



Ontological Governance: Gender, Hormones, and the Legal Regulation of Transgender Young People

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Abstract

Legal institutions worldwide construct theories about gender's ontology—i.e., theories about what gender *is*—and use those constructions to govern. In this article, I analyse how the Family Court of Australia constructed ontologies of gender to govern young people's gender-affirming hormone use. By analysing the 'reasons for judgment' published about cases where minors applied for the Court's authorisation to use hormones, I show that the Court constructed two theories about the ontology of gender concurrently—one essentialist and the other performative—which it leveraged to arbitrate the legitimacy of hormone use. By critically examining the Court's ontological assertions, I argue that both theories advanced anti-queer directives that tethered the legitimacy of hormone use to its promise to produce normatively gendered subjects. This analysis highlights that legal regimes concerned with controlling gender-affirming practices have much more at stake than access to those practices alone. By governing mechanisms of gender's production, these regimes do not merely shape how gender can be expressed but also the possible forms of gender itself.

Keywords Gender affirmation · Hormones · Queer theory · Regulation · Transgender · Young people

Introduction

What is gender? Many legal institutions purport to answer this question. Through laws governing identity documentation, marriage, employment relations, military service, public sport, access to public bathrooms, placement in state custody, anti-discrimination provisions, and much more, legal institutions construct and deploy classificatory schemes that try to define gender and assign it to their subjects

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(Meadow 2010; Currah 2022). These schemes become especially visible, and often especially violent, when they address subjects whose bodies, desires, or identities controvert their claims to universality (Sharpe 2002; Mitchell and Rogers 2021). Crucially, these schemes work not only to examine, identify, and declare the gender of their subjects, but also to enforce their ascriptions. In this way, legal institutions play a central role not just in defining and assigning gender, but also in shaping its production (Spade 2008; Davis 2017; Beauchamp 2019; Vogler 2021).

In this article, I examine how the Family Court of Australia worked to describe, ascribe, and govern the production of gender through its regulation of young people's gender-affirming hormone use. In the last two decades, it has become increasingly common for young people to use exogenous hormones (i.e., hormones that originate outside the body) for gender affirmation (Skordis et al. 2020).¹ This kind of hormone use is undertaken predominantly under the auspices of medical professionals who sanction the practice as a means to 'treat' what they term 'gender dysphoria' or 'gender identity disorder' (Telfer et al. 2018; Coleman et al. 2022). However, as the practice has become more common, so too have legal efforts to regulate it.

The Family Court of Australia was among the first institutions globally to debate the legality of young people's gender-affirming hormone use, having first contemplated the practice in the case of *Re: Alex* in 2004 (Kelly 2014).² In *Alex*, the Department of Health and Community Services, acting as fourteen-year-old Alex's guardian, asked the Court to clarify whether it could authorise hormone use as a treatment for gender identity disorder on Alex's behalf. The Court responded by declaring that gender-affirming hormone use constitutes a 'special medical procedure' to which neither a minor nor their parent/guardian could consent. To justify this designation, the Court referred to a High Court precedent which held that parental powers to authorise medical procedures do not extend to procedures that are "non-therapeutic", "irreversible", and which carry a "likely possibility of a wrong decision being made".³ Hence, the Court stated that minors could only use exogenous hormones for gender affirmation if they had obtained Court orders confirming either their capacity to consent to this 'treatment' themselves—described in common law as 'Gillick competence'—or that the 'treatment' was in their 'best interests'. This requirement was eventually dissolved in 2017 as a consequence of *Re: Kelvin*.⁴ However, in the years between *Alex* and *Kelvin*, the Court heard at least 76 cases where a young person applied for its authorisation to use exogenous hormones for gender affirmation.

¹ Throughout this article, I usually refer simply to 'hormone use' to denote using hormones that originate outside the body for gender affirmation. However, I want to emphasise that hormones are involved in producing gendered bodies and subjectivities regardless of whether they are manually introduced or arise automatically in one's body. Put simply, those who use exogenous hormones are not the only ones that use hormones to affirm their gender; most, if not all, gendered subjects do too. Bearing this fact in mind, I want to highlight that the Court was only ever concerned with regulating manual and exogenous hormone use, even though automatic and endogenous hormones can also pose significant risk for many young people (Rew et al. 2021).

² *Re: Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297.

³ *Secretary of the Department of Health and Community Services v JWB and SMB* [1992] HCA 15.

⁴ *Re: Kelvin* [2017] FamCAFC 258.

While the Family Court's regulation was in place, it was the only legal institution in the world to involve itself directly in arbitrating young people's gender-affirming hormone use (Kelly 2014). However, in the years following its dissolution, legal institutions worldwide have rushed to implement similar mechanisms to restrict, if not prohibit, this practice. In 2021, in the United States, at least 22 states debated or passed legislation that criminalises or otherwise forbids gender-affirming hormone use for minors. Similarly, in 2020, the United Kingdom's High Court of Justice barred minors from using exogenous hormones to affirm their gender by ruling that it was "highly unlikely" that they could consent to such practices.⁵ Notably, the UK's High Court of Justice leveraged similar arguments and identical legal precedents to those that structured the Family Court of Australia's regulations. These developments show that the Family Court of Australia's regulations were an early manifestation of what would become a much broader international trend.

Taking the Family Court of Australia's regulations as a case study, in this article I argue that such legal interventions are not concerned merely with regulating hormone use *per se* but with controlling the nature of gender itself. I base this argument on a critical discourse analysis of the 76 'reasons for judgment' published by the Court following cases where a young person sought authorisation to use hormones (see Jørgensen and Phillips 2002; Mitchell 2023). As I will show, the Court repeatedly made assertions about the nature of gender—that is, its ontology—to justify its decisions about the legitimacy of hormone use. Crucially, these assertions were neither neutral nor passive but contained distinctly anti-queer directives that tethered the legitimacy of hormone use to its capacity to secure or promote the realisation of normatively gendered subjects.

This article is structured in two parts. In part one, I examine the Court's assertions about gender, showing that they advanced two competing ontological claims simultaneously, and analysing each claim in turn. First, I discuss the essentialist ontology the Court constructed. As I will show, the Court would often talk about gender as if it were an immutable and innate property of human beings. Upon doing so, it would cite the existence of this essence as legitimising a subject's hormone use as a means to manifest externally a form of gender that had always-already manifested internally. Second, I discuss the performative ontology of gender the Court advanced. When leveraging this ontology, the Court would speak about gender as if it were enacted—that is, as if it emerged as an effect of a subject's behaviour. With these statements, the Court contradicted its essentialist contentions, framing gender as achieved rather than intrinsic—i.e., something one *does* rather than *is*. Based on these assertions, the Court would argue that hormone use was legitimate conditionally as a means to help a subject act in ways that would make a consistent, socially appropriate, and coherent form of gender appear.

In part two, I examine the anti-queer directives embedded in the Court's use of these ontologies. As I will argue, these statements did not merely purport to represent gender. Instead, because the Court deployed these statements explicitly

⁵ *Bell & Anor v The Tavistock And Portman NHS Foundation Trust* [2020] EWHC 3274, para 145. This decision was later overturned by the Court of Appeal in *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363.

to control hormone use—and, as such, because they were backed by the coercive power of the state—they were invested with the power to govern the conditions of gender’s production such that it might conform to those representations. And indeed, the Court advanced a consistent vision of what hormone use ought to make gender become through both its essentialist and performative discourses. Through both ontologies, despite their incongruence, the Court sought to ensure that its subjects would only use hormones to normalise their gender, making it legible, stable, and enduring. These imperatives, I will argue, are explicitly hostile to queerness.

Constructing Ontologies of Gender

The Family Court made assertions about the ontology of gender repeatedly throughout its 76 judgments. Indeed, ‘gender’ was among the Court’s most frequently used terms, appearing 1577 times across the corpus, or approximately 20 times per judgment. However, despite this ubiquity, the Court never defined gender nor discussed the term’s meaning explicitly. Instead, the Court made a range of statements *about* gender that implied specific conceptions of its ontology. These statements contained suppositions about gender’s nature, its defining properties and characteristics, the forces that produce it, and the conditions under which it can change. These suppositions were crucial in structuring and justifying the Court’s decisions regarding the legitimacy of hormone use in each case.

As I have said, the Court advanced two competing claims about the ontology of gender concurrently—one essentialist and the other performative—and used both claims to arbitrate the legitimacy of hormone use. In this section, I will examine how the Court formulated and leveraged each claim in turn. However, it is important to note at the outset that the Court used these discourses always to legitimise rather than prohibit hormone use. Of all the cases I analysed, the Court authorised hormone use for all applicants but one.⁶ Yet, as I will show, the Court’s affirmative use of these discourses neither diminished nor made benevolent their regulatory power.

Gender Essentialism

The Court advanced an essentialist ontology of gender in several ways throughout its judgments. Often, this ontology was implied by the framing devices the Court used to talk about gender. Spatial metaphor was one such device, through which the Court represented gender as located ‘inside’ its subjects.

The Court used spatial metaphors repeatedly in its judgments. In the case of *Re: Eddie*, for instance, the Court justified hormone use as something that would help

⁶ The Court declined to authorise hormone use in three cases: *Re: Jamie* [2011] FamCA 248, *Re: Jamie* [2013] FamCAFC 110, and *Re: Jan* [2016] FamCA 1171. However, Jamie eventually succeeded in obtaining authorisation in *Re: Jamie* [2015] FamCA 455, making Jan the only person to apply for, but never receive, the Court’s authorisation. According to the reasons for judgment, Jan’s lawyers failed to present sufficient evidence to the Court to confirm a diagnosis of gender dysphoria and, therefore, to authorise hormone use as its treatment.

Eddie to express his “inner state of gender identity”.⁷ Likewise, in *Re: Tahlia*, *Re: Harley*, and *Re: Martin*, the Court described gender as an “inner, core identity” that hormones would help to express.⁸ Similar notions of interiority are present in other instances where the Court used the figure of the ‘wrong body’ (see Engdahl 2014) to conceptualise its subject’s gender as internal. In *Re: Marley*, *Re: Karsen*, and *Re: Jordan*, for instance, the Court described its subjects as “trapped in a female body” or “trapped in a girl’s body”.⁹ Kate, meanwhile, was described analogously as “a woman trapped inside a male body”.¹⁰

The Court used several other allegories to interiorise gender as well. For instance, it supported the legitimacy of both Harley’s and Martin’s hormone use by reporting in identical terms that both had an “enduring experience since very early childhood of [themselves] as a boy at [their] core”.¹¹ This notion of gender being at one’s “core” appeared in *Re: Eddie* as well, where the Court described gender as “a core aspect of [Eddie’s] essential personhood”.¹² In each instance, by locating gender at a subject’s “core”, the Court suggested that gender is an innermost and central aspect of one’s being.

The Court proffered the same idea in remarks about gender’s ‘depth’. Dale, for instance, was said to feel a “deep longing for male body features”,¹³ while Flynn held a “deep belief that she is a girl”.¹⁴ Likewise, Jaden’s desire to use hormones was described as arising from his “deep felt sense of the inappropriateness of living as a female”.¹⁵ Here, gender appears neither superficial nor “on the surface” but located far down inside.

The spatial metaphors the Court advanced in these statements are commonly used in essentialist discourses about gender and sexuality in the contemporary West. These discourses connote a spatially bifurcated model of the self, typical of post-Enlightenment accounts of subjectivity, which propose a split between the self’s interior (essential, primary) and exterior (peripheral, secondary) manifestations (see Kirby 1996). Within this framework, these two facets of selfhood are often seen as conflicting and defined by contrasting traits. Hence, the ‘interior’ is imagined to consist of the subject’s reflexive self-consciousness; it is an opaque and immutable space where one’s ‘inner truth’ or ‘soul’ resides. Conversely, the ‘outside’ comprises

⁷ *Re: Eddie* [2017] FamCA 822 at para 25. The similar phrase ‘inner gender identity’ also appears in *Re: Drew* [2015] FamCA 784 at para 30; *Re: Chelsea* [2017] FamCA 389 at para 12; and *Re: Kelvin* [2017] FamCA 78 at para 35.

⁸ *Re: Harley* [2016] FamCA 334 at para 50; *Re: Martin* [2015] FamCA 1189 at para 41; *Re: Tahlia* [2017] FamCA 715 at para 42.

⁹ *Re: Marley* [2015] FamCA 878 at para 14, *Re: Karsen* [2015] FamCA 733 at para 11, *Re: Jordan* [2015] FamCA 175 at para 16, my emphasis.

¹⁰ *Re: Kate* [2015] FamCA 705 at para 10, my emphasis.

¹¹ *Re: Harley* (*supra* n 8) at para 31; *Re: Martin* (*supra* n 8) at para 18.

¹² *Re: Eddie* (*supra* n 7) at para 59.

¹³ *Re: Dale* [2015] FamCA 473 at para 64.

¹⁴ *Re: Flynn* [2015] FamCA 629 at para 60.

¹⁵ *Re: Jaden* [2017] FamCA 269 at para 19.

the subject's social performance of self to others. It is figured as a transient and ephemeral space that usually 'misrepresents' the interior in some way.

Essentialist constructions of gender and sexuality often cite and build upon this framework. The figure of 'the closet', which subjects are idiomatically said to 'be *inside*' before publicly disclosing their identity, is a pervasive example of this iteration. Herein, disclosure is framed inversely as either 'coming *out*' or being '*outed*'. As queer theorists have argued, these spatial rhetorics produce essentialist conceptions of gender and sexuality by constructing a subject's gender or sexuality as existing always prior to discourse in an already fixed state (Sedgwick 1990; Butler 1991, 171–178). Hence, when these discourses appear in the Court's judgments via the spatial metaphors I have just discussed, gender is framed as neither a feature of a subject's supposedly transient and artificial 'outside', nor a characteristic of one's personhood that is readily 'on display' to a social audience. Instead, gender appears as an indelible 'inner state' that, in these instances, has come into conflict with the body it is 'trapped inside'.

The figure of the 'true self' was a similar rhetorical device that incited gender essentialism in the Court's judgments. Like the spatial metaphors the Court deployed, the figure of the true self connotes an essentialist account of subjectivity by positing the existence of an enduring, immutable, and incontrovertible substance that acts as the term's referent. This notion appeared in the Court's remarks about Martin, whose hormone use was framed as a necessary means for him to express "his 'true self'".¹⁶ In *Re: Anita*, meanwhile, the Court legitimised hormone use as a tool to help Anita become a "more honest" version of her "true self".¹⁷ Similarly, the Court argued that Kate could legitimately use hormones because it believed her "life would be much better as a girl as she would be living true to her inner self".¹⁸

Importantly, as these statements reveal, the Court's discourses on the 'true self' were not merely descriptive but also carried a clear normative directive. In each instance where the Court referenced the true self, it also suggested that subjects had an obligation or compulsion to express that self 'authentically' in social practice. Subjects were required, in other words, to render their 'inner truth' visible to those on the 'outside'. Indeed, the Court often leveraged this imperative directly to advocate for the legitimacy of hormone use, arguing that the practice could be justified as a means to realise such authenticity. In *Re: Sara*, for example, the Court argued that hormone use was justified as a means to help Sara become "an authentic person".¹⁹ Similarly, in *Re: Andy*, the Court suggested that hormone use would make Andy "able to be his authentic self".²⁰ In these instances, the Court frames hormone use as a means to express an already established truth. The nature of its subject's gender—and indeed the nature of gender itself—is, apparently, always settled. The question that remains, in the Court's view, is how best to render that truth observable to others.

¹⁶ *Re: Martin* (*supra* n 8) at para 18.

¹⁷ *Re: Anita* [2017] FamCA 1137 at para 31.

¹⁸ *Re: Kate* (*supra* n 10) at para 16.

¹⁹ *Re: Sara* [2016] FamCA 405 at para 20.

²⁰ *Re: Andy* [2017] FamCA 966 at para 23.

An essentialist ontology also appears in the Court's repeated suggestions that gender is discoverable through introspection. This notion appeared in *Re: Kelvin*, where the Court reported that Kelvin "was nine years old [when] he discovered the concept of transgender in a book and immediately identified with it".²¹ Discovery was also a theme in *Re: Marco*, where the Court quoted an affidavit from Marco's father that described Marco's gender as a "new identity that he discovered within".²² In both instances, the language of 'discovery' suggests that Kelvin's and Marco's genders were fully formed and awaiting detection. For the Court, then, gender was neither constituted nor affected by an epistemic process of search and discovery; that process merely revealed what was always-already the case.

Similar modes of representing gender as 'discovered' recur throughout the Court's judgments. In *Re: Sasha*, for example, the Court noted that "Since discovering the existence of transgenderism at age 14, [Sasha] realised that this was what was happening to her".²³ Here, as above with Kelvin, the Court implies that Sasha's newfound knowledge about "transgenderism" expedited her ability to perceive and articulate something about herself that was true a priori—that is, true before she learned how to acknowledge it. The Court told a similar story about Logan, who had been "aware of having female gender feelings since early in childhood although was unable to recognise these feelings as gender dysphoria since early in high school after reading more about this on the internet".²⁴ Here, the Court deploys a subject-object distinction to frame the relationship between Logan and her gender. By portraying Logan as having 'recognised' her gender, the Court implies that Logan's gender was something that she encountered, interpreted, and classified.

Similar subject-object distinctions appear frequently in the Court's judgments, especially in discussions about how subjects came to apprehend and identify their gender. For example, the Court reported that Sasha had a "female *sense* of identity", that Shane had "always *perceived* himself as a boy", and that Flynn "*sees* herself as a girl".²⁵ In each of these instances, the Court narrated the relationship between its subject and their gender as an empirical exchange between a subject and an object. The subject never simply *is* gendered in these statements. Rather, each statement features a subject (Sasha, Shane, or Flynn) who observes (senses, perceives, or sees) an object (their gender) which they apprehend through that mode of observation. Hence, these constructions objectify gender, representing it as an entity or characteristic that exists prior to and independently of observation and the observer. Gender, in this telling, is never generated subjectively. Instead, it always precedes the subject and any observations made about it. As a result, apprehending one's gender always seems to come *after* its creation and never seems to play a role in shaping it.

²¹ *Re: Kelvin* [2017] FamCA 78 at para 19.

²² *Re: Marco* [2016] FamCA 187 at para 57.

²³ *Re: Sasha* [2015] FamCA 785 at para 32.

²⁴ *Re: Logan* [2016] FamCA 87 at para 64.

²⁵ *Re: Sasha* (*supra* n 23) at para 41 (a similar phrase also appears in *Re: Tara* [2016] FamCA 406 at para 19 and *Re: Darcey* [2015] FamCA 409 at para 27); *Re: Shane* [2013] FamCA 864 at para 15; *Re: Flynn* (*supra* n 14) at para 60, my emphasis.

The Court invoked a similar kind of epistemic relationship between its subjects and their genders by deploying the language of ‘belief’ throughout its judgments. In *Re: Kate*, for instance, the Court described Kate as holding a “belief that she is a woman”.²⁶ Emery, too, held a “belief that he is male”, while Marco was said to have “a conviction of being male”.²⁷ This notion of ‘belief’ also appeared in *Re: Jamie*, where the Court considered whether hormone use constituted altering “an otherwise healthy body’s functioning [...] to address a dissonance between a *belief* as to gender and the *actual* gender of the person”.²⁸

This language of ‘belief’ suggests an essentialist ontology in much the same way as the language of discovery or observation discussed previously. Put simply, when a subject’s statements about their gender are constructed as beliefs, they appear as fallible *representations* of reality rather than realities in themselves. Hence, this language implies that gender is an entity that exists independently of any ideas a subject might formulate about it. In other words, by describing its subject’s assertions about their gender as beliefs, the Court suggested that they are merely statements that the subject supposes to be true. Belief therefore constructs its subjects’ statements about their gender as propositions rather than axioms, implying that there are mind-independent facts about gender that can discipline truth claims made about it. Indeed, this distinction between supposition and reality is made explicit in some instances, like in the passage from *Re: Jamie* I quoted above, where the Court distinguishes between Jamie’s ‘belief’ about her gender and what may ‘actually’ be the case. Such passages underscore gender’s facticity, asserting that gender can be neither changed nor abrogated by its subject’s views or desires. Gender always simply *is*.

An essentialist conception of gender also appears in a range of statements that attributed gender with the power to influence its subjects’ desires and behaviour. This notion was apparent in *Re: Dale* when the Court recounted that Dale had “displayed a tendency towards boys’ clothing from the age of four or five and *gravitated* towards friendships with boys around that same age”.²⁹ Similarly, in *Re: Mitchell*, the Court wrote that “Mitchell was *drawn* to ‘boyish’ clothing”.³⁰ In both statements, gender appears to exert some kind of attractional force that compels its subjects to act in particular ways. A similar dynamic appears in the statement I quoted earlier from *Re: Sasha* where the Court described Sasha as having “discover[ed] the existence of transgenderism” and in doing so “realised that this was what was happening *to her*”.³¹ This statement not only frames Sasha and “transgenderism” as separate entities but also suggests that the former is beholden to the latter.

A similar conception of gender’s power appears in several instances where the Court discusses parental attempts to ‘correct’ their children’s gender non-conforming behaviours. For example, the Court recounted in *Re: Jamie* that Jamie’s parents

²⁶ *Re: Kate* (*supra* n 10) at para 19.

²⁷ *Re: Emery* [2016] FamCA 240 at para 42; *Re: Marco* (*supra* n 22) at para 39. A similar construction of ‘belief’ appears in *Re: Nadia* [2017] FamCA 526 at para 3.

²⁸ *Re: Jamie* [2013] (*supra* n 6) at para 36, my emphasis.

²⁹ *Re: Dale* (*supra* n 13) at para 39, my emphasis.

³⁰ *Re: Mitchell* [2017] FamCA 185 at para 9, my emphasis.

³¹ *Re: Sasha* (*supra* n 23) at para 32, my emphasis.

“tried to reinforce Jamie’s masculinity, encouraging her to wear male clothing, have her hair cut short, and play with gender-neutral toys”, but Jamie only became “more insistent on identification with the female gender”.³² A similar story appeared in *Re: Flynn*, where the Court noted that Flynn’s gender identity persisted despite the “well-meaning pressure placed upon [her] to engage in ‘male orientated activities’”.³³ In *Re: Celeste*, too, the Court wrote that Celeste’s “parents [had tried] to encourage Celeste to live more as a boy so that she would ‘fit in’ and not be bullied... but this was not successful”.³⁴ In each of these statements, the Court narrated its subjects’ genders as enduring despite external forces striving to overpower them. Hence, these narratives suggest that gender is *insistent*. The same notion appears in slightly different form in *Re: Marco*, where the Court reports that Marco’s male identity emerged despite there being “no pressure placed on Marco by his parents to conform to girl or boy expectations”.³⁵ In this statement, while gender is not actively resisting external pressures to shape it, it nonetheless emerges of its own volition.

The final way the Court advanced an essentialist ontology of gender was by suggesting that a subject’s gender was present from an early age. Statements of this kind were pervasive throughout the Court’s judgments. In at least ten cases, the Court noted in identical terms that its subject “identified as [fe/male] from an early age”.³⁶ Yet the Court made this suggestion in many other ways as well. In *Re: Spencer*, for instance, the Court recorded that Spencer had “maintained the wish to be a boy since early childhood”.³⁷

Often the Court made similar suggestions with reference to its subject’s styles of dress and behaviour. This was the case in *Re: Benjamin*, where the Court described its subject “as having always been a tomboy” and as “growing up with mostly male friends, and choosing to wear boyish clothing from an early age”.³⁸ The story was similar for Rae, whose “gender-variant or gender-expansive behaviours were present since early childhood, and there has been no change over time”.³⁹ Daniel’s gender was evident, too, in his “early childhood years”, because “he was observed to be a child who enjoyed wearing clothing and playing with toys typically associated with boys”.⁴⁰ Brittany, in contrast, “from an early age [...] would engage in activities more frequently associated with girls, and would frequently wear her sister’s

³² *Re: Jamie* [2011] (*supra* n 6) at para 13.

³³ *Re: Flynn* (*supra* n 14) at para 37.

³⁴ *Re: Celeste* [2016] FamCA 503 at para 10.

³⁵ *Re: Marco* (*supra* n 22) at para 16.

³⁶ This statement appears in similar form in eleven cases: *Re: Ashley* [2015] FamCA 373 at para 2; *Re: Dale* (*supra* n 13) at para 2; *Re: Kaitlin* [2017] FamCA 83 at para 5; *Re: Julian* [2015] FamCA 562 at para 2; *Re: Leo* [2015] FamCA 50, headnote; *Re: Harley* (*supra* n 8) at para 28; *Re: Jamie* [2015] (*supra* n 6) at para 43; *Re: Mackenzie* [2016] FamCA 610 at para 3; and *Re: Pat* [2017] FamCA 185 at para 15.

³⁷ *Re: Spencer* [2014] FamCA 310 at headnote. A similar phrase appears in *Re: Logan* (*supra* n 24) at para 64.

³⁸ *Re: Benjamin* [2017] FamCA 528 at para 4.

³⁹ *Re: Rae* [2017] FamCA 958 at para 35.

⁴⁰ *Re: Daniel* [2017] FamCA 155 at para 8.

clothing”.⁴¹ Gabrielle, meanwhile, “sought out feminine toys, for example Barbie dolls, and female dress-ups from an early age”.⁴² Conversely, Adrian’s gender was evidenced by the fact that “from early childhood [he] did *not* like dolls”.⁴³ Gender is represented here not as a matter of desire, preference, or practice. Instead, it is an inherent feature of a subject’s personhood that one is compelled to express involuntarily.

The Court seems to have believed so deeply in this notion of gender as always-already manifest at an early age that it was willing to make outlandish statements in support of it. In *Re: Colin*, for instance, the Court reported that “From as early as nine months of age, Colin has identified and behaved as male rather than female”.⁴⁴ Immediately, one might query what it could mean for a nine-month-old to ‘behave as male’ when a nine-month-old would have barely developed the motor skills necessary to crawl or to pick up a toy. Yet, one might also wonder how a nine-month-old could be capable of conceiving and articulating the nature of their gender identity when, at this age, they would not yet have acquired language or the cognitive capacity to form symbolic thoughts. Hence, the Court’s statements in *Re: Colin* construct gender as unconstrained by the body’s material affordances, manifesting, perhaps, on another plane entirely.

Gender Performativity

The Court was simultaneously asserting performative ontologies of gender while it was constructing gender as an essence. As I stated earlier, when the Court spoke about gender as performative, it implied that gender is something one enacts, produces, or achieves—that is, something one *does* rather than *is*. These statements contradicted the Court’s essentialist ontology. However, like the framing devices the Court used to establish its essentialist ontology, the framing devices it used to establish a performative ontology were diverse in form.

One way the Court advanced a performative ontology of gender was by describing gender as a social role that its subjects were performing. Indeed, often the Court would use this notion of a ‘role’ explicitly. For example, the Court noted in *Re: Christopher* that Christopher was “full-time living in the male role”.⁴⁵ Celeste, similarly, was said to have “fully transitioned to a female role in school and more broadly in society”.⁴⁶ Andrea, meanwhile, was “living more in the social role of female”.⁴⁷

Sometimes the Court would discuss a more specific kind of role. In *Re: Marley* and *Re: Mason*, for example, the Court described its subjects respectively as “enrolled as a boy... [at] a school in the local area” and “enrolled at his new school

⁴¹ *Re: Brittany* [2017] FamCA 527 at para 100.

⁴² *Re: Gabrielle* [2016] FamCA 470 at para 11.

⁴³ *Re: Adrian* [2017] FamCA 957 at para 17, my emphasis.

⁴⁴ *Re: Colin* [2014] FamCA 449 at para 2.

⁴⁵ *Re: Christopher* [2015] FamCA 454 at para 19.

⁴⁶ *Re: Celeste* (*supra* n 34) at para 34.

⁴⁷ *Re: Andrea* [2017] FamCA 24 at para 63.

using his chosen male name”.⁴⁸ In the context of these discussions, the Court would often also describe whether and how its subjects had acquired the institutional and bureaucratic accoutrements befitting their gendered role. For example, the Court noted that Colin had “changed his name from [a female name] to Colin on the school records”.⁴⁹ Similarly, the Court found it important in both *Re: Marley* and *Re: Jordan* that its subjects had tried to change their gender designation on their birth certificates and Medicare cards.⁵⁰ Collectively, these statements offer a view of gender not as an essence that one *has* but a role that one *fulfils*. Hence, gender appears not as something that one simply *is* but something that one *acts to become*.

The Court often leveraged this notion of gender as a role directly to legitimise hormone use. For instance, the Court stated in many cases that the drive to perform such a role correctly was what motivated its subjects to want to use hormones in the first place. For instance, it described at least six of its subjects as wanting to use hormones explicitly to fulfil their “wish[] to continue living in a [fe/]male role”.⁵¹ In *Re: Kate*, similarly, the Court asserted that the purpose of hormone use was to “enable [Kate] to continue to affirm as a female and fully live in the female role”.⁵² Conversely, the Court worried about the legitimacy of hormone use in *Re: Anita* because Anita “had not yet had the full real life experience of living in a female role”.⁵³ It was comforted, however, by a report that she was “actively pursuing” such a role.⁵⁴

Echoing the notion that gender is something one does rather than is, the Court also framed gender as an activity in several ways throughout its judgments. One way the Court proffered this idea was by describing gender as a kind of behaviour, or something that behaviour engendered. Colin and Leo were both observed to have “behaved as male”, for instance.⁵⁵ Marco, too, “had always behaved in a more male-typical manner”, while Julian had “experienced his gender to be male [by] displaying behaviours such as destroying dolls instead of playing with them”.⁵⁶

Gender also appeared as an activity when the Court discussed it as something that subjects *live as* rather than simply *are*. The Court remarked, for instance, that Colin had “started to live as a male” and that Hudson “lives and is treated as a male”.⁵⁷

⁴⁸ *Re: Marley* (*supra* n 9) at para 22; *Re: Mason* [2017] FamCA 453 at para 12. The Court also mentioned the gender role that its subject had adopted in their enrolment at school in *Re: Anita* (*supra* n 17) at para 13; *Re: Christopher* (*supra* n 45) at para 13; *Re: Kaitlin* (*supra* n 36) at para 9; and *Re: Hudson* [2017] FamCA 938 at para 13. In *Re: Karsen* (*supra* n 9) at paras 1 and 9, the Court made the same point but via a negative framing, noting that Karsen “hated” having been enrolled in an all-girls school.

⁴⁹ *Re: Colin* (*supra* n 44) at para 31.

⁵⁰ *Re: Marley* (*supra* n 9) at para 21; *Re: Jordan* (*supra* n 9) at para 11.

⁵¹ *Re: Adrian* (*supra* n 43) at para 30; *Re: Celeste* (*supra* n 34) at para 36; *Re: Colin* (*supra* n 44) at para 51; *Re: Drew* (*supra* n 7) at para 25; *Re: Darcey* (*supra* n 25) at para 23; *Re: Oliver* [2016] FamCA 423 at para 19.

⁵² *Re: Kate* (*supra* n 10) at para 49.

⁵³ *Re: Anita* (*supra* n 17) at para 22.

⁵⁴ *Ibid.*

⁵⁵ *Re: Leo* (*supra* n 36), headnote. The Court noted that Colin “behaved as male” on three occasions in *Re: Colin* (*supra* n 44) at paras 2, 42, headnote.

⁵⁶ *Re: Marco* (*supra* n 22) at para 39; *Re: Julian* [2017] FamCA at para 35.

⁵⁷ *Re: Colin* (*supra* n 44) at para 31; *Re: Hudson* (*supra* n 48) at para 17.

Similar language appears in an abundance of other cases as well. Elliott had begun “to live as male at school and in the community”, while Julian “lives his social life as a young man”.⁵⁸ Sasha had “started to live her life as a female full time” and Tahlia had “transitioned to live as a girl”.⁵⁹ Dale had “the desire to live and be accepted as a member of the opposite sex”, whereas Jaden had “done all he can to live life as male from age four”.⁶⁰ Shane “lives as male” and is “completely committed to living his life as a male”.⁶¹ Each of these constructions suggest that subjects were not always-already gendered but became gendered as a consequence of their actions. To *live as* a particular gender, in this sense, means to bring gender to life—that is, to vitalise or manifest it through one’s manner of living. Gender, then, is animated by one’s practice. It appears not as a passive process but a dynamic activity.

Another way the Court advanced a performative ontology of gender was by constructing gender as socially attributed. The Court noted, for instance, that “Jamie was known exclusively as a girl”, that Marco was “regarded as a male at school”, and that Ashton was “known to family and friends as male”.⁶² The Court found it important to state, also, that Harley had been “acknowledged as a boy by his peers, family and the broader community”.⁶³ In these constructions, gender is epistemological before it is ontological; subjects *become* gendered by acting in a manner that secures their social attribution as such.

The figure of the ‘tomboy’ was another rhetorical device that constructed gender as a product of social recognition in the Court’s judgments. Many of the Court’s subjects—Ashton, Benjamin, Bobbie, Jordan, Julian, and Martin—had apparently been recognised as ‘tomboys’ while growing up.⁶⁴ As feminist and trans scholars have noted, this figure of the tomboy is typically attributed to ‘girls’ who act and present in ways conventionally associated with boys (Halberstam 1998, 186–93). Hence, when the Court constructed its subjects as tomboys, it signalled that these subjects had already achieved some form of social recognition as *boyish* in nature. To take one example from *Re: Martin*, then, when the Court observed that Martin “was always seen as a tomboy to others”, it suggested that Martin was already enacting some partial kind of boyhood. In other words, through the figure of the tomboy, Martin had been *recognised* as proto-male. Gender thus appears in these moments not as an intrinsic characteristic but as a performative effect. It is the consequence of one’s *recognition as being* rather than a form of being *in itself*.

⁵⁸ *Re: Elliott* [2017] FamCA 1008 at para 8; *Re: Julian* (*supra* n 56) at para 2.

⁵⁹ *Re: Sasha* (*supra* n 23) at para 16; *Re: Tahlia* (*supra* n 8) at para 22.

⁶⁰ *Re: Dale* (*supra* n 13) at para 62; *Re: Jaden* (*supra* n 15) at para 38. The Court also frames Jaden’s gender as a mode of life when recounting that he “has lived life as male since he was eight years old” and that he experienced a “consistent and ardent desire to live as and be treated as male”, at paras 11, 46.

⁶¹ *Re: Shane* (*supra* n 25) at para 21, 43.

⁶² *Re: Jamie* [2015] (*supra* n 6) at para 55; *Re: Marco* (*supra* n 22) at para 39; *Re: Ashton* [2017] FamCA 1137 at para 2.

⁶³ *Re: Harley* (*supra* n 8) at para 31.

⁶⁴ *Re: Ashton* (*supra* n 62) at para 36; *Re: Benjamin* (*supra* n 38) at para 4; *Re: Bobbie* [2017] FamCA 974 at para 3; *Re: Jordan* (*supra* n 9) at paras 13–4; *Re: Julian* (*supra* n 56) at para 10; *Re: Martin* (*supra* n 8) at para 18.

The idea that gender could be chosen was another feature of the Court's discussions that implied a performative ontology. The Court stated that Marco, for instance, had been "living full time in [his] chosen gender".⁶⁵ Similarly, Hudson was said to have "decided that he wanted to change his name and gender", while Jason "decided he would identify as a male".⁶⁶ Eddie had also "decided that he needed to be a boy".⁶⁷ In *Re: Jamie*, meanwhile, the Court framed hormone use as denoting "a choice of identity with concomitant lifestyle implications".⁶⁸ In these scenes, the Court imagines gender to be the effect of deliberation, such that subjects produce their gender by assessing their options and selecting which gender they would prefer to be.

Often, these discussions about choice centred on the 'risk' that subjects might 'change their mind' about their 'chosen' gender and hence their desire to use hormones to affirm that gender. For example, the Court ruminated on this risk in *Re: Gabrielle*, worrying that "at some stage in the future [Gabrielle] may feel uncomfortable living as a female and wish to change back to being male" and that "continued treatment may make it difficult for her to feel confident that people will accept her moving back to a male role".⁶⁹ To counteract this fear, the Court cited evidence from a child and family psychologist to argue that "In the extremely unlikely event that [Gabrielle] should decide to change back to being male... she has the thoughtfulness and creativity to be able to manage possible de-transition comfortably".⁷⁰

The same concern appeared in several other cases as well. In *Re: Flynn*, the Court considered the risks that may eventuate "if [Flynn] decided to change back to being a male".⁷¹ This concern was also noted in *Re: Rae*, where the Court worried that "If children have completely socially transitioned, they may have great difficulty in returning to the original gender role upon entering puberty".⁷² In *Re: Kerry*, meanwhile, the Court was comforted to learn that the effects of hormone use are "partially reversible" because this meant that "should Kerry change her mind she can return to her life identified as a boy".⁷³ Similarly, in *Re: Leo* the Court reported that Leo had "considered future desire to return to identifying as female was highly unlikely, but could acknowledge the possibility of the same".⁷⁴ This language of reversion appeared in at least five other cases as well, where the Court reported in identical terms that its subject understood that they "could [choose to] not proceed

⁶⁵ *Re: Marco* (*supra* n 22) at para 12.

⁶⁶ *Re: Hudson* (*supra* n 48) at para 11; *Re: Jason* [2016] FamCA 772 at para 14.

⁶⁷ *Re: Eddie* (*supra* n 7) at para 25.

⁶⁸ *Re: Jamie* [2015] (*supra* n 6) at para 21.

⁶⁹ *Re: Gabrielle* (*supra* n 42) at para 20.

⁷⁰ *Ibid.*

⁷¹ *Re: Flynn* (*supra* n 14) at para 65.

⁷² *Re: Rae* (*supra* n 39) at para 53.

⁷³ *Re: Kerry* [2016] FamCA 970 at para 68.

⁷⁴ *Re: Leo* (*supra* n 36) at para 44.

with androgen therapy and return to a [fe/]male gender role”.⁷⁵ These statements suggest not only that gender is mutable but also that subjects can shape gender to their will.

Thus, there appears to be a clear paradox at work in the Court’s understanding of gender. These performative ontologies directly contradict the essentialist ontologies I described in the previous section. In short, an entity cannot simultaneously precede and be the product of action. If gender were contingent upon action, then it could not be essential. Conversely, if gender were an essence, then its nature could not be affected by actions as that nature would transcend any efforts to change or express it. Nonetheless, these claims shared a common set of properties despite their contradictions. I turn to discuss these in the next section.

Governing Gender Through Ontology

In the preceding two sections, I have shown that the Court simultaneously advanced two contradictory claims about the ontology of gender which it used to arbitrate the legitimacy of hormone use. In this section, I turn to consider the common regulatory investments embedded in these claims. As I will explain, despite their apparent contradictions, the Court’s two ontologies were united in advancing a shared and mutually reinforcing set of anti-queer directives.

In calling these directives anti-queer, I am invoking that particular notion of queerness expounded in queer theory. Queer, in this context, does not denote a distinct identity, entity, or exercise but what Halperin (1995) has described as “a positionality vis-a-vis the normative” (62). Queerness, then, is not some ‘thing’ already defined but “a horizon of possibility whose precise extent and heterogeneous scope cannot in principle be delimited in advance” (Halperin 1995, 62). It is an orientation that embraces change, affirms difference, and seeks the realisation of the new. Muñoz (2009) described this sense of queerness elegantly as a “rejection of a here and now and an insistence on potentiality or concrete possibility for another world” (1). I argue that the Court’s ontologies were antithetical to precisely this kind of queerness because they legitimised hormone use exclusively as a means to reinforce the legibility, immutability, and consistency of its subjects’ genders. Hence, under these discourses, hormone use was legitimate only ever as a means to eradicate, rather than affirm, queer potential.

Legibility

Legibility was a primary anti-queer directive embedded in both the Court’s essentialist and performative ontologies. Both discourses constructed the legitimacy of hormone use as dependent upon a subject having rendered themselves legibly

⁷⁵ *Re: Adrian* (*supra* n 43) at para 30; *Re: Celeste* (*supra* n 34) at para 36; *Re: Colin* (*supra* n 44) at para 51; *Re: Drew* (*supra* n 7) at para 25; *Re: Darcey* (*supra* n 25) at para 23; *Re: Oliver* (*supra* n 51) at para 19.

gendered to the Court and to the social world more broadly. In doing so, these discourses articulated a powerful injunction against queerness.

The Court's performative ontology advanced this imperative for legibility most clearly. When leveraging this ontology, the Court argued concurrently that hormone use was legitimate specifically as a means to affirm a gender that a subject was (a) already performing, and (b) performing *successfully*. For the Court, a successful performance was, as I detailed in the previous section, one that secured a subject's social recognition as being of a given gender and fulfilled the social role attached to that gender. Hence, under this discourse, legitimate hormone use required legibility: subjects had to demonstrate, or at least have the Court declare that they had demonstrated, a socially and institutionally coherent gender presentation, such that their intelligibility and functioning as the gender they wanted to use hormones to affirm could be established.

The Court's essentialist discourses proffered the same mandate for legibility, albeit via a more complex semiotic route. These discourses asserted that hormone use was legitimate specifically as a means to express a subject's essential gender. Hence, hormone use became legitimate conditionally upon a requisite essence having been established. Like their performative counterparts, these essentialist discourses mandated legibility by directing subjects to behave in ways that rendered them intelligible as being of the gender they wished to use hormones to affirm. However, unlike their performative counterparts, this mandate was not premised on the belief that gender was produced in and through such acts. Instead, the Court's essentialist discourses mandated legible performances of gender based on the presumption that such performances could *signify* a gendered essence.

The Court's essentialist discourses required such legible performances to evidence the essences they cited for two reasons. First, the Court required these performances to establish the presence of an essence because—even presuming essences exist—the Court could not have relied on the essence to establish itself. Subjects could not have allowed the Court unmediated access to their essences, nor could they have neutrally or objectively expressed them. Given that essences are unobservable by definition, such access or expression could not have been possible. Hence, the Court could only have relied on *representations* made about those essences when citing their existence to adjudicate the legitimacy of hormone use. In doing so, the Court's essentialist ontologies made hormone use conditional upon subjects making legible *representations* to the Court that cultivated *the impression* of their being essentially gendered.

Yet the Court's essentialist discourses also advanced a mandate for legible performances of gender for a more fundamental reason: that is, that the very notion of an essential gender is *itself* a semiotic construction that requires social performance to actualise. This argument has been made extensively in feminist, queer, and trans theory (Stone 2016). For example, Butler (1999, 32–33) famously argued that ideas of a “gender core” or an “inner space” of gender—two figures that appeared frequently in the Court's essentialist discourses—are “produced by the regulation of attributes along culturally established lines of coherence”. Thus, for Butler, the configuration of gender as an essence is a discursive, political, and normative achievement, not a universal truth. On this basis, Butler asserts that the notion of an essential gender

is the effect of social performances which, when placed inside a particular cultural frame, produce the impression of an interior substance. As Butler writes (1991, 28):

In effect, one way that gender gets naturalised is through being constructed as an inner psychic or physical necessity. And yet, it is always a surface sign, a signification on and with the public body that produces this illusion of an inner depth, necessity or essence that is somehow magically, causally expressed.

An essential gender, in this sense, is not an objective state of being but a social performance produced through culturally and historically located significations. Accordingly, for a subject to appear *as if* their gender is essential, they must perform their gender in ways that conform to the intelligibility criteria operating in that setting that make the signification of an essence possible.

Hence, both the Court's ontological discourses demanded legibility. According to the Court's performative ontology, legitimate hormone use required a socially and institutionally recognisable performance of gender that hormones could corroborate and reinforce. Meanwhile, the Court's essentialist ontology required subjects to perform in ways that made them *appear* essentially gendered, such that hormones could be understood as a means to express and affirm that essence.

This requirement for legibility is anathema to queerness because the social attribution of gender—in either a performative or essentialist mode—depends upon a subject's capacity and willingness to perform hegemonic gender norms. As Califia (2003) observed, a requirement to be legible *as* a given gender—that is, what is colloquially known as the requirement to pass—forces subjects to capitulate to the semiotic demands of “an oppressive polarized, binary gender system” (210). Bornstein (1994, 127) made a similar declaration, writing that “through the mandate of passing, the culture uses transsexuals to reinforce the bi-polar gender system, as transsexuals strive for recognition within their new gender, and thus the privilege and chains of their new gender”. In other words, legibility requires normativity, as normativity is what makes recognisable forms of gender cohere.

To stipulate a performance of dominant gender norms as a condition of being able to use hormones legitimately is to oppose queerness in multiple ways. Firstly, this stipulation is hostile to queerness because of its investment in the erasure of non-conforming gendered presentations and subjectivities. Many people reject the validity, authenticity, or necessity of performing according to the norms that legibility requires (Feinberg 1998; Sycamore 2006). Moreover, as many queer and trans scholars have noted, legibility requires not only performing gender in line with culturally coded expectations but often also performing in ways that conceal one's status as trans, intersex, or gender non-conforming (Sycamore 2006; Cooley and Harrison 2012). Requiring legibility, then, constitutes an investment in the erasure or suppression of queerness.

The directive to be legible is also hostile to queerness by order of its exclusivity. As queer and trans scholars have shown, the ability to achieve legibility is neither universally nor evenly distributed but constructed according to norms that are sexed, racialised, classed, ableist, and structured by other hegemonic social dynamics (McRuer 2006; Snorton 2017; Gill-Peterson 2018). Legibility, riven as it is by dominant norms, requires particular configurations of the body, a specific set of bodily

capacities, as well as access to a range of temporal, financial, and other kinds of capital to achieve. Moreover, in contemporary Western dominant cultures, legibility is usually limited to prevailing binary conceptions of gender presentation. This stipulation of legibility, then, actively excludes non-binary and genderqueer articulations of gender which do not have access to, or may actively reject, normative modes of recognisability (Davy 2018; Barbee and Schrock 2019; Bradford et al. 2019).

The hostilities that legibility evokes are also entangled with a range of further anti-queer investments. For instance, the discourse on legibility that the Court cites here is also involved in delegitimising trans, intersex, and gender non-conforming people as well as their identities, experiences, and realities in contexts beyond the Courtroom. For example, the requirement for legibility is often invoked to delegitimise those who refuse or fall short of passing as inauthentic or as social deviants (Anderson et al. 2020). In this way, the requirement for legibility is also directly related to violence against gender non-conforming people. As Gagné and Tewksbury (1998, 86) observe, for example, many trans people practise passing as a mode of “self-preservation”, because in a world where there is “no social place for a person who is neither a woman nor a man” to not pass is to be subjected to violence. The requirement for legibility, then, underpins the violence directed towards those deemed illegible.

Immutability

A requirement for immutability was another key anti-queer directive embedded in the Court’s ontologies. By order of this imperative, subjects had to demonstrate, or at least promise to produce, a singular and unchanging form of gender as a condition of being able to use hormones legitimately. Hormone use became legitimate, in this sense, specifically as a means to reinforce gender’s stasis.

In the Court’s essentialist discourses, this directive appeared as a requirement for subjects to efface their capacity to change. Invoking gender essentialism inevitably requires such effacement because this ontology holds that gender is an unalterable and intractable property which, therefore, can be neither changed nor chosen (Stone 2016). Indeed, this is a feature of essentialist theories of subjectivity in general, which advance a notion of the self as discrete and immutable and thereby oppose conceptions of the self as potentially dynamic and changing (Klein et al. 2015). Hence, by tethering the legitimacy of hormone use to the performance of an essential gender, the Court rendered hormone use conditional upon a repudiation of the notion that gender is mutable or capable of being affected by personal or collective agency. As such, according to the Court’s stipulations, any possibilities or desires for transformation were incompatible with legitimate hormone use.

The same dynamic was at work in the Court’s performative ontologies. While these discourses implicitly contained the possibility of change, the Court’s use of them explicitly sought to prevent it. By making hormone use conditional upon a coherent gender presentation, as described above, these discourses held that subjects could only use hormones to manifest forms of gender that either were, or at least *appeared to be*, inert. This desire for permanence can be observed in the Court’s

argument that hormone use could be legitimate as a means to enhance the legibility of a gendered social role that a subject was *already* performing. The Court argues, in other words, that the legitimacy of hormone use depends upon its capacity to support gender's iterability and hence ward against its liability to change. Hormones' legitimate function is conceived, then, as enhancing a subject's ability to *enact the same gender* repeatedly, consistently, and reliably. Consequently, the regulatory imperatives embedded in the Court's performative ontology of gender mirrored those generated by its essentialist counterpart. Despite being fundamentally premised upon contingency and mutability, the Court's performative ontology invests nonetheless in producing forms of gender that give *the impression* of intransience.

Like its efforts concerning legibility, the Court's efforts to tether the legitimacy of hormone use to immutability were deeply hostile to queerness. Queerness is defined by an orientation toward the new and an appreciation of potentiality and change. As Duggan (1992, 11) attests, queer is "the promise of new meanings, new ways of thinking and acting politically". Likewise, Jagose (1996, 158–159) describes queer as a practice that embraces the "radical unknowability of its future formations". Queerness, then, is always in process and open to transformation, allowing its subjects to become other than that which they are already being. A mandate for immutability is, therefore, a direct negation of queerness. It requires that subjects only ever *be* gendered in ways they are already being. As such, it also requires that subjects express both a capability and willingness to strive toward a certain future and subordinate any desires for transformation they might hold. In this way, the Court's mandate for immutability conscripts its subjects into curbing gender's potential for actualising otherwise.

Crucially, this hostility to queerness is not merely an abstract concern. Many trans scholars have criticised immutable conceptions of gender for erasing the myriad ways in which experiences, embodiments, and identifications with gender can modulate throughout one's life and across social contexts (Corwin 2017; Galupo, Pulice-Farrow, and Ramirez 2017; Halberstam 2018). They have also argued, alongside feminist scholars, that immutable conceptions of gender are centrally involved in maintaining patriarchal and other hierarchically gendered social structures by supporting the notion that those hierarchies are inevitable and unassailable (Stone 2016). Butler (1999, 173–74), for instance, pointed out that the construction of gender as immutable "precludes an analysis of the political constitution of the gendered subject" such that the "political regulations and disciplinary practices which produce that ostensibly coherent gender are effectively displaced from view". This notion of immutability, then, renders invisible the various forms of regulation that produce and circumscribe the limits of gendered beings—including the limits that might allow gender to appear immutable in the first place.

Consistency

Like their investments in immutability, the Court's ontologies also proffered an anti-queer directive that sought to secure consistency and eliminate difference. These

ontologies worked collaboratively toward this end by jointly advancing a conception of gender as an entity that manifests—whether essentially or as the product of action—in distinct, discrete, and universal forms. This notion appeared in the Court’s essentialist discourses, where it implied that gender manifests independently of and prior to a subject’s actions and always in an unmitigated state. It also appeared in the Court’s performative discourses, where the Court considered not only that specific actions can materialise an objective form of gender if performed successfully, but also that there is a discrete inventory of actions that must be practised before a given form of gender can come into being.

The conception of gender these discourses build—as a distinct, discrete, and universally recognisable entity—was central to the Court’s deliberations on the legitimacy of hormone use. It was always the presence or absence of such objective forms of gender that determined the legitimacy of subject’s hormone use. In every case, the Court declared that hormone use was legitimate because its subjects had demonstrated that they were already the gender they sought to affirm, regardless of whether that gender was established essentially or performatively. As such, subjects were directed not to use hormones to affirm or enact new or different forms of gender—they could only ever become what they were presently being.

The consequences of this directive overlap with those following from the imperative for immutability that I just discussed, but they also differ in important ways. These differences arise because while immutability is concerned primarily with change, consistency is concerned primarily with emergence. In other words, immutability captures how the Court’s ontologies sought to prevent a subject’s gender from transforming, whereas consistency highlights their efforts to preclude a subject from using hormones to produce new forms of gender—that is, forms of gender that were not already manifest. This concern with consistency thus precedes the concern with immutability, such that consistency indexes *what gender can be* while immutability indexes *what gender might become*. Hence, these ontological discourses posited a distinct antagonism toward the generativity: they desired not only to keep gender fixed in place but also to ensure that subjects could only realise forms of gender that existed already.

Moreover, given that essentialist and performative discourses typically appeared simultaneously in each case, this imperative for consistency usually applied not only to the subject’s performance of gender—or indeed their performance of essence—but also to the relationship between these two, apparently separate, versions of gender. For example, to return to two quotes I discussed earlier, the Court was concerned in *Harley’s* case both that he had an “enduring experience since very early childhood of himself as a boy at his core” and that he was “acknowledged as a boy by his peers, family and the broader community”.⁷⁶ Thus, in *Re: Harley* the Court evinces a concern with a subject demonstrating both an essential gender *and* their ability to perform that gender socially. Here, neither the presence of an essence nor the subject’s ability to perform gender “correctly” appears sufficient to justify hormone use. Instead, the legitimacy of hormone use depends on a subject having *both* an essence *and* the ability to signify that essence in social practice. Hormone use

⁷⁶ *Re Harley* (*supra* n 8) at paras 50, 31.

becomes legitimate, in this sense, as a means to maintain a consistent relationship between essence and performance.

This mandate for consistency is again antithetical to queerness due to its investments in an organising principle of contemporary gender norms: namely, what Butler (1999) describes as “the heterosexual matrix”. As Butler articulates, the heterosexual matrix dictates that a subject’s “interior” (that is, their essence) *must* be expressed corporeally through the configuration and comportment of their body (that is, through performance). Accordingly, Butler (1999, 194) defines the heterosexual matrix as:

a hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality.

In line with the heterosexual matrix, the Court’s leveraging of essentialist and performative discourses simultaneously required its subjects to demonstrate their capacity to correctly express their essence through performance. This requirement, when operating as a condition of legitimate hormone use, meant that subjects were directed to use hormones only to produce isomorphic relationships between the ‘inner’ and ‘outer’ manifestations of their gender such that a sense of consistency was always maintained. In other words, while the Court’s discourses do not distinguish between sex and gender in the terms Butler invokes, they nonetheless reaffirm the notion that the body is obliged to signify the identity it contains. However, one critical difference between the Court’s directive and the one that Butler describes is worth noting. Whereas the heterosexual matrix has historically constructed hormones as an unalterable element of a subject’s sex, in these cases, the Court came to view hormones as a changeable aspect of gender expression. Hence, in the Court’s accounts, hormones shift from being a part of the underlying truth (‘sex’) that must be reflected in performance to a component of performance (‘gender’) that must be used to express that truth.

Conclusion

In this article, I have examined how the Family Court of Australia constructed ontologies of gender to arbitrate the legitimacy of young people’s gender-affirming hormone use. In doing so, I have shown that the Court constructed two distinct ontologies simultaneously—one essentialist and the other performative—which both advanced the same anti-queer directives. To conclude, I would like to return to a point I made in the introduction: that these ontological discourses were not merely descriptive but forcefully performative. My concern with these discourses is not, therefore, that they might have merely (mis)described gender’s reality. Instead, I am concerned with the power the Court invested in these discourses to create the reality they named.

Gender does not have a fixed ontology. It has no permanent or necessary existence. It is not an objective, universal, or discrete phenomenon. Instead, gender is socially, culturally, and historically contingent. It is a relational, structural, and fundamentally unstable phenomenon that owes its existence and form to the conditions of its creation—conditions that are similarly unstable and liable to change. Consequently, when those conditions are shaped, including by coercive institutional powers like the Family Court, so too is gender shaped. My claim, then, is that by making the legitimacy of hormone use conditional upon a subject's alignment with certain ontological discourses, the Court was involved in shaping how gender could manifest. Understanding the performative power the Court wielded in these instances—that is, the power not just to describe but to shape reality—is crucial for understanding why the anti-queer directives it advanced matter so profoundly.

The Court's work to negate queerness in these cases is striking for several reasons. First, it is striking because the norms that the Court demanded its subjects maintain are especially violent toward those that are marginalised by them, including not least of all those that use hormones to manifest a gender other than that which they were forcibly assigned (Namaste 2000). As such, the Court made those most vulnerable to the violence that these norms engender responsible for upholding them and barred those that may have had the most to gain from the transformation of those norms from participating in that transformation. In other words, the Court's ontologies sought to expunge queerness from subjects for whom queerness held great liberatory potential.

The Court's work to negate queerness is also striking because the subjects that these cases concerned were among queerness' most powerful vectors. The practice that these subjects were asking the Court to allow them to perform radically challenges the norms that the Court was promulgating. As several trans scholars have noted, to transform one's body in the ways that the Court's subjects were intending can be a way to challenge one's confinement to an ascribed category of gender and actualise novel and more livable modes of being (Halberstam 1998; Prosser 2018; Jordan-Young and Karkazis 2019). Hence, by refusing to capitulate to the gender assignment that had been thrust upon them, the subjects of these cases affirmed their potential for change and the creation of the new. The Court, conversely, demanded that they carve their being to fit prevailing norms. Instead of supporting its subjects to shed the restraints of the already and to generate more capacious alternatives, the Court worked to redirect their revolutionary capacities toward a reiteration of the status quo.

It is also significant that the Court's ontological discourses concerned hormone use specifically, given that hormone use can also be a powerful vector of queer potential. Hormones influence the constitution of the gendered body, as well as the gendered subjectivity that is bound up with that body, discursively and materially (Lane 2009; Irni 2013). Yet hormones do not produce any essential effects in this regard; they are dynamic chemical signals that interact omnigenously with the changing world around them (Oudshoorn 1994; Roberts 2007). As Gill-Peterson (2014, 407, my emphasis) argues, hormones play a role in the production of gender by “participat[ing] in the body's *open-ended* technical capacities”. That these capacities are open-ended means that they can be harnessed to produce a

diverse array of gendered embodiments and subjectivities. In other words, hormones can exploit the body's inherent capacity for transformation. Hormones might be used to interrupt, usurp, or redirect bodily automaticities and in doing so shape the body and gender in unanticipated, new, and challenging ways. Consequently, hormones might be used to remake gender, push it toward new possibilities, and unshackle it from the forces that seek to keep it fixed in place (Roberts and Cronshaw 2017). Or, indeed, given that the relationship between hormones and gender is born of convention and not necessity, hormones might even be used to produce beings that are untethered from gender entirely. Yet the Court seemed intent upon arresting this transformative potential. Through the conditions its ontological discourses constructed, the Court worked to make hormone use function only as an instrument of normalisation.

This analysis reveals that legal regimes concerned with controlling gender-affirming practices like hormone use have much more at stake than access to those practices alone. By analysing the ontological discourses the Court wielded in these cases, I have shown that these regimes do not regulate gender affirmation merely out of a concern with how gender is expressed. Rather, the Court's wielding of these ontological discourses shows that its desire to regulate gender affirmation was, in both form and effect, a desire to control gender itself. Moreover, my analysis suggests that neither essentialist nor performative ontologies can be intrinsically relied upon to oppose such efforts to control. Neither is inherently emancipatory and both are potentially dangerous. Regulatory systems can employ either ontology to discipline gender and curtail queerness, and they can be especially oppressive when wielded simultaneously.

These insights are crucial to note in a contemporary context where legal regimes like the one I have discussed are myriad, multiplying, and intensifying (Davis 2017; Vogler 2021; Currah 2022). I have examined one case study, but the discourses I have observed and critiqued at this site did not originate within and still circulate widely beyond this context. The same discourses are at work in producing an increasing number of legal and other ordinances that seek to control, criminalise, and prevent contra-normative gender affirmation in other contexts. They have been at work, too, in recent efforts to prevent trans people from military service, participating in public sports, accessing public bathrooms, being placed appropriately in state custody, or obtaining refugee status. So, while the Family Court of Australia's regulations may no longer be at play, the ontologies that established and sustained its control over its subjects' possibilities for gender transformation remain very much alive and global in reach.

By exposing the ontological discourses that structured the Family Court of Australia's regulations and critiquing the regulatory directives they advanced, this article hopes to offer a useful blueprint for charting and undermining the growing surfeit of governance mechanisms that have spawned in its wake. These regimes must be undone so that trans and gender non-conforming lives might more easily flourish and proliferate. Yet, for them to be undone, so too must the ontologies that underpin them. Therein lies a clear mandate for feminist, queer, and trans scholarship to persist in its core mission: finding ways to challenge unjust strictures and realise radical new becomings.

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