

# THE WEB OF DESIRE AND THE NARCISSISTIC TRAP

## A Psychoanalytic Reading of *Re Alex*

By Paula Baron\*

This paper seeks to provide an alternative reading of *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297 (13 April 2004) from a psychoanalytic perspective. The claim of this paper is that psychoanalytic theory can provide an alternative reading of Alex's case that emphasises the social and cultural construction of gender. The implications of such an alternative reading are both particular and more general: the particular implications for this case are that gender reassignment may not free Alex from the web of parental desire and narcissism, and therefore it is difficult to say with any confidence that the decision was in the best interests of the child; and the more general implications of the reading are that gender is largely the product of convention and should not be viewed as inherently natural, inevitable and dichotomous.

### Introduction

In April 2004, the Honourable Alastair Nicholson, Chief Justice of the Family Court of Australia, considered an application requesting approval for a medical procedure. This procedure involved the administration of hormonal therapies that would begin gender reassignment. The subject was a 13-year-old child identified as Alex.<sup>1</sup> Although initially the treatment would be reversible, it would be irreversible in its later stages.<sup>2</sup> As His Honour had to decide whether this procedure was 'in the best interests of the child',<sup>3</sup> a host of experts were

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<sup>1</sup> *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297 (13 April 2004) (hereafter *Re Alex*). The child is identified as 'Alex' in the judgment to preserve anonymity. The judgment was also designed to prevent the disclosure of other identifying characteristics.

<sup>2</sup> Originally, permission was sought only for the first stage of hormonal treatment, not for the second stage, which carries irreversible effects. However, the Chief Justice was of the view that the stages of treatment should be regarded as a single treatment plan. He considered it would be 'destructive and anxiety-provoking' to require a future application to the court for a second stage of treatment.

<sup>3</sup> At the time of the judgment, Alex was under the legal guardianship of a government department pursuant to the order of a Children's Court following care proceedings taken a number of years previously. The department had applied to the Family Court for authorisation of the proposed treatment because it seemed

called to give their opinions on Alex. These experts were unanimous in assessing Alex as suffering from 'gender dysphoria'. The case is controversial<sup>4</sup> primarily because of the age of the child involved. It is consistent with a similar decision in 1993, *Re A*,<sup>5</sup> which also permitted gender reassignment in the case of a 13-year-old girl, although in rather different factual circumstances.<sup>6</sup>

This paper considers *Re Alex* from a psychoanalytic perspective. Psychoanalytic accounts of law seek to reveal the links between subjectivity, identity, law and desire, and to focus upon the problem of the subject.<sup>7</sup> The claim of this paper is that psychoanalytic theory can provide an alternative reading of *Re Alex* that emphasises the cultural construction of gender. In support of this thesis, the paper makes four primary points. The first two points are that the orthodox psychological account of Alex, and in particular the label 'gender dysphoria', are not very helpful in understanding Alex; nor do these help in determining whether the decision to allow gender reassignment would ultimately be in the best interests of the child. Third, psychoanalytic theory can provide an account of Alex that does not pathologise or stigmatise Alex; and finally, in contrast to the conventional analysis presented to the court, a psychoanalytic reading suggests that gender reassignment might ultimately serve to exacerbate, rather than resolve, Alex's aggression and suicidal ideation. The implications of such an alternative reading are both particular and general: the particular implication for this case is that gender reassignment may not free Alex from a web of parental desire and narcissism, and therefore it is difficult to say with any confidence that the decision was in the best interests of the child; and the more general implication of the reading is that gender is largely the product of convention and should not be viewed as inherently natural, inevitable and dichotomous.

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that the proposed treatment was a type of special medical procedure to which neither Alex as a minor, nor a parent or guardian, could give consent. The Chief Justice agreed, relying upon the authority of *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's case*). Recent decisions of Australian courts involving the welfare jurisdiction include *In the Matter of the Welfare of A (a Child)* (1993) FLC 92-402 (hereafter *Re A*); *In the Matter of P and P* (1995) FLC 92-615; *In the Matter of GWW and CMW* (1996) No HB 1447 (Hannon J, 21 January 1997).

<sup>4</sup> This controversy was canvassed in the media reports at the time. See, for example, Bolt (2004a); Tonti-Filipini (2004); Jeffreys (2004); Bolt (2004b); 'PM May Intervene' (2004); *Age* Editorial (2004); Symons (2004).

<sup>5</sup> *In the Matter of the Welfare of A* (1993) 16 FamLR 715; [1993] FLC 92-402. (hereafter *Re A*).

<sup>6</sup> A was diagnosed shortly after birth as having a condition known as adrenal hyperplasia, which resulted in her appearance as a baby boy, although she was biologically a girl.

<sup>7</sup> Caudill (1993), p 707 notes the claim that 'there is a gap or void in contemporary jurisprudence in regard to the subject. Accounts of the subject are rare and the problems such accounts raise are generally evaded.' Indeed, Caudill argues at 716 that: 'Most legal thought is structured to repress the problem of the subject.'

The paper begins by presenting the value of psychoanalytic jurisprudence in understanding the relationship between subjectivity and law. It then outlines the facts of Alex's case. It considers the difficulties inherent in the label of 'gender dysphoria' before providing a psychoanalytic account of gender identity using the work of Freud and Lacan. Lastly, the issues of violence and suicidal ideation raised in Alex's case will be analysed by applying the work of Serge Leclair.

It is necessary to note before beginning, however, that the suggestions put forward in this paper are purely from the perspective of an application of theory to the facts as presented in the decision of *Re Alex*. A psychoanalytic understanding of Alex could only be gained from engagement with Alex in person. Although the application of theory suggests that the decision should be viewed with some caution, this is not to suggest that, in a clinical setting, a psychoanalytic psychotherapist working from a Freudian/Lacanian perspective might not conclude that gender reassignment would ultimately be in Alex's best interests. Postmodern psychoanalytic psychotherapy ultimately works with the uniqueness of the individual, rather than attempting to fit the individual into the theoretical schema. The purpose of this paper is not to provide the definitive account of Alex, but to provide a different reading of Alex's situation. In so doing, I draw on theoretical literature that challenges the notion that gender is natural, inevitable and dichotomous.<sup>8</sup>

### **Psychoanalytic Jurisprudence and Subjectivity**

Psychoanalysis was developed in order to understand individual human subjectivity and to attempt to cure psychopathology, particularly neurosis. However, since its development, psychoanalysis has also been used by theorists in a wide variety of disciplines to understand social institutions and the individual's relationship to them.<sup>9</sup> Indeed, the application of psychoanalysis to social institutions was a development that was anticipated by Freud, who argued that psychoanalysis could potentially be used to understand the collective, as well as the individual.<sup>10</sup> It was not until Lacan, however, that psychoanalytic theory was to have a significant impact upon jurisprudence.

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<sup>8</sup> A view also recently challenged by Naffine (2004).

<sup>9</sup> See, for instance, Friedlander (1978), who argues that any particular society will display a conscious and an unconscious. This is because a specific culture 'allows certain fantasies, drives and other psychic manifestations to reach and remain on the conscious level, and demands that others be repressed'. Adopting an explicitly Freudian approach, he claims that the Oedipus complex provides the model for the relation between man and authority, whatever its nature — religious, ideological or political.

<sup>10</sup> See, for instance, 'Civilisation and its Discontents' (in Gay 1995, pp 767–71), where Freud argues that the processes of individual development are similar to those of the development of civilisation, and that civilisations could thus be 'analysed' with the aim of uncovering what is unconscious in mental life. Indeed, he claims that it is possible that, given the similarity in development between the individual and civilisation, some civilisations or epochs of civilisations could be neurotic.

Goodrich and Carlson<sup>11</sup> observe that there have been three primary ways in which psychoanalysis has influenced jurisprudence: first, to provide an alternative way of reading legal speech; second, to offer alternative ways of reading legal representations; and third, to analyse the place of the subject in legal knowledge and the place of legal knowledge within the subject. These categories have been elaborated on elsewhere,<sup>12</sup> but they provide a useful framework for an overview of psychoanalytic jurisprudence. In relation to the analysis of *Re Alex*, it is the third category — that of legal subjectivity — that is most relevant. Psychoanalytic jurisprudence has been used to address legal subjectivity in two respects: to undertake an analysis of the place of the subject in law; and to analyse the place of law within the subject.

Lacan's notion of the subject as constituted in and by Symbolic and Imaginary relations has been a particularly significant influence in the reconsideration of the subject in law. Unlike positivism, which distinguishes and separates the subject and the law,<sup>13</sup> for Lacan the subject and the law are inseparable: law inaugurates and maintains separation and thus subjective life. In turn, the subject is caught in a web of language, law, identification and desire.<sup>14</sup> Such a view is highly subversive of the presumed or potential 'subject-in-control' which characterises much conventional legal and political theory.<sup>15</sup> Although Lacan does not give an extended analysis of legal processes or legal institutions, the term 'law' appears throughout his work, ordinarily as a reference to the dividing or prohibiting function of law represented by the 'Name-of-the-Father'.<sup>16</sup> The more specific implications of his ideas are taken up by theorists such as Pierre Legendre. Discussing the Lacanian notion that the 'law of the Father' is that original separation of the subject from the maternal entity that establishes subjective life, Legendre observes that the 'Name-of-the-Father' signifies that the individual is subject to the law of differentiation through speech.<sup>17</sup> The logical function of society and the essence of the Symbolic function are to put into play, in the unconscious representations of the subject, the power to institute separation by words.<sup>18</sup> The law stands in relation to the individual as the 'speaking place of the third'.<sup>19</sup> As such, the law proffers a system of messages to the subject.<sup>20</sup>

In turn, psychoanalysis reveals the active subjectivity and affect hidden within law.<sup>21</sup> This, in turn, reveals the necessary internality of legal rules:

<sup>11</sup> Goodrich and Carlson (1998).

<sup>12</sup> Baron (2004), p 438.

<sup>13</sup> Caudill (1993), p 712.

<sup>14</sup> Caudill (1993), p 720.

<sup>15</sup> Caudill (1993), p 723.

<sup>16</sup> Caudill (1993), p 721.

<sup>17</sup> Legendre (1998), p 181.

<sup>18</sup> Legendre (1998), pp 181–82.

<sup>19</sup> That is, as the father stands in relation to the child as representative of the Symbolic order.

<sup>20</sup> Legendre (1998), p 182.

<sup>21</sup> Goodrich and Carlson (1998), p 6.

There is no legal subject without an obedient soul, no letter of the law without the *anima legis* of its interpreter, no text without its bearer, no exterior court without its predicate in an interior judgment or court of conscience.<sup>22</sup>

The legal construction of subjectivity is thus the key to understanding the Western jurisprudential tradition.<sup>23</sup>

Law requires us, as subjects, to be gendered beings,<sup>24</sup> but at the same time assumes gender to be 'natural'. The value of psychoanalysis is that it can reveal the extent to which gender is a social construct, the result of the individual's internalisation of desire, language and parental narcissism. It can thus provide valuable insights into Alex's story.

### Alex's Story

Alex was 'anatomically, and in the eyes of the law' a girl, but had 'a longstanding, unwavering and present identification as male'. She wore male clothes from an early age and reported being distressed when she saw her mother's body for the first time: '[She] thought the whole world was male.'<sup>25</sup> Alex claimed to be disgusted by her body, especially with the onset of menstruation. She found her body a source of frustration and desired to live as a 'normal teenage boy'.

Alex was born overseas and was an only child. Alex and her parents lived with her paternal grandparents when she was very young.<sup>26</sup> Alex had experienced ongoing and profound rejection by her mother from an early age. However, Alex was extremely close to her father, with whom she had slept and bathed. Significantly, Alex's recollection is that her father 'tried to make me a boy; he bought me boy things, he played with me like a boy — lots of action, fighting, punching and karate.'<sup>27</sup> Alex described their relationship as 'like best friends', and said her father protected her from her mother.

Alex's father died suddenly when Alex was five. A few years later, Alex's mother's remarried and the family migrated to Australia. Alex was angry with her mother for remarriage. Within months, a child protection alert was issued in relation to the then 10-year-old Alex. Alex's stepfather rejected Alex, and Alex's mother accused her of trying to kill her stepbrothers on

<sup>22</sup> Goodrich (1995), p 243.

<sup>23</sup> Goodrich and Carlson (1998), p 9.

<sup>24</sup> As Naffine (2004) observes, law 'enforces sexual nature, from the moment of our birth, sometimes with an insistence that seems to border on cruelty'.

<sup>25</sup> *Re Alex* [2004] FamCA 297 at para 95.

<sup>26</sup> This household included an uncle whom Alex described as 'crazy, he'd fight with me'. It was not clear from the evidence whether this was the same uncle who Alex said had tried to 'touch' Alex in a sexual way, but had not proceeded to do so.

<sup>27</sup> *Re Alex* [2004] FamCA 297 at para 4.

several occasions. She claimed Alex was 'a follower of the devil'.<sup>28</sup> She claimed she did not love Alex and wanted the government to take her away.<sup>29</sup>

Alex then went to live with her maternal aunt, although this relationship broke down. Alex was then placed in foster care, but this too broke down, and at the time of the decision Alex had returned to live with her aunt.<sup>30</sup>

Alex suffered from serious behavioural problems and depression. She had been aggressive to peers and students at school and had assaulted some of them.

Alex reported experiencing fantasies of having a female partner and children, although she had no sexual experience and could not describe the sort of sexual behaviour she might engage in as a man.<sup>31</sup> Alex rejected the idea that she could be an 'emerging lesbian'. Alex attributed her anger and depression to her inability to live as a male. It was alleged<sup>32</sup> that Alex had suicidal ideation, but Alex denied this, saying: 'That's a silly thing. I have a normal life. I want to be male and play with other males. My mother prohibited me from this.'

Alex acknowledged having perceptual disturbances, claiming that she would hear her own voice or the voice of his father, and that someone could read her mind. Psychiatrists maintained, however, that there was no evidence of a delusional or thought disorder and that Alex's orientation and cognition were intact.

Because of Alex's age, the key issue before the Court was whether it should authorise the requested medical treatment and in making this decision, it must be satisfied 'upon clear and convincing evidence' that the proposed treatment was in the best interests of the child.<sup>33</sup> His Honour was convinced that this was indeed the case, based on the evidence of Alex herself, Alex's caseworker, Mrs R, a number of medical experts who provided evidence to the Court,<sup>34</sup> Mr H, the principal of the primary school which Alex attended, and

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<sup>28</sup> *Re Alex* [2004] FamCA 297 at para 66.

<sup>29</sup> *Re Alex* [2004] FamCA 297 at para 63.

<sup>30</sup> At the time of the application, Alex was under the legal guardianship of a government department as a consequence of a care order made by a Children's Court under child welfare law.

<sup>31</sup> *Re Alex* [2004] FamCA 297 at para 99.

<sup>32</sup> By his case worker and by his aunt.

<sup>33</sup> *Re Marion (No. 2)* (1994) FLC ¶92-448. The standard to be applied was that established by *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>34</sup> Professor P, an Associate Professor in the Department of Psychiatry at a university faculty of medicine and a consultant child psychiatrist at a hospital for children; Professor W, an associate professor in the Department of Paediatrics and Adolescent Gynaecology at the same university as Professor P who had referred Alex to Professor P; Dr N, a consultant psychiatrist and specialist in child and adolescent psychiatry, particularly gender issues; Dr C, an overseas expert who was a consultant child and adolescent psychiatrist and an honorary senior lecturer at an English university medical school, Dr G, the head of the Department of Paediatrics and Adolescent Gynaecology at the same hospital as Professor P and Professor W, who at the request of the court swore an affidavit wherein she provided information on the proposed treatment for Alex. Dr N, Dr C and Dr G

Mr D, the principal of her new secondary school. The medical experts were unanimous in finding that Alex suffered from ‘gender dysphoria’.

### A Bad Case of ‘Gender Dysphoria’

The first point is that the orthodox account of Alex’s situation, and in particular, the labels of ‘gender dysphoria’,<sup>35</sup> ‘gender identity disorder’<sup>36</sup> or ‘gender identity dysphoria’<sup>37</sup> are not particularly useful in understanding Alex, nor in determining whether the gender reassignment is in the best interests of the child. Similarly, the label of ‘gender dysphoria’<sup>38</sup> literally tells us nothing more than the fact that Alex was unhappy with her gender<sup>39</sup> — something that is obvious from Alex’s narrative. Although some link is made by Dr J between Alex’s incomplete mourning for her father and gender dysphoria,<sup>40</sup> it is not at all clear what this link is or why an incomplete mourning should result in unhappiness with the gendered body. Nor does it explain why Alex is violent or why she should have suicidal ideation. Lacanian analyst Bruce Fink<sup>41</sup> has argued that a diagnosis of anorexia is not very helpful — all it tells us is that the patient will not eat — but a diagnosis of hysteria<sup>42</sup> may be helpful in an

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were not in a treatment relationship with Alex. Leave was granted to the Child Representative to issue a subpoena to obtain the mental health file associated with Alex’s care proceedings in the Children’s Court. This contained a report by a child psychiatrist, Dr J, who was not called as a witness. The Child Representative also arranged for the preparation of a Family Report by Mr T, a probationary psychologist under supervision during his training period. Mr T had worked as a counsellor in the community with Alex between August 2001 and early September 2003.

<sup>35</sup> *Re Alex* [2004] FamCA 297 at paras 35, 99 and 100.

<sup>36</sup> *Re Alex* [2004] FamCA 297 at paras 2, 99, 100, 101, 102, 111, 118 and 194.

<sup>37</sup> *Re Alex* [2004] FamCA 297 at paras 31, 35, 98, 100, 103 and 202. In the United Kingdom, under the *Gender Recognition Act 2004*, a medically diagnosed condition of gender dysphoria entitles an applicant to change his or her legal sex.

<sup>38</sup> The standard psychological diagnostic manual is the DSM-IV-TR (hereafter ‘DSM’) which stands for the *Diagnostic and Statistical Manual of Mental Disorders* (4th Edition, Text Revision, 2000). The DSM refers to ‘gender identity disorder’, which is classified as a mental disorder: ‘Individuals with this mental disorder are uncomfortable with their apparent or assigned gender and demonstrate persistent identification with the opposite sex.’ The diagnostic criteria can be found in the *Re Alex* judgment at para 101 and also online at [www.behavenet.com/capsules/disorders/genderidid.htm](http://www.behavenet.com/capsules/disorders/genderidid.htm).

<sup>39</sup> Dysphoria is an emotional state characterised by anxiety, depression or unease. Its etymology is from the Greek *dusphori*, distress, from *dusphoros*, hard to bear.

<sup>40</sup> In *Re Alex* [2004] FamCA 297 at para 69, Dr J recommends that: ‘[Alex’s] identification with being a male should be reviewed in the context of [his] incomplete mourning of [his] father’s loss in the longstanding conflictual relationship with his mother.’

<sup>41</sup> Fink (1997), p 116.

<sup>42</sup> Following Lacan, ‘hysteria’ is used in a particular sense in Fink’s work to denote a certain personality structure. This is discussed in more detail below.

understanding of *why* it is that the patient will not eat. Similarly, a diagnosis of 'gender dysphoria' is symptomatic. The report of Dr C is clearer in its identification of the link between Alex's history and her 'gender identity disorder' ('[Her] investment as male simultaneously expresses anger towards [her] mother and maintains closeness with [her] dead father.') Despite the sensitivity of Dr C's report, Alex is still labelled as having a 'disorder'. Further, the assumption is made that Alex's violence and suicidal ideation are, as in her own account, the result of her female body. But it is not clear, given Alex's history, that this is the case.

Further, the label of 'gender dysphoria' conveniently provides a medicalised account of Alex,<sup>43</sup> which can edge uncomfortably towards a biological determinism.<sup>44</sup> There is little analysis of the way in which the child's treatment as a male by others — particularly, in this case, by Alex's father — might lead her to perceive herself as male and to exhibit 'male' tendencies, such as an attraction to girls. It has been observed that:

What seems to have gone amiss in the case is how much did Alex's exposure to masculinity, coupled with limited exposure to and growing resentment of, femininity born out of his mother's apathy towards him, affect his ultimate gender identity? There is some doubt raised when you consider that Alex told a doctor in 2001 that '[he] "knows [he] is a girl but would like to be a boy"''.<sup>45</sup>

A similar criticism is made by Millbank in her analysis of the *Re A* case, a decision which shows striking similarities to *Re Alex*.<sup>46</sup>

Indeed, there is some suggestion in *Re Alex* that transexualism is of biological origin. Although Nicholson CJ concludes that transexualism is not a 'disease', and indeed acknowledges that many transgendered people would consider that characterising it as a disease is offensive,<sup>47</sup> he needed to ascertain whether transexualism is a 'malfunction or disease' for the purposes of determining jurisdiction. He quotes the Full Court in the case of *In Re Kevin*:<sup>48</sup>

the weight of medical opinion generally agrees that in the instance of a transsexual person, that individual is born with a brain that recognises him or herself as a member of the sex opposite to that whose

<sup>43</sup> Justice Nicholson states at the beginning of his judgment that '... Alex has been diagnosed as having what some of the experts define medically as a gender identity disorder..' [2]

<sup>44</sup> This is also the case, as Millbank points out, in *Re A*. However, on the facts, this is even less justifiable than in the *Re A* case where A suffered from adrenal hyperplasia, which resulted in her appearance as a baby boy, though she was biologically female.

<sup>45</sup> Bledsoe (2004).

<sup>46</sup> Millbank (1995); *Re A* (1993) 16 Fam LR 715; [1993] FLC 92-402.

<sup>47</sup> *Re Alex* [2004] FamCA 297 at para 97.

<sup>48</sup> *Re Kevin (Validity of Marriage of Transsexual) (No 2)* (2003) FLC ¶93-127 at para 56.



physiological indicia he or she bears. The expert evidence before His Honour, which he accepted, was that this was probably of biological origin within the brain.

Chief Justice Nicholson then proceeded to ask the medical experts whether there was a physiological basis for transsexualism.<sup>49</sup> Professor W maintained that the evidence was inconclusive, but expressed his own belief that transsexualism was biological, while Dr C expressed the view that ‘it’s a combination of biological predisposition or biological factors in association with psychological or social factors’. The ‘medicalisation’ of Alex’s desire is significant because it carries with it an implication that Alex can be ‘cured’ of her ‘disorder’ and that a medicalised form of treatment (ie psychiatric intervention, hormonal treatment and ultimately surgery) is the solution to Alex’s ‘unacceptable’ female body. This view tends to reinforce an inevitable and literal dichotomy of gender.

Finally, the label of ‘gender dysphoria’ seems inappropriate when a child is so young and has what appears to be an incomplete understanding of sexuality and its implications. At 13, aspects of the individual’s identity such as gender identification and sexual preference are still likely to be fluid and uncertain. Although, unlike the case of *Re A*, the court considers the possibility Alex is an ‘emerging lesbian’, the possibility is dismissed because Alex denies that this is the case.<sup>50</sup> Yet it is not clear from the judgment that Alex has any real idea of what lesbianism is — or indeed what life as a man, in the sexual sense, might mean:<sup>51</sup>

[Alex] has feelings of sexual attraction towards girls but is adamant that this is a male and not as a lesbian. [He] does not want girls to think of [him] as a girl and sees [him]self as in long-term relationships with women as a heterosexual man. [Alex] has not had any sexual experiences and could not describe the sort of sexual behaviour she might engage in as a male. [He] said [he] would tell a female partner [he] ‘could not ever have children as a man and has no penis’ but had not considered how this might impact on a sexual relationship.

As in the *Re A* case, there is little discussion of the practical reality of the results of the gender reassignment process and Alex’s ability to ‘function’ as a man. As in *Re A*, it is the appearance of being male that counts. Thus the conventional account, and especially the label of gender dysphoria, is not particularly helpful in understanding Alex’s case, nor in determining whether gender reassignment is in the best interests of the child.

<sup>49</sup> *Re Alex* [2004] FamCA 297 at para 192.

<sup>50</sup> ‘[Alex] is adamant that [he] is not “gay or lesbian”. [He] sees this as the worst insult that anyone could make to [him]. [He] says [he] is a boy and would like to have relationships with a girl’: *Re Alex* [2004] FamCA 297 at para 93, from the report by Professor P.

<sup>51</sup> *Re Alex* [2004] FamCA 297 at para 93, from the report by Dr N.

## The Web of Desire

Psychoanalytic theory can provide an alternative reading of the development of identity, particularly gender identity, which does not require Alex to be pathologised or stigmatised. As noted above, the label of 'gender dysphoria' can tend to medicalise Alex's desire to be male and can lead to the conclusion that the condition is a physical or mental abnormality. This problem can be seen even in critics of the *Re Alex* case, such as bioethicist Nicholas Tonti-Filipini, who claims that:

all the evidence suggests that gender dysphoria is a form of mental illness and should be treated as a mental illness, not by trying to adjust her biologically to match the delusion.

The alternative to 'gender dysphoria' as a physical or mental pathology is to characterise Alex's upbringing as 'disadvantaged', implying some norm of a middle-class upbringing that will produce a 'well-adjusted' child whose gender accords with his or her biological sex. Psychoanalytic theory can, however, provide an account of the development of gender that does not require Alex's desire to be characterised in any of these ways.

According to Freud, identity — the self — is not the unified, conscious mind encased in its 'instrument', the body, as postulated by post-Enlightenment philosophy,<sup>52</sup> but remains fundamentally split into the conscious and unconscious. This unconscious reveals itself in what Freud describes as the 'gaps' in the 'data of consciousness':<sup>53</sup> slips of the tongue, unintentional behaviour (parapraxis), symptoms<sup>54</sup> and dreams.<sup>55</sup> This unconscious is the necessary and inevitable result of repression,<sup>56</sup> the effort to keep certain thoughts out of consciousness.<sup>57</sup> Identity is formed by the complex process of repression of early and intense expressions of sexual desire. In early childhood, the infant does not experience themselves as a unified and separate self; however, as the child grows, the libidinal drives — although centred upon the child's

<sup>52</sup> While the great philosophical distinction between mind and body in Western thought can be traced to the ancient Greeks, it is the work of Rene Descartes (1596–1650) that was the most significant influence on subsequent philosophy. Descartes argued that the body was purely physical and the mind the result of conscious thought. The thinking mind, so long as it was joined to the body, uses the body as its instrument to achieve its will. See Descartes (1998), pp 37–38.

<sup>53</sup> Freud (1986), p 143.

<sup>54</sup> In 'The Paths to the Formation of Symptoms', Freud (1973), p 404 defines symptoms as 'acts detrimental, or at least useless, to the subject's life as a whole, often complained of by him as unwelcome and bringing unpleasure or suffering to him'.

<sup>55</sup> See in particular Freud (1985, 1963, 1991).

<sup>56</sup> 'Thus we obtain our concept of the unconscious from the theory of repression ...': Freud (1986), p 441.

<sup>57</sup> Freud (1986), p 524. Unconscious processes in the Freudian schema are of two types: those which become conscious easily (pre-conscious); and those which are subject to repression (dynamically unconscious): Rycroft (1995), p 191.

own body — start to channel sexuality toward various objects and aims. The decisive moment in childhood development is the experience of the Oedipus complex,<sup>58</sup> a group of largely unconscious ideas and feelings that revolve around incest and murder: the desire to possess the parent of the opposite sex and to eliminate the parent of the same sex.<sup>59</sup> In the Freudian schema, the Oedipus complex is universal. As the peak of infantile sexuality, the Oedipus complex exercises a decisive influence not only on adult sexuality, but on identity itself.<sup>60</sup> In the conventional course of events, the boy-child relinquishes his desire for the mother and identifies with the father in order to take up a 'masculine' role in society. The girl-child's passage through the Oedipus complex causes her to realise that she has already been castrated, which leads her to identify with the mother and take up a 'feminine' role.

The Freudian reading of the formation of gender identity is important because it emphasises that the formation of identity always takes place within a network of social relations. Thus, applied to Alex's case, it would suggest that Alex's identification with her father and rejection by her mother, and thus the failure of the conventional Oedipal process, are the cause of Alex's rejection of her female body, rather than necessitating a search for (an elusive) biological cause. I stress the term 'conventional' here because, importantly, Freud's account is descriptive rather than normative. There is thus nothing 'pathological' in Alex's desire to be a boy on this reading. Rather, it is the case that the process which leads others to achieve a gender identity that accords with their biological sex has not occurred in Alex's case.

Indeed, Lacan takes this notion one step further by suggesting that a fixed gender identity tends to be the product of neurosis (that term used in this case in the structural sense, which will be explained). Lacan reinterpreted Freud's Oedipus complex to emphasise the role of language. For Lacan, Freud's manifestations of the unconscious — jokes, dreams and parapraxis — are all language effects. Thus, identity, sexuality and the unconscious are sites for the production and transmission of meaning.<sup>61</sup> The development of the self, and hence identity, is caused not only by the fear or realisation of castration, but through the acquisition of language. In turn, the imperative to invest in what Lacan terms the 'Symbolic order' — that is, the world of language, culture and law — results, in Lacan's view, from the Oedipus complex.<sup>62</sup>

<sup>58</sup> 'It has justly been said that the Oedipus complex is the nuclear complex of the neuroses, and constitutes the essential part of their content.' Freud (1962), p 130. Post-Freudian psychoanalytic theory, particularly object-relations theory, questioned the centrality of the Oedipus complex and placed a greater emphasis on the pre-Oedipal (mother/infant) experience. Lacan was to restore the centrality of the Oedipus myth to psychoanalytic theory.

<sup>59</sup> Freud, in Gay (1995), p 641, however, refers in 'The Ego and the Id' to a 'complete Oedipus complex' which is one that takes into account the inherent bisexuality of all individuals.

<sup>60</sup> Freud, in Gay (1995), p 130.

<sup>61</sup> Grosz (1990), p 4.

<sup>62</sup> Lacan reinstated the centrality of the Oedipus myth, which had been lost in post-Freudian theory which placed greater emphasis upon the pre-Oedipal relationship

Like Freud, Lacan emphasised the importance of triangulation in forming subjectivity. In particular, he stressed the role of the ‘paternal function’ (sometimes called the ‘Nom de Pere’,<sup>63</sup> the ‘no’ of the father, or simply ‘the Law’ or the ‘third’) in helping the child to understand that it has a position in the wider social context. It is this paternal function that takes the child out of the blurred duality of the imaginary into the social world. Without a sufficient registration of the paternal function, the individual remains in psychic unity with the (m)other and thus tends to psychosis. Importantly, one particular symptom of psychosis is a confusion about, or an indeterminacy of, gender. In contrast, the neurotic (having come through the Oedipal process more conventionally) tends to have a fixed gender identity. However, it is important to note that the terms ‘psychosis’ and ‘neurosis’ are used by Lacan to denote particular personality structures and, again, are used in the descriptive rather than the normative sense. Thus all people are classified in the Lacanian schema as psychotic, neurotic or perverted. Neurotics are further divided into obsessives, hysterics and phobics. Although the psychotic (the term used here in the Lacanian sense) may exhibit those symptoms that one conventionally associates with psychotics (here used in the more conventional psychological sense), he or she may never have a psychotic break. His or her difficulty, however, lies in existing in a world that is run by and for neurotics.

The significance of these ideas in this case is that they suggest one of two things in the case of Alex: the first is that Alex remains in a psychic unity with her father, who did not perform the symbolic role of the paternal function, but rather established a dyadic relationship with Alex. This dyadic relationship then failed to be broken by Alex’s mother. In such a case, Alex may well have a psychotic structure, and her disjunction between her biological sex and her gender identity is a characteristic of this structure.<sup>64</sup> If this is the case, Alex’s gender identification may remain indeterminate despite gender reassignment. On the other hand, it may be that Alex is an hysteric (again, that term is used in the structural sense), in which case her desire to be a boy may be read as a desire to *be* the phallus — an extreme and literalised form of ‘penis envy’, characteristic of the hysterical structure. Lacan emphasises the role of desire in the formation of the sub-categories of obsession and hysteria in neurosis. According to Lacan, desire — the difference or gap between need and demand — exists in the realm of the Symbolic. In Lacanian theory, the *object a*<sup>65</sup> is the object cause of desire, that which will fulfil desire, fill the lack and make the

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— that is, mother and child. Lacan did not dismiss the pre-Oedipal period, but taught that it was a precursor to the Oedipal and thus influenced it.

<sup>63</sup> A play in French on the ‘non du pere’ — that is, the ‘no’ of the father.

<sup>64</sup> Some support for the view of Alex as having a psychotic structure can also be found in the evidence given of her delusions, but the evidence is certainly not conclusive. See *Re Alex* [2004] FamCA 297 at para 57.

<sup>65</sup> Referred to by some theorists and commentators as the ‘object petit a’.

split subject whole.<sup>66</sup> The neurotic subject either situates the self as desiring the lost object (the obsessive) or as being the Other's lost object (the hysteric). But attaining or being the *object a* cannot fulfil desire.<sup>67</sup> Wholeness and subjectivity are mutually inconsistent: 'The subject only exists insofar as he desires and desire only exists because it is impossible to satisfy.'<sup>68</sup> Thus the 'object a' is nothing more than lack: the object is the original lost object, and only desired insofar as it is lost.<sup>69</sup> If Alex is an hysteric, in the structural sense, her desire to gain wholeness by 'being' the beautiful phallic boy is likely, ultimately, to be futile, but positioning herself as the object a is not pathological; rather, it is characteristic of this type of personality structure and a common feature of all hysterics.

### The Narcissistic Trap

The third point is that a psychoanalytic account would recommend that gender reassignment should be approached with some caution. In the psychological account and in the judgment, Alex's violence and relationship difficulties, together with her alleged suicidal ideation, are directly or impliedly linked to her gender dysphoria.<sup>70</sup> Therefore, gender reassignment is likely to go some way to 'curing' these problems. The psychoanalytic account, however, might suggest something rather different.

The links between violence — particularly violence directed against children — and the self are explored by Serge Leclair, in his book *A Child is Being Killed*.<sup>71</sup> In this book, Leclair draws on Freud's paper 'On Narcissism', in which Freud defines 'primary narcissism' as the image of ourselves that the parent holds.<sup>72</sup> Far from being sentimentalised, parental love is characterised by Freud as a 'revival and reproduction' of the parents' own narcissism, long since abandoned.<sup>73</sup> Freud suggests that this 'primary narcissism' precedes the

<sup>66</sup> Schroeder (2000b), pp 36–39. With specific reference to property, Schroeder (1988), p. 20 argues: '[W]e desire the objects of property not for their own sake but derivatively as means to our true desire — the desire of and for other persons.'

<sup>67</sup> Schroeder (2000b), pp 37–38.

<sup>68</sup> Schroeder (2000b), p 36.

<sup>69</sup> Schroeder (2000b), p 38.

<sup>70</sup> *Re Alex* [2004] FamCA 297 at paras 62, 67, 75 and 99.

<sup>71</sup> Leclair (1998), p 2.

<sup>72</sup> Freud (1984): 'The child shall have a better time than his parents; he shall not be subject to the necessities which they have recognized as paramount in life. Illness, death, renunciation of enjoyment, restrictions on his own will, shall not touch him; the laws of nature and of society shall be abrogated in his favour; he shall once more really be the centre and core of attention — "His Majesty the Baby", as we once fancied ourselves.'

<sup>73</sup> Freud (1984), pp 84–85: 'The child shall fulfil those wishful dreams of the parents which they never carried out — the boy shall become a great man and a hero in his father's place, and the girl shall marry a prince as a tardy compensation for her mother ... Parental love, which is so moving and at bottom so childish, is nothing but the parents' narcissism born again, which, transformed into object-love, unmistakably reveals its former nature.'

formation of the child's ego. The child, therefore, cannot oppose itself or overcome this experience because it is undifferentiated and 'objectless'.<sup>74</sup> However, in the ordinary course of events, the individual moves from primary to secondary narcissism as the ego develops. Satisfaction is then obtained by fulfilling the ego ideal.<sup>75</sup> Where this movement does not occur, the individual remains trapped in the narcissistic desire of the parent. These ideas are significant because they highlight the potential role of parental narcissism in the development of Alex's gender identity. As the only child, she was the object of her father's hopes and dreams, and these clearly focused upon a boy child. He refused to be disappointed in Alex's gender. Indeed, he denied it. At the same time, and again from an early age, Alex was rejected by her mother. It would not be very difficult to imagine that Alex attributed her rejection to the fact that she was not a boy — that is, her gender was the reason for her mother's disappointment and denial. It also appears that she blamed her mother for her femaleness: 'I want to be male and play with other males. *My mother prohibited me from this.*' (emphasis added). Indeed, it may well be the case that Alex was rejected by her mother because she was a girl. Notably, Alex's step-siblings are male and it appears significant that Alex's mother takes them into her bedroom at night, and locks the door *against* Alex. It would not be difficult to see the way in which Alex might believe that her ability to be loved requires her to be the wonderful (boy) child for her father and a boy for her mother. The danger of gender reassignment is that it tends to suggest that life will be 'better' if Alex is a boy. But there is no guarantee of that. What happens for Alex if she does not find that life as a boy necessarily brings her the love and attention that she craves?<sup>76</sup>

Further, Leclair goes on to suggest that the killing of the child is a particular, privileged and universal fantasy, along with castration and the primal scene, and is a direct result of this primary narcissism.<sup>77</sup> The primary narcissistic representation — the perfect child — is a fantasmic way of representing the subject without lack. But the wonderful child is the *object* of parental love, not a subject. This wonderful child, the object of parental hopes, dreams and narcissism, must be killed not just once, but repeatedly, in order for the subject to truly live. Without killing and mourning the phantasmic child he or she might have been, the individual is lost in limbo, 'in the milky light of a shadowless, hopeless waiting'.<sup>78</sup> But whoever believes that he or she has

<sup>74</sup> Mitchelmore (2003).

<sup>75</sup> 'The development of the ego consists in a departure from primary narcissism and gives rise to a vigorous attempt to recover that state. This departure is brought about by means of the displacement of libido on an ego ideal imposed from without; and satisfaction is brought about from fulfilling this ideal.' Freud (1984), p 95.

<sup>76</sup> '[Alex] feels "sad most of the time" and describes urges to self-harm. [He] has cut [his] arm with a knife and on one occasion hit [his] head on a wall. [He] stated that the hope of being able to be a male has prevented [him] from further acting upon these impulses': from the Report of Dr C, *Re Alex* [2004] FamCA 297 at para 90.

<sup>77</sup> Leclair (1998), p 5.

<sup>78</sup> Leclair (1998), p 3.

killed the tyrant once and for all cuts the self off from the source of creativity and *jouissance*, ‘slumbering’ in the hedonism of the day or returning to a fantasised omnipotence, dreaming grandiose dreams of putting the world back in order for all.<sup>79</sup> Thus the killing of the primary narcissistic representation is ‘as imperative as it is impossible’.<sup>80</sup> This analysis suggests that Alex’s aggression, the alleged attempts to kill her step-brothers and her assaults on other children are attempts to act out this fundamental fantasy in an attempt to gain back her subjectivity.<sup>81</sup> Further, Alex’s ‘suicidal ideation’ could be characterised as a confusion between the first death (castration) and the second death (the real death).<sup>82</sup> ‘[t]he killing of the primary narcissistic representation implied in analytic work’ can be expressed in reality as a result of failing to resolve the common confusion between the first and second deaths. The significance of these ideas is that they suggest that gender reassignment may not assist Alex: ‘there can be no life without killing that strange, original image in which everyone’s birth is inscribed’.<sup>83</sup> Gender reassignment is likely to move Alex closer to, rather than further away from, the phantasm of the wonderful child and may well trigger more attempts to kill this being without lack. In a strange sense, the court’s decision to approve gender reassignment was in the best interests of the child. But it is this child who must be overcome and mourned, not once but repeatedly.

## Conclusion

The thesis of this paper has been psychoanalytic theory, by revealing the links between subjectivity and the law can provide alternative and helpful insights into Alex’s history and her current situation. Although the law demands that we are gendered subjects, it assumes that gender is somehow ‘natural’, dichotomous and inevitable. Psychoanalytic theory, however, provides an explanation of identity that reveals the extent to which gender may be seen as a social construct, the result of the individual’s internalisation of desire, language and parental narcissism. Applied to the story of Alex, the psychoanalytic account would place considerably more weight upon the interaction of Alex and her primary carers in the determination of her gender identification than does the label of ‘gender dysphoria’. In so doing, the psychoanalytic account can explain Alex’s gender identification in a way that does not require Alex to be pathologised or stigmatised. However, in contrast to the conventional analysis presented to the court, a psychoanalytic reading would suggest that gender reassignment might ultimately exacerbate, rather than resolve, Alex’s aggression and suicidal ideation.

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<sup>79</sup> Leclair (1998), p 3.

<sup>80</sup> Leclair (1998), p 10.

<sup>81</sup> Leclair (1998), p 9 states: ‘The indefinite way in which the phantasy “a child is being killed” is formulated is perfectly fitting: only the verb is precise, indicating the act of killing, of putting to death. We don’t know who is killing nor what “child is being killed”.’

<sup>82</sup> Leclair (1998), p 5.

<sup>83</sup> Leclair (1998), p 2.

Reading *Re Alex*, one cannot help but be struck by the fact that no opposition to the application was raised, and that no alternative accounts of Alex's situation were presented to the court. This paper has attempted to provide an alternative perspective on gender identity to the conventional psychological account relied upon by the court. The implications of such an alternative reading are both particular and general: the particular implications for this case are that gender reassignment may not free Alex from the web of parental desire and narcissism, and therefore it is difficult to say with any confidence that the decision was in the best interests of the child, while the more general implications of the reading suggest that gender is largely the product of convention and not inherently natural, inevitable and dichotomous.

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