Books

TRANSGENDER JURISPRUDENCE by Andrew Sharpe, London and Sydney, Cavendish, 2002, xxiii and 229pp

DESMOND MANDERSON*

A recent essay in the *New Yorker* bemoaned the difficulties of reconciling the dictates of etiquette with the modern world. The author wondered what to make of the following 'predicament that Mrs [Emily] Post never had to face'? A friend's room-mate was planning a formal wedding:

> The bride's parents were divorced; her mother had remarried and her father was undergoing but had not yet completed gender-reassignment surgery, and was living as a woman. How should the invitation be worded?[1]

This should alert us to the fact that etiquette, like law and many other discourses besides, appears to be wedded to a host of deeply embedded cultural dualisms or dichotomies that are, in fact, neither as stable nor as eternal as they are made to appear. We need to be able to assign things to set categories in order to make decisions at all: yes/no, true/false. But an anxiety of legitimacy besets all decision-making systems (whether they are expressed in the form 'how should the invitation be worded?' or in the form 'should the defendant be convicted?'). As a result, such systems tend to naturalise categories and consequently transform them from a discomfiting question of judgment to a comforting one of fact.[2] Indeed, the distinction between law on the one hand and etiquette on the other, is itself an example of a dualism — utilised precisely so as to decide to which system a question ought be allocated — that has in recent years seemed to be far less secure than HLA Hart,[3] for one, once insisted. The fixed and binary assignment of gender is surely another. Just as, over a long period of time, the changing understanding of sexual preference has eroded many cherished assumptions, to the anxiety of some and the liberation of others, so too recent developments in our understanding of sexual difference have made the very dualism man/woman increasingly unstable.

There, right there, on the very cusp of the two, we find transsexual and transgender persons — those who maintain their right not just to a certain sort of sexual behaviour but to a kind of sexual *being* different from that to which they were allocated at birth. Etiquette, perhaps, might keep a genteel silence about such things but law, thank goodness, is more readily provoked and responsive.

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* Professor Desmond Manderson holds the Canada Research Chair in Law & Discourse at McGill University, Montreal.

1 J Thurman, 'If You Ask Me' (February 18 & 25 2002) *The New Yorker* 188 at 189.

2 Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society* (1988) and the special edition of *Cardozo Law Review* (1992) both place particular store in the reliance of systems theory on the generation of decision-making dyads of the kind on/off or legal/illegal.

3 Herbert LA Hart, *Concept of Law* (1961) at ch 2.

Transgender Jurisprudence[4] is both a response to the changing law and a provocation. As response, Andrew Sharpe's book is a work of the most careful and comprehensive scholarship. He is a Senior Lecturer in the Division of Law at Macquarie University in Sydney, and he has been researching this area for several years. His detailed knowledge of every case in the common law world concerning the law's understanding and treatment of transgender persons shines through. The historical chapters are particularly thorough and display an excellent knowledge not only of legal doctrine, but of the medical, psychological, and sociological literature. This makes for a compelling and helpful survey. The book then sets out, for the first time and with admirable clarity, a conspectus of legislative and judicial responses to all the issues that law's treatment of transgender raises. These are, broadly speaking, questions of both identification and discrimination: when is it important to determine the sex of a person, for what purposes, and with what consequences? The book is a mine of information and will, I have no doubt, be a standard resource to all those who have reason to work in the area, both as practicing lawyers, activists, or academics, in years to come.

Sharpe's work is far from merely descriptive. As provocation, his argument takes as its targets our assumption that law's story is one of gradual progress, and in particular those who would further treat the legal strategy of recognition of transgender persons — especially in the aftermath of surgical intervention — as equivalent to that progress. Sharpe is no Tory, but he is no Whig either. For Gilbert and Sullivan, such a dualism was all there was:

> Then let's rejoice with loud Fal la — *Fal la la!*
> That Nature always does contrive — *Fal lal la!*
> That every boy and every gal
> That's born into the world alive
> Is either a little Liberal
> Or else a little Conservative!
> *Fal lal la!*[5]

But the author will not be drawn into over-simplification. Indeed, it is one of the pleasures of the book that the *way* he makes his argument echoes the same rejection of facile dualisms that underscores his substantive analysis of transgender. In other words, Sharpe's book critiques one central example of the dualisms that dogmatically carve up the world (that of man-or-woman gender analysis), and he does so using a style of argument that itself implicitly critiques another (that of reaction-or-reform political analysis). Sharpe's case study in this book and his whole scholarly approach both work to transgress boundaries, resist simple categorisation and refute dichotomies in favour of a complexity that will not neatly fit into one category or another. Both his subject and his method are incorrigibly *trans*.

4 Andrew Sharpe, *Transgender Jurisprudence* (2002).

5 William S Gilbert, *Iolanthe* (1882).

The book argues, therefore, against a conservative insistence that the law of gender merely reflects what nature herself contrives; and equally against a liberal complacency that the barbarities of the past are slowly but surely being replaced by a truly enlightened approach. Relentlessly and convincingly, Sharpe demonstrates that the legal parallels to this political dualism — call them denial and reform — share certain important and self-limiting assumptions. The first assumption that both sides of this apparent dualism share, concerns an essentialist narrative of identity. The jurisprudence of denial treats gender as determined at birth and fixed for life. It is written on the body and evidenced by the genitals. The jurisprudence of reform treats gender as no less determined at birth and equally fixed for life. The difference is that it is written on the mind and evidenced by elective genital modification. But since the story of reform jurisprudence is equally essentialist, a certain narrative that Sharpe calls the 'discovery story of transsexuality' — I was always 'really' a man or woman and this is when I discovered the 'truth' — is highly privileged at the expense of all others. Enormous power is thereby given to psychiatry and to surgery. Law requires that these professions confirm the narrative of the mind, and imprint it on the body, respectively. Still more significantly, the stories of those whose sexual identity is not so simple or univocal or unchanging do not pass muster. The recognition and the denial of recognition of transgender can both be seen as strategies to protect the categorical imperative of gender.

The second assumption that both sides of this apparent dualism share concerns an underlying narrative of homophobia. The jurisprudence of denial displays a powerful homosexual anxiety. This anxiety manifests itself in those cases that have resisted recognition of a change in gender, since otherwise law would be contriving to legitimate post-operative relationships that are 'really' homosexual. If one accepts biological determinism, then one must prevent sexual transgressors from surreptitiously subverting the heterosexual purity of marriage; from the outside in, as it were. But the jurisprudence of reform fares little better. There anxiety manifests itself in those cases that have recognised changes in gender, since from another perspective, a law which refused to recognise this truth would have the effect of protecting pre-operative relationships that are themselves 'really' homosexual. If one accepts the narrative of discovery, then it is the *unacknowledged* transsexual that is already subverting the heterosexual purity of marriage; from the inside out, as it were. Sharpe pursues his quarry with enormous vigour, referring us to case after case in which the language of the judges betray in the most explicit and unsettling fashion the centrality of this anxiety. Judges are shown to be shop stewards of the marital union, sometimes preventing fifth columnists from crossing the picket line, sometimes removing the *agents provocateurs* in their midst.

The clear and compelling argument of this book shows on two levels the complicity of denial and reform, conservatives and liberals. This illuminates in a new way how we might think about the legal problems facing transgender persons. And above all it draws our attention to those who remain invisible beneath that complicity. Those who cannot force the experiences of their life into a consistent

and unchanging narrative, and in particular those men or women for whom sex change means just that — a *change* in their life — are strangely silenced. Those for whom sexual identity and sexual preference are quite separate questions, like the homosexual transsexual, remain anathema to law. Those who might be reluctant to submit to the authority of the psychiatrist's couch or the surgeon's knife are often considered at best transitional or at worst inadequate. The book provides important food for thought both to those who might treat the problems of discrimination that ensue as trivial, and to those who might think the answers are straightforward.

As his title implies, Sharpe's broader ambitions are not just to engage with the question of 'transgender' but also with the question of 'jurisprudence'. Yet here one encounters an unresolved tension. In doing justice to transgender law, Sharpe's comprehensive discussion of the case law can occasionally become a little wearing on the general reader. This is not helped by his tendency, once having hit upon a useful phrase, to repeat it at every available opportunity — sometimes at the expense of further analysis. Phrases like 'the discovery story of transsexuality'[6] or 'legal anxiety over proximity to the homosexual body'[7] are best used to sum up a thematic argument in the course of which cases are drawn upon to sustain and illustrate particular points. Instead, Sharpe will sometimes go through the cases individually and use the phrase as a recurring talisman that concludes each instance. But in the end we are left wondering what questions might be begged by relying on such a constant form of words. There is, for example, the question of personification. Can 'law' itself experience anxiety, and if so how? In what sense is it meaningful to describe it as exhibiting 'legal desires'[8]? If law is anxious or desirous, why and to what end? And if only particular legal actors express these mental states, what general lessons can be drawn? Does the anxiety of certain judges influence the experience of law beyond the courtroom, and if so in what ways?

These criticisms are matters of style but they reflect a larger point. Sharpe argues, and rightly so, that the study of transgender law may yield important lessons for much broader questions of law and politics. But in the current work, Sharpe only touches on these lessons. He is right, for example, to insist that the difficulties posed by trans-sexuality 'confront a feminist politics.'[9] I would have liked the author to tell us precisely what this means and why, and what the outcome of such a confrontation might look like. We are left with only hints at the wide-ranging implications of his analysis.

There are several possible ways in which one could open out Sharpe's specific work in order to make explicit its general significance to our thinking about law and society. One way would involve the exploration of the power of medicine and psychiatry within the law, and the serious problems of such reliance. The study of

6 Above n4 at 31, 53–70, and elsewhere.

7 Id at 93–118 *passim*.

8 Id at 171.

9 Id n4 at 6, 8, 72, 98, 103.

the limits of transgender reform would illuminate questions of proof, authority, and social control, and draw our attention to the ways in which the notion of responsibility has come to embody radically different, and perhaps incommensurable, theoretical models in different fields. Another would, as I have indicated above, offer the experience of transgender law as part of broader scholarship on the boundary problem in law. The necessary imperfection and perhaps even the fictional nature of law's dualisms, is a fundamental question for much legal theory. It has implications not just for feminist and queer scholarship but for the very nature (and justification) of legal judgment in every area of the law. Is an eviscerated chicken, to take an evocative example, a 'primary product' or a 'manufactured good'?[10] Much hangs on the answer — on how we are going to decide, and why. Sharpe's approach is well suited to the post-structural critique that in recent years has been brought to bear on just this kind of question.[11] The specificity, and social importance of his case study would, if further developed in this direction, add greatly to a school of thought that has sometimes had trouble convincing general readers that abstract ideas really matter.

What ties all these different questions together is its intersection with Foucault.[12] Sharpe's indebtedness to Foucault's work is, I think, clear, but I would like to see him pursue it further. For what we see in the operation of transgender law is the way in which law, under the guise of merely describing nature, actively *constitutes* legal subjects. Foucault tells the story of how the old, or juridical, legal order exercised its power with sudden and spectacular displays of force, most particularly through the public lessons in obedience provided by torture and capital punishment.[13] The law would let us live *(laisser vivre)* but could choose to make us die *(faire mourir)*.[14] But in the modern, disciplinary society, law operates very differently. It is not interested in the intensive but localised application of force from time to time, but in the extensive but generalised application of surveillance from moment to moment. Its subtle and constant pressure will make us live a certain way *(faire vivre)* and, when it is through with us, it will let us die *(laisser mourir)*.[15]

Two examples will suffice to show the relevance of this to the present work. First is the question of subjectivity. The designation of gender has proved

10 *Interstate Commerce Commission v Kroblin* (1953) 133 F Supp 599, discussed in Peter Goodrich, *Reading the Law* (1986) at 190.

11 See, for notable examples in the field of deconstruction and law, Jaques Derrida, 'Force of Law' (1990) 11 *Cardozo LR* 919; Jack Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 *Yale LJ* 743; Peter Goodrich, *Legal Discourse* (1987); Costas Douzinas and Ronnie Warrington with S McVeigh (eds), *Postmodern Jurisprudence* (1991); Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmoderntiy and Critical Legal Studies* (1994).

12 Michel Foucault, *The History of Sexuality, Volume 1* (1985); *The Birth of the Clinic* (1975); *Discipline and Punish* (1979); *Power/Knowledge* (1979).

13 I am particularly adopting *Discipline and Punish,* above n13.

14 I am grateful to Associate Professor Alain Pottage for drawing my attention to the explanatory force of this contrasting formulation.

15 Michel Foucault, 'Faire Vivre et Laisser Mourir: la Naissance du Racisme' [1991] *Les Temps Modernes* (February) 37–61.

particularly important as it pertains to marriage. But this turns on whether the court treats the pre-operative or the post-operative body as monstrous.[16] If the latter, then the court is quite clearly preventing a certain kind of life from being fully lived. But if the former, then the recognition of transgender is far from a descriptive process by which the court determines as a matter of fact the 'true' gender of the subject. It is in fact a constitutive process by which the court determines as a matter of law how the subject is to be permitted to live. A new subject, gender assigned post-operatively, is literally naturalised — *made* natural by surgical intervention and legal recognition. They are not just let live but *faire vivre.*

Second is the question of objectification. The discrimination of transgender increasingly turns on questions not of ontology or essence but of performance or gaze.[17] After all, as Sharpe argues, it is surely right to understand discrimination as involving the prejudicial treatment of someone 'on transgender grounds'[18] quite regardless of whether they are or are not 'really' as they appear. It is their treatment by, and therefore the way they are *perceived* by, others that is at issue. Legislative responses have, however, conflated the distinct notions of sexuality and identity, and of the essence of a person and their treatment, with 'myriad and contradictory effects'[19] well explored by the author. But the point here is that if discrimination is about how we appear to others, then our subjection to their pitiless gaze is itself a vital aspect in the constitution of our identity. It is not our souls but our surfaces that are the objects of this gaze. The experience of discrimination should prove to us once and for all that the quest for a fixed identity, for the deep down truth of a person's being — with which the whole morass of transgender law has been obsessed — is pointless. We are creatures whose experience of ourselves comes from the gaze with which others fix us. It is members of society that ultimately have the power to bestow on or withhold identity from us, and thus they that have the power to *faire vivre.*

The political and legal implications of this approach are not uncontroversial, as Sharpe points out, although he is reluctant to step too deep into the mire of implications.[20] On the one hand many gay activists frequently choose to argue that sexual preference is natural, fixed, and determined; on the other, the logic of transgender inevitably undermines the possibility of being able to sustain any such claims. If transgender is fundamentally about the possibility of change, then it must be the enemy of *all* absolutes and dualisms. But it seems to me that there is potential here too. It is not the definition of categories per se but the existence of the boundary that requires them that surely deserves our critique. As august a body as the Law Reform Commission of Canada has asked,[21] why *should* the value of

16 Above n4 at 125–28.

17 Above n4 at 157–74.

18 Above n4 at 160.

19 Above n4 at 171.

20 Above n4 at 196.

21 Canadian Law Reform Commission, *Recognizing and Supporting Close Personal Relationships Between Adults* (2000): <http://www.lcc.gc.ca/en/themes/pr/cpra/paper.html>.

marriage, an institution of affect, depend on a particular sexual constellation? The same applies to the wedding invitation with which this review began. The problem was the difficulty of assigning the father of the bride to a particular category. But the answer does not lie in deciding whether they 'really are' a Mr or a Ms. Rather, it lies in rethinking our understanding of what an invitation ought to be like. Justice requires of us that we do not uphold our formal structures unquestioningly; but that we continue to test them against the substantive respect and concern that we owe all who seek it. In that light, many of the judges whose remarks and arguments are so ruthlessly dissected in *Transgender Jurisprudence* display a cavalier disregard and a shameful lack of justice. Sharpe has done a great service in placing these judicial perspectives in clear and critical context. Ironically, one of the earliest texts of etiquette offers far more compassionate counsel than these callous formalists. In 1774, Lord Chesterfield advised his son: 'No Man is ridiculous for being what he really is, but for affecting to be what he is not.'[22]

I think, however, that we need to go further. Perhaps we might encourage the law not to pin down identities, like a lepidopterist's specimens; but to let them go where they will, like a butterfly on the wing. It is not who we are but how we might grow that should matter to us; and discrimination — against whomever it is committed and whatever form it takes — is fundamentally the way in which certain parts of society work to prevent that growth in others. Discrimination is not a wrong against being, but a wrong against becoming. For law to set its face against it, it must do more than *laisser vivre* (since this conservatism would leave the socially oppressive gaze entirely free of restraint), and more than *faire vivre* (since this liberalism constitutes only certain and very limited subjectivities). It must, instead, *laisser devenir:* it must let us become. We need a movement, the necessity for which *Transgender Jurisprudence* commendably demonstrates: a revolt against the habits of dualism and all the ingrained imperatives of categorisation. As citizens we have stuck to our old-fashioned political homelands, labor and liberal, whig and tory, for too long; as scholars we have likewise been trapped within disciplines that have become limited, inflexible, and even ossified. Now we need *trans* disciplinarity.[23]

22 Above n1 at 192.

23 See Margaret Somerville and D Rapperport (eds), *Transdisciplinarity: Re-creating Integrated Knowledge* (2000).