

The Brain-Sex Binary in Law:

The influence of neurological theories of sex and gender on legal decision- making for trans and intersex minors

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degree of

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Under the supervision of Distinguished Professor Isabel
Karpin and Associate Professor Karen O'Connell

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Aileen Diana Kennedy, declare that this thesis is submitted in fulfilment of the requirements for the award of Doctor of Philosophy in the Faculty of Law at the University of Technology Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis. This document has not been submitted for qualifications at any other academic institution. This research is supported by the Australian Government Research Training Program.

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Abstract

The brain is the latest candidate in an historical search for a reliable and fixed biological marker of 'true sex' that has permeated every aspect of Western culture, including law. Different physical characteristics, from gonads to hormones to chromosomes to genitals, have previously been candidates for a fixed, universal, and authentic marker of sexed identity. Each of these has, in its time, done the work of configuring binary sexed biology as normal, natural, and pre-cultural. Each, in turn, has faltered or failed as a convincing biological anchor for the binary sex categories of male and female. Attention has most recently turned to the identification of a brain sex binary in the discipline of neuroscience. This thesis critiques this most recent turn as well as the sometimes uncritical endorsement of this perspective by law and legal actors.

Law, alongside medicine, has been an integral part of the quest for a biologically-fixed gender binary. It is a primary means of drawing regulatory and definitional boundaries of sexed identity. In this thesis I examine how law determines and differentiates 'male' and 'female' in a series of contested areas of sexed identity, namely those cases authorising medical interventions to alter the embodied sex characteristics of transgender and intersex minors. Ultimately I argue that law's reliance on neurology's 'brain sex binary' is no more helpful than earlier biological measures in ensuring just outcomes. Rather I argue that what is needed is greater acceptance of dynamic complexity and diversity in the domain of sex/gender. Law must retreat from its aspiration to create, define, and regulate artificially bounded sex categories of male and female which can lead to violations of embodied integrity and a betrayal of autonomous rights of intersex minors. Instead, law must allow liminal embodiment and identity to be normalised and accepted. That is not to argue that all intersex or transgender people have to remain 'liminal', but rather that law should support diversity of identity and embodiment and allow people to work out their own needs.