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RE-MAKING LAW'S REALITY: AN AVENUE TOWARDS SEXLESS AND GENDERLESS LAW

DANIEL MARCANTELLI*

Gender is all-pervasive. It has been such a readily accepted aspect of humanity that our legal systems — the systems that order our society — take its form and permanence as a given. Although it is deeply interwoven into our system of laws, it is not fundamental to its operation. A system of laws that never depends on sex or gender as its touchstone has considerable advantages, and is not as radical a change in thinking as it might at first seem. The past two decades have shown a tendency towards flexibility and sensitivity in the case law concerning the fluidity of gender and sex, but this has not necessarily been reflected in legislation. This experience suggests that legislative attempts to facilitate such fluidity will fail so long as they depend on rigid categories of identity, and that the path towards a genderless and sexless legal system will be better achieved by way of the flexible approach found in case law.

* This article was originally prepared as part of the course Law and the Sexual Citizen. It was subsequently submitted to and received The Hon Michael Kirby Award 2013. It has since been revised to take account of more recent developments in law and policy. As of publication, Daniel Marcantelli is an undergraduate student of Law at Griffith University. Although he does not identify with the terms Queer or LGBTIQ, issues of legal recognition are of great importance to him. Daniel would like to thank Ms Merran Lawler for her teaching and guidance that lead to the preparation of this work.

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I INTRODUCTION

It’s not that pink is intrinsically bad, but it is such a tiny slice of the rainbow, and, though it may celebrate girlhood in one way, it also repeatedly and firmly fuses girls’ identity to appearance.¹

The question of “blue for boys, pink for girls” is no longer novel. It features in classroom discussions in secondary school sociology classes and even the household dining table — and there can be few greater measures of non-novelty. The world was nonetheless rocked when it was revealed that a family in Canada had chosen to raise their new child, Storm, without a gender. The case of Storm is unsettling perhaps because it forces us to question one of the most basic aspects of our identity — our gender. One criticism levelled at the concept of a genderless child came from a specialist in gender identity disorder in children, who argued that the important thing for a child is not to have their gender identity dictated to them, but instead that they have some anchor or reference point from which to define themselves. This suggestion indicates a contrary reality to that assumed by law. Historically, law has examined our personal histories and, through our interactions with it, moulded and shaped them, adding an extra piece or embellishment here and there. Law has always preferred that it knows us. The legal process demands our names and authentication of our identity: one must use passports, licenses, and other permits, all of which attach to *us* and assume continuity to *us*. But this permanency to identity is largely a legal fabrication. As early as the 18th century, the

¹ Peggy Orenstein, *Cinderella Ate My Daughter: Dispatches from the Front Lines of the New Girlie-Girl Culture* (Harper Collins, 2011) 58.

German scientist George Christoph Lichtenberg recognised that identity was essentially something that man chose himself.²

Our identity has long been the source of our authenticity, as both citizens and as human beings. Through its insistence on our continuity and its demands that we *exist*, law compels us to seek that authenticity. The rub is that only certain types of identity are acceptable to law. So far the problems to which identity gives rise have been answered, unsuccessfully, by identity politics. Its lack of success is a result of its inherent requirement that we fit neatly into categories that are capable of in-group protection. Those who do not “tick-the-boxes” of one identity can be left without adequate protection from discrimination, neglect, or mal-treatment.

Lamentably, our identity is not only how we seek authenticity before the law, but it is also integral to how we live our lives — how we interact. It is more than the labels that we ascribe to ourselves (or have ascribed to us); they are also relied upon as adjectives and verbs. They describe what we are through their connotations and they proscribe our behaviour — identities are performed and performative.³ They have drawbacks in that they tend towards results in subjective assumptions, but they are nonetheless identities — we need them to identify *us*. A solution to the crisis of sexual identities that defy normative assumptions is to alter law; not in the usual sense of law reform but instead by altering the way in which law uses and defines identities. Not the usual fare of chopping and changing, consolidating and unifying. Rather, *reform* in the sense of re-making, and doing so in a very fundamental way.

II LAW'S REGULATORY POWER

Through its administrative functions and formal requirements, law structures our lives. Traditionally, law has sought to be informed by other disciplines in certain matters. For example, the law looks to the advice of forensic experts in criminal matters, psychologists and other medical practitioners in sentencing, and to biology on matters of sex. One Australian case provides a prime example of the significance of science in

² 'I believe that man is in the last resort so free a being that his right to be what he believes himself to be cannot be contested.' See George Christoph Lichtenberg, *The Waste Books* (R J Hollingdale trans, New York Review Books, 1990) L 98 [trans of: *Sudelbücher* (first published 1799)].

³ Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40(4) *Theatre Journal* 519.

matters of sex and gender. *Re Jamie* concerned a 10-year-old boy who had been diagnosed with gender identity disorder.⁴ Throughout the judgement, Dessau J referred to Jamie as a female, and was persuaded by Jamie's repeatedly *identifying* as a girl. The law had, for the 10 years and 10 months prior to the judgement, treated Jamie as a boy merely on the basis of his (her) biological make-up.⁵

There were two central themes in Dessau J's judgement: medical testimony and Jamie's testimony. The law relied, as has been its custom, upon medical (read: biological) evidence in coming to conclusions about the appropriate "identity" for Jamie. This included the affidavits of two specialist psychiatrists, an endocrinologist, and a separate 'Family Report' (also prepared by a Doctor).⁶ Through its positioning as *expert*, science (in particular, psychology) was given *pseudo-law* making powers. With each case in which this occurs, the particular scientific viewpoint becomes increasingly interwoven with the law 'til the two appear as if a seamless cloth. This has tacitly been the fashion in which law has carried on. However, this leaves many in the dark and ignores shortcomings in other disciplines, each of which are subject to internal disputes not readily apparent to outsiders. It is worth noting the criticisms that have been levelled at the pathologisation of 'gender identity disorder'.⁷ Dessau J failed to enter into any discussion as to whether gender can necessarily be the subject of mental illness in this way. It is somewhat at odds with an earlier case on family law that placed the test of sex on the mind, rather than the body.⁸

Law frequently bows to the expertise of other disciplines, perhaps seeing them as more certain or concrete. Nevertheless, it does from time to time create its own reality without outside assistance.

⁴ *Re Jamie (Special medical procedure)* [2011] FamCA 248.

⁵ An issue, not the subject of this article but nonetheless pertinent, is the conflation between sex and gender. The issue has been discussed in numerous other publications. See, eg, 'Gender Dysphoria' in American Psychiatric Association (eds), *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 5th ed, 2013); Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, July 2013, 4.

⁶ Australian Government, above n 5, 6.

⁷ Katherine K Wilson, 'The Disparate Classification of Gender and Sexual Orientation in American Psychiatry' (Paper presented at the Annual Meeting of the American Psychiatric Association Toronto, Ontario Canada, 2 June 1998).

⁸ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

III LAW'S REALITY

Law, through its functioning and its privileged position in society, is able to shape a certain reality. It is in this reality, rich with ceremony and protocol, that law carries out those functions that subsequently leave a mark on the world.⁹ It is the law's power as an authorising and legitimising force that allows its reality to impact the world at large. There is a limitation intrinsic to this system — the law's own perceived omniscience. For example, in colonial India the Commonwealth powers ignored the subtle distinctions between different groups and instead collapsed them into a single homogenous group.¹⁰ The reality was and is far more complex. For instance, the group now identified as '*hijra*' were treated as 'eunuchs'.¹¹ This re-casting ignored important cultural differences and the significant role of *hijra* in native customs and practices.¹² The loss of distinct identity suffered by the *hijra* occurred within law's reality, the result was a stripping, and subsequent reassignment of identity.¹³ Reassignment that was not, in theoretical terms, forced — it simply happened. By re-classifying some groups as "criminal tribes", the colonial powers effectively limited citizenship to those groups to which it could readily recognise and which were 'acceptable' to the law of the time. The lasting impact of this substitution of the previous reality with one of law's own can still be seen in India today.¹⁴

Although law does to an extent rely upon other disciplines in arriving at its decisions, it has also chosen to ignore them to the extent it feels appropriate. Some of the extreme examples are to be found in regards to sexuality. The law in one instance ignored expert testimony to the effect that a boy was in fact capable of obtaining an erection and could thus be charged with sodomy. The bench drew a distinction between the *physical* possibility of a boy obtaining an erection, and the *legal* one. The judge found as a matter of law that a boy of 14 could not become erect, despite medical and eyewitness

⁹ *Why are Ritual and Ceremony Important in Courts?* (28 January 2007) Alan Macfarlane <<http://www.youtube.com/watch?v=VfESgFRiDkQ>>.

¹⁰ *Criminal Tribes Act 1871* (Imp) 34 Vict.

¹¹ *Ibid* ss 24, 26, 27.

¹² Serena Nanda, *Neither Man nor Woman* (Wadsworth Publishing Company, 2nd ed, 1990) ix.

¹³ It should be noted that the *Criminal Tribes Act* had the same effect on many other groups who had a special and significant identity within their culture.

¹⁴ Ratna Kapur, 'Out of the Colonial Closet, But Still Thinking "Inside the Box": Regulating "Perversion" and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns' (2009) 2(3) *National University of Juridical Sciences Law Review* 381.

testimony to the contrary.¹⁵ In another instance the law ignored biological definitions of sex, instead choosing to create its own definition based on more than physical biology.¹⁶ In yet another case, from India, the law in essence ‘falsified’ sexual identity when Judge Vimal Kumar recorded two females as being married despite laws restricting marriage to man and woman.¹⁷

Historically, the law is notoriously slow to change. However, in 2001, the case of *Re Kevin* illustrated how the law may alter its reality in order to deal with the challenges presented by a more sexually diverse world.¹⁸ The innovation was the decision of Chisholm J to split from the sciences and make a separate ‘legal’ construct of sex. This is not in itself a solution to the problem of identity, but is indicative of a pragmatic way forward. Although it fails to address the problem of sexuality based identities, it does provide an interesting precedent for how law can make its own constructions of identities; constructions which, through careful judicial creativity, overcome some, though not all, the hurdles to which identity gives rise. Chisholm J’s reasoning suggests that law need not be so pre-occupied with the biological. Instead, there is a ‘freedom to be ... what we believe ourselves to be.’¹⁹

However, we must not be so hasty to praise Chisholm J’s reasoning. It was cunning and served that particular case well; the applicant had to live and to be seen to exist as his ‘new’ gender. In regards to marriage equality, *Re Kevin* is at risk of privileging transsexualism, and, for the purposes of family law, assimilating transsexualism into the category of the hetero-normative. This case allows a person to change their gender identity completely, but its result is insufficient to answer the problems presented by other aspects of identity. It is, nonetheless, a step forward. It is a specimen that demonstrates how the law may, for its own ends, alter its reality in order to conceive of something that may not otherwise be possible — a man with an XX chromosome.

¹⁵ See generally Yorick Smaal, ‘Consent and Capacity: Boys, Sex and the Law in the British World’ (Paper presented at the 30th Annual Conference of the Australian and New Zealand Law and History Society, Griffith South Bank Graduate Centre, Griffith University, 13 December 2011).

¹⁶ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

¹⁷ Dipak Kumar Dash and Sanjay Yadav, ‘In a First, Gurgaon Court Recognizes Lesbian Marriage’, *The Times of India* (online), 29 July 2011 <<http://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms>>.

¹⁸ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

¹⁹ Lichtenberg, above n 2.

Although it did not eliminate the place of identity as an important construct in law, *Re Kevin* has eroded its reliability. By recognising the more fluid, and thus elusive nature to identity, Chisholm J has changed the previously concrete nature of identity into something that has limitations as a foundation law. Nevertheless, the law must still find a way of creating a reality in which identity is not a foundation. If it succeeds in doing so, then the barriers experienced in law shall be lessened. The language of law will no longer have to *work* to be inclusive, it will simply *be* inclusive.

IV SANCTIONING NON-BINARY GENDER/SEX

The regulatory grip, somewhat loosened by *Re Kevin*, has been somewhat tightened in more recent years by reform targeted at 'inclusive' policy with regards to people of 'unspecified sex/gender'.²⁰ In some respects, such an approach represents a move towards a more inclusive political environment, cognisant of members of society that do not fit "traditional" hetero-normative identities. However, this approach does not necessarily afford the flexibility appropriate to the issue at hand.

Despite a trend in medicine away from treating non-conformity to binary sex/gender identities,²¹ legal instruments still place reliance on medical statements as support for sex/gender identities.²² The issue was not live, though it was present, in *NSW Registrar of Births, Deaths and Marriages v Norrie*.²³ *Norrie* was concerned with whether the NSW Registrar for Births, Deaths and Marriages ('BDMR') was confined to registering a person's sex as 'male' or 'female'. The High Court of Australia upheld the decision of the NSW Court of Appeal, finding that the BDMR was not so confined, and that he was in a position to register *Norrie's* sex as 'non-specific'.²⁴

The statute that was the primary concern in *Norrie* still provides that the registrar should place reliance on medical reports as to a person's gender identity,²⁵ as do

²⁰ Australian Government, above n 5, 4 ('Indeterminate', 'intersex' and 'unspecified' are the terms used to describe a 'third option' for people not identifying as 'male' or 'female').

²¹ 'Gender Identity Disorder' is no longer considered to be a form of illness. Gender dysphoria is however described as the 'distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender' (American Psychiatric Association, above n 5).

²² See, eg, *Births, Deaths and Marriages Registration Act 2003* (Qld) s 24(4)(b).

²³ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 ('*Norrie*').

²⁴ *Ibid.*

²⁵ *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32DB requires statutory declarations from two doctors, or registered medical practitioners, verifying that an applicant has undergone a sex affirmation procedure.

equivalent statutes in other Australian jurisdictions.²⁶ In this way, they restrain law from taking the somewhat flexible approach hinted at by Chisholm J in *Re Kevin*. In Queensland, for example, a person must have undergone some surgical procedure to have a different sex recorded on their birth certificate.²⁷ Such procedures are not readily available, nor are they viable options for many people who do not identify with the sex/gender ascribed to them at birth, but for whom an alteration to their sex as recorded on the BDM Register is appropriate.²⁸ A person wishing to have such an alteration (to the Register) is hamstrung by an inexplicably rigid legislative regime that fails to realise the realities “on the ground” as it were, for people who experience greater (relative) fluidity in their sex or gender identities.

V SHIFTING THE FOUNDATION OF LAW’S REALITY

The movement in law is generally towards giving words their *contemporary* ordinary meaning.²⁹ However, the ruling in *Re Kevin* suggests that in the context of sex and gender, greater weight ought to be given to the way in which a person is treated and lives when determining their gender. Thus the ‘ordinary and contemporary meaning’ might be found by asking, without anything more than a cursory glance, ‘is this person a man or a woman?’ Chisholm J’s approach was outstanding for its acquaintance with the nuanced aspects of transsexualism, but it failed, for good reason,³⁰ to break into a broader discussion on the challenges of working within the ‘two-sex, two-gender’ system of regulating sexual identity.³¹

It has been suggested that, due to the embedded nature of our assumptions about gender and identity, it is ‘probably impractical for the law to abandon the two-sex assumption.’³² Given the tendency of the (common) law to favour ordinary language, this is probably correct — in our “ordinary” language people are either one or the other.

²⁶ See Australian Government, above n 5, 4.

²⁷ *Births, Deaths and Marriages Registration Act 2003* (Qld) s 24(4)(b), Sch 2.

²⁸ It was submitted, and favourably treated, in *Norrie* at [30], that the purpose of the BDMR is to state ‘the truth about matters recorded in the Register to the greatest extent possible’.

²⁹ *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509, 514 (Kitto J) cited in *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

³⁰ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 [18].

³¹ *Ibid* [17] (Chisholm J) quoting Vivienne Muller, ‘Trapped in the Body – Transsexualism, the Law, Sexual Identity’ (1994) 3 *Australian Feminist Law Journal* 103.

³² Douglas K Smith, ‘Transsexualism, Sex Reassignment Surgery, and the Law’ (1971) 56 *Cornell Law Review* 963, 972.

Instances of “other” sexual identities are experienced as novel, not ordinary. It is, however, possible for the law to move to a ‘no-sex’ model — an approach that echoes a number of writers on the subject of transsexualism and law.³³ The question is whether or not sex and gender are necessary for our authenticity before the law. *Re Kevin* perpetuates the idea that with a certain identity there is a certain set of characteristics. Whilst Chisholm J notes that there are ‘no doubt different ways of being a man’,³⁴ there are telling examples in his Honour’s extracts of affidavits which suggest that what was persuasive was the extent to which Kevin was perceived as a “manly-man”. For example, the description of his home as having a ‘bachelor-like, Spartan appearance’,³⁵ and that his ‘physique, mannerisms, speech, attitude, and interests all demonstrate his maleness.’³⁶ These extracts, if not read in the proper context in which they were given, risk perpetuating the idea that there is a “correct” way of *performing* gender identities. The result may be a perpetuation of fixed concepts surrounding outward appearance and superficial aspects of ‘maleness’ if future cases do not pay heed to the check that Chisholm J placed on the evidence. These examples are useful *only* to the extent to which they demonstrate that Kevin’s being seen and treated as male, for all intents and purposes, was the crucial factor.³⁷ He is not seen as a woman pretending to be a man, but is *believed* to be a man. The reasons for which people around him perceived him as a man are irrelevant in determining gender.

In some cases, regimes have come to recognise the importance of a fluid understanding of sex and gender identities. The introduction of sex-X on Australian passports, as an alternative to male or female, affords greater flexibility to those not identifying with either of the “traditional” binary-sexes. Such policies are an improvement over older arrangements, however they need to be approached with some caution. The passport policy allows for individuals who may more strongly identify as X to still be identified on

³³ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, [17] (Chisholm J). His Honour noted a number of works which advocated that the gender question ought not be asked at all, including: Isis Dunderdale, ‘The Human Rights of Transsexuals’ (1992) 17(1) *Alternative Law Journal* 23; John Mountbatten, ‘Priscilla’s Revenge: Or the Strange Case of Transsexual Law Reform in Victoria’ (1996) 20 *Melbourne University Law Review* 871; A Sharpe, ‘Judicial Uses of Transsexuality: A Site for Political Contestation’ (1996) 21(4) *Alternative Law Journal* 153.

³⁴ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, [69].

³⁵ *Ibid* [59].

³⁶ *Ibid* [57].

³⁷ *Ibid* [68].

their passport as ‘male’ or ‘female’ for safety purposes.³⁸ That nuanced aspect of the policy juxtaposes rather curiously with the treatment of sex and gender in other regimes, such as the State-based BDM Registers, where deviation from ‘male/female’ is still treated somewhat pathologically — as something requiring medical evidence, rather than self-identification of the individual. In allowing someone who identifies with ‘sex-X’ to do so, whilst still allowing them to be identified on paper as ‘male’ or ‘female’, the policy shows a greater connection with the day-to-day realities of the world, in which people who deviate from the “norms” of sex or gender face discrimination and mal-treatment.

VI CONCLUSION

Law, as an omnipotent discourse community, has profound effects on our identities. It makes assumptions about what we are and ascribes a permanency to that identity. Identity is central not only to our existence in the legal realm, but also our social and cultural realms. Identity is largely about what makes us different and the ways in which we make ourselves unique. Identity is a safe haven, to the extent that it is unique to us, and is representative of a freedom to be us. The limitations to which it gives rise are found when regulations are grounded in matters of identity. Since law must be generally consistent and certain, it is not possible to create a legal system that caters for all identities. Instead, it is necessary to create a legal system capable of treating identities as fluid and unfixed. Ideally, such a legal system would consider identities to be ultimately meaningless. The result would be a legal system better equipped to deal with the new, unusual, or unique.

³⁸Australian Passport Office, *Sex and Gender Diverse Passport Applicants*, Australian Government, Department of Foreign Affairs and Trade
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