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THE JOURNAL OF GENDER, RACE AND JUSTICE

A JOURNAL OF THE UNIVERSITY OF IOWA COLLEGE OF LAW

Fall 1998

Volume 2 No. 1

Happy Endings:
Law, Gender, and the University
Deirdre McCloskey

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Deirdre McCloskey*

It could have happened this way:

McCloskey v. State of Iowa, 347 U.S. 483 (1999)

Plaintiff, a transsexual professor of economics and of history at the University of Iowa, formerly "Donald," alleged discrimination on the basis of gender preference. It was stipulated that after her transition from male to female she was, with the concurrence of administrators at the University, assigned to the worst classes, denied regular raises, and shunned by colleagues. The Court held that gender preference was not a fundamental right, which would trigger strict judicial review. Further, the meaning of "sex" in relevant statutes prohibiting discrimination did not cover Ms. McCloskey's status. Therefore, the decision of the U.S. Court of Appeals for the Seventh Circuit, Judge Richard Posner presiding, that on utilitarian grounds the hurt to McCloskey's colleagues in having to look at her every day offset the damage to her person and income, was upheld. "The Constitution of the United States," wrote Justice Thomas for the majority, "does not mention a right to be weird."

It did not happen that way, though in an earlier time, perhaps before the gender revolution of the 1960s, it could have. In a small state college in Arkansas it is happening to a transsexual professor of mathematics. In fear of that result, a transsexual in a small college in Pennsylvania has not come out. But in big or distinguished places of higher learning it does not happen, nowadays. There is a transsexual professor of history at Swarthmore, and a transsexual professor of political science at Washington. The chair of a science department at a southern university is about to transition. One of the California State colleges has a female-to-male math professor. The Domestic Bursar of Exeter College, Oxford, a former naval commander, transitioned in 1993. When Newnham, an all-female college at Cambridge, appointed Rachel Padman, a distinguished senior astrophysicist, in 1997, the only voice raised in protest was that of Germaine Greer. *The (London) Times* gave front-page coverage of her essentialist view that someone who was a man twenty years ago couldn't possibly be reckoned now a woman. The other papers made Greer's nastiness the story.

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In Iowa, in 1995, it happened like this:

Donald McCloskey was standing outside the dean's office at the College of Business one day in October 1995, on another matter. Dean Fethke wandered through on his way to his office, and noticed McCloskey's ear studs. Small, but both ears. McCloskey and Fethke had known each other since 1980 and were on good man-to-man terms. Fethke thought he knew that McCloskey was heterosexual, even macho, or at least as macho as professors can manage. In the gender-policing way that straight men have with each other, he smiled and said jocularly, "What's this?! Have you turned gay?"

McCloskey decided then. It's coming out anyway, he said to himself. It's gotten out through the Iowa Foundation.

"You want to know, Gary?"

"Uh . . . yes. Come into my office." He shut the door.

Don sat and talked, with this ironic, tough-guy demeanor, the last defenses of masculinity: Don was transsexual; he had started hormones last month; two months before he had come to this realization; he and Joanne were getting divorced; he had been experimenting with more crossdressing since January; he had crossdressed since age 11; and he was terrified of how the University community would react to his realization that he could and would become a woman.

Gary sat stunned for a moment. He and Don were both economists, conservatives by academic standards, free-market men. Then he spoke as a dean:

"Thank God . . . I thought for a moment you were going to confess to converting to *socialism!*" Donald laughed, relieved—the dean was going to react like a friend.

"And this is *great* for our affirmative action program—one less man, one more woman!" More laughter, more relief.

"And wait a minute—it's even better: as a woman I can cut your salary to 70 cents on the dollar!" Not quite so funny!

And then seriously: "That's a strange thing to do." Donald agreed.

And Gary continued: "How can I help?" The month of hormones was working, but even without the hormones, Donald would have felt like crying.

Gary kept his word, acting as an advocate for Donald and his strange choice in the administration and the faculty. Later Deirdre would advise other transsexuals: What you want to do is to get the support of the top person in your organization. Never approach this through channels, from the bottom. The lower people will discriminate in fear of imagined gender anxieties at the top. But the top people have fewer anxieties, not more.

Not all of them, of course. On a mellow October evening his wife Joanne came home panicked.

"It's all over campus," she said. Her worst fear. Indeed, her only fear—that People Would Know and that she would be shamed. She could never develop much fear on his behalf for what he faced.

"Good Lord. How did that happen? I wanted it to be confidential until I leave for Holland in January."

"Well, that's not what's happening. My dean in Nursing told me she knows. She heard it from someone in the Iowa Foundation." The Foundation is the fundraising arm of the University.

"You've been telling some of your colleagues in Nursing," he pointed out. "One of them is married to someone in the Foundation."

"No, no. That can't be. It must have leaked through you."

Donald later learned from two high administration officials that someone in the Foundation was spreading it as juicy gossip. The high officials were annoyed. "This person is notorious for getting positions by telling tales," one of the officials told him. Some weeks later, Donald called up Darrell Wyrick, the Director of the Foundation. By that time, there had been two stories on the front pages of the *Des Moines Register*, an arrest and confinement overnight in a locked mental ward at the behest of Donald's hysterical sister, and the whole University was talking about it.

* * *

"Hello, Darrell. This is Don McCloskey."

"Hello, Don. How are you?"

"Not so well. You've heard."

"Uh, yes."

"I want you to know that I was outed by someone in your organization."

"What do you mean, Don?"

"I mean that someone in your hire went around telling everyone about my plans. I think you should advise him or her not to do this kind of thing again."

"I don't understand. What do you mean, Don?"

"I mean that your person did me tremendous damage. I've been told by people—people who should know—that someone at the Foundation spread the news of my transsexuality."

"I don't understand. What do you mean, Don?"

"Darrell. It's not that hard to understand. Either you have decided not to do anything, or to apologize."

"I don't understand. What do you mean, Don?"

"Good-bye, Darrell."

"Good-bye, Don."

* * *

As soon as the news was out, Donald decided to tell as many people as he could. It would be better appealing to their best sentiment—love—rather than letting it spread through their worst—glee at another's discomfort. That is Dairdre's other piece of advice to transsexuals: get ahead of the news.

Tell people yourself before they hear of it. Don't be ashamed, or be seen to be ashamed.

On the same principle, he spoke openly to newspapers, to the fury of his wife. As a result, the newspapers told of an unusual personal decision instead of a scandalous, shameful act. Same facts, two different stories. One salacious tidbit did appear in the British *Independent*, collected by a stringer with a British accent working out of Los Angeles. Fleet Street and its progeny. Otherwise the news was good, from the students' *Daily Iowan* to *Harper's* magazine.

The administration was supportive. Donald went to see the Dean of Liberal Arts, who was warmly courteous, and who agreed with Donald that he/she might want to be involved in Women's Studies. Nancy Hauserman, the ombudsperson and a specialist in employment law, worked to find precedents, and at a meeting with Ann Rhodes, Vice President for University Relations, told Donald she had found one.

"There's a case in a business south of here. I've spoken to the person involved and to the bosses."

"That's wonderful, Nancy. Thank you very much."

"Not at all. I can put you in touch with her."

"Is her name 'Anna'?" Nancy looked startled at the question.

"Uh, yes. How do you know?"

"She's a member of my club here in town."

"Goodness! Well, I guess then you're already in touch with her."

"Yes, dear. But thank you very, very much." The loving effort to do justice was what mattered. A few weeks later, Nancy accompanied Donald to court to change her name to Deirdre. Nancy knew courts. Even better, she gave Deirdre a greeting card. On the front sat a goofy woman in the lotus position. "An interesting Birthday Thought: Some Eastern thinkers believe that life is a journey and beyond that, all are reincarnated from one level to a higher, more perfect level." Open the card: "So in essence, all men eventually become women."

One might think that the administration was courageous, temperate, just, and loving out of pure prudence. After all, universities in the 1990s are governed largely by the advice of terrified, or experienced, lawyers, who like economists are specialists in the virtue of Prudence. Anyone who is not paranoid about legal liability in university life is not paying attention. McCloskey may have been treated in a kindly and thoughtful manner because there are laws looming in the background against discrimination, and many enriched victims in Palm Beach.

That is possible. The administrators may have said to themselves, "Good Lord, we have a potential suit on our hands. Let's bend over backwards."

If that were so one would expect the faculty, who are indifferent to legal consequences, to act *without* kindness or thoughtfulness. But that was not the case. The faculty men were of course uncomfortable, some of them treating Deirdre when she returned to campus briefly during her year in Holland as

though she had Dutch elm disease. They were not harshly impolite, just graceless, like boys. The emotionally mature men were better, and started opening doors for her. She was often surprised by who could and could not handle it. One never knows, "do" one?

The women were more skilled, when they were not motivated by some cruel feminist theory that McCloskey Is Butting In. They were welcoming—that sweetest word. Before all the news broke, Donald came out to a luncheon group. The men and women sat gap-mouthed. Lola Lopes, an experimental psychologist and a colleague of Donald's/Deirdre's at the business school, had to leave for another meeting.

"I have only one thing to say to you, Don," she said as she put on her coat.

"What's that, Lola?" They were friendly anyway.

"Welcome." The tears welled.

So the force of the law, the threat of suit, does not appear to explain the good outcome. Deirdre was tenured, a senior professor, pretty well-known in economics, and not only because she was once a man. It would have been a lot easier to harass her if she were unproven in academic life. Certainly no governmental action could be expected to protect her. Transsexuals are far down the list of potential protected categories, well off the radar screen. Iowa City, Donald was amused to find out, passed an ordinance just as he was coming out that forbids housing and employment discrimination against transsexuals. San Francisco, Minneapolis, Houston (a strange one, caused by a tough litigator in town who is a new woman herself), and Iowa City, population 55,000.

The virtue of Justice, it could be argued, does not on the whole come from laws, black letter or case law. It comes, as Stanley Fish would argue, from an interpretive community.¹ Or as James Boyd White puts it, it comes from "translation," an imaginative act of placing oneself in other shoes.² Don't condemn the transsexual until you've walked a mile in her high heels. Both are saying that justice comes from a conversation: "Whenever we talk we create a character for ourselves and a relation with others; we offer to constitute a community of a certain kind."³ He asks, "Shall the law be a force for multivocality, for the acknowledgment of the other—a species of translation . . . —or shall it be reduced to an instrument of bureaucratic and theoretical power?"⁴

McCloskey had experience of that kind of bureaucratic and theoretical power, the failure to see law as a conversation. When he was Donald he knew

1. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989).

2. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1989).

3. *Id.* at ix.

4. *Id.* at 267.

it only conceptually, watching with amusement his colleague Richard Posner in the early days of law and economics at Chicago. Donald was well disposed toward the Chicago free-market approach until the spring of 1994, when he tried to teach out of Posner's *Economic Analysis of Law*.⁵ The only virtue in utilitarianism is Prudence, something an economist cannot take lightly, and should commend. But she should not imagine the world is made of it entirely. Posner does, and shows his contempt for the virtue of Justice on every page. His wholly prudential (that is, utilitarian) analysis of rape⁶ will be enough to keep him off the Supreme Court. And on the left, Donald knew Duncan Kennedy in college, following with horror Duncan's career of making law into bureaucratic and theoretical power alone—a nasty, hateful conversation. These men of the right and the left have been unjust.

McCloskey's conceptual knowledge grew an inch a decade. But in autumn of 1995 he experienced the failure of law as conversation in his life. Her life.

In early November the news was out. He was known. He was sitting in his living room giving an interview to a reporter from the *Cedar Rapids Gazette*, who was trying to catch up with the story as covered by the *Des Moines Register*, when a knock came at the door. Sheriff's deputies came in and arrested him, taking him in handcuffs through the university hospital to a locked ward. His sister had gotten a former colleague at the University of Chicago, a man named David Galenson, whom McCloskey had caused to be hired at Chicago, to co-sign a committal request, and had found a local judge who would sign it. His sister did it again two weeks later in Chicago, but that lay in the future. Donald was not shown the claims his sister had made, namely mistakes or perjury, depending on one's judgment of her mental state. After a night of terror in a madhouse and \$3000 in legal fees, Donald was released.

The University that with one hand was treating him justly, was, with the other hand, treating him unjustly. It's no wonder: institutions are not people, and even people can act inconsistently. The Department of Psychiatry was terrified by the case. What this meant was that it bent over backwards to ignore McCloskey's civil rights. Its main worry was that McCloskey would be released and would promptly shoot himself. No inconvenience or damage or terror imposed on the patient would be allowed to weigh against the Department of Psychiatry's concerns of liability. (McCloskey was never in fact a patient. He was seized by the law, and was not under treatment; he had never had a day of mental illness). Hospitals, like universities—and most specifically university hospitals—are run by lawyers.

That is what law does when made into Power instead of Conversation. Of course it must be power, sometimes. But the macho delight in moving at once to state power, to hardball, is bad for communities, and is not in fact how they work. They have virtues and vices other than self-interest. The struggle against

5. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

6. *See id.* at 218.

oppression is not always bettered by using law in a hard-nosed fashion. The left and the right agree on this overused hardness. It is an economist's duty to point out the unintended consequences of Getting Tough With Criminals, or Using the Law to Right Inequities. Justice Holmes delighted in the cruel violence of Power in the law. How masculinist of him, poor dear, traumatized by the Civil War.

When the law's violence combines with the pretensions of science, the result is unhappy. This is the case of psychiatry, which does good, doubtless, but also does harm. A week after being released, Donald went over to the hospital, as the court had ordered, to be interviewed by a psychologist, a young man with some experience at the university program for transsexuals at the University of Minnesota. Uh, oh, Donald thought, one of the American university programs following Johns Hopkins. Johns Hopkins had once been a help for transsexuals, but in the 1970s it was taken over by psychiatrists who wanted to "cure" them. Medicine could help by carrying out the transsexual's desire. No one had ever been cured, anywhere, anytime, in the history of psychiatry, yet the Johns Hopkins psychiatrists kept on racking their "patients." Help or medieval "cure," he thought: it depended on which example of disease you used. Is it help, in the form of hormones and operations, like plastic surgery after a disfiguring auto accident? Or should one hurt the patient, delivering a "cure" for silly delusions? Discipline and punish. The silly science of psychiatry. "Vee have vays of 'curing' dat."

The young psychologist was sweet, and better informed than most. But watch it. Nice or not, he's not your friend, thought Donald. And then in a feminine way, or maybe just the self-involvement of a man, he forgot it and talked too openly. The young psychologist's boss was a Dr. Robinson. As chairman of the department, he was somehow to be involved. The Department of Psychiatry had lost all conception of justice in thinking about the matter. A woman professor in the department whom Donald knew slightly had not returned his calls that week. She later wrote him a letter suggesting he move away and start a new life. The silly scientists closed ranks.

After Donald had been talking amiably to the psychologist for an hour or so, Dr. Robinson swept in with the air of a man cutting through all the nonsense to the core of the issue.

"Are you a homosexual?" he asked abruptly.

"Uh, no." Good Lord, doesn't he know the difference between homosexuality and transsexuality, who you love and who you are? Yiddish syntax: This is a *psychiatrist*? Not so funny. Watch out.

"Have you ever had a homosexual experience?"

"No." Sweet Jesus, what is he leading up to?

"Do you wish to become one?" Holy Mary, he's got a category Them in his mind, containing all sorts of threats to Maleness. The man doesn't know anything at all. Donald might as well be "diagnosed" by the average homophobe drinking boilermakers at the American Legion. Watch out. Be careful. Remember: these are not your friends. Jailers rather than healers. Don't

say any of this. Don't get indignant that he doesn't know his job, and can ruin your life with ignorance. Don't. Keep your temper.

"No, I've never wished to become a homosexual," replied Donald as nonchalantly as he could manage.

Dr. Robinson was astonished. "Well, then. *Why are you doing this?!*" Good God in heaven. He has the religious right's theory of homosexuality, as something you decide, like style in clothing. He probably thinks that transsexuality is that sort of thing. And it's worse: he thinks they are the same thing. He thinks homosexuals want to be women and that transsexuals are in it for the sex. Don't say this. Don't. Don't.

He regarded Dr. Robinson with alarm, but did not reply. The young psychologist, embarrassed by Robinson's ignorance, changed the subject. They later wrote a finding for the court, long and self-protecting and irrelevant to the only legal matter at issue: Donald's competence to have a nose job. The judge ignored it, chiefly because he learned that Donald's sister had had him seized again in Chicago, and was going to continue abusing the too-easy law of commitment until she won her point.

Later, the university hospitals of Iowa and Chicago sent Deirdre bills for \$5,000 to pay for her own involuntary, overnight incarcerations. (The *legal* bill in Chicago was higher than in Iowa City, because the attorney was the best man in the Chicago mental health bar: a day of work for \$5000.) Because Deirdre had declined on legal advice to sign a permission to be "treated," Blue Cross would not pay her bills. The natural assumption that her sister and David Galenson would pay turned out to be false, both legally and in practice; they would not pay when asked, and they were not required to. The process is made as easy as possible for people to seize other people for mental examination.

After a year of dunning, the university hospitals gave up their pursuit of their past and present faculty member. At Chicago, a good administrator intervened; at Iowa, the Department of Psychiatry finally responded to threats of legal counteraction. Love and Justice vs. Prudence and Fear.

What conclusion, then, from these stories? The virtue of Justice comes from character, not from the other virtue, Prudence. The Marxist or Chicago-School reduction of all behavior to Prudence is scientifically silly, and does not fit either the case or the kind of community we wish to be. An economist cannot deny that Prudence is important, that people respond to incentives. But no incentive absent the virtues of Love, Courage, Temperance, and Justice can explain how the good administrators at Iowa succeeded, or how the bad ones failed. Universities are not markets, purely (neither are markets, for that matter), and are not arenas for struggles of opposing powers either, not entirely, not without culture and speech. They are speech communities with ethical actors, good and bad. The lawyers and the economist, who are both professional cynics (egged on by a third group of cynics, the journalists), are inclined to miss the point that it is a community we are constructing.

And one more thing, while we're at it: you'd better *really* want to change gender if you decide to act on it. Even in a liberal university community it is not

easy, or cheap. McCloskey lost her immediate family over it. And many former friends, some of them lawyers, shift uneasily when she comes into the room. Most of us accept our gender without question at about age three. The level of rationality in treating the question therefore is low.

Still, if people in universities remember that they are ethical actors as much as they are prudent seekers of self-interest, these places can be as good for sexual minorities as they are for other minorities. As a headline writer for *The [London] Times* put it, entitling an article by Deirdre McCloskey, née Donald, praising academic life as a venue for transition: *It's Good to be a Don if You're Going to be a Deirdre*.⁷

7. Deirdre McCloskey, *It's Good to be a Don if You're Going to be a Deirdre*, TIMES (LONDON) HIGHER EDUC. SUPPLEMENT, Aug. 23, 1996.