

## **RE ALEX**

### **Narrative Identity and the Case of Gender Dysphoria**

*By Kim Atkins\**

In April 2004, the Family Court was called upon to determine whether gender reassignment treatment was in the best interests of a child named Alex. In determining any person's interests, it is necessary to know who that person is and whose interests are at stake. This is even more difficult where the interest at stake concerns a person's identity. In order to determine whether gender reassignment was in Alex's interests, the court was required to determine how the question of gender related to who Alex was. In short, the court had to deploy a theory of identity. This article will argue that the process and the reasoning behind the judgment demonstrate the deployment of a practical and discursive conception of identity (specifically, a narrative self-constitution view), rather than an essentialist view according to which gender identity is regarded as a direct expression of bodily sex. In coming to his judgment, the Chief Justice demonstrated a critical sensitivity and responsivity to the discursive nature and social context of identity by facilitating a dialogical account of Alex's situation and, ultimately, gender identity.

On 13 April 2004, the Chief Justice of the Family Court, Alistair Nicholson, decided in favour of an application requesting that the court approve permission for a special medical procedure for a child known as Alex. The special medical procedure was a course of staged treatment that would progress from reversible to irreversible pharmacological therapies of gender reassignment.

The Family Court was called upon to determine whether gender reassignment treatment was in the best interests of the child, Alex. In determining any person's interests, it is necessary to know who that person is and whose interests are at stake. This is even more difficult where the interest at stake concerns a person's identity. In order to determine whether gender reassignment was in Alex's interests, the court was required to determine how the question of gender related to who Alex was. In short, the court had to deploy a theory of identity. This article will argue that the process and the reasoning behind the judgment demonstrate the deployment of a practical and discursive conception of identity (specifically, a narrative self-constitution view), rather than an essentialist view according to which gender identity is regarded as a direct expression of bodily sex. In coming to his judgment, the Chief Justice demonstrated a critical sensitivity and responsivity to the

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discursive nature and social context of identity by facilitating a dialogical account of Alex's situation and, ultimately, gender identity.

In what follows, a short overview of the case will be given, followed by an explanation of the narrative self-constitution view. The paper will then discuss the judgment with reference to this practical conception of identity to demonstrate the narrative model at work. Throughout the judgment, Alex is referred to as a male. For that reason, this article also employs the male form of reference.

### Overview of the case

Alex is a 13-year-old with normal female chromosomes, hormone levels and reproductive organs, and with no ambiguity in sexual characteristics. Alex is 'anatomically, and in the eyes of the law'<sup>1</sup> a girl, but has 'a longstanding, unwavering and present identification as male'.<sup>2</sup> Alex has suffered from serious behavioural problems and depression, which he attributes to his inability to live as male. Alex's caseworker and treating psychiatrist, as well as the consulting psychiatrists requested by the court, were unanimous in their assessment of Alex as suffering from gender dysphoria, which: 'refers to the self-perception of being male or female ... [it] describes a condition characterised by the incongruence between the self-perception of being male or female and the phenotypical body'.<sup>3</sup>

Every party to this case, including the child's aunt and court appointed child representative, was supportive of the application to the Family Court.

The application concerning Alex was brought before the Family Court because the request concerned procedures that would be considered beyond the scope of parents or legal guardians to consent to.<sup>4</sup> The court has jurisdiction in cases concerning special medical procedures under section 67ZC of the *Family Law Reform Act 1995*, which 'is similar to the ancient *parens patriae* jurisdiction'.<sup>5</sup> Such powers over special cases are justified with regard to the 'significant risk of making the wrong decision and ... because the consequences of a wrong decision are particularly grave'.<sup>6</sup> The Chief Justice noted that the Family Court had jurisdiction because, in the first instance, it was a request for a procedure for which Alex could not give full consent. Despite his 'good intellectual and cognitive capacity',<sup>7</sup> Alex was considered too immature to fully grasp the long-term implications of gender reassignment. Second, it was a request for a procedure that involved 'invasive, permanent

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<sup>1</sup> *Re Alex: Hormonal Treatment for Gender Dysphoria* [2004] FamCA 297, at para 2.

<sup>2</sup> *Re Alex* [2004] FamCA 297, at para 80.

<sup>3</sup> *Re Alex* [2004] FamCA 297, at para 100.

<sup>4</sup> *Re Alex* [2004] FamCA 297, at para 176.

<sup>5</sup> *Re Alex* [2004] FamCA 297, at para 6.

<sup>6</sup> *Re Alex* [2004] FamCA 297, at para 176.

<sup>7</sup> *Re Alex* [2004] FamCA 297, at para 163.

and irreversible<sup>8</sup> treatment. Although the Chief Justice did not consider that there was sufficient evidence that treatment for gender dysphoria would ‘cure a disease or correct some malfunction’, as section 67ZC had been interpreted in earlier judgments,<sup>9</sup> he noted the indeterminate scope of *parens patriae* jurisdiction, especially in light of recently described disorders that arise as ‘the march of science overtakes the perimeters of settled law’.<sup>10</sup> In other words, he recognised the lag between the current law and the demands presented by novel situations that arise as science and technology create new ways of understanding ourselves and our place in the world. This interpretation also showed an appreciation of the historical contingency and discursive character of certain pathologies.<sup>11</sup>

In considering the evidence, the Chief Justice noted that Alex had thought of himself as a boy from a very early age. He was extremely close to his father, with whom he had slept and bathed and who had taught him karate and fighting. Alex reported being distressed when he saw his mother’s body for the first time: ‘[he] thought the whole world was male’.<sup>12</sup> He had worn male clothes from a very early age and generally behaved like a male; Alex’s aunt and others referred to and introduced Alex as ‘he’. Alex’s father died suddenly when Alex was five years old, leaving a (still) traumatised and grieving child. Alex’s history also revealed that he had experienced ongoing and profound rejection by his mother from a very early age. He has since suffered prolonged anger, violent outbursts, depression and self-harm, exacerbated by his mother’s remarriage to a man who also rejected him after the family migrated to Australia. Alex’s mother accused him of trying to kill his stepbrothers on several occasions and believed he was ‘a follower of the devil’.<sup>13</sup> She was reported as saying that she did not love Alex and wanted the government to take him away.<sup>14</sup> She was not able to be contacted about the Family Court proceedings, and consequently took no part in them.

Along with his identification with maleness, Alex had great hostility to his femaleness. He said that he was disgusted by his body, especially with the onset of menstruation. He found his body a source of great frustration and longed to live like a normal teenage boy. He suffered acutely from depression and anger about his condition and found it difficult to connect to others emotionally. Alex reported experiencing fantasies of having a female partner and children, although he ‘has no sexual experience and could not describe the sort of sexual behaviour she [sic] might engage in as a man’.<sup>15</sup> Given all this, it

<sup>8</sup> *Re Alex* [2004] FamCA 297, at para 153.

<sup>9</sup> *Re Alex* [2004] FamCA 297, at para 190.

<sup>10</sup> *Re Alex* [2004] FamCA 297, at para 198.

<sup>11</sup> See Levin and Solomon (1990). For an excellent discussion of the way in which our conceptions of machines have informed our conceptions of the human organism (and vice versa), see Canguilhem (1992).

<sup>12</sup> *Re Alex* [2004] FamCA 297, at para 95.

<sup>13</sup> *Re Alex* [2004] FamCA 297, at para 66.

<sup>14</sup> *Re Alex* [2004] FamCA 297, at para 63.

<sup>15</sup> *Re Alex* [2004] FamCA 297, at para 99.

is possible that Alex may never have identified as a girl. The psychiatrists who gave evidence were in agreement with a diagnosis of gender dysphoria. There are a number of criteria for this diagnosis, which were easily met in Alex's case. The consulting psychiatrists also agreed that Alex was, and could be expected to remain, unresponsive to behavioural therapy, and so was unlikely to accept a female role. Alex strongly resisted the suggestion that he was an emerging lesbian.

In the initial application, permission was sought only for the first and reversible stage of hormonal treatment, not for the administration of a second stage of hormonal treatment, which carries irreversible effects. However, in considering the staged and progressive nature of gender reassignment treatment, the Chief Justice acceded to the view that the stages of treatment be regarded as a single treatment plan because he considered it to be 'destructive and anxiety-provoking' to leave the second stage of treatment for a future application to the court.<sup>16</sup> Accordingly, the Chief Justice gave permission for both reversible and irreversible treatments to be administered according to the clinical judgments of the treating doctors and as long as Alex so wished it. Such treatment routinely incorporates a 'neutral' period around age 16 years, prior to commencing the second stage of treatment, when the patient can reassess the decision and discontinue treatment without irreversible effects if so desired. The applicant and all other parties were keen that Alex's treatment should commence before he began secondary schooling in order to facilitate his social integration as a male.

Finally, the Chief Justice noted with regret the hardships that Alex and others would incur by the requirement in a number of states that a change to the sex on a birth certificate is allowed only where the person has undergone gender reassignment surgery:

This is of little help to someone who is unable to undertake such surgery. The reasons may differ but for example in the present case, a young person such as Alex, on evidence, would not be eligible for surgical intervention until at least 18 years of age.<sup>17</sup>

And

a requirement of surgery is not only generally inconsistent with human rights. The requirement is more disadvantageous and burdensome for people seeking legal recognition of their transition from female to male than male to female ... the requirement of surgery is a form of indirect discrimination.<sup>18</sup>

In these comments, the Chief Justice makes two significant points. First, in contradistinction to earlier judgments concerning transgendered individuals

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<sup>16</sup> *Re Alex* [2004] FamCA 297, at para 185.

<sup>17</sup> *Re Alex* [2004] FamCA 297, at para 234.

<sup>18</sup> *Re Alex* [2004] FamCA 297, at para 239.

(with the exception of the most recent, *Re Kevin and Jennifer v Attorney-General for the Commonwealth*<sup>19</sup>), he disengages gender identity from the presence of primary sex organs.<sup>20</sup> Second, he recognises that laws impact differently on male and female bodies. In short, he identified a double disadvantage for those whose gender identity is at odds with their female sexed body. Furthermore, he recognised the important role of the birth certificate as an anchor for identity in which the biological, familial and social aspects of personal identity intersect. In not being able to change the sex on one's birth certificate without sexual reassignment surgery, people like Alex find themselves caught at this interface, and unable to acquire a socially endorsed personal identity. For example, Alex would not be able to get a passport nor enjoy the civil liberties that follow from its possession.

Perhaps the most controversial statement from the Chief Justice was his comment that: 'A requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity.' (my emphasis)<sup>21</sup>

Although it is far from clear that Alex has a right to choose his gender identity, he does have a right to an identity,<sup>22</sup> and that requires something like choice — namely reflective endorsement.<sup>23</sup> In reflective endorsement, rather than 'choosing' in the usual sense, one's identity is effected in part through an act whereby one *affirms*, and thus endorses, one's personal attributes that one most values. In doing so, one makes those attributes properly one's own. The model here is analogous to promising. When one keeps one's word, one affirms the values and beliefs (one's personal attributes) on which the earlier undertaking was based and, in doing so, constitutes oneself as the same, earlier self. Understanding personal identity in terms of endorsement emphasises self-constancy rather than a metaphysically dubious conception of radically free will.

<sup>19</sup> *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074, and *Attorney-General for the Commonwealth and 'Kevin and Jennifer' and Human Rights and Equal Opportunity Commission* [2003] FamCA 94. See Andrew Sharpe's account in Sharpe (2002).

<sup>20</sup> Against the view that gender is a direct expression of bodily sex, Judith Butler (1990) argues that the coherence and continuity in our experiences of our gender identities is the effect of sedimented regulatory practices premised upon a normative ideal of what human bodies should be like, namely, heterosexual. Gender is a 'fictive construction' that gives gender the appearance of a natural and immutable state of one's sex as man or woman. However, argues Butler, gender identity is a form of 'reiteration' effected when one enacts the socially endorsed forms of sexed identity — forms which conform to certain historical ideas that perpetuate heterosexual culture. For a critical commentary on Butler, see McNay (2000).

<sup>21</sup> *Re Alex* [2004] FamCA 297, at para 237.

<sup>22</sup> *Re Alex* [2004] FamCA 297, at para 220. The Chief Justice here referred to Article 8 (1) of the United Nations Convention on the Rights of the Child.

<sup>23</sup> See Korsgaard (1996).

This approach avoids two common but problematic alternatives pertaining to choice, each of which share the central premise of mind-body dualism: the idea that the mind and body are constituted by mutually exclusive properties. The first is an essentialist view that regards gender as the direct expression of biological sex. On this view, gender identity is a property of the body (its sex) and so choice is impossible. The alternative, libertarian view regards gender as nothing other than choice (a property of the mind). However, if this is the case, confusion about identity is impossible. In both cases, gender identity is regarded as a problem of knowledge: one simply needs to have the correct *idea* about one's sex, hence the long-standing tradition of treating problems of identity with psychological therapies. Although treatment for gender dysphoria now incorporates psychological and bodily therapy, the law (for example, for the purpose of marriage) has remained premised upon dualism by setting the test of gender identity as 'psychological and anatomical harmony'.<sup>24</sup> Here 'harmony' means strict one-to-one identity between primary sex organs and psychological gender.<sup>25</sup> That is, maleness is premised upon the possession of a penis, and femaleness on the possession of a vagina. In contrast to these strict binary rules for the correlation of gender to biology (or to radically undetermined will), the narrative model of identity provides alternative conceptual resources for integrating psychological, biological and cultural aspects of identity.

### The Narrative View of Identity

Narrative identity is the view that, as persons, we understand our lives by telling stories about ourselves. Put in this way, it seems overly simplistic and unappealing. More accurately, narrative identity rests upon the claim that self-understanding (in fact, all understanding) takes a narrative form. That is, the means by which meaning is produced in the life of a person is basically the same means by which meaning is produced in a narrative text. On this view, a narrative is not simply a first-person report, it is a complex and rule-governed conceptual structure with synthetic semantic resources that creates a temporal and conceptual unity (and therefore an identity over time) from its qualitatively distinct elements.

All theories of personal identity have a common heritage in Locke's account of a person as 'a thinking intelligent being that has reason and reflection, and *can consider itself as itself, the same thinking thing, in different times and places*'<sup>26</sup> (my emphasis). Locke here offers a self-constitution view of personal identity by proposing that the continuity in one's identity is partly constituted by one's own reflective activity in recognising and appropriating one's identity *as one's own*.

<sup>24</sup> See Sharpe (2002), p 312.

<sup>25</sup> Although, in the case *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074, Kevin lacked a penis, he nevertheless had — as was required — undergone sexual reassignment surgery with the aim of giving his genitals the characteristics of the male primary sex organ.

<sup>26</sup> Nidditch (1979), p 355.

The narrative conception of identity is a self-constitution model — that is, it is a practical conception of identity. In practical terms, identity is something that one has to *do*. This contrasts with essentialist views of the self that regard a person's identity as the expression of an inner immutable essence, such as the soul or one's sex. On the self-constitution view, identity involves agency; it entails self-constructive activity on the part of the person whose identity is at issue.<sup>27</sup> More precisely, it entails *both* agency and patience in relation to one's existence. While this model gives a central, constitutive role to the first-person perspective (and emphasises the point that identity is a form of self-understanding), it also gives a central role to the view that others have of us, and to the view of ourselves as one person among others. Understanding who a person is involves:

understanding how the self can be at one and the same time a person of whom we speak and a subject who designates herself in the first person while addressing a second person ... The difficulty will be ... understanding how the third person is designated in discourse as someone who designated himself as a first person.<sup>28</sup>

Putting the question like this frames identity in terms of relations of mutuality between the subjective, material, interpersonal and social aspects of who one is. In short, this describes identity as a discursive process.

The first-person perspective, although crucial to a self-constitution view of identity, is not sufficient to it. Self-understanding also involves taking a third-person perspective upon oneself, a view of oneself that 'one in general' may take — that is, an objective point of view. The objective perspective encompasses such things as the biological factors in identity. Persons are, at least, partially physical beings subject to the laws of nature. For example, not only is an intact brain essential to self-awareness, but so are various other organic processes. For example, kidney failure, hormone-secreting tumours and metabolic disturbances can cause delusional states, memory disturbances and disruptions to cognitive processes that undermine one's sense of who one is. Furthermore, disturbances to proprioception (one's sense of one's body as integrated and located in space and time) have a profound effect on one's capacity to form a coherent sense of self.<sup>29</sup> Such disturbances demonstrate that one's capacity to take a first-person perspective is intimately bound up with one's biological functioning. Put simply, one can say that the first-person perspective is mediated through the third-person perspective.

While recognising the importance of the first- and third-person perspectives, the narrative view also recognises that one's sense of self is mediated through dialogical relations with others, and so entails a second-person perspective. Significant here is the role of a child's earliest carers in forming that child's sense of identity, initially through the tactile and

<sup>27</sup> See Ricoeur (1992); Schechtman (1996); Meyers (1997).

<sup>28</sup> Ricoeur (1992), pp 34–35.

<sup>29</sup> See, for example, O'Shaughnessy (1998); also Sacks (1986).

emotional quality of their interactions, and later through shared practical and linguistic activities.<sup>30</sup> On this view, reflective self-awareness necessitates that one develop biologically as part of a communicative group of like-bodied beings through whose bodily interactions one actualises powers merely latent in one's biological makeup.<sup>31</sup> To give a simple example of the role of others in constituting a sense of self, consider a very young child seeing, for the first time, other children kicking a ball. On the view proposed here, the child perceives in that activity a focus for the as yet undirected muscular and perceptual powers he or she merely feels in his or her developing body. Consequently, the child realises (in the full sense) his or her own capacities in the bodies of those others, and is able to regard his or her body as capable of the same activity. This principle holds for all uses of the body, including language (which is regarded as a peculiarly complex form of action).<sup>32</sup> The point here is that the meaning of one's body and its capacities is not simply given by nature and apprehended intuitively. Rather, it is acquired discursively through a kind of shared embodiment.

This has at least two important implications. First, it means that a human being acquires the conceptual and representational competencies necessary for self-understanding only to the extent that he or she participates in a communicative group; such capacities can bloom only within social structures.<sup>33</sup> Second, the meaning of supposedly objective, 'natural' physical states and attributes is partly culturally constructed.<sup>34</sup> In short, our thoughts, beliefs and actions always imply an interlocutor, either directly through

<sup>30</sup> To illustrate, see Merleau-Ponty (1992), p 352: 'A baby of fifteen months opens its mouth if I playfully take one of its fingers between my teeth and pretend to bite it. And yet it has scarcely looked at its face in a glass, and its teeth are not in any case like mine. The fact is that its own mouth and teeth, as it feels them from the inside, are immediately, for it, an apparatus to bite with, and my jaw, as the baby sees it from the outside, is, immediately, for it, capable of the same intentions. "Biting" has immediately, for it, an intersubjective significance.' There is a wealth of literature on family relations and child psychology. On the primacy of the second person perspective from a philosophical point of view, see Merleau-Ponty (1964).

<sup>31</sup> See Merleau-Ponty (1992), especially Pt 2, Ch 4. Also Bermudez et al (1998).

<sup>32</sup> See also Ricoeur (1991a).

<sup>33</sup> Marya Schechtman (1996) argues that, in order to realise the competencies involved in self-determination, one must learn the culture's concept of 'person' and apply it to oneself. Ricoeur (1991a), p 87 goes so far as to tie our very being to the social. The implication here is that, outside of social organisation, homo sapiens would have an existence quite unlike the lives of human beings as we know them: 'We understand ourselves only by the long detour of the signs of humanity deposited in cultural works. What we would we know of love and hate, of moral feelings, and, in general, of all that we call the self if these had not been brought to language and articulated by literature?'

<sup>34</sup> Simone de Beauvoir (1967), p 83 describes the way in which oppression works by creating in individuals the belief that the limits of one's situation are natural and therefore insurmountable — after all, 'one cannot revolt against nature'. See also de Beauvoir (1988), p 65 and Butler (1990), pp 18–26.



dialogue or indirectly through the communicative networks implied in the meanings that constitute one's language. To the mediation of the third-person perspective, then, we must add the second person. An uncritical acceptance of social values and norms is not something that the narrative view proposes. The disabling and oppressive effects of the social mediation of identity are well documented. Rather, it emphasises the enabling effects of community, friendship and family, and takes a critical approach to *all* claims by appealing to evidence, standards of rational argumentation and validation akin to procedures employed in legal interpretation and communicative ethics.<sup>35</sup>

Continuity of identity, then, demands coherence between three different perspectives which together express one's subjective beliefs and feelings, one's physical states and one's interpersonal and social relations (which include the institutional mediators of identity such as citizenship, religion and occupation, to name a few). As discursive and practical, the narrative model of identity is attuned to just this demand. It responds to the complexities of personal identity by deploying synthetic semantic structures and strategies that underlie and render intelligible human action. These semantic structures and strategies are the same as those through which a story is able to furnish a unified entity by interweaving the heterogeneous components of a lived situation into a conceptual and temporal whole, giving it continuity, coherence and meaning.<sup>36</sup>

Narrative has this capacity because it is, to cite Aristotle, the 'imitation ... of an action and of life'.<sup>37</sup> That is to say that narrative, through its ordering (emplotment) of events, characters, motives, circumstances, objects and so on, utilises the same semantic web that underlies the intelligibility of action in human life. Narrative emplotment organises these relations in such a way as to provide answers to questions of 'why?', 'who?', 'how?', 'where?', 'when?', 'with whom?' and so forth. In other words, narrative emplotment links together its constitutive elements in such a way that they have an *explanatory* function. One understands what a character did by reference to why, how and when the deed was done; one understands who did the deed by reference to what was done, and how and why it was done; and we understand these by in relation to what other characters say and do. We understand what a narrative 'imitates' (what it is about) when we grasp the network of relations that connect the diverse elements of the action into a unity. As a practical being whose existence is structured by action, the meaning and continuity of one's life and identity — who one is — is structured through the semantic resources of narrative.

On the narrative self-constitution view, personal identity is an achievement; it involves work. The synthesis of one's identity is not merely given but must be, in some minimal way, conceptually worked through and emotionally integrated (that is, 'emplotted') by oneself. It is in this sense that aspects of identity may be regarded, somewhat misleadingly, as 'chosen'. As

<sup>35</sup> Ricoeur (1991a).

<sup>36</sup> See Ricoeur (1984), pp 52–77; also Ricoeur (1991a).

<sup>37</sup> Aristotle's *Poetics* VI, 1450a, in Butcher (1951).

Christine Korsgaard argues, those aspects of our identities that, on reflection, we value positively, we welcome and take as our reasons for acting; those aspects of our identities that, on reflection, we value negatively, we do not welcome and strive to avoid acting upon. We cannot choose those attributes we find ourselves with, for example, as a result of our childhood development or traumatic experiences, but we can 'choose' in the sense of endorsing those that we want to form the basis of our motives and outlook. Through reflective endorsement, one attempts to be (or not to be) the kind of person who embodies certain of those attributes. In this way, one's reasons for acting can be said to arise from one's self-conception or practical identity. Practical identity:

is not a theoretical one, a view about what as a matter of inescapable scientific fact you are. It is better understood as *a description under which you value yourself, a description under which you find your life to be worth living* and your actions to be worth undertaking ... Practical identity is a complex matter ... You are a human being, a woman or a man, an adherent of a certain religion, a member of an ethnic group, a member of a certain profession, someone's lover or friend, and so on.<sup>38</sup> (my emphasis)

To recap, then, in taking a narrative approach to identity, one deploys the synthetic resources of a semantics of action: one grasps together (emplots) the diverse and heterogeneous elements of one's life ideally, in a form guided by one's reflectively endorsed values, and in doing so forms a conceptual and temporal unity of which one is the subject. Who one is, on this view, encompasses both passivity and activity: I am passive to the actions of others, the effects of institutions, language and my past experiences, but I also take an active stance toward those aspects of my life through my narrative integration and endorsement of them. In this sense, one can be a self-determining individual.

## The Discursive Formation of Alex's Gender Identity

### *Alex and the Problem of Incoherence*

For people who have the good fortune to be raised and to live in a relatively stable environment, the work of self-integration and reflective endorsement is minimal simply because the sources of dissonance are minimal. Because identity is a constructive achievement, it can come apart in a variety of ways: through disturbances of an organic, psychological or social nature such as disease, domestic violence, political persecution or a combination of these.<sup>39</sup> Such, it seems, was the situation of Alex. Alex's early experiences of shared corporeity were primarily with his father rather than his mother — establishing, very early on, a sense of himself as male. This identification with

<sup>38</sup> Korsgaard (1996), p 101.

<sup>39</sup> See Susan Brison's harrowing account of her recovery after being raped and left for dead in Brison (1997).

the male body in turn led to difficulties in establishing mutual understanding and supportive interpersonal relations, which in turn led to problems with social integration. These problems were exacerbated by the family's migration to Australia, and reached crisis point with the onset of adolescence. The diagnosis of gender dysphoria, in recognising the problem as incongruence between self-perception and phenotypical body, acknowledges both the constitutive role of the first-person perspective in identity and its own heterogeneous aetiology:

many factors (biological, psychological and social) need to be present simultaneously and work together during a critical period of development to produce a full-blown gender disorder.<sup>40</sup>

In accepting the expert psychiatric evidence, the court recognised the multi-factorial and discursive character of Alex's condition. Subsequently, the court pursued a course of action that would facilitate the integration of Alex's self-perception and first-person perspective with his physical body and his social environment, primarily through treatment of his body. It did not pursue a course of disciplinary action with the aim of reforming or normalising Alex's attitude toward his female body.

### *The Authority of the Subjective Perspective*

On the narrative model of identity, the first-person perspective has a central, constitutive and irreducible role. There are numerous philosophical arguments concerning the role and irreducibility of the first-person perspective.<sup>41</sup> My purpose is not to defend these arguments, but rather to argue that the Family Court judgment accords with such a view.

The purported authority of the first person has long rankled philosophers, particularly where young people are concerned. This is for sound reasons. Youth and lack of experience mean that a young person usually does not have well-developed competencies in critically reflecting upon and understanding their situation, reasons for acting, desires and possible consequences of various courses of action. This makes a young person vulnerable to predatory behaviour from others, as well as to accident and misfortune. Moreover, even as mature and well-travelled adults, we are frequently wildly inaccurate in our assessments of our own motives and character, as well as the motives and characters of others. While the first-person perspective is clearly vulnerable to error in its account of oneself or the world, it is nevertheless indispensable to having a self and a world. Therefore, a full description of who a person is must be partially given in the first-person perspective of the person whose identity it is. This does not collapse into subjectivism because first-person claims are subject to the intersubjective constraints of the communicative group/s in

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<sup>40</sup> *Re Alex* [2004] FamCA 297, at para 102.

<sup>41</sup> For example, Frankfurt (1971); Pippin (1987); Ricoeur (1991b); Cassam (1992); Korsgaard (1996).

which one has acquired selfhood.<sup>42</sup> For example, first-person claims can be tested against the knowledge that others have of the person, and by the conceptual norms and logical rules that underpin rational discourse within that person's linguistic community (conditions that apply equally to other's claims about oneself).<sup>43</sup> However, there is one aspect of the first-person perspective that is not subject to this kind of intersubjective validation and that is the aspect known as the subjective character of experience.

The subjective character of experience concerns the 'what it is like', the immediate 'inner feel', of one's subjective states, which comprise one's individual, subjective point of view. In his highly influential paper 'What is it like to be a Bat?',<sup>44</sup> Thomas Nagel has claimed that for every experiential individual there is something that it is 'like' to be that individual. Taking the example of a bat, Nagel argues that, regardless of how much objective, scientific knowledge we have about echolocation or bat biology, our ability to understand what it is like to be a bat is limited by the fact that we can only ever extrapolate from our own experience. That is, even if we knew all the objective facts there were to know about bat perception and bat behaviour, and even if we could imagine ourselves with the capabilities of bats, all this could tell us is what it is like for *us* to behave like bats. It will not tell us what it is like for the *bat* to be a bat.<sup>45</sup> Furthermore, the attempt to extend a model of objectivity to the subjective character of experience will take us further from that goal, not closer:

If the subjective character of experience is fully comprehensible only from one point of view, then any shift to greater objectivity — that is less attachment to a specific view-point — does not take us nearer to the real nature of the phenomenon: it takes us farther away from it.<sup>46</sup>

Nagel's lesson is one of epistemological humility:<sup>47</sup> we cannot know everything about an individual's experiences. In virtue of the multi-perspectival nature of experience there comes a point where we have to defer to the individual's report of the subjective character of his or her experiences.

Returning to Alex's case, the extent to which others can comprehend (and, furthermore, evaluate) his experience of the incongruence between his self-perception and his phenotypical body is limited. We cannot fully know what it is like to be Alex because we cannot experience from Alex's unique

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<sup>42</sup> See Schechtman (1996), pp 115–25. Schechtman argues that reflective self-awareness presupposes that a person is able to 'grasp her culture's concept of a person and apply it to herself' (p 95). This in turn entails two constraints: the reality constraint and the articulation constraint, each of which arises from the normative context of personal identity.

<sup>43</sup> See Ricoeur (1991a), p 159; also Habermas (1984).

<sup>44</sup> Nagel (1979); see also Atkins (2000).

<sup>45</sup> Nagel (1979), p 169.

<sup>46</sup> Nagel (1979), p 174.

<sup>47</sup> Atkins (2000), p 75.

point of view. When it comes to the subjective character of Alex's experience, Alex is the sole authority. Accordingly, we are required to respect his first-person report. However, that report is but one — albeit essential — component of the account of Alex's identity, the determination of which will provide the justification and legitimation for the court's decision regarding what constitutes his best interests and the courses of action open to him (and the court). The task for a determination of identity, then, is to locate this aspect in the appropriate relation to the other aspects of identity. In a practical sense, the solution is a description of Alex's life that interweaves the first-, second- and third-person perspectives of selfhood into a logically coherent and rationally defensible account that can be endorsed from Alex's subjective perspective — in other words, by the employment of a narrative self-constitution model.

### *The Format of the Hearings*

The court recognised both the authority of Alex's first-person perspective and its discursive mediation and social constraints in the inquisitorial style employed in the proceedings. Note the Chief Justice's comments:<sup>48</sup>

The hearing was conducted in a private conference room setting around a table ... I did not require the aunt and school principals to give their evidence in chief by affidavit and took such evidence *viva voce*.

It was agreed that the hearing would not necessarily follow the traditional course of each party having a single sequential opportunity to cross-examine witnesses one by one but rather the questioning of witnesses may alternate between legal representatives, other witnesses and myself as evidence was proffered. Thus, the hearing often took the form of an orderly discussion ...

A distinct benefit of the discussion format from my perspective was hearing witnesses engage in a dialogue in respect of each other's evidence.

The nature of the proceedings lent themselves to more than one hearing date rather than a single continuous fixture. This enabled parties to provide further expert material and for witnesses to consider the evidence of other witnesses and to respond in a considered way to material points of difference.

This non-traditional format gave a place to the voices and perspectives of Alex and relevant others, but it also required that those perspectives stand up to the considerations raised by the other parties, both subjective and objective, in an open give-and-take dialogical form of discourse. This had the advantage of allowing views to be freely expressed without the limitations of rules for the presentation of evidence that characterise the traditional style of hearing, while at the same time requiring that those views withstand logical and normative challenges (within the constraints discussed above). While Alex's claims about the subjective character of his experience of incongruence between his self-

<sup>48</sup> *Re Alex* [2004] FamCA 297, at para 43.

perception and his phenotypical body were not of a type that are amenable to argumentation to establish the objective facts, other types of facts pertinent to his claim were, and these constituted the evidence accrued from all the parties who gave evidence. These were, for example, facts about the duration and consistency of Alex's self-perceptions; his early life experiences and his relations with his father and mother; his cognitive capacity and reasoning about his situation; his efforts in gaining recognition as male; his problems with interpersonal relations and social integration; his physical and mental health; and his general grasp of reality and the actual conditions of his existence, including his future. Moreover, Alex's claims stood up to the challenge of mediation through both the objective scientific perspective provided by the expert witnesses and the second-person perspectives of his interlocutors in the dialogical format of the hearings. As a result, a highly coherent narrative was established that connected, *in a mutually explanatory way*, Alex's claims about his experiences, the scientific and medical data about Alex's condition, and the various other reports of Alex's experiences from his family, teachers and caseworker.

This format closely resembles the normal discursive processes of identity formation, and therefore is more likely to produce a judgment that is consonant with our natures as self-reflectively aware, embodied social beings. Such was the outcome of this process: a course of action that was mediated through the exchange of concerns and experience of the relevant parties, that was subject to intersubjective and logical validation as well as legal argument, and that attested to the subjective character of the experiences of the person whose identity was at issue.

## Conclusion

This paper has argued that the judgment embodies a properly discursive response to the question of Alex's identity. In deploying a narrative self-constitution model of identity, it provides a coherent and logically rigorous way for Alex, his family, the law and society in general to answer the question, 'Who is Alex?' By ensuring that claims about Alex's gender identity were subjected to legal, scientific, logical and normative standards of objectivity, and were mediated through the perspectives of those closest to him and in relation to whom his sense of self and his interests were embodied, the Family Court was able to determine what constituted Alex's best interests. From a philosophical point of view, there simply is no more legitimate source of authority currently available.

Finally, it should be noted that the narrative model does not guarantee the resolution of problems of identity. The recognition of the synthetic and heterogeneous basis of identity simultaneously recognises its inherently tensive nature and the ever-present possibility that coherence can fail. Where there is conflict between norms, values, beliefs or interpretations, the unity of a life can be thwarted; such is the tragic quality of the human situation. Nevertheless, the narrative model provides the best chance of coherent identity given the tensions and complexities of the human situation, and endeavours to

do justice to both the disabling and enabling effects of the social mediation of subjectivity.

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