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Transgender Jurisprudence: Dysphoric Bodies Of Law

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BOOK REVIEWS

*Jennifer Levi**

TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW

**By Andrew Sharpe
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I will say at the outset of this review that I am no theorist.¹ Andrew Sharpe, on the other hand is a theorist, and a keenly insightful one at that. In his opus, *Transgender Jurisprudence: Dysphoric Bodies of Law*, Sharpe takes on the monumental task of integrating, synthesising, and deconstructing transgender

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jurisprudence² as it has evolved in common law traditions. The result is quite fascinating, successfully breaking the case law down into several predictive models which serve as useful tools for practitioner and theorist alike. Sharpe goes even further in his efforts by identifying the homophobia that underlies so many of the unprincipled decisions in cases involving transgender people, particularly in the marriage and family law area. From the perspective of an attorney who litigates cases on behalf of transgender people as well as same-sex couples seeking marriage rights, I think Sharpe has done an incredible job identifying the source of the internal inconsistencies in such cases.

Sharpe's work arrives on the scene at an exciting moment in the legal and cultural history of transgender. While it is true that the transgender rights movement has a rich, complex, and varied past,³ the last ten years have brought an intense maturity to the movement including, at least in the United States, significant political gains at the state and local levels.⁴ Along with this maturation and these gains has come a question of the locus of our movement and, more broadly, the nature of its relationship with an arguably more established, coordinated, and theorised gay and lesbian movement. Sharpe's contribution to this cultural moment is invaluable for at least two reasons. One, by being the first in-depth and full-length comprehensive treatment of the topic of transgender jurisprudence, it will be, and indeed is already emerging as the foundational work by which others will be measured. And, two, by exposing the homophobia underlying many of the key decisions, particularly in the area of marriage and family law, it provides an important link between the lesbian, gay, bisexual, and transgender movements which may not and should not be ignored by activists from both worlds.

² By the term transgender jurisprudence, Sharpe means to include all cases involving transgender litigants to the extent that the litigants' transgender status is relevant to the case. In Sharpe's view, transgender identity includes people who identify as transsexual. It also includes people who do not 'conceive of themselves as being of the sex opposite to that designated at birth' and people who have a range of cross-gender characteristics but do not necessarily 'complete crossings of that divide'. See A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (2002) 45.

³ For a more detailed description of the transgender rights movement in the United States, including, in particular, its relationship with the gay and lesbian rights movement, see S Minter, Symposium, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion in the Gay Rights Movement*, 17 *New York Law School Journal of Human Rights* 589 (2000).

⁴ Incredible work has been done in the United States, particularly at the state and local level, to explicitly include transgender people in non-discrimination laws and ordinances. As of April 2003, 3 states and 55 local jurisdictions have trans-inclusive laws including large metropolitan areas such as Boston, New York, and San Francisco, as well as smaller cities and towns such as DeKalb, IL, Ypsilanti, MI and Multnomah Co., OR. For a comprehensive and up-to-date list, see www.transgenderlaw.org.

The book is broken down into three parts. In Part I, 'Approaching Transgender Bodies', Sharpe provides a comprehensive medical history of transgender in order to set the stage for the analysis of the non-marriage cases that follow, cases that take on the legal question of male/female status. The scientific background is necessary both because of the medical underpinnings in almost all of the cases involving transgender litigants considered by courts and because of the meta-structure that Sharpe provides to describe the case law. In Part II, 'Homophobia as Subtext', Sharpe exposes the homophobia that serves as the subtext in cases involving marriages of transgender people. In closely analyzing the cases in which the marriages of transgender people are recognized and those in which they are invalidated, he highlights the motivating factor that underlies decisions that acknowledge a person's transitioned-to sex. Judges are willing to recognize a person's transitioned-to sex where doing so maintains the anti-gay status quo. Finally, in Part III, 'Sex: From Designation to Discrimination', Sharpe analyses cases involving discrimination against transgender litigants in which the court need not answer the question of what someone's sex is but rather whether transgender people fit into non-discrimination law. In this part, Sharpe gives the reader a glimpse of his view of the approach to transgender jurisprudence that offers the greatest potential for true progress, or 'reform', rather than the supposed reform jurisprudence that Sharpe criticises and deconstructs.

Perhaps Sharpe's most valuable contribution to transgender law is setting forth models by which virtually all transgender cases involving legal determinations of sex can be classified. The three models he describes are (1) (bio)logical; (2) psychological and anatomical harmony; and (3) psychological, social and cultural harmony.

The reason this contribution is so valuable for litigators is because it allows us to consider the wisdom of appealing to one or another of the available models. For example, Sharpe carefully and cogently describes the wisdom (or lack thereof) of appealing to (bio)logic as a litigation strategy. (Bio)logic, according to Sharpe views law as limited in its ability to determine 'true' sex. As a result of law's limitation, (bio)logic ostensibly defers to medicine as the arbiter of 'true' sex. In the foundational case of *Corbett v Corbett*,⁵ the English Court held that sex is fixed at birth, is unchangeable, and may be resolved by 'objective' factors determinable at birth, such as chromosomes, gonads, and genitals.

As Sharpe explains, the approach restricts legal claims because of courts' reliance on (bio)logical factors which do not account for the strong cultural, societal, and psychologically constructed components of gender — not to mention the subjectivity of medicine, to begin with — and, as a result, lacks integrity and truth

⁵ [1970] 2 All ER 33

about our lives. In addition, as he explains, the model's overemphasis on one temporal moment belies the legitimacy of transgender identity because of a focus on 'truth' of sex. The result is a 'naturalised' view of sex that calls into question the veracity of transgender identity.

Turning to cases in which courts have acknowledged individuals' transgender reality, which Sharpe calls reform jurisprudence, the book describes two alternatives to (bio)logic: a psychological and anatomical harmony approach and a psychological, social and cultural harmony approach. Under the psychological and anatomical harmony approach, courts look beyond the temporal moment of birth to determine one's sex. Where a transgender person, through the process of sex reassignment, has taken sufficient steps to bring one's anatomy into harmony with psychological sex, courts have been willing to acknowledge the transitioned-to sex for some purposes. Despite the judiciary's willingness under this analysis to 'say "yes" to the sex claims of transgender persons',⁶ Sharpe nevertheless cautions against this approach because of its 'reproduction of gender polarity',⁷ a result which is inconsistent with many transgender (and non-transgender, for that matter) people's lived experience.

The second reform approach, that of psychological, social and cultural harmony, looks beyond anatomy and surgical requirements. In two social security decisions overturned on appeal, judges looked at the respondent's 'psychological and social/cultural gender identity ... not sex chromosomal configurations or gonadal or genital factors'.⁸ While conceding that an approach that rejects a surgical requirement is 'perhaps to be welcomed',⁹ Sharpe criticises it nonetheless for several reasons. First, he argues that it 'serves to reproduce the gender dichotomy through the articulation of a 'wrong body' story'.¹⁰ In other words, even these more progressive tribunals insist that the litigant accept the "'wrongness" of the pre-operative transgender body', and confess the truth of not having undergone surgical 'correction'. Once the litigant has done so, Sharpe suggests the tribunal 'develop[s] amnesia with regard to [the litigants] continued possession of a "wrong", and therefore transgressive, body and grant[s] legal absolution'.¹¹ In addition, Sharpe criticizes the approach because it denies 'transgender autonomy'.¹² In other words, it does not allow a transgender litigant to declare his or her own sex but, rather,

⁶ Sharpe, above n 2, 57.

⁷ *Secretary, Department of Social Security v HH* [1991] 13 AAR 314, 324 quoted by Sharpe, above n 2, 76.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid 75.

¹¹ Ibid 77.

¹² Ibid.

retains reliance on the policing by the medical community in order to determine sex through detached ‘observation, assessment and calibration’.¹³

Herein lies perhaps the book’s greatest weakness not because it omits any of the criticisms that may be properly waged against these models but because, in so soundly exposing the tensions that arise as a result of the application of each model, Sharpe leaves litigators like me in a quandary. How is it that we can both represent the interests of a particular client thereby meeting ethical obligations of zealous advocacy, while, at the same time, keep in mind the interests of the broad community that identifies as transgender? While it may be true that a segment of the transgender community seeks to break down rigid gender boundaries, it is also true that other segments of the community wish to embrace gender albeit in a way that is markedly distinct from the (bio)logic hegemony that dictates one’s sex at birth. While this divergence within the community presents fascinating questions of how best to advance our mutual concerns, politically or socio-culturally, without denigrating either experience, litigators like me are still left with real people and real cases in which clients serve to lose real rights, protections, or benefits, if advocates cannot convince a court to respect a person’s sex for legal purposes.

Although I agree that sex should be irrelevant for legal purposes — especially because as Sharpe so successfully points out, its relevance is usually to ensure the denial of protections for gay people or to enforce heterosexuality — a gendered binary remains not just a strong force in law but the presumed legal ‘reality and truth’ and, more importantly, the legal constraint within which litigators practice, particularly in the family law realm. While I strongly agree that there would be a benefit in breaking down this rigid binary, particularly because of the length it would go in advancing rights not just for transgender people but for gay and lesbian people, as well, many instances of litigation do not offer an opportunity to advance this admirable sociopolitical and cultural goal.

On the other hand, some cases do and I would extol activists and litigators to take advantage of the opportunity when presented in cases where, for example, the court must address the question of the nature of the discrimination at issue, rather than whether an individual is male or female. Recent reform in the United States reversing unprincipled exclusions of transgender people from sex discrimination law offers the possibility of covering all transgender people within its protection because it turns on what Sharpe refers to as ‘transgender performance’ rather than ontological inquiry.¹⁴ As I have explained elsewhere,¹⁵ cases involving discrimination against transgender people in employment or credit transactions, for

¹³ Ibid.

¹⁴ Ibid 12.

¹⁵ J L Levi, ‘Paving The Road: A Charles Hamilton Houston Approach To Securing Trans Rights’, 7 *William & Mary Journal of Women & the Law* 5 (2000).

example, offer the possibility of reversing historic exclusions while simultaneously educating the courts about our lives. Notwithstanding, many legal challenges simply do not offer this possibility and litigation should not necessarily be avoided simply because of law's fundamentally conservative nature.

Moreover, in suggesting that there is a stark divide between segments of the transgender community that claim the 'wrong body' story and those of us who reject it, Sharpe misses the transgressive effects of litigating transgender issues from a broad range of strategies. After all, under both reform approaches Sharpe describes, courts have acknowledged the changeability of sex, at least for legal purposes. And, in the end, if one can 'change' sex, how rigid can gender boundaries be?

If there is one flaw in the work — and it is hard to imagine how any foundational work could not have at least one — it is his failure to step into the fray and offer his perspective on an 'ideal' model for pursuing litigation on behalf of transgender clients. While this may be a philistine criticism from a post-modern perspective (and one leveled against probably every post-modern critic at one point or another), it remains significant given how far the work goes to analyse critically the efforts made on behalf of transgender litigants. Moreover, the reason this flaw even surfaces is because, given Sharpe's depth of analysis, it is hard to imagine that he has not been able to work through some of the more nettlesome issues that arise in the cases given the exhaustive review of the decisions at all levels of appeal. In the end, though, the work satisfies far more than it does not and, as the first in-depth scholarly review of the subject, sets a high bar for later works to follow.