

Bridging the Gap: A Look Into Gender Bi-furcated Culture

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## **Abstract**

The purpose of this paper is to explore the gap between medical and scientific knowledge of sex and gender as opposed to the societal constructs of sex and gender, by providing evidence of biological gender nonconformity, psychological gender nonconformity, and intersex birth conditions. This social construct of gender will then be the lens through which American law and legal cases are examined. Concluding in a call to action to higher education, industry and society to examine their own policies, processes and culture and create change for America's transgender population.

## Bridging the Gap: A Look Into Gender Bi-furcated Culture

It is believed that 1 in 1500 to 1 in 2000 children are born with noticeably atypical sex at birth (Blackless, Charuvastra, Derryck, Fausto-Sterling, Lauzanne, & Lee, 2000). This number escalates significantly, to 1 in 100 births, when less noticeable intersex conditions are considered (Intersex Society of North America, 2008). Additionally, as of a 2011 study by Gary Gates, and reported in the Times Union, there are upwards of 700,000 adults in the United States self-reporting as transgendered (2011). Moreover, Dr. Olson of Los Angeles Children's Hospital confirms that she has seen more than a 330 percent increase in the last year [2013] in the number of children identifying as transgender (CBS News, 2014). Conversely, society in general and higher education law and policy specifically have been structured on a dimorphic sexual model, where one is either absolutely male or one is absolutely female. This paper seeks to explore the gap between biological, scientific, and medical facts and higher education law and policy, with sex and gender identity being the discriminating factor.

## Defining Terminology in the Gap

In order to understand why a gap exists one must first separate social construct from biological fact. This begins with an explanation of commonly confused terms. Sex and gender are often mistakenly used interchangeably. Sex is assigned at birth; this is usually based upon physical and biological attributes such as chromosomes, hormone prevalence, and external and internal anatomy. Gender on the other hand is a social construct and involves culturally assigned roles, behaviors, activities and attributes appropriate for males or females (American Psychological Association, 2011). An additional term of importance in discussing gender identity and policy in higher education is intersex.

According to Neil Kaneshiro, of the National Institute of Health, “intersex is a group of conditions where there is a discrepancy between the external genitals and the internal genitals” (2013). Intersex, has supplanted the more familiar term of hermaphrodite. Also critical to this understanding are the terms gender identity, gender dysphoria, transgender and transsexual. This group of terms is tightly bound and frequently confused. Gender identity refers to ones feelings about oneself as male or female, both or neither. Gender identity may be the same or different from an individuals sex assigned at birth. Gender dysphoria is the clinical term for individuals whose gender identity is not the same as their birth gender. Similarly, but more commonly used is transgender; this term defines a group of people whose gender identity does not match their sex (Human Rights Campaign, 2016). Transsexual is someone who is transgender but also participates in a physical transformation either through hormone therapy or surgery or both (University of Colorado, 2016). These terms are not exhaustive, but they are the most common when discussions of gender arise in higher education law and policy.

#### A Social Construct

The data shows that at least 700,000 American adults have identified as transgender, a number that is likely much higher with transgendered individuals not yet willing or able to identify themselves publicly. It is also compelling to note the number of children who are not reported in this figure and the increase in children identifying their nonconforming gender identity to their families and their doctors. Yet society still operates under the umbrella of dimorphic sexuality, meaning that society governs itself under the belief that males and females are so different that they require different rules and laws that will define their behaviors. That there are absolute male standards and

absolute female standards. This does not allow for what Blackless et.al, refer to as an incomplete dimorphism bell curve, where sex and gender are not so absolute but rather they exist on a bimodal continuum (2000, p. 162). What this means is that not all men conform to the expected societal standards of what an ideal male is, nor do women conform to the standards expected of them. That instead there is for each gender a bell curve, and that curve forms a continuum of standards and that the genders actually overlap each other. That sex and gender are not bifurcated but instead that they are deeply variable.

#### Exploring the Law

The variability easily measured in gender and sex is not readily reflected in American law and policy. Indeed any mention of gender otherness sparks heated debate and results most frequently in the continued discrimination of those considered other, and the absence of activity in any forthcoming policy. Constitutional protections are limited and largely reflected in equal protection clause of the Fourteenth Amendment. Indeed, David Smolin states that in crafting the Fourteenth Amendment, “the framers chose not to include political rights (such as the right to vote, which the Fifteenth Amendment would later address) and social rights within the protections of the Fourteenth Amendment” (2012). Moreover, at the time when the Fourteenth Amendment was drafted in 1868, the framers were almost wholly thinking about solidifying the rights granted by the Civil Rights Act of 1866, which “granted citizenship and the same rights enjoyed by white citizens to all male persons in the United States, ‘without distinction of race or color, or previous condition of slavery or involuntary servitude’” (PBS, 2003). Further limitations reside in the broad language used, which Smolin explains is language that leaves open to

debate the question of exactly what does it mean to treat persons equally, what exactly is equal treatment (2012)?

In addition to the 14<sup>th</sup> Amendment are Title VII and Title IX of the Civil Rights Act of 1964. While sex is a protected characteristic under Title VII, it is applicable only to employment rights, protecting employees from workplace discrimination and harassment. Likewise, Title IX also protects sex, however this provides that no person in the United States on the basis of sex, be excluded from... or denied the benefits of... any education program receiving federal funds. However, litigation under these laws is complex and there are many areas of subjective interpretation, and a number of religious exemptions. When exploring American law and gender issues the 19<sup>th</sup> Amendment must be mentioned. In 1920, exactly fifty years after African American men secured the right to vote with the 15<sup>th</sup> Amendment, women secured their right to vote with the 19<sup>th</sup> Amendment. In other words, race became a protected characteristic long before gender. Furthermore, though women today have the right to vote they do not have equal protection under the United States Constitution. In 1923, the Equal Rights Amendment (ERA) was proposed, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on the account of sex" (Biddle, 2014), and as of today it has never been fully ratified. When a bifurcated society fails to protect a gender it recognizes, it is unlikely to protect a gender that it does not.

#### Case Law

Yet there is hope. Case law over the years has made strides towards gender equality, and *Price Waterhouse v. Hopkins* was just such a case, in that it highlighted sex stereotyping as an intentional protection of Title VII of the Civil Rights Act and not just

sex. This distinction is important because it begins to recognize that sex is not so simply defined by socially dictated expectations. The decision forces a pause, a consideration of our biases towards the sexes and questions the validity of those biases. The question in this case wasn't whether or not Price Waterhouse discriminated against Hopkins because she was a woman, but rather because she wasn't woman enough (1989).

While not directly related to a transgender population, that the courts are recognizing sex as a stereotype is the first step in validating and legitimizing transgender people as a gender themselves. Another case that further propels the law into the direction of protecting sex as a spectrum rather than a binary is *Student v. Arcadia Unified School District*, where a trans male student who had identified as a male since early childhood, was clearly discriminated against by the school district in regards to bathroom, locker room, and other accommodations. And while this case did not result in a traditional decision, it did result in a resolution agreement which would not only alter the student's life, but the lives of other transgender students current and future, because the Department of Justice and the Department of Education both concurred on the violation of the child's rights under Title VII and IX and required the district to implement policies that would create a safe, inclusive environment for transgender students and provide necessary training for all staff and faculty to prevent harassment of such students (2013).

### Conclusion

There is significant scientific and medical evidence that sex is not an absolute determination, that in fact sex is dimorphism bell curve, where neither male nor female are absolute but are instead a deeply varied spectrum. There is also a preponderance of

evidence that suggests that gender is not a biological fact but rather that it is a social construct where a culture assigns expected standards of appearance, behavior and attitude depending upon a mistaken notion of absolute gender where one is either absolutely female or one is absolutely male. It is clear that the law is poised to protect this significant class of people, but slow in responding to this evidence. Likewise, it is equally clear that things are changing. The law moves forward, propelled by injustice and the cases brought before it. And the need is perhaps greater now than ever before; society has expanded the conversation if not the acceptance, but that too is growing for a population of people who do not conform to gender standards, who choose who they are based on how they feel, and it is a population that is at once growing and becoming less afraid to tell the world who they are. It is the purpose of this paper to present this evidence in such a way that it compels higher education, industry and society to examine their own policies, their own processes and their cultures and to reflect upon, and create change for a growing body of students who are neither absolutely male nor absolutely female. It is the purpose of this paper to begin to bridge the gap.



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