, that:

<sup>152</sup> The Court quoted the DSM (American Psychiatric Association 1994; 2013) criteria in full in Re Celeste ¶32; Re Shane ¶14; Re Kerry ¶67; Re Jaden ¶15; Re Drew ¶22; Re Sasha ¶27; Re Colin ¶43; and Re Marco ¶39. The Court also cited criteria from the ICD-10 (World Health Organization 1994) in Re Christopher ¶16; Re Colin ¶42; Re Emery ¶45; Re Jamie (2013) ¶58; Re Jamie (2015) ¶67; Re Kerry ¶67; Re Mason ¶35.

<sup>153</sup> Re Martin ¶20; Re Harley ¶36; Re Tahlia ¶26.

<sup>154</sup> Re Flynn ¶24, 1.

<sup>155</sup> Re Logan ¶64.

In approximately January 2014, prior to the commencement of her Year 10 studies, Logan informed her mother of her gender dysphoria and stated that her name was Logan.<sup>156</sup>

In each instance, the Court framed Logan as having understood and expressed herself as gender dysphoric. Thus, gender dysphoria, according to the Court, encompassed both the character of her feelings regarding her gender as well as the mode in which she articulated these feelings to her mother. Gender dysphoria continued to serve this purpose for the Court throughout Logan's judgment. Over several paragraphs, the Court reiterated that Logan's disclosures regarded gender dysphoria specifically:

After Logan informed the mother of her Gender Dysphoria, she showed the mother the items of clothing she had previously purchased  
...

In September 2014, Logan told her younger brothers about her Gender Dysphoria. Since this time, both younger brothers have called her Logan.

In December 2014, Logan told her cousin of her Gender Dysphoria.

In January 2015, Logan told her father of her Gender Dysphoria.

In about March 2015, Logan wanted to tell the mother's parents of her Gender Dysphoria. The mother says that Logan's father told his parents about Logan's Gender Dysphoria in early 2015.<sup>157</sup>

The Court deployed the same frame in Marco's case, using the language of gender dysphoria exclusively to represent Marco's articulation of his gender over several paragraphs:

The father was informed of Marco's gender dysphoria by the mother. However, the father says that Marco had been providing him with hints to his Gender Dysphoria before this time for example in the manner of his dress and stereotypical male behaviour and interests.

<sup>156</sup> Re Logan ¶39.

<sup>157</sup> Re Logan ¶34, 45-49.

In the year after Marco disclosed his Gender Dysphoria to his parents, he had a lot of anger issues in which his twin sister would also partake. . . . Marco took more time to inform his grandparents and extended family of his Gender Dysphoria. . . . After disclosing his Gender Dysphoria, Marco was observed to become more at ease within himself[.]<sup>158</sup>

The Court narrated Jamie's disclosures in these terms as well, writing that "Jamie has confided in several of her friends her diagnosis of gender dysphoria."<sup>159</sup> It also reinstated this frame a few paragraphs later to compliment the "significant resilience and resourcefulness" that Jamie had shown "in dealing with the diagnosis of [gender dysphoria] and the effect on her."<sup>160</sup> In each of these instances, the Court narrated gender exclusively in pathological terms—that is, *not* as an identity, mode of being, interactional achievement, or any other way of understanding gender, but as a codified and diagnosed condition of disease. In doing so, the Court not only configured Jamie's, Marco's, and Logan's gender as pathological but also negated the possibility of configuring it otherwise.

Throughout the Court's judgments, there were many other instances outside of the context of disclosure where the discourse of gender dysphoria supplanted alternative ways of conceptualising gender. In Christopher's case, for example, the Court used gender dysphoria to describe Christopher's positionality at school, writing that "He is enrolled as a boy and it is only his teachers who are aware that he is being treated for Gender Dysphoria."<sup>161</sup> In Lincoln's case, meanwhile, the Court treated Lincoln's understanding about his gender exclusively as a matter of understanding his diagnosis, writing that "The father talked to Lincoln about gender dysphoria a few days later and formed the view that he was extremely knowledgeable about this condition."<sup>162</sup> And in Anita's case, the Court adopted the language of gender dysphoria to describe Anita's father's struggle to accept her gender, writing

<sup>158</sup> Re Marco ¶24–26, 28.

<sup>159</sup> Re Jamie (2015) ¶56.

<sup>160</sup> Re Jamie (2015) ¶62, square brackets in original.

<sup>161</sup> Re Christopher ¶13.

<sup>162</sup> Re Lincoln ¶III.

that “It appears that the father has only recently been able to accept Anita suffers from gender dysphoria.”<sup>163</sup> In each of these scenes, the Court privileged the language of gender dysphoria to describe the form of gender that manifests to the exclusion of other possible ways of narrating it.

One of the reasons that gender dysphoria functioned as an organising concept in these judgments is that the legal structure that produced these cases framed them as applications for a “special medical procedure.”<sup>164</sup> This framing meant that the Court was required to use diagnostic categories like gender dysphoria to conceptualise manual hormone use as a form of medical treatment such that it could authorise it *as* a form of medical treatment. Indeed, Chief Justice Diana Bryant stated as much in her judgment in *Re Jamie* (2013), arguing that the Court’s conceptualisation of gender needed to defer to medical authority, despite accepting as convincing competing anti-pathologisation accounts:

[T]ranssexualism . . . should be seen as an example of the diversity in human sexual formation, rather than as an aberration in or departure from the norm. Once this is accepted, it is readily understandable why people with transsexualism are concerned about the psychiatric diagnoses of gender dysphoria or gender identity disorder, as they see themselves as merely an example of diversity in human sexual formation, rather than having a psychiatric condition. However whilst understanding this discomfort, I do not need to determine whether that characterisation is correct or not for the purpose of these proceedings. Gender identity disorder is a psychological condition identified in DSM-IV (and the new DSM-5, published May 2013). It may be that in time to come, transsexualism will no longer be described as a disorder, but for the time being, and for the foreseeable future, the weight of professional opinion is that it represents a particular category of pathology or mental illness.<sup>165</sup>

<sup>163</sup> *Re Anita* ¶20.

<sup>164</sup> For more detail, see my earlier discussion of this designation in the introduction and in footnote 7.

<sup>165</sup> *Re Jamie* (2013) ¶68-69.

Nonetheless, the Court's use of gender dysphoria exceeded the definitional parameters of a medical instrument. Gender dysphoria is the organising concept in the Court's conceptualisations of Jamie's resilience, Christopher's categorisation at school, Anita's relationship with her father, and Logan and Marco's disclosures. In each instance, the Court installed gender dysphoria as the only framework within which the subject's gendered subjectivity was to be understood and constituted as an object of judgment at the exclusion of other possible and existing ways of doing so.

The Court's use of gender dysphoria produced several governing effects that owed to the definitional parameters that constitute gender dysphoria itself. Gender dysphoria, as a nosological instrument, is a concept that is formulated by psychologists and psychiatrists to identify and test the existence of what they believe to be a discrete and measurable pathology (Langer and Martin 2004; Daley and Mulé 2014; Meyer-Bahlburg 2019; Lev 2006; Sennott 2011). Thus, when psycho-medical practitioners deploy the concept of gender dysphoria they assume that the phenomenon that they are using that concept to signify exists in a form that has universal, clearly defined, and immutable boundaries, and which can, as such, be scientifically codified. The conceptual architecture of gender dysphoria thus contains the notion not only that the phenomenon it describes exists independently of its description of it, but also that it is possible to isolate and test that phenomenon to establish whether it is present in any given subject. Consequently, gender dysphoria *purposively* renders invisible, illegitimate, inauthentic, or fallacious articulations of gender that are not recognisable within its framework (Suess, Espineira, and Walters 2014). As Lev (2006, 42–43) notes,

diagnoses related to gender issues are based on classification systems that seek to type and subtype gender variant people in order to determine who is “really” transsexual and only those who fit certain narrow criteria are deemed eligible for further medical treatments . . . According to this model, only “true” or “primary” transsexuals should be eligible for medical and surgical treatments and distinguishing between “true” transsexuals and all other gender variant and gender dysphoric

people became the focal point of much of the research as well as clinical evaluation.

Yet neither gender dysphoria nor the criteria that define it correspond to any objective features of reality. Rather, as numerous scholars across a variety of disciplines have shown, classifications of gendered pathologies, much like classifications of gender more broadly, are cultural and historically specific constructs that reflect and reinforce the social environment in which they are formulated (Spade 2003; Butler 2004b; Lev 2006; Burke 2011; Sennott 2011; Suess, Espineira, and Walters 2014; Davy 2015; Inch 2016; Winter 2009; Drescher 2015; Langer and Martin 2004; Vasey and Bartlett 2007; Bryant 2006; Repo 2016; Meyerowitz 2002). In support of this thesis, scholars have pointed out that an objective formulation of any gendered pathology is impossible given that gender is a subjectively produced entity the nature of which varies according to its cultural and historical context (Lev 2006; Vasey and Bartlett 2007; Meyer-Bahlburg 2019). Moreover, scholars have pointed out that the stigmatisation and pathologisation of gender identification practices is a historically recent and culturally specific phenomenon (M. Robinson 2020; Rizki 2019; McNabb 2018; Mirandé 2016; 2014; Besnier and Alexeyeff 2014; S. C. Kerry 2014; Schmidt 2017; 2010; Reddy 2005; K. Brown 2004; Stephen 2002; Jacobs, Thomas, and Lang 1997). It follows, then, that any attempt to create universal criteria to isolate and test a given category of gender-related pathology will be, in a foundational sense, arbitrary.

The Court's use of such arbitrary criteria to judge the legitimacy of its subjects' manual hormone use thus governed its subjects' gender through exclusion. This is because if the Court could only recognise manual hormone use as legitimate when a subject was intelligible as gender dysphoric then manual hormone use would always require subjects to enacting forms of gender that complemented that designation. This stipulation was governing because, as Lev (2006, 42) points out, "those who fit the diagnostic criteria of [gender dysphoria] are only a small segment of gender variant people potentially seeking [hormone] treatment." As such, the majority of those who may have wanted to use hormones manually would have been excluded from receiving authorisation to do so under this condition.

Yet the Court's use of gender dysphoria as a metric to assess the legitimacy of manual hormone use also governed gender *constitutively*. This is because the criteria that constitute gender dysphoria—as well as alternative forms of nosology such as gender identity disorder—require a subject to enact a normative form of gender as a condition of diagnosability. Indeed, many scholars have argued that the present-day nosological schemas like gender dysphoria are extensions of a long history of medical and psychiatric involvement in the classification and pathologisation of gender difference (Davy, Sørli, and Suess Schwend 2018; Spade 2003; 2006; Langer and Martin 2004; Bryant 2006; Vasey and Bartlett 2007; Drescher 2010; Sennott 2011; Burke 2011; Yost and Smith 2014; Davy 2015; Drescher 2015; Inch 2016; Oosterhuis 2012; Prosser 1998b; De Block and Adriaens 2013). Scholars in this field have pointed out that diagnostic discourses were explicitly created as instruments to 'manage' gender non-conformity and to support clinical interventions aimed at normalising those variances (Drescher 2010; 2015; Meyerowitz 2002; 2008; Repo 2016; Gill-Peterson 2018). Serano (2007, 129) aptly summarises the contention of this literature, writing that critics have diagnostic paradigms as “justification for carrying out behavioral modification (including aversion and electroshock therapies) on children in an attempt to eliminate their exceptional gender expression and prevent them from growing up to be queer.”<sup>166</sup> In support of this claim, scholars from an array of disciplines have shown that the diagnostic criteria contained within the DSM and other nosological systems reflect, rely upon, recreate, and enforce gender norms that are culturally and historically specific yet socially dominant (Spade 2003; Latham 2017b; 2017a; 2019; Davy 2015; Sennott 2011; Lev 2006; Inch 2016; Butler 2004b; Ault and Brzuzy 2009; Davy, Sørli, and Suess Schwend 2018; Drescher 2015; Suess, Espineira, and Walters 2014; Suess Schwend et al. 2018; Yost and Smith 2014; Burke 2011; Winter 2009; Langer and Martin 2004; Vasey and Bartlett 2007; Bartlett, Vasey, and Bukowski 2000; Bryant 2006). That these diagnostic criteria are premised upon

<sup>166</sup> Indeed, many scholars have argued, in line with Sennott (2011, 95), that gender identity disorder “was added to the DSM when homosexuality was removed as a way to continue policing atypical gender expressions” (see further Lev 2006; Ault and Brzuzy 2009; Langer and Martin 2004; De Block and Adriaens 2013; Drescher 2010; 2015; Sennott 2011; Bartlett, Vasey, and Bukowski 2000; Bryant 2006).

such normative commitments means that they are also based upon and work to reinforce socially constructed notions of gender appropriateness. Spade (2003, 24–25) argues, for instance, that the construction and application of these diagnostic discourses rely upon and institute an impression of ‘normally’ gendered subjects from which pathological subjects are differentiated, writing:

The diagnostic criteria for GID [gender identity disorder] produces a fiction of natural gender in which normal, non-transsexual people grow up with minimal to no gender trouble or exploration, do not crossdress as children, do not play with the wrong-gendered kids, and do not like the wrong kinds of toys or characters . . . Non-GID kids can be expected to: play with children of their own sex, play with gender appropriate toys (trucks for boys, dolls for girls), enjoy fictional characters of their own sex (girls, specifically, might have GID if they like Batman or Superman), play gender appropriate characters in games of “house,” etc . . . This story is not believable. Yet, it survives because medicine produces it not through a description of the norm, but through a generalized account of the norm’s transgression by gender deviants.

Davy’s (2015, 1167) assessment of the DSM’s criteria for gender dysphoria is similar, contending that they are sensitive only to a narrowly racialised, classed, and sexualised range of expressions of gender that “are derived from stereotypes applied in the gender identity clinics serving transpeople, rather than empirically developed from biological imperatives.” Lev (2006, 51) offers a similar contention, arguing that “the basis for the diagnostic criteria [of gender identity disorder in children] rests in stereotypical definitions of ‘normal’ male and female, including pathologizing cross-gendered play and the preference of having playmates of the other sex.” For this reason, Lev (2006, 51) characterises the construction of gendered pathologies as an exercise in the “clinical reification of sexism.” Meanwhile, Sennott (2011, 95) has argued that gendered pathologies such as gender dysphoria rely “on stereotypes about men and masculinity and women and femininity [that] ignore[] the last 40 years of feminist advances in gender liberation.” Butler (2004b, 86–87), too, has observed that nosological schemas like gender dysphoria only treat as pathological

gendered desires and expressions that do not align with culturally dominant norms, writing:

[M]en who want penile augmentation or women who want breast augmentation and reduction are not sent to psychiatrists for certification . . . There is no presumption of mental malfunctioning for women who take estrogen or men who take Viagra . . . No one gets sent to a psychiatrist for announcing a plan to cut or grow his or her hair or to go on a diet, unless one is at risk for anorexia. Yet these practices are part of the daily habits of cultivating secondary sex characteristics, if that category is taken to mean all the various bodily indicators of sex . . . This is, I presume, because they are operating within the norm to the extent that they are seeking to enhance the “natural,” making readjustments within acceptable norms, and sometimes even confirming and strengthening traditional gender norms.

In line with Butler’s observation, several scholars have also pointed out that feminine-coded behaviours performed by subjects socially identified as male are much more likely to be pathologised, both socially and clinically, compared to masculine-behaviours performed by subjects socially identified as female (Serano 2007; Coyle, Fulcher, and Trubutschek 2016; Sirin, McCreary, and Mahalik 2004; McCreary 1994; Sedgwick 1991). Mary Adams (2013, 518) criticised the behavioural criteria for gender identity disorder on this basis, arguing that it pathologised femininity in boys and linked their psychological wellbeing to their capacity to cultivate hegemonically masculine attributes such as “aggressive, competitive physicality.”

Scholars have also criticised gender dysphoria for its investment in essentialist and binary notions of sex and gender. Inch’s (2016; see also Burke 2011; Sennott 2011) analysis reveals, for instance, that the DSM’s treatment model for gender dysphoria assumes that sex and gender are both binary formations. As such, Inch asserts that gender dysphoria reduces the diversity and complexity of transgender experiences to a subject feeling dissatisfied with their inhabitation of one category and desiring to transition to ‘the other.’ Davy (2015, 1167) argues, too, that the DSM’s criteria are

underpinned by “essentialist, heteronormative assumptions that situate binary sexes—male and female—with corresponding genitalia as the anchor from which [gender dysphoria] is judged.” For Davy, these criteria work to essentialise culturally constructed notions of masculinity and femininity by treating expressions of culturally coded masculine or feminine behaviour as indicative of an intrinsic gendered essence. Butler (2004b, 81) makes this point as well, arguing that the diagnostic criteria for gender dysphoria shore up essentialist notions of gender by presuming that the norms that govern the recognisability of different forms of gender are static; or, as she writes, “that we all more or less ‘know’ already what the norms for gender—‘masculine’ and ‘feminine’—are and that all we really need to do is figure out whether they are being embodied in this instance or some other.” Butler (2004b, 81) also identifies essentialist notions undergirding gender dysphoria’s requirement that subjects demonstrate that they have been experiencing “symptoms” for “at least 6 months’ duration,” noting that:

The diagnosis of gender dysphoria requires that a life takes on a more or less definite shape over time; a gender can only be diagnosed if it meets the test of time. You have to show that you have wanted for a long time to live life as the other gender; it also requires that you prove that you have a practical and livable plan to live life for a long time as the other gender. The diagnosis, in this way, wants to establish that gender is a relatively permanent phenomenon. It won’t do, for instance, to walk into a clinic and say that it was only after you read a book by Kate Bornstein that you realized what you wanted to do, but that it wasn’t really conscious for you until that time.

Thus, if gender dysphoria’s diagnostic criteria are gender normative, then by requiring its subjects to be diagnosed with gender dysphoria to be able to use hormones manually the Court reserved manual hormone use for only those subjects that could achieve intelligibility as normatively gendered. In this way, the Court’s wielding of gender dysphoria tasked subjects who use hormones manually with upholding a set of norms that disparage gender diversity and privilege conformity. Scholars have identified this governing mechanism in other spheres. Trans scholars

have noted, for instance, how in clinical contexts the DSM's criteria forces subjects to construct themselves in gender normative ways as a condition of securing psycho-medical support to commence manual hormone use (Latham 2017b; 2017a; 2019). Accordingly, in trans and gender diverse communities, it is common for subjects to rehearse normative clinical narratives to expedite such processes (Spade 2003; Davy 2015; Prosser 1998a). The governing effects of this are manifold, as subjects are not only required to construct themselves normatively but in doing so are also required to reinforce the validity of those governing norms. Diagnostic criteria thereby have a performative effect which, as Beauchamp (2012, 58, my emphasis) has stated, means that they "do not simply dictate how transgender individuals should be treated but work to *produce the very category of transgender* as one that displays particular behaviors, emotions, and self-identifications."

Yet even while the Court's wielding of gender dysphoria worked to govern its subjects' gender through normalisation, it also governed their gender by pathologising their difference. This is because gender dysphoria, as a nosological instrument, is a concept that has been explicitly formulated within psycho-medical discourse as a means to classify a state of illness and to organise interventions aimed at eliminating that illness (Davy, Sørli, and Suess Schwend 2018; Castro-Peraza et al. 2019; Suess, Espineira, and Walters 2014). Nosological constructions of this kind are not objective; rather, as scholars within the sociology and anthropology of medicine have long asserted, the classification of a phenomenon within diagnostic schema depends fundamentally upon the social construction of that phenomena as a 'problem' (Collyer 2015; Csordas and Kleinman 1990; Conrad and Barker 2010; McGann and Hutson 2011). Reiss and Ankeny (2016) summarise this position accordingly:

[D]efining various disease conditions is not merely a matter of discovering patterns in nature, but requires a series of normative value judgments and invention of appropriate terms to describe such conditions. Conversely, health involves shared judgments about what we value and what we want to be able to do; disease is a divergence from these social norms.

Jutel (2011a; 2011b) explicates this position further in her sociological study of diagnosis. There, she argues that the defining effect of a diagnostic discourse is to constitute the phenomenon that it names as a disease and to organise, legitimise, and operationalise it within the structures of medical knowledge and practice. Meanwhile, the term disease, for Jutel, describes a state that has been *judged* to be undesirable, impairing, and abnormal and which therefore warrants intervention. Disease, in this sense, is not a natural category but a value-laden, and social, construction.

Acknowledging the pathologising effects of diagnostic discourse, several scholars have argued that when certain forms of gender are constructed as coextensive with gender dysphoria those forms of gender are made to appear as a professionally certified form of undesirability (Sennott 2011; Lev 2006; Suess, Espineira, and Walters 2014; Davy 2015; Burke 2011). As Butler (2004b, 76) has noted in her analysis of gendered pathologies, “to be diagnosed [...] is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all.” Suess, Espineira, and Walters (2014, 74) suggest that this is one of the reasons why a movement for depathologisation has emerged and grown in prominence in recent years, “based on the observation of structural interrelations between dynamics of psychiatrization, discrimination, and transphobia and on an acknowledgment of the negative effects that a psychiatric classification has on the citizenship rights of trans people.” Along these lines, depathologisation advocates have also criticised the logic of elimination that diagnostic categories necessitate when applied to gender non-conformity. Sandy Stone (2006, 227, my emphasis) notes, for instance, that “the foundational idea for the gender dysphoria clinics was first, to study an interesting and potentially fundable human aberration; second, to provide help, as they understood the term, for a *correctable problem*.” The idea prevailing behind the administration of medical ‘treatments’ for gendered pathologies then, as Beauchamp (2012, 58, my emphasis) identifies, is that gender non-conforming people “will take up hormones and surgeries as tools to *eradicate* any markers of gender nonconformity and presume an ultimate goal of transitioning linearly from one gender to another.” On this basis,

depathologisation advocates have argued, as Suess, Espineira, and Walters (2014, 74) attest, for “a paradigm shift in the conceptualization of gender identities: from conceiving gender transition as a mental disorder to recognizing it as a human right and expression of human diversity.”

Thus, by requiring subjects to achieve a diagnosis of gender dysphoria as a condition of being authorised to use hormones manually, the Court required them to submit themselves to gender dysphoria’s attendant modes of pathologisation. The governing effects of this pathologisation are manifold. Firstly, that gender dysphoria is necessarily pathologising means that to subsume various formations of gender into the conceptual architecture of gender dysphoria—as the Court did in the several instances that I noted previously—is to impose negative value judgments upon those formations of gender. This is to say that in each instance where the Court conceptualised its subjects’ genders *as* manifestations of gender dysphoria, it also constructed those genders as manifestations of a disease that ought to be eliminated. In another way, by ensuring that subjects were constructed as gender dysphoric before they could use hormones manually, the Court ensured that manual hormone users were always marked as pathological. Accordingly, manual hormone use always appeared as a means to ameliorate that pathology. And indeed, the Court affirmed this conceptualisation of gender dysphoria as a disease by repeatedly describing it as a form of suffering that its subjects sought to purge. Drew, Chelsea, and Kelvin are all described as “*suffering from* gender dysphoria,” for instance, while in at least five cases the Court describes the purpose of manual hormone use as being to “relieve [its subject’s] suffering.”<sup>167</sup> The stigma that thus arises through pathologisation is governing not only in the context of the Courtroom but also because extends to broader social and discursive spaces as well, as medical discourse is involved in the construction and adjudication of trans, intersex, and gender non-conforming lives in fields far beyond the legal and medical (Butler 2004b, chap. 4; Burke 2011).

<sup>167</sup> This phrase appears in Re Drew ¶18; Re Chelsea ¶13; Re Kelvin ¶35. The Court also describes the purpose of manual hormone use as being to “alleviate the gender dysphoria that [the subject] suffers from” in Re Logan ¶68; Re Adrian ¶32; Re Marco ¶56; Re Sara ¶15; and Re Anita ¶27. I discuss the association drawn here between gender dysphoria and distress in further detail in chapter six.

Another significant governing effect that arose from gender dysphoria's status as a nosological instrument concerned the medical power relations that govern diagnosis. Gender dysphoria, being nosological in nature, is not only a concept that is formulated and managed predominantly by psycho-medical practitioners; it is also a phenomenon that only psycho-medical practitioners have the authority to identify. As Jutel (2011b; 2011a) argues, a diagnosis is a socially achieved attribution that can only be administered by medical professionals. "[O]nly the medical profession," she writes, "has the power to diagnose disease" (Jutel 2011a, xiii). And, in her view, it is precisely the power to diagnose that "sets the doctor apart from the layperson and other professionals, confirming the medical practitioner's greater knowledge and status, as well as medicine's authority" (Jutel 2011b, 5). As such, by requiring its subjects to be diagnosed with gender dysphoria as a condition of being authorised to use hormones manually, the Court gave to medical practitioners an authority only superseded by its own to judge whether a subject held a legitimate claim to be able to use hormones manually to affirm their gender. And indeed, the Court acknowledges this power relation directly in its judgments. In Jordan's case, for instance, the Court asserted that the legitimacy of Jordan's manual hormone use depended upon the authority of the medical evidence that it had received: that is, because it is the only outcome "that meets best practice guidelines," "is consistent with internationally recognised guidelines," and which is supported by "expert medical evidence."<sup>168</sup>

That the Court recognised diagnosis as an attribution governed by medical power can also be observed in the ways that the Court described gender dysphoria as *enacted* by medical practitioners in Spencer's case. Throughout the judgment in *Re Spencer*, gender dysphoria only comes into being as the performative effect of diagnostic and clinical practice—that is, once certain 'qualified' actors name it—and thus depends upon those practices for its existence. The judgment records:

Spencer has been receiving specialist medical care for gender identity dysphoria since June 2012. At that time his psychologist, Ms W referred

<sup>168</sup> Re Jordan ¶40-44, 5.

Spencer to Dr P, psychiatrist at the Hospital for assessment. Dr P works as a child and adolescent psychiatrist and psycho-therapist, and has significant experience working with children and adolescents who have gender identity development disorders.

Since September 2012, Dr P has seen Spencer and his mother on approximately eight occasions.

Dr P has assessed Spencer as a young person who meets the criteria for a formal diagnosis of gender identity disorder of adolescence, transsexual type, female to male.

That diagnosis was confirmed by Dr K, consultant child and adolescent psychiatrist who provided a second psychiatric opinion upon referral of Spencer by Dr P. Dr K assessed Spencer and his mother on 15 August 2013. In her report dated 3 December 2013 Dr K confirmed that Spencer's presentation is consistent with a diagnosis of gender identity dysphoria in adolescents (DSM-5).

Spencer has been treated by Dr T, adolescent physician, in relation to his gender identity dysphoria. Dr T proposes to treat Spencer with testosterone to masculinise his body. This is described as stage two treatment.<sup>169</sup>

In this excerpt, Spencer does not 'have' gender dysphoria until qualified medical practitioners pronounce that he does. The narrative is framed in such a way that it is only through the *repetition* of certain speech-acts, voiced by medical practitioners, that Spencer comes to 'have' gender dysphoria. Spencer's "condition" only *becomes* gender dysphoria once those with the authority to name it declare it as such. Without this pronouncement, Spencer's condition could not have legitimately been described as gender dysphoria in this context. By requiring its subjects to demonstrate a diagnosis of gender dysphoria as a condition of being authorised to use hormones manually, the Court thus tethered Spencer's ability to use hormones manually to his ability and willingness to have medical practitioners enact him as gender dysphoric.

<sup>169</sup> Re Spencer ¶14-18

The Court's requirement that its subjects achieve a diagnosis of gender dysphoria as a condition of being authorised to use hormones manually thus contributed to gender governance by reinforcing the power of medical professionals to act as an arbitrator in this regard as well. This requirement did not only give medical practitioners the power to confirm or deny the presence of a given 'condition' and as such to facilitate or deny a person the ability to use hormones manually on that basis. It also reinforced and legitimised the power of psycho-medicine to exercise control over manual hormone use as a gender-affirming practice and to determine the nature of the conditions that make that use possible. Moreover, even once authorisation was granted, this discourse required that manual hormone using subjects constantly engaged with these power relations. This is because if manual hormone use only becomes legitimate as a means to treat a medical condition then manual hormone users need to maintain their legitimacy in the eyes of medical practitioners to have continuing access to those hormones. This means that the Court's subjects had to subject themselves to the surveillance of medical power in perpetuity, such that medical professionals could observe and assess their ongoing compliance (Daley and Mulé 2014). The governing effects of this power have already been criticised extensively by trans scholars (Spade 2003; Latham 2017a; 2017b; 2019; Inch 2016; Davy 2015; Davy, Sørli, and Süss Schwend 2018; Davy 2016). Sandy Stone (2006) and Jay Prosser (1998a) have both argued that the power wielded by medical professionals in this respect shapes the range of ways that gender non-conforming people can constitute and express gendered identities. Prosser (1998a, 104–7) describes diagnosis as regulatory accordingly, writing that:

The story the transsexual tells the clinician must mirror or echo the diagnosis, its details matching or varying those of this master narrative. Clinicians (the first of transsexual autobiography's critics and setting a precedent in the exactingness of their approach) listen as narratologists for the recognizable transsexual plot, tropes, or themes, matching the subject's narrative against the narratemes of this archetypal story of transsexuality . . . When the subject's story diverges substantially from the clinical genre, when its details don't fit the specified requisites of

what constitutes a transsexual story, its teller has traditionally had a hard time becoming (being a transitioning) transsexual. The diagnosis acts as a narrative filter, enabling some transsexuals to live out their story and thwarting others. In short, if the dependence of the diagnosis on autobiography suggests that one cannot be a transsexual outside the operations of narrative, transsexuality's entry into DSM hones this stipulation to a very set narrative

Suess, Espineira, and Walters (2014, 74) argue similarly, writing that the diagnostic governance of trans people's gender affirmation "limit[s] trans people's decisional autonomy by the imposition of an evaluation process and for reducing the diversity of gender transition processes and health care paths through the triadic model of diagnosis, hormone treatment, and surgery." Other scholars have argued that this kind of medical governance repudiates trans people's rights to self-determination (Davy 2015; Davy, Sørlie, and Suess Schwend 2018) and that it forces subjects to subject themselves to a process of psychiatric assessment that, as Latham (2017b, 57) identifies, "can be intrusive, costly, and . . . harmful."

### **Affect and Emotionality**

The Court also built its theory of extrospective knowledge by citing its subjects' emotional and affective character. In doing so, the Court relied upon dominant Western cultural constructions of gender that assert essential differences between men and women on the basis of affective-emotional traits (Fischer and Manstead 1999; Brody 1997; Brody and Hall 2010; Plant et al. 2000). Such constructions define masculinity either by the control over or absence of emotion. They also associate masculinity with affective-emotional traits that express or enhance power, such as anger, pride, contempt, or disgust. Meanwhile, femininity is inversely defined by excess emotion and associated with affective-emotional traits that express powerlessness, such as fear and sadness, or with traits that support the provision of care, such as the capacity for empathy and sensitivity. The construction of women—as those most often considered or required to be vessels of femininity—as containers

of excess emotion has also been tied to their construction as less rational, yet possessing greater aptitude in emotional intelligence, expression, and communication. The impassivity of men, who have been normatively considered or required to be the vessels of masculinity, by contrast, has been used to characterise them as possessing a greater capacity for reason.

The Court used these stereotyped constructions of masculine and feminine affect-emotionality as instruments with which to judge a subject's gender and to legitimise their manual hormone use on this basis. In cases concerned with manual oestrogen use—that is, with a hormone that is typically constructed as the 'female' sex hormone (Oudshoorn 1994; C. Roberts 2007)—the Court often cited the subject's exhibition of feminine affective-emotional traits as a factor that confirmed the existence of a female gender identity and thus conferred legitimacy upon the use of oestrogen to affirm that identity. This was the case for Logan, whose female gender and desire to use oestrogen were legitimised, in part, because her "mother [had] observed [her] to be 'sweet, sensitive, compassionate, nurturing, empathetic, kind, caring and affectionate'."<sup>170</sup> The Court similarly legitimised Flynn's request to use oestrogen to affirm her identity as female because her "mother [had] observed her to be a 'sensitive new age guy' who appeared to have a caring and empathetic nature."<sup>171</sup>

This characterisation of Flynn as a "sensitive new age guy" as well as "caring and empathic" works to legitimise Flynn's claim to femaleness, and thus legitimate manual oestrogen use, by cultivating an impression of innate femininity and absent masculinity. The figure of the sensitive new age guy—or "SNAG" as it is popularly acronymised (McMahon 1998)—accomplishes this by suggesting that Flynn had demonstrated an affective-emotional character that could not be contained by a male gender alone. As McMahon (1998) explains, that the adjectives "sensitive" and "new age" *modify* the category "guy" suggests that traits such as care and empathy are not typically inferred by the term "guy" on its own. As such, the SNAG typically refers

<sup>170</sup> Re Logan ¶30.

<sup>171</sup> Re Flynn ¶30.

to a kind of person who is making their way *towards* femininity through the displacement of masculinity. Raewyn Connell (2005, 136–37) makes a similar observation regarding the social category that she labels “sensitive new men.” These men occupy a position she describes as characterised by an “annihilation of masculinity,” which she suggests is cultivated through the performance of feminised traits such as emotional expressiveness, compassion, and honesty. Accordingly, Flynn’s characterisation as a SNAG also supports her definition as female in both a positive and negative sense: she is known to be female because as a SNAG she simultaneously displays feminine emotional traits and does not display masculine traits.

Affective-emotional traits were also an important consideration for the Court when determining the legitimacy of manual testosterone use—that is, a hormone that is typically constructed as the ‘male’ sex hormone (Oudshoorn 1994; C. Roberts 2007). The Court asserted that affective-emotional traits stood as evidence of a subject’s gender circuitously in Xanthe’s case, recording that “[Xanthe] sees [himself] as being primarily masculine in nature, but may concede that [he] has a larger than stereotypical capacity for empathy and lesser than stereotypical male level of aggression and competitiveness at this time.”<sup>172</sup> Here, the Court affirms the epistemic value of affective-emotionality for ascertaining the nature of Xanthe’s gender despite the disputation that Xanthe poses by constructing that disputation as an anomaly rather than a contradiction. Adopting a different approach elsewhere, the Court described Martin as having the “strong and persistent stereotypical feelings and reactions of a boy,” and stated identically that both Marco and Christopher had “a strong conviction” that they had “the typical feelings and reactions of the male gender.”<sup>173</sup> The Court did not elaborate in either instance upon which “feelings and reactions” count as characteristically male, suggesting that it considered this to be a natural or axiomatic way to classify emotions—that is, that the maleness of any given affective-emotional trait is self-evident. The Court thus

<sup>172</sup> Re Xanthe ¶23.

<sup>173</sup> Re Martin ¶17; Re Christopher ¶18; Re Marco ¶39.

did not consider the *content* of these “feelings and reactions” to be noteworthy; instead, it was important only that these “feelings and reactions” were *recognised* as being “of the male gender.”

The ideas that the Court proffered here that specific affective-emotional characteristics are essentially masculine or feminine, and that essentially different affective-emotional dispositions constitute men and women, are cultural fictions. These ideas have been central features of Western constructions of gender difference for centuries (Fischer and Manstead 1999). Nonetheless, they are culturally and historically specific, and despite the prominence of claims to their naturalness, are *forcibly* instituted and maintained. Human beings are not fated by nature to experience or display any particular or immutable set of emotions; rather, emotional experiences and dispositions always take shape in relation to the cultural and historical environment in which they are located and affected (Weed and Smith-Lovin 2016; J. Turner and Stets 2006; Ahmed 2015). In contemporary Western contexts, this environment contains coercive processes of socialisation that attach to a subject’s assigned gender and work toward accomplishing the production of normatively masculine or feminine affective-emotional habituses (Oransky and Marecek 2009; Brody and Hall 2010; A. Cleary 2012; Way et al. 2014; Randell et al. 2016). Subjects are coerced, for instance, into complying with what Brody and Hall (2010) have called emotional “display rules.” These rules govern how, when, and where subjects can express and respond to particular emotions and provoke severe social censure when breached (Brody and Hall 2010; Brody 1997; Hercus 1999; Oransky and Marecek 2009; Seidler 2007; Way et al. 2014; Randell et al. 2016). Nonetheless, these coercive mechanisms do not fully accomplish the ends that they seek. It is not the case that men and women universally or otherwise inevitably experience certain kinds of emotions or express those emotions in distinct ways. Even in the Western cultural contexts, where emotions are socially regulated along gendered lines, people of different genders vary immensely in the way that they experience and express emotion—both interpersonally as well as across race, class, ability, and other modes of social organisation (Weed and Smith-Lovin 2016; J. Turner and Stets 2006). Masculinities scholars have illustrated this point in their

studies of emergent and shifting forms of masculinity. In particular, they have noted the rise of “soft” and inclusive masculinities that permit, if not encourage men to engage with their emotions in a manner of depth that exceeds the Court’s conceptions of the possible (R. Connell 2005; Underwood and Olson 2019; Randell et al. 2016; de Boise and Hearn 2017; E. Anderson 2009; Hammarén and Johansson 2014; Waling 2019).

On this account, the gendered construction of emotions is not something that *reflects* external or naturally gendered realities; rather, it is involved in *producing* and *maintaining* gender and gendered relations more broadly. Research on how individuals ‘do’—rather than express—their gender through socially situated performances of emotion illustrates this point. An abundance of literature has tracked the various ways that emotions are involved in *producing*—rather than expressing—the gendered characters of relationships, identities, experiences, social environments, workplaces, objects, and so forth, for instance (Shields et al. 2006, 66–67). Crying, for example, is an act that can express emotion in ways that can either eviscerate, coexist with, and in rare circumstances reinforce a subject’s masculinity, depending upon a range of situational variables (Underwood and Olson 2019). Crying can also be involved in the production of *different kinds* of men and women, depending upon the context in which it is performed. As such, by requiring its subjects to display specific affective-emotional characteristics, the Court also required them to *do* their gender in particular ways *through* emotionality.

That these discourses played a critical role in arbitrating whether a subject would be able to use hormones manually means that they also worked to maintain the relationship that they inferred between certain affective-emotional traits and particular modes of being gendered. By only having recognised its subjects as fe/male—and thus only having granted them the capacity to use hormones manually to affirm their gender as fe/male—conditionally upon demonstrating that they possessed specific affective-emotional character, the Court worked to ensure that subjects could only use hormones manually to manifest forms of gender that maintained the Court’s preconceptions regarding the kinds of affective-emotional traits that fe/maleness requires. Equally, these criteria configured subjects who

experienced and expressed their emotions in ways that did not reflect the normative expectations attached to their gender designation as holding a less veracious claim to be gendered and as such a less legitimate claim to use hormones manually to affirm that gender. The Court's use of these discourses was, therefore, not merely descriptive; it also invested in ensuring that the gender of a subject is reflected in and contained by the way that they emote. The discourses worked to manifest a world where one can only *be* a wo/man if one feels as a wo/man ought to feel, and if one *is* a wo/man then they can only feel as a wo/man ought to feel.

Yet the Court's requirement that its subjects demonstrate certain affective-emotional traits as a condition of being authorised to use hormones manually not only governed gender on an individual level; it also governed gender by requiring that subjects participated in the maintenance of a broader gendered order that is sustained, in part, through affective-emotional norms. Feminist scholarship has studied the social and political consequences that arise from gendered constructions of emotionality for decades. One aspect of this work has involved accounting for the role that the emotional differentiation of men and women has played in producing, justifying, and sustaining gendered power imbalances in the West. Feminists have shown, for instance, that the construction of women as having greater capacities to experience, express, and communicate emotions to other has been used to institute and justify the disproportionate and exploitative positioning of women in emotional labour and care roles in both personal and professional settings (de Boise and Hearn 2017; Fischer and Manstead 1999; Brody 1997). It has also included work that has shown how the construction of women as emotional—or more specifically, as subservient to and unduly affected by their emotions—has been part of a broader discourse on women's inherent inferiority to men (Fischer and Manstead 1999; Schrock and Knop 2014; de Boise and Hearn 2017; Brody 1997; Ahmed 2015; R. Connell 2005; Seidler 2007). As Ahmed (2015, 3) identifies, this has been part of a discourse of representing women “as ‘closer’ to nature, ruled by appetite, and less able to transcend the body through thought, will and judgement,” while men, by contrast, appear as rational and capable of better decision-making account of their impassivity or their ability to suppress or control their emotions. Moreover, this notion has not

only supported the production and perpetuation of patriarchal power relations, generally conceived, but has also played a key role in inspiring and justifying paternalistic colonial orders. As Seidler (2007, 9) observes:

Within a dominant Anglo-American culture we inherit universal models that echo the idea that a dominant white-European masculinity can alone take its reason for granted. Identifying with mind, reason, and consciousness within a Cartesian tradition, dominant masculinities have learned a disavowal of bodies, sexualities, and emotional lives that are expelled as elements of an “animal nature” that needs to be controlled. Within prevailing colonial discourses, bodies, sexualities, and desires come to be identified with the “un/civilized” who can only make a transition from nature to culture by accepting subordination to their colonial masters.

The idea that women are unreasonably emotional has also played a role in depoliticising and delegitimising women’s political claims, casting their analyses of inequality as hostile, subjective, hysterical, exaggerated, and as such irrational (Hercus 1999; Pease 2012; Delap 2018). There is a long history of the purported emotionality of women being used to pathologise women’s rage, undermine their pain, question their vigilance, belittle their fear, and demean their sorrow in response to injustice, as well as ridicule their hope for change. This dynamic has also been acutely destructive when articulated through race (T. Jones and Norwood 2017; Griffin 2012; Srivastava 2005; Ahmed 2015; Lorde 1984, 119–28, 140–70).

Emotional-affective constructions of men have been involved in producing and maintaining a patriarchal gender order in several other ways as well. Scholars have shown, for instance, that the emotions encouraged in men, such as anger and pride, are those that are more likely to play a role in helping to confirm or enhance power and status (Fischer and Manstead 1999; Brody and Hall 2010). Psychological research has also shown that gendered constructions of emotion play a key role in producing and justifying men’s interpersonal violence by encouraging men to be distant from and fearful of their emotions in a way that fuels their anger and incites its externalisation as aggression (Seidler 2007; Cohn, Seibert, and Zeichner 2009;

Tager, Good, and Brammer 2010; Jakupcak, Tull, and Roemer 2005; Way et al. 2014; Jakupcak 2003; Umberson et al. 2003). In these ways, the modes of emotionality that are imposed upon and encouraged for men can harm others. Yet, men are also harmed by the requirements that have been imposed upon them by such constructions. As Seidler (2007, 16) notes, that masculinity requires men to appear emotionless or perpetually in control of their emotions, and that men's experiences of emotions other than anger are perpetually trivialised or pathologised, means that it is "difficult for men to acknowledge their emotional needs . . . [and] to feel entitled to a sense of emotional fulfillment." This is what Boise and Hearn (2017, 782) have labelled the "cost of masculinity," and this constitutes a substantial drain on the well-being of men and boys (Randell et al. 2016; A. Cleary 2012; Way et al. 2014; Oransky and Marecek 2009). As Boise and Hearn (2017, 782) note in a review of literature that:

Sociologically informed perspectives have noted how men's inability to talk about experiences of vulnerability, mortality, pain, grief and loss [...] in line with cultural gendered constructs, have also been central to their underreporting of depression and other mental health issues. Men's relatively high suicide rates across various different countries have also been explicitly linked to an unwillingness to express or talk about emotions.

Scholars have also pointed out a range of other denigrations that come from the emotional requirements of masculinity. These include the barriers they pose to men's alliances with and capacity to benefit from feminist and queer activisms (Delap 2018; Pease 2012), men's ability to participate in various social and professional environments (Nixon 2009), men's capacity of form emotionally intimate relations with their family members (including partners, children, fathers, and siblings) (de Boise and Hearn 2017), as well as to men's capacity to form emotionally intimate and care-centred friendships (Fischer and Manstead 1999; Way et al. 2014; Randell et al. 2016; Oransky and Marecek 2009).

Collectively, these notions about the essentially gendered nature of different affective-emotional characteristics are involved in the construction and maintenance

of certain kinds of gendered subjects and a particular order of relations between those subjects. Thus, in light of the role that such discourses play in the construction and maintenance of gender relations more broadly, by endorsing these discourses on the gendered nature of affective-emotional character and wielding them as instruments of judgment, the Court worked to ensure that its subjects were committed to reproducing the gendered order that those discourses were involved in enacting.

### Behaviour

The Court also asserted that it could generate knowledge about its subjects' gender by observing their behaviour. In Karsen's case, for instance, the Court characterised a report that "Both parents confirm that Karsen acted like a boy in most respects as he grew through the various stages of his early childhood development" as providing insight into the nature of Karsen's gender.<sup>174</sup> The Court also treated as instructive reports that Marco "had always behaved in a more male-typical manner,"<sup>175</sup> that Leo had "behaved as male from an early age,"<sup>176</sup> and that Colin had "presented and behaved as a male . . . from age 4."<sup>177</sup> The perpetuity of these behaviours was a point of fixation in Colin's case, such that the Court was compelled to note that his "extreme tomboyism was continuous throughout the rest of his childhood."<sup>178</sup> Collectively, these statements infer that knowledge about whether a subject is *male*—or, by extension, whether they should be allowed to use hormones manually to affirm maleness—can come from observing whether they *behaved as* male. Notably, the Court does not clarify what acting like a boy might entail, nor does it explain the nature of 'male behaviour.' Rather, the Court treats it as sufficient that such actions are *interpreted as* signifying maleness. It is not the acts themselves that matter in this setting, then, but what those acts denote.

<sup>174</sup> Re Karsen ¶8

<sup>175</sup> Re Marco ¶39

<sup>176</sup> Re Leo, headnotes

<sup>177</sup> Re Colin ¶42

<sup>178</sup> Re Colin ¶42

The Court also extrapolated knowledge about its subjects' gender from discussions that centred upon their 'interests.' In Brittany's case, for instance, the Court took care to note that "from an early age, she would engage in activities more frequently associated with girls, and would frequently wear her sister's clothing."<sup>179</sup> The Court also remarked upon Celeste's "feminine behaviours and interests" at length, writing:

From a young age [Celeste] displayed feminine behaviours and interests. She expressed no interest in boys' games, clothes or sporting activities. She asked her parents for girls' clothes, books, movies and decorative items. She loved princess movies, fairies and Barbie dolls, brats, princess and monster high girls. As young as when she was being pushed in her stroller at the shops she would say "Mum, look at those pretty things." . . . There were difficulties at home with Celeste sharing a bedroom with her two brothers. There were regular arguments about girly colours, girly toys, girly furniture and girly television programs. Even the bedtime story became a battle of genders. So in 2011 the parents provided Celeste with her own bedroom which is decorated with butterflies, princesses, hearts and fairies, and in the colours of pinks, purples and aqua. The manchester is feminine in style.<sup>180</sup>

In this passage, the Court proffers an epistemic relationship between Celeste's interests and her gender in two ways. Its first rhetorical move is to constitute Celeste as devoid of masculinity, remarking upon the *absence* of Celeste's male behaviour through the observation that "She expressed *no interest* in boys' games, clothes or sporting activities." As such, the Court infers that Celeste is *not* a boy because she did not perform the acts required to generate an impression of boyhood. After having established Celeste as devoid of masculinity, the Court then makes a second rhetorical move to fill that lack with femininity. In this sense, it enacts Celeste as female *positively*, by citing an array of behaviours and interests that signify femaleness. In doing so, the Court not only treats "princess movies, fairies and Barbie

<sup>179</sup> Re Brittany ¶3

<sup>180</sup> Re Celeste ¶6, 12-13.

dolls, brats, princess and monster high girls” as evidence of an intractable femininity but argues further that it would be unlikely if not impossible for a male child to enjoy engaging with such items. Celeste’s judgment also suggests that her expression of interests was natural and inevitable. As I discussed in chapter four, by asserting that each of these factors was observable “from a young age,” the Court suggests that Celeste exhibited a pre-determined inclination toward femininity. This notion of inevitability concerning behaviours and interests recurs throughout the Court’s judgments. The Court makes a similar intimation about Nadia, for instance, suggesting that the link between *being* a girl and enacting girly behaviour is one rendered by “nature:”

Although born male, both Nadia’s parents recollect that she was noticeably different to other young boys, in that she seemed to be more attracted to feminine toys and clothing. Both parents agreed to “let nature take its course.”<sup>181</sup>

The Court took its subjects’ interests as evidence of their gender in many other instances as well. Martin’s case was exemplary in this respect, featuring the following evidence detailed under the heading “Gender”:

He never wanted ‘girly stuff’, avoiding the waring (sic) of dresses, preferring boys’ type clothing. He was always seen as a tomboy to others. His games and activities were always very masculine, he preferred to associate with boys and was an enthusiastic participant in the sport called [a form of cycling]. He was distressed when girls and boys were separated into different groups, and he was unable to participate with boys. He gave the sport away. His other sports were very masculine as football, soccer and karate.<sup>182</sup>

In this passage, the Court made the same two rhetorical moves that appeared in Celeste’s case, albeit inversely. First, it established Martin as *not* a girl by constructing him as devoid of femininity. Then, it moved to fill that lack with behaviours that it codes as signifying essential masculinity. As such, the Court simultaneously

<sup>181</sup> Re Nadia ¶3.

<sup>182</sup> Re Martin ¶18.

produced Martin and the sports that he played as essentially masculine. And in doing so, the Court suggested that there is a reliable if not necessary epistemic relationship between one's gender and sporting behaviours, and that girls do not cycle, practice karate, or play football and soccer. The Court performed the same gesture for Harley who had his maleness assured on account of having "displayed stereotypically male orientated interests including playing with boys' games and toys" from three years of age.<sup>183</sup> Xanthe, too, was inferred to be male based on a report that he "preferred the company and gender typical activities of boys since early childhood, felt that [he] has never 'fitted' in as a girl and could not relate to the interests and concerns of girls in [his] age peer group."<sup>184</sup>

The move to establish a subject's gender as an effect of their rejection of particular gender-typed interests and behaviours was repeated in several others cases as well. The Court took a report that Harley "refused to participate in girls' activities" as evidence that supported his application, for instance.<sup>185</sup> Similarly, in Ashton's and Bobbie's cases, the Court treated as assuring identical reports that stated that "[he] had been a 'tomboy' since early childhood and he 'never had any real interest in the typical things that girls of a similar age to him enjoyed'."<sup>186</sup> Here, the invocation of the tomboy works to cultivate an impression of enduring maleness through the repudiation of femininity. As Craig and LaCroix (2011, 452) point out in their analysis of cultural constructions of tomboyism, "The use of tomboy is not only for those who choose to *enact* masculinity, but also those who choose to *dismiss* femininity." Thus, mirroring the move made in Celeste's and Martin's cases, Ashton's and Bobbie's maleness is produced here through their disavowal of femininity. Their recognition as *not*-typical girls was thus taken to support the assertion that they may, in fact, be boys. This connotation appeared in Shane's case as well, where the Court wrote that:

<sup>183</sup> Re Harley ¶16.

<sup>184</sup> Re Xanthe ¶6.

<sup>185</sup> Re Harley ¶19.

<sup>186</sup> Re Ashton ¶36; Re Bobbie ¶3.

[Shane] was not a typical girl. He had no interest in the usual things that girls like doing (for example, playing with dolls). His behaviour was more than just being a tom-boy.<sup>187</sup>

This passage digresses slightly from the narrative offered in other cases because the report that Shane “was not a typical girl” did not render him knowable as a boy on its own. In this passage, the Court suggests instead that atypical girls are not *necessarily* boys—they may simply be “tom-boys.” Shane’s behaviour indicated maleness, however, because it exceeded the limits of this category: he behaved in a way that “*was more than* just being a tom-boy.” As such, Shane became a boy, in the Court’s view, because no other category could contain him.

The Court also cited its subjects’ propensity for “rough and tumble play” toward this end. Flynn’s identity as female was supported, for instance, by a report that she “showed little interest in team sport or play that involved ‘rough and tumble’ but rather seemed to prefer her own company.”<sup>188</sup> Marley’s identity as male, meanwhile, was assured on the basis that “he is reported to have preferred playing with male peers, rough and tumble games and stereotypical ‘male style’ games.”<sup>189</sup> Flynn’s “little interest” is a useful counterpoint to Marley’s ‘preference’ in this instance as it highlights that a distinct binary is at work in the imagination of these activities. Thus, in each of these instances, the Court expresses the view that boys like rough and tumble play and girls do not. And therefore, the Court holds that a subject’s status as a boy or girl can be determined with reference to whether their behaviour aligns with either of these poles.

The Court also cited the kind of toys that its subjects preferred as children as evidence of their gender. When the Court sought to establish its subject as female it often posited that their preference for dolls expressed the truth of their gender. Tahlia, “always had an interest in feminine toys, such as Barbie and other dolls.”<sup>190</sup> Celeste, as already stated, “loved . . . Barbie dolls, brats, princess and monster high

<sup>187</sup> Re Shane ¶15.

<sup>188</sup> Re Flynn ¶31.

<sup>189</sup> Re Marley ¶10.

<sup>190</sup> Re Tahlia ¶22.

girls.”<sup>191</sup> Gabrielle also “sought out feminine toys, for example Barbie dolls.”<sup>192</sup> Chelsea “displayed preferences for dolls and princess costumes.”<sup>193</sup> Logan “indicated no interest to pursue sport or ride a bike but was observed to play with dolls.”<sup>194</sup> Inversely, the Court often established boyishness through the negation of a preference for dolls, asserting that Adrian “did not like dolls,” Marley “would not play with ‘girly’ toys or dolls,” Harley “began to hate dolls,” and Julian “destroy[ed] dolls instead of playing with them.”<sup>195</sup> Yet, despite the malleability of the term ‘doll’ (L. Collins 2011; Sutton-Smith 1986; Cross 1997), the Court did not specify the *kind* of doll that operates as the subject of dislike, indifference, hate, or destruction in these instances. Instead, given that the opprobrium directed toward these dolls is framed as evincing some kind of essential masculinity, the reader is left to assume that such dolls are ‘feminine’ in nature and not the kind of “action figures” that are “often associated with boys.”<sup>196</sup> Moreover, the Court assumes that its reader will understand that boys are naturally or otherwise inevitably inclined to abhor or desire the destruction of feminised objects, or perhaps femininity itself. Nonetheless, in each of these statements, the Court affirms an essential and binary epistemic relationship between doll-use and gender, and as such attributes dolls with the power to reveal a subject’s gender.

The Court constructed an epistemic relationship between maleness and a subject’s engagement with an array of other toys and activities as well. In Mitchell’s case, for instance, the Court considered it relevant that he “preferred activities often associated with boys, such as football, basketball, Lego, video games and playing with action figures.”<sup>197</sup> Similarly, the Court noted that Martin’s “early interests [were] stereotypically male orientated, playing with dinosaurs, enjoying games played by boys and pursuing karate and soccer over dance and gymnastics.”<sup>198</sup> In these

<sup>191</sup> Re Celeste ¶6.

<sup>192</sup> Re Gabrielle ¶11.

<sup>193</sup> Re Chelsea ¶9.

<sup>194</sup> Re Logan ¶30.

<sup>195</sup> Adrian ¶17; Re Marley ¶7; Re Harley ¶17; Re Julian (2015) ¶35.

<sup>196</sup> Re Mitchell ¶7.

<sup>197</sup> Re Mitchell ¶7.

<sup>198</sup> Re Martin ¶15.

statements, the Court suggests that Mitchell and Martin cannot be girls because girls are not interested in palaeontology and they do not play football, basketball, karate, soccer, video games, or with *certain kinds* of dolls such as action figures. In the Court's view, these are singularly the activities of boys. Therefore, Mitchell and Martin's engagement in these activities, according to the Court, could only evince their maleness. Meanwhile, in many other instances, the Court did not find it necessary to specify which toys or activities were specifically fe/male in kind. Instead, the Court often found it sufficient to state simply *that* its subjects' toys or activities were masculine or feminine and infer their gender on that basis. Kerry, for instance, was described as always having "enjoyed 'boy's activities,'" while Daniel was said to have enjoyed "playing with toys typically associated with boys."<sup>199</sup>

The Court considered the existence of an epistemic relationship between its subjects' interests and their gender to be of such importance that it had to defend its validity against potential challenges. Such a defence was mounted in Sasha's case, where the Court found it necessary to attest to the legitimacy of Sasha's identity as female *despite* her having 'atypically' gendered interests. The judgment records that:

[Sasha] has de-identified as a male since puberty and does not relate to many of the stereotypical interests and concerns of boys in her age peer group. [Sasha] does *retain* an avid interest in metal music and video gaming *but* regards herself as being primarily female in nature at this time.<sup>200</sup>

Here, the Court tried to affirm the validity of interests as evidence of gender, as well as the validity of Sasha's identity as female, notwithstanding their apparent incompatibility in this instance. The Court thus expressed the view that females do not listen to metal music and do not enjoy video gaming. The word "retain," as such, works to ameliorate the apparent tension this caused in Sasha's case. Hence, Sasha's penchant for metal music and video gaming appeared as a relic—something that had survived her transition from boy to girl. This notion of retention helps the Court to maintain and naturalise the essentially gendered character of these interests,

<sup>199</sup> Re Kerry ¶35; Re Daniel ¶8.

<sup>200</sup> Re Sasha ¶32.

despite their ostensible incommensurability with the gender of its subject in this case, by implying that they originated from a former state of maleness from which she has now “*de-identified*.”

There is no ontological foundation to support the Court’s classifications of its subjects’ behaviours and interests as intrinsically masculine/male or feminine/female, nor is there an essential epistemic relationship between such behaviours and interests and the gender of the subjects who practice them. There is no world in which human behaviours and interests are naturally or otherwise inevitably divided into a binary scheme of classification along gendered lines, nor could such a world exist. In these instances, the Court *constructed* such behaviours and interests as containing, expressing, or constituting a gender and, more importantly, *enforced* that construction. As is the case with gender attribution more broadly, any construction of behaviour or interests that attributes a gender to its object will be foundationally as well as culturally and historically contingent. Gender is not found or conveyed through behaviours and activities; it is attributed to and enacted through them (Kessler and McKenna 1978; West and Zimmerman 1987; Butler 1999).

This point is established in sociological, historical, and cross-cultural studies on the gender-typing of behaviours and interests, especially in the context of childhood and adolescence. These bodies of literature show that the activities and interests that people of all ages pursue, as well as the range of *meanings* attributed to those practices, are given by the social, cultural, and historical context they inhabit. That such predilections are context-dependent means that the claim that they inherently express a given gender is unsustainable. The cultural and historical study of toys, for example, points out that neither the meanings attributed to toys nor the nature of toys themselves are naturally occurring (Kline 1995; Sutton-Smith 1986; Roopnarine, Johnson, and Hooper 1994; Roopnarine et al. 2015). Toys do not exist independently of human production. Humans quite literally construct them. As such, toys must be understood as cultural artefacts that are imagined, designed, manufactured, and imbued with meaning by humans. This point can be asserted semantically in the sense that toys can only be said to *be* toys when they are engaged with and attributed the status of such by humans. For example, a stick is not intrinsically a toy but can

*become* a toy when it is picked up, played with, and constructed as such by a human subject. And as such, given that the meaning of ‘toy’ is ascribed rather than given, it follows that various objects have been and continue to be attributed the function and meaning of ‘toy’ in various historical and cultural contexts. It follows, too, that the range of meanings attributable to different kinds of toys shifts according to historical and cultural context.

Indeed, the gender attribution of different styles of toys and modes of play for children and adolescents is not universal—in the sense that it does not appear in all cultures and throughout the entirety of human history—and also shifts markedly across different historical and cultural contexts (Blakemore and Centers 2005; C. L. Martin, Eisenbud, and Rose 1995; Dinella and Weisgram 2018; Cherney 2018; Murnen 2018; Leaper and Bigler 2018; Cross 1997; Weisgram 2018; Kline 1995; Sutton-Smith 1986). Indeed, the kinds of toys and modes of play that children and adolescents are encouraged to engage at any given moment in time and place are always affected by the social values operating at that moment. For instance, while dolls have been a part of children’s play for centuries and cross-culturally, they have not always been gendered, and they have not always been gendered in the same ways. Much has been written about the relationship between the production of toy soldiers and “action figures” for boys and the inculcation not only hegemonically masculine ideals such as dominance, power, and violence, but also broader political values such as nationalism, defence of territory, and militarism (Murnen 2018). Similarly, the “Barbie dolls, brats, princess and monster high girls” mentioned in Celeste’s case are also historically recent and culturally specific phenomena that feminists have criticised for supporting patriarchal constructions of women as domestic, docile, otiose, and vain, as well as for supporting patriarchal beauty norms (L. Collins 2011). There are also gendered dynamics at play in the attribution of the word “doll” to different kinds of figures. In contemporary Western cultures, the term ‘doll’ is almost exclusively reserved for feminised humanoid figures marketed to girls. Action figures, meanwhile, despite having homologous configurations, are less likely to be attributed this label (L. Collins 2011; Endendijk et al. 2014). This being the case, scholars have argued that toys are a key medium through which children and young

people learn about and learn to re-enact dominant gender norms. From this vantage point, toys ought to be seen as instruments involved in the co-construction of gender rather than natural mediums for gender's expression.

The idea that a child's choice of toy could naturally reflect some kind of essential or objective truth about their gender is also questionable given that, increasingly, a global capitalist market economy governs the production and attribution of meaning to toys (Kline 1995; Cross 1997; Baxter 2004; Chudacoff 2007). Since at least the early 20<sup>th</sup> century, toys and toy cultures have been predominantly controlled by enormous multi-national conglomerates that design, manufacture, and market toys for profit. These corporates can and do manipulate the meanings attributable to different kinds of objects to suit their interests. As such, the array of toys available to children and young people, the form and function that those toys assume, as well as the range of meaning attributable to them, cannot hold an intrinsic relationship with a child's essential gender. Rather, their production depends upon the range of technological capacities, modes of organising labour and distributing capital, and global market trends that are given historically. Lego, for example, which is mentioned in Mitchell's case, is produced by Lego Group—a multinational conglomerate that is worth and annually generates billions of dollars. After having been founded in the early 20<sup>th</sup> century, over its relatively short history, Lego has marketed its products variously as gender-neutral toys, as 'boys toys,' and then as a differently configured set of products marketed to boys and girls separately (Reich, Black, and Foliaki 2018). In this light, the gender attribution of Lego cannot be seen to emerge from its essentially gendered nature but from shifting metrics of profitability attached to gender attribution.

The Court's belief that gender is naturally expressed or contained by certain behaviours and interests can be challenged on similar grounds. Foremost, the idea that there are intrinsically gender-typed behaviours and that the performance of these behaviours indicate a natural, inevitable, or pre-social form of gender does not exist in all cultures, nor has it been uniformly expressed in any one culture over time (Nanda 2000). Moreover, there is an abundance of scholarship that has shown that children and adolescents are socialised into performing gender-typed behaviours

through gendered child-rearing practices and broader social environment influences (Honig 2006; Ramsey 2006; Murnen 2018; Athenstaedt, Mikula, and Bredt 2009; Leaper and Bigler 2018; Eccles, Jacobs, and Harold 1990; Boe and Woods 2018; Chick, Heilman-Houser, and Hunter 2002; Hilton 1991; Endendijk et al. 2014; Spivey, Huebner, and Diamond 2018; C. L. Martin, Wood, and Little 1990; Kollmayer et al. 2018; Jacklin, DiPietro, and Maccoby 1984; Dinella and Weisgram 2018; Yuen and Shaw 2003; Fagot, Leinbach, and O'Boyle 1992; Weisgram, Fulcher, and Dinella 2014). The predominant consensus in developmental literature is that childhood play is a site where children *learn* rather than express gender-typed behaviours (Chudacoff 2007; Endendijk et al. 2014; Hilton 1991; Cherney 2018; Yuen and Shaw 2003; C. P. Edwards 2000; Honig 2006; Barnes 2006). Accordingly, scholars have also pointed out that the behavioural roles children and adolescents are socialised into in the West mirror broader patriarchal and traditional gender roles that encourage boys to engage in and practice masculine traits which Honig (2006, 379) lists as “active, aggressive, ambitions, competitive, dominant, feeling superior, independent and self-confident.” Girls, meanwhile, are encouraged to engage in and practice traits designated as stereotypically “feminine,” which according to Honig (2006, 379) are those that show the child to be “considerate, devotes self to others, emotional, gentle, home-oriented, kind, likes children, and passive.” These socialisation practices work to produce an enduring association between certain genders and certain kinds of behaviours and traits through repeated coupling. They also achieve this through intense surveillance, and through punishment in the event of underperformance.

The Court's suggestion that rough-and-tumble play is evidence of maleness has received particularly critical attention. The concept of rough-and-tumble play was developed in developmental psychology in the mid-20th century based on studies of rhesus monkeys and was applied to describe the gender-typed differences in behaviour between girls and boys shortly thereafter (Pellegrini 1989). Critiques of this concept have centred on the subjective interpretation of a child's propensity for 'rough and tumble play,' given that observers are much more likely to notice and censure this behaviour in girls for social rather than natural reasons, as well as the

fact that parents are more likely to play with and encourage their male children to play in a highly physical way (Boe and Woods 2018; Jacklin, DiPietro, and Maccoby 1984; Pellegrini 1987, 1989; Fagot, Leinbach, and Hagan 1986; E. Scott and Panksepp 2003; M. L. Adams 2013). On this basis, developmental psychologists have argued that rough-and-tumble is involved in *producing*, rather than expressing, maleness. As Mary Adams (2013, 519) identifies, a boy can only be (will only be allowed to be and recognised as) a boy if they rough and tumble—if they do not, their boyhood is called into question. She suggests accordingly that “the effeminate boy with an aversion to rough-and-tumble play is not just challenging cultural gender conventions, but also demonstrating the failure of his body to produce in him a normal maleness” (M. L. Adams 2013, 519).

The claim that there are certain kinds of leisure activities that naturally express gender is also built upon contingent foundations. The gendered organisation of leisure activities is not, as the Court claims, reflective of the essentially gendered nature of the subjects that participate in it. Rather, as sociologists of sport and leisure have pointed out, the gender-typing of activities and interests is a practice that *produces* and *maintains*—rather than merely represents—gendered norms, hierarchies, and subjectivities (Koivula 1995; Watson and Scraton 2017; Coakley 2017; Scraton and Flintoff 2002; Roth and Basow 2004; Athenstaedt, Mikula, and Bredt 2009; Henderson and Shaw 2006; Grossman, O’Connell, and D’Augelli 2005; Yuen and Shaw 2003). This means that leisure ought to be considered a sphere of socially constructed and organised activities where gendered roles, discourses, bodies, and relations are made, sustained, contested, and transformed, rather than expressed.

Illustrating this point, a wealth of literature has shown how the gendered differentiation of leisure activities emerges from and plays a key role in reproducing gender norms (Henderson and Shaw 2006; Roth and Basow 2004; M. L. Adams 2013; Scraton and Flintoff 2002; Koivula 1995). One of the ways that this occurs is through the demarcation of leisure activities as masculine and feminine in nature. Another is through the intense social pressure that is placed upon subjects to engage only with those activities associated with their gender designation (Spivey, Huebner, and Diamond 2018; Wren 2002; Grossman et al. 2005; Riley et al. 2013; Kane 2006;

M. L. Adams 2013; Koivula 1995). In the West, boys are, for example, expected and encouraged to play basketball and not to join dance groups. Meanwhile, sewing is encouraged for girls, but football is not. Indeed, *most* sports are classified as inappropriate for women, while comparatively fewer sports are considered unsuitable for men, depending upon their alignment with notions of appropriately masculine or feminine comportment (Coakley 2017). In fact, in Western cultures sport is predominantly considered a domain for men and is constructed as a social sphere where men can learn, practice, and reinforce their masculinity (Koivula 1995; Coakley 2017; Scraton and Flintoff 2002; M. L. Adams 2013; Wellard 2002; Bryson 1987; Dashper 2012; Steve Robertson 2003; R. Connell 2008; Dunning 1986; Messner 1990; A. Adams, Anderson, and McCormack 2010; Larsson, Redelius, and Fagrell 2011). There is also a substantial body of literature that has demonstrated how gender affects one's engagement in leisure in many forms, affecting access, constraints, type, cost, frequency, enjoyability, and so forth (see J. White 2004; Henderson and Shaw 2006; Watson and Scraton 2017; Bryson 1987). This has meant that women have, in many ways, been excluded from sports and other forms of physical activity. Women, as Roth and Basow (2004) attest, have consistently lower participation rates in sport, fewer resourced opportunities at all levels, and having been constructed as weaker and less able due to the view that participation in athletics is incompatible with the feminine role. This stereotyping also affects how the purpose of engaging in certain leisure activities is constructed differentially for men and women. Men's participation in sport, for instance, is still typically narrated as oriented toward the demonstration of physical prowess and cultivation of male homosocial bonds, while women's participation tends to be seen as part of broader regimes of beautification and wellness (Roth and Basow 2004; Watson and Scraton 2017; Wellard 2002).

In these ways, the gender-typing of leisure activities is involved not only in the expression of gender but also in its production. The gender-typing of sports, for instance, impacts the extent to which people of different genders participate in certain activities. It also produces spaces where subjects learn, practice, and co-construct gendered cultural norms and identities, as well as where they participate in various modes of disciplining the self and others to conform with such norms.

The role that this plays in producing gender has been described powerfully by scholars who have studied the role that the gender-typing of activities has on the production of gendered modes of embodiment for people of different genders (Roth and Basow 2004; Wedgwood 2004; Wellard 2009). Iris Marion Young (1980, 152) offered an account of this dynamic in her essay on “throwing like a girl,” where she argued that:

The modalities of feminine bodily comportment, motility, and spatiality . . . have their source [...] in neither anatomy nor physiology, and certainly not in a mysterious feminine “essence.” Rather, they have their source in the particular situation of women as conditioned by their sexist oppression in contemporary society. Women in sexist society are physically handicapped. Insofar as we learn to live out our existence in accordance with the definition that patriarchal culture assigns to us, we are physically inhibited, confined, positioned, and objectified. As lived bodies we are not open and unambiguous transcendences which move out to master a world that belongs to us, a world constituted by our own intentions and projections . . . For the most part, girls and women are not given the opportunity to use their full bodily capacities in free and open engagement with the world, nor are they encouraged as much as boys to develop specific bodily skills. Girl play is often more sedentary and enclosing than the play of boys. In school and after school activities girls are not encouraged to engage in sport, in the controlled use of their bodies in achieving well-defined goals.

The gender-typing of leisure activities also works to produce gender by order of the role that it performs as a disciplinary instrument, particularly as it is involved in supporting the cultivation of hegemonic masculinity. The experiences of hostility and violence that most non-heterosexual and effeminate men, on account of their perceived breaches of normative gender, have endured in sporting spaces are one stark example of the disciplinary power of gender-typing leisure activities (Dashper 2012; Steve Robertson 2003; Larsson, Redelius, and Fagrell 2011; Wellard 2002).

Mary Adams (2013, 350, 315) has written about the role that sport plays in regulating the effeminacy of boys along these lines, noting that:

Sporting venues, like schoolyards and playgrounds, are critical sites for the policing of effeminacy . . . In popular and professional discourses about effeminacy or sissyness, boys' feelings about sport (and about gym class) and their actual athletic abilities have been represented as both symptoms of abnormality and possible targets of intervention.

Thus, in Adams' view, sporting environments are social spaces where gender-appropriateness is monitored and controlled, as well as where deviance from the norm is strictly reprimanded. They are not spaces where 'natural' gender inclinations emerge, nor spaces where prevailing gender norms can be easily subverted.

Collectively, these literatures on gender-typing raise two points regarding the consequences that arise from the Court's use of behaviours, interests, and activities as evidence of a subject's gender. First, they show that the Court's claims that these actions expressed or contained a subject's gender were socially, culturally, and historically contingent assertions rather than natural or universal truths. As such, by requiring its subjects to establish their gender with reference to whether they engaged in these kinds of behaviours, the Court required its subjects to re-enact socially, culturally, and historically norms as a condition of being authorised to use manually. These discourses thus govern gender by working to ensure that the Court's subjects could only use hormones manually if they promised to uphold specific ideas about how a boy or girl *ought* to behave, and as such, to support the notion that *being* gendered in a certain way requires the performance of certain kinds of acts. Yet these discourses also worked to govern gender in another way, as these practices are not only culturally constructed as expressing a subject's gender, but are also involved in producing, normalising, and monitoring it. This is to say that in contemporary Western societies the social construction and organisation of toys, interests, behaviours, and leisure activities is arranged such that these practices are deeply involved in the *production* of gender rather than merely its expression. As such, by requiring that its subjects were engaging in these practices as a condition of being authorised to use hormones manually, the Court was not only requiring them to

uphold specific normative associations between gender and practice; it was also requiring its subjects to participate in and be perpetually subjected to the normalising and disciplinary influence of those practices.

## **Presentation**

The Court also built its theory of extrospective knowledge by treating its subjects' presentation as evincing their gender. As part of this, the Court treated its subjects' clothing as signifying their gender. The Court's judgment in Colin's case illustrates explicitly the epistemic power that clothing wielded in these cases. In *Re Colin*, Colin's relationship with clothing is the central narrative device that the Court uses to establish Colin as male, punctuating the Court's account of Colin's life over several paragraphs:

When Colin was five years of age he first vocalised his desire to be a boy when he stated "Dad I want to be a boy and I want to dress like [his close friend] ...". Colin also expressed this same desire to his mother. At this time Colin wanted to wear jeans and shorts rather than skirts and dresses. By approximately 2005, Colin refused to wear any girls' clothing and insisted that he shop for clothing in the boys' section of the store. Just prior to Colin's eighth birthday, his parents persuaded Colin to wear a dress to his Auntie's wedding. He was most reluctant to do this but ultimately obliged his parents' request. This was the last time Colin ever wore girls' clothing, with the exception of his school uniform which was a dress. Wearing girls' clothing caused him considerable distress . . . In 2007, when Colin was nine he became increasingly distressed at having to wear a tunic to school. He was also regularly bullied at school. But he did not tell his parents about the bullying. In 2007, Colin changed schools to one that was less tolerant of bullying and which allowed the girls to wear shorts and trousers as part of their uniform.<sup>201</sup>

<sup>201</sup> *Re Colin* ¶17-23. Clothes feature as a similarly pronounced narrative device in the Court's account of Kate's gender as well: *Re Kate* ¶3, 7, 16-17, 58.

In this narration, the Court describes Colin's life as organised around his relationship with clothing. The narrative's focus on clothing, to the exclusion of all else, implies that Colin's clothing spoke *for* him. It was Colin's clothing, more than Colin himself, that established the legitimacy of his gender and his desire to use hormones manually to affirm that gender. The Court thus disclosed that it wanted to ensure that subjects who used hormones manually demonstrated a particular set of sartorial desires.

A subject's manner of dress was a primary means through which the Court sought to establish its subjects' gender in most cases. The Court found it necessary to note, for instance, that Daniel "was observed to be a child who enjoyed wearing clothing [...] typically associated with boys," and that he "had been wearing exclusively male clothing to school and at home."<sup>202</sup> Similar statements appear in Benjamin's, Ashton's, and Jaden's cases as well. Benjamin is described as "choosing to wear boyish clothing from an early age," Ashton is described as wearing "loose fitting clothes that boys would typically wear," while Jaden "now exclusively wears male clothing."<sup>203</sup> The Court identified Blaine's maleness as demonstrated by his choice of clothing as well, writing that "[Blaine] began identifying as male, at least by about eight years, in his clothes and attitude."<sup>204</sup>

There were an immense number of references to clothing throughout the corpus of cases that I analysed. Celeste had "objected to having to wear a boy's school uniform to school" and "started to wear female clothing when going out to the shops or socialising."<sup>205</sup> Gabrielle had "sought out . . . female dress-ups from an early age."<sup>206</sup> Kate had been observed to enjoy "'dressing up' in stereotypical girls' clothing."<sup>207</sup> Martin's gender was evinced by a report that "in Year 6, [he] was the only [student socially identified as] female [...] to wear pants."<sup>208</sup> The Court also noted that "When Marley was about four or five years old, he began insisting on

<sup>202</sup> Re Daniel ¶8, 10.

<sup>203</sup> Re Benjamin ¶4; Re Ashton ¶36; Re Jaden ¶13.

<sup>204</sup> Re Blaine ¶10.

<sup>205</sup> Re Celeste ¶11, 15.

<sup>206</sup> Re Gabrielle ¶11.

<sup>207</sup> Re Kate ¶7.

<sup>208</sup> Re Martin ¶15.

wearing pants or leggings under his skirts and dresses.”<sup>209</sup> In Sasha’s case, meanwhile, the Court recorded that:

Sasha’s mother became aware that Sasha was dressing like a girl in private in her bedroom. Her siblings, or at least two of her siblings, said they noticed that their clothes and make-up had gone missing and were later discovered in Sasha’s room. Sasha later showed her mother a small suitcase of girls’ clothes that she had taken from her siblings.<sup>210</sup>

The Court presented the epistemic relationship between clothing and gender in stringently binary ways. It noted that Xanthe, who identified as male, “presents socially in loose male clothing, short hair and wearing no jewellery or makeup” and that his “preferred clothing now is jeans, shorts, sweatpants with t-shirts and men’s shirts.”<sup>211</sup> It was also important, in the Court’s view, that Shane had always “select[ed] male clothes whenever he was given the opportunity to choose his outfit,” and that when his parents went shopping for his underwear “absolutely no frills or lace was the order of the day.”<sup>212</sup> The Court remarked that female-identifying Sasha, on the other hand, “presents socially in androgynous or feminine clothing, long hair and sometimes wearing jewellery.”<sup>213</sup>

The Court also cultivated an impression of its subjects’ gender through negation—that is, by recounting occasions where subjects had rejected the sartorial trappings of the ‘other’ gender. In Lincoln’s and Logan’s cases, for instance, the Court observed identically that several years prior both subjects “began to refuse absolutely to wear female clothing, for example skirts[.]”<sup>214</sup> The Court also treated Shane’s rejection of feminine clothing as noteworthy, recording that Shane “reported feeling ‘mortified’ about wearing the female school uniform of dresses and skirts during primary and early high school.”<sup>215</sup> Likewise, in Elliot’s case, the Court remarked that “although born as female, the child has, *from the moment he could talk*, said that he

<sup>209</sup> Re Marley ¶8.

<sup>210</sup> Re Sasha ¶II.

<sup>211</sup> Re Xanthe ¶II.

<sup>212</sup> Re Shane ¶17.

<sup>213</sup> Re Sasha ¶3I.

<sup>214</sup> Re Lincoln ¶9; Re Logan ¶34.

<sup>215</sup> Re Shane ¶20.

did not wish to wear dresses.”<sup>216</sup> The story was similar for Jordan, who “would not wear dresses and other flowery clothes.”<sup>217</sup> In each instance, the subject’s repudiation of a certain kind of clothing functions to stabilise their gender through negation. Such constructions imagine gender as a binary formation that is evinced by opposing sartorial presentations. This polarity is rendered clearly in Spencer’s case, where the Court noted that “at the age of approximately three years Spencer preferred to wear shorts and T-shirts *as opposed to* dresses.”<sup>218</sup> By framing t-shirts and dresses as oppositional in character, this construction both suggests that these two items each represent one of two possible categories of gender and also denies the possibility of liminality, mixture, or multiplicity in relation to both clothing and gender. Here, the Court suggests that there only male and female clothes, contrarily defined, that there are only male and female people who are likewise contrarily defined, and that their oppositional beings are expressed, invariably, through their clothing. In the context of the Court’s judgment, this construction works to facilitate the impression that a subject’s displacement from one gendered category can legitimise their placement at the other. This is because within this polarity rejection from one category must always equate to an attachment with the other.

The Court also built an epistemic relationship between clothing and gender by constructing its subjects’ sartorial choices as foreshadowing the revelation of their gender. In these instances, a subject’s style of dress was seen to have indicated their gender long before they disclosed it. In Logan’s case, for example, the Court recorded that:

As a child and a teenager, Logan disliked the clothing the mother bought for her including items with images of skulls and male underwear. Logan was adamant that she would not wear this clothing and refused to have the clothing in her drawers, either hiding them or throwing them away. When Logan was 15 years of age, she asked her mother to assist her with the purchasing of clothes online. After Logan

<sup>216</sup> Re Elliot ¶5.

<sup>217</sup> Re Jordan ¶13.

<sup>218</sup> Re Spencer ¶5.

informed the mother of her Gender Dysphoria, she showed the mother the items of clothing she had previously purchased being “from a ... female fashion line and included a dress, ... skirt and top, tights and a garter belt.” . . . [A while later,] prior to the commencement of her Year 10 studies, Logan informed her mother of her gender dysphoria and stated that her name was Logan.<sup>219</sup>

In this scene, the Court constructed Logan’s clothing choice as preceding and anticipating her disclosure of identity. Clothing, in this sense, was taken to predetermine its subjects’ gender to the extent that it could predict a subject’s gender before they disclosed it. Clothing foretold Kelvin’s gender in this way, too, with the Court noting that:

In 2013 Kelvin’s father observed some behavioural changes in Kelvin. For example, he says he had his hair cut short, displayed masculine behaviour and began dressing as a male. Kelvin also threw out all of his ‘female’ clothing and purchased a chest binder. His father says that Kelvin’s preferred gender at school was male and he presented himself as male . . . In January 2014, when Kelvin was 13 years old, he disclosed that he was transgender to his father.<sup>220</sup>

Then, later in the judgment, clothing appears once again to corroborate that disclosure in an excerpt from an affidavit submitted by Kelvin’s psychiatrist which recorded that Kelvin had “presented as of average stature, dressed and appearing as *very male* in black beanie and coloured zipper jacket, dark pants and boots.”<sup>221</sup>

Yet while clothing was the most frequently cited mode of gendered presentation that the Court considered in its judgments, it was only one aspect of a broader assemblage of presentational traits that the Court considered indicative of its subjects’ gender. The way that subjects styled their hair was another factor that the Court considered critical in this respect. In Christopher’s case, for instance, the

<sup>219</sup> Re Logan ¶34, 39.

<sup>220</sup> Re Kelvin ¶20-23.

<sup>221</sup> Re Kelvin ¶52.

Court narrated Christopher's decision to cut his hair as connected directly to his disclosure of his gender as male, recounting that:

When aged approximately three years, Christopher told his mother “I am not a girl, I am a boy” and further that “when I was in your tummy I was a boy but I heard you wishing for a girl”. At about that time, Christopher cut his hair off at the roots.<sup>222</sup>

In this construction, Christopher's choice to “cut his hair off at the roots” follows both chronologically and logically from his disclosure of gender. Indeed, the Court reaffirmed this notion later in its judgment on Christopher when it took as reassuring the report that since that initial disclosure “he has maintained his appearance as that of a boy with respect to his hair-style and dress.”<sup>223</sup>

The Court remarked upon its subjects' choice of hairstyle repeatedly across the corpus of judgments that I analysed. As with its discourses on clothing, a strict binary structured the Court's discourses on hairstyle. Reports that a subject had desired or attempted to cut their hair short frequently featured in cases that sought to establish their subjects as male. The Court reported that “Colin . . . insisted on having his hair cut in a spiky boys cut” and that Marley had “cut his hair short to make himself look more like a boy.”<sup>224</sup> The Court was also concerned to note that “from a young age, [Jordan] wanted his hair cut short,” and that Lincoln had “insisted on increasingly short haircuts” since ten years of age.<sup>225</sup> It was important, too, that “as a very young child” Harley had “insisted on having his hair cut short so that it did not look feminine.”<sup>226</sup> Xanthe, meanwhile “had [his] hair cut short” two years earlier and “kept it short ever since.”<sup>227</sup> Ashton, too, had “cut his hair short” two years before making an application to the Court, as Kelvin had done four years earlier.<sup>228</sup> Karsen's haircutting was situated in proximity to several other presentation practices as well, apparently cultivating an impression of consistency, such that he

<sup>222</sup> Re Christopher ¶6.

<sup>223</sup> Re Christopher ¶2.

<sup>224</sup> Re Colin ¶19; Re Marley ¶12.

<sup>225</sup> Re Jordan ¶13; Re Lincoln ¶9.

<sup>226</sup> Re Harley ¶31.

<sup>227</sup> Re Xanthe ¶7.

<sup>228</sup> Re Ashton ¶37; Re Kelvin ¶20. A similar statement also appears in Re Martin ¶18.

had not only “cut his hair short,” but also “stopped shaving his legs, used male grooming products and hated wearing the girls’ uniform.”<sup>229</sup> Conversely, subjects that the Court sought to establish as female had their desire for or presenting with long hair cited as legitimising their claim. In Kate’s case, for instance, the Court recorded that:

As a young child Kate was observed to be keen to grow her hair long and when in Grade 1, she preferred to wear her hair in pigtails . . . She wore her hair long until early high school when she cut it primarily to conform, but this also caused her distress.<sup>230</sup>

Likewise, it was important in Sasha’s case that she had been “growing out her hair.”<sup>231</sup> In Chelsea’s case, meanwhile, the Court found it noteworthy that as a child she had wanted to have “long hair like her favourite TV characters.”<sup>232</sup>

Makeup also evinced gender in the Court’s judgments. The Court found it encouraging if those seeking to use hormones manually to affirm a female gender wore makeup. For instance, the Court observed that Anita had “began to wear a wig and make up,” and that Logan “wore make-up to her Year 10 formal.”<sup>233</sup> Subjects that sought to establish themselves as male, on the other hand, had the validity of their claim established by their refusal to wear makeup. The legitimacy of Xanthe’s male gender identity was corroborated by a report that he was seen “wearing no jewellery or makeup,” for instance.<sup>234</sup> Likewise, the Court found affirming a report that Marco “wears no jewellery or makeup.”<sup>235</sup>

The Court was also concerned to note whether subjects that sought to use hormones manually to affirm a male gender had attempted to present themselves as breastless.<sup>236</sup> The Court treated it as significant when judging the legitimacy of

<sup>229</sup> Re Karsen ¶9.

<sup>230</sup> Re Kate ¶7.

<sup>231</sup> Re Sasha ¶29.

<sup>232</sup> Re Chelsea ¶9.

<sup>233</sup> Re Anita ¶13; Re Logan ¶41.

<sup>234</sup> Re Xanthe ¶5.

<sup>235</sup> Re Marco ¶39.

<sup>236</sup> In addition to the quotes cited below, chest binding is also mentioned in Re Ashton ¶37; Re Drew ¶9; Re Elliott ¶8; Re Isaac ¶12; Re Hudson ¶12; Re Karsen ¶12; Re Marley ¶17; Re Mason ¶15; Re Mitchell ¶11; Re Emery ¶37, 39.

Andy's manual hormone use, for instance, that he "presently binds his chest and wears loose clothes."<sup>237</sup> Both Marco and Xanthe were also observed to be "mak[ing] efforts to flatten [their] breasts by wearing a binder . . . and look[ing] forward to having surgery to remove [their] breasts and fashion a more masculine chest shape in the future."<sup>238</sup> Likewise, in Harley's case, a report that he "wears a binder to minimise the appearance of his breasts" and that "he would like to have [his breasts] removed" validated his identity as male.<sup>239</sup> It was relevant, as well, that Kelvin "threw out all of his 'female' clothing and purchased a chest binder," that Martin "binds his chest in order to minimise their external appearance," and that Shane "has been binding his breasts . . . to appear more male like."<sup>240</sup> Julian, meanwhile, "wore baggy jumpers from the age of 11 to hide his breast development and started wearing binders from the age of 14," whilst Daniel was "concerned by the feminisation of his body and wears a binder to cover his breasts."<sup>241</sup> Binding is a practise that many people use to achieve particular modes of gender presentation, to be sure (H. Rubin 2003; Abelson 2019; Bishop 2015). Yet in the context of the Court's judgments, breast binding appears explicitly as *evidence* of its subjects' gender rather than as any other form of self-expression or constitution. As such, the Court suggests that being male is co-extensive with desiring, and appearing to be, breastless. Moreover, while commenting on breast binding, the Court often highlighted the duration and consistency with which its subjects had been practising it. The Court emphasised in Dale's case that from the beginning of puberty Dale "began binding his breasts" and that he "*constantly* wears them, despite the discomfort they cause."<sup>242</sup> The Court reported identically in Jaden's and Jordan's cases as well that they "bind [their] breasts *every day*[,] even while at home[.]"<sup>243</sup> In this sense, the Court found it important not only *that* subjects were presenting themselves as breastless males, but also that they were making *continuous* efforts to do so.

<sup>237</sup> Re Andy ¶23.

<sup>238</sup> Re Marco ¶39; Re Xanthe ¶23.

<sup>239</sup> Re Harley ¶31.

<sup>240</sup> Re Kelvin ¶20; Re Martin ¶18; Re Shane ¶26.

<sup>241</sup> Re Daniel ¶12.

<sup>242</sup> Re Dale ¶45.

<sup>243</sup> Re Jaden ¶38; Re Jordan ¶15.

Collectively, the Court's discourses on its subjects' clothing, hair, makeup, binding, and so forth suggest presentation helped it to determine the legitimacy of their manual hormone use. In each of these statements, the Court declared that subjects ought to be able to use hormones to affirm only those genders that they had effectively expressed through their presentation. The Court's judgments thus advanced and worked to secure the notion that there is, or should be, a constitutive relationship between a subject's gender and their presentation: that is, that to *be* fe/male requires, or should require, certain enactments of style.

Yet despite the Court's intimations to the contrary, a determinative relationship between gender and presentation does not exist. There are no universal or objective referents to which the terms "boy's clothes" or "girls' clothes" might refer. There is no essential relationship between one's gender and the length of one's hair. People of many different gender designations use or refuse to wear makeup. And, there is no necessary relationship between one's gender and the size of one's breasts, or the practices that one might use to either augment or reduce the appearance of one's breasts. Indeed, there are no objectively meaningful modes of presenting the body *at all*. There are only mutable assemblages of fibre,  $\alpha$ -keratin, and other chemical compounds that are *inherently* meaningless but capable of being *imbued* with meaning by socially-situated interpreters. Indeed, people who inhabit homologous gender designations adopt vastly diverse styles of bodily presentation, even at the same cultural and historical coordinates. Women *do* wear pants and t-shirts, and men *do* wear jewellery and makeup, even though the Court implied otherwise.

Moreover, cross-cultural and historical scholarship on fashion has demonstrated not only that any singular sartorial practice can produce a diversity of meanings in any single context, but also that both the manners of dress available as well as the meanings attributable to those modes of dress shifts across time and place (Crane 2000; Paoletti 2015; 2012; 1987; Jolles and Tarrant 2012; Cooper 1987; Parkins 2008; Barry 2018). Jolles and Tarrant (2012, 1) observe, for instance, that "black lace at a funeral means something quite different than black lace on a negligee" while "wearing a pair of overalls in Manhattan evokes quite a different response than wearing overalls on a farm." Scholars have also pointed out that the material

existence of different kinds of clothing—and as such, the possibility of those clothes signifying at all—depends upon the technological and economic conditions that make production and symbolic construction of those items possible. Much like the toys that I discussed previously, clothing is not a naturally occurring phenomenon; human beings, organised within particular social and economic orders, quite literally construct it. The construction of clothing is, therefore, always facilitated and shaped by prevailing social and economic interests. And moreover, the forms and meanings of clothing are affected, inevitably, by the material and symbolic conditions that organise the capacity of humans to create it.<sup>244</sup>

Feminist scholarship on fashion has had a great deal to say about the contingency of gendered meanings attributed to dress. Feminists have pointed out that the norms and trends that govern which modes of dress are appropriate, desirable, and sanctionable for people of different gender designations, like fashion norms more broadly, shift dramatically according to time and place. Feminist scholars have noted that pants, for instance, were not considered appropriate for women in the West until the 1960s. It was not until feminists began to use pants as a symbol and rallying point for emancipatory politics that their use by women gradually became normalised (Cooper 1987; C. Evans and Thornton 1991; Henry 2012; Hillman 2013; Jolles and Tarrant 2012; Paoletti 2015; C. E. Waggoner and Hallstein 2001; for example, see Brownmiller 1984, 79–83). This social shift demonstrates not only that the meanings both attributed and attributable to any given presentation of the body are culturally and historically contingent, but also that those meanings are part of broader processes of value exchange. Indeed, the idea that people of particular gender designations must wear specific kinds of clothing is

<sup>244</sup> Indeed, many scholars have argued that clothing's contemporary role in signifying identity is undergirded by the particular arrangement of social and economic relations that emerged with industrialisation. It was the massification of clothing production through machine manufacturing that made new and diverse modes of dress more widely accessible to the general population and therefore that enabled fashion to come into being as a general social practice (Crane 2000; Cooper 1987; Shannon 2004; Wilson 1985). Crane (2000) argues as such in her social history of clothing where she observes that before industrialisation and machine manufacturing clothing was inordinately expensive and as such not accessible to the poor. This meant that multiple garment wardrobes and the use of clothing as an instrument of identity creation was reserved for the wealthy and difficult to achieve for most people.

itself historically and culturally specific. Paoletti (1987, 136–37) makes this point in her history of children’s clothing in the United States, noting that:

Until World War I, little boys were dressed in skirts and had long hair. Sexual ‘color coding’ in the form of pink or blue clothing for infants was not common in this country until the 1920s; before that time male and female infants were dressed in identical white dresses. In fact, between 1890 and 1920 the clothing of infants and preschoolers became more sex-typed, while adult women’s clothing was beginning to look more androgynous.

Thus, even while the Court assumed a natural relationship between sartorial practice and gender—for instance, that only girls want to wear dresses, and as such that if one wants to wear a dress then one must be a girl—the kinds of clothing constructed *as* dresses and the relationship between such articles of clothing and femaleness are situationally specific and not universal. One might ask, for instance, how the Court would interpret the legitimacy of manual hormone use for a young person who displayed a penchant for wearing either a sarong, kilt, thawb, kanzu, or kaftan.

Hairstyling is also a cultural practice that is performed and symbolically constructed differently across time and place. The popularity, permissibility, and meaning of different hairstyling practises shifts markedly across cultural and historical location (Biddle-Perry and Cheang 2008; Elizabeth Johnson 2013; Keyes 1967; Corson 1971; Simon 2000; Banks 2000; S. J. Vincent 2018). For instance, growing one’s hair long is a normal if not esteemed practice of cultivating masculinity in many cultures, yet long hair is feminised at some coordinates in contemporary Western culture. Even so, in Western cultures, the connection between hair length and masculinity has shifted over time according to various axes of social difference (Barber 2008). And indeed, in contemporary Western cultures, women *do* have short hair and that men *do* have long hair, despite the Court’s allusions to the contrary. Moreover, any given practice of hairstyling can produce a multiplicity of meanings even within an ostensibly singular historical and subcultural environment as well, as demonstrated, for instance, by the cultural contestations that

surround the significance of a shaved head within and outside of White skinhead cultures (R. T. Wood 1999).

Makeup has also been used in diverse ways by people of all genders, in cultural rituals and performances, as well as in everyday beauty practices. In these various settings, makeup has been involved in constituting and contesting a diverse range of gender identities (Rupp, Taylor, and Shapiro 2010). Yet, the meanings attributable to different modes of bodily presentation are contingent not only upon history and culture but increasingly upon on global economic forces. In the present day, the meanings attached to makeup and its adjacent beauty practices are increasingly constructed and managed by a global capitalist market economy which designs, markets, and sells the meaning of cosmetic items for profit (Corson 1972; Eldridge 2015). And indeed, gender is a principle that organises the marketing of these items. Nonetheless, while makeup has traditionally been constructed as a purview of women in the West, increasingly men are the target of global marketing campaigns for the sale of cosmetic products and many of the most commercially successful makeup artists and cultural icons of the makeup industry are men (Gough, Hall, and Seymour-Smith 2014; Hall, Gough, and Seymour-Smith 2012; J. Miller 2013). As such, there is no ground to support the claim that such practices necessarily indicate femininity. These practices do not engender or express their own sets of meanings; rather, their significance is generated relationally by a socially-situated subject whose interpretation is configured by the discursive resources and cultural values that they have available (Cooper 1987; Barnard 2014).

Several governing effects arose from the Court's use of culturally and historically mutable presentation norms to legitimise manual hormone use. In one sense, the Court's use of these norms governed by enforcing particular modes of presenting one's gender as a condition of being authorised to use hormones manually. This requirement was an investment in the maintenance of gender presentation norms—that is, the notion that there are more-and-less appropriate ways for one to present per their assigned or affirmed gender. Yet it also worked to ensure that subjects *enacted* certain forms of gender *through* their presentational practises. This is because presentation practices are not merely involved with the

*expression* of gender, but more fundamentally, with the *production* of it. If, as Butler (1999, xv) argued, “gender is manufactured through a sustained set of acts, posited through the gendered stylization of the body,” and if presentation practises like dress, hairstyling, and makeup are involved in the gendered stylisation of the body, then these presentation practices are engaged in constructing gender and not merely signifying it. Barthes (1990, 115) made this point in his consideration of sartorial cultures, asserting that “the garment does not express but constitutes the person; . . . the person is nothing but this desired image which the garment permits us to believe in.” Scholars have borne out this claim in a wealth of empirical and theoretical engagements with dress, hairstyling, makeup, and other stylistic practices, showing how these ways of presenting the body are involved variously in producing and contesting gendered social relations and modes of identification (Crane 2000; Corrigan 1989; Appleford 2014; Barry 2015; 2018; Barry and Dylan 2015; C. Evans and Thornton 1991; Henry 2012; McNeill and McKay 2016; A. Miller 2015; Paoletti 2012; Shannon 2004; Reddy-Best and Pedersen 2015; Parkins 2008; Wilson 1985; McCann 2018; Jolles and Tarrant 2012; Barnard 2014; Steele 1985; Swain 2002; 2003; Suyarkulova 2016; Tamara Shefer, Ratele, and Clowes 2017; Presterudstuen 2014; Hillman 2013; Gibson 2016). Swain (2003, 307) summarises the contention of this literature in his study of schoolboy constructions of masculinity, noting that “The body is sign-bearing and sign-wearing and also a producer of signs, and the clothes that we choose to wear make a highly visible statement of how we wish to present ourselves to the world; who we think we are, or who we would like to be.” Crane (2000, 2) has argued similarly, asserting that clothes have the power “to impose social identities and empower people to assert latent social identities.” Taking these claims into consideration, to require particular modes of presentation, as the Court did, is not merely to require that subjects *express* ‘who they are’ in particular ways. More fundamentally, it is also to require that subjects *constitute* who they are, through their manner of presentation, in line with predetermined norms.

Indeed, feminists have long argued that presentation practices are involved in the production of gender. Radical feminists, in particular, have argued that fashion and beauty practices are one of the primary mechanisms of gender differentiation

and thus patriarchal subordination (Cooper 1987; C. Evans and Thornton 1991; Parkins 2008; Jolles and Tarrant 2012). Whisner's (1982) work on gender-specific clothing regulations exemplifies this position. For Whisner (1982, 119), presentation norms are among the primary drivers of patriarchy because they are among the primary drivers of gender differentiation, which in turn "sustains and preserves . . . systemic power disparities based on gender." Andrea Dworkin's (1974) analysis of beauty practices proffered a similar argument. For Dworkin, the primary function of presentation norms is to delineate human beings into discretely observable sex classes which can thus be treated accordingly. As such, she described beauty practices as both productive and disciplinary: in her words, "the major substance of male-female role differentiation" and "the most immediate physical and psychological reality of being a woman" (A. Dworkin 1974, 114). In Dworkin's stead, Bartky (1990, 39–43) described the "fashion-beauty complex" in a similar vein, as one of the "central *producers and regulators* of 'femininity'."

Feminist scholars have also pointed out that presentation practices are not only involved in the production of gender but are also involved in constituting and coercing compliance with gender norms. In the contemporary West, there are rigid and strictly policed rules regarding the modes of dress that are appropriate for subjects according to their gender designation (Barry 2018; Entwistle 2000; Crane 2000; Reddy-Best and Choi 2020; Serano 2007). Severe consequences attend forms of presentation that breach gendered presentation norms, ranging from social opprobrium to termination of employment or expulsion from school, fines, arrest, imprisonment, and execution (Davidmann 2014; Swain 2003; Paoletti 1987; 2015; Barry 2015; 2018; Ekins and King 1996). Legal institutions have played a key role in establishing and enforcing these regulations, including through obscenity laws, the policing of men's hair length, gender-segregated school dress codes, the criminalisation of 'cross-dressing,' and the banning of certain kinds of clothing (Watt 2013; J. W. Scott 2010; Corrigan 1989; Whisner 1982; Levi 2006; Paoletti 2015; Mogul, Ritchie, and Whitlock 2011; Sears 2015). As Whisner (1982, 118) summarised:

[There are a] wide range of legal and quasi-legal pressures that are brought to bear on clothing choice. Employers can control workers'

appearance through their power to hire and fire; schools can control students' appearance through the threat of suspension or expulsion; government can control citizens' appearance through arrest. Sanctions are real and significant.

Gendered presentation norms are, therefore, not only involved in enacting gender but also operate as a powerful mechanism of “gender accountability” (Crawley 2008; West and Zimmerman 1987; Barry 2018; Messerschmidt 2009). For instance, in his study of schoolboy constructions of masculinity, Swain (2003, 308) shows how donning the correct attire is necessary for safety in the schoolyard:

There were serious risks involved for anyone not conforming to the group norms, for the wearing of certain clothes was very much a cultural imperative. It was as if masculine competence was on trial or on show, and looking good and having the right stuff to wear needed commitment and dedication, knowledge and, importantly, peer-group recognition, validation and legitimation. I would also argue that, although the boys' appearance was equated with their performance, and in many ways ‘to look was to be’ [...] there was also the need ‘to look’ in order to be safe. Those who did not conform to the right ‘look’... were categorised as ‘other’, and this could lead to rejection and/or peer-group ostracism. This was policed by the boys from the dominant groups: if a boy wore anything associated with the regulation school uniform, apart from the sweat shirt, they would often be called either ‘boff’ or ‘gay’, and they were used on an interchangeable basis.

As such, by requiring its subjects to present themselves as complying with prevailing gender norms, the Court not only forced its subjects to constitute their gender in line with those norms, but also conscripted them into maintaining a system of gender accountability that rebukes non-conformity through violence. In this sense, the Court's enforcement of presentation norms did not only work to subjectify those seeking to use hormones manually but also recruited their participation in the subjectification of others.

Yet by requiring its subjects to embody certain presentation norms, the Court not only worked to coerce its subjects into complying with and enforcing certain gender norms; it also worked to prevent its subjects from harnessing the subversive potential of gender presentation as a means to resist or challenge those norms. As many feminist, queer, and trans scholars have argued, presentation practices are not exclusively a medium through which power is exerted *upon* subjects from ‘above,’ nor is it only a medium through which gender is enforced. Rather, gender presentation can also be a medium through which gender norms and power relations are defied, contested, and transformed (Ekins and King 1996; Jolles and Tarrant 2012; Paoletti 2015; Wilson 1985; C. Evans and Thornton 1991; McCann 2018; Crane 2000; R. Nelson 2020). Queer and trans subcultures have long adopted insurrectionary modes of presentation as a means to rebuke and rework gender norms. Dissident gender presentations are a crucial feature of drag artistry, for example. Drag artists often practise their craft expressly to confront, protest, and subvert gender presentation norms, as well as to fashion new and challenging forms of gender through presentation (Butler 1999, 174–80; 1993, 174–80; Maltz 1998; Alexeyeff 2000; Crowley 2003; Schacht 2003; V. Taylor, Rupp, and Gamson 2004; Swarr 2004; V. Taylor and Rupp 2004; Spruill 2004; V. Taylor and Rupp 2005; Shapiro 2007; Rupp, Taylor, and Shapiro 2010; Egner and Maloney 2016; Rogers 2018; Levitt et al. 2018). A range of other queer subcultures—including leather, rubber, BDSM, gender b(l)ending, and androgyne communities, for instance—also practise bodily presentation in ways that defy and manipulate gender norms for novel and/or transformative ends (Halberstam 1998a; R. Barrett 2017; Hennen 2008; McCann 2018; Ekins and King 1996; G. Rubin 2012; Devor 1989; Maltz 1998; Levitt and Horne 2002; Levitt, Gerrish, and Hiestand 2003; Levitt and Hiestand 2004; Eves 2004; Dahl 2012; Bailey 2013). Indeed, in each of these settings, presentation often functions as a medium for enacting or expressing queerness rather than heterosexuality or gender conformity. To restrict the modes of presentation available is thus to threaten the existence of the subjectivities and communities that are constituted through marginalised presentation practices. As such, it is also to curb the queer potential of presentation practises. The Court’s requirement that subjects engage only in normatively

sanctioned modes of gender presentation must, therefore, be read as both an injunction upon the possibility of producing new or non-conforming forms of gender through presentation, as well as a means to mute the transformative potential that can be actualised through presentation.

### **Passing**

The Court also asserted that a subject's gender could be known, and as such that their right to use hormones manually to affirm that gender legitimated, according to whether they had attempted and been successful in passing. The Court demonstrated that it considered a subject's success in passing to be a significant factor in determining the veracity of their gender in Marco's case. In one section, the Court cited an affidavit from Marco's father to suggest that Marco was, in some sense, already passing as male before he had disclosed that he identified as male, writing that "the father says that Marco had been providing him with hints to his Gender Dysphoria before [disclosing his identity], for example in the manner of his dress and stereotypical male behaviour and interests."<sup>245</sup> From this statement, the Court inferred that Marco had secured an impression of being male before disclosing himself as such. Indeed, the Court made this point again later in the judgment, suggesting that Marco had achieved nascent recognition as male from his extended family before disclosing this identity to them. The Court noted, as such, that "it seems as if [Marco's family] had read the signs of [Marco's] identity well ahead of any announcement made by [Marco]."<sup>246</sup> Later again, the Court remarked that when Marco identified himself as male to his school friends, his "announcement would not have been unexpected due to [his] 'male-oriented dress, attitude and social interactions'."<sup>247</sup> Collectively, these statements indicate that the Court was concerned whether Marco was passing as male before he had identified himself as such. The presence of this discussion in the judgment suggests that in demonstrating

<sup>245</sup> Re Marco ¶24.

<sup>246</sup> Re Marco ¶26.

<sup>247</sup> Re Marco ¶30.

to the Court that he had achieved this recognition was one of the factors that contributed to the legitimacy of his request to use hormones manually to affirm his gender.

The use of passing as a metric to judge the veracity of a subject's gender was common throughout the corpus of judgments that I analysed. In several cases, this notion manifested in avowals that the subject was "being seen, known and treated as a [fe/]male" in their social interactions.<sup>248</sup> This sentiment was expressed in several other forms across the corpus as well. In Kaitlin's case, for instance, the Court treated as legitimising a report that by the time "Kaitlin identified in herself that she was transgender . . . most people who met her believed her to be a young woman anyway."<sup>249</sup> This claim was verified, in the Court's view, by an account that "one day, a girl at Kaitlin's school asked Kaitlin's mother 'if her daughter could come over to her house'."<sup>250</sup> Similarly, in Martin's case, the Court found it important to note that he had been "acknowledged as a boy by his peers, family and the broader community," and that in his younger years he "was always seen as a tomboy to others."<sup>251</sup> The Court also considered reports that "Jamie was known exclusively as a girl at school," and that Kerry had been "accepted and well supported as female both within her home and school environments."<sup>252</sup> Likewise, in Harley's case, the Court recorded that he had "always [...] been strongly identified by teachers and peers as a boy."<sup>253</sup> It was noteworthy, too, that Kelvin was recognised as male from multiple quarters. The Court noted, for instance, that his family had "accepted his request to be recognised as male," and that his psychiatrist had confirmed the legitimacy of this request upon noting that Kelvin "presented as of average stature, dressed and *appearing as very male* in black beanie and coloured zipper jacket, dark pants and boots."<sup>254</sup> In each instance, the Court emphasised not only that its subject had *presented* a given kind of gender to a social audience but also that that audience

<sup>248</sup> Re Marco ¶39; Re Sasha ¶31; Re Xanthe ¶5.

<sup>249</sup> Re Kaitlin ¶7.

<sup>250</sup> Re Kaitlin ¶7.

<sup>251</sup> Re Martin ¶18. This phrase also appears in Re Harley ¶31.

<sup>252</sup> Re Jamie (2013) ¶11; Re Kerry ¶55.

<sup>253</sup> Re Harley ¶31.

<sup>254</sup> Re Kelvin ¶49, 52.

had *believed, acknowledged, or accepted* that presentation. Moreover, in these instances, the Court was concerned to record not only that the subject had been able to secure the *impression* that their gender was veracious, but also that their performance had compelled spectators to *treat them as if* their gender was veracious. In this way, a subject's success in passing was indexed not only by their ability to achieve recognition as being gendered in a specific mode, but also by the extent to which their performance of gender inspired others to act in such a way that kept *reciprocal* gendered practices in play.

The Court's use of passing as a metric with which to judge the legitimacy of a subject's gender, and their manual hormone use by extension, contributed to its machinery of gender governance in several ways. Most centrally, by requiring its subjects to pass as a condition of being authorised to use hormones manually the Court necessarily also required its subjects to perform gender normatively as a condition of being authorised to use hormones manually. The association between passing and gender non-conformity has been pointed out and criticised as length by trans scholars. Califia (2003, 210) describes the requirement to pass in this way as forcing the subject into "buying into an oppressive polarized, binary gender system." Bornstein (1994, 127) has argued along these lines as well, writing that "through the mandate of passing, the culture uses transsexuals to reinforce the bi-polar gender system, as transsexuals strive for recognition within their new gender, and thus the privilege and chains of their new gender." She continues (1994, 125):

Most passing is undertaken in response to the cultural imperative to be one gender or the other. In this case, passing becomes the outward manifestation of shame and capitulation. Passing becomes silence. Passing becomes invisibility. Passing becomes lies. Passing becomes self-denial.

Thus, if passing means conformity then upholding passing as a means to legitimise manual hormone use makes manual hormone use only conditional upon the extent to which subjects can approximate socially constructed norms.

Yet passing requires not only performing gender in line with culturally coded expectations but also in doing so ensuring that one's status as trans, intersex, or

gender non-conforming is not disclosed (Sycamore 2006; Cooley and Harrison 2012). Namaste (1996a, 590) argues as such, writing that passing means “hiding the fact that you are transsexual and/or transgendered” by “presenting yourself as a ‘real’ woman or a ‘real’ man—that is, as an individual whose ‘original’ sex is never suspected.” Similarly, for Sandy Stone (2006, 231) “passing means to live successfully in the gender of choice, to be accepted as a ‘natural’ member of that gender.” As such, passing for both Namaste and Stone means enacting forms of gender that oppose or conceal difference, or erasing forms of gender that do not fit within the confines of dominantly available categories such that that difference is not noticeable. Accordingly, the imperative to pass is intrinsically hostile toward gender non-conformity (Sycamore 2006).

On this basis, the requirement to pass thus produced several governance effects. First, it governed through the enforcement of gender norms, such that if passing operated as a condition of being authorised to use hormones manually then being authorised to use hormones manually depended upon one’s promise to reproduce dominantly available gender norms. Second, it governed by working to ensure that subjects that did not promise to pass would not be authorised hormones manually. The ability to pass is neither universally nor evenly distributed but constructed according to norms that are sexed, racialized, classed, ableist, and structured by other hierarchical social dynamics (Snorton 2017; Gill-Peterson 2018; Puar 2015; McRuer 2006). Passing requires particular configurations of the body, a specific set of bodily capacities, as well as access to a range of temporal, financial, and other sets of capital to achieve. As such, that passing played a role in determining which subjects could use hormones manually means that the hierarchical dynamics that already structure passibility governed hormone use in this setting.

Yet the Court’s requirement to pass also governed gender by working to deny legitimacy to subjects that refused to pass. As passing requires conformity to pre-established norms, many subjects can and do reject the validity, authenticity, or necessity of performing according to those norms for personal and political reasons (Sycamore 2006; Feinberg 1998; Califia 2003; Bornstein 1994). By requiring subjects to pass, then, the Court both denied subjects the right to decide for themselves

which norms, if any, they would choose to participate in, and also engaged in a form of political suppression by precluding the capacity of subjects to defect from those norms. Moreover, in the context of contemporary Western dominant cultures, one can only pass with reference to prevailing binary conceptions of gender presentation. Consequently, the requirement to pass excludes non-binary and genderqueer forms of gender from achieving legitimacy as they do not have access to, or may actively reject, established means of passing (A. D. Anderson et al. 2020; Darwin 2020; Barbee and Schrock 2019; Vijlbrief, Saharso, and Ghorashi 2019; Conlin et al. 2019; Davy 2018; Bradford et al. 2019). As such, requiring subjects to pass requires them to enact a binary form of gender and thus to keep a binary gender system in play.

By requiring its subjects to pass as a condition of being authorised to use hormones manually, the Court also reinforced a range of broader systems of governance that are attached to the passing imperative. For instance, the discourse on passing that the Court cites here is also a discourse that is complicit in delegitimising trans, intersex, and gender non-conforming people as well as their identities, experiences, and realities in contexts beyond the Courtroom. This works on one level through the implicit suggestion, built into passing discourse, that if one is passing one is accomplishing the mandates of a given social role or performance. The notion of passing can thus suggest that a subject is ‘acting’ and as such that their presentation of gender is fictitious or inauthentic. Alecia Anderson et al. (2020, 45) note, for instance, that “passing has been used against trans people by cis people to insinuate that trans people pass in order to deceive others regarding their gender and/or sex.” In line with this, discourse surrounding passing has also been involved with delegitimising those who do not pass as inauthentic or as social deviants (Sycamore 2006; Gagné and Tewksbury 1998). Sharpe (2018; 2017) has examined a pernicious set of consequences that this discourse has produced in her work on “gender fraud.” She shows that social and cultural constructions of the requirement for trans people to be fully disclosed about their identity have been complicit in the prosecution of trans people for engaging in sexual activities when they had not disclosed their “gender history.” In her analysis of these cases, Sharpe explicates how these cases have criminalised the failure or refusal to disclose one’s “gender history”

by rendering sexual consent impossible in such circumstances. Collectively, these works reveal passing discourse is marred by a double bind, such that trans, intersex, and gender non-conforming subjects are marked as deceptive whether they pass or not.

The Court's use of passing as an instrument of judgment also governed by order of the relationship between passing and violence. The directive to pass is premised upon violence because it enforces compliance by enacting violence upon those that do not obey its mandates. Indeed, Anderson et al. (2020, 45) confirm in their study of trans people's perspectives on passing that many "attempt to pass to escape [...] discrimination." Gagné and Tewksbury (1998, 86) also found that many trans people practise passing as a mode of "self-preservation." The incentive to do so arises because to fail or refuse to pass in a world where, in their terms, there is "no social place for a person who is neither a woman nor a man," is to be subjected to violence (Gagné and Tewksbury 1998, 86). They note, too, that passing brings with it the privileges associated with social acceptance, including social approval as well as the affirmation of one's identity. As such, Bornstein (1994, 87, 125–26) discusses "passing" as a way of positioning oneself within the gender order in order to avoid opprobrium and censure, writing:

You don't want the high school kids pointing and yelling. You don't want to see the looks of disgust on people's faces. So you learn how to blend in. It's called "passing." . . . I [pass] because I don't want to get beaten up . . . Passing is seductive—people don't look at you like you're some kind of freak.

Feinberg (2006, 207) made a similar observation, noting that transgender people "are *forced* underground or to 'pass' because of the repression and ostracism they endure" as a consequence of breaching normative gender scripts. Thus, by using passibility to judge gender difference, the Court cited a system of attributing authenticity and legitimacy to gendered subjects that is premised upon the abrogation of non-conformity. In this way, the Court reinforced the broader systems of governing gendered subjects that operate according to socially established norms.

## Homosociality

The Court also asserted that it could generate knowledge about a subject's gender by observing their propensity for and success in forming homosocial relationships—that is, friendships with those who shared their gender designation. This assertion was evident in many cases. The Court noted in Shane's case, for instance, that while he “had very few friends [...] of those he had, all were boys.”<sup>255</sup> It was important too, that “most of [Jordan's] friends [were] boys,” and that Anita “tended to prefer the company of girls as friends.”<sup>256</sup> The Court also considered it noteworthy that Daniel's “preference [was] to play with boys,” that Mitchell “had mostly male friends,” that Martin “preferred to associate with boys,” and that Logan's “closest friends have mostly been and are still female.”<sup>257</sup> In Marco's case, meanwhile, the Court treated as significant a submission that “at primary school, Marco preferred to spend time with boys and refrained from being with girls,” and that he now “socialises with a group of guys at school.”<sup>258</sup>

In some cases, the Court grounded its use of homosociality as an instrument to judge gender in the suggestion that subjects are inherently compelled to enact relationships with correspondingly gendered people. The Court discerned that Dale was and ought to be able to affirm his gender as male, for instance, because in childhood he had been observed to have “*gravitated* towards friendships with boys around that same age.”<sup>259</sup> Similarly, in Marley's case, the Court remarked that “Interacting with girls has been somewhat difficult for Marley as he seems *naturally* more comfortable with boys.”<sup>260</sup> These statements both assert that their subject expressed a proclivity for social relations with subjects of the same gender designation and suggest that that proclivity was an *inevitable* effect of their gender.

<sup>255</sup> Re Shane ¶17.

<sup>256</sup> Re Jordan ¶21; Re Anita ¶13.

<sup>257</sup> Re Daniel ¶8; Re Mitchell ¶7; Re Martin ¶18; Re Logan ¶31. In addition, the Court noted Harley's proclivity for male friendships on two occasions: Re Harley ¶53, 56. See also Re Christopher ¶7.

<sup>258</sup> Re Marco ¶17, 32.

<sup>259</sup> Re Dale ¶39.

<sup>260</sup> Re Marley ¶12.

By framing Dale's friendships with boys as *gravitational* in nature, the Court implies that they were induced by some kind of physical and objective force—or, fundamental a-priori property of the universe—that pulls homomorphically gendered people into social relations. Likewise, by framing Marley's friendships as *naturally* induced, the Court suggested that subjects are *essentially* compelled to enact social relations with comparably gendered people. As such, in both instances, the Court inferred that gender predisposed its subjects toward homosocial bonds, and therefore, that it could observe the gendered nature of their friendships to ascertain the nature of their gender.

The Court made similar assertions by taking a subject's discomfort or distress with heterosocial relations as evidence of their gender. When judging the legitimacy of manual hormone use in Colin's case, the Court recounted, for instance, that:

As his school cohort began entering puberty, Colin found himself being forced to play with the girls more as the boys started to exclude him.

He was devastated and started to refuse to attend school.<sup>261</sup>

The story was similar for Martin, who the Court noted “was distressed when girls and boys were separated into different groups [as] he was unable to participate with boys.”<sup>262</sup> Julian's unease with gender segregation also played a role in his case, where the Court documented that he had “played in the boys' football team from the age of six but was required to play in the girls' team from the age of 14 and discontinued it because he felt uncomfortable.”<sup>263</sup> In each of these instances, the subject was narrated as finding themselves displaced and upset when segregated with others who do not share their gender designation. In this way, the Court suggested both that a subject's gender can be ascertained by observing the gender of those with which they establish favourable relations and also those with which they establish adverse relations. Favourable relations, in this view, necessarily signal affirmative homosociality, while adverse relations necessarily signal unfavourable heterosociality. In this way, comfort and success in relations with boys is taken to signal

<sup>261</sup> Re Colin ¶25.

<sup>262</sup> Re Martin ¶18.

<sup>263</sup> Re Julian (2015) ¶35.

simultaneously that one is/ought to be a boy and that one is not/ought not to be a girl and vice versa.

This contention was advanced, too, in assertions that a subject's social exclusion from heterosocial relations could evince their gender. In Celeste's case, this notion appeared in a report that centred on how "she did not fit in with boys."<sup>264</sup> The Court recorded that:

Before Celeste was five years of age various health professionals [...] advised the parents to encourage Celeste to live more as a boy so that she would "fit in" and not be bullied. But this was not successful and Celeste was the subject of bullying.<sup>265</sup>

Social exclusion from one set of gendered social relations supported manual hormone use in Xanthe's case as well, such that in making its judgment the Court took as validating a report that Xanthe "felt that [he] has never 'fitted' in as a girl and could not relate to the interests and concerns of girls in [his] age peer group."<sup>266</sup> Similarly, the Court made a point of noting that Kate had been *emasculated* by her peers and thus rejected from male homosocial relations, recording that she had been "teased by some of her peers for being gay or being a girl."<sup>267</sup> In each scene, the Court suggested that a subject's *failure* to enact homosocial relations with one gendered cohort indicated the impossibility of their gender reflecting that cohort.

Thus, in each of the scenes that I have just described, the Court cited, as a means to establish the legitimacy of a subject's manual hormone use, the likelihood that hormone use would produce a form of gender that affirmed, rather than threatened, its subjects' potential to form homosocial relationships. The presumption that the Court deploys here—that a subject's propensity for and success in developing homosocial relations could stand as evidence of their gender and thus confirmation of the legitimacy of their manual hormone use—was not reflective of a genuine relationship between homosocial relations and the nature of a subject's gender. The

<sup>264</sup> Re Celeste ¶7.

<sup>265</sup> Re Celeste ¶10.

<sup>266</sup> Re Xanthe ¶6.

<sup>267</sup> Re Kate ¶8.

notion that subjects are naturally or socially obliged to enact homosocial relations is a performative assertion that is socially, culturally, and historically specific. Indeed, as Allan (1998, 686–87) attests in his sociological work on friendship, the nature and structure of friendship relations in general are “inevitably bound to the social and economic environment in which they are being enacted” and are “patterned according to social conventions whose roots lie in the broader social and economic milieus in which the individuals involved are located.” The historical scholarship on the gendered nature of friendships supports this argument further by demonstrating that the practices, expectations, and meanings that structure friendships between people of different gender designations have shifted and continue to shift substantially over time (Caine 2008, xii–xiii). It is also reflected in more contemporary empirical work that has shown that the norms that structure homosocial relations differ markedly even at singular points in time and space. In queer communities, for instance, there are often fewer and different distinctions between friendship and sexual relations (Weston 1991; Nardi 1999; Stacey 2004; de Vries and Hoctel 2006; Gottlieb 2008). This means not only that there cannot be a necessary relationship between friendship relations and the forms of gender that are available in that setting, but also that any given order of homosocial friendship norms will always be enacted rather than inevitable. Indeed, upon observing the countless ways that homosociality is engrained and enforced in contemporary Western societies—for example, through institutional sex-segregation in schooling and sport—scholars have argued that homosocial norms are far from natural. Rather, they require substantial social efforts to enact and maintain (Hammarén and Johansson 2014; Haywood et al. 2017). As such, to characterise human beings as either naturally or socially obliged to form friendships with people of the same gender is to cite a culturally and historically specific story told about the gendered nature of friendships—a story that is institutionally enshrined and managed—rather than a universal or empirically verified truth. In this light, the Court’s requirement that subjects demonstrate an ability and willingness to engage in homosocial relations can be read as working to *achieve* a specific order of gendered friendship norms rather than merely citing the existence of such norms.

The contingency of friendship norms is important for understanding how the Court governed gender in this context, as homosociality is not only an *unnatural* mode of organising social relations but also one that is intensely gender normative in orientation and effects. This is the case for several reasons. First, the conception of homosociality that the Court deploys here relies upon a binary and universal construction of gender. In the Court's discourses, there are only two discrete kinds of gendered persons, whose natures are oppositional, and who organise social relations exclusively with those of the same 'kind.' As such, by requiring subjects to participate in the maintenance of this social institution, the Court necessarily required its subjects to participate in an institution that opposes and erases the possibility of non-binary, multiple, or variegated articulations of gender.

Yet homosociality functions as a mechanism of gender normalisation in several additional ways as well. Foremost, homosociality is involved in producing normatively gendered subjects by order of the key role that it plays in gendered socialisation. This works through the production of segregated 'social learning' spaces that differentiate subjects according to their gender designation and then subject them to different behavioural and interpersonal norms as well as disciplinary structures. Accordingly, homosocial spaces provide an environment where subjects are forced to learn, practise, and instruct others how to act in accordance with the mandates of their assigned gender, both as individuals and as groups (Kyratzis 1999; Sanders 2015; Willett 2006; McGuffey and Rich 1999; Thurnell-Read 2012; Grazian 2007; Nardi 1992; Roseneil 2006; Bank and Hansford 2000; O'Meara 1989). Several scholars have shown, for example, that homosocial friendship relations are a site where men learn, practise, and police the emotional and linguistic norms of hegemonic masculinity, including learning to suppress and/or forgo emotional intimacy with other men as well as to chastise other men's expressions of emotion (Bank and Hansford 2000; Kiesling 2013; Bird 1996; Strikwerda and May 1992; Way 1997; Pascoe 2012). These studies illustrate how homosocial group dynamics generally work to socialise subjects into gendered norms both by rewarding ostensibly 'correct' performances of gender as well as by punishing failures to do so (Haywood et al. 2017). In this light, the Court's requirement that its subjects

demonstrate their ability and willingness to form successful homosocial relations can be seen as ensuring that those subjects were participating in one of the primary mechanisms of gender's normative production. In this way, the subject's homosociality promises their subjection to gendered socialisation, and as such works to guarantee their normalisation.

Yet homosocial relations are not only a key site where gendered norms are learned; they are also a key site where gender difference is punished. As several scholars have noted, one's ability to achieve success in forming homosocial relations often depends upon one's ability and willingness to perform gender according to the strictures of normative masculinity and femininity (Britton 1990; Blatterer 2013). This means that homosocial relations are also often a key site where failures or refusals to conform to the strictures of normative gender are violently policed (Pascoe 2012; McGuffey and Rich 1999). As such, "fitting in" to homosocial relations is often a feat that is rendered coercively rather than naturally. Indeed, homosociality is itself a gendered norm that is often violently policed. The Court acknowledges this directly in Xanthe, Kate, and Celeste's cases above. In these cases, the Court observes how a subject's failure to perform homosociality according to their assigned gender was deemed as transgressive and therefore as justification for corrective violence. As such, tying a subject's ability to use hormones manually to their success in enacting homosocial relations is to ensure that only those subjects capable of and willing to comply to the norms of masculinity and femininity required to 'fit in' to those relations.

Feminist scholarship has also tracked the relationship between homosociality and gender normativity as a function of the role that homosocial relations play in the maintenance of gendered hierarchies. Indeed, in their review of literature, Hammarén and Johansson (2014, 1) observe that the bulk of scholarship on male homosociality has analysed it "as a mechanism and social dynamic that explains the maintenance of hegemonic masculinity . . . [as a factor of] how men tend to bond, build closed teams, and defend their privileges and positions." Haywood et al. (2017, 56) note, too, that homosociality has been "frequently applied [in the social sciences] to explain how men, through their friendships and intimate collaborations with

other men, maintain and defend the gender order and patriarchy.” They remark further that “there is a massive body of literature on the homosocial ordering of men’s relations and on all the different strategies men use to maintain the conventional gender order and to uphold male privileges” (Haywood et al. 2017, 59). Much of this work has revealed that male homosociality plays a role in maintaining patriarchal gender relations the workplace (Bird 1996; Dressel, Hartfield, and Gooley 1994; Kanter 2010; V. Fisher and Kinsey 2014). Kanter (2010) argues, for instance, that male homosociality has been central to the maintenance of male dominance in the corporate world, showing that “men attempt to reproduce their dominant power relations by only uniting with and sharing the same occupational space and privilege with those males who resemble them.” Fisher and Kinsey (2014, 44; see also Dressel, Hartfield, and Gooley 1994) have made a similar observation in an academic context, writing that “The boys club is still a powerful feature of British universities, ... [and] they can and do promote and maintain male interests in a myriad of ways, including selection and promotion. Scholars have also examined how homosociality supports patriarchal gender relations by fostering misogyny and anti-femininity among men. Bird (1996, 120) contends, for instance, that:

Through male homosocial heterosexual interactions, hegemonic masculinity is maintained as the norm to which men are held accountable despite individual conceptualizations of masculinity that depart from that norm. When it is understood among heterosexual men in homosocial circles that masculinity means being emotionally detached and competitive and that masculinity involves viewing women as sexual objects, their daily interactions help perpetuate a system that subordinates femininity and nonhegemonic masculinities.

Anderson (2008, 257) has observed a similar dynamic in the context of team sports, noting that “the segregation of men into a homosocial environment limits their social contact with women and fosters an oppositional masculinity that influences the reproduction of orthodox views regarding women.” And conversely, Anderson (2008, 257) also shows that heterosocial relations “positively reformulate [men’s] attitudes toward women.” In this light, the Court’s investment in the reproduction

of homosociality can be seen as an investment in the reproduction of normative gendered relations *via* the role that homosociality plays in reproducing a patriarchal gender order.

A wealth of feminist literature has also examined how homosociality supports the maintenance of gender norms via the role that it plays in the reproduction of normative heterosexuality. Scholars in this field have noted that homosociality is one of the primary sites where heterosexuality—as a social institution, rather than a specific sexual practice—is learned, enacted, and enforced (Flood 2008; Grazian 2007; Pascoe 2012; Wight 1994; McBee 1999; A. Hunt 2002a; S. Roberts et al. 2020). Homosocial relations play a significant role in the heterosexual economy in one way by participating in the discursive construction of heterosocial relations as teleologically oriented toward erotic and/or romantic association. As Hunt (2002a) has shown, heterosocial social spaces and cultural practices are typically organised around and oriented toward the formation and conduct of sexual interactions. DeAngelis (2014, 2) has made a similar observation, noting that popular representations of heterosocial relations typically follow a “Friends-into-lovers” narrative pattern, such that:

In popular relationship discourse, the progression from “just friends” to “lovers” has become such a naturalized “given” in culture that its absence is seen as either a mark of failure (“What prevented the couple from taking it to the ‘next level?’”) or the cause for sorrow or regret (“If only it had happened”).

Homosociality also supports the heterosexual economy by providing spaces where individuals and groups learn and practice the normative structures of heterosexual mores and desires (Flood 2008; Sedgwick 1985). This is particularly the case for young people for whom knowledge development and exchange regarding sexual practice takes place nearly exclusively in homosocial settings (Pascoe 2012; Wight 1994). Yet homosociality also plays a structuring role for heterosexual relations broadly. As Hammarén and Johansson (2014, 2) observe, male homosociality organises men’s heterosexual relations and vice versa, such that sexual relations with women feature as “a kind of currency men use to improve their ranking

on the masculine social scale and practices” and as such to structure their relations with each other. Sedgwick’s (1985) work on male homosociality makes a similar point, observing that the contemporary structure of male homosocial desire as expressed in Western literature works to reduce the role of women to mediating relations between men. Flood (2008, 355) reached this conclusion in his study on the relationship between male homosociality and heterosexuality, writing that:

Male-male relations organize and give meaning to the social and sexual involvements of young heterosexual men in powerful ways. Homosocial bonds are policed against the feminizing and homosexualizing influences of excessive heterosociality, achieving sex with women is a means to status among men, sex with women is a direct medium of male bonding, and men’s narratives of their sexual and gender relations are offered to male audiences in storytelling cultures generated in part by homosociality.

According to Flood, the kinds of “sociosexual” structures that homosocial practices constitute are characteristically patriarchal, hierarchical, and violent. They function, in his view, as a medium through which men instrumentalise, objectify, and thus subordinate women to bond with each other. Exploiting women for homosocial gain, according to Flood, perpetuates male dominance by constructing women as sexually supervenient to male interests (see also Bird 1996). Along similar lines, scholars have also observed the role that homosociality among men plays in perpetuating sexual cultures that are premised on the sexual objectification, exploitation, and assault of women (Crowhurst and Eldridge 2020; Grazian 2007).

Feminist and queer literatures have also shown how homosociality plays a role in the reproduction of normative heterosexuality by working to preclude homoerotic desires. This is partially a function of the social construction of friendship in contemporary Western societies which distinguishes friendship from other forms of social relations (such as romantic and/or erotic relations) according to the presence or absence of sexual desire and/or practice (Blatterer 2013; O’Meara 1989). As such, homosocial relations predominantly operate as tacitly heterosexual spaces, unless declared otherwise, in which members of the ‘same’ sex are available exclusively for

friendships while members of the ‘opposite’ sex are solely available for romantic and sexual relationships (Martinussen 2019; Good 2012; E. M. Thompson 2006; Sedgwick 1985; Roseneil 2006; Blatterer 2013; O’Meara 1989). The cultural propensity to label emotionally intense or intimate male friendships “bromances” evinces the tacit heterosexualisation of homosocial bonds. As DeAngelis (2014) observes, for an affectionate relationship between men to be described as a “bromance,” the members of that relationship usually need to reject or ridicule the prospect of homoerotic desire. Alternatively, if homoerotic desire is not abjected, the relationship risks being construed as “suspicious.” Inversely, dominant homosocial norms work to configure intimate relationships among women as tacitly non-sexual. Haywood et al. (2017) summarise this point succinctly:

Young women who kiss, hold hands with, and hug each other are considered not lesbians but rather women involved in normalised feminine heterosexual behaviour. Lesbians are, therefore, made invisible and are ignored. According to a heteronormative order and the male gaze, women’s intimate relations are understood as friendship or a sexual display aimed at heterosexual men.

Haywood et al. (2017) thus illustrate how homosocial norms both mystify and efface desire between women, as well as homoerotic desire driven by women. Other quarters of feminist and queer scholarship have elaborated upon this theme at length in (E. M. Thompson 2006; Morgan and Thompson 2006; Galupo 2006; Rich 1980).

Several scholars have thus claimed that homosocial norms work to efface the imagination and realisation of same- or multi-gender attractions. This means that when the Court required its subjects to participate in homosocial friendships, it simultaneously required its subjects to engrain themselves in a social institution that rendered obligatory if not compulsory non-sexual relations with other members of their gender designation. Accordingly, through its discourses on homosociality, the Court also worked to heterosexualise its subjects both by requiring them to participate in a heterosexualising social institution as well as by requiring them to abject the possibility of homoerotic or other forms of non-heterosexual desire.

Homosociality also works to heterosexualise its subjects through its close relationship with homophobia. Britton (1990, 423), for instance, identifies how homosociality operates as a powerful force in the production of “powerful sex-segregated institutions” which are premised upon normative, compulsory, or assumed heterosexuality. Homosociality is also intertwined with homophobia by order of the role that the routine abjection of homosexual desires, practices, and identities plays in producing and maintaining male homosocial bonds and establishing their requisite forms of masculinity in contemporary gender orders (Haywood et al. 2017; Marsiglio 1993; Flood 2008; Hammarén and Johansson 2014; M. S. Kimmel 2009; Plummer 1999; Britton 1990; Mason and Tomsen 1997; Tomsen 2017; Sedgwick 1985; Pascoe 2012; Way 1997; T. Barrett 2016). Sedgwick (1985) made this point in her treatise on male homosocial desire, observing that the legibility of male homosocial bonds has depended historically on the disavowal of homoerotic desire. Way (1997) notes, too, that homoerotic desire is often interpreted as threatening the viability and legitimacy of male homosocial bonds. As such, for Way, the abjection of homoerotic desire becomes requisite as a means to maintain those bonds.

The role that homophobia plays in supporting homosocial bonds has been identified at a range of different sites. Pascoe (2012) luridly illustrated this dynamic in her study of adolescent constructions of masculinity, showing how social bonds between teenage boys are constituted through collaborative abjections of homosexuality. According to Pascoe, a collective and repeated disavowal of “the fag” helped the adolescent boys in her study to establish a shared normative masculinity as the basis of their male homosocial bonds and to discipline those that failed or refused to comply. Barrett (2016) identified a similar dynamic at play in homosocial relations between heterosexual men and men of diverse sexual orientations as well. In his study of friendships between men of various sexual orientations, Barrett shows that homosocial relationships are frequently sustained by the abjection of homosexuality, even in contexts where some of the participants identify as ‘same-sex’ attracted. In these scenarios, this abjection is often accomplished through forms of jest which construct that relationship as explicitly non-sexual.

These analyses of homosociality suggest that by requiring its subjects to participate in homosocial relations the Court also required them to participate in an institution that is organised around the abjection of homoerotic desire and the cultivation of heterosexuality. As such, the Court's use of homosociality as a legitimising instrument could only have invested in the production of heterosexual subjects. Considering the role that homosociality plays in enacting normative gendered subjectivities and relations, the legitimisation of a subject's manual hormone use conditionally upon their propensity for and success in forming homosocial relations must be read as an act that ensures that manual hormone use can only be practised by subjects that promise to maintain that mode of gender normalisation.

### **Epistemological Governance: Inside and Out**

This chapter has thus examined the two kinds of epistemological assertions that the Court wielded to arbitrate the legitimacy of its subjects' manual hormone use. By interrogating the range of claims that made up the Court's articulations of both introspective and extrospective knowledge, I have revealed how both discourses established modes of knowing gender that were grounded in, as well as invested in reproducing, dominant gender norms. As such, I have analysed how each of these epistemological claims has governed gender in their own ways by tethering the legitimacy of a subject's manual hormone use to their correspondence with various sets of norms. Now, in this final section, I turn to consider how the Court's epistemologies worked together to establish shared mechanisms of gender governance.

Fundamentally, the Court's epistemologies worked together to govern gender by jointly tethering the legitimacy of a subject's manual hormone use to the knowability of their gender. This is to say that the Court's epistemology of gender—in both its introspective and extrospective iterations—governed gender by (a) advancing the notion that there are objective ways to know it and (b) requiring the demonstration of such objective knowledge as a condition of receiving authorisation to use hormones manually. Both introspective and extrospective discourses worked,

therefore, to ensure that subjects could only use hormones manually to affirm forms of gender that the Court could 'know.' I have already shown throughout this chapter that this mandate governed gender in *specific* ways, as an effect of the directives that arose in relation to each of the epistemological criteria that the Court established as objective.

Yet, this requirement was also governing more *generally*, because the mandate that subjects render their gender knowable was governing *in itself*. Firstly, this is because knowledge about one's gender is not a natural or necessary condition for legitimate manual hormone use to occur. Rather, in this instance, the Court has regulated manual hormone use in such a way that *forces* the practice of it to take place exclusively in relation to knowledge about one's gender, thus performatively inducing an essential relationship between manual hormone use and such knowledge. Secondly, the requirement that subjects render their gender knowable was governing *in itself* because the domain of the knowable that the Court deployed exhausted neither the modes of knowing gender that already exist nor those that are potentially actualisable. This is because by requiring subjects to render themselves knowable the Court simultaneously prohibited them from using hormones manually as a means to change their gender, to become gendered differently, to create new forms of gender, to manifest forms of gender that were inarticulable within prevailing epistemological frames, or indeed, to refute, destabilise, or become something that exceeded the frame of 'gender' entirely. This injunction thereby confined subjects to inhabit modes of being that they were already 'known' to be and worked to ensure that subjects could not actualise any mode of being that outstripped the Court's conceptions of the known. The Court's epistemologies were governing, therefore, both because they coerced subjects into enacting 'known' forms of gender, and also because they required subjects to negate alternative modes of knowing, the possibility of not knowing, as well as the possibility of refusing to know or be known entirely.

Yet, the Court did not merely require its subjects to demonstrate discrete forms of introspective and extrospective knowledge *per se*; rather, it always required its subjects to establish that their gender was knowable in both domains at once, and

that their gender appeared to be homologous in both fields of knowledge. This is to say that the Court's discourses on introspective and extrospective knowledge did not govern independently but worked collaboratively to ensure that subjects could only produce *isomorphic* relationships between the gender that they were 'known' to be 'on the inside' and the gender that they were 'known' to be 'on the outside.' Neither introspective nor extrospective knowledge could authorise a subject's manual hormone use on its own. Rather, in every judgment that I analysed, the Court only authorised manual hormone use when its subjects were 'known' to be gendered *in the same way* in both domains.

The requirement that subjects maintained an isomorphic relationship between how they knew themselves to be gendered 'on the inside' and how others knew them to be gendered 'on the outside' contributed to the Court's machinery of governance in several ways. This requirement was governing *in itself* because it worked to ensure that subjects could only enact modes of being gendered that complied with these epistemological strictures. This is to say that the Court's discourses on introspective and extrospective knowledge worked in tandem to ensure that subjects could only use hormones manually to represent 'externally' a form of gender that they were already known to inhabit 'internally.' The Court's epistemology thus barred subjects from using hormones manually to produce an 'exterior' that would fail to signify their 'interior.' Yet, by enforcing this mode of 'congruence' between its subjects' 'interiors' and 'exteriors,' the Court also supported the broader regimes of governance that are organised around the maintenance of this norm. As I pointed out in chapter four, the notion that subjects ought to have others 'know' their gender in the same way that they 'know' their own gender is a cultural logic that constructs as unreal, inauthentic, and/or abominable expressions of gender that do not signify this congruence (see also S. Stone 2006; Butler 1999). Accordingly, by ensuring that subjects could only use hormones manually in ways that reinforced such a conception of congruence, the Court barred them from using hormones manually to challenge that mandate and the various modes of coercion that maintain it.

The Court's discourses on introspective and extrospective knowledge also governed collectively in another way, by working together to efface the contingency

and mutability of epistemologies of gender. This is because the Court's construction of gender as objectively knowable relied upon a conception of gender as a universal and immutable property of subjects that could be revealed, observed, and identified empirically through the application of pre-established epistemological criteria. In offering this narrative, the Court implied that all subjects are gendered in more-or-less the same way, differentiated only according to a binary male-female designation, and that the same measures can be applied universally to discern a subject's gender objectively.

The Court effaced the contingency and mutability of epistemologies of gender in its discourses on introspective knowledge by proffering universal narrative about the nature and possibility of knowledge about one's own gender. As I showed in the first part of this chapter, the Court constructed all of its subjects as having conceptualised and come to know their gender as an 'internal' property by observing it empirically through sensation and experience. Yet, this way of accounting for knowledge about one's gender is neither objective nor universal. The idea that one's gender is an interior reality that is objectively knowable through introspection has not been and is not held by all people in all cultures, times, and places. Rather, diverse modes of 'knowing' one's gender—including modes that externalise rather than internalise gender, and that see gender as neither reducible to, nor inherently connected to, personal experience—have been forged at various historical and cultural intersections (Mirandé 2014; G. Herdt 1994; Stephen 2002; K. Brown 2004; Mirandé 2012; Besnier and Alexeyeff 2014; Nanda 2000; Mirandé 2016; Schmidt 2016; S. Kerry 2017; S. C. Kerry 2014; Schmidt 2017). Indeed, the notion of selfhood that underpins the Court's conception of introspective knowledge—that is, the idea that the self is a discrete and internally constituted entity—is a specifically Western and modern cultural formation (Mansfield 2000; A. Elliot 2008). It is also not the case that gendered beings universally understand their gender as a mode of, or as expressing itself in, their sensations and experiences. Many people do not consider themselves to be possessed of an intrinsic gender, or of sensations and experiences that are inherently and immutably gendered. Likewise, many people do not consider themselves to be discretely gendered, or indeed, may not consider themselves to be

gendered *at all* (Galupo, Pulice-Farrow, and Ramirez 2017; Stachowiak 2017; Bradford et al. 2019; Davy 2018; Barbee and Schrock 2019; Conlin et al. 2019). Thus, while gender is sensate and experiential for many, gender does not *require* certain sensations or experiences, nor are there any set of sensations or experiences that are objectively or universally indicative of a subject's gender. As such, when the Court made the articulation of a specific epistemology of introspective knowledge a condition of being authorised to use hormones manually, it worked to efface the cultural and historical contingency of that epistemology, erase the diversity of alternative epistemologies that already exist, as well as preclude the possibility of bringing new epistemologies into being. In doing so, the Court masked the social dynamics that shape how subjects can know their gender—including the coercive powers that institutions like the Court can wield to control that knowledge—while excluding the possibility of difference and change.

The Court's discourses on extrospective knowledge also effaced the contingency and mutability of knowledge about gender by claiming objectivity and universality. As I showed throughout the second part of this chapter, the Court's discourses on extrospective knowledge cited a range of factors that spectators could observe to generate knowledge about a subject's gender. These factors included their diagnostic status, displays of affect and emotionality, behaviour, presentation, ability and willingness to pass, and propensity for homosocial bonds. In examining each of these modes of knowing, I have argued that they index socially, culturally, and historically specific gender norms rather than the natural products of innate forms of masculinity or femininity. As such, by tethering its subjects' ability to use hormones manually to their compliance with these norms, the Court not only coerced its subjects into perpetuating these norms but also worked to naturalise them and obscure the coercive social processes that maintain them.

By objectifying gender in this way, the Court's epistemology of gender also worked to undermine the authority of its subjects' knowledge about their gender. This is because the Court's discourses on both introspective and extrospective knowledge displaced their subjects' abilities to speak truth about their gender and placed this power in the hands of external arbitrators instead. In the Court's

discourses on introspective knowledge, for instance, by constructing gender as an objective property that subjects can discern through introspection, the Court proffered a correspondence theory of knowledge about gender that rendered its subjects' self-knowledge fallible. This fallibility arises because a correspondence theory infers that a subject's knowledge about their gender is merely a *representation* of a reality that exists independently of and external to that representation. Thus, by suggesting (a) that a subject's gender exists independently of and external to their observations of it, and (b) that subjects generate knowledge *about* their gender through empirical observation, these discourses imply that a subject could be *mistaken* in their beliefs about their gender or that they could *misrepresent* their gender to the Court. Indeed, to claim that there are 'correct' forms of introspective knowledge about gender—as the Court did—is to claim that there can be 'false' or erroneous forms of introspective knowledge as well. And as such, if the legitimacy of manual hormone use depends upon valid introspective knowledge, and if the subject's introspective knowledge is fallible, then the subject's introspective knowledge about their gender becomes something that the Court can judge for its validity. The Court's discourses on introspective knowledge thereby supported the Court's role in arbitrating these matters because they gave power to the Court to *either* (a) affirm the validity of a subject's introspective knowledge and legitimise their manual hormone use accordingly *or* (b) refute the validity of a subject's introspective knowledge and deny the legitimacy of their manual hormone use on that basis. As such, in the context of the Court's judgments, claims to introspective knowledge deny rather than affirm the subject's capacity to know their gender because they always require the Court's verification to function as valid. In this context, only the Court had the power to determine the authenticity of its subjects' claims to be gendered.

The Court's discourses on extrospective knowledge undermined the authority of its subjects' knowledge about gender in a similar way. This is because by requiring that subjects were 'known' to be gendered extrospectively the Court held that a subject's knowledge was never sufficient to authorise manual hormone use on its own. Rather, in the Court's judgments, introspective knowledge always required

support from extrospective modes of knowing before it could legitimise manual hormone use. As such, the Court granted spectators the power to arbitrate the legitimacy of a subjects' manual hormone use, and in doing so constructed a hierarchical power relation between the gendered subject and their social context, whereby it was always 'others' that had the power to determine the authenticity of a subjects' claim to be gendered and never the subject themselves. Under this condition, subjects could only use hormones manually to enact forms of gender that others were willing and able to verify as authentic. Thus, the Court reinforced the power of social norms to govern gender legitimacy by using them to arbitrate its subjects' possibilities for being and becoming gendered in this setting. In doing so, the Court further disenfranchised its subjects of the capacity to enact modes of being gendered that had not received assent from those norms. The Court's discourses on extrospective knowledge thus governed in line with its discourses on introspective knowledge not only by objectifying gender but also by ensuring that the power to determine the nature of that object was always socially displaced.

## Conclusion

This chapter has interrogated the range of epistemological assertions that the Court used to arbitrate the legitimacy of its subjects' manual hormone use. In doing so, it has argued that these epistemological assertions contributed to the Court's machinery of gender governance by constructing manual hormone use as legitimate only when it promised to affirm modes of being gendered that subjects were already *known* to be. This construction gave rise to a form of *epistemological governance* because the modes of being gendered that the Court considered knowable were both governing in themselves as well as invested in the reproduction of hegemonic norms that governed gender supplementarily.

Thus, at the close of this chapter, this thesis has now examined two of the three primary categories of the assertions that the Court wielded to arbitrate its subjects' manual hormone use. Now, after having interrogated the Court's discourses on ontology in chapter four, and after having interrogated the Court's epistemology of

gender in the present chapter, I turn in the next chapter to examine the Court's discourses on the teleology of manual hormone use. By examining this teleology, the next chapter reveals how Court arbitrated its subjects' manual hormone use by making assertions about the desirable ends that such a practise might achieve. In doing so, the next chapter joins with the present and previous chapters in criticising the conditions that the Court constructed to legitimise manual hormone use for the role they played in regulating how subjects could be gendered, and as such, controlling how gender could manifest.

# Chapter Six

## *Teleology*

This chapter interrogates the teleology that the Court constructed to judge the legitimacy of its subjects' manual hormone use. Teleology is the third of the three primary categories of discourse that the Court deployed in its judgments to determine the legitimacy of its subjects' manual hormone use. In this context, teleology worked alongside ontology, which I discussed in chapter four, and epistemology, which I discussed in chapter five, to determine the conditions under which the Court allowed its subjects to use hormones manually.

The Court's teleology consisted of assertions about which aims or ends manual hormone use could realise to achieve legitimacy. These ends played a critical role in the Court's judgments because one of the tasks that the Court had to perform to legitimise manual hormone use was to establish whether such use was in its subjects' "best interests." This requirement meant that the Court needed to assert in each case whether the benefits of manual hormone use—that is, the desirable ends that it could achieve—outweighed its risks. However, as I will show throughout this chapter, the Court's assertions to this effect did not arise from objective calculations of 'the good.' Rather, these ends were *constructed* as valuable. And that value, I will contend, was invested in realising a gender normative subject.

There were six key 'ends' that the Court expected manual hormone use to accomplish to achieve legitimacy: (1) mental health, (2) happiness, (3) assimilation, (4) sexuality, (5) adulthood, and (6) mind-body alignment. In this chapter, I discuss each of these ends in turn, showing how each constituted an investment in gender normativity. Collectively, these ends contributed to the Court's machinery of gender governance by positioning the gender normative subject as the telos that manual

hormone use needed to pursue as a condition of its legitimacy. Thus, by tethering the legitimacy of manual hormone use to its ability to realise gender normative ends, the Court ensured that its subjects could only use hormones manually upon promising that this would produce the kinds of gendered subjects that the Court deemed desirable. The Court's teleology worked, therefore, to transform manual hormone use into a technology of normalisation, and to foreclose its possibilities for enacting gender differently.

## Teleologies of Manual Hormone Use

### Mental Health

The promise that manual hormone use would produce a mentally healthy subject was one of the key factors that the Court cited to establish its legitimacy. Indeed, this was the end that the Court cited most frequently and the only end that the Court cited in every judgment that I analysed. The Court constructed the capacity and utility of using hormones manually to achieve mental health in various ways throughout its judgments.

Most centrally, the Court constructed improvements in mental health as the telos that legitimises manual hormone use by framing manual hormone use a form of medical treatment “prescribed for the purpose of treatment of Gender Dysphoria.”<sup>268</sup> This construction was a foundational feature of every case given that the Court had determined in *Re Alex* and *Re Jamie* that manual hormone use was legitimate *only* when this was “for the purpose of curing a malfunction or disease.”<sup>269</sup> In Jordan's case, for instance, the Court repeatedly emphasised that the legitimacy

<sup>268</sup> *Re Frances* ¶1. This phrase also appears in near identical form in the orders declared in *Re Dana* ¶1, *Re Pat* ¶1, and *Re Matthew* ¶1.

<sup>269</sup> This language comes from Marion's case (¶33, 48, 53) which, as I outlined in the introduction, set the precedent that the Court relied upon in *Re Alex* and *Re Jamie* (2013). This language appears frequently throughout the corpus of cases that I analyse here because this phrase was central to the way that the Court framed the manual hormone use was framed.

of manual hormone use depended upon its definition as medical treatment, writing at various junctures that:

The proposed testosterone treatment is . . . recommended *because it is the only treatment for* female to male Gender Dysphoria that meets best practice guidelines[.]

[ . . . ] It is significant that both Dr T and Professor X state that there is *no alternate treatment* available for Jordan. The proposed Stage 2 treatment is consistent with internationally recognised guidelines and has been utilised in other hospitals throughout Australia to treat Gender Dysphoria.

[ . . . ] Further, as earlier noted, the treatment will have irreversible effects on Jordan's physical appearance. However, based on the expert medical evidence, male pubertal induction is in Jordan's best interests, *particularly as it is the only treatment for* Jordan's Gender Dysphoria and is in line with Jordan's expressed wishes.<sup>270</sup>

Thus, the Court repeatedly stated that it was manual hormone use's status as the *only* treatment for gender dysphoria that established its legitimacy. In line with the DSM-5's definition of gender dysphoria as "A marked incongruence between one's experienced/expressed gender and assigned gender . . . associated clinically significant *distress*" (American Psychiatric Association 2013, 452), the Court also frequently legitimised manual hormone use as a means to alleviate its subjects' distress. The Court drew this association in Sasha's case, where it wrote that the objective of manual hormone use was "the alleviation of distress" and worried that "if the procedure is not carried out, [Sasha] would continue to experience considerable distress."<sup>271</sup> It also relied upon evidence that Drew, Bobbie, and Blaine were experiencing "ongoing distress from gender dysphoria" to assert that manual hormone use was in their "best interests."<sup>272</sup> Often, the Court leveraged distress as a legitimising factor *ad nauseum* in its judgments. In Martin's case, for instance, the

<sup>270</sup> Re Jordan ¶39, 41, 44.

<sup>271</sup> Re Sasha ¶27, 33, 34, 38, 46, 48.

<sup>272</sup> Re Drew ¶27; Re Bobbie ¶27; Re Blaine ¶21.

Court discussed Martin’s distress on fourteen occasions. This included statements that Martin (1) “is *distressed* that, although assigned female at birth, he experiences himself to be male and, as a result, he experiences significant *distress* about having a female body instead of a male body,” (2) “had periods of increasing *distress* and despair, relieved at times by self-harm and cutting his skin,” (3) “has consistently tried to avoid causing *distress* to his family and friends,” (4) “describes (sic) experiencing *distress* about his female body since he can first remember,” (5) “was *distressed* when girls and boys were separated into different groups,” (6) “finds the presence of his breasts extremely *distressing*,” (7) “finds [that] the presence of his female reproductive organs is extremely *distressing*,” and (8) “is increasingly *distressed* at being aware of the difference between his own physical development and that of his peers.”<sup>273</sup> It also reported that Martin’s manual hormone use would be “highly likely to reduce the risk of significant mental *distress* and depression,” and conversely, that if Martin did not receive hormone treatment, he would “remain increasingly isolated, anxious and *distressed* within himself and in the company of his peers,” and would “remain significantly *distressed*, anxious and depressed.”<sup>274</sup> Similarly, in Sasha’s case, the Court returned to Sasha’s distress repeatedly, using the term and its related forms nine times. It reported, for instance, that (1) Sasha’s “anticipated secondary sex characteristics . . . has been a source of increasing personal *distress* and dysphoria since the onset of puberty at 13 years of age,” (2) Sasha “is *distressed* by the emergence of facial and body hair and dislikes her low voice,” (3) Sasha “has consistently expressed her personal *distress*, due to experiencing a disjunction between her assigned gender and her experienced gender,” and (4) that Sasha “finds need to shave and/or wax for removal of body hair is particularly *distressing*.”<sup>275</sup>

Yet gender dysphoria and associated distress was only one of several psycho-medical pathologies that the Court cited as legitimising manual hormone use.<sup>276</sup>

<sup>273</sup> Re Martin ¶18, 41, 43, 44, 47. Similarly, In Harley’s case, the Court uses the term *distress*, *distressed*, or *distressing* thirteen times: ¶22, 30, 31, 50, 53, 56, 57, 59.

<sup>274</sup> Re Martin ¶44, 47.

<sup>275</sup> Re Sasha ¶27, 28, 33, 34, 38, 46, 48, 50.

<sup>276</sup> Discussions of mental health pathologies were pervasive throughout the Court’s judgments. Depression was mentioned in 52 (of 76) judgments, with its associated terms (*depression*,

Depression, anxiety, and self-harm were also common considerations. The Court authorised Brittany's manual hormone use, for instance, on the basis that this would "minimise . . . the risk of [her] developing anxiety and depressive symptoms."<sup>277</sup> The Court advanced a similar argument in Marco's case, arguing that his manual hormone use was legitimate because "The frequency of psychopathology is lower in transgender individuals who are receiving hormone therapy when compared with those who are not."<sup>278</sup> Karsen's manual hormone use was also justified with reference to the likelihood that this would "reduce the risk of . . . future mental health problems such as low mood, anxiety, suicidal ideation and self-harming behaviours."<sup>279</sup> In Mitchell's case, the Court justified manual hormone use because of "the expected improvement in [his] mental health" that would follow. Indeed, the prediction that manual hormone use would improve Mitchell's mental health made it "imperative that [he] be given the opportunity to commence [hormone] treatment as a matter of urgency."<sup>280</sup> By tethering the legitimacy of manual hormone use to its ability to 'treat' psychological pathologies in these ways, the Court asserted that legitimacy of manual hormone use depended in part, upon its capacity to deliver 'therapeutic' beneficence.

The Court advanced a similar argument by constructing manual hormone use as a suicide prevention strategy. In Drew's case, for instance, the Court suggested that the intended effect of hormone "treatment" was the "permanent cessation of suicide attempts and self harm behaviours."<sup>281</sup> Similarly, the Court framed the legitimacy of Andrea's manual hormone use as arising from its capacity to reduce

depressive, depressed) appearing 190 times across the corpus, resulting in an average of 3.65 mentions in each judgment that it appeared. Anxiety was mentioned in 52 judgments, with its associated terms (anxiety, anxious, anxieties) appearing 175 times across the corpus, resulting in an average of 3.37 mentions in each judgment that it appeared. Self-harm was mentioned 117 times across 42 judgments, with an average of 2.79 mentions in each of these judgments. Suicide and its associated terms (suicide, suicidality) appeared 99 times across 34 judgments with an average of 2.91 mentions in each of those judgments.

<sup>277</sup> Re Brittany ¶13.

<sup>278</sup> Re Marco ¶61.

<sup>279</sup> Re Karsen ¶23.

<sup>280</sup> Re Mitchell ¶38.

<sup>281</sup> Re Drew ¶30.

“the risk of her self-harming or attempting suicide.”<sup>282</sup> The invocation of “research” was sometimes used to bolster such constructions of manual hormone use as a psychiatric intervention. The Court’s judgments in Flynn’s, Andrea’s, and Gabrielle’s cases, for instance, identically record that:

Research consistently demonstrates that denial of support and medical treatment for children and adolescents with gender dysphoria carries with it a 50% risk of self harm and a 30% risk of attempted suicide during adolescence.<sup>283</sup>

In other cases, the Court argued that manual hormone use was legitimate because it predicted that a risk of suicide would arise if it were not allowed to occur. In Rae’s case, for instance, the Court was concerned that “a failure to provide [hormone] treatment will result in spiralling depression, self-harm or potentially suicide.”<sup>284</sup> This argument also appeared in Kelvin’s, Chelsea’s, and Drew’s cases where the Court wrote in near-identical terms that:

. . . if the treatment is not carried out, [the subject] will experience ongoing intense frustration and feelings of isolation, disgust with his physical body (which [the subject] continues to actively experience with respect to his female genitalia) and consequent difficulty forming relationships. These factors are recognized as triggers for suicide attempts. Approximately one third of transgender individuals are reported to have attempted suicide at least once during adulthood pre-treatment.<sup>285</sup>

Thus, suicidality retained its legitimising function across these various contexts, despite the different conceptual framings that surrounded it.

The Court’s construction of mental health as an end that legitimises manual hormone use contributed to its machinery of gender governance in several ways. First, by positioning the figure of the mentally healthy subject as the telos that

<sup>282</sup> Re Andrea ¶47. A similar statement appears in Re Martin ¶44.

<sup>283</sup> Re Flynn ¶50; Re Andrea ¶61; Re Gabrielle ¶22.

<sup>284</sup> Re Rae ¶19. The Court also records a similar remark later in *Rae*, writing that “The risk of not providing appropriately supervised medical treatment is the risk of self harm including suicide attempts.” ¶61.

<sup>285</sup> Re Kelvin ¶38. A near identical statement is made in Re Chelsea ¶14 and Re Drew ¶30.

motivates and justifies manual hormone use, the Court transformed the capacity of the subject to realise this telos into an instrument that it could use to *either* authorise *or* prohibit that use. By working to legitimise ‘ill’ subjects’ claims to manual hormone use, this discourse also works to *delegitimise* the same claim from ‘healthy’ subjects. As such, the Court could refuse to legitimise manual hormone use for subjects that were not intelligible as ‘ill’—that is, could refuse legitimation to contented, cheerful, secure, as well as self and life-affirming subjects—as it could hold that manual hormone use would not have a legitimate purpose to serve in this context. The Court’s discourses on mental health also meant its subjects needed to be constituted as ill—that is, as dysphoric, depressed, anxious, self-harming, or suicidal—as a condition of being authorised to use hormones manually. As such, the Court’s judgments envisage a world in which manual hormone users are *necessarily* dysphoric, depressed, anxious, self-harming, or suicidal. Thus, even while there is not an inherent association between these forms of illness and manual hormone use, this legal regime *enforced* such an association.

Two further normative consequences follow from requiring manual hormone users to present as ill. First, by enforcing the pathologisation of manual hormone users, the Court subjected them not only to its own governing oversight but to the regulatory powers of the psycho-medical institutions that manage these forms of illness. I discussed the governing effects of psycho-medical pathologisation in detail in chapter five. There, I argued that pathologisation requires stigmatisation, subjection to medical power and surveillance, as well as subjection to the disciplinary effects of diagnostic instruments. Second, enforcing the pathologisation of manual hormone users also governs their gender by enforcing an association between gender non-conformity and disease. Roen (2019) has observed this effect in the context of the clinical care of gender non-conforming young people, where she suggests that the constant reiteration of the risk of self-harm means that self-harm has become “stuck” to gender non-conforming bodies. Roen argues that the repeated narrativization of gender difference as necessitating mental pathology institutes an impression that to manifest gender difference is to experience mental pathology (Roen 2019; 2016). Scholars have also examined how this association has been built

in media representations of gender non-conforming lives, noting the recurrent ‘tragic queer’ trope which represents queer characters as inevitably suffering (Kelso 2015; Deshler 2017; Hesselink 2019; Bridges 2018; E. B. Waggoner 2018). The stigma that these associations produce is both harmful in itself and also because it compels further violence against gender non-conforming people (Roen 2016; 2019; Davy 2015; Inch 2016, 197–98; Drescher 2010; 2015; Sennott 2011; Wiggins 2020; Lev 2006; Spade 2003; Langer and Martin 2004). Yet the stigmatisation that arises from pathologisation works not only to punish gender non-conforming people but also to reinforce gender normativity by way of deterrence. This is because pathologisation portends that the manifestation of gender non-normativity will invariably lead to misery.

Moreover, by constructing manual hormone use as premised upon injury, the Court deepened its governance of over its subjects’ gender by individualising and medicalising the distress that many trans, intersex, and gender non-conforming people feel as a consequence of living in a society that subjects them to violence. This individualisation and medicalisation responsabilises the victims of this violence for the psychological trauma that they may suffer as a result. It also silences the imperative to correct the structures that produce that violence, and instead focuses corrective efforts upon the normalisation of the people who suffer from it. Along these lines, Langer and Martin (2004, 11–12) charge the DSM’s criteria for gender identity disorder as failing to account for “the difference between distress that is inherent and distress that is socially imposed.” Taking this point further, Sennott (2011, 95) describes the distress associated with gender non-conforming lives as ‘socially imposed’ and as the consequence that comes from living in a world that is actively hostile toward gender non-conformity. Sennott (2011, 95) asks whether distress could instead be considered “a result of oppressive sociocultural structures,” and “whether a person with atypical gender expressions would feel distressed or impaired if transphobia did not exist and gender affirming body modifications were easily accessible.” Burke (2011, 192) states deftly that pathologisation “misdiagnoses the problem, which does not reside in gender-variant identities but in rigid social standards dictating appropriate and inappropriate forms of gender identity and

expression.” As such, by appropriating gender dysphoria as a tool to judge the legitimacy of its subjects’ manual hormone use, the Court did not only require its subjects to be distressed as a condition of manual hormone use. It also required those subjects to uphold a discourse that invisibilises the structural conditions that punish their gender non-conformity and which works therefore to keep punitive gender norms in place. And moreover, those subjects were forced to accept the individualisation and responsabilisation of the harms following from the maintenance of that structure.

Yet the construction of gender non-conformity as inherently distressing also works to keep gender norms in place by implying that ‘normally’ gendered people are satisfied with and not disaffected by their gender. As Kate Bornstein (1994, 118) has argued, the concept of “dysphoria” can be used to pathologise common and reasonable dissatisfaction with the strictures of normative gender roles. She writes:

[N]early everyone has some sort of bone to pick with their own gender status, be it gender role, gender assignment, or gender identity. And when this dissatisfaction can no longer be glossed over with good manners, or cured by purchasing enough gender-specific products or services—and when this dissatisfaction cannot be silenced by the authority of the state, the medical profession, the church, or one’s own peers—then the dissatisfaction is called transsexuality, or gender dysphoria. We’re most of us—whether “transsexual” or not—dissatisfied. Some of us have less tolerance for the dissatisfaction, that’s all. I accept the label transsexual as meaning only that I was dissatisfied with my given gender, and I acted to change it. I am transsexual by choice, not by pathology.

Thus, for Bornstein, pathologising gender dissatisfaction supports the notion that to dissent from gender norms is abnormal, if not dangerous. As such, pathologisation produces dissent as something that governing institutions ought to manage, if not eliminate.

The Court’s construction of mental health as an end that legitimises manual hormone use also governed gender through the entanglement of mental health with

gender normativity. The figure of the mentally healthy subject is riven with gender normative imaginaries regarding how subjects should think, feel, and act. Feminist psychologists have made this point concerning both psycho-medical and popular constructions of mental health (Yost and Smith 2014; A. J. Stewart and Dottolo 2006; Crawford 1989; Kurtiş and Adams 2015; Pugliesi 1992). The dominant schemas that organise such constructions of mental health, according to these critiques, simultaneously pathologise failures to perform an assigned gender role and efface pathologies that attend the successful performance of an assigned gender role. Illustrating this point, feminist psychologists have shown that mental health practitioners have tended to pathologise traits in women when they breach prevailing expectations of femininity, including aggressiveness, assertiveness, overt sexual desire, or impassivity (L. S. Brown and Ballou 1992; Ballou and Brown 2002; Stoppard 2000). All the while, practitioners have tended to qualify male aggressiveness and anhedonia as normal. On this basis, feminist psychologists have argued that constructions of mental illness and health play a key role in reinforcing the reproduction of gender roles.

The entanglement of mental health with gender normativity is also evinced by the plethora of psycho-medical institutions that have pathologised gender non-conformity, both historically and contemporaneously, as well as in the plethora of apparatuses through which those institutions have sought to manage, curb, and eliminate that pathology (Drescher 2010; 2015; De Block and Adriaens 2013; Prosser 1998b; Nicolson 1993; Weeks 1985; 2000; Oosterhuis 2012; Inch 2016; Foucault 1978; Irving 2008; Meyerowitz 2002; Repo 2016). The pathologisation and medicalisation of non-heterosexual practices and minority practices of gender identification, and the production of institutions aimed at eliminating these 'pathologies,' demonstrates the inextricable nature of mental health with gender and sexual norms. As such, if the characterisation of the mentally healthy subject is one that is structured by gender norms, and if legitimate manual hormone use depends upon the promise of becoming mentally healthy, then legitimate manual hormone use also depends upon the promise of becoming gender normative. Or, to put it another way, if the figure of the mentally healthy subject is entwined with the figure of the gender-conforming

subject, then the Court's citation of mental health as an end that legitimises manual hormone use transforms that use into an instrument of gender normalisation.

## Happiness

The Court also cited the prospect that manual hormone use would produce a 'happy' subject as a factor that contributed to its legitimacy. The Court argued that Darcey, Sasha, and Tara's manual hormone use was legitimate, for instance, because this promised to "enhance [their] personal happiness [and] enable a greater enjoyment of life."<sup>286</sup> A similar argument was constructed with reference to "confidence" and "self-esteem." For Lucas and Kelvin, for instance, the Court considered manual hormone use legitimate because this was "likely to increase [their] self-esteem and confidence."<sup>287</sup> Likewise, Gabrielle's and Tahlia's manual hormone use was justifiable because it was expected to improve their "social confidence with [their] girlfriends, family and [their] extended social network."<sup>288</sup> In Eddie's case, too, the Court claimed that "the main advantage" of manual hormone use would be that "he will be more socially confident and able to express himself more easily."<sup>289</sup> Meanwhile, the Court argued that Ashton, Benjamin, Harley, and Kerry had a legitimate claim to use hormones manually because this would be helpful in "boosting [their] self-esteem."<sup>290</sup> Logan's hormone use was justified, similarly, as a strategy to ward off the "significant risk" of "low self-esteem."<sup>291</sup>

The promise that manual hormone use would produce a 'happy' subject also performed a legitimising effect when a subject's happiness had been reported to increase following their passage through 'earlier stages' of medically-assisted gender

<sup>286</sup> Re Darcey ¶27; Re Sasha ¶52; Re Tara ¶19.

<sup>287</sup> Re Lucas ¶44; Re Kelvin ¶34.

<sup>288</sup> Re Gabrielle ¶18; Re Tahlia ¶47.

<sup>289</sup> Re Eddie ¶65.

<sup>290</sup> Re Ashton ¶68; Re Benjamin ¶14; Harley ¶57; Re Kerry ¶70. Similar statements are also made in Re Eddie ¶58, Re Marco ¶59, and Re Xanthe ¶25: that hormones "will enhance [their] self-esteem."

<sup>291</sup> Re Logan ¶72. This risk is also mentioned in Re Lucas ¶39.

affirmation.<sup>292</sup> The Court argued that Andrea’s manual hormone use was legitimate, for instance, because she had “an increased self-confidence and self-esteem and appear[ed] ‘much happier’” since “commencing puberty ‘blockers’.”<sup>293</sup> Similarly, the Court considered the report that Rae “ha[d] become more confident and content” since beginning to take puberty-blocking medication to legitimise her manual hormone use.<sup>294</sup> Jordan’s manual hormone use was justified on the same grounds, with the Court taking into consideration that:

Since commencing [puberty-blocking] treatment . . . Jordan reports that he is no longer depressed, he is no longer suicidal, he is once again feeling happy, he is enjoying life, he is enjoying school, he is studying and achieving well academically, and has been seeing a Psychologist on a monthly basis which has been helping him work through and sort things out in his own mind.<sup>295</sup>

By arguing that happiness is an end that legitimises manual hormone use the Court transformed happiness into an instrument of governance. The use of happiness as an instrument of gender governance has been observed in other settings before. Chu (2018), for instance, has condemned medical practitioners’ use of happiness as a metric to judge the legitimacy of gender-affirming surgical practices:

[A]s things stand today, there is still only one way to obtain hormones and surgery: to pretend that these treatments will make the pain go away. . . . As long as transgender medicine retains the alleviation of pain as its benchmark of success, it will reserve for itself, with a dictator’s benevolence, the right to withhold care from those who want it.

In the present context, happiness operated as a mechanism of gender governance because it arbitrated its subjects’ right to use hormones manually. As such, by citing happiness as an outcome that legitimised manual hormone use the Court *required*

<sup>292</sup> That is, according to the staged model of medical treatment that the medical profession has upheld as best practice (Telfer et al. 2017; World Professional Association for Transgender Health 2011) which, as I discussed in the introduction, formed the basis of the Court’s understanding of medically-assisted transition.

<sup>293</sup> Re Andrea ¶46.

<sup>294</sup> Re Rae ¶17, 82

<sup>295</sup> Re Jordan ¶21.

its subjects to be unhappy as a condition of being authorised to use hormones manually. This requirement would also ensure that already-happy subjects could not access this mode of legitimation because manual hormone use would have no purpose to serve in this context. Moreover, those that did use hormones manually, but either became or continued to be unhappy, would lose their access to this mode of legitimacy thereafter. Happiness thus became *prohibited* for manual hormone users, as once happiness was achieved, manual hormone use would no longer serve a legitimate purpose.

The Court's use of happiness also contributed to the Court's machinery of governance through the entanglement of happiness with gender normativity. Scholars in critical happiness studies have shown that happiness is not an objective entity or experience but a socially and historically subjective phenomenon (Freund 1985; Feldman 2010; Bok 2010; McKenzie 2016; Zevnik 2014; Delle Fave 2013). This means that happiness cannot be cited as a neutral or natural 'good,' as the power relations that structure the socio-temporal context in which it arises will always structure its nature, experience, and effects (Contreras-Vejar, Jen, and Turner 2019). Working from this premise, feminist and queer scholars have tracked the cultural tethering of happiness to hegemonic gender and sexual norms and have argued that happiness plays a role in the reproduction and enforcement of those norms (Lovelock 2019; Love 2007; McGlynn et al. 2020; Berlant 2011; Goltz 2010; Halberstam 2011). For instance, an abundance of work in cultural studies has shown how depictions of non-heterosexual and non-cisgender lives as tragic produce associations between queerness and unhappiness that have disciplinary and performative effects (Namaste 1996b; Love 2007; Ahmed 2010; Goltz 2010; Deshler 2017; Bridges 2018; E. B. Waggoner 2018; Hesselink 2019).

Sara Ahmed (2010; 2015; 2017), too, has contended that the cultural contingency of happiness means that it cannot be disentangled from its investments in sexual and gender norms, and as such that imperative to be happy can function as normalising and regulatory instrument in relation to those norms. She argues that dominant cultural constructions of happiness—what she describes as “happiness scripts”—are often wielded discursively “to redescribe social norms as social goods”

(Ahmed 2010, 2). As such, in Ahmed's view, happiness scripts work to ingratiate subjects toward inhabiting culturally sanctioned, and thus hegemonic, modes of being. She writes that (Ahmed 2010, 2):

happiness is associated with some life choices and not others, [...]  
happiness is imagined as being what follows being a certain kind of  
being . . . In wishing for happiness we wish to be associated with  
happiness, which means to be associated with its associations.

Ahmed notes in particular how the heterosexualisation and gendering of happiness functions to regulate queer people by promising happiness in return for their reproduction of gender and sexual norms. In making this point, Ahmed (2010, 90–92) offers a pertinent example of how the historical linking of “the good life” with “heterosexual conduct, as expressed in romantic love and coupledness, as well as in the idealization of domestic privacy” produces disciplinary effects. Discussing how these discourses work to configure “the queer child [as] an unhappy object for many parents,” she observes that the association between queerness and unhappiness means that “In some parental responses to the child coming out, this unhappiness is not so much expressed as being unhappy about the child being queer, but as being unhappy about the child being unhappy” (Ahmed 2010, 92). In this sense, the parental wish for a child to be happy becomes a wish for that child to become ‘normal.’ As she states, “queers are rewarded with happiness in return for approximating signs of straightness”—and as such, “If queers have to approximate signs of happiness in order to be recognized, then they might have to minimize signs of queerness” as well (Ahmed 2010, 94, 115). For this reason, Ahmed (2010, 91) asserts that “happiness scripts could be thought of as straightening devices, ways of aligning bodies with what is already lined up.” Ahmed argues on this basis that freedom from harmful gendered norms requires a negative orientation toward happiness norms.<sup>296</sup>

Katrina Roen's (2016; 2019) work on the construction of trans and gender diverse young people in psycho-medical clinical practice resonates strongly with Ahmed's critiques of happiness. Roen (2019, 8) identifies how happiness works *upon* trans and

<sup>296</sup> Ahmed illustrates this through her figure of the “feminist killjoy,” which is developed comprehensively in *Living a Feminist Life* (2017, especially 251–268).

gender diverse young people as a kind of discipline, writing that “emotions such as happiness are intricately woven into the norms that structure gendered development and the process of coming into being as a young (trans) adult.” Roen argues further that the construction of happiness as the goal that clinicians strive to achieve for trans youth is one that is linked with heterosexual and cisgender imaginations of ‘the good life.’ As such, she argues that gender normativity becomes a central feature of clinical practice *via* its orientation toward happiness (Roen 2019, 2):

[It is the] familiar and ordinary binary gender framework [that] provides the grounds for gender dysphoria [and so] it seems commonsensical to reach for that framework to try and steer gender dysphoric youth back onto a pathway that is (heteronormatively) recognisable [sic] and safe . . . [Yet] binary gender does not provide [everyone] a safe space of belonging.

Chu (2018) criticises the role that happiness plays as a metric of the legitimacy of gender-affirming practices on similar grounds. Reflecting upon her own experience of seeking gender-affirming care in a medical system that is organised around the pursuit of happiness, she states bluntly: “my new vagina won’t make me happy, and it shouldn’t have to.” She continues:

Next Thursday, I will get a vagina. The procedure will last around six hours, and I will be in recovery for at least three months. Until the day I die, my body will regard the vagina as a wound; as a result, it will require regular, painful attention to maintain. This is what I want, but there is no guarantee it will make me happier. In fact, I don’t expect it to. That shouldn’t disqualify me from getting it . . . [I] believe that surgery’s only prerequisite should be a simple demonstration of want. Beyond this, no amount of pain, anticipated or continuing, justifies its withholding . . . The negative passions—grief, self-loathing, shame, regret—are as much a human right as universal health care, or food. There are no good outcomes in transition. There are only people, begging to be taken seriously.

In light of these critiques, the Court's use of happiness as a metric to judge the legitimacy of manual hormone must be read as contributing to its machinery of gender governance. If the achievement of happiness depends, as Ahmed and others assert, upon the achievement of normative gender, then by orienting its subjects toward happiness the Court was also orienting its subjects toward gender normativity. Or, to put this another way, if the Court desires the production of happy subjects in a social context that punishes gender nonconformity and rewards gender conformity then the Court must also desire the kinds of gendered subjects that will be able to achieve that form of happiness.

### **Assimilation**

In the Court's view, manual hormone use was also legitimate if it promised to help its subjects to assimilate into their social environment. This reasoning appeared in both Kelvin and Marco's cases where the Court stated that manual hormone use was justified because the "affirmation of [a subject's] gender identity . . . typically results in improved social outcomes in both personal and work lives."<sup>297</sup> Likewise, the Court deemed Lucas' manual hormone use legitimate because it predicted that this would make him "more likely to fit in with his peer group as he will be in a similar physical developmental level to the rest of the boys his age."<sup>298</sup> In several other cases, the Court cited the "facilitation of social acceptance,"<sup>299</sup> "an improvement in the child's social experience," "increased capacity for social relationships,"<sup>300</sup> and "more confidence moving amongst [their] peers in day to day activities"<sup>301</sup> as 'goods' that manual hormone use might generate.

<sup>297</sup> Re Kelvin ¶36; Re Marco ¶45.

<sup>298</sup> Re Lucas ¶44.

<sup>299</sup> Re Xanthe ¶29; Re George ¶14; Re Marco ¶49. This argument is also offered in different terms in Re Adrian ¶32 and Re Bobbie ¶23.

<sup>300</sup> Re Darcey ¶27. For Tara, this is expressed as "an increased ease in social relationships:" Re Tara ¶19.

<sup>301</sup> This phrase appears in near identical form in Re Martin ¶43 and Re Harley ¶53, 56. For Gabrielle and Tahlia, this is also expressed as manual hormone use bringing about greater "social confidence with [their] girlfriends, family and her extended social network": Re Gabrielle ¶18; Re Tahlia ¶47.

One of the ways that the Court explained the ability of manual hormone use to enhance a subject's social integration was with reference to its capacity to strengthen the cohesiveness of their gender presentation. This assertion appeared in Flynn's, Gabrielle's, and Kate's judgments, where under the heading of "effects of treatment" the Court recorded the "social benefits of greater aesthetic consistency with [their] gender identity."<sup>302</sup> The Court argued similarly in Sasha's case, reasoning that "Given [Sasha] is socially living life as female and will be attending school in female dress, the use of hormone therapies consistent with her gender assignment will have significant social benefits for her."<sup>303</sup> While the Court did not provide any further guidance on what such 'consistency' might entail, it nonetheless asserted that (1) there are more or less consistent ways of manifesting gender, (2) a more consistent gender presentation is more likely to achieve social success, and (3) the measure of the subject's social success in manifesting their gender can and should serve as a measure of the desirability of that gender.

Similar discussions arose in the Court's judgments regarding the prospect that manual hormone use might help its subjects to pass. The Court argued that manual hormone use was legitimate in Rae's case, for instance, because "looking like a man or woman when living as the opposite sex creates difficult barriers with enormous life-long disadvantages."<sup>304</sup> Meanwhile, in Lincoln's case, it was the prospect that *not* using hormones manually would "pose an obstacle to [Lincoln's] ability to pass as a male amongst his new peers in his tertiary studies" that justified authorisation.<sup>305</sup> The Court reasoned that if Lincoln were unable to pass it would be "very difficult [for him] to form friendships and relationship [sic] due to inner conflicts, body dysmorphia and self-loathing."<sup>306</sup> Being unable to pass would, in turn, make him "very likely to underachieve academically, isolate himself socially and become extremely angry and self-destructive."<sup>307</sup> In each of the above scenes, the legitimacy

<sup>302</sup> This appears identically in Re Flynn ¶47; Re Gabrielle ¶17; and Re Kate ¶54.

<sup>303</sup> Re Sasha ¶47.

<sup>304</sup> Re Rae ¶53.

<sup>305</sup> Re Lincoln ¶26.

<sup>306</sup> Re Lincoln ¶26. A near identical statement appears in Re Marco ¶60 and Re Xanthe ¶27.

<sup>307</sup> Re Lincoln ¶26.

of manual hormone use is framed as secured by the capacity of those hormones to produce a subject that can successfully assimilate into their social environment. The concern here is with how well the subject can ‘fit in’ with or become incorporated within the current gender order and operate successfully within it. To assimilate, in this sense, is to be recognised as ‘like,’ to not ‘stand out’ as different, and to therefore gain access to the privileges that are associated with integration.

To this end, the Court often treated as legitimising reports that stated that a subject’s desire to use hormones manually arose directly from their willingness to pass. In Marco’s case, for instance, the Court found it important that Marco “hopes to be seen and accepted as male by society” and that he considered manual hormone use to be an instrument for achieving that end.<sup>308</sup> In both Sasha and Xanthe’s cases, meanwhile, the Court took as evidence in support of their manual hormone use a report that stated that its subject “strongly desires to be seen, known and treated as a [fe/]male.”<sup>309</sup> Likewise, Harley’s manual hormone use was legitimised on the basis of his desire for “people to treat him as a boy.”<sup>310</sup> Kelvin’s case was similarly assisted by a report that he sought to use hormones manually as a means to “pass all the time” and “be comfortable being seen as [a male].”<sup>311</sup> Further, the Court recited a report from Kelvin that stated: “I don’t want to be sending mixed messages, I want people to be certain and see me as male . . . I need to pass all the time and I don’t want to be misgendered.”<sup>312</sup> In this sense, the Court treated it as important that the telos motivating its subjects’ manual hormone use was the realisation of a socially unambiguous and recognisable form of gender.

The Court also argued that manual hormone use could be used legitimately as a strategy of violence prevention along these lines. In Logan’s case, for instance, the Court reasoned that to deny Logan the right to use hormones manually would be to expose her to the “psychological and social risk of being visually gender non-

<sup>308</sup> Re Marco ¶47.

<sup>309</sup> Re Sasha ¶31; Re Xanthe ¶5.

<sup>310</sup> Re Harley ¶50.

<sup>311</sup> Re Kelvin ¶34.

<sup>312</sup> Re Kelvin ¶34.

conforming” which included the “risk of prejudice and violence.”<sup>313</sup> The Court further elaborated on the relationship between Logan’s ability to pass and her susceptibility to violence, forewarning that “[if] her body becomes more masculine [she] will be more at risk from the community at large.”<sup>314</sup> As such, the Court reasoned that manual hormone use could be authorised as a means of violence prevention. In this sense, manual hormone use became legitimate to the extent that it could feminise Logan’s body in a manner that would reduce her susceptibility to violence. Analogous remarks appeared in Xanthe’s case, where the Court identified gender non-conformity as giving rise to several risks, including “rejection by family and friends, discrimination in public and the workplace, harassment and abuse, including physical attack and rape.”<sup>315</sup> On this basis, the Court argued that manual hormone use could become legitimate as a means to ward off “transphobic people”—that is, as a means to produce a subject that would not “be perceived as [...] a target” for abuse.<sup>316</sup> The Court thus constructs manual hormone use as a means to assimilate subjects into their social environment such that they might avoid facing marginalisation on account of their inability or refusal to adhere to the strictures of normative gender.

That assimilability functioned as a *telos* that justified manual hormone use in these cases means that assimilability also contributed to the Court’s machinery of governance. This is because by citing assimilability as a metric that determined the legitimacy of a subject’s manual hormone use the Court transformed it into a tool for arbitrating which gendered possibilities its subjects would be allowed to realise. As such, the Court’s discourses on assimilability worked to govern gender by tethering its subjects’ ability to use hormones manually to their inability to assimilate without it, as well as to their promise to do so as a means to enhance their assimilability. This suggests not only that the Court desired the production of an

<sup>313</sup> Re Logan ¶72.

<sup>314</sup> Re Logan ¶70, 72.

<sup>315</sup> Re Xanthe ¶26. This risk is also mentioned in Re Marco ¶42.

<sup>316</sup> Re Xanthe ¶26.

assimilated subject but also that the Court wanted to ensure that hormones were only used manually to produce an assimilable subject.

The Court's investments in the production of an assimilable subject contributed to its machinery of gender governance because assimilability and gender normativity are inextricable. As feminist, queer, and trans scholars have consistently shown, the ability to assimilate into any given social environment depends, in part, upon compliance with the gendered expectations of that environment (Gagné and Tewksbury 1998; Sycamore 2006; A. D. Anderson et al. 2020; C. Connell 2010; Kessler and McKenna 2000; Cunningham 2018; Kessler and McKenna 1978; R. Connell 1987; West and Zimmerman 1987; Acker 1992; P. Y. Martin 2004). The norms that govern social acceptability, particularly in the spaces that the Court mentions, are structured invariably by gendered expectations that privilege conformity and punish difference. This point has been made well by trans scholars in their discussions on passing. Passing, they point out, arbitrates the attribution of gender legitimacy in contemporary Western societies, and in doing so requires that trans and gender non-conforming people re-enact normative gender as a condition of their viability (Sycamore 2006; Gagné and Tewksbury 1998; A. D. Anderson et al. 2020; Begun and Kattari 2016). Namaste (1996a, 590) has written about the relationship between passing and social opprobrium, for instance, and notes that:

because most people believe that there are only “men” and “women,” transgendered people need to live as one or the other in order to avoid verbal and physical harassment. In transgendered communities, this is known as the need to pass.

Sandy Stone (2006), making a similar observation, has also criticised the fact that passing is used as a metric of trans people's “success” on the basis that this prohibits the envisaging and enacting of lives beyond the confines of dominant gender scripts. For Stone (2006, 232), that passing requires compliance with rigid gender norms means that passing is an “extremely high price to pay for acceptance.” In this light, assimilability can be understood as a metric of gender normativity, as assimilation necessarily entails conforming to the gendered norms that govern inclusion in a given setting.

And indeed, the Court acknowledges the relationship between gender norms and assimilability directly in the instances that I have just discussed. This is illustrated most blatantly in the several cases where the Court linked the legitimacy of its subjects' manual hormone use to their capacity to produce a gender presentation that was compliant enough to facilitate social acceptance. For instance, the claim that the Court leveraged in several cases, that greater "aesthetic consisten[cy]" in a subject's gender presentation will lead to "social benefits," can only work in a social context that privileges certain gendered expressions over others, and that structures social viability according to the maintenance of certain gender norms. This is to say that the notion that manual hormone use can be used to produce a socially acceptable form of gender can only hold in a social context where one's enactment of gender bears relevance for one's ability to succeed socially. As such, in having required its subjects to aspire to the accomplishment of these "social benefits," the Court required them to use hormones manually to produce the requisite forms of gender that will grant them access to those benefits. Moreover, this meant that the Court recruited its subjects into re-enacting the system of normativity from which the norms that govern assimilability arise.

In this way, the Court's discourses on assimilability governed gender not only by requiring that subjects work toward enacting a normative form of gender but also by requiring them to participate in denigrating failures to assimilate. By constructing assimilation as an end that subjects *ought* to pursue, and by requiring that its subjects complied with this imperative, the Court asserted that deviance from the norm ought to be corrected and that technological interventions could be justified to accomplish this end. Queer scholars have identified this dynamic elsewhere in liberal models of minority inclusion premised on 'respectability.' These models argue that subjects ought to be conferred rights conditionally upon their promise to reflect and uphold, rather than threaten, a society's dominant norms (Edelman 2004; Duggan 2003; Warner 1993; 1999; Sullivan 2003; Muñoz 2009; Phelan 1997; Kampler and Connell 2018; Mathers, Sumerau, and Cragun 2018; Bernstein, Harvey, and Naples 2018; Reynolds 2013; D. Martin 2018; C. A. Ball 2016). Sullivan (2003, 30) describes this move as "a capitulation to hegemonic heteronormative discourses and discursive

practices which ultimately function to destroy (and/or to cure) difference.” As such, the Court’s discourses on assimilability worked simultaneously to ensure that its subjects strove to enact socially compliant forms of gender and to suppress presentations of difference that might threaten their assimilability. This imperative was governing not only because subjects were required to recreate prevailing norms, but also because those norms marginalised the very subjects that the Court coerced into recreating them. In this sense, the Court reinforced the norms that govern assimilability by recruiting those subjects that were most threatening them.

The imperative to assimilate also contributed to gender governance by reinforcing broader systems of gender normativity. By only allowing its subjects to use hormones manually to enact forms of gender that could secure their assimilation, the Court ensured that subjects could only use hormones manually to reinforce the legitimacy of the norms that governed their inclusion. To argue that assimilability is an end that justifies manual hormone use in this way is to argue that failures or refusals to assimilate can and ought to be corrected. This logic motivates violence against gender non-conforming people (Namaste 1996a; Lombardi et al. 2002; Jauk 2013; Perry and Dyck 2014; Jamel 2017; Bettcher 2007) Thus, by supporting the power of the social to be an arbiter of gender legitimacy, in a social context where non-normative performances of gender prompt violence, the Court reinforced the legitimacy of those forms of violence that seek to eliminate non-conformity. Moreover, in doing so, the Court not only failed to problematise the violence directed toward its subjects as a social pathology. It also responsabilised the recipients of that violence for their victimisation by suggesting that they ought to capitulate to the norms that produced it. In this way, the Court made manual hormone use perform the same function as the violence that it legitimised manual hormone use to prevent.

## **Sexuality**

The prospect that manual hormone use could secure a subject’s sexual viability was another factor that the Court constructed as contributing to its legitimacy. In

Harley's case, for instance, the Court advanced this argument by stating that manual hormone use was legitimate because this would enhance his "capacity to explore his ordinary sexual feelings," and help him "to develop a more confident interest in his own sexuality," such that he would become "more confident in exploring and developing personal and potential intimate and sexual relationships in future."<sup>317</sup> Moreover, it stated in Harley's case, as well as several others, that one of the effects of manual testosterone use would be "the likely stimulation of more assertiveness and sexual desire."<sup>318</sup>

The Court was similarly concerned with its subjects' 'sexual development' in several other cases. It legitimised Celeste's manual hormone use, for instance, because it believed that this would "facilitate her normative psychological, social and sexual development."<sup>319</sup> In Sasha's case, too, the Court was concerned to note that her manual hormone use was occurring "at a crucial period of her social and sexual development."<sup>320</sup> Conversely, manual hormone use was justified for Martin because the Court was concerned that he would "be unable to develop romantic interests" without it.<sup>321</sup> These cases demonstrate that the Court saw the achievement of sexuality as a necessary and valuable end that manual hormone use could help its subjects to achieve. The Court considered this vital because it believed that the accomplishment of sexuality is essential both for normal adolescent development as well as for their well-being. As such, the legitimate manual hormone user, in the Court's view, is a subject that 'lacks' sexuality—that is, one that inhabits a state of sexual deficit—such that manual hormone use can ameliorate that deficiency.

The Court's construction of legitimate manual hormone use as a mechanism to produce a sexually viable subject transformed sexual viability into an instrument and object of governance. This is because, in doing so, it transformed sexual viability into an index that the Court could cite to either facilitate or prohibit their manual

<sup>317</sup> Re Harley ¶53-56. The Court records similar statements in Re Martin ¶43.

<sup>318</sup> Re Harley ¶54, 56; Re Martin ¶43; Re Ashton ¶57; Re Emery ¶53; Re Mason ¶27; Re Christopher ¶20; Re Isaac ¶16; Re Spencer ¶19; Re Mitchel ¶26; Re Julian (2017) ¶23.

<sup>319</sup> Re Celeste ¶42.

<sup>320</sup> Re Sasha ¶41.

<sup>321</sup> Re Martin ¶18.

hormone use. Consequently, manual hormone users needed to inhabit a state of sexual deficit to achieve legitimacy, because in the absence of such a deficit manual hormone use would not have a legitimate purpose to serve. Accordingly, this discourse also required manual hormone users to strive toward the achievement of sexuality as a condition of their legitimacy. These discourses thus established a form of sexual surveillance that authorised the Court to monitor and direct its subjects' sexual activity and desire. This contributed to the enforcement of sexuality as a compulsory social practice—an imperative that works both within and beyond the Court to coerce subjects into establishing normative sexual relations. It also works to construct asexuality and non-sexuality as pathological and non-desirable (Przybylo 2011; Bogaert 2015; Carrigan 2011).<sup>322</sup>

In this way, these discourses also contributed to the already pervasive power that States wield to govern their subjects' sexuality. This is a power which scholars in the field of sexual citizenship have shown to be invested in the production of sexual subjects and modes of sexual reproduction that align with State interests and the prevention, exclusion, and destruction of those that do not (D. Evans 1993; Richardson 2000; Seidman 2001; Stychin 2001; Lister 2002; Cossman 2007; Puri 2016; Josephson 2016; Richardson 2017; Aggleton et al. 2018; Kapur 2005). Yet more specifically, it also contributed to an already pervasive set of State systems that are directed at the regulation and control of childhood and adolescent sexualities (Monk 1998; Aggleton et al. 2019; Brownlie 2001; Carter 2014; Edelman 2004; Haywood 1996; C. Howard, Hallam, and Brady 2016; Mann 2013; McDonald 2012; Best and Bogle 2014; Nakata 2015; K. H. Robinson 2012; Rollins 2015; Schalet 2000; van Loon 2007; Waites 2005; Angelides 2019; Pande 2012). As Rosky (2013) identifies, there are a vast array of regulatory apparatuses, many of which are State and legal institutions, that are animated by what he calls the “fear of the queer child” and an imperative to

<sup>322</sup> Asexual and non-sexual people are marginalised legally, socially, and politically in societies that normalise and centralise sexual desire in a manner that casts as deviant or deficient subjects that do not express or practice sexual desire (Bogaert 2015, 368; Przybylo 2011; Gupta 2017; Carrigan 2015). As Gupta (2017, 991) argues, “the privileging of sexuality and the marginalizing of nonsexuality” is an organising social practice in contemporary Western societies, and as a result asexuality and non-sexuality are often stigmatised as shameful and/or pathological.

orient children toward normative heterosexuality (see further Rosky 2014; 2016). As such, when the Court constructed manual hormone use as a legitimate tool for ensuring the production of an optimally sexual subject, it participated in a broader system of control that works to prevent the manifestation of ‘deviant’ childhood and adolescent sexualities and to secure the production of ostensibly ideal sexual subjects.

Yet in addition to enacting a form of sexual governance, the Court’s construction of sexual viability as a telos that justifies and motivates manual hormone use also worked to govern its subjects’ gender. This is because the Court treated gender and sexuality as inextricable throughout its judgments, such that the accomplishment of sexual viability was, in the Court’s view, coextensive with the accomplishment of gender normativity. As such, by tethering its subjects’ ability to use hormones manually to their orientation toward sexual viability, the Court made its subjects’ manual hormone use conditional upon their willingness and ability to become gender normative. This notion was expressed in several instances where the Court imagined that manual hormone use would ‘solve’ the ‘problem’ of its subjects’ deficient sexuality in the same way that it imagined manual hormone use could solve the problem of their social assimilation: that is, through the production of a coherent and thus desirable form of gender. This was clear in Gabrielle’s case, where the Court reasoned that once “her body becomes more obviously feminine” she will be able “to explore personal relationships with boys in a much more relaxed and confident way.”<sup>323</sup> Here, the Court suggests that manual hormone use will enhance Gabrielle’s success in romantic and sexual relationships *via* its capacity to produce corporeal femininity. This is to say that the Court imagines that manual hormone use will manifest a form of *gender* that makes *sexuality* possible. Inversely, the Court suggests that a masculine or non-feminine body will make such relations “*with boys*” more difficult, if not impossible. This construction is simultaneously gender and hetero-normative: it suggests that Gabrielle’s capacity to desire and be desired sexually as a woman is conditional upon her achievement of femininity, and conversely, that masculine or non-feminine women are both less desirable and less capable of desire.

<sup>323</sup> Re Gabrielle ¶18.

The Court advanced a comparably heteronormative construction of the relationship between gender and sexuality in Julian’s case, where it argued that Julian’s desire to follow a heterosexual life course justified his manual hormone use. This appears in a discussion where the Court asserts that manual hormone use might assist Julian in achieving his desire “to have a girlfriend and eventually a wife, and have the care of children[.]”<sup>324</sup> In this context, the legitimate purpose of manual hormone use becomes supporting Julian’s accomplishment of heterosexuality, which in this context entails both sexual and gendered relations.

The Court also constructed sexuality and gender as co-extensive while debating the legitimacy of its role in arbitrating manual hormone use. In *Re Jamie* (2013), for instance, Chief Justice Diana Bryant intertwined gender and sexuality while arguing that the uncertainty surrounding the question of whether young people are capable of deciding for themselves whether to use hormones manually was one of such significance that it justified the Court’s intervention. She wrote:

one might think that, of all the medical treatments that might arise, treatment for something as personal and essential as the perception of one’s gender and sexuality would be the very exemplar of when the rights of the *Gillick*-competent child should be given full effect.<sup>325</sup>

Contrarily, in Flynn’s case, Justice Berman leveraged a conception of sexuality and gender as coextensive to criticise the Court’s involvement in arbitrating manual hormone use:

Whilst not requiring a resolution, it is interesting to ponder on whether the Family Court should play any role in determining what should be done about a young person’s gender or their preference. The underlying rationale is that gender dysphoria is in and of itself a medical disorder, illness or condition. It may very well be nothing more than sexual preference which should not involve the court, particularly in

<sup>324</sup> *Re Julian* ¶50.

<sup>325</sup> *Re Jamie* (2013) ¶125.

circumstances where there is no opposition or resistance to the proposed course of treatment or procedure.<sup>326</sup>

Berman's assertion that issues of "sexual preference" ought not to be issues of law reflects liberal constructions of sexuality that have been used to argue for the extension of social and political rights to same-sex couples in Western states in recent years (Phelan 2000; C. A. Ball 2001; D. Martin 2018; Tremblay, Paternotte, and Johnson 2016). Thus, suggesting that the 'freedoms' associated with sexuality should apply in this case, Berman leverages a conception of sexuality and gender as homologous in the eyes of the Court. Indeed, Berman's belief in the entanglement of gender and sexuality was so durable that he insisted on their interchangeability despite recording protestations from Flynn "that it was not her 'sexuality' that was an issue but rather her 'gender'."<sup>327</sup>

The Court treated sexuality and gender as inextricable in several other ways throughout its judgments as well. In Sasha's case, the Court collapsed gender into sexuality by framing manual hormone use as for the purpose of producing "physical changes which [will] bring about the characteristics of [her] affirmed sexual identity."<sup>328</sup> A similar conflation appears in Shay's case, where the Court framed its task as being to determine "whether Shay has achieved a sufficient understanding and intelligence to enable her to understand what is proposed in relation to a medical process which, if implemented, would affect her sexuality."<sup>329</sup> In both instances, the Court supposed that the form of gender that manual hormone use was going to enact would necessarily restructure its subjects' sexuality. A different yet nonetheless instrumental conflation of gender and sexuality is present in Anita's case. There, the Court cited a report that Anita is "exclusively sexually attracted to males" to corroborate the statement that "She regards herself as a female person and desperately wants to develop physically as a female."<sup>330</sup> In this scene, the Court

<sup>326</sup> Re Flynn ¶24.

<sup>327</sup> Re Flynn ¶34.

<sup>328</sup> Re Sasha ¶4.

<sup>329</sup> Re Shay ¶3.

<sup>330</sup> Re Anita ¶21.

supposed that being sexually attracted to males is, at least in part, indicative of being female in gender.

The Court also cited a relationship between sexuality and gender to judge the legitimacy of manual hormone use in Marley's case, where it took a report that "his peers viewed him as a 'butch lesbian'" as corroborating his male gender.<sup>331</sup> This figure of the "butch lesbian" infers a specific entanglement of gender and sexuality. As Gayle Rubin (2012, 242) notes, "Butch is most usefully understood as a category of lesbian gender that is constituted through the deployment and manipulation of masculine gender codes and symbols." When operating together, the terms 'butch' and 'lesbian' suggest a confluence of masculinity and female-desiring sexuality that is not inferred by either term on its own (see further Halberstam 1998a). In this way, by reporting that Marley's "peers viewed him as a 'butch lesbian,'" the Court worked to institute a conception of Marley as already inhabiting a masculine positionality. Marley's configuration as a "butch lesbian" suggested that his masculinity exceeded both his designation as a 'woman' as well as his designation as a 'lesbian.' In some sense, then, the figure of the butch lesbian might have helped the Court to imagine that Marley was already a man in the making.

The Court also entangled gender and sexuality when accounting for the censure that its subjects had experienced in relation to their gender nonconformity. For instance, when the Court noted that "Kate was teased by some of her peers for being gay or being a girl" it explained Kate's victimisation as the product of a coterminous breach of sexuality ("being gay") and gender norms ("being a girl").<sup>332</sup> Likewise, the Court explained Logan's experience of "bullying and violent physical (including beatings) and emotional treatment" by reciting a report that Logan had submitted to a Family Consultant to suggest that "the perpetrators were threatened by her 'trans gender and gayness'."<sup>333</sup> Here, the Court proposed that Logan's sexuality and gender functioned *in union* to precipitate her victimisation. This suggestion also appears in Dale's case, who the Court stated had been "enrolled in Year 9 at a high

<sup>331</sup> Re Marley ¶13.

<sup>332</sup> Re Kate ¶8.

<sup>333</sup> Re Logan ¶32.

school with an expressly open attitude towards the *sexual preferences* of students” as a strategy to avoid gender-based harassment.<sup>334</sup>

The Court was not mistaken in asserting gender and sexuality are inextricable and mutually constitutive. Feminist, queer, and trans scholars have long argued that sexuality and gender are coextensive, albeit on the basis of different ontological and epistemic positions (K. Johnson 2012; P. Elliot 2010; Marinucci 2010; Chu and Drager 2019). The interdependence of sexuality and gender is a central tenet of radical feminism, for instance, which argues that gender is produced by patriarchal sexual relations (MacKinnon 1989; A. Dworkin 1974; Rich 1980; Bartky 1990). MacKinnon (1983, 635) frames the relationship between sexuality and gender in this way:

[S]exuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other.

Wittig (1992; see further Hale 1996) advanced this position as well when she argued that lesbians are not women. “Lesbians are not women,” she stated, because “woman’ has meaning only in heterosexual systems of thought and heterosexual economic systems” (Wittig 1992, 32). This is to say that the category of woman, according to Wittig, is produced through heterosexual relations with men. As such, that lesbians (by her definition) refuse to be in such relations means that they cannot count as women. She explains (Wittig 1992, 20):

Lesbian is the only concept I know of which is beyond the categories of sex (woman and man), because the designated subject (lesbian) is not a woman, either economically, or politically, or ideologically. For what makes a woman is a specific social relation to a man, a relation that we have previously called servitude, a relation which implies personal and physical obligation as well as economic obligation (“forced residence,” domestic code, conjugal duties, unlimited production of children, etc.),

<sup>334</sup> Re Dale ¶44.

a relation which lesbians escape by refusing to become or to stay heterosexual.

In this sense, for Wittig, sexuality (heterosexuality) produces gender (woman) such that the absence of heterosexuality precludes the presence of womanhood.

Successive feminist and queer theories have revised the determinative relationship between sexuality and gender that Wittig, MacKinnon, and others proposed. This more recent scholarship advocates for a pluralised and mutually constitutive—yet still inextricable—understanding of the relationship between sexualities and genders (e.g. Hale 1996; Butler 1999; Halberstam 1998b; Califia 2003). Along these lines, an abundance of work has traced and troubled the cultural role sexuality plays in producing subjects as ‘men’ and ‘women.’ This includes scholarship that has traced the role that coming-of-age narratives play in constructing the acquisition of sexuality or participation in sexual intercourse as moments where a subject transitions from childhood into adult wo/manhood, for instance (Waites 2005; Clarke 2010; Pande 2012; Angelides 2019; Aggleton et al. 2019). These constructions attribute penetrative sex the power to produce a wo/man, and thus invest in broader heteronormative and gender normative imaginaries of adulthood (Cohler and Hammack 2007; E. Freeman 2007; McBean 2013; McCallum and Tuhkanen 2011; Stockton 2009; Matz 2015). Feminists and queer scholars have pointed out that sexual practices are defined in relation to gender norms, showing that the term ‘sex’ does not describe any stable set of acts but refers to acts constructed *as* sex and that the prospect of a practice being described as ‘sex’ is culturally moderated by its conceptual proximity to heterosexual penis-in-vagina intercourse ending in ejaculation (G. Rubin 2012; A. Dworkin 1974; Rich 1980; Segal 2015; Thomas 2000). Scholars have pointed out, too, how gender norms work to both police and produce sexual practices that violate those norms as ‘deviant,’ such that a practice’s cultural acceptability is determined predominantly by its conceptual proximity to conjugal, heterosexual, penetrative, and missionary intercourse (G. Rubin 2012). There is also a large body of scholarship that has theorised the homophobia directed toward men as a form of misogyny. These works argue that homophobia works to reinforce gender binarism as such by (a) disciplining men who

have sex with men for failing to perform normative masculinity on the basis that being a man requires the penetration of women and the abjection of being penetrated, and (b) asserting the inferiority of femininity (R. Connell 2005; Mason and Tomsen 1997; Mason 2002; Serano 2007; Sedgwick 1991; Tomsen and Mason 2001; Pascoe 2012; Theodore and Basow 2000; M. S. Kimmel 2009; Plummer 1999; Namaste 1996a). Work has also shown how expressions of asexuality and non-sexuality are often taken to destabilise gender intelligibility, indicating that sexual practice is often seen as necessary for the apprehension of a secure gender (Cerankowski and Milks 2010; 2014; Przybylo 2011; Chasin 2013; Gupta 2017).

Taken collectively, the inextricability of sexuality and gender both within the Court's judgments and beyond suggests that when the Court constructed sexual viability as a telos that motivates and justifies manual hormone use it also made the production of a certain kind of gender a condition of its subjects' ability to use hormones manually. Given that sexuality is one of the primary mechanisms through which genders are produced, the Court's concern regarding its subjects' accomplishment of sexuality cannot have functioned as a concern for sexuality's sake alone. Rather, the inseparability of sexuality and gender means that any concern with its subjects' sexuality must have also functioned as an instrument through which the Court's regulation of manual hormone use governed its subjects' gender.

## Adulthood

The Court also argued that manual hormone use could be legitimate as a means to transform its subjects into ideal adults. The Court viewed its subjects as amid a "transition phase from childhood to adulthood,"<sup>335</sup> and it considered itself responsible for ensuring that this transition was completed successfully. It took this responsibility seriously because it believed that its intervention held at stake the kind

<sup>335</sup> Re Ashley ¶56; Re Dale ¶72; Re Isaac ¶45; Re Julian (2015) ¶65. This conceptualisation of childhood/adolescence as transitional is codified as part of the *Gillick* standard to which these cases were held. There is a range of literature that critically analyses the conceptualisations of childhood embedded in *Gillick* (Moran 1986; Pilcher 1997; M. Freeman 2005; Cave 2014; Nakata 2015, 102–7).

of adult subject that would emerge, and that if it did not intervene there was a risk that this transition could fail. In this light, it argued that manual hormone use could be legitimate if it would ensure that its subject matured ‘correctly.’

In many cases, the Court *explicitly* stated that the telos that justified and motivated manual hormone use was the production of an ideal adult subjectivity. In Chelsea, Drew, and Kelvin’s cases, for instance, the Court reasoned that manual hormone use was legitimate because it would help its subject to “evolve into a healthy and well-adjusted adult.”<sup>336</sup> The Court put forward a similar argument in Mitchell’s case, explaining that Mitchell’s manual hormone use was justified because this was his “best opportunity . . . to live as a productive and happy adult.”<sup>337</sup> Likewise, the Court justified manual hormone use in Karsen’s, Hudson’s, and Marley’s cases as a means to ensure that they “continue to develop into adult manhood.”<sup>338</sup> Colin’s manual hormone use was legitimate, meanwhile, because this would “allow [him] to continue to mature and blossom.”<sup>339</sup> Here, the Court analogises Colin’s progress toward adulthood as akin to a plant commencing sexual reproduction. To expand the metaphor, this suggests that Colin’s manual hormone use is legitimate because it will help him to ‘flower’—that is, to progress to the next stage of his natural life course (sexual maturity) and move beyond the initial phases of germination and growth. In the absence of manual hormone use, the Court feared that Colin might remain perpetually immature, and as such, might wilt.

The Court established the production of an ideal adult subjectivity as the telos that justifies manual hormone use in several other ways throughout its judgments as well. For Brittany, Ashley, Andrea, Benjamin, and Julia, the Court legitimised manual hormone use as a strategy to “maximise [their] emotional, social and educational potential.”<sup>340</sup> This statement demonstrates a concern with producing the

<sup>336</sup> This phrase appears in identical form in Re Chelsea ¶13; and Re Drew ¶30; Re Kelvin ¶35.

<sup>337</sup> Re Mitchell ¶38.

<sup>338</sup> Re Karsen ¶1; Re Hudson ¶1; Re Marley ¶1.

<sup>339</sup> Re Colin ¶55.

<sup>340</sup> This phrase appears in near identical form in Re Brittany ¶13; Re Ashley ¶44, 62; Re Andrea ¶55; Re Benjamin ¶15; Re Julian ¶29. In a few other cases, this is written as the promise that hormones “will ensure optimal emotional, social and psychological development.” Ashton ¶68; Re Harley ¶57; and Re Benjamin ¶14.

'best' subject possible and recruits manual hormone use as a means to accomplish this ideal. The Court also expressed concern that *not* allowing its subjects to use hormones manually might negatively impact their ability to realise adulthood. In Martin's case, this was expressed as a concern that if he were deprived of the ability to use hormones manually he would also be "deprived of the possibility of achieving his own developmentally appropriate personal goals."<sup>341</sup> This concern was also at the fore in Marco's case, where the Court recorded that "the anxiety about being seen, treated and accepted as a male"—which it considered manual hormone use would ameliorate—"is proving a significant additional barrier to his late adolescent social development."<sup>342</sup> In this context, the Court constructed the legitimacy of Marco's manual hormone use as arising from its power to liberate Marco from his state of arrested development and to help him "reach his full life's potential."<sup>343</sup>

The teleology that the Court cited in each of these instances replicates dominant Western constructions of the developmental life course. This is a way of narrating the lives of human beings as organised into a series of discrete developmental stages, beginning in infancy, moving to childhood, then adolescence, adulthood, middle age, and ending in old age (James and Prout 2015a; Fass 2013; Stearns 2006; Heywood 2001). Within this discourse, these life stages are conceptualised as bounded and independent phases, the boundaries of which are governed by 'rites of passage' which, if successfully navigated, allow a subject to pass from one stage to the next. As such, each life stage is imagined to comprise a distinct set of aims, events, and ends that allow development to progress, and as such, which confer a unique set of attributes upon its incumbents by virtue of their ostensibly linear and ongoing development.

These constructions of the life course are culturally and historically specific. Sociologists and historians have shown that classifications relating to age and life course such as childhood, adolescence, and adulthood do not reflect natural or objective states of being. Rather, these terms represent socially constructed categories

<sup>341</sup> Re Martin ¶44.

<sup>342</sup> Re Marco ¶58.

<sup>343</sup> Re Marco ¶44.

that are produced and enforced by social, legal, and political institutions (Ariès 1962; Wells 2011; James and Prout 2015a; 2015b; Wyn and Cahill 2015; Heywood 2001; Stearns 2006; Fass 2013). Indeed, the concept of childhood that operates in contemporary Western constructions of the life course—as a discrete and bounded developmental stage that is defined by age—is a historically recent and distinctly modern phenomenon. As Ariès (1962) observes in his influential history of childhood, such a concept of childhood emerged late in 19<sup>th</sup>-century Western thought as the product of substantial shifts in the social, economic, and political structure of Western societies. Before this, childhood functioned as a marker of social dependence rather than a discrete and universal category defined by age or personal development. Moreover, Ariès (1962, 128) claims that earlier than this, in medieval societies and their antecedents, “the idea of childhood did not exist.” As such, in line with Ariès, sociologists and historians of childhood have shown how a range of structural transformations in Western societies that occurred during the Enlightenment and industrialisation contributed to the delineation of childhood as a distinct stage of life. These shifts include the establishment of age-based educational systems and a range of legal regulations which, according to Hockey and James (2003, 64), includes “the age of criminal responsibility, consensual sex, leaving school, consent to surgery, access to contraception, participation in work and the right to vote.”

The life course paradigm that emerged from these shifts—and the paradigm that the Court cited in its judgments on manual hormone use—imagines childhood, adolescence, and adulthood, as well as the relationships between each of these stages, in particular ways. Foremost, as Nakata (2015) argues, modern Western constructions of children and adolescents construe them as “adults in the making.” Thus, under this paradigm, children and adolescents are constructed as *becoming* rather than *being*—or, more specifically, as in the process of “becoming adult,” rather than as already-active and fully realised beings in their own right. This means that childhood and adolescence are typically construed as a means to an end rather than ends in themselves. Accordingly, any desires a child or adolescent may express will often be evaluated with reference to futural rather than present outcomes.

Childhood and adulthood thus operate as binary oppositions within this framework where, as James and Prout (2015a, 11) detail, children and adolescents appear as the “immature, irrational, incompetent, asocial [and] acultural” counterparts to adults who, by contrast, appear as “mature, rational, competent, social and autonomous.” This means that within this paradigm childhood and adolescence have been construed simultaneously as deficient versions of adulthood as well as the production grounds for a future adult subjectivity.

That childhood and adolescence contain the processes through which adults are produced has meant that they are the subject of considerable anxiety in the West. This is because within this paradigm the realisation of adulthood is not taken for granted; instead, adulthood is understood as an outcome or accomplishment that arises only once a subject *successfully* passes through a series of ‘coming of age’ rituals. In this sense, a subject can only ‘become’ an adult by effectively navigating the developmental hurdles that punctuate their earlier stages of life. As such, childhood and adolescence are understood as the *malleable* precursors to ostensibly stable adult subjectivities, such that what happens to subjects in these earlier stages of life is believed to shape and determine the kind of adult that that child will eventually become, if they can become one at all. Adulthood therefore functions as a *normative* goal rather than a fixed or inevitable point of arrival from the perspective of childhood and adolescence; it is not an objective state of being but a socially conferred status that is only attributed once certain normative criteria are met. Importantly, this means that a subject’s transition from childhood/adolescence to adulthood can fail, and because of this childhood and adolescence become sites of intense risk (Brownlie 2001; Stevi Jackson and Scott 1999; Nakata 2015; Angelides 2019). The child thus becomes a developmental ‘problem’ that must be managed, and as such, produces of a panoply of disciplinary, regulatory, and governing apparatuses and interventions that aim to keep young people ‘on track’ and to ensure that the ‘right’ kind of adult emerges.

Such conceptions of childhood and adolescence played a key role in the Court’s work to establish adulthood as a telos that justifies manual hormone use. As such, these conceptions formed a key part of the Court’s machinery of governance. These

conceptions were governing because they tethered the legitimacy of a subject's manual hormone use to the promise that those hormones would help them to become an ideal adult. The Court thus advanced the notion that its subjects could only become 'adults' by using hormones manually as a means to secure their transition into adulthood. This governed in one sense by working to ensure that subjects could only use hormones manually as a means to accomplish this end. As such, subjects who wanted to use hormones manually needed to appear as perpetually in a state of arrested or at-risk development such that manual hormone use could maintain its legitimacy as a corrective strategy. Yet, this also governed by order of the relationship between adulthood and gender normativity.

Adulthood, as it is constructed within the discourses that I have just outlined, is a category that is defined by gender norms. This can be illustrated in one sense by observing how cultural imaginations of 'normal' childhood and adolescence—and thus the kinds of childhoods and adolescences that are imagined to produce normal adulthoods—are defined by compliance with gender and sexual norms (O. Jones 1999; Baxter 2004). Young people that are gender non-conforming and/or that breach the sexual mores that govern childhood and adolescence occupy one of the most severely censured subject-positions in contemporary Western societies (Angelides 2019; Meadow 2018; Gerrard 2020; Rosky 2013). As such, the 'problem' of childhood and adolescent sexuality and gender non-conformity has been a regular fixture of political debates in the West, where constructions of queer children and adolescents as corruptible, corrupted, or corrupting have been leveraged in support of socially conservative agendas (Rosky 2014; Gill-Peterson, Sheldon, and Stockton 2016; Stockton 2016; Rosky 2013; Gill-Peterson 2018; Meadow 2018; Law 2017; McDonald 2012; Best and Bogle 2014; Brownlie 2001; Wells 2011; K. Smith 2012; K. H. Robinson 2012; 2008; Stevi Jackson and Scott 1999; Fishman 1982; Gerrard 2020). The relationship between gender norms and adulthood can also be observed in the role that gender and sexuality play in delineating childhood from adolescence and adolescence from adulthood. A subject's passage from childhood to adolescence and adulthood is marked in the West by 'rites of passage' that are explicitly gendered and sexualised. Bodily events such as menarche and spermarche are, for example,

commonly cited as signalling a child's transition into adolescence, while the accomplishment of penetrative sexual intercourse is often cited as a critical event in an adolescent's transition to adulthood (Waites 2005; Aggleton et al. 2019; Angelides 2019; Clarke 2010; Torkelson 2012). Many scholars have also argued that sexual and gender norms play a crucial role in organising childhood and adolescence by marking out according to age which kinds of bodies are allowed to be sexually desired by whom and which subjects are capable of sexual agency (Stephen Robertson 2002; K. H. Robinson 2008; 2012; Clarke 2010; Angelides 2019; Waites 2005; Fischel 2016; Pande 2012; Aggleton et al. 2019).

The role that gendered and sexual norms play in delineating and structuring adulthood has been the subject of substantial criticism within queer scholarship. Queer scholarship on temporality has shown how Western cultural constructions of the life course are structured by hetero- and gender normative imperatives that exclude or preclude queerness (Halberstam 2005; McCallum and Tuhkanen 2011; Halberstam 2011; E. Freeman 2007; 2010; Stockton 2009; Edelman 2004; Barad 2013; McBean 2013; Fabbre 2014; Matz 2015; Israeli-Nevo 2018; C. Stewart 2019). More broadly, queer scholars have also pointed out that adulthood is a concept that is marked by heterosexualised and gender normative life achievements such as the reproduction of the nuclear family through heterosexual reproduction (Stockton 2009; 2016; Rosky 2013; 2016; Angelides 2019). Marriage, for instance, is ordinarily considered to be a critical event in the accomplishment of adulthood in the West (E. Freeman 2010; Stockton 2009). Yet, this institution has only recently become available for same-sex couples in the West, and it remains unavailable for most other kinds of sexual and kinship relations, including polyamorous or polygamous relations (C. A. Ball 2016). If these norms are involved in constituting 'adults,' then the accomplishment of adulthood depends upon compliance with norms that are antithetical to queerness. As such, queer scholars have observed that queer people are often culturally infantilised and marked as deviant on account of their failure or refusal to enact the gendered and sexual norms that govern passage from childhood to adulthood (Halberstam 2005; 2011; Stockton 2009; E. Freeman 2010). Or, to use the language of the Court, queer people are often constructed as having failed to

mature, to reach their life's potential, to become a productive and well-adjusted adult, and to achieve wo/manhood on the basis of their failing or refusing to reproduce the norms that govern recognisable adulthood. To orient subjects toward the accomplishment of adulthood, then, in a context where the accomplishment of adulthood depends upon the accomplishment of gendered norms, is to govern their gender. Moreover, to suggest that certain subjects can only become adults by using hormones manually, or that their ability to become adults would be undermined if they were not able to use hormones manually, is to suggest that manual hormone use will function as a practice of gender normalisation such that their adulthood can become realisable.

### **Aligning Body and Mind**

The Court also legitimised manual hormone use by constructing it as a means to 'correct' an incongruence between its subjects' 'mind' and 'body.' This notion appeared in many instances where the Court argued that a subject ought to inhabit a body that 'aligned' with their gender identity. In making this suggestion, the Court relied upon a Cartesian theory of mind and body where the mind ("inner identity," "sense of self") is considered to be distinct and independent from the body.<sup>344</sup> This construction is an organising feature of the DSM-V's conceptualisation of gender dysphoria, which it defines as "A marked incongruence between one's experienced/expressed gender and assigned gender" (American Psychiatric Association 2013, 452–53). Given that the Court relied upon the notion that manual hormone use was "prescribed for the purpose of treatment of Gender Dysphoria" it follows that one of the ends that the Court imagined manual hormone use would serve was this incongruence.<sup>345</sup> The Court expected that manual hormone use could achieve this by altering its subject's body to align it with their mind.

<sup>344</sup> See Atkins (2005b, chap. 1) for an overview of the Cartesian theory of mind and body.

<sup>345</sup> Re Frances ¶1. This phrase also appears in near identical form in the orders declared in Re Dana ¶1, Re Pat ¶1, and Re Matthew ¶1.

The Court made this point in several ways throughout its judgments. In Drew, Chelsea, and Kelvin's cases, the Court stated that the purpose of manual hormone use was to "align [the subject's] physical gender characteristics with [their] inner gender identity."<sup>346</sup> The Court put this similarly in Jamie's case, affirming that her manual hormone use was intended to "address the *imbalance* of the patient's self-identity with some, at least, of its bodily representation."<sup>347</sup> In Anita and Adrian's cases, meanwhile, the promise that manual hormone use would "achieve a greater *congruence* between [its subject's] sense of self and how [its subject] is perceived and treated by others" contributed to its legitimacy.<sup>348</sup> Similarly, for Sara, the Court proposed that manual hormone use would "arrest the development of male sexual characteristics and bring about physical and psychological alterations that are *consistent* with her female sense of identity."<sup>349</sup> In Rae's case, the Court suggested that the purpose of manual hormone use was "to change [the subject's] gender to *match* their sense of self."<sup>350</sup> In most of these instances, the Court implied that the alignment of body and mind was a good in-itself. Yet, it sometimes asserted that the value of such alignment inhered in effects that it would produce. In Kelvin's case, for instance, the Court contended that manual hormone use was legitimate because it would ensure that Kelvin would be able to "develop the congruence necessary for a healthy future outlook."<sup>351</sup> Regardless, whether congruence was valuable in itself or as a means to an end, Chief Justice Bryant made it clear that its realisation was a premier concern for the Court. Presiding over *Re Jamie* (2013), Bryant described "aligning the self-identity and the physical characteristics" of its subjects as an "*absolute necessity*."<sup>352</sup>

The Court's discourses on mind-body alignment advanced four claims about gender: (1) there are gendered minds, (2) there are gendered bodies, (3) it is possible for these different forms of gender to "align," and (4) these different forms of gender

<sup>346</sup> Re Drew ¶30; Re Chelsea ¶12; Re Kelvin ¶35.

<sup>347</sup> Re Jamie (2013) ¶67-68.

<sup>348</sup> Re Adrian ¶32; Re Anita ¶27. A similar phrase also appears in Re Sasha ¶40.

<sup>349</sup> Re Sara ¶5.

<sup>350</sup> Re Rae ¶26.

<sup>351</sup> Re Kelvin ¶34.

<sup>352</sup> Re Jamie (2013) ¶68.

*ought* to align. I will examine each of these claims over three sub-sections to come. I will deal with the first and second claims separately in the first two sub-sections and then deal with the third and fourth claims together in the third. Each of these claims was built on contingent foundations and, as I will show, each contributed to the Court's machinery of governance.

### *The Gendered Mind*

The first claim embedded within the Court's discourses on mind-body alignment was that there is such a thing as a gendered mind. By promulgating the idea that gender dysphoria is characterised by a distressing incongruence between a subject's mind and body, and by framing manual hormone use as a solution to this incongruence by order of its ability to change the body to become congruent with the mind, the Court suggested not only that gendered minds exist, but also that gendered minds can manifest in forms that allow them to be discerned as either congruent or incongruent with particular kinds of gendered bodies. This claim is essentialist: it suggests that gender is defined by specific, universal, and inalienable properties that allow it to be discerned as such. Feminist, queer, and trans scholars have problematised the ontological and epistemological foundations of essentialist theories of mind (Bleier 1984; Fausto-Sterling 1992; Malane 2006; Fine 2011; Bluhm, Maibom, and Jacobson 2012; Schmitz and Höppner 2014a). The ontological possibility of essentially gendered minds and innate gender and sexed identities has been questioned, for instance, on the basis of the cultural and historical contingency that would characterise any construct that might be used to posit and measure the existence of such an entity. Scholars have argued, too, that if gender is a social and historical phenomenon—that is, a phenomenon that is socially and historically mutable—then it is not possible to cite any enduring and universal substrates to confirm or refute its existence. Moreover, one could question how the existence of new forms of gender could be realised if gender were a fixed and essential property rather than an entity forged through social action. Epistemologically, scholars have also questioned the validity of scientific attempts to identify and measure the

existence of inherently gendered minds as the inexorability of social and cultural influences makes neutral, objective, or monofactorial measurement impossible (Fine 2011; Bluhm, Maibom, and Jacobson 2012; Schmitz and Höppner 2014a; 2014b; Serano 2007). Rippon et al. (2014, 5) criticise attempts to use neuroimaging to identify enduring and universal differences between differently sexed brains along these lines:

Whatever female/male behavioral and therefore brain differences are observed . . . [will always be] contingent on both chronic and short-term factors such as social group (such as social class, ethnicity), place, historical period, and social context and therefore cannot be assumed a priori to be generalizable to other populations or even situations . . . Each individual's behavioral and neural phenotype at the moment of experimentation is the dynamic product of a complex developmental process involving reciprocally influential interactions between genes, brain, social experience, and cultural context. [As such,] simpler, implicitly essentialist models will need to be replaced by more complex multivariate models which acknowledge the interactive contribution of many additional sociocultural factors.

This means that minds cannot be neatly categorised into binary classificatory schemes such as male or female and, furthermore, that there are no universal or positivistic means to determine whether any given mind/brain should be classified as fe/male.

Feminists also have problematised theories of essentially gendered minds for their adverse social and political effects—that is, for propagating what Fine (2011) calls “neurosexism.” Feminist and queer neuroscientists and biologists have traced how the notion of essentially gendered minds has been involved in establishing and supporting hegemonic gender relations (Fausto-Sterling 1992; Fine 2011; 2017; Bleier 1984; Bluhm, Maibom, and Jacobson 2012; Malane 2006; Schmitz and Höppner 2014a; 2014b). This claim—that there are essentially gendered minds, and by necessity that there are also inherent differences that allow one to differentiate between different kinds of gendered minds—has been promulgated historically and

contemporaneously in a *vast* field of literatures, both scientific and popular (Bluhm 2012; Malane 2006; Fine 2011). Theories of essentially gendered minds typically assert that female minds are more emotional, less rational, feebler, less intelligent, more nurturing, and more subservient than their male counterparts (Malane 2006). This claim has been used to explain the subordinate status of women in a vast range of social and professional spheres as a natural effect of their inferior mental constitution. It has been used to justify domestic and subservient female gender roles as produced by women's natural inclination toward servitude. Male minds, by contrast, have been constructed as controlled, economic and rational, impassive, and assertive. Feminist scholars have shown that essentialist accounts of sexed difference of this kind have been used for centuries to justify and reinforce a 'natural order' of men over women by supporting the notion that the social and political divisions between men and women are the natural effects of their inherently different constitutions (A. Stone 2016; Bleier 1984; Rosser 1992; Fausto-Sterling 1992; Birke 1986; L. H. Nelson 2017). It has also been used to justify and explain harms perpetrated by men as the inevitable and thus excusable effects of their mental constitution, regardless of how ironic this may seem in a context where male minds are simultaneously constructed as 'rational' and 'controlled.' As such, feminists have contended that the thesis of essentially gendered minds works to naturalise and justify socially constructed differences between people of different genders and thereby support the (re)enactment and hierarchisation of those differences (Bluhm 2012, 231–32; Fine 2011). In this way, essentialist discourses like the theory of essentially gendered minds govern gender through the connections they share with and support that they provide for broader regimes of gendered hegemony and social control.

The theory of essentially gendered minds also works to govern gender through other means as well. Feminist, queer, and trans scholars have also pointed out that the theory of essentially gendered minds necessarily produces boundaries of exclusion that can be wielded to delegitimise and undermine claims to identity and experience. Neuroscientific research has consistently been unable to identify any neurological substrate that can account for human gender diversity (Mueller, De

Cuypere, and T'Sjoen 2017; Kiyar et al. 2020). Feminist, queer, and trans scholars have consistently expressed scepticism not only of the possibility of doing so but also the social and political effects that might arise from claims to have succeeded (Schmitz and Höppner 2014a; More and Butler 2016). Scholars have pointed out that it would not be possible to identify any trait that is universally present in people who claim a particular gender identity. As such, if any trait is established as the essential or necessary condition of group membership, then the absence of that trait could be cited to deny, delegitimise, and exclude the identity claims of those who do not possess that characteristic. As such, the theory of essentially gendered minds will inevitably set up a system for delegitimising those subjects whose 'brains' or 'minds' do not conform to the normative criteria that delineate which brains or minds 'count' as veraciously gendered.

The theory of essentially gendered minds also governs by restricting its subject's possibilities for change. The argument runs that if gender is an essential property of human beings, then it must also be immutable, objective, trans-historical, and trans-cultural. Such an account of gender has not only been used to argue that a subject cannot change their gender due to its essential nature but also to delegitimise and destabilise feminist, queer, and trans projects for equality by supporting arguments regarding the desirability and immutability of patriarchal gender roles (Birke 1986; Bleier 1984; Rosser 1992). This account has also been and continues to be used to discredit and refute the existence of trans and gender diverse articulations of gender as 'unreal' on the basis that such articulations of gender do not conform to ostensibly 'objective' accounts of gender's reality (R. Connell 2012; Namaste 1996b; 2009; Bettcher 2014; 2019; Namaste 1994; Heyes 2003; Whittle 2006b; Awkward-Rich 2017; Ahmed 2016; C. Williams 2020). And indeed, this theory could be used this way by the Court. It would allow the Court to refuse to authorise manual hormone for a subject that it did not recognise as having the requisite kind of gendered mind to warrant manual hormone use as a means to produce a congruent mode of embodiment.

*The Gendered Body*

The second claim that underpinned the Court’s discourses on mind-body alignment was that bodies can be and are discretely and categorically gendered. The Court made this assertion by claiming that manual hormone use could ‘treat’ gender dysphoria by producing a gendered body that ‘aligns’ with a certain kind of gendered mind. This claim relies upon a conception of what an appropriately gendered body is such that it can align with a specific type of internally gendered state, and also suggests that manual hormone use is capable of producing such a body. In this context, the descriptions that the Court offered regarding the bodily changes that it predicted would follow from manual hormone use function as assertions about what an ideal or typical ‘male’ or ‘female’ body is such that it might ‘correctly’ align with an already gendered mind.

The Court described the ‘effects’ of manual hormone use as giving rise to a particular kind of morphology, and as such described that morphology as constitutive of gender ‘alignment.’ This is to say that when the Court described the intended effect or purpose of manual hormone use as the production of a ‘male’ or ‘female’ body—or, as the Court puts it, “a male body habitus” or “a feminine habitus”—its descriptions of the effects of hormones become descriptions of the ideal fe/male body that it imagines will be produced to align with a subject’s fe/male identification.<sup>353</sup> The ‘male body’ that the Court imagined that hormones would produce to align with a male gender identity was hairy, muscular, and strong; it would not menstruate or ovulate, and would express a lowly-pitched voice.<sup>354</sup> It would also be characterised by a long and erectile phallus, and rough skin. In *Re Dylan*, for instance, the Court stated that the purpose of Dylan’s manual testosterone use would be to allow him to:

<sup>353</sup> The phrase “male body habitus” appears in *Re Adrian* ¶31; *Re Drew* ¶25; *Re Eddie* ¶55, and in slightly altered form in *Re Martin* ¶41; *Re Harley* ¶50. The phrase “female body habitus” appears in *Re Celeste* ¶25; *Re Gabrielle* ¶18.

<sup>354</sup> References to these features as well as those listed below can be found in every judgment in the corpus that I analysed, most typically in a section concerned with the ‘effects’ of manual hormone use.

develop as male[,] that is, [to] develop secondary sex characteristics commonly seen in other adolescent males including the development of facial, pubertal and other body hair, lengthening of his phallus, increased muscle mass, deepening of his voice, [and the] development of an Adam's apple.<sup>355</sup>

The Court described the 'female body' that manual hormone use would produce in diametrically opposite terms. The Court imagined that the appropriate female body to align with a female gender identity was hairless, as well as smoother, softer, less muscular, and physically weaker than a male body. The female body was also characterised by its more prominent buttocks, hips, and thighs, and by its breasts. The Court also stated that female bodies were defined by their expression of a more highly-pitched voice than a male body. In *Re Gabrielle*, for instance, the Court noted that the intended effect of Gabrielle's manual hormone use would be to stimulate "breast development; decreased facial and body hair to that which is more consistent with female appearance; increased fat on buttocks, hips and thighs consistent with a feminine shape; [and] a decrease in muscle mass and strength."<sup>356</sup>

Yet, the Court's conception of the ideal or typical 'male' or 'female' body was not only morphological. The Court also considered that 'male' and 'female' bodies are defined by their unique capacities to engender certain kinds of feelings, emotions, and behaviours. In this sense, the Court understood the differentiation between male and female bodies as both corporeal *and* affective. Male and female bodies *do* certain things to the subjects that inhabit them, in the Court's view. The notion that male bodies produce characteristically male affects was recorded in both *Harley* and *Martin's* cases, for instance, where the Court asserted that manual hormone use would result in "a more masculine emotional experience" for them both.<sup>357</sup> The Court did not elaborate upon what a "masculine emotional experience" might entail

<sup>355</sup> *Re Dylan* ¶23.

<sup>356</sup> *Re Gabrielle* ¶17. A similar quote appears in *Re Tahlia* ¶41, which records that the purpose of Tahlia's manual hormone use would be "to develop breasts, reduce facial and body hair, have a redistribution of body fat so that her buttocks, hips and thighs have a more feminine shape and smoother less oily skin."

<sup>357</sup> *Re Harley* ¶54; *Re Martin* ¶43.

but suggested nonetheless that the ‘male’ body that manual hormone use would produce would *feel* a certain way from the inside-out. This indicates that inhabiting a ‘male body’ necessitates the experience of a particular set of emotions that are generated specifically by male bodies.

The notion that male bodies engender certain kinds of behaviours proliferated throughout the Court’s judgments. In thirteen cases, the Court recorded that the manual use of testosterone to produce a ‘male’ body would likely “affect [the subject’s] behaviour by stimulating more assertiveness (sometimes aggression).”<sup>358</sup> This concern arose in Ashley’s case as well, where the Court worried that “Ashley’s mood may be affected and that he may become aggressive if the testosterone dose is increased too rapidly.”<sup>359</sup> In Shane’s case, the Court noted further that “treatment with testosterone is known to cause affective lability (characterised by mood swings and low mood) and increases the risk of agitation and aggression.”<sup>360</sup> The Court did not consult the several scientific meta-analyses that have demonstrated that the link between testosterone and aggression is either negligible or non-existent to assuage its anxieties about these claims (Archer 1991; Book, Starzyk, and Quinsey 2001; Archer, Graham-Kevan, and Davies 2005). Instead, the Court sought to ensure that “[a]ppropriate psychological assessments are planned to monitor Shane’s mental state during the treatment.”<sup>361</sup> The Court sought to moderate these apparent risks similarly in Marley’s case, arguing that they “can be reduced through ongoing psycho-education and psychological support and therapy.”<sup>362</sup>

In direct contrast to the increased assertiveness and aggression that the Court expected testosterone to produce in male bodies, the Court expected estrogen to

<sup>358</sup> Re Ashton ¶57; Re Christopher ¶20; Re Daniel ¶31; Re Emery ¶53; Re Harley ¶54; Re Isaac ¶16; Re Julian (2015) ¶56; Re Julian (2017) ¶23; Re Martin ¶43; Re Mason ¶28; Re Mitchell ¶26; Re Spencer ¶19; Re George ¶16. The wording differs slightly between cases, for example referring to the “likely stimulation of more assertiveness and sexual desire” in Re Martin and the “potential for adverse mood effects of testosterone therapy including increased aggression” in Re George. In Re Sasha ¶41, the Court remarked that blocking testosterone will lower Sasha’s aggressive drives.

<sup>359</sup> Re Ashley ¶43. A near identical phrase appears in Re Ashton ¶61.

<sup>360</sup> Re Shane ¶25. A near identical phrase appears in Re Marley ¶29.

<sup>361</sup> Re Shane ¶25. A near identical phrase appears in Re Marley ¶29.

<sup>362</sup> Re Marley ¶29. A near identical phrase appears in Re Karsen ¶21.

produce “increased sensitivity and emotional fluctuation” in female bodies.<sup>363</sup> The Court maintained the ambiguity of this prospective “increased sensitivity and emotional fluctuation” in this context in the same way that it did with Harley’s and Martin’s aforementioned “masculine emotional experience.” The Court again did not clarify what kinds of emotions would be fluctuating nor the specific character of this sensitivity. Indeed, in theory, these fluctuating emotions could be those stereotypically associated with masculinity such as anger, pride, contempt, or disgust.<sup>364</sup> This notion appeared again in similarly vague terms in Gabrielle’s case where the Court discussed “the hypothetical *risk* that [manual hormone use] may lead to a more stereotypic feminine emotional and cognitive personality development [and] personality functioning.”<sup>365</sup> The Court considered this risk to be ameliorated by a report that “this is entirely consistent with what [Gabrielle] wishes.”<sup>366</sup> Yet, the Court did not elaborate upon either the nature of the threat that “a more stereotypic feminine emotional and cognitive personality” might pose, nor did it clarify what constitutes a “stereotypic feminine emotional and cognitive personality.”

The Court also inferred that male and female bodies are defined by opposing vectors of sexual desire. Male bodies, by order of their hormonal constitution, generated a greater quantity of sexual desire, in the Court’s view. The Court articulated this assertion in a variety of ways. In twelve cases, the Court asserted that its subjects’ would experience “Behavioural change as testosterone stimulates more . . . sexual desire,” while in four cases it claimed that manual testosterone use would engender “increased libido.”<sup>367</sup> Additionally, in two cases, the Court stated that manual testosterone use would stimulate an “increase in sex drive.”<sup>368</sup> In contrast, the

<sup>363</sup> Re Chelsea ¶8.

<sup>364</sup> On the gender stereotyping of emotion, see my discussion of affect and emotionality in chapter five, as well as Fischer and Manstead (1999), Brody (1997), and Plant et al. (2000).

<sup>365</sup> Re Gabrielle ¶20.

<sup>366</sup> Re Gabrielle ¶20.

<sup>367</sup> Increased “sexual desire” is mentioned in Re Daniel ¶31; Re Julian (2017) ¶23; Re Mitchell ¶24; Re Spencer ¶19; Re Isaac ¶16; Re Christopher ¶20; Re Mason ¶28; Re Emery ¶53; Re Harley ¶54; Re Ashton ¶57; Re Martin ¶43. “Increased libido” is mentioned in Re Mitchell ¶24; Re Marley ¶27; Re Jordan ¶23; Re Shane ¶33.

<sup>368</sup> Re Darryl ¶16; Re Lincoln ¶31.

female body that the Court expected manual hormone use to produce was defined by its diminished sexual desire, stating in three cases that manual estrogen use would result in “reduced sex drive” and in five cases that it will result in a “decreased libido.”<sup>369</sup> The relationship between testosterone, oestrogen, and libido that the Court cites here is highly contested in the scientific literature and no direct, monofactorial, or universal link has been established between any level of either hormone and a subject’s sex drive (S. Davis 2000; Elaut et al. 2008; Kronawitter et al. 2009; Schwenkhagen and Studd 2009; Basson 2010; Wierckx et al. 2011; Reed, Nemer, and Carr 2016; Achilli et al. 2017).<sup>370</sup> As such, the Court’s statements about the link between hormone levels and sexual desire were not factual statements about the effects that those hormones will engender. Rather, that these features were cited as the effects of manual hormone use in the context of the Court’s judgments means that they played a role in constructing the imagined ‘male’ or ‘female’ body that the Court believed would arise to accomplish gender ‘congruence.’ This means that the Court saw these metrics of sexual desire as linked to its subject’s capacities to ‘be’ a man or a woman, such that these changes would play a role in realising a more appropriate alignment between “[the subject’s] physical gender characteristics with [their] inner gender identity.”<sup>371</sup>

The Court’s expectations regarding the kinds of fe/male bodies that manual hormone use would produce to realise gender ‘alignment’ reflected dominant Western constructions of sexual difference. This is a manner of conceptualising human bodies as naturally expressing one of two possible kinds of biological sex—male and female—the nature of which is immutable as well as objectively observable and classifiable. By promulgating this account of sexed bodies, the Court imagined that manual hormone use would produce a range of traits in its subjects’ bodies that would allow them to reflect the image of the ‘naturally’ sexed fe/male body, as well

<sup>369</sup> “Reduced sex drive” is mentioned in *Re Frances* ¶14; *Re Sara* ¶20; *Re Sasha* ¶41. “Decreased libido” is mentioned in *Re Tahlia* ¶47; *Re Rae* ¶43; *Re Dana* ¶14; *Re Gabrielle* ¶19; *Re Jamie* (2015) ¶49.

<sup>370</sup> On the mythologisation of the relationship between testosterone and masculinity, see Jordan-Young and Karkazis (2019).

<sup>371</sup> *Re Drew* ¶30; *Re Chelsea* ¶12; *Re Kelvin* ¶35.

as make their bodies *act* and *feel* in the way that fe/male bodies are supposed to act and feel. These are essentialist claims. They assert that a body's status as a wo/man's body can be determined with reference to whether that body possesses the features that *necessarily* constitute a wo/man's body and which all wo/men's bodies share on account of their membership of that category.<sup>372</sup> This account of sexual difference prevails in popular discourse and has been a central feature of sexological and second-wave feminist theorisations of the sex/gender distinction.<sup>373</sup>

Yet, there is no such thing as an objectively, discretely, or universally 'male' or 'female' body. This is for at least three reasons. First, human bodies do not universally conform to binary 'male' and 'female' schema. Second, there are no universal or objective ways to classify what constitutes a 'male' and 'female' bodies. And third, there are no universal or objective ideals that bodies must strive toward to achieve maleness or femaleness. These are all well-established contentions in sociological, biological, feminist, trans, and intersex considerations of the gendered body. This scholarship shows that male and female bodies are not naturally occurring entities but are socially constructed as such through interpretive schemas that are culturally and historically located (Morland 2014; K. Cleary 2016; Clough 2012; Kevin 2009; Grosz 1994; Butler 1993; 1999; Shildrick 1997; Weinberg 2012; B. S. Turner 2008; 2012; Fausto-Sterling 2000; 2012a; Morland 2016; Lennon and Brook 2014; G. Davis, Dewey, and Murphy 2016; Latham 2017a; Kessler 1998; Dreger 1998; Heller 2019;

<sup>372</sup> The Court's expectation that manual hormone use would easily produce an ideally gendered body was grounded in similar essentialist assumptions. By constructing manual hormone use as the sole ingredient necessary to produce an ideally gendered body, the Court suggests that the gendered appearance of a body is fundamentally the product of its hormonal constitution. However, hormones produce a variety of effects in bodies, effect different bodies in vastly diverse ways, and as such the bodies that they produce cannot be perfectly predicted in advance. Moreover, the gendered modes of embodiment that manual hormone use is capable of producing are similarly diverse and variable. (C. Roberts 2007; C. Roberts and Cronshaw 2017; R. Lane 2009; Irni 2013; 2017; Gill-Peterson 2014; Jordan-Young and Karkazis 2019). This means that a linear relationship between manual hormone use and any mode of gender's production cannot be guaranteed.

<sup>373</sup> As I discussed in chapter two, the sex/gender distinction, in both feminist and sexological accounts, distinguished sex, coded as the 'natural' features of biological development, from gender, coded as the social system which trained and socialised biological men and women into masculine and feminine "gender roles" (Oakley 1972; G. Rubin 1975).

Weeks 2000; Laqueur 1990; Foucault 1978; Holmes 2009a; 2008; Karkazis 2008; Kessler and McKenna 1978; 2000). Stryker (2006, 9) wrote, summarising such work:

[W]hat we typically call the sex of the body, which we imagine to be a uniform quality that uniquely characterizes each and every individual whole body, is shown to consist of numerous parts—chromosomal sex, anatomical sex, reproductive sex, morphological sex—that can, and do, form a variety of viable bodily aggregations that number far more than two. The “wholeness” of the body and “sameness” of its sex are themselves revealed to be socially constructed. Sex, it turns out, is not the foundation of gender . . . “sex” is a mash-up, a story we mix about how the body means, which parts matter most, and how they register in our consciousness or field of vision.

As such, sexual dimorphism is a culturally and historically specific *ideal* that is *imposed onto* bodies. It is not a mode of classification that emerges from them.

Such a critique of sexual dimorphism has been a central feature of intersex scholarship. In this field, a wealth of literature has shown that attempts to organise bodies into discrete categories inevitably fail to achieve coherence because concepts such as ‘male’ and ‘female’ are cultural and historical constructions that do not map onto a discrete or orderly material reality (Kessler 1998; Dreger 1998; Preves 2003; Karkazis 2008; Holmes 2008; 2009b; G. Davis 2015). Indeed, they point out that the presence and configuration of the kinds of characteristics that are often cited as constitutive of sex—such as particular configurations of internal and external genitalia, gonads, hormones, and chromosomes—vary substantially between all bodies as well as between bodies that are socially ascribed the same categorical status as either ‘male’ or ‘female.’ There is also substantial variability in the configuration of “secondary sex characteristics” that different individuals classified as ‘male’ or ‘female’ express—including those that the Court cited explicitly, such as facial and body hair, vocal pitch, muscularity, fat distribution, hairiness, the erectability and length of the phallus, menstruosity, and the roughness of skin. That these characteristics are highly malleable as well as variable within and between classifications of sex means that they cannot function as the foundations for the maleness or femaleness of any given

body. As Dreger (1998, 4, 9) writes in her history of medical constructions of hermaphroditism:

The sexual development of any individual is a complicated and amazing event, involving the working of chromosomes, the action of self-produced and/or ingested hormones, the effects of environmental agents like toxins and nutritional substances, social norms like those that dictate circumcision or clitoridectomy (removal of the clitoris) or certain levels of physical prowess, family dynamics, individual sexual encounters, accidents, and so on. What it means to be a male, a female, or a hermaphrodite—or what it means to become a male, a female, or a hermaphrodite—goes far beyond the “sex chromosomes.” . . . [T]he answer necessarily changes with time, with place, with technology, and with the many serious implications—theoretical and practical, scientific and political—of any given answer. The answer is, in a critical sense, historical—specific to time and place. There is no “back of the book” final answer to what must count for humans as “truly” male, female, or hermaphroditic, even though the decisions we make about such boundaries have important implications. Certainly we can observe some basic and important patterns in the bodies we call “male” and the bodies we call “female.” And the patterns we notice depend in part on the cognitive and material tools available at a given moment. But the development of new tools doesn't get us closer and closer to some final, definite answer of what it is to be “truly” male, female, or hermaphroditic. Instead it only alters the parameters of possible answers.

Moreover, far from being natural, feminist, trans, and intersex scholars have shown that accounts of sexual dimorphism are not only fabricated but also realised performatively through force. In sexological and psycho-medical settings throughout the 20<sup>th</sup> and 21<sup>st</sup> centuries, accounts of essential and dimorphous sexual difference have been used to pathologise bodies and subjectivities that have not conformed with their directives. Accordingly, these accounts have supported the design and implementation of medical, psychiatric, and surgical interventions aimed

at ‘correcting’ divergences from their ideals (Repo 2016; Meyerowitz 2002; Karkazis 2008; Dreger 1998; G. Davis, Dewey, and Murphy 2016; Latham 2017a; Clune-Taylor 2019). This means that the idea that there are only two kinds of human bodies, the variegation of which is reducible to binary sexual difference, can only *appear* to be true once certain regulatory practices have successfully shaped reality in a way that supports that appearance. This point is demonstrated palpably by the ongoing surgical normalisation of intersex infants whose bodies are literally shaped by medical professionals to support the inexhaustibility of the sex binary (Kessler 1998; Dreger 1998; Preves 2003; Karkazis 2008; Holmes 2008; Parens 2006; G. Davis 2015).

The Court’s use of this account functioned as a strategy of normalisation in a similar way. Fundamentally, this is because it produced an exclusionary set of criteria that governed which bodies were recognisable as *fe/male* and which cast a range of bodies as *not fe/male* bodies. This occurred in one way through the language of incongruence that the Court used to describe its subjects’ ‘predicament.’ When the Court constructed a particular body as failing to align with the *fe/male* mind or identity of its inhabitant, the Court was arguing that that body was not yet recognisable as a *fe/male* body. In another sense, by arguing that manual hormone use could be used to produce the traits necessary for a body to be recognisably *fe/male*, the Court argued that bodies that did not meet that criteria—that is, bodies that did not look, feel, act, and desire in line with the requirements it listed—were *not* recognisable as *fe/male* bodies. As such, the Court reasoned that male bodies *must* be hairy, muscular, non-menstrual; *must* possess a long and erectile phallus, high sex drive and aggression, and rough skin; and *must* express a lowly-pitched voice, to *be* male. Moreover, in the Court’s view, bodies that possess these features *cannot* be female. Conversely, the Court argued that female bodies *must* be relatively hairless, smoother, softer, and less muscular than male bodies; *must* engender a low sex drive and minimal aggression; *must* display a curvaceous figure; and *must* express a more highly-pitched voice. And again, bodies that possess these features, in the Court’s view, *cannot* be male. Accordingly, the Court suggested that its subjects’ bodies could not be recognised as *fe/male* bodies until they were able to exhibit these traits, and

as such, that they could not *be* fe/male until they used hormones manually to reconfigure their bodies to meet these criteria.

The Court's imagination of what constitutes a recognisably fe/male body was governing in several ways. Primarily, it governed by making the pursuit of such a body a condition of being authorised to use hormones manually. That is, by making the realisation of *this* fe/male body the telos that motivates and justifies manual hormone use, the Court *required* its subjects to strive to manifest this kind of body to be able to use hormones manually. Accordingly, the Court transformed manual hormone use into a technology that was explicitly deployed for the normalisation of bodies—that is, for the production of bodies that reflected its imagination of what fe/male bodies ought to be. Consequently, manual hormone use became a means to eliminate queer bodies, rather than to facilitate their actualisation.

By setting up the accomplishment of the ideal fe/male body as the telos that motivates and justifies manual hormone use the Court also set up a form of governance that applied to its subjects *in perpetuity*. This is because the ideal fe/male body is, by definition, impossible to actualise. That it is ideal means that it is an imagined norm rather than something realisable. No body can be 'perfectly' gendered in a way that could achieve absolute congruence with the gender of a subject's mind. As such, when the Court positioned the ideal fe/male body as the telos that motivates and justifies manual hormone use, it demanded that its subjects strove toward a goal that they could never accomplish. In doing so, it extended its governance over the gendered morphology of their body indefinitely as its oversight could only be relieved once its subjects had realised the unrealisable. At such an impossible moment, both the Court's oversight over manual hormone use, as well as the incongruence that legitimised manual hormone use, would dissipate.

Similarly, the telos of the ideal fe/male body also worked to govern its subject's gender by constructing their bodies as perpetually deficient. Specifically, by suggesting that its subjects' bodies could only *be* fe/male once they reflected this impossible ideal, the Court constructed its subjects' bodies as perpetually becoming but never being fe/male. In this sense, the Court denied its subjects' the possibility of ever inhabiting a body that it would recognise as a fe/male body because in this

context that recognition depended upon their ability to realise an unrealisable body. As such, the Court constructed its subjects' bodies as in a permanent state of deficit and required that they worked relentlessly to resolve that discrepancy.

The Court's discourses on the ideal gendered body also governed by order of their relationship with broader notions of biological essentialism. This is because (a) the Court's discourses on the ideal gendered body required subjects to affirm a theory of biological essentialism as a condition of being authorised to use hormones manually, and (b) the theory of biological essentialism underpins regimes of gender governance that extend beyond the purview of the Court. For instance, feminist, queer, and trans scholars have shown that the essentialist claim that one's status as fe/male depends upon the presence or absence of certain corporeal characteristics has been wielded to delegitimise, dehumanise, and justify violence against trans and gender diverse people (S. Stone 2006; Prosser 1998a; Feinberg 1998; Heyes 2003; Whittle 2006b; Awkward-Rich 2017; Ahmed 2016; R. Connell 2012; Zanghellini 2020; C. Williams 2020). This can be observed, for instance, in the way that theories of biological essentialism—that is, the notion that one's status as being a wo/man depends upon the presence or absence of certain essential properties such as particular reproductive organs—have been used to repudiate trans and gender diverse identities by asserting that those subjects lack the necessary biological constitutions that would legitimise their membership in their affirmed identity category. This logic also underpins a range of regimes that operate globally which force trans and gender diverse people to undergo body modification surgeries as a condition of achieving legal recognition of their gender—surgeries that can be invasive, expensive, and may be unwanted (Winter 2014; Carastathis 2015; Dunne 2017b; 2017a; van der Ros 2017; Weissman 2017; Honkasalo 2018; Lowik 2018; Toze 2018; Alaattinoğlu and Rubio-Marín 2019; Repo 2019). And, as already mentioned, the theory of biological essentialism supports various surgical and psychiatric normalisation regimes that aim to produce bodies that are recognisably male or female in line with the norms that the Court listed. By requiring that its subjects reproduce the notion that a particular array of essential characteristics constitutes fe/male bodies, the Court required its subjects to uphold and reproduce a norm that

is involved in disciplining and punishing bodies that fail or refuse to conform to such ideals.

However, the governing effects of the Court's imagined ideal fe/male body do not apply only to those subjects that breach its norms but also to those subjects that comply with its directives. This is because the ideal fe/male body that the Court constructed is the product of and is invested in maintaining a patriarchal (and thus hetero- and cis-normative) gender order. To construct its ideal fe/male body, the Court drew upon a range of discourses which feminists have shown work to institute and neutralise sexist notions about sexed difference and support patriarchal gender roles (Brownmiller 1984; Bartky 1990; Bordo 1993). The Court's descriptions of the ideal female body, for instance, made use of a range of descriptors that positioned women as comparatively weak and passive in relation to men. Women were not only constructed as physically feebler but were also infantilised through descriptions of their hairlessness, smoothness, softness, lower aggression, and lower sex drive. These constructions of the ideally gendered body support patriarchal power relations by constructing women as literally less powerful than men and by denying women's capacity to experience desire or anger, constructing these dispositions as the prerogative of men exclusively. These norms have a disciplinary effect because they encourage women to *become* physically weaker and to distance themselves from their sexual desire as a condition of maintaining their femininity (Young 1980; Holland et al. 1994). Moreover, the converse construction of men as 'naturally' more powerful, aggressive, and libidinous has been identified as a discourse involved in shoring up patriarchal power relations by working to naturalise, depoliticise, and excuse the hegemonic behaviours of men.

Further still, the production of such 'ideally' gendered bodies is also involved in a range of additional mechanisms of governance by order of the coercive and oppressive standards that they impose. These constructions of the body, when they operate as normative ideals that subjects must strive to achieve, require gendered subjects to discipline their bodies through various means—beauty practices, surgeries, diets, exercise, and various other modes of bodily presentation—as a condition of achieving gender legitimacy. These practices can be unwanted, harmful,

expensive, and time-consuming, and can negatively impact upon individual's self-esteem in the inevitable event of failing to live up to such ideals (Bartky 1990; Tammy Shefer 1990; Kevin 2009). The construction of women as naturally hairless and smooth, for instance, is a fallacious ideal—and a perniciously racialized one at that—that *requires* the shaming and punishing of women's naturally occurring body hair to be maintained (Basow 1991; Basow and Braman 1998; Tiggemann and Kenyon 1998; Toerien and Wilkinson 2003). Gendered bodily ideas have also been shown to have a denigrating effect on the mental wellbeing of both women and men, illustrated palpably by the stark increases in eating and other body dysmorphic disorders in the late 20<sup>th</sup> and early 21<sup>st</sup> century (Bordo 1993; 1999; Fallon, Katzman, and Wooley 1984; Malson and Burns 2009). As such, the Court's use of such ideals necessarily invests in these broader regimes of gender governance.

#### *The Possibility and Necessity of Alignment*

The third and fourth claims that the Court made in its discourses on mind-body alignment were (3) that the gender of the mind and the gender of the body *can* align, and (4) that these different forms of gender *ought* to align. Both claims depend upon the essentialist ontologies that I have just discussed. These ontologies posit that there are discrete and classifiable forms of gendered minds and bodies, and further, that the gendered characters of minds and bodies can reflect one another. In this view, a wo/man's mind is characterised *as* a wo/man's mind by *the same kind* of wo/manliness that would characterise a wo/man's body as such. It is only on this basis that the wo/manliness of one's mind could be said to mirror the wo/manliness of one's body *isomorphously*.

In addition to questioning the possibility and desirability of essentially gendered minds and bodies, feminist and trans scholars have also criticised the metaphysical assumptions that undergird the possibility of gender (in)congruence. Engdahl (2014, 268), for instance, argues that notions of (in)congruence require “a distinction between materiality (the body) and subjectivity (the self)” that errantly assumes “that these are separable things” when they are, in fact, “inherently

inseparable.” These critiques notwithstanding, the Court argued that its subjects were inhabiting bodies that failed to reflect the gender of their mind and that this predicament *demand*ed rectification. Thus, upon citing medical testimony regarding the intractability of its subjects’ gender identification, the Court argued that subjects needed to change their body to achieve “alignment.”

These claims contributed to the Court’s machinery of governance by setting up a normative relationship between the mind and body, and by asserting that only bodies that assume a certain morphology can ‘correctly’ signify certain kinds of gendered minds. These claims suggested that certain relationships between the gendered configuration of the body and the mind are ideal, and also held that manual hormone use needed to pursue those ideals as a condition of its legitimacy. Yet, there are already a great plurality of gendered embodiments in existence and there are no discrete set of ends that body modification can be or must be practised to realise (Farley and Kennedy 2015; Aboim 2016; Schrock, Reid, and Boyd 2005; H. Rubin 2003; Roen 2019; Davy 2016; Fausto-Sterling 2012b; Shrage 2009). The Court’s construction of ideal mind-body relationships was governing, therefore, because it worked to ensure that manual hormone use could only be used to achieve a particular morphological representation of gender. According to this discourse, subjects should only use hormones manually to produce bodies that maintain prevailing conceptions of ‘congruence.’ This had the effect of coercing subjects into producing a particular mode of embodiment through manual hormone use and effacing the diversity of relationships between gender and embodiment that are already lived and are possible to live.

By coercing its subjects into maintaining what it posited to be a ‘congruent’ relationship between mind and body, the Court also recruited its subjects into maintaining a broader set of gender norms. This is because the idea that ‘congruence’ between gendered minds and bodies is possible and desirable—the idea that undergirded the Court’s legitimation tactics in this instance—is a central feature of gender normativity in the contemporary West. The idea that the gender of the mind and body ought to align—that is, that the body ought to signify on the ‘outside’ the gender that is contained ‘inside’ it—is one property of the normative schema that

Butler called “the heterosexual matrix.” In chapter four, I detailed Butler’s (1999, 194) conception of the “heterosexual matrix” as:

a grid of cultural intelligibility through which bodies, genders, and desires are naturalized . . . that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable *gender* (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality.

The Court’s discourses on mind-body alignment supported a similar governing logic to that propagated by its discourses on the ontology of gender, which I likewise discussed in chapter four. By legitimising manual hormone use as a means to secure mind-body alignment, the Court ensured that its subjects could only use hormones manually as a means to reproduce the heterosexual matrix. Accordingly, positioning mind-body alignment as a telos that legitimises manual hormone use works to maintain the normative ideals that commissioned such a mode of governance in the first place by reaffirming the notion that such modes of congruence are both possible and desirable.

Trans and queer scholars have also robustly criticised the “wrong body” narrative that these discourses promulgate for the normative investments that it has carried in other spheres. The wrong body is a figure that has often been used to conceptualise trans and gender diverse experiences of identity and embodiment (Prosser 1998a; Bettcher 2014; McQueen 2014; Sullivan 2008; L. Hughes 2018; Serano 2007, chap. 10; Hines 2013; S. Stone 2006). McQueen (2014, 536) summarises the wrong body narrative as follows:

In essence, this is the claim that one is falsely embodied – that the body one inhabits (most probably, although not necessarily, the body one was born with) is the wrong body. The desire, therefore, is to alter this body in order to bring it into alignment with one’s internal sense of gender. It is a struggle to achieve the ‘right’ body, i.e. a supposedly true or authentic form of embodiment.

For McQueen, this narrative both relies upon and works to reinforce normative conceptions about gendered bodies, identities, and the relationships that ought to exist between them. Sullivan (2006; 2008) offers a similar assessment. In her view, wrong body discourses construct trans and gender non-conforming people as always desiring congruence and conformity. She explains that when transition is understood as an attempt to realise the 'correct' body, trans experiences can only be understood as oriented toward the accomplishment of normality and the negation of queerness. Moreover, Sullivan (2008, 106) argues that wielding the 'wrong body' as a legitimisation tactic produces a recursive set of regulatory effects, noting that:

in conceiving of the wrong body as merely a thing which is separate from, and at odds with, the self, such an analogy not only fails to account for bodily specificity, but ultimately perpetuates the phenomenological conditions, the sense of profound alienation, that requires wrong body narratives in the first place.

In this sense, by legitimising manual hormone use as a means to secure mind-body alignment, the Court argued that manual hormone use was legitimate only to the extent that it promised to orient its subjects toward the accomplishment of gender normativity.

The notion that gendered minds and bodies ought to align also contributed to gender governance by underwriting the disapprobation of gender 'incongruence.' By arguing that subjects *ought* to demonstrate a 'congruent' relationship between their mind and body, the Court was also arguing that its subjects *ought not* to enact 'incongruent' relationships between their mind and body and that such manifestations ought to be redressed. The notion that incongruence is undesirable renders undesirable all modes of enacting and embodying gender that do not conform to prevailing conceptions of what 'congruence' looks like because it supports the idea that they are 'wrong' and thus ought to be 'corrected.' Given that 'congruence' is not a universal category but one constructed with reference to prevailing norms, its enforcement effaces or casts as pathological the diverse modes of embodying gender that are already lived and valued as well as those that might be brought into the world in future. This is another point that McQueen (2014) makes

in his analysis of wrong body narratives. For McQueen (2014, 538), “false embodiment” narratives of this kind work to “foreclose other forms of gendered subjectivity – namely those which are more ambiguous or fluid with regard to the male/female binary.” As such, for McQueen (2014, 534), even while the wrong body has been useful in many instances as a strategy for legitimising gender-affirming practices, it will always work to “render [‘incongruent’] gender identities illegitimate and unviable, thus coercing individuals into particular forms of behaviour and appearance.” In this way, the Court’s discourses on mind-body alignment governed gender not only by investing in the production of subjects who performed ostensibly ‘congruent’ relationships between their mind and body, but also because they worked to prevent or eliminate the manifestation of mind-body relationships that did not express such congruity. Noting this effect in other spheres, several trans scholars have argued for the abolition of the wrong body as an instrument for legitimising gender affirmation (Prosser 1998a; Bettcher 2014; L. Hughes 2018; Serano 2007; Hines 2007; 2013; Engdahl 2014; S. Stone 2006).

It should now be clear that each of the claims that the Court advanced about gender in its discourses on mind-body alignment—that there are gendered minds, that there are gendered bodies, and that it is both possible and desirable for these different forms of gender to either “align”—were invested in an array of gender normative imaginaries. Throughout this section I have shown how each claim is premised upon a particular arrangement of socially, culturally, and historically contingent gender norms. As such, when the Court wielded these claims to arbitrate the legitimacy of manual hormone use they worked together to tether that legitimacy to the promise that manual hormone use might produce a normatively gendered subject. In this way, the Court’s discourses on mind-body alignment, based on the four claims that they carried, contributed to the Court’s machinery of gender governance.

## Teleological Governance

Throughout this chapter, I have shown that the Court advanced a range of teleological assertions about the ends that manual hormone use should work toward accomplishing as a condition of its legitimacy. There were six key ends that the Court purported to be both desirable and attainable through manual hormone use: mental health, happiness, assimilation, sexuality, adulthood, and mind-body alignment. Thus, manual hormone use could be legitimate, in the Court's view, if it promised to help its subjects to achieve these ostensibly valuable ends. In the previous sections, I have described how the Court constructed these teloses as desirable and legitimising, and have explicated how the Court imagined manual hormone use to be capable of realising these ends. Yet, more importantly, I have also shown that these teloses were not neutral or objective calculations of the good, but were value judgments invested in the production of normatively gendered subjects.

The Court's consideration of these ends arose, in part, because it was obliged to establish whether manual hormone use was in its subjects' "best interests." This meant that the Court was required to assert in each case whether the benefits of manual hormone use—that is, the ostensibly desirable ends that it could achieve—outweighed its risks. As I discussed in chapter three, from a formal legal standpoint, the Court should have conducted this calculation empirically, rationally, and in line with prevailing legal principles. In turn, the Court's judgment on the legitimacy of its subjects' manual hormone use should have been based on an objective evaluation of their best interests, supported by the facts presented to it. Yet an objective judgment of this kind is impossible. Foremost, this is because there is no objective set of ends toward which manual hormone use must be oriented. Neither the list of effects that manual hormone use can produce, nor the list of ends that one might use hormones manually to pursue, is finite or discrete. Hormones can and do produce a variety of effects in bodies, and those effects can be and are made to mean in immeasurably diverse ways (C. Roberts 2007; C. Roberts and Cronshaw 2017; R. Lane 2009; Irni 2013; 2017; Gill-Peterson 2014; Jordan-Young and Karkazis 2019). As such, the ends that subjects might use hormones manually to realise are mutable and

limited more by subjective and collective imagination than by the objective features of an intransigent reality.

There is also no objective way to judge the value of any end that manual hormone use might accomplish. Value judgments of this kind—what Kluckhohn (1951, 395) called “conceptions of the desirable”—are subjective formulations that can only be derived from socially mediated conditions of desirability. This point has been articulated repeatedly within the sociology of values, which argues that assertions about “the good” are always specific to the cultural and historical contexts that produce them and are indelibly affected by the social location of the subject that is authoring them (Spates 1983; Sztompka 2007; Wuthnow 2008; Gecas 2008). As such, ends can only be *constructed as* valuable; they can never be valuable *in themselves*. And indeed, this point has been made in the scholarship on “best interests”—the conceptual framework that structures the Court’s value judgments in this setting. As I outlined in chapter three, scholarly inquiries into the best interests standard have consistently argued that there is no way to derive its meaning objectively. As such, scholars have argued that best interests has been and can only be subjectively constructed and discretionarily applied (Wayne 2008; Piper 2000; Salter 2012; Walker 1998; Carbone 2014; Hansen and Ainsworth 2009; Skivenes 2010; Dolgin 1996). This means that the Court’s teleological assertions, and the value judgments they carried, were subjective and necessarily *interested*. They did not consist of impartial assessments of value; they consisted of contingent assertions about which ends manual hormone use *ought* to be used for and the forms of beneficence that might arise as a result.

Upon setting out to interrogate the values that underpinned the Court’s teleological assertions in this way, my argument has been that the ends that the Court constructed to legitimise manual hormone use were invested in the production of gender normative subjects. Through its discourses on mental health, happiness, assimilation, sexuality, adulthood, and mind-body alignment, the Court positioned the gender normative subject as the telos that manual hormone use needed to pursue to achieve legitimacy. In various ways, each of these discourses were invested in the accomplishment of gender normativity and the prevention—if not

the elimination—of queerness. Accordingly, by legitimising manual hormone use according to a subject's promise to realise these ends, the Court tethered its subjects' ability to use hormones manually to their promise to become gender normative. As such, the Court's teleology worked to transform manual hormone use into a technology of normalisation and to foreclose its possibilities for enacting gender otherwise, or indeed, for enacting a mode of being that exceeded the frame of gender entirely. Thus, my argument is that these discourses on teleology contributed to the Court's machinery of gender governance. By governing which ends subjects could use hormones manually to realise, the Court's teleology allowed it to ensure that manual hormone use was tethered to the production of gender, to govern which forms of gender its subjects were able to manifest, and to govern which forms of gender manual hormone use could be used to manifest.

This mode of governance stretched across multiple temporalities. It governed the present by orienting it exclusively toward one particular future. Under the Court's teleological regime, subjects not only to promise the realisation of a certain future but also to subordinate any desires for transformation that they might have held to the future that that transformation might realise. The effect of this was to bind the salience of the subject's present desires to the question of which kind of subject those desires will produce in the future. This bond is a common feature of regimes that are concerned with young people. As scholars in the sociology of childhood have noted, the construction of childhood and adolescence as oriented toward adulthood has often been used in ways that remove or ignore the agency of young people in the present for the sake of who they might become in the future (Angelides 2019; Brownlie 2001; Heywood 2001; James and Prout 2015a; Nakata 2015; Rosky 2013; 2014; Stockton 2009).

Yet, this form of governance also resolved to operate in perpetuity. This is because the teloses that it required its subjects to achieve are, by necessity, unrealisable. Mental health, happiness, assimilation, sexuality, adulthood, and mind-body alignment are ends that one can strive toward but can never fully achieve. It is not possible to achieve *ideal* mental health, happiness, assimilation, sexuality, adulthood, and mind-body alignment. It is also not possible to realise the ideal forms

of gender that these discourses contain. This is because ideals are, by definition, imaginary and elusive. As such, if manual hormone use can only be legitimate as a strategy for striving toward these ends, then the conditions that govern that legitimacy will endure in perpetuity. For as long as the unachievable is unrealised, the Court's oversight must remain in place. Moreover, this teleological regime requires that manual hormone users strive toward, but always fall short of achieving, the ends that it constructs as legitimising. This is because if the legitimacy of manual hormone use arises only when it is practised as a means to accomplish these ends, then realising those ends would dissipate that legitimacy. In this way, this teleological regime maintains the necessity of its arbitration at all times.

By criticising the Court's teleology of manual hormone use I do not mean to suggest that the ends the Court cited should not legitimise manual hormone use. My argument is not that hormones should not be used manually in pursuit of social integration, enhanced sexuality, maturity, mental wellbeing, greater happiness, or mind-body alignment. Nor do I mean to suggest that manual hormone use cannot or should not contribute toward one's progress toward such ends. Rather, as I stated in chapter three, my critique centres upon the wielding of these teloses by a governing authority to arbitrate the legitimacy of manual hormone use and to restrict the possibilities that manual hormone use can unleash to the service of these ends. My critique concerns the use of these teloses to govern how subjects can enact gender and what forms of gender can be enacted. In pointing out how these teloses were invested in the reproduction of gender normative subjects, I do not mean to foreclose these ways of justifying manual hormone use. Instead, I mean to challenge the Court's use of these teloses to foreclose other ways of doing so.

My critique, then, has been characteristically queer in its aspirations. Queer scholarship has, since its inception, been concerned with challenging and disrupting the normative criteria that govern what counts as a 'good life.' This is because queer theorists have shown that the criteria that structure contemporary Western conceptions of 'the good life' are riven with hetero- and cis-normative imperatives. These imperatives orient subjects toward the re-creation of dominant gender norms, but also disparage and preclude the realisation of forms of life that exist outside of

these norms (Berlant 2011; Warner 1999; E. Freeman 2010; Edelman 2004). Ruti (2017, 1) captures the essence of this critique as a line of questioning, asking: “Why would we want to be normal? Isn’t normal what has always oppressed us?” Along these lines, Muñoz (2009, 98) argued that dominant imaginations of the life-course, being riven by heteronormative imperatives, harm queer people by forcing them to appear as “developmentally stalled” and forever lacking “the complete life promised by heterosexual temporality.” It follows, for Muñoz (2009, 112), that in a world where time is imagined predominantly in hetero- and gender normative terms “queers think that both the past and future do not belong to them.”

In response, queer scholarship has sought to affirm the legitimacy, value, and possibility of non-normative, if not insurgent, ways of being. This feature of the queer project found its nascent articulation in the gay and lesbian liberation movements of the 1960s and 1970s. As Sullivan (2003, 29) notes, “For liberationists . . . the imperative was to experience homosexuality as something positive in and through the creation of alternative values, beliefs, lifestyles, institutions, communities.” More recently, queer theorists have continued to argue that refusing normative conceptions of the good life is vital for the emancipation of queerness. Halberstam (2005, 4), for instance, shows how dominant notions of ‘the good life’ are underpinned by a heterosexist and “middle-class logic of reproductive temporality” and argues on this basis that queers should embrace failure with regard to these norms. Failure, for Halberstam (2011, 88), means “refusing to acquiesce to dominant logics of power and discipline,” and in doing so “imagin[ing] other goals for life, for love, for art, and for being.” As he writes (2011, 2–3):

Under certain circumstances failing, losing, forgetting, unmaking, undoing, unbecoming, not knowing may in fact offer more creative, more cooperative, more surprising ways of being in the world. Failing is something queers do and have always done exceptionally well . . . failure allows [queers] to escape the punishing norms that discipline behavior and manage human development with the goal of delivering us from unruly childhoods to orderly and predictable adulthoods.

As such, for Halberstam, failure both subverts heteronormative norms and allows for the affirmation of alternative modes of being that are not valued by the current order.

Stockton (2009) makes a similar point about the imagination of futures for children in particular. She identifies a range of fantasies of ‘the good life’ that position the only valuable path for children as working toward the accomplishment of a typical heterosexual adulthood. She identifies the contemporary Western construction of childhood as a time of “growing up” as a normative spatial configuration. This “relentlessly figured as vertical movement upward,” she states, is always configured as growing “toward full stature, marriage, work, reproduction and the loss of childishness” (Stockton 2009, 4). As a counterpoint to this, Stockton frames the queer child as “growing sideways,” a position that “locates energy, pleasure, vitality, and (e)motion in the back-and-forth of connections and extensions that are not reproductive” (Stockton 2009, 13).

Ahmed (2010; 2015; 2017) advances a similar position throughout her oeuvre. In deconstructing the cultural production of happiness as an instrument that “is used to justify social norms as social goods,” she advocates for liberating happiness and its associated forms of value from its shackling to gender normative ends (Ahmed 2017, 254). In making this argument, Ahmed (2017, 196) notes that “the word happiness derived from the Middle English word *hap*, meaning chance.” “Happiness,” she observes, “shares its hap with the word perhaps as well as happens and happenstance”—words that “convey movement, blowing haphazardly, rather like straw in the wind.” Noting this, Ahmed (2017, 196) wonders, “How did happiness lose its hap?” In other words, how did happiness become so narrowly circumscribed that it is now conterminous only with hetero-, gender, and cis-normative objects, ends, events, and experiences? Accordingly, Ahmed (2017, 265–66), argues that feminist and queer projects should strive to “put the hap back into happiness.” She writes (2010, 222):

a critique of happiness can be offered as an affirmative gesture. We would not be calling for an affirmative approach to life, or calling for affirmation as an ethics. Rather we would be affirming the possibilities

of life in whatever happens; we would be opening up possibilities that are negated by the very demand that we live our lives in the right way.

Thus, in the spirit of a critique that affirms alternatives rather than merely deconstructs regimes of the normal, my point is not that manual hormone use cannot or should not be legitimised as a means to pursue the ends that the Court cited. Rather, it is that manual hormone use should be legitimate and practicable in pursuit of ends other than those that the Court cited, or indeed, in pursuit of ends that contradict, undermine, or challenge those that the Court cited. It is also to say that manual hormone use should be considered legitimate when it is used to affirm the value of forms of life that do not conform with the parameters of what the Court, in these discourses, considered to be a life worth living. And, it is to oppose the foreclosure of possibilities rendered by regimes of teleological governance that limit the possible trajectories lives can take, and that straighten their subjects' chances for lateral growth, transformation, and change. The question that arises is thus not "which ends ought manual hormone use be oriented toward as a condition of its legitimacy?" Instead, we should ask "who can decide which ends are worth pursuing," "who should have the power to determine which kinds of gendered lives are worth living," and "who should have the power to bring those lives to life, or not?" The point of a queer critique of this kind, as Muñoz (2009) also helps to articulate, is reimagining not just the present but the future that the present might realise as well. As he puts it, "queerness is not yet here but it approaches like a crashing wave of potentiality" (Muñoz 2009, 185). He writes (2009, 1):

The here and now is a prison house. We must strive, in the face of the here and now's totalising rendering of reality, to think and feel a then and there . . . Queerness is the longing that propels us onward, beyond romances of the negative and toiling in the present. Queerness is that thing that lets us feel that this world is not enough.

## Conclusion

This chapter has shown that the Court constructed a teleology to arbitrate the legitimacy of its subjects' manual hormone use. In the preceding sections, I have examined each of the ends that comprised this teleology—mental health, happiness, assimilation, sexuality, adulthood, and mind-body alignment—and demonstrated how each positioned the realisation of gender normativity as the telos that motivates and justifies legitimate manual hormone use. On this basis, I have argued that this teleology worked to ensure that its subjects could only use hormones manually to normalise their gender, and as such, to preclude their queerness. Teleology, in this way, was a key feature of the Court's machinery of gender governance. It was one instrument, alongside ontology and epistemology, that the Court wielded to control the way that its subjects could be gendered, and as such, to control how gender could manifest.

This chapter thus concludes the series of three chapters that have examined, in turn, each of the three categories of assertions—ontology, epistemology, and teleology—that the Court used to arbitrate the legitimacy of its subjects' manual hormone use. In each of these chapters, I have shown how these discourses contributed, in their own ways, to the Court's machinery of gender governance. In the following chapter, I consider the broader implications that arise from my analysis of the Court's regulation, and set in motion a way of imagining how the critique that I have offered might contribute to future unleashings of gender's potential.

# Conclusion

I may feel that without some recognizability I cannot live. But I may also feel that the terms by which I am recognized make life unlivable. This is the juncture from which critique emerges, where critique is understood as an interrogation of the terms by which life is constrained in order to open up the possibility of different modes of living; in other words, not to celebrate difference as such but to establish more inclusive conditions for sheltering and maintaining life that resists models of assimilation.

— Judith Butler (2004b, 4)

This thesis has analysed the Family Court of Australia's regulation of young people's gender-affirming manual hormone use as *a case of gender governance*. As such, it has examined how the Court exerted power over gender through its regulation of manual hormone use. I wanted to achieve two goals with this analysis. First, I wanted to show how the Court's regulation of manual hormone use controlled how its subjects could enact gender. And second, I wanted to challenge the boundaries that the Court constructed therein to determine which forms of gender would be able to manifest. I wanted to do this because, as Butler suggests in the quote above, these boundaries are neither neutral nor axiomatic; rather, they are contingent restraints rendered upon their subjects' possibilities for life, if not upon life itself.

The preceding chapters have all worked toward these ends. In chapter two, I laid the conceptual foundations necessary to support an analysis of gender governance. To do this, I engaged with a range of feminist, queer, and trans literatures to conceptualise the nature of gender and theorise how it could be governed. Then, in chapter three, I developed a method that would allow me to analyse how the

Family Court governed gender by regulating young people's manual hormone use. There, I outlined my approach to and rationale for conducting a discourse analysis of the 76 reasons for judgment that the Court published in the wake of each case where a young person applied for its authorisation to use hormones manually. This analysis allowed me to identify, interrogate, and challenge the conditions that the Court constructed to arbitrate the legitimacy of its subjects' manual hormone use. And as such, it allowed me to identify, interrogate, and challenge the discursive mechanisms that the Court deployed to govern how its subjects could *be* gendered. I explicated the details of this analysis in chapters four, five, and six.

My analysis of the Court's judgments revealed that the Court used three kinds of statements to arbitrate the legitimacy of its subjects' manual hormone use. These statements concerned the ontology of gender, the epistemology of gender, and the teleology of manual hormone use. In chapters four, five, and six, I examined each of these categories of discourse in turn. These chapters revealed how the discourses that comprised each category contributed both individually and collectively to the Court's machinery of gender governance. First, in chapter four, I showed how the ontological assertions that the Court made about gender, by playing a role in arbitrating manual hormone use, worked to ensure that subjects could only use hormones manually to secure the realisation of immutable, socially congruent, and seemingly natural forms of gender. Then, in chapter five, I showed how the Court's claims about the epistemology of gender worked to ensure that subjects could only use hormones manually to affirm a form of gender that they were already known to be. This meant that authorisation to use hormones manually depended upon subjection to a panoply of intra- and inter-personal apparatuses of gender accountability. Lastly, in chapter six, I showed how the Court's teleology of manual hormone use made the legitimacy of its subjects' manual hormone use conditional upon their promise to use those hormones to *become* normatively gendered, as judged by their potential to realise several normative objectives.

Thus, each chapter has contributed in its own way to advancing this thesis' central claim: that the Court's regulation of manual hormone use enacted a form of governance not only over how its subjects could be gendered but also over gender

itself. Throughout chapters four, five, and six, I showed that although the Court authorised its subjects to use hormones manually in almost every case, it did so only after tethering the legitimacy of that hormone use to its subjects' promise to uphold certain ontological, epistemological, and teleological norms. Upon critically analysing these norms, I have argued that the conditions of legitimacy that the Court constructed through its discourses on ontology, epistemology, and teleology worked to secure the manifestation of gender normative subjects and to prevent or reorient the manifestation of non-normative others. Or, to put this another way, the Court's legitimation normalised and privileged certain ways of being gendered while delimiting or denigrating others as unreal, impossible, unworthy, or undesirable. As such, even while the Court used its discourses on ontology, epistemology, and teleology primarily to *legitimise* its subjects' manual hormone use—given that the Court authorised its subjects to use hormones manually in all cases but one—these discourses worked simultaneously to prevent subjects from using hormones manually to realise modes of being that exceeded their normative boundaries. In this sense, the Court governed gender *affirmatively* by allowing manual hormone use to occur but only to realise the modes of being gendered that it had sanctioned. These conditions constituted a mode of governance over gender *itself* because, as I argued in chapter two, gender does not have a fixed or universal form. Rather, gender is enacted; it is something that subjects bring into being. Its nature depends, therefore, upon the conditions of its creation. To control the way that gender can be practised—that is, to force subjects to *be* gendered in line with specific norms—is to control the nature of gender itself.

My argument, then, is that the Court's regulation of manual hormone use governed gender in both its present *and* potential forms. This is because, in short, if gender is something that changes depending upon how it is enacted, and if gender can be enacted in many different ways, then gender is not a static entity but a field of possibility. That is, if gender is not an essence but a mode of being that is realised through action, then the term 'gender' does not map onto a discrete set of ontological forms but a locus of potentiality. Thus, gender always contains the promise of manifesting in a great diversity of ways. Butler (1999, 79, 143) made this point,

reflecting on Simone de Beauvoir's (1953, 301) famous assertion that "One is not born, but rather becomes, a woman," writing that:

If there is something right in Beauvoir's claim that one is not born, but rather becomes a woman, it follows that woman itself is a term in process, a becoming, a constructing that cannot rightfully be said to originate or to end . . . [I]f gender is something that one becomes—but can never be—then gender is itself a kind of becoming or activity, and that gender ought not to be conceived as a noun or a substantial thing or a static cultural marker, but rather as an incessant and repeated action of some sort . . . [Thus,] as an ongoing discursive practice, [gender] is open to intervention and resignification.

Gender is, therefore, something that is always *becoming*. It is constantly in process and thus always open to transformation. Gender is, as such, a site of possibility rather than stasis; it can always *become* other than that which it is currently *being*. To force subjects to *be* gendered in circumscribed ways—that is, to force subjects to enact only specific kinds of gendered *beings*—is, therefore, not only to restrict subjects to inhabit modes of being that are already actualised. More incipiently, it is also to curb gender's potential for actualising otherwise. The Court's regulation of manual hormone use, as such, worked to orient the trajectory of gender's becoming toward a recapitulation of its normalised forms. The mechanism of gender governance that the Court enacted was, therefore, an injunction not only upon gender *per se* but also upon the vector of gender's potential.

This foreclosure of possibility was violent in several respects. First, it perpetrated a kind of ontological violence—that is, violence on the level of *being* itself—by prescribing limits upon how its subjects could *be* gendered. These prescriptions were violent because they forced subjects to inhabit only those modes of being that the Court had sanctioned and, as such, restricted their ability to be or become otherwise. This internment was harmful in one sense because it abrogated its subjects' existential freedom. Openness to change, difference, and transformation is a form of existential freedom. To embrace becoming, to become other than what one already is, or to become other than what one is coerced into being, is to exercise existential

freedom. To require subjects to inhabit certain modes of being, conversely, is to constrain their being and immobilise their potential for actualising anew. This mode of confinement is a kind of oppression, generally conceived. As Butler (2020, 100–101) writes, “without an open future, a life is merely existing, but it is not living.” This confinement can also be acutely oppressive for those who find the mode of gendered being in which they are confined to be undesirable, or worse, unlivable.

And indeed, the modes of being gendered that the Court required its subjects to inhabit were unlivable on multiple counts. On one count, this unlivability arose because subjects can and do desire to be gendered in different ways, and their capacity to realise these desired modes of being often indexes the livability of their life as well as their ability to thrive within it. Thus, interning subjects into particular modes of being can harm them by denying them the chance to realise more desirable, capacious, or flourishable lives. The unlivability of constraint thus arises, in one respect because to enforce a certain mode of being gendered is both to confine a subject to *be* in ways that may be harmful or inhibiting in themselves and to prevent them from manifesting more prosperous alternatives. Indeed, many of the subjects these cases concerned may have been seeking to use hormones manually, in part, because they experienced their confinement to a particular order of being gendered to be unlivable and thus sought to actualise better alternatives. In such instances, transformation promised to facilitate rather than threaten a subject’s capacity to thrive, yet their desire for transformation was only intelligible to the Court, and thus realisable in the Court’s view, as a desire for conformity.

Yet the Court affected the livability of its subjects’ lives not only as a condition of internment *itself* but also as an effect of the *kinds* of gendered beings that this internment compelled its subjects to enact. As I have argued throughout the preceding chapters, the normative archetypes of masculinity and femininity that the Court prescribed in these cases are intrinsically injurious. This is to say that being ‘normally’ gendered in the way that the Court desired requires being subjected to, if not subjectified through, violence. Indeed, the very conception of the normal that operates in this designation depends upon violence. This is because the modes of being that register as ‘normal’ according to prevailing criteria do not occur naturally

but are brought into being and sustained through social regulation. As feminist, queer, and trans scholars have shown, the boundaries of ‘normality’ that define these modes of being depend upon prohibition, discipline, impairment, and punishment as a condition of their possibility. Their status as normal relies on the coercion of subjects into occupying and reinstituting those modes of being and the promise that physical, social, structural, psychological, and various other kinds of violence will befall those who breach these boundaries of normality.

Further still, the Court’s governance of gender was violent not only because of the impact that it had upon the subjects of its proceedings but also because it worked to sustain a broader system of gender norms that is both produced and maintained through violence as well as violent in its effects. As I argued in chapter two, the institutionalisation of gender norms depends upon the (re)production of gendered subjects that act in line with—and as such work to sustain—those norms. The normative production of gendered subjects is, as such, one of the key processes involved in producing and maintaining the harms that gender normative institutions enact. The harms that stem from the institutionalisation of gender norms are manifold and variegated, as feminist, queer, and trans scholars have laboured to show. Yet collectively, these harms work to organise the livability of the lives that they enclose hegemonically by unevenly distributing quality of life, possibilities within life, as well as possibilities for life itself, according to the kind of gendered being that one is able or forced to enact, as well as one’s willingness and capacity to conform to the mandates of that assignment.

The Court also contributed to the maintenance of this system by enacting an injunction against defecting from, challenging, or transforming the norms that support it. By prescribing limits upon how its subjects could *be* gendered, and as such by restricting its subjects’ ability to actualise alternative modes of being, the Court worked not only to ensure that its subjects would reinstitute prevailing gender norms but also to render its subjects unable to destabilise and rework those norms. The Court therefore diminished both its subjects’ power to affect the trajectory of their own gendered lives as well as their power to participate in redirecting the trajectory of gender itself.

Taken together, these injunctions against change, and these foreclosures of possibility, constituted an assault upon queerness. This is because queer is, by definition, the practice of possibility, the manifestation of difference, the embrace of change, and the promise of unrealised potential. Queer is, as Giffney (2016, 8) asserts, the practice of “fluidity, über-inclusivity, indeterminacy, indefinability, unknowability, the preposterous, impossibility, unthinkability, unintelligibility, meaninglessness and that which is unrepresentable or uncommunicable.” Or, to follow Sedgwick (1993, 8), queer is “the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning” that arise “when the constituent elements of anyone's gender, of anyone's sexuality aren't made (or can't be made) to signify monolithically.” Queer, then, is a way of asking what could be rather than what is. To be queer is to be always swept away by a current of becomings, the culminations of which are forever yet to arrive.

The Court's regulation of manual hormone use worked toward the annihilation of queerness, as such, by attempting to secure its subject's capitulation to normality. The Court refused to affirm its subjects' openness to transformation and it refused to encourage its subjects to pursue yet to be realised possibilities. Instead, the Court worked to constrain its subjects within the confines of the already, to coerce its subjects into the re-creation of dominant norms, to cauterise their difference, and to arrest their potential for change. In essence, the Court's regulation of manual hormone use was antithetical to queerness because it sought to secure the manifestation of *beings*—and only those *beings* that it had sanctioned—rather than facilitate the capacity of those beings to become other than what they already were or what they were pressured to be. In short, by requiring its subjects to perform stasis, normality, and conformity instead of embracing fluidity, diversity, and creativity, the Court not only regulated its subjects in ways that abrogated queerness itself, but also worked to shape its subjects in ways that would neutralise, annihilate, prevent, or inhibit their actual or potential queerness.

The Court's work to negate queerness in these cases is striking for several reasons. First, it is striking because the norms that the Court recruited its subjects into maintaining are *especially* violent toward those that are marginalised by them,

including not least of all those that use hormones manually to manifest a gender other than that which they have been assigned. As such, the Court made those most vulnerable to the violence that these norms engender responsible for upholding them. And in doing so, the Court worked to ensure that any subject that it allowed to use hormones manually also invested in the reproduction of a system of norms that punishes manual hormone users as deviant. In this way, the Court not only forced its subjects to participate in a system that subordinated them but also barred those that had the most to gain from the transformation of that system of norms from participating in such a transformation. In other words, the Court worked to expunge queerness from the subjects for whom queerness may have held the most liberatory potential.

The Court's work to negate queerness is also striking because the subjects that these cases concerned were among its most powerful vectors. This is because the practice that these subjects asked the Court to authorise them to perform radically challenges the norms that it was promulgating. As several trans scholars have noted, to 'transition' in the ways that many of the Court's subjects were intending can be—although it may not *necessarily* and certainly does not *have* to be (Namaste 1996b; Bettcher 2014; Prosser 1998a)—a way to challenge one's confinement to one category of gender and to actualise novel and more livable modes of being gendered (Bornstein 1994; S. Stone 2006; Stryker and Whittle 2006; Stryker and Aizura 2013b; Califia 2003; Serano 2007; Feinberg 1998; Valentine 2007; A. Enke 2012b). Indeed, Halberstam (2018, 4) writes that the category of "trans\*" itself "can be a name for expansive forms of difference, haptic relations to knowing, uncertain modes of being, and the disaggregation of identity politics predicated upon the separating out of many kinds of experience that actually blend together, intersect, and mix." Halberstam (2018, 50) writes further that:

"trans\*" marks a politics based on a general instability of identity and oriented toward social transformation, not political accommodation . . .  
 Trans\* also signals the insufficiency of current classificatory systems . . .  
 [and aims] not to impose ever more precise calibrations of bodily

identity but rather to think in new and different ways about what it means to claim a body.

Hence, by refusing to capitulate to the gender assignment that had been thrust upon them, the subjects of these cases affirmed their potential for change and for the creation of the new. However, rather than encourage its subjects' to embrace transformation, or to actualise the yet-to-be-realised, the Court forced them to carve their being to fit with prevailing norms. Instead of supporting its subjects to shed the restraints of the already and to generate more capacious alternatives, the Court worked to redirect their revolutionary capacities toward a reiteration of the status quo.

Manual hormone use can also be a powerful vector of queerness. Hormones influence the constitution of the gendered body, as well as the gendered subjectivity that is bound up with that body, both discursively and materially (R. Lane 2009; Irni 2013; 2017). In this way, hormones participate in the production of gender, regardless of whether they are used manually or arise in a body automatically, and irrespective of whether subjects 'choose' which hormones will or will not affect them. Yet, hormones do not produce any essential set of effects in this regard. Rather, they are dynamic chemical signals that interact omnigenously with the changing world around them (Oudshoorn 1994; C. Roberts 2007; Jordan-Young and Karkazis 2019). As Gill-Peterson (2014, 407, my emphasis) has argued, hormones play a role in the production of gender by order of their "participation in the body's *open-ended* technical capacities." That these capacities are open-ended means that they can be harnessed to produce a diverse array of gendered embodiments and subjectivities. Hormones, as such, do not consist of discrete chemical forms but mutable assemblages of relations. They are sites of plural potentialities rather than linear forces of cause and effect.

Hence, hormones can produce gender in countless ways. Hormones can be used to interrupt, usurp, or redirect bodily automaticities and can exploit the body's inherent capacity for transformation. They can arise automatically in the body and affect it in both predictable and surprising ways. Hormones can also be used manually to shape the body and its gender in either anticipated or new and

challenging ways. Consequently, hormones can challenge one's confinement to any particular mode of being. Hormonal gender affirmation can be used to remake gender, push it toward new possibilities, and unshackle it from the various forces that seek to keep it fixed in place. By intervening in the trajectory of the body and persuading it to be configured differently, hormones can be used to realise hitherto impossible or unimaginable manifestations of gender (Gill-Peterson 2014; C. Roberts and Cronshaw 2017). Hence, manual hormone use holds the promise of a more expansive and capacious set of possibilities for being gendered. It is, for this reason, *potentially* radical. Yet, the Court's regulation of manual hormone use was intent upon arresting this transformative potential. Through the conditions it constructed through discourses on ontology, epistemology, and teleology, the Court worked to ensure that manual hormone use could only function as an instrument of normalisation. In this way, the Court's regulation promised to repress, rather than enliven, a powerful vector of queer potential.

The overarching goal of this thesis, as an interrogation of gender governance, has been to expose and challenge these foreclosures. Throughout the preceding chapters, I have endeavoured to reveal, criticise, and destabilise the mechanisms through which these foreclosures were enacted. In undertaking such a project, this thesis joins with a chorus of feminist, queer, and trans scholars whose work calls into question the regimes that govern how subjects can *be* gendered and that police the boundaries of gender legitimacy. This project has, as such, sought to interrogate how the Family Court wielded its power to regulate the production of gendered subjects, to orient that production toward normative ends, and to prevent the realisation of new and insurgent forms of gender.

This thesis has interrogated only one mechanism of gender governance, and it has grappled with only those discursive techniques that have comprised this particular mechanism. Nonetheless, the critique that I have offered makes a useful contribution toward feminist, queer, and trans ends. Although this particular mode of legal regulation is no longer in place, and although it was only one among a vast panoply of governing mechanisms, many of the instruments that the Court deployed to arbitrate the legitimacy of its subject's gendered lives—including its discourses on

ontology, epistemology, and teleology—circulate and support the arbitration of gender in domains that stretch far beyond the purview of this case study. That these instruments play a role in arbitrating the possibilities of gendered life beyond the courtroom mean that the mechanism of governance that I have critiqued here is neither isolated nor discrete. Rather, it is connected to, emulated by, and endures within broader systems of gender governance—many of which continue to operate, are intensifying, or are in the process of emerging anew. As such, I have written this thesis in the hope that by delineating how this governing mechanism operated, and by offering strategies to criticise and undermine the discursive methods that it deployed to govern, this thesis might prove useful in destabilising the governing mechanisms that endure in its stead.

Yet, I also hope that my critique registers as more than merely subversive. In the spirit of a queer analysis, this project has also aspired to be affirmative. Queer critique, as I elaborated in chapter three, intends to offer more than negation. It also focuses its attention on the realisation and celebration of marginalised or yet-to-be-realised possibilities (M. Ball 2014). As Duggan (1992, 11) attests, queer is “the promise of new meanings, new ways of thinking and acting politically—a promise sometimes realized, sometimes not.” Similarly, for Jagose (1996, 158–159), queer is a practice that embraces the “radical unknowability of its future formations.” Or, to draw upon Halperin’s (1995, 62, my emphasis) conceptualisation, queer is not a distinct end, identity, entity, or exercise but “a *horizon of possibility* whose precise extent and heterogeneous scope cannot in principle be delimited in advance.” The queer project, as such, is defined by an orientation toward the new and an impulse to affirm the manifestation of difference (Warner 1993; Ahmed 2017, 7–15). These ambitions mean that queer work is always engaged in a kind of world-building—or, as Muñoz (2009, 1) would have it, “a doing for and toward the future” that is premised upon a “rejection of a here and now and an insistence on potentiality or concrete possibility for another world.” To be queer, then, is to appreciate difference, to embrace potentiality, and to be engaged in a valediction of oppressive norms.

In aspiring to be a queer project of this kind, my efforts to reveal and undermine the conditions that the Court constructed to arbitrate the legitimacy of manual

hormone use have not intended to narrow the scope of that legitimacy. Rather, they have endeavoured to point out the limitations that such rationales imposed upon the possibilities that manual hormone use might deliver, as well as challenge the Court's authority to decide which possibilities ought to be realised. As such, I have worked not only to challenge the Court's foreclosures of gender's potential but also to support radical new becomings. I have sought to disrupt the mechanisms that wrought these foreclosures in an effort to affirm alternative modes of legitimising manual hormone use and alternative possibilities for being gendered. In this sense, I have formulated this project as an antithesis, intent upon controverting the ends that the Court aspired to achieve. While the Court worked to foreclose possibilities, in contesting the legitimacy of those foreclosures, I have strived to emancipate them.

My argument, then, is that neither manual hormone use nor the gendered ends that it might realise should be confined to the ontological, epistemological, or teleological strictures that the Court imposed. My work has aspired to affirm the legitimacy of manual hormone use as a means to enact modes of being gendered that are not knowable within already prevailing epistemic frames. It has been motivated by a vision of a world where the legitimacy of manual hormone use is not tethered to their power to transpose a subject into normality or produce a subject that upholds gender normative orders. It has insisted upon a world in which one might use hormones manually, or engage in any other kind of gender-making practice, to realise new, insurgent, or hitherto unthinkable ways of being—that is, a world in which one's possibilities for being are not arbitrarily foreclosed by institutional desires to maintain gender norms. And, it has laboured to endorse the value of manifesting forms of gender that do not conform to dominant norms, as well as challenge the various institutional processes that inhibit or prevent the manifestation of insurrectionary forms of gender. Indeed, the arguments that I have offered strive to realise a world where one might be able to use hormones manually to transform one's body, subjectivity, or manner of being in ways that are entirely unconnected to gender—that is, where one might be able to use hormones manually to manifest new and diverse modes of embodiment and subjectivity that are unconstrained by gender and that may be connected to another set of meanings

entirely. This also means avowing the possibility of a world where ‘gender’ is no longer a *mandated* feature of one’s being—that is, where one’s existence, either in its quality or in its totality, does not depend upon their gender—or where ‘gender’ is no longer *required* for legitimate manual hormone use. I have tried to ask whether manual hormone use can be legitimate on different terms, as well as whether it is legitimate to regulate it in such a manner at all. In turn, I hope that the critique that I have offered contributes to the on-going project of challenging the boundaries of a legitimately gendered life, broadening the scope of possibilities that can be organised under that label, if not to abolish the arbitration of such a category entirely. May those projects, both scholarly and otherwise, endlessly proliferate.



# Appendices

## Appendix I: Case List

### Cases Analysed

Re Adrian [2017] FamCA 957 (10 November 2017)  
Re Andrea [2017] FamCA 24 (21 April 2017)  
Re Andy [2017] FamCA 966 (16 November 2017)  
Re Anita [2017] FamCA 1137 (19 December 2016)  
Re Ashley [2015] FamCA 373 (22 May 2015)  
Re Ashton [2017] FamCA 1137 (23 May 2017)  
Re Benjamin [2017] FamCA 528 (12 July 2017)  
Re Blaine [2017] FamCA 647 (23 August 2017)  
Re Bobbie [2017] FamCA 974 (29 November 2017)  
Re Brittany [2017] FamCA 527 (14 July 2017)  
Re Cameron [2015] FamCA 1113 (9 December 2015)  
Re Celeste [2016] FamCA 503 (29 March 2016)  
Re Chelsea [2017] FamCA 389 (19 May 2017)  
Re Christopher [2015] FamCA 454 (16 June 2015)  
Re Colin (Gender Dysphoria) [2014] FamCA 449 (27 June 2014)  
Re Corey [2017] FamCA 595 (21 July 2017)  
Re Dale [2015] FamCA 473 (22 June 2015)  
Re Dallas [2016] FamCA 1131 (8 December 2016)  
Re Dana [2017] FamCA 686 (29 August 2017)  
Re Daniel [2017] FamCA 155 (17 March 2017)  
Re Darcey [2015] FamCA 409 (2 June 2015)  
Re Darryl [2016] FamCA 720 (26 August 2016)

Re Drew [2015] FamCA 784 (11 May 2015)  
Re Dylan [2014] FamCA 969 (5 November 2014)  
Re Eddie (No 2) [2017] FamCA 1001 (4 December 2017)  
Re Eddie [2017] FamCA 822 (9 October 2017)  
Re Elliott [2017] FamCA 1008 (11 December 2017)  
Re Emery [2016] FamCA 240 (15 April 2016)  
Re Flynn [2015] FamCA 629 (31 July 2015)  
Re Frances [2017] FamCA 904 (10 November 2017)  
Re Gabrielle [2016] FamCA 470 (10 June 2016)  
Re George [2016] FamCA 136 (4 March 2016)  
Re Harley [2016] FamCA 334 (22 April 2016)  
Re Hudson [2017] FamCA 938 (14 November 2017)  
Re Isaac [2014] FamCA 1134 (17 December 2014)  
Re Jacinta [2015] FamCA 1196 (22 December 2015)  
Re Jaden [2017] FamCA 269 (2 May 2017)  
Re Jamie [2013] FamCAFC 110 (31 July 2013)  
Re Jamie [2015] FamCA 455 (16 June 2015)  
Re Jan [2017] FamCA 1171 (21 December 2016)  
Re Janson [2015] FamCA 499 (27 March 2015)  
Re Jason [2016] FamCA 772 (9 September 2016)  
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