

CRITIQUE AND COMMENT

PRISCILLA'S REVENGE: OR THE STRANGE CASE OF TRANSSEXUAL LAW REFORM IN VICTORIA

JOHN MOUNTBATTEN*

[This article responds to a recent Discussion Paper commissioned by the Victorian Government on the subject of transsexual law reform. That Discussion Paper, in effect, consolidates the kind of liberal thinking which existed on this subject more than a decade ago. It argues that society should conditionally extend its margin of toleration by legally recognising transsexuals. But what are transsexuals? How are they to be defined legally and upon what conditions? This article contests the familiar medico-legal paradigm perpetuated by the Discussion Paper and questions the epistemological foundations which appear to support it. Drawing instead upon the concept of postmodern identities, reflecting upon the valence of some competing or counter-narratives, and considering some of the kaleidoscopic images of contemporary culture, the author argues that the disruptive discourse constituted by the transsexual 'predicament' is emblematic of a society which has not so much lost its way, as of one which is increasingly prepared to consider new possibilities.]

[T]o minds strongly marked by the positive and negative qualities that create severity — strength of will, conscious rectitude of purpose, narrowness of imagination and intellect, great power of self-control, and a disposition to exert control over others — prejudices come as the natural food of tendencies which can get no sustenance out of that complex, fragmentary, doubt-provoking knowledge which we call truth.¹

TOWARDS A TRANSSEXUAL LED RECOVERY — THE BACKGROUND

A Law Reform Discussion Paper² on the subject of transsexualism is currently in the hands of Victoria's Attorney-General, Ms Jan Wade. The paper was

* BA, Dip Ed, LLB (UNSW); Barrister and Solicitor of the Supreme Court of South Australia; Lecturer in Legal Studies, School of Cultural Studies, Flinders University, South Australia. (I would like to thank Professor Andrew Goldsmith and Associate Professors David Clark and Michael Meehan for their thoughtful comments on the first draft of this paper).

¹ George Eliot, *The Mill on the Floss* (Pan ed, 1976) Bk 6 Ch 12, 432-3. It is, of course, no coincidence that the epigraph I have chosen comes from the pen of a woman (Mary Ann — or Marian — Evans) who wrote all her great novels under a male pseudonym. The etymology of the word pseudonym 'reveals' that it comes from two Greek words: one meaning 'false' and the other suggesting 'an intention to deceive'. There has been a good deal of debate recently in Australian literary circles concerning the 'pseudonym' Demidenko. Regarding Helen Demidenko/Darville, see generally John Jost, Gianna Totaro and Christine Tysling (eds), *The Demidenko File* (1996). There was even a Demidenko presence in the Sydney Gay and Lesbian Mardi Gras parade earlier this year. The relevance of this for transsexualism will be explored later in this paper.

² Henry A Finlay, *Transsexualism in a Modern State: Options for Reform* (1995). (Privately printed by the author, from whom copies may be obtained by writing to 122 Nelson Road, Sandy Bay, Tasmania, Australia 7005) ('Finlay DP').

prepared by Dr Henry Finlay,³ who came out of semi-retirement to take up the cudgels of a cause with which he has long been associated. On its completion,⁴ the Discussion Paper was forwarded to the Victorian Attorney-General's Law Reform Advisory Council for consideration. This Council has agreed that Dr Finlay's recommendations should 'go forward to the Attorney-General on the basis that those Recommendations be dealt with at a national level through the Standing Committee of Attorneys-General.'⁵

At first blush, it seems surprising that an essentially conservative government, such as the Kennett government, should be concerning itself with transsexual law reform. South Australia is the only Australian state to have enacted legislation providing for the legal recognition of transsexuals,⁶ South Australia having decided to 'go it alone' when negotiations between the Commonwealth and the States, on the subject of uniform legislation, broke down in the mid-1980s.

This article reviews that Discussion Paper and comments on its recommendations. It also attempts to situate the Paper within the broader context of a growing debate over postmodern identities, as represented by some of the more adventurous counter-hegemonic discourses to emerge from the academy in recent years, as well as by a number of creative representations of lived experience — particularly recent literary and cinematic evocations of popular, contemporary culture.

RECOMMENDATIONS

Briefly, the overall thrust of the Discussion Paper lies in its repudiation of the chromosome test propounded in *Corbett v Corbett*⁷ which the author describes as

³ Formerly Associate Professor of Law at Monash University (1972-88) and currently Senior Lecturer in Law at the University of Tasmania. Dr Finlay is a long-time commentator on Australian family law. See Henry A Finlay and Rebecca Bailey-Harris, *Family Law in Australia* (4th ed, 1989); Henry A Finlay, Rebecca Bailey-Harris and Adrian Bradbrook, *Family Law: Cases, Materials and Commentary* (2nd ed, 1993). He was also one of the early and most influential Australian advocates of law reform in this area. See Henry A Finlay and William A W Walters, *Sex Change: Medical and Legal Aspects of Sex Reassignment* (1988). On the same subject see William A W Walters and Michael W Ross (eds), *Transsexualism and Sex Reassignment* (1986).

⁴ The Discussion Paper is dated 1 May 1995.

⁵ Victorian Attorney-General's Law Reform Advisory Council, *Annual Report* (1995) 8.

⁶ Sexual Reassignment Act 1988 (SA). The history of this legislation may be gleaned from South Australia, *Parliamentary Debates*, Legislative Council, December 1987 - March 1988. In introducing the Bill on 2 December 1987, the Attorney-General spoke of the need to regulate sexual reassignment procedures in the State, as well as the need for legal recognition of a person in his or her 'reassigned sexual identity'. Unfortunately, the only people who may have recourse to the Act are those who have been 'reassigned' in South Australia or who were 'reassigned' elsewhere but born in South Australia: s 7 (8). Since its enactment, about 30 people (the figures are not entirely reliable) have made applications for 'recognition' under the terms of the legislation. The figures are set out in Finlay DP, above n 2, 24. At the time the legislation was introduced, operations were being performed in South Australia. This is no longer the case — although the Health Commission of SA has recently approved the reformation of a Gender Reassignment Unit which is expected to recommence reassignment surgery in South Australia as early as June 1996. So far as I am aware, the Gender Dysphoric Clinic (the very name is revealing) at the Monash Medical Centre, Victoria is currently the only public hospital in Australia performing sex reassignment surgery.

⁷ *Corbett v Corbett* [1971] P 83 ('Corbett'). Put simply, *Corbett* stands for the proposition that

inaccurate and serving no useful purpose in modern Australian society.⁸ There are no surprises here.⁹ The chromosome test has, over the years, attracted a considerable body of criticism¹⁰ and Dr Finlay's conclusion that it is time *post-operative*¹¹ transsexuals be given full legal and administrative recognition by all levels of government will not surprise many — certainly not those who have kept a watching brief on this issue over many years.

The Discussion Paper is divided into three parts: A, B and C.

Part A deals with methodology and resources.¹² It explains the concept of *gender dysphoria*,¹³ without in any way analysing or critiquing the dominant social and medical models which respectively give rise to and perpetuate notions of gender identity.¹⁴ It examines the 'straitjacket'¹⁵ of *Corbett v Corbett*¹⁶ and

'woman' in the context of marriage does not embrace post-operative male-to-female transsexuals. According to *Corbett*, the conclusive factor in the determination of sex/gender is the congruence (or otherwise) of chromosomes, gonads and genitals. When all three are congruent, the answer is said to be clear — psychological orientation or gender identification or surgical intervention notwithstanding.

⁸ Finlay DP, above n 2, 60.

⁹ Recent judicial approval of *Corbett* notwithstanding. See, eg, *Lim Ying v Hiok Kian Ming Eric* [1992] 1 SLR 184; also see reports of this case in Serene Lim, 'High Court grants annulment to babysitter' *The Straits Times Weekly (Overseas Edition)* 8 June 1991, 6-7.

¹⁰ See, eg, David Green, 'Transsexualism and Marriage' (1970) 120 *New Law Journal* 210; Douglas Smith, 'Transsexualism, Sex Reassignment Surgery, and the Law' (1971) 56 *Cornell Law Review* 963; Terrence Walton, 'When is a Woman not a Woman?' (1974) 124 *New Law Journal* 501; Rebecca Bailey, 'Family Law — Decree of Nullity of Marriage of True Hermaphrodite Who Has Undergone Sex-Change Surgery' (1979) 53 *Australian Law Journal* 659; Henry Finlay, 'Sexual Identity and the Law of Nullity' (1980) 54 *Australian Law Journal* 115; Gordon Samuels, 'Transsexualism' (1983) 16 *Australian Journal of Forensic Sciences* 57; Terrence Walton, 'Why Can't a Woman?' (1984) 134 *New Law Journal* 937; Alec Samuels, 'Once a Man, Always a Man; Once a Woman, Always a Woman — Sex Change and the Law' (1984) 24 *Medicine, Science and the Law* 163; Michael Kirby, 'Medical Technology and New Frontiers of Family Law' (1987) 1 *Australian Journal of Family Law* 196; Jerold Taitz, 'A Transsexual's Nightmare: the Determination of Sexual Identity in English Law' (1988) *The International Journal of Law and the Family* 139; Rebecca Bailey-Harris, 'Sex Change in the Criminal Law and Beyond' (1989) 13 *Criminal Law Journal* 353; Margaret Otlowski, 'The Legal Status of a Sexually Reassigned Transsexual: *R v Harris and McGuinness* and Beyond' (1990) 64 *Australian Law Journal* 67; John Mountbatten, 'Transsexuals, Hermaphrodites and Other Legal Luminaries' (1991) 16 *Legal Service Bulletin* 223; Jerold Taitz, 'Judicial Determination of Sexual Identity' (1992) *Australasian Journal of the Medical Defence Union* 12; Vivienne Muller, "'Trapped in the Body" — Transsexualism, the Law, Sexual Identity' (1994) 3 *Australian Feminist Law Journal* 103.

¹¹ Emphasis added. More on this significant qualification later.

¹² Dr Finlay refers to 'the very limited resources at my disposal for such a broad survey' and explains how his methodology was largely determined by the exigencies (viz: very limited time and money) under which he operated: Finlay DP, above n 2, 2.

¹³ Gender dysphoria simply means gender disturbance or gender anxiety; that sense of persistent unease felt by those who are convinced that their 'real' gender identity does not correspond to their biological sex. Transsexualism is regarded as a symptom of this condition. Medical literature speaks of *primary* and *secondary* gender dysphoria; the first, indicating a condition which arises in childhood (classically by about five years of age) without any apparent underlying physical or psychological cause; the second, a condition arising later in life (generally in late adolescence or early adulthood), often accompanied by some underlying psychological or physical condition. It is interesting to note that the most recent edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* (4th ed, 1994) 532-8, paras 302.6-302.9, no longer lists transsexualism as a separate category. Instead, it appears as one among many 'gender identity disorders' (*sic*); or rather, as one of many forms of cross-over behaviour. Interestingly, it was not until 1980 that the same manual officially recorded transsexualism as a 'disorder' at all.

¹⁴ This point has been made throughout the literature from time to time. Billings and Urban are

explains the effect of *Corbett* on contemporary Australian law. It explores a variety of 'Sexual Abnormalities [*sic*]'¹⁷ including cases of hermaphroditism¹⁸ and gonadal dysgenesis¹⁹ and argues, somewhat ironically, that because there are so many variations from the norm — or 'genetic errors' as they are sometimes *tellingly* described — inflexible adherence to the standard model is, at best, problematic.

Part B provides a broad overview of Australian law as it affects transsexuals, considers the effect and adequacy of current South Australian legislation and (under the heading 'De Facto Recognition') comments on some interesting recent developments in courts and tribunals in Australia²⁰ and New Zealand.²¹

Certainly, there are some examples of creative law making to be found here: cases where the more imaginative judges and also members of tribunals have not felt constrained by the dead hand of precedent and have tried to move with the times. Nevertheless, even the dab hand of the earnest reformer occasionally hesitates. For example, neither the majority of the New South Wales Court of Criminal Appeal in *Harris and McGuiness*²² nor the Full Federal Court in *SRA*²³

notable among the early critics for arguing that transsexualism is a socially constructed reality which *only* exists in and through medical practice: Dwight Billings and Thomas Urban, 'The Socio-Medical Construction of Transsexualism: an Interpretation and Critique' (1982) 29 *Social Problems* 266. Bernice Hausman is also critical of the practices of cultural institutions such as the medical profession, although she goes further and argues that the material with which medicine works (the transsexuals themselves) comes about as a result of a complex interplay between ideology and technology. So far as technology is concerned, Hausman places particular emphasis on twentieth century developments in endocrinology and plastic surgery — medical specialities which provide the medical means of eradicating 'aberration' and rendering the 'abnormal' normal: Bernice Hausman, 'Demanding Subjectivity: Transsexualism, Medicine, and the Technologies of Gender' (1992) 3 (2) *Journal of the History of Sexuality* 270.

¹⁵ Emphasis added. (I assume no pun is intended).

¹⁶ Finlay DP, above n 2, 4.

¹⁷ *Ibid* 9. This is a dangerous phrase. Are we simply talking about statistical variations from the norm or something egregious in the sense of aberration? What follows are references to hermaphrodites, pseudo-hermaphrodites and 'outright chromosomal abnormalities'. Medical evidence is supplied 'to describe some of the *genetic errors* that may occur in human development.' (Emphasis added).

¹⁸ Medical science recognises 'true' and 'pseudo' hermaphrodites. True hermaphrodites possess both male and female sex tissue with both ova and spermatozoa able to be identified; while pseudo-hermaphrodites, although to varying degrees sexually ambiguous, are effectively male or female with either testes or ovaries able to be identified.

¹⁹ A diagnostic cover-all denoting clinical gonadal (ie sex gland) abnormality.

²⁰ *R v Cogley* [1989] VR 799; *R v Harris and McGuiness* (1988) 17 NSWLR 158 ('*Harris and McGuiness*'); *Re Secretary, Department of Social Security and HH* (1991) 23 ALD 58; *Re Secretary, Department of Social Security and SRA* (1992) 28 ALD 361; (1993) 43 FCR 299 ('*SRA*').

²¹ *M v M* [1991] NZFLR 337. In Finlay DP, above n 2, 41, Dr Finlay described the case in these terms: '*M v M* is perhaps the case most in point for our present purpose, coming not from a specialised jurisdiction such as the criminal law or social security law, but arising in the very same area of law as *Corbett v Corbett*.' Of course, since the publication of the DP, an even more significant New Zealand case has been decided (significant, that is, so far as the ability of post-operative transsexuals to marry is concerned): *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603. This case approved the judgment in *M v M*. The 'modern trilogy' says Dr Finlay — as far as Australasia is concerned — consists of *Harris and McGuiness*, *SRA* and *M v M* which (together) demonstrate 'how easy it is to push over a decision that ... has been shown to be no longer serviceable or appropriate in modern social conditions': Finlay DP, above n 2, 41. It is not difficult to detect a note of wish fulfilment here.

²² (1988) 17 NSWLR 158 (Street CJ and Mathews J).

felt able to recognise *pre-operative* transsexuals — a position which Dr Finlay clearly supports. Certainly, he is fulsome in his praise of the leading judgment in *SRA*²⁴ which I have previously criticised as flying in the face of 'expediency and justice combined'.²⁵ There are difficulties here and there is more than a little irony in an approach which, while purporting to unshackle the fetters of some stereotypical and outmoded judicial reasoning (as in *Corbett*), succumbs instead to the beguiling blandishments of a social paradigm which has, arguably, all but outlived its usefulness: namely, the binary constellations of gender and sexuality. Indeed, it is curious — considering how critical Dr Finlay is of 'doctrinal orthodoxy'²⁶ not to mention 'rigid and doctrinaire principle'²⁷ — that he is so readily able to endorse the 'bipolar model of human sexuality [*sic*]'²⁸ while simultaneously advocating legal recognition for those 'various intermediate "abnormalities" which diverge, in greater or lesser degree, from the norm.'²⁹ All this, at the same time as demanding that the law 'hold a mirror up to life' so that it may 'accommodate' — not 'assimilate' be it noted — 'all the varieties of human sexuality.'³⁰ There are assumptions here which need to be questioned and inconsistencies to which I shall return.

Undoubtedly, one of the most interesting parts of the Discussion Paper (particularly from a political perspective) concerns the attitude of the Commonwealth to mounting pressure for transsexual law reform. In this context, it is disappointing to note that written inquiries directed by Dr Finlay to the then Commonwealth Attorney-General³¹ appear to have been all but ignored, the more so because part of those inquiries raised the interesting question of whether the Commonwealth had given any consideration to employing the external affairs power to enact legislation — along the lines of the Human Rights (Sexual Conduct) Act 1994 (Cth) — giving effect to some of Australia's obligations under the provisions of the International Covenant on Civil and Political Rights.³²

²³ (1993) 43 FCR 299 (Black CJ, Lockhart and Heerey JJ).

²⁴ Speaking of Justice Lockhart's judgment, Dr Finlay, above n 2, 36, writes: 'His Honour's Conclusion [*sic*] represents, be it respectfully said, a masterly overview of the evolution of an aspect of the law that shows that the law is a living construct and capable of moving with the times, in accordance with the views and social attitudes of the society which it serves.'

²⁵ John Mountbatten, 'Transsexuals and Social Security Law: the Return of Gonad the Barbarian' (1994) 8 *Australian Journal of Family Law* 166, especially 176.

²⁶ Finlay DP, above n 2, iii.

²⁷ *Ibid.*

²⁸ *Ibid.* ii. Throughout the DP, the term 'sexuality' is employed where 'gender' may have been more appropriate — particularly given the sensitivity of so many transsexuals on this point.

²⁹ *Ibid.*

³⁰ *Ibid.* 23 (emphasis added). It is not clear whether Dr Finlay here means gender or sexuality or both.

³¹ Michael Lavarch.

³² International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 1976) ('ICCPR'). This strategy has been taken up by Senator Sid Spindler (Law and Justice spokesperson for the Australian Democrats) in drafting his Sexuality Discrimination Bill 1995 (Cth), which was presented to the Senate and read a first time on 29 November 1995. The purpose of the proposed legislation, in cl 3, is 'to eliminate, as far as

For more than a year now, it has been rumoured that several state governments have been considering legislative reform in this area,³³ that the federal Labor government was considering a reference to the Australian Law Reform Commission on the subject of legal recognition for hermaphrodites and transsexuals, and that these and related matters would soon be put on the agenda for discussion by the Standing Committee of Attorneys-General. Needless to say, there are few votes in transsexual law reform and it is not surprising that a certain inertia appears to have prevailed.

Part C sets out the options for reform. After declaring his bias in favour of reform, Dr Finlay says:

It is inconsistent with the philosophy underlying a modern state, based on the principle of participatory democracy, to include within it a group, however small, that is denied the opportunity of living their lives to the fullest potential. If the utilitarian principle of 'the greatest good for the greatest number' is part of our guiding philosophy, then this should allow for creating the conditions in which the individual can seek happiness and fulfilment, so long as it is not at the expense of others.³⁴

As a piece of liberal rhetoric such sentiments sound appealing — but how broadly are they cast? Which groups are to be privileged? The phrase used is 'a group, however small'. What about cross-dressers *simpliciter*?³⁵ What about sado-masochists? What about pre-operative gay or lesbian transsexuals?³⁶ Clearly (and in my view, sadly) certain definitional limitations are implied. 'Transsexual' here means *only* those who suffer from a known *medical condition* (gender dysphoria) and who are committed to rectifying their *problem* by resorting to irreversible reassignment surgery. 'Genetic errors' and hermaphro-

possible, discrimination against people on the basis of their sexuality or transgender identity': Commonwealth, *Hansard*, Senate, 29 November 1995, 4126.

³³ In October 1995, the NSW Attorney-General announced the Government's intention to introduce legislation amending the Anti-Discrimination Act 1977 (NSW) to protect transsexuals and transgenders. This followed an unsuccessful Private Member's Bill (Anti-Discrimination (Transgender) Amendment Bill 1994 (NSW)) which did not proceed beyond its second reading speech: New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1994, 5767. On 1 May 1996 the NSW Government introduced its Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996 (NSW). At the time of writing (10 May 1996), the Bill has received its Second Reading speech and debate has been adjourned. See New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 1996, 642. The main purpose of the Bill, apart from amending the Anti-Discrimination Act 1977 (NSW) to include discrimination on transgender grounds as a separate ground of discrimination, is to amend the Births, Deaths and Marriages Act 1995 (NSW) to provide for the legal recognition of post-operative transgender persons.

³⁴ Finlay DP, above n 2, 46.

³⁵ On the subject of cross-dressing see generally, Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (1992); Vern Bullough and Bonnie Bullough, *Cross Dressing, Sex and Gender* (1993); Adam Phillips, 'Cross-Dressing' in Adam Phillips, *On Flirtation* (1994) 122; Tony Ayres (ed), *String of Pearls: Stories About Cross-Dressing* (1996).

³⁶ The diversity of the wider transsexual community is generally misunderstood and rarely articulated. Meyer was one of the first clinicians to draw attention to the variety of applicants for sex reassignment. See Jon Meyer, 'Clinical Variants Among Applicants for Sex Reassignment' (1974) 3 *Archives of Sexual Behaviour* 527. On the subject of a feminist response to the idea of lesbian transsexuals see generally Jacquelyn Zita, 'Male Lesbians and the Postmodernist Body' (1992) 7 (4) *Hypatia* 106.

dites are similarly 'accommodated' on the 'understanding' that they are prepared to comply with the terms of the binary model. In other words, they must elect to be one thing or the other, particularly if they hope to contract a lawful marriage.³⁷ No one questions the genuine sympathy and obvious concern directed to alleviating *some* of the 'problems' of *some* of these people; but so expressed, it is easy to discern the rather arbitrary brand of justice which this sort of selective advocacy threatens. Dr Finlay writes:

To negate the chance of happiness to transsexuals [as defined above] by denying them the full recognition which they feel is their right, is to maintain a rigid and doctrinaire principle for its own sake. It seeks justification in that worst of all brakes upon progress: 'because it has always been thus'.³⁸

The unintended irony is all too obvious. Difference, or rather divergence, may be accommodated but only after it has been *rectified*, that is, brought back within the template of normalcy as currently defined.

Briefly, the Paper's preferred option (elevated by its author to the 'ideal solution')³⁹ is for the enactment of complementary legislation which would provide national recognition for *post-operative* transsexuals as well as for 'genetic errors' (*sic*) and 'sexual aberrations' (*sic*). Various models and their respective implications are considered. Should uniform legislation prove too difficult, consideration of referral of powers is recommended. If neither approach succeeds, individual states, it is suggested, might choose to follow the South Australian example and 'go it alone'.

There follows a consideration of the Commonwealth's legislative options with particular reference to the marriage power⁴⁰ and the foreign affairs power.⁴¹ So far as the marriage power is concerned, it has long been assumed that the common law definition of marriage⁴² might prove to be an impediment to legislative reform. The better opinion clearly is that the categories of marriage are not closed. After all, as Dr Finlay reminds us, Windeyer J once indicated that it is always open to Parliament (or indeed the courts) to extend the current definition of marriage and that the traditional Christian model is not legally immutable.⁴³ Whereas Dr Finlay recommends a Commonwealth Act dealing specifically with sexual reassignment and consequential amendment of the Marriage Act, others would prefer to see the traditional definition recast so as to be more inclusive of, and user friendly to, a decidedly postmodern, multicultural Australian society.⁴⁴

³⁷ See *In the Marriage of C and D* (1979) 35 FLR 340.

³⁸ Finlay DP, above n 2, 46.

³⁹ *Ibid.*

⁴⁰ Australian Constitution s 51 (xxi).

⁴¹ *Ibid* s 51 (xxix).

⁴² '[T]he voluntary union for life of one man and one woman, to the exclusion of all others': *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, 133. In this context, see Family Law Act 1975 (Cth) s 43 (a); Marriage Act 1961 (Cth) ss 46 (1), 69 (2).

⁴³ *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 577.

⁴⁴ I have argued elsewhere, in the context of a 'relationships' debate, that any attempt to protect marriage from the sullyng effects of 'other relationships' will breed a hierarchy of relationships

So far as the foreign affairs power is concerned, the case of *Toonen*⁴⁵ and the recent Human Rights (Sexual Conduct) Act 1994 (Cth) offer particularly useful models for legislative exploration in the context of transsexual law reform. There are various provisions of the ICCPR which are relevant here: the right to privacy;⁴⁶ the right to marry and found a family;⁴⁷ the right to be free from arbitrary discrimination *of any kind*;⁴⁸ and (strangely, this is not mentioned by Dr Finlay) the right to equality before the law.⁴⁹ The real point, as Dr Finlay himself suggests, is that the Commonwealth is not without a range of legislative options at its disposal. The question is whether it has sufficient will to act.

ALL DRESSED UP BUT NOWHERE TO GO

By way of conclusion, Dr Finlay says this:

Enough has been said in support of the basic proposition that it is time full legal and administrative recognition were given to post-operative transsexuals throughout Australia at every level of government. This is supported by considerations of equity, of human rights and of justice, humanity and compassion ... To do so would disadvantage nobody, provided that everything is kept above board and there is no deception, either deliberate or inadvertent.⁵⁰

This last sentence appears to betray something of an obsession with the potential for fraud; and strangely so, considering an earlier pronouncement (albeit arrived at after some difficulty) that there should be no requirement for the reassigned transsexual who proposes to marry to tell his or her spouse of the reassignment.⁵¹ This cautionary advice puts me in mind of recent cinematic portrayals of 'the fear of discovery'.⁵² What are such sensibilities founded upon? There seems to be a number of factors at work here. First, there is the all but unshakeable commitment to historical fact (we see this in the debate over what should be done about 'amending' birth certificates);⁵³ then, there is the fear (no doubt occasionally realised) that discovery of the 'truth' — particularly *in*

which will inevitably relegate those 'others' to an altogether inferior status. See John Mountbatten, 'Out of the Closet and into the Ghetto' (1994) 4 *Australasian Gay and Lesbian Law Journal* 85, 94. It is interesting to see that the issue of same-sex marriage was commented upon (albeit reluctantly and unsympathetically) by Paul Keating and John Howard in the run-up to the 1996 Federal election. Even the Sexuality Discrimination Bill 1995, above n 32, which seeks to protect same-sex couples (cl 107) avoids the word 'marriage'.

⁴⁵ United Nations Human Rights Commission, UN Doc CCPR/C/50/D/488/1992 (31 March 1993).

⁴⁶ ICCPR, above n 32, art 17.

⁴⁷ *Ibid* art 23.

⁴⁸ *Ibid* art 2 (1) (emphasis added).

⁴⁹ *Ibid* art 26. Arguably, the real potential of this article — so far as transsexuals are concerned — remains largely unexplored. Unfortunately, it also received scant attention at the hands of the Human Rights Committee in *Toonen*. However, see the separate opinion of HR Committee Member Bertil Wennergren on this point: above n 45.

⁵⁰ Finlay DP, n 2, 60.

⁵¹ *Ibid* 57-8.

⁵² See, eg, *The Crying Game* (1992) and *To Fong Woo, Thanks for Everything, with love, Julie Newmar* (1995) ('*To Fong Woo*').

⁵³ Finlay DP, above n 2, 54.

flagrante — is likely to result in mayhem; and then, there is the even greater fear that it may not!

This Discussion Paper commends itself in a number of ways but the philosophical conception of its 'target group' (viz: *bona fide* transsexuals as oppressed minority) is, with respect, not one of them. Moreover, its cultural foundations (the binary model of gender and sexuality) have long been the subject of critical attention by commentators and need to be addressed.

OTHER WAYS FORWARD

A better approach has been adopted in a recent Discussion Paper prepared by the Commonwealth Human Rights and Equal Opportunity Commission concerning legislative options available for the protection of transsexuals from discrimination.⁵⁴ The stated aims of this Paper are:

- to assess the potential of existing legislative mechanisms to provide an avenue of redress for transsexual/transgender persons who are discriminated against;
- to explore the potential for federal anti-discrimination legislation for transsexual/transgender persons;
- to explore the potential for enactment of federal legislation to acknowledge the preferred gender identity and/or reassigned sex of transgender/transsexual persons; and
- to consider the potential for legislation for the protection of the right to privacy for transgender/transsexual persons.⁵⁵

The more expansive terminology (transsexual/transgender) is significant and is indicative of the different positions adopted by various groups within the transsexual community⁵⁶ as well as the author's concern to accommodate the legitimate interests of as many stake holders as possible. This is no easy task. In this area, definitional difficulties abound.⁵⁷

⁵⁴ Cara Seymour (Policy/Research Officer, Sex Discrimination Unit, HREOC), *Transgenders and Discrimination: Options for Legislative Protection — A Discussion Paper* (1996) ('HREOC DP'). Two drafts of this paper were circulated for comment in 1995. The first draft (released in June) was given a limited circulation and targeted the various lobby groups. The second draft (released in November) was more widely circulated. The final version was officially released by Sue Walpole, Sex Discrimination Commissioner, in February 1996.

⁵⁵ *Ibid* 1.

⁵⁶ This subject was recently addressed in the NSW Parliament during the course of the Second Reading speech concerning the introduction of the Transgender (Anti-Discrimination and Other Acts Amendment) Bill (NSW) (above n 33, 643) where the Minister said this:

The term 'transsexuality' is the term most commonly used by the general community ... [but] has attracted criticism, especially from the transgender community, for being too narrow in scope. There is concern that the term 'transsexual' is inevitably linked with 'sex-change' surgery, with the implication that the proposed discrimination amendments would only apply to post-operative transsexuals. As estimates indicate that only about 20 per cent of persons who have assumed a different gender have undergone surgical intervention, there is an argument for employing more broadly based terminology.

⁵⁷ I maintain the term 'transsexual' throughout this paper mainly because of its widespread usage,

Some groups favour a strict medical interpretation of transsexuality (viz: as the symptom complex of the condition gender dysphoria).⁵⁸ As I have already indicated, this interpretation tends to suggest that transsexuals suffer from a 'disability' and need protection against discrimination, for example, by amending the terms of the Disability Discrimination Act 1992 (Cth) to include transsexuality as a protected disability. When such groups speak about 'gender identification', they are speaking of those transsexuals who are not only living permanently as members of their sex of choice, but who have adopted the physical characteristics of that sex by means of gender reassignment surgery. In other words, the same group Dr Finlay is anxious to protect.

Other groups are suspicious of what they regard as an overly simplistic process of clinical categorisation⁵⁹ and argue instead for a more inclusive terminology directed to enhancing the lives of 'all those persons whose current **social** gender status is at variance with the sex originally assigned without marginalising anyone on the basis of their biological status.'⁶⁰ Such groups generally prefer the term 'transgender' to describe those who have crossed or intend to cross over *permanently* into the gender opposite to their gender of birth.

This terminology has the advantage of including pre-operative transsexuals but remains problematic in other respects. Why the requirement of permanency? Can't a man/woman be allowed to change his/her mind? Why the implicit emphasis on psychological (as opposed to biological) determinism? The Transgenderist Support Association of Australia (Qld) has declared that '[t]ransgenderism is not a lifestyle of choice'.⁶¹ Why not? Is there a fear here that without subscribing to an element of psychic compulsion the transgenderist will not be taken seriously? Not surprisingly perhaps, what is clear, even here, is the seemingly ineradicable need to conform to the socially hallowed binary model. In other words, all of us (transgenderists included) must be — or at least be seen to be — one thing or the other: male or female. Even hermaphrodites will be required to make a choice.⁶² In the realm of gender, pangenderists, it seems, are at least as threatening as bisexuals are in the realm of sexuality,⁶³ further evidence of the socio-cultural construction of gender and sexuality and just how entrenched some of these notions are.

although it will be clear from my argument that I support the broadest possible interpretation of that term. The appeal of the word 'transgender' is, of course, that it focuses on the issue of gender. Sex (in the sense of sexuality) is often discounted by transsexuals as an almost irrelevant consideration. But need it be? Is this response personal or political or both? Clearly, what we are dealing with here is a very broad spectrum of cross-over behaviour which particular groups legitimate in different ways.

⁵⁸ The Gender Council of Western Australia is generally associated with this view.

⁵⁹ The Sydney based Transgender Liberation Council holds this view — a view supported by the *Report* of the National Transgender HIV/AIDS Needs Assessment Project. See Recommendation A.3 which suggests that legislative protection of gender identity be independent of medical criteria.

⁶⁰ HREOC DP, above n 54, 6.

⁶¹ *Ibid* 5.

⁶² See, eg, Finlay DP, above n 2, 60.

⁶³ See, eg, Myke Dobber, 'SexCrime' (1995) 20 (6) *Alternative Law Journal* 285.

While it is conceded 'that legislation which embraced transgenders who had not undergone any formal diagnosis or treatment would [be likely to] generate a [certain] amount of official and public concern',⁶⁴ it is suggested that these concerns — originating, as they often do, in suspicion or prejudice — may easily be overstated or arrived at without any reasonable foundation in fact. Assuming this to be so, the familiar question arises as to whether the law should follow or help shape public opinion. This question is rhetorical to the extent that we live in a society which is no longer *as* sympathetic to the notions of moral outrage so eloquently and so dangerously espoused by Lord Devlin⁶⁵ at a time when the now familiar discourse on human rights was still embryonic. Times change.⁶⁶ While it is increasingly fashionable to point to the resurgence of the political right and to extol the incremental nature of law reform at the same time as advocating a certain degree of pragmatism and the need to develop a consensus at least sufficient to garner political support,⁶⁷ change can surely be initiated without pandering to the unreasonable scruples of those 'timorous souls' who — as Dr Finlay rightly (but ironically) suggests — are essentially afraid to act.⁶⁸ And, of course, it is not only the timorous souls who need convincing.

⁶⁴ HREOC DP, above n 54, 18.

⁶⁵ See the celebrated Hart/Devlin debates — the opening shot of which was fired on 18 March 1959 when Sir Patrick Devlin (as he then was) delivered his famous Maccabean Lecture in Jurisprudence: *The Enforcement of Morals* (1965).

⁶⁶ *Plus ça change, plus c'est la même chose*. In this context, one thinks of the moral panic induced by recurrent media 'beat-ups', scapegoating the popular (*sic*) demon of the moment: yesterday, the 'putrid Paxtons'; today, the predatory paedophile. Certainly such attitudes, where they persist, are open to exploitation but not, I would suggest, on the scale or to the extent which we have seen in the past. Better education, greater social awareness and a currently dynamic popular culture regularly expose many (perhaps most) of us, more often, to some of the kaleidoscopic complexities of postmodern experience, thereby helping reduce our fear of 'the other' and encouraging us to be more tolerant and, consequently, more suspicious of the motivations of those who would instinctively round up the usual (and, more particularly, the unusual) suspects: the new scapegoat; the latest stereotype.

⁶⁷ The difficulty with this thesis is that it offers little protection against occasional outbursts of 'majoritarian madness' — especially at a time when we see a general disdain for law 'making' on the part of the judiciary (the recent Mason High Court being a welcome exception to this rule) and the usual disinclination of parliaments to run the risk of electoral backlash by taking up what they perceive to be minority causes. Of course, there are some conspicuous exceptions, such as the Sex Reassignment Act 1988 (SA), but these remain exceptions for obvious reasons. There is no scope here to tackle the large issue of active judicial law making. See generally Peter Irons, 'Making Law: The Case For Judicial Activism' (1989) 24 *Valparaiso University Law Review* 35. Suffice it to say, those much vaunted safeguards of individual liberty, a deliberate judicial sense of self-effacement and an unswerving devotion to serving the letter of the law, do not always work in the interests of justice. Although something of a generalisation, it is also fair to say that most judges speak in and for their culture, whereas most creative artists would feel something like an obligation to speak against it. This is indicative, perhaps, of the judicial inclination to confirm and order, as opposed to the artistic predisposition to critique and disrupt: one of the reasons why Plato elevated Law above Art (or Poetry) and the interests of the state above those of the individual.

⁶⁸ See, eg, Finlay DP, above n 2, ii.

TOWARDS A RHETORIC OF 'REAL' CONCERN

In the leading judgment in *Harris and McGuiness*,⁶⁹ in response to the proposition that the law should recognise *pre-operative* transsexuals, Justice Jane Mathews said:

I could not subscribe to this approach ... It would create enormous difficulties of proof, and would be vulnerable to abuse by people who were not *true* transsexuals at all. To this extent it could lead to a trivialisation of the difficulties *genuinely* faced by people with gender identification disharmony.⁷⁰

The implication here, if I understand her Honour correctly, is that there are *real* transsexuals who suffer, and consequently have a reasonable call on our sympathy and understanding. That is, they deserve to be recognised for what they say they are *because* they have crossed the Rubicon⁷¹ (the river of reassignment); as opposed to the rest, whose behaviour must somehow be fraudulent or whose commitment to their chosen gender identity fails to pass the taxing threshold of social and judicial forbearance. Again, the lack of permanency; again, the failure to take the irrevocable step. This brake on the creative imagination is curious in the context of a judgment which in other respects is so encouraging.⁷²

A similar conclusion was reached by Justice John Lockhart in *SRA*,⁷³ in spite of his Honour's evident sympathy⁷⁴ for the respondent in that case. It is easy to understand but impossible to commend this approach ('so far but no further'), particularly when one considers the degree of personal distress occasioned by it.⁷⁵ Of course, in different ways, we are all prisoners of the ideological gulag, all of us being the historical product of a life-time of experiences and attitudes shaped to a considerable extent by those around us. How many of us, for exam-

⁶⁹ (1988) 17 NSWLR 158.

⁷⁰ *Ibid* 193 (emphasis added).

⁷¹ But read: 'returned to the fold' by joining *us* on the *opposite* shore.

⁷² One other curious aspect of the judgment which I cannot pursue here is Mathews J's almost peremptory dismissal of the concept of a third sex as a kind of cultural impossibility — *pace* Aristophanes, who explains in Plato's *Symposium* how the sexes were originally three in number: men, women and a combination of both. The social possibilities of a third sex are explored by Marjorie Garber in *Vested Interests*, above n 35, 9-13.

⁷³ (1993) 43 FCR 299.

⁷⁴ The question of *sympathy* is an interesting one and has been the subject of increasing attention in the academy in recent years. Many scholars have spoken of the dangers of law's self-regard, but 'under the influence' of feminist epistemology, some have gone further to argue that we should cast aside (or at least relegate) the old seductive influences of reason and the received wisdom of immanent/eminent legal standards (the legal norm) in favour of a more sympathetic engagement with the lived experience of the litigant. This approach may seem quaint (to say the least) and clearly is not without its own particular dangers but it should not be dismissed as irrelevant to the business of law. Indeed, as West has pointed out, the doctrine of unconscionability is, in effect, founded upon such a paradigm, which probably explains some of the lingering controversy. See Robin West, 'Disciplines, Subjectivity and Law' in Austin Sarat and Thomas R Kearns (eds), *The Fate of Law* (1991) 119. For commentary on the latter, see Andrew Goldsmith, "'Positively Postmodern Stanley" and Other Law Stories' (1993) 56 *Modern Law Review* 248. This is a 'lesson' which is preached in different ways from the literary pulpit. See, eg, the tensions exemplified between the rule of law and the denial of justice in Shakespeare's *Measure for Measure*.

⁷⁵ See David Leser, 'I am Woman', *Sydney Morning Herald Good Weekend* (Sydney), 21 October 1995, 31. ('The extraordinary saga of the Federal Government's Determination to Make a Man out of Susan— Whatever it Cost the Taxpayer'.)

ple, know a transsexual — never mind an hermaphrodite? Of course, this is not to say that empathic responses and creative law making are impossible for those who have lived, as it were, outside the ghetto. It is not impossible, merely difficult, and Justice Deirdre O'Connor has already demonstrated that it can be done.⁷⁶ However it is worth recalling that even the Administrative Appeals Tribunal implicitly accepted the binary gender model and was generally concerned to defer to the usual medical indicia which included 'reports from relevant psychiatrists involved in the management of [SRA's] case.'⁷⁷

Of course, SRA was considered to be such a 'difficult' case because it concerned a pre-operative transsexual, which is why the terminology employed in the recent HREOC Discussion Paper is of such interest. HREOC rejects 'transsexual' as narrowly defined in favour of 'transgender', broadly defined as:

all persons whose biological birth sex is at variance with their preferred gender identity; and

- who adopt or seek to adopt the social, behavioural, psychological and/or physiological characteristics of that preferred gender identity; and
- who live or seek to live in conformity with that preferred gender identity.⁷⁸

For HREOC, transgender persons include those who are, or who identify themselves as being, transsexual, pre-operative gender dysphoric, non-operative gender dysphoric or reassigned persons. While this kind of definitional debate (which aims to be inclusive but which is potentially so divisive) appears to be central to the creation and maintenance of identity, it need not be. Other, essentially postmodern, possibilities exist.

THREE COUNTER NARRATIVES

*1 The Roberta Perkins Story*⁷⁹

How do transsexuals manage to convince others that they are 'the genuine article'? How do they convince a sometimes suspicious medical profession that their gender dysphoria is 'real'? As part of the process of substantiation, almost all transsexuals are required to submit to various forms of psychiatric and psychological assessment. In the context of the 'long game' which many transsexuals are forced to play with their psychiatrists in order to obtain medical

⁷⁶ See generally SRA (1992) 28 ALD 361.

⁷⁷ *Ibid* 367.

⁷⁸ HREOC DP, above n 54, 59. There are some interesting differences between this definition and that proposed in the 1995 Draft Discussion Papers which I will not elaborate on here, except to say that I prefer the earlier models particularly because of their explicit rejection of 'medical intervention' as *the* determining factor. The earlier models were also very nearly identical to the definition set out in Senator Spindler's Sexuality Discrimination Bill 1995 (Cth), above n 32; and Clover Moore's Anti-Discrimination (Transgender) Amendment Bill 1994 (NSW), above n 33; and similar to those set out in the NSW Government's Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996 (NSW), above n 33.

⁷⁹ 'Portrait of a Transsexual' in Gael Knepper, *Sex in Australia* (1984) 64.

approval for sex reassignment surgery, Roberta Perkins tells the story of a pre-operative male-to-female transsexual friend who took up knitting to bolster her case. Each time she went to see her psychiatrist she took her knitting with her. Although she never knitted at any other time in her life, she always knitted in the doctor's waiting room. Real women knit! Her gender identity was therefore unassailable.⁸⁰ (Needless to say, the gender identity of men who knit is often considered questionable.)

2 *The James Baldwin Story*

As a young boy, Baldwin frequently went to the movies. It was a cheap escape from the boredom and misery of life in the ghetto. For a long time his passion was American westerns. To a young boy looking for escape, there was little complexity in the simple morality tales flashing across the silver screen at that time.⁸¹ And yet, during the course of one such film, just as the cavalry swept 'gloriously and inevitably' over the horizon and came charging down the hill to teach those Indians (read 'others'/'savages') the lesson of their lives, Baldwin — who along with the rest of the audience had been cheering the bluecoats on — realised for the first time (suddenly and painfully) that he too was an Indian. He was black; he was gay; he was an Indian.⁸²

3 *The Henry Finlay Story*

I recently asked Henry Finlay what relevance, if any, he thought either gender or sex (in the sense of sexuality) had for law in the closing years of the millennium. He appeared bemused. Doesn't it all come down, I suggested, to a deep seated reluctance to re-think the received order of things;⁸³ that, and an irrational

⁸⁰ Sandy Stone (no relation to Barry Humphries) makes the point that for many years the standard text on transsexualism was Harry Benjamin, *The Transsexual Phenomenon* (1966). In the days when general literature on the subject of transsexualism was difficult to come by, this book was passed from hand to hand around the transsexual community, providing transsexuals with the perfect opportunity for bringing their 'condition' into perfect alignment with received medical theory. See Sandy Stone, 'The Empire Strikes Back: A Posttranssexual Manifesto' in Julia Epstein and Kristina Straub (eds), *Body Guards: the Cultural Politics of Gender Ambiguity* (1991) 280. Billings and Urban, above n 14, 274 have — rather unfortunately — referred to this process as a 'con' which they attempt to expose at one point by reporting the warning given by one physician to his colleagues at the Fifth International Gender Dysphoria Symposium (1977) to be on the look out for 'a male-to-female post-operative transsexual posing as the mother of young, male candidates [for sex reassignment surgery] in order to corroborate their early socialisation accounts of ambivalent gender cues and over-mothering'. I say 'unfortunate' because the idea of 'deception' has very little meaning when the search for 'truth' is exposed as illusory. We all study our parts — in the metaphysical sense. It is merely that some 'performances' are more 'convincing' than others. In any event (as I hope to demonstrate), what might be described as 'textbook transsexuals' are not necessarily or entirely the product of their own imaginations. The process of socialisation (particularly patient socialisation) plays a key role — as Billings and Urban's research demonstrates.

⁸¹ While it is still relatively easy to point to conventional celluloid heroes/heroines, by and large the emotional range of the modern cinema (and its audience) has never been greater. This both reflects and reinforces the cultural complexity of the time.

⁸² Story told by Baldwin in a filmed retrospective on his life and work: *The Price of the Ticket* (1990).

⁸³ Sheriff Dullard (*sic*) puts this nicely in *To Wong Foo*, above n 52, when he refers to 'boys in dresses wanting to change the way things have always been.'

fear of what change might mean in relation to public toilets. Public toilets, after all, must be among the most primitive sites of our earliest declarations of gender identity. Ah yes, Henry assured me, public toilets are very much an issue.⁸⁴ But then he embarked on something of a counter-cultural discourse of his own.

It seems that at a conference in Germany some years ago, Henry, who speaks fluent German, asked for directions to the toilet. He found his way there but just as he was about to go in, a woman (he assumed she was a woman) came out. Thinking he had arrived at the wrong door, he apologised. Where did he come from, asked the woman. Toilets in Germany, she told him, had been 'desegregated' for some time! It's an amusing story but, gender politics aside, it also reminds us that not so long ago public facilities were legally segregated (on the basis of race) and not in South Africa alone. Is 'segregation' based on *gender identity* really so different?

What do these stories tell us? In a sense, that there are always 'different' stories to be told. That in itself is a cautionary tale and is reminiscent of Michael Dobber's observation that 'oppositional discourses are themselves replete with systems for domaining discourse and silencing voices. Who is a Real Other, who can tell the Real counterstories, is a serious theoretical [and practical] problem.'⁸⁵

An otherwise perceptive colleague of mine recently saw a documentary about French transsexuals and commented that he found them personally rather pathetic: trying to live out a kind of impossible dream by pretending (even to themselves) to be what they can never *really* become. I suppose this kind of observation could be levelled at many of us in different ways. The following day, I happened to be proof-reading an article written by this friend and in it I came across this quotation from Marcus Clarke: 'The wife is what her husband makes her, and his rude animalism had made her the nervous invalid that she was.'⁸⁶ Why did it not occur to my colleague that *all* people under power are traditionally rendered pathetic? Why are we less sympathetic to this particular marginalised group? Why is sex/gender difference more problematic than say race, colour or belief? And, of course, it is even more complicated than this. Woman, as oppressed gender, is one thing. Male-to-female transsexuals (read: not *real* women) are quite 'another'. And what of female-to-male transsexuals? So, is it because we are not sufficiently familiar with the transsexual 'predicament' to be able to empathise or is there something just too threatening about sex/gender transgression generally? Or is it something else entirely? Perhaps it is that we reserve our most trenchant criticism for those who are bold enough to reject those conventions which we were either too timorous to question or too inured even to notice.

⁸⁴ The French semiotician Jacques Lacan has written on the symbolic import of the laws of 'urinary segregation': Jacques Lacan, 'The Agency of the Letter in the Unconscious or Reason Since Freud' in *Ecrits: A Selection* (1977) 146, 151.

⁸⁵ Michael Dobber, 'Hegemon: Tracing Power through Bodies of Law' (1995) 2 *Law/Text/Culture* 61, 65.

⁸⁶ Marcus Clarke, *For the Term of His Natural Life* (1885) 402.

SLAPPING THE HAND OF GOD

In the play (and subsequent film) *Six Degrees of Separation*,⁸⁷ the anti-hero Paul (poor, black and gay) teaches an art dealer Ouisa (rich, white and straight) that the only thing that separates them — physically as well as metaphysically — is a failure of the imagination. In order to see this connection, Ouisa — and through her the audience — must learn to shatter a few of the shibboleths of conventional wisdom: must learn, in the language of the play, to ‘slap the hand of God’. It is a gentle reminder that all of us need from time to time to question the easy attitudes and conventional wisdom which cosset our own lives. Unlike her husband and, one suspects, many or most of the ‘audience’,⁸⁸ Ouisa learns this lesson but at considerable personal cost.

One of the more significant metaphors of the play concerns a painting by the Russian artist Wassily Kandinsky. This Kandinsky is a double: that is to say, it is painted on both sides. On one side: order, pattern, structure; on the other: it is random, fluid, chaotic. Order and Chaos. The play opens and closes as the painting revolves and in between, the playwright invites us to rekindle our *imagination* as the means by which we are best able to negotiate the limits of both order and chaos. Consider the transsexual as metaphor, as culturally disruptive agent. What socio-cultural ‘truths’ might this strategy expose? It is not my purpose here to suggest convenient answers but rather to raise or tease out some engagingly perplexing questions; questions which may help point the way to new or different or just more complex understandings: what postmodernism — at its best — is all about.

Whoever it was who said that Helen Demidenko is a metaphor which Helen Darville⁸⁹ has yet to discover, understands something both of the possibilities and the pitfalls associated with the traditional purpose of ‘the mask’. Demidenko as metaphor, as role, as mask, has this potential: it offers us a range of imaginative possibilities capable of revealing certain truths about ourselves and others; truths about human behaviour generally and about individual behaviour in particular.⁹⁰ On the other hand, belief by Darville in Demidenko as ‘truth’ (rather than ‘possibility’) raises all sorts of problems. Dobber writes:

Truth is setting in the West. The laws of God, of Science, of Reason, of Nature, are being usurped. In the language of Lyotard, critic of the post-modern, depth is being exchanged for surface. Our epistemological universe is less and less one of length, width and depth, and increasingly one of planes ... Now, we think through perspectives, our visions are situated on an epistemic and a political landscape, each of our utterances per force reflect [*sic*] the particular

⁸⁷ John Guare’s play won the 1990 New York Drama Critics’ Circle Award for best play. The film of the same name (directed by Fred Schepisi) was released in Australia in 1995.

⁸⁸ I certainly know many people who are completely unable to sympathise with Paul.

⁸⁹ Perhaps it would be going too far to claim that Helen Demidenko is currently regarded as Australia’s most famous ‘female’ impersonator: see above n 1. Nevertheless, the idea of personality as — recognised — mixed metaphor (Darville/Demidenko) speaks volumes for cultural possibilities generally.

⁹⁰ ‘For the New Critics’, writes Camille Paglia, ‘a writer never speaks for himself but only through an assumed persona, a mask.’ See generally Camille Paglia, ‘Sexual Personae: the Cancelled Preface’ in Camille Paglia, *Sex, Art and American Culture: Essays* (1992) 103.

gradient of our selves' particular grassy knolls. ... [F]arewell the unitary conception of the self ... we become fundamentally divided. ... Multiple 'I's continually arise and fade ... where is gender, sexual orientation, desire, in such a world?'⁹¹

ASKING THE BIG QUESTIONS

Where indeed? These are the big questions and, leaving aside the insider language of theoretical discourse, they are nowhere raised (much less tackled) in Dr Finlay's Paper.⁹² Why? Is it because law in action (rather than theory) is inherently so conservative and therefore indifferent to those 'radical' ideas currently circulating in the broader intellectual market place? Is it that the same 'white male voices' continue to speak for the oppressed?⁹³ Is it that pragmatic law reformers understand the political requirement to hasten slowly? Or is it that identity politics are yet to be taken seriously⁹⁴ by the legal academy?

The concept of the determinate identity (legal and otherwise) is under threat. We live in a culture dedicated to the generation of new and mutable identities; of multiple identities; of the eternally transgressive identity; each of which, law must somehow manage to accommodate, as opposed to control. Perhaps it is time to call off the search for the *true* transsexual⁹⁵ and expose it for what, in some ways, it has always been: a latter day attempt to reclaim the lost certainties of an ever more quickly receding past. It is interesting to consider that Jan Morris now believes that 'the transsexual era' may soon be over, in so far as a less repressive culture may make surgical solutions unnecessary.⁹⁶ Responses to that analysis will be conditioned by our notion of what constitutes the transsexual. Morris is, of course, reflecting upon the paradigm case as it was lived and recorded by her in the early 1970s.

To date, law's intellectual response to the phenomenon of transsexualism has been largely disappointing and lacking in any sustained critique of the medical model of containment.⁹⁷ Dobber is surely right to be critical of the dominant legal discourse on transsexualism, embracing as it does — without any apparent reserve — the medical construction of 'gender disorder'. Some of his sharpest

⁹¹ Dobber, 'Hegemon', above n 85, 66.

⁹² This is curious, considering the fact that Michael Dobber teaches in the same Law School as Henry Finlay.

⁹³ We might even ask, as Dobber does: *which* oppressed? Who speaks, and on whose behalf, are important questions and suggest that this debate has an important political dimension to it. Law has often been described as 'politics by other means'. See, eg, David Kairys, 'Legal Reasoning' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (1982). On the other hand, as Michael Oakeshott has argued, the limitation of view so characteristically associated with political activity brings problems of its own. See 'The Claims of Politics' in Timothy Fuller (ed), *Michael Oakeshott: Religion, Politics and the Moral Life* (1993) 93.

⁹⁴ By which I mean: presented in *all* their complexity. Neat solutions are always appealing but not at the cost of asking difficult questions or silencing other oppressed voices.

⁹⁵ See Billings and Urban, above n 14, 266.

⁹⁶ See 'Epilogue' to Jan Morris, *Conundrum* (1986) 159.

⁹⁷ For an interesting critique of this model, see Hausman, above n 14.

criticism is directed at Finlay and Walters' classic monograph *Sex Change*⁹⁸ whose 'ideology' is characterised as 'care of the sick'.⁹⁹ Dobber argues:

The structure of that text betrays its politics: that the first half is written by a medical doctor¹⁰⁰ (the expert opinion, providing the 'facts' of the case) and the second by a legal academic¹⁰¹ (the 'law'), symbolises as it reenacts the hegemony of these twin master discourses. The cover blurb of *Sex Change* chirps merrily:

There are people with a deep conviction that they were born into the wrong sex. In the past, they suffered considerable anguish and distress. Today a person can be given the appearance and most of the functions of a member of the opposite sex.¹⁰²

Dobber draws our attention here to the familiar 'representation of modern science as salvation' and the 'patently ludicrous suggestion' of the true believers 'that until this point in human history ... [those who challenged gender convention] were doomed to lead tragic, dissolute, unfulfilled lives.' He rejects the label 'deviant' and is entirely suspicious of attempts to 'sympathise' with the 'condition' of the 'misunderstood'.¹⁰³ Dobber writes:

The second section of *Sex Change* is no less clear. 'The causes and symptoms of transsexuality are now much better understood.' A moot point. Finlay continues: 'In the more tolerant Western societies of today cases of transsexuality are allowed to come into the open.' Again, a moot point. *Sex Change* is clearly situated within the modernist metanarrative of grand scientific progress. It belies the reality that many societies may be seen to have encompassed *crossing*

⁹⁸ Above n 3. The most recent Australian monograph in this area is Frank William Lewins' *Transsexualism in Society: A Sociology of Male-to-Female Transsexuals* (1995). What makes this work so interesting and unusual is that it is based on the 'testimony' of transsexuals themselves and it explores the idea that gender identity is primarily a cultural construct rather than biologically determined. However, while Lewins clearly rejects the simple brutality of the medical model, there is a tendency (in his search for the *cause* of this 'phase') to let 'condition' and perhaps even 'illness' in by the back door. Undoubtedly, the spur to Lewins' work was principally his own daughter's experience of gender transformation. Of course, insider experiences have their advantages but they have their drawbacks as well and subjective experience should always be tempered with the consideration that fish are often the last to discover water.

⁹⁹ Dobber, 'Hegemon', above n 85, 79 (emphasis added). While it is true that in recent years there has been something of an ideological retreat from the overt conception of gender dysphoria as 'disease', it is clear, as Michael Taussig has argued, that many conceptions of 'illness' emanate from some subterranean moral concern: Michael Taussig, 'Reification and the Consciousness of the Patient' (1980) 14B *Social Science and Medicine* 3.

¹⁰⁰ Professor William Walters, now Professor of Reproductive Medicine, Newcastle University, New South Wales. The Finlay DP quotes from recent correspondence with Professor Walters on the subject of gender dysphoria. In this correspondence, Professor Walters rejects the suggestion that mental disorder or obsessional or delusional states of mind are necessarily associated with the condition of gender dysphoria although he does speak with approval about the *treatment* of transsexuals and their *integration* into society: Finlay DP, above n 2, 3 (emphasis added).

¹⁰¹ Dr Henry Finlay.

¹⁰² Dobber, 'Hegemon', above n 85, 79.

¹⁰³ *Ibid.* If we lay aside the lens of Western cultural imperialism for a moment, we see that many societies have adopted a very different approach to the cultural expression of gender 'dissonance' and/or sexual 'transgression'. See, eg, the Native American *Berdaches*; the Burmese *Acault*; the Samoan *Fa'afine*; and the *Wodaabe* of the Niger.

phenomena better (perhaps even more 'humanely') than our own, their ignorance of science and of the liberal virtue of tolerance notwithstanding.¹⁰⁴

THE RAPTURE OF RUPTURE

In something of a *tour de force*, Dobber goes on to lift the 'radical' veil from the faces of these ostensibly 'liberal' and 'humane' legal commentators whose work, in his view, amounts to an 'essentially direct translation and redeployment within the legal discursive space of scientific constructions of gender and identity.'¹⁰⁵

There is much in Dobber's analysis which recommends itself: the 'silencing function' of the 'master [pun intended] discourse'; the 'problematizing' of all forms of 'crossing' as sites of 'rupture' (as opposed to rapture); the social, political and perhaps even psychic need 'to stave off boundary collapse', to resist gender and sexual 'bracket creep' or 'category quake';¹⁰⁶ the rendering and ultimately the erasure¹⁰⁷ of the transgressive voice as a kind of 'madness discourse'¹⁰⁸ with the 'final solution' being the 'depoliticisation of resistance' under the guiding hand of the 'helping' professions. All, suggests Dobber, 'to produce the docile body appropriate to the exigencies of the age.'¹⁰⁹ Some of this is occasionally hedged about — but never overwhelmed¹¹⁰ — by allusions to patriarchal oppression, power politics and conspiracy theory: a postmodernist rounding up of the usual suspects. I invite 'sympathetic' readers to pause here and consider the dangers prospectively ushered in by some new master/miss/ms (the meta the better) narrative.

Nevertheless, most of what Dobber says in 'Hegemon' makes this point. It is an argument in favour of 'polyvocality';¹¹¹ an argument against the privileging of any particular voice. It rejects, almost as simple-minded, concepts of the 'natural' and notions of the 'Edenic'. These are difficult pills to swallow. Life is often characterised as the pursuit of the perfect praxis, constituted in anatomical terms by the body beautiful. But here is the body baleful, a hideous trick of nature/nurture, a cruel crack in the ideological/psychic superstructure. Unfortunately, there is little comfort in cracks, in fissures, in the shattered mirror of human imperfection. Or is there? A better understanding of human complexity and a greater commitment to the plurality (indeed the ambiguity) of lived

¹⁰⁴ Dobber, 'Hegemon', above n 85, 79-80 (emphasis added).

¹⁰⁵ *Ibid* 80.

¹⁰⁶ Marjorie Garber's term is 'category crisis', above n 35, 17.

¹⁰⁷ Stone has spoken of transsexuals being 'clinically erased by diagnostic criteria': above n 80, 294.

¹⁰⁸ À la Michel Foucault, *Histoire de la Folie* (1961) translated as *Madness and Civilization* (1971).

¹⁰⁹ Dobber, 'Hegemon', above n 85, 87.

¹¹⁰ Noteworthy, in this context, is Dobber's assertion that 'Contra *Empire* (an allusion to Janice Raymond's classic text: *The Transsexual Empire*) a (transgender) feminist is not a logical impossibility': *ibid* 85.

¹¹¹ Again, a term earlier employed by Stone who questions 'the old morality tale of the *truth* of gender' (emphasis added) in light of the '[e]mergent polyvocalities of lived experience': above n 80, 293.

experience is surely something.¹¹² And indeed, Dobber sees some hope in a *temporary privileging* of the marginalised voice as a point of theorisation not in spite of but rather because of its 'flawed' constitution. And, if I understand him correctly, he suggests that there is considerable value for all of us to acknowledge (the cross-dresser not least) that our 'seams' (our 'seems'?) are showing. This is precisely what I mean when I speak of the transsexual as metaphor; as counter-hegemonic discourse; as disruptive element; as threat — all but forcing us to reconsider our own positions and challenging us to take up new ones. And if this is good for us, why not for transsexuals themselves?

'PASSING' AND FAILING

As Sandy Stone has pointed out, real (*sic*) transsexuals are programmed to self destruct. Their lives reflect and reinforce the great binary divide. They live to die, to 'pass' from 'mistake' through 'correction' into 'truth'. In asking for our 'help' they confirm the unspeakable injustice of their 'predicament'. Theirs is a 'narrative of redemption'.¹¹³ It's a familiar story. It should be. We wrote it. No wonder we so often find the 'performance' moving. This is not in any way to deny the transsexual experience but merely to invite reflection upon it — particularly by transsexuals themselves. There is nothing so very startling about this. Postmodernism — like Feminism(s) before it — has taught us to question those old morality tales which so effectively police the body as well as the mind; to consider instead new valencies, other possibilities. This will take time. One theory about the current popularity of costume dramas¹¹⁴ is that they depict an ordered, even hierarchical, world where people understood their place and, for the most part, behaved accordingly. This is understandable, even appealing, in a society such as ours undergoing extraordinary change.¹¹⁵ However, like it or not, this trend is likely to prove something of a rear guard action. The most cursory examination of the new Pulp Diction reveals some interesting clues about the shape of things to come. For example:

Visionary designer Calvin Klein has a new obsession. He has plunged to the depths of the generation X psyche and emerged with CK One, a *genderless fragrance for the fluid Nineties*.¹¹⁶

¹¹² Ibid 295.

¹¹³ Sandy Stone, above n 80, 288.

¹¹⁴ See, eg, the current cinematic spate of Austentatious historical romance. Taking refuge in Austen, say, is something of a reaction (I do not go so far as to say an over-reaction) to the recent successes (excesses?) of Quentin Tarantino — the darling of the postmodern cinema but the *bête noir* of post-Port Arthur consciousness.

The subject of clothes or 'costumes' is an interesting one. To a considerable extent — even today — clothes maketh the man (and woman). Life can be thought of as something of a costume drama and in this sense we are all 'doing drag' — all of the time. The semiotics of clothing is a large subject on which the poets (Shakespeare among them) have often spoken. W H Auden in 'Law Like Love', says that 'Law is the clothes men wear/Anytime, anywhere': W H Auden, *Collected Shorter Poems 1927-1957* (1966) 154.

¹¹⁵ Particularly in relation to sex and gender politics. I am yet to identify a homosexual, much less a transsexual, much less a lesbian transsexual in the novels of Jane Austen.

¹¹⁶ Jennifer Egan, 'The Power of One' *Elle Magazine*, October 1995, 143.

THE BODY MUTABLE

Meantime, however, transgender consciousness constitutes a direct assault on the solar plexus of our individual psychic security: namely, the unreflected belief in a fixed, rather than fluid, personal gender identity. Consider too, that this threat comes not so much from those transsexuals who identify as gender dysphoric (whose 'problems' can be medically assuaged and therefore socially accommodated) but rather from those who see gender identity as socially constructed and therefore infinitely mutable. For those postmodernists who believe that the body is merely in performance mode, that is, 'a product of discursive construction and a field of interpretative positionalities that can occupy different locations or personalities',¹¹⁷ everything is possible: People and personalities, bodies and minds, genders and sexualities may endlessly reconstitute themselves. This is not psychosis. It is merely extending the range of imaginative possibilities which the vast majority (predictably enough) will probably never take up.¹¹⁸ Every society at one time or another has gone through the process of reinventing itself. The construction of subjectivity is not a postmodern invention. Ours is not the first age — nor will it be the last — to interrogate (or even overthrow) the old certainties: in this case 'the simple unities and stabilities of self.'¹¹⁹ It is simply that the postmodern lens provides a mass audience with a more sophisticated means than it has ever had before of accessing multiple perspectives.¹²⁰ This is, of course, a two-way street: the more sophisticated the lens, the more sophisticated the viewer, and vice versa.

Lest the dubious suspect some intellectual sleight of hand here, it is as well to remind ourselves that the inscription of gender is, literally, a given. We are labelled by others (male or female) and (more often than not — although to varying degrees) we confirm that labelling in the way we present to the world.¹²¹ This is generally conceived as being the natural order of things, indeed believed by many to be divinely inspired.¹²² Transsexuals, of course, reject their given label. The *natural* order of things is then not so simple as we might first have believed. A more sophisticated interpretation of this process speaks of a continuum of human natures relative to the sex/gender ideal — the binary or bi-polar model which Dr Finlay refers to as being the product of 'modern insights'.¹²³ But

¹¹⁷ Zita, above n 36, 107.

¹¹⁸ At the time of the Renee Richards' case, there was a good deal of media hype about an anticipated flood of transsexuals onto the professional tennis circuit and the lively 'problems of transsexuals in sport' debate continues. (Similar anxiety can be detected in the social welfare cases as well as in the 'marriage' cases.) For a critical examination of the cultural implications of the Richards' case, see Susan Birrell and Cheryl L Cole, 'Double Fault: Renee Richards and the Construction and Naturalization of Difference' (1990) 7 (1) *Sociology of Sport* 1.

¹¹⁹ Zita, above n 36, 109.

¹²⁰ The role of modern technology in all this can hardly be overestimated. On this subject, see Hausman, above n 14; and on the postmodern effects of technology generally, see Rosanne Kennedy, 'Spectacular Evidence. Discourses on Subjectivity in the Trial of John Hinckley' [1992] 3 (1) *Law and Critique* 3.

¹²¹ I am drawing here upon Jacquelyn Zita's analysis of 'doing gender': see Zita, above n 36, 114.

¹²² Finlay DP, above n 2, 11 refers to this as 'the simplistic biblical dichotomy'.

¹²³ *Ibid.*

both practices are ontologically suspect. Both rely on an idealised conception of gender performance and both exist to castigate any deviation from the norm. Curiously (or predictably?) enough, classic transsexuals ('trapped in the wrong body' transsexuals) are gender conservative in that they confirm rather than deny the conventional dichotomy. Depicted transsexuals — by which I mean those taken up by the media — extol the verities of essentialism. After all, being trapped in the 'wrong' body surely implies that there must be a 'right' body.¹²⁴ Emphasising the gender question and playing down the sexuality question makes for less disturbance. The classic transsexual speaks of *gender* rather than *sex/sexuality* but presents as being exclusively heterosexual. There are many intriguing questions here. One of the most telling is this: 'Suppose that you could be a man (or woman) in every way except for your genitals; would you be content? There are several possible answers, but only one answer is clinically correct.'¹²⁵ A new body is *required*. 'Under the binary phallocratic founding myth by which Western bodies and subjects are authorised, only one body per gendered subject is "right".'¹²⁶ Little wonder then that we find the classic narrative of redemption so consoling. In this context, Stone's reading of the dominant discourse as 'colonising' is entirely apposite.¹²⁷

In *Re A (a child)*¹²⁸ the Family Court of Australia permitted reassignment surgery (female to male) 'in the child's best interest'; a judgment based essentially on the child's erotic orientation. This was a biologically female child who was sexually attracted to girls. The child thought of himself as male. He wanted to be a boy. His application was supported by his parents and (somewhat reluctantly) by his medical advisers. Clearly, it was a difficult case. Would it surprise any one to learn that the possibility of 'raising' this child as a lesbian was never adverted to, much less discussed, as a valid possibility.¹²⁹ If gender ambiguity is undesirable, 'deviant' sexuality is unthinkable. The first sentence of the section of Dr Finlay's Paper which discusses this case reads as follows: 'Cases occur of children being born whose *correct sexuality* [*sic*] may not be apparent and who are consequently assigned to *the wrong sex*.'¹³⁰ Again, the fear of mistake, of getting it wrong; or worse: the prospect of perpetual ambiguity. Instead, the constant clamour for clarity. Why is it that it is always a question of right or wrong; good or bad; boy or girl; hetero or homo; true or untrue? Why is it that our culture so relentlessly fetishises sex/gender difference?¹³¹

¹²⁴ For a recent feminist analysis: see Muller, above n 10.

¹²⁵ Stone, above n 80, 297.

¹²⁶ *Ibid.*

¹²⁷ That is '[t]he initial fascination with the exotic, extending to professional investigators; denial of subjectivity and lack of access to the dominant discourse; followed by a species of rehabilitation': Stone, above n 80, 294.

¹²⁸ (1993) FLC 92-402; (1993) 16 Fam L R 715.

¹²⁹ See Jenni Millbank, 'When is A Girl A Boy? *Re A (a child)*' (1995) 9 *Australian Journal of Family Law* 173.

¹³⁰ Finlay DP, above n 2, 42 (emphasis added).

¹³¹ Garber, above n 35, 117.

MORE POSTMODERN CONSIDERATIONS

Michel Foucault, that tireless campaigner against the most pernicious effects of power over the public and private self — formerly as spectacle (in the form of torture and ritual execution) and more recently as a narrative of surveillance (almost a psychic or quasi-psychic indictment of self) — in his 'Introduction' to *Herculine Barbin*¹³² (the memoirs of that 'famous' nineteenth century French hermaphrodite), asks: 'Do we truly need a true sex?' Like all the best questions, it is at once deceptively simple and profoundly disturbing. It is *the* question. It needs to be asked repeatedly, not only in the legal context but also in the broader social context.

Two of the buzz words of the age are *gender* and *sexuality*. How we respond to the issues instantiated by either or both will (it is generally believed) 'determine' or 'reveal' something about our own identities.¹³³ As individuals and as a society we are all but consumed by a *fin-de-siècle* fascination with the phenomenon of identity; of how as individuals and as a society we construct, deconstruct and reconstruct identity. The postmodern question is not so much what can I do, as who can I become, and how many possibilities of being can I embrace. The cultural possibilities of transgressive sexuality and gender b(l)ending have probably never been greater. We see this in the 'lives' of any number of pop icons — Michael Jackson, Madonna and Boy George being some of the more 'obvious' — as well as in the realm of popular entertainment. Contemporary cinema is alive with examples of sex/gender dissonance:¹³⁴ *The Crying Game*; *The Adventures of Priscilla, Queen of the Desert*;¹³⁵ and *To Wong Foo*¹³⁶ come easily to mind. Paradox notwithstanding (and paradox is something which lies at the heart of the postmodern) activity in the margins appears poised to spill over onto the page; witness the popularity of the Sydney Gay and Lesbian Mardi Gras.¹³⁷ Is this really what so many of our gatekeepers fear? But there is a danger

¹³² Michel Foucault (ed), *Herculine Barbin — Being the Recently Discovered Memoirs of a Nineteenth-Century French Hermaphrodite* (1980) xvii.

¹³³ People often ask me *how I* became interested in *such* a subject!

¹³⁴ Compiling an extended list would be quite a task. Well-known examples would include: *Some Like It Hot* (1939); *Myra Breckinridge* (1970); *Cabaret* (1972); *The Rocky Horror Picture Show* (1975); *Tootsie* (1982); *Victor/Victoria* (1982); *Torch Song Trilogy* (1988); *Paris is Burning* (1990); *The Silence of the Lambs* (1991); *Orlando* (1993); *Mrs Doubtfire* (1993) and *Stonewall* (1995).

¹³⁵ At the time of the 1995 Academy Award nominations there was considerable debate about whether Terrence Stamp (who played the part of a transsexual in *Priscilla, Queen of the Desert*) — if nominated — might actually take out the Oscar in a new 'category'. Best Actor in a Female Role!

¹³⁶ 'Since the psychedelic Sixties dissolved the rigid sex roles of the Fifties, we have been in a maelstrom of gender . . . The drag queen has emerged in America in the Nineties as a symbol of our sexual crisis'. Paglia, above n 90, 99.

¹³⁷ This is a topic in itself. Some members of the Gay and Lesbian community contend that the Mardi Gras is not representative of *their* lived experience and, therefore, many feel unable to support it — at least in its current form. On the other hand, many members of the 'straight' community strongly support Mardi Gras. The fact that counting in the Federal election and the Mardi Gras parade were both scheduled for the same night (2 March 1996) threw television programmers into confusion and polarised many in the 'electorate'. This is some indication of the complexity of contemporary Australian culture.

here and it is the danger of replacing one verity, one construct, one subjectivity with another. This is the epistemological crux of the matter.

UNSEAMLY (*SIC*) THOUGHTS

When Garber speaks of ‘category crisis’ she means *all* categories. She exhorts us not only to ‘cross’ borders but to erase them:¹³⁸ Black/White; Right/Wrong; East/West; Master/Slave; Jew/Gentile; Worker/Boss; Labor/Liberal; Upper/Lower (as in ‘class’); This/That (and always ‘the other’); You/Me; Us/Them; Male/Female and so on. What she is talking about is what so many of us are constantly guilty of and that is ‘binary thinking.’ (*People follow Ideas.*) As Edward Said proposes, the job of thinkers is to remind us that this need not always be so; that a better way is possible:

However much intellectuals pretend that their representations are of higher things or ultimate values, morality begins with their activity in this secular world of ours — where it takes place, whose interest it serves, how it jibes with a consistent and universalist ethic, how it discriminates between power and justice, what it reveals of one’s choices and priorities. Those gods that always fail demand from the intellectual in the end a kind of absolute certainty and a total, seamless view of reality that recognises only disciples or enemies.

What strikes me as much more interesting is how to keep a space in the mind open for doubt and for the part of an alert, sceptical irony (preferably also self-irony). Yes, you have convictions and you make judgments, but they are arrived at by work, and by a sense of association with others, other intellectuals, a grass roots movement, a continuing history, a set of lived lives. As for abstractions or orthodoxies, the trouble with them is that they are patrons who need placating and stroking all the time. The morality and principles of an intellectual should

¹³⁸ Garber, above n 35, 17. At the literal level (state boundaries), there is an obvious lesson here for both federal and nation states: on the one hand, the global village; on the other, the rebirth of nationalism. Factionalism, provincialism, tribalism: these are the familiar legacies of political, legal, social and cultural balkanization. The problem with diversity is the danger which lurks in the proliferation of unnecessary lines of physical and metaphysical demarcation — so popular with those who privately believe (even if they do not always publicly insist) that all of us must be liberated *their way*.

Naturally enough, the elimination of boundaries comes at a price: for example, the price of certainty — so beloved of the law. There are disruptive implications here to be sure. But hegemony too has its price and as usual ‘the little people’ (to use Leona Helmsley’s memorable phrase) generally end up paying it. In this context, consider the experience of feminism generally.

I am, of course, also aware that the idea that *certain* boundaries (and possibly *all* boundaries) are endlessly revisable as a matter of personal choice and public celebration, is potentially confronting for many and particularly so for those who hold either to a natural order of existence or who cherish the normative value of traditional roles. For them (and others), the idea that life can be ‘reduced to some postmodern notion of “jouissance”’ — as one colleague of mine recently put it — is almost considered indecent; but that is the idea which is beginning to rattle the palace gates. To those who would trot out (as I have done myself) the tired old joke about not being able to deconstruct the bus (‘Priscilla’?) that is about to run over us, I would say: remember the man who stood in front of the tank in Tiananmen Square. That was a moment of palpable deconstruction if ever there was one; and one which demonstrates that ultimately no metanarrative (not even one supported by tanks) is impervious to ‘deconstruction’ — which is, after all, only a fancy word for human judgment. In the face of which, any assault on the binary gender divide is bound to look pretty tame.

not constitute a sort of sealed gearbox that drives thought and action in one direction, and is powered by an engine with only one fuel source.¹³⁹

Transsexualism (broadly defined) is the phenomenon, *par excellence*, which demonstrates that gender is not a necessary consequence of anatomy. Feminism and postmodernism both, have tried to teach us similar lessons: for example, that social organisations and political institutions do not necessarily reflect essentialist, foundational or universal truths, so much as temporal and provisional accommodations to a particular kind of momentary conception of reality — as presently advised.¹⁴⁰ But who is empowered to speak these respective ‘truths’? Which doctor (!), which lawyer, which cultural theorist? Which of the normalising disciplines will be first to rush into print with the latest paradigm of convenience? The multicultural fluidity of the nineties makes us all potentially mutable figures in a decidedly postmodern landscape. A certain turbulence is to be expected.¹⁴¹

CULTURAL R/EVOLUTION

Dr Finlay describes his blueprint for reform as ‘frankly, polemical’¹⁴² and the Victorian government may well agree. Others would suggest that we are already in the throes of a new cultural revolution which promises to overrun the ‘nostrums of the past’¹⁴³ and sweep the traditional gatekeepers aside. The narratives of oppression have been multiplying; the demand for inclusivity is intensifying. It has been said that life (like law) is in the detail; that small stories matter; that lived experience should (wherever possible) be reasonably accommodated. Law reform, at its best, embraces detail and celebrates complexity. As doctors are conditioned to heal, so lawyers are conditioned to regulate. Occasionally, the patient/client will know best. What the transsexual metaphor stands to teach us, however, (lawyers and laity alike) is that inflexible prescriptions such as gender role stereotyping need to be resisted and where necessary revised. In the same way we need to resist/revise (or at least regularly reflect upon) all critical perspectives — especially those we cherish most.

No doubt the recent work on transsexual law reform in Victoria springs from a genuine desire to alleviate the suffering and enhance the dignity of one of the most marginalised groups in our community. However, before it rushes to judgment, the Victorian government would do well to reflect upon some of the assumptions on which the Discussion Paper is based and consider whether a less

¹³⁹ Edward Said, *Representations of the Intellectual: The 1993 Reith Lectures* (1994) 89.

¹⁴⁰ See generally Patricia Waugh, ‘Modernism, Postmodernism, Feminism: Gender and Autonomy Theory’ in Patricia Waugh (ed), *Postmodernism. A Reader* (1992) 189.

¹⁴¹ It should not be assumed that this is necessarily a process of unalloyed bliss, as G C McColl explains in ‘Posing. Questions about Cross-Dressing’ (1995) 54 (1) *Meanjin* 44.

¹⁴² Finlay DP, above n 2, i.

¹⁴³ This used to be one of Paul Keating’s favourite phrases. His final address to the National Press Club on 29 February 1996 — two days before the Federal election — was peppered with words like ‘change’ and ‘turbulence’ and ‘complexity’ — all used with evident approval and giving some indication of *his* view of the temper of the times.

prescriptive view of the ‘problem’ might not be more efficacious. I began with George Eliot and will end with her.

All people of broad, strong sense have an instinctive repugnance to the men of maxims; because such people early discern that the mysterious complexity of our life is not to be embraced by maxims, and that to lace ourselves up in formulas of that sort is to repress all the divine promptings and inspirations that spring from growing insight and sympathy. And the man of maxims is the popular representative of the minds that are guided in their moral judgment solely by rules, thinking that these will lead them to justice by a ready-made patent method, without the trouble of exerting patience, discrimination, impartiality — without any care to assure themselves whether they have the insight that comes from a hardly-earned estimate of temptation, or from a life vivid and intense enough to have created a wide fellow-feeling with *all that is human*.¹⁴⁴

¹⁴⁴ Eliot, above n 1, 472 (emphasis added).