

# Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital "Normalizing" Surgery

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ALLYSHIP TO THE INTERSEX COMMUNITY ON COSMETIC,  
NON-CONSENSUAL GENITAL “NORMALIZING” SURGERY

ROBERT HUPF\*

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INTRODUCTION

*I serve in this movement as an invited guest.*<sup>1</sup>

Being an ally to a community is a tricky exercise. It often requires individuals to reevaluate assumptions they have taken for granted all their lives, and to recognize instances of privilege that

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1. Jim Rigby, *Oath of a Social Justice Ally*, JIMRIGBY.ORG (July 3, 2013), <http://www.jimrigby.org/oath-of-a-social-justice-ally> [<http://perma.cc/J5TT-JZZK>].

favor one group over another on an institutional level, not just the personal. It also requires putting the lived experiences of those most harmed by societal practices and assumptions at the forefront of any movement for change. What is most difficult about this process is sometimes recognizing the need, even as an enthusiastic ally, to step back or stand down from a proposal to help a community; sometimes, despite the best of intentions, an ally's proposed solution does not address the immediate needs of individuals within that community. These steps are all necessary, however, to establish a true allyship framework of social justice.

One illustration of the difficulties involved in being an ally to a community, concerns the intersex community and its fight against cosmetic, non-consensual genital "normalizing" surgery. While intersex activists have been very explicit about the proposed solution being sought—a moratorium on these types of surgeries—well-intentioned, privileged,<sup>2</sup> allies have proposed alternative solutions. Not only have these contrary solutions been criticized by intersex activists as ineffective in addressing the community's immediate needs, but the adoption and implementation of these solutions by international actors may be preventing future progress on the issue.

This Article will discuss the concerns intersex activists have raised regarding cosmetic, non-consensual genital "normalizing" surgery, highlight proposed solutions by both intersex activists and other allies, and examine the adoption of these solutions by international actors. In doing so, this Article will adopt an allyship framework and focus on the expressed perspective of the intersex community and intersex activists who have discussed proposed solutions to the problem.<sup>3</sup> Part I will begin this discussion by examining the proper

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2. The term "privileged" here is being used to describe noncommunity members that do not, and cannot, carry the same lived experiences as those actually oppressed by an issue; privileged individuals lack the knowledge of the full extent of the consequences borne by community members, even if they have some general awareness of the struggles and adversity being inflicted. As such, they should generally defer to the voices and thoughts of members of the community that do carry those lived experiences.

3. This Article will primarily cite the testimonies, thoughts, and experiences of actual members of the intersex community. This is done intentionally to place the expressed concerns and thoughts of the community at the forefront. Of course, due to internal disagreements and a wide range of variant opinions, there is no *universal* perspective that embodies the thoughts of every member of the intersex community. It is possible that this Article may misinterpret their perspective unintentionally; it is also possible that opinions and perspectives change. At the end of the day, however, an allyship model of writing is necessary when speaking on what issues and solutions are necessary for a particular community and this Article attempts to encapsulate the dominant perspective espoused at the time. See Emi Koyama, *Suggested Guidelines for Non-Intersex Individuals Writing About Intersexuality and Intersex People*, INTERSEX SOC'Y OF N. AM., <http://www.isna.org/pdf/writing-guidelines.pdf> [<http://perma.cc/LUP6-ZK4M>] ("Recognize that you are not

terminology used by the intersex community, particularly noting various disputes and divergent views that have arisen internally within the community on how to self-identify. Part II will be an introduction to the issue of cosmetic, non-consensual genital “normalizing” surgery, including an examination of the history of the procedure and the current status of intersex activists in their struggle. Part III will examine various proposals by scholars on breaking down sex-based binary systems as a possible solution to the needs expressed by the intersex community and the response of actual intersex activists to these proposals. Part IV will examine the adoption and implementation of these proposed solutions by various international agents and assess whether the approaches taken actually solve, or even address, the issue of cosmetic, non-consensual genital “normalizing” surgery. This Article will conclude by advocating for allies to adopt a more allyship based framework of assessment, in particular putting the lived experiences of the intersex community at the forefront of the movement, and withdrawing proposed solutions that may actually hinder, rather than help, intersex individuals.

#### I. SELF-IDENTIFICATION AND TERMINOLOGY

*I will not patronize or rescue the people for which  
I am [an] ally, but will support them in their efforts  
at self determination.*<sup>4</sup>

##### A. “Intersex”

The term “intersex” has a contentious history, even within the community itself.<sup>5</sup> Organization Intersex International (OII) defines intersex as “physical differences in chromosomes, genetic expression, hormonal differences, reproductive parts like the testicles, penis, vulva, clitoris, ovaries and so on . . . . Intersex may be somewhat apparent in innate physical differences in secondary sexual characteristics such as muscle mass, hair distribution, breast development and stature.”<sup>6</sup> Generally, members of the community do not treat

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the experts about intersex people, intersexuality, or what it means to be intersexed; intersex people are. When writing a paper about intersexuality, make sure to center voices of intersex people.”) (emphasis omitted).

4. Rigby, *supra* note 1.

5. Gina Wilson, *The Terminology of Intersex*, ORG. INTERSEX INT’L (Nov. 14, 2010), <http://oiiinternational.com/2602/terminology-intersex> [<http://perma.cc/3M6J-YKL7>].

6. *Intersex FAQ*, ORG. INTERSEX INT’L (Jan. 19, 2012) <http://oiiinternational.com/intersex-library/intersex-articles/what-is-intersex> [<http://perma.cc/F2MZ-NGBB>]; see also Free & Equal: United Nations for LGBT Equality, *LGBT Rights: Frequently Asked*

the term as a self-identity category;<sup>7</sup> instead, the term is used to describe a medical condition or a unique physical state possessed by individuals within the community.<sup>8</sup> Other labels, including male, female, straight, and LGBT are common within the community.<sup>9</sup> In terms of preferred gender pronouns (PGPs), intersex organizations recommend that “[p]ronouns should not be based on the shape of one’s genitalia, but on what the person prefers to be called. . . . [However,] [d]o not call intersex children ‘it,’ because it is dehumanizing.”<sup>10</sup>

### B. “Disorders of Sex Development”

In the medical community, intersex conditions are referred to as disorders of sexual development [hereinafter DSD or DSDs].<sup>11</sup> The decision to drop the term “intersex” when discussing individuals with intersex conditions, and focusing instead on the specific labeling of various intersex conditions, was a result of the 2006 Consensus Statement on Management of Intersex Disorders [hereinafter Consensus Statement].<sup>12</sup> The Consensus Statement concluded that, because terms such as “intersex” are “controversial,”<sup>13</sup> “potentially pejorative,”<sup>14</sup> and “confusing to practitioners and parents alike,”<sup>15</sup> a better term was needed. The Consensus Statement defined DSDs

*Questions*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, [https://unfe-uploads-production.s3.amazonaws.com/unfe-7-UN\\_Fact\\_Sheets\\_v6\\_-\\_FAQ.pdf](https://unfe-uploads-production.s3.amazonaws.com/unfe-7-UN_Fact_Sheets_v6_-_FAQ.pdf) [<http://perma.cc/EWW6-6PXK>] (“An intersex person is born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male or female or as neither. Intersex status is not about sexual orientation or gender identity: intersex people experience the same range of sexual orientations and gender identities as non-intersex people.”); Wilson, *supra* note 5 (“[I]t is simply a way of describing the continuum of differences from wholly male to wholly female.”).

7. Wilson, *supra* note 5. See also *Intersex FAQ (Frequently Asked Questions)*, INTERSEX INITIATIVE (June 29, 2008), <http://www.intersexinitiative.org/articles/intersex-faq.html> [<http://perma.cc/7CC3-6FCC>].

8. See *Intersex FAQ*, *supra* note 7.

9. See Claudia Astorino & Hida Vioria, *Brief Guidelines for Intersex Allies*, ORG. INTERSEX INT’L (2012), <http://oii-usa.org/wp-content/uploads/2012/10/Brief-Guidelines-for-Intersex-Allies.pdf> [<http://perma.cc/FV5R-YYRA>].

10. See *Intersex FAQ*, *supra* note 7.

11. *‘ISGD’ and the Appropriation of Intersex*, ORG. INTERSEX INT’L AUSTL. LTD. (May 22, 2011), <http://oii.org.au/13651/isgd-and-the-appropriation-of-intersex/> [<http://perma.cc/36XE-ZY9U>].

12. Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, in *PEDIATRIC CLINICAL PRAC. GUIDELINES & POL’Y*, e488, e488 (13th ed. 2013).

13. *Id.*

14. *Id.*

15. *Id.*

as “congenital conditions in which development of chromosomal, gonadal, or anatomic sex is atypical.”<sup>16</sup>

Different segments of the intersex community have expressed divergent views on the label DSD.<sup>17</sup> For some members of the community, the word “disorders” pathologizes the existence of intersex individuals and further asserts the need of doctors to “cure” any intersex condition.<sup>18</sup> For others, the term avoids the widely variant definitions of “intersex,” focusing attention on the physical body’s condition and rejecting the somewhat confusing use of “intersex” as a self-identity label.<sup>19</sup>

More recent commentary on the DSD label by intersex activists seems to reject the usage of DSD.<sup>20</sup> Organization Intersex International (OII), one of the premier intersex organizations internationally, acknowledges that while “not all intersex persons like being called intersex,”<sup>21</sup> the creation and usage of the term DSD merely promotes the invisibility and homophobic exclusion of the intersex community.<sup>22</sup> Additionally, members of the community have expressed concern that the language change was made without their contribution and without any discussion, even if such a change was medically convenient and/or necessary.<sup>23</sup> Due to this history, members of the community still embrace the term “intersex.”<sup>24</sup>

16. *Id.*

17. See Emi Koyama, Keynote Speech at the University of Vermont Translating Identity Conference: From “Intersex” to “DSD”: Toward a Queer Disability Politics of Gender (Feb. 2006) in INTERSEX INITIATIVE, [http://www.intersexinitiative.org/articles/intersex\\_tods.html](http://www.intersexinitiative.org/articles/intersex_tods.html) [<http://perma.cc/SK5F-NYSN>]; Wilson, *supra* note 5.

18. See Wilson, *supra* note 5.

19. Emi Koyama, *Frequently Asked Questions About the “DSD” Controversy*, INTERSEX INITIATIVE (June 29, 2008) <http://www.intersexinitiative.org/articles/dsdfa.html> [<http://perma.cc/RF3B-2WS3>]. See also Koyama, *supra* note 17.

20. Wilson, *supra* note 5 (“There are no intersex people, to our certain knowledge, who use or approve of this terminology.”). *But see* FAQ, *Why Does AIC Use the Terms “Intersex” and “DSD”?*, ADVOCATES FOR INFORMED CHOICE, <http://aiclegal.wordpress.com/faq> [<http://perma.cc/334J-J83H>] (AIC using both Intersex and DSD in order to bridge the gap between various communities).

21. Wilson, *supra* note 5. See also Alice D. Dreger & April M. Herndon, *Progress and Politics in the Intersex Rights Movement: Feminist Theory in Action*, 15 GLQ: J. LESBIAN & GAY STUD. 199, 208 (2009); Koyama, *supra* note 17.

22. Bhakti Ananda Goswami, *About the Term Intersex Versus the Term DSD*, ORG. INTERSEX INT’L (Jan. 18, 2012), <http://oiiinternational.com/2524/term-intersex-term-dsd> [<http://perma.cc/V8YE-6C5N>].

23. See Koyama, *supra* note 19 (“[O]nly two intersex activists were invited to the LWPES/ESPE meeting that produced ‘Consensus Statement’ and sanctioned the term ‘DSD’ . . . . Then, the participants subdivided into six working groups, effectively denying activists’ ability to influence majority [sic] of proceedings. . . . One could reasonably argue that the whole setup was rigged and activists should have simply run out of the door . . . .”).

24. In light of this history and criticism, this Article uses the term “intersex” and “intersex conditions” over the term DSD.

### C. “Transgender”

In recent years, the grouping of intersex as a subcategory of transgender has also become prevalent.<sup>25</sup> Oftentimes, the grouping of the two communities together is premised on the belief that both are fighting around issues concerning genital surgery.<sup>26</sup>

Intersex activists dispute the transgender subcategorization and view the grouping as an attempt to make the unique needs of the intersex community invisible or secondary.<sup>27</sup> They also point out the views of the two communities on genital surgery are not the same.<sup>28</sup> Unlike the transgender community, the intersex community’s main concern has never been about *choosing* whether to have surgery to conform the body to their right gender; the issue has been about choices concerning their bodies being made without their input in the first place.<sup>29</sup> Unfortunately, due to their intersex conditions, intersex infants are far more likely to undergo cosmetic, non-consensual genital “normalizing” surgery as a result of the common medical standard<sup>30</sup> than infants born without such conditions (who may later on in life become transgender adults).

### D. “Hermaphrodite”

While some have used the term as a method of reclamation, most intersex activists reject the use of the term “hermaphrodite.”<sup>31</sup> The word refers to animals, such as snails and worms, which have a functioning set of both male and female organs.<sup>32</sup> The same is not true of individuals born with an intersex condition.<sup>33</sup> Due to its inaccuracy

25. See *Intersex FAQ*, *supra* note 6; *What’s the Difference Between Being Transgender or Transsexual and Having an Intersex Condition?*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/faq/transgender> [<http://perma.cc/5BMK-CSCG>].

26. *Intersex FAQ*, *supra* note 7.

27. See, e.g., *High Court Recognises “Non-Specific” Gender Identity, Implications for Intersex People*, ORG. INTERSEX INT’L AUSTL. LTD. (Apr. 2, 2014), <http://oii.org.au/25214/media-release-intersex-community-on-edge-high-court-contemplates-transgender-case> [<http://perma.cc/LM3A-RQSL>].

28. See *‘ISGD’ and the Appropriation of Intersex*, *supra* note 11 (quoting Raven Kaldera, a member of both the intersex and trans communities, who recalls encountering “transsexuals who express envy to those of us who have been mutilated at birth. (‘You’re so lucky! You got the sex change that I wanted!’)”).

29. Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 51 (2006) (“Transsex individuals often desire the future body that they *should have*, while intersex individuals often mourn the body they *had* before an unwarranted normalizing surgery interfered with it.”).

30. Lee et al., *supra* note 12, at e488.

31. See *Intersex FAQ*, *supra* note 7.

32. *Id.*

33. See Alice Dreger, *When to Do Surgery on a Child With ‘Both’ Genitalia*, THE

and mythologizing history,<sup>34</sup> intersex activists tend to treat the term as a pejorative.<sup>35</sup>

## II. THE HISTORY OF THE STRUGGLE

*This movement is not about me. It is about the persons . . . most affected by this injustice.*<sup>36</sup>

Since its founding in 1993, the Intersex Society of North America [hereinafter ISNA] has consistently advocated “for patients and families who felt they had been harmed by their experiences with the health care system.”<sup>37</sup> As noted by Cheryl Chase,<sup>38</sup> ISNA’s founder, and various other intersex activists and community members,<sup>39</sup> this harm chiefly manifested itself through “unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female.”<sup>40</sup> While the fight still continues on this issue, ISNA itself closed its doors in March 2008.<sup>41</sup>

Other intersex activist organizations,<sup>42</sup> including ISNA’s direct successor Accord Alliance,<sup>43</sup> the Intersex Initiative,<sup>44</sup> Advocates for Informed Choice (AIC),<sup>45</sup> and the Organization Intersex International

ATLANTIC (May 16, 2013), <http://m.theatlantic.com/health/archive/2013/05/when-to-do-surgery-on-a-child-with-both-genitalia/275884> [<http://perma.cc/8NKW-ZGEM>].

34. See Jo Bird, *Outside the Law: Intersex, Medicine and the Discourse of Rights*, 12 CARDOZO J.L. & GENDER 65, 71 (2005).

35. See *Intersex FAQ*, *supra* note 7.

36. Rigby, *supra* note 1.

37. INTERSEX SOC’Y OF N. AM., <http://www.isna.org> [<http://perma.cc/FJ9E-RBZ8>].

38. ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 80 (1st ed., 2000).

39. See Alice Dreger, *Why Do We Need ISNA?*, INTERSEX SOC’Y OF N. AM. (May 2001), <http://isna.org/newsletter/may2001/may2001.html> [<http://perma.cc/R4TN-YVNN>] (noting that, due to the sensitivity of the topic, many members of the intersex community are hesitant about talking about their experiences); see also Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, 4 GLQ: J. LESBIAN & GAY STUD., 189, 197 (1998) (“All the things my body might have grown to do, all the possibilities, went down the hall with my amputated clitoris to the pathology department. The rest of me went to the recovery room—I’m still recovering.”).

40. INTERSEX SOC’Y OF N. AM., *supra* note 37.

41. *Id.*

42. This selection of intersex organizations is not meant to embody the entire perspective of every individual within the intersex community. The organizations themselves disagree on various positions. However, these organizations provide perspective on how the intersex community evaluates the issue.

43. ACCORD ALL., <http://www.accordalliance.org> [<http://perma.cc/GHQ8-2VH6>].

44. INTERSEX INITIATIVE, <http://www.intersexinitiative.org/index.html> [<http://perma.cc/WFM6-NLUL>].

45. *Who We Are: Mission*, ADVOCATES FOR INFORMED CHOICE, <http://aiclegal.org/who-we-are/mission> [<http://perma.cc/GJR8-4QEG>].



(OII),<sup>46</sup> have all repeatedly noted this same goal: to end the medical standard of “cosmetic,”<sup>47</sup> non-consensual genital “normalizing” surgeries.<sup>48</sup> Unfortunately, this form of surgery has a long history of acceptance within the medical community.<sup>49</sup>

### A. Historical Development

Before the 1950s, the medical standard concerning infants born with an intersex condition did not require cosmetic, non-consensual genital “normalizing” surgery.<sup>50</sup> This changed in the 1950s due to two developments: (1) the development of surgical techniques making it possible to modify genitalia in a “cosmetically acceptable” fashion,<sup>51</sup> and (2) the theory of Dr. John Money concerning the development of one’s gender identity, in particular how such development was based on how one was nurtured, irrelevant of the natural sexual anatomy one was born with.<sup>52</sup>

Due to his theory of nurture trumping nature, in regards to the development of one’s gender identity, Dr. Money advocated for a change in the medical standard.<sup>53</sup> He proposed that infants born with ambiguous/intersex genitalia should undergo cosmetic genital “normalizing” surgery to change “unacceptable” genitalia into “normal” genitalia.<sup>54</sup> The test to determine whether genitalia were “ambiguous” was to examine the chromosomal make-up of the child and then assess the presence and size of a phallus.<sup>55</sup> For infants born with a male chromosomal make-up, “normal” genitalia required an “adequate” sized<sup>56</sup> penis that would allow penetration of the vagina;<sup>57</sup> infant males born with a micro-penis condition were surgically

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46. ORG. INTERSEX INT’L, <http://oiiinternational.com> [<http://perma.cc/GHF5-QY7P>].

47. “Cosmetic” is used in this Article to refer to surgeries performed despite a lack of life threatening or medically necessary reasons to do so.

48. See Astorino & Vioria, *supra* note 9; *Intersex FAQ*, *supra* note 7; Consortium on the Management of Disorders of Sex Development, *Clinical Guidelines for the Management of Disorders of Sex Development in Childhood*, INTERSEX SOC’Y OF N. AM. 28–30 (2006), <http://www.accordalliance.org/dsdguidelines/htdocs/clinical/index.html> [<http://perma.cc/M3GZ-WA89>] [hereinafter Consortium].

49. Astorino & Vioria, *supra* note 9.

50. Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 LOY. L.A. L. REV. 849, 856 (2012).

51. *Id.*

52. See *id.* at 856–58 n.20 and accompanying text.

53. See Alison Davidian, *Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children*, 26 WIS. J.L. GENDER & SOC’Y 1, 5 (2011).

54. *Id.*

55. *Id.* at 3.

56. Alice Domurat Dreger, “Ambiguous Sex”—or Ambivalent Medicine?, *Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CTR. REP., May–June 1998, at 24, 30 (noting that if the length of the stretched phallus is greater than 2.5 centimeters, or one inch, then the child will be raised as a male).

57. Greenberg, *supra* note 50, at 857.

altered to be raised as girls.<sup>58</sup> For infants born with a female chromosomal make-up, “normal” genitalia simply required a vagina that could accommodate a penis;<sup>59</sup> infant females born with clitorises that were deemed “too large” (i.e., too similar to a penis) were surgically altered to remove or reduce the size of their clitoris.<sup>60</sup> Any genital surgery done to an infant that changed their genitalia contrary to their chromosomal make-up could be furthered through social conditioning and proper nurturing of the child under their new gender.<sup>61</sup> Dr. Money also asserted that failure to undergo the cosmetic genital surgery would result in the child’s social exclusion, severe psychological trauma, and the weakening of bonds between child and parents.<sup>62</sup>

Unfortunately, Dr. Money tested his gender identity theory and cosmetic, genital “normalizing” surgery practice on David Reimer, an infant male whose penis was accidentally castrated during a routine circumcision.<sup>63</sup> Through the removal of David’s testicles and the construction of female appearing genitalia, Dr. Money attempted to show that David could successfully be raised as a girl, despite David having been born with male genitalia and with the hormones and chromosomes of a male.<sup>64</sup> David ultimately rejected his female assignment, even at a young age,<sup>65</sup> and underwent several surgeries in an attempt to restore his male genitalia.<sup>66</sup> In 2004, David took his own life.<sup>67</sup>

As infants born with intersex conditions have always had their genitalia deemed “unacceptable” or “abnormal,” the development of

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58. *Id.*

59. Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 *CARDOZO J.L. & GENDER* 31, 47–48 (2005).

60. Greenberg, *supra* note 50, at 858 (citing L.H. Braga & J.L. Pippi Salle, *Congenital Adrenal Hyperplasia: A Critical Appraisal of the Evolution of Feminizing Genitoplasty and the Controversies Surrounding Gender Reassignment*, 19 *EUR. J. PEDIATRIC SURGERY* 203, 204 (2009)).

61. *See id.*

62. Davidian, *supra* note 53, at 7 (citing Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 *ENDOCRINOLOGIST* 277, 279 (2003)).

63. *Id.* at 6.

64. *Id.*

65. *Id.*

66. *Id.* at 7.

67. *Id.* For more information on David Reimer’s story, see JOHN COLAPINTO, *AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL* (2000); John Colapinto, *What Were the Real Reasons Behind David Reimer’s Suicide?*, *SLATE* (June 3, 2004, 3:58 PM), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2004/06/gender\\_gap.2.html](http://www.slate.com/articles/health_and_science/medical_examiner/2004/06/gender_gap.2.html) [<http://perma.cc/87VU-VTDV>] (“David’s blighted childhood was never far from his mind. Just before he died, he talked to his wife about his sexual ‘inadequacy,’ his inability to be a true husband. Jane tried to reassure him. But David was already heading for the door.”).

Dr. Money's cosmetic, genital "normalizing" surgery practice had significant ramifications for the intersex community.<sup>68</sup> The practice's adoption as the medical standard began to encourage a culture of secrecy and shaming concerning intersex conditions.<sup>69</sup> Parents were told half-truths about the existence, future effects, and/or urgency of intersex conditions in favor of the quick solution of cosmetic genital "normalizing" surgery options.<sup>70</sup>

It was not until the 1990s and the growth of intersex organizations, such as ISNA, that criticisms concerning these cosmetic, non-consensual surgery practices began to reach a wider audience.<sup>71</sup> There were three primary concerns behind these criticisms: (1) that the shaming half-truths told to parents about the effects of intersex conditions led to psychological trauma associated with feelings of sexual "abnormality" on any individual who did not undertake this procedure;<sup>72</sup> (2) that the nurture over nature theory of gender identity advocated by Dr. Money had been empirically disproven<sup>73</sup> through countless personal narratives of irreversibly harmed intersex individuals;<sup>74</sup> and (3) that the benefits of "cosmetic" genital surgeries are outweighed by the risks of sterilization, genital scarring, urinary discomfort, and the loss of erotic sensation.<sup>75</sup> Despite these positions by intersex activists and the lack of evidence supporting Dr. Money's medical standard, the American Academy of Pediatrics continued to maintain that the birth of an intersex child was a "social emergency" requiring early surgical intervention up through the early 2000s.<sup>76</sup>

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68. See Hazel Glynn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 16–21 (2000).

69. See Dreger, *supra* note 56, at 33 ("Patients are lied to; risky procedures are performed without follow-up; consent is not fully informed; autonomy and health are risked because of unproven (and even disproven) fears that atypical anatomy will lead to psychological disaster."); see also Greenberg, *supra* note 50, at 859 ("Because infants with an intersex condition were considered 'abnormal,' their births were typically shrouded in shame and secrecy.").

70. Greenberg, *supra* note 50, at 857, 859; see also Inter/Act, *What We Wish Our Doctors Knew* (2013), ADVOCATES FOR INFORMED CHOICE, [http://aiclegal.org/wordpress/wp-content/uploads/2013/10/interact\\_ms-updated.pdf](http://aiclegal.org/wordpress/wp-content/uploads/2013/10/interact_ms-updated.pdf) [<http://perma.cc/92EM-T3DQ>].

71. Greenberg, *supra* note 50, at 859.

72. *Id.* at 859–60.

73. Davidian, *supra* note 53, at 8 ("[S]ince Money's John/Joan case study was discredited, not a single case has been found or cited to support the long-term physical and psychological successes of this surgery.") (quoting Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER, L. & JUST. 59, 71 (2006)).

74. See Chase, *supra* note 39, at 189–91.

75. See Greenberg, *supra* note 50, at 860.

76. Davidian, *supra* note 53, at 9.

In 2006, the push for awareness generated by intersex activists finally led to the development of the Consensus Statement.<sup>77</sup> The Consensus Statement encouraged a shift to a more patient-centered model, which stressed that “open communication with patients and families is essential, and participation in decision-making is encouraged . . . .”<sup>78</sup> Additionally, the Consensus Statement explicitly noted that “systematic evidence” supporting the idea that cosmetic genital “normalizing” surgery must be performed in the first year of life was ultimately “lacking.”<sup>79</sup> While the Consensus Statement is a definite step forward for the medical community,<sup>80</sup> it did not take the ultimate step and advocate for the end of cosmetic, non-consensual genital “normalizing” surgery in its entirety.<sup>81</sup> Moreover, intersex activists have noted how changing the medical standard is not something that occurs overnight,<sup>82</sup> even with the recommendations under the Consensus Statement, doctors and hospitals could, and likely would, still push forward flawed assertions about intersex conditions under the premise that intersex individuals need to be “cured.”<sup>83</sup>

### B. Current Movement

Since the 2006 Consensus Statement, intersex activists, and an increasing number of medical experts,<sup>84</sup> have continued to request a

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77. *Id.* at 9–10.

78. See Lee et al., *supra* note 12, at e490.

79. *Id.* at e491; see also Beh & Diamond, *supra* note 68, at 9 n.30 (“Money, in 1998, acknowledged the failure of treatment but theorized that other variables including surgical delay may have caused [David Reimer] to reject the assigned gender.”) (citation omitted).

80. See Consortium, *supra* note 48, at 1 (noting the “patient-centered” model as the ideal model to deal with the long term physical, psychological, and sexual well being of individuals born with an intersex condition).

81. See Lee et al., *supra* note 12, at e491.

82. See Koyama, *supra* note 17 (quoting Dreger as stating “I thought the standard treatment of intersex was so morally outrageous that, once exposed, it would quickly change. I’m often asked why intersex medicine hasn’t changed, and nowadays I think that the reason must be because, in spite of what I thought in 1998, the treatment of intersex actually looks a lot like other realms of modern medicine. I have come to realize that I was really naïve about medicine.”).

83. See Samantha S. Uslan, Note, *What Parents Don’t Know: Informed Consent, Marriage, and Genital-Normalizing Surgery on Intersex Children*, 85 IND. L.J. 301, 308 (2010).

84. See Greenberg, *supra* note 50, at 863–84 nn.56–61 (citing N.K. Alizai et al., *Feminizing Genitoplasty for Congenital Adrenal Hyperplasia: What Happens at Puberty?* 161 J. UROLOGY 1588, 1589 (1999); Sarah M. Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 LANCET 124, 124 (2001); Joel Frader et al., *Health Care Professionals and Intersex Conditions*, 158 ARCHIVES PEDIATRICS & ADOLESCENT MED. 426, 427–28 (2004); Birgit Kohler et al., *Satisfaction with Genital Surgery and Sexual Life of Adults with XY Disorders of Sex Development: Results from the German Clinical Evaluation Study*, 97 J. CLINICAL ENDOCRINOLOGY & METABOLISM 1441 (2001)) (noting studies

moratorium on all cosmetic, non-consensual genital “normalizing” surgeries done without the express informed consent of the individual undergoing the procedure, emphasizing the intrusive nature of the procedure.<sup>85</sup> These groups have asserted that surgeries should be delayed until the child has reached the age where they have the capacity to determine whether they want to undergo the genital “normalizing” surgery themselves.<sup>86</sup>

On February 1, 2013, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Méndez, presented a report on “certain forms of abuses in health-care settings that may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment.”<sup>87</sup> Amongst those procedures highlighted were “genital-normalizing surgeries under the guise of so called ‘reparative therapies.’”<sup>88</sup> In response to the “accounts and testimonies” of those who had undergone these surgeries, the report asserted that “[t]he Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery . . . when enforced or administered without the free and informed consent of the person concerned.”<sup>89</sup>

This recent success is notable for its overall condemnation of the practice of cosmetic, non-consensual genital “normalizing” surgery and its call for an outright moratorium on the procedure until the point in time that the child has the ability to consent.<sup>90</sup> Such recognition of the pressing need and concerns of the intersex community is laudable and reflects the success of intersex activists in pushing forward awareness of the harms done by forced “treatment” surgeries of intersex conditions.

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and recommendations by various medical experts and organizations that concluded that unnecessary cosmetic surgeries should be delayed until the child is old enough to provide informed consent to the procedure).

85. Susan Donaldson James, *German Law: Parents of Intersex Kids Can Pick ‘Gender Undetermined,’* ABC NEWS (Nov. 1, 2013), <http://abcnews.go.com/Health/german-law-parents-intersex-kids-pick-gender-undetermined/story?id=20752191> [<http://perma.cc/539X-3U2R>] (“Drescher said that now some doctors are still ‘practicing that model.’”).

86. See *Intersex FAQ*, *supra* note 7 (“Irreversible surgeries on infants should be avoided in order to give them the widest range of choices when they are older.”).

87. Juan E. Méndez (Spec. Rapporteur on Torture), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, summary, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf) [<http://perma.cc/E6C2-ZTK3>].

88. *Id.* ¶ 76.

89. *Id.* ¶ 88.

90. *Id.* ¶¶ 77–78, 81–85, 88.

## III. ALTERNATIVE PROPOSALS

*If I disagree with decisions made by the oppressed group, I will either offer my silent support or I will stand down.*<sup>91</sup>

The recent success of intersex activists has been interestingly paralleled by the contributions of several legal scholars and theorists that have focused their attention on the existence of the intersex community and its struggle against cosmetic, non-consensual genital “normalizing” surgery as illustrative of the failings of the male/female sex binary system of identification.<sup>92</sup> Proposals have been made to challenge this binary through the creation of a “third gender”<sup>93</sup> category or the elimination of government-mandated sex identification on official documentation such as birth certificates and passports.<sup>94</sup> These proposals argue it is the sex binary system itself that justifies and pressures the use of such “normalizing” surgeries.<sup>95</sup>

Although these scholars and theorists are providing necessary and valid commentary on systemic social structures maintaining oppression, these proposals are ultimately not addressing the immediate concerns and needs expressed by the intersex community. Intersex activists have criticized the proposals as shifting the conversation from a focus on medical intrusion on infants, who lack consent, to a focus on identity and self-identification.<sup>96</sup> The adoption of these sex binary focused proposals is inadvertently concealing the actual solution being sought by intersex activists, an immediate international moratorium on cosmetic, non-consensual genital “normalizing” surgery.<sup>97</sup>

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91. Rigby, *supra* note 1.

92. See Elizabeth Reilly, *Radical Tweak—Relocating the Power to Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality*, 12 CARDOZO J.L. & GENDER 297, 301–02 (2005–2006). *But see* Koyama, *supra* note 3 (“Do not use intersex people merely to illustrate the social construction of binary sexes.”).

93. See Bird, *supra* note 34, at 77 (“Tony Briffa made the following recommendation on behalf of the Androgen Insensitivity Syndrome Support Group Australia (AISSGA), that ‘those adults with intersex conditions who identify their gender as intersex should be permitted to be legally recognized as intersex in lieu of male or female.’”).

94. Reilly, *supra* note 92, at 297–98.

95. Uslan, *supra* note 83, at 304 (“The driving force behind the performance of genital-normalizing surgeries is society’s insistence that each person fit neatly within the binary gender system, which includes only the categories of male and female. It is this insistence that pressures parents to consent to genital-normalizing surgeries in the first place.”).

96. See April Herndon, *Why Doesn’t ISNA Want to Eradicate Gender?*, INTERSEX SOC’Y OF N. AM. (Feb. 17, 2006), [http://www.isna.org/faq/not\\_eradicating\\_gender](http://www.isna.org/faq/not_eradicating_gender) [<http://perma.cc/J5VR-86F8>].

97. *Id.*

### A. *Alternative Theoretical Solutions*

Many of the alternative solutions proposed by legal scholars and theorists focus on the existence of a male/female sex binary<sup>98</sup> within society that denies the very existence of those with intersex conditions.<sup>99</sup> Due to an ontologically enforced requirement of a “male” or “female” sex,<sup>100</sup> the birth of an infant that defies male/female classification provides the justification for labeling intersex individuals as a “social emergency,”<sup>101</sup> something that must be “cured” due to its abnormality.<sup>102</sup> These solutions thus suggest breaking down the male/female binary as an *a priori* requirement to moving away from the practice of cosmetic, non-consensual genital “normalizing” surgeries. As the “normalizing” aspect of these surgeries is grounded in the assumptions of a rigid sex binary,<sup>103</sup> only by removing those assumptions can the true horror and harms of such surgeries be made apparent to individuals outside the intersex community.

In proposing this challenge to the male/female sex binary system, several specific solutions have been proposed: (1) the creation of a “third gender”/“indeterminate”/“intersex” category of sex identity, and (2) the elimination of the use of government-mandated sex identification on legal government sponsored identity documentation, particularly birth certificates, passports, and the like.<sup>104</sup>

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98. Within this Article, sex and gender are understood to be socially constructed performances. These multiple constructed performances intersect and form a cohesive self-identity, in addition to other such constructs like race and sexuality. As constructions, these performances are fluid, but are often treated as fixed by normalizing institutions that enforce fixed categorization, such as the male/female sex binary. Sex generally refers to the body, the physical body, and is thus about being. Gender generally refers to the nature assumed, in regards to “masculine” or “feminine” traits, and is thus about doing. See Ben-Asher, *supra* note 29, at 52–53 (“While gender is often considered to be something that bodies *do*, sex is often considered to be something that bodies *are*.”); see also JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 6–7 (1990).

99. James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 369 (2009) (“[T]he presence of intersex people reveals the impossibility of identification of all people into two categories of sex, spurring some authors to call for removing a gender or sex identifier on birth certificates. The intersex may be born with ambiguous genitalia, defying simple sex assignment.”).

100. Reilly, *supra* note 92, at 298.

101. Davidian, *supra* note 53, at 9–10.

102. *Id.* at 20 (“Only in a society where sex is understood in binary terms with everyone either male or female does the body of an intersex child become an abnormality that requires fixing. This notion of a sex binary appears to overwhelm other factors in considering the merits and risks of surgery.”).

103. McGrath, *supra* note 99, at 369 (“Requiring a sex determination on a birth certificate may also pressure parents to consent to immediate and unnecessary surgery on infants whose sex is not clearly either male or female.”).

104. *Id.* at 369–70.

The argument for creating a recognized “third gender”/third sex identification is premised on creating a safe space within the legal realm for the intersex community.<sup>105</sup> As individuals with intersex conditions, or “disorders of sex development,” are primarily a population discussed within the medical realm, and are rarely given any equivalent recognition in the legal realm (particularly as those with intersex conditions generally adopt other terms of self-identity), official legal recognition would allow the community to avoid the invisibility of being a legal non-entity.<sup>106</sup> Jo Bird discusses this analysis by pointing out that “[t]o be considered as a human by the law, one must have a recognisable, classifiable sex. Certain human rights of the intersex child are treated as non-existent, because the child who inhabits a body that is ‘without a sex’ is not considered human.”<sup>107</sup> In making this analysis, Bird discusses the famous case of *C. v. D.*, an Australian case between a biological woman and her intersex husband.<sup>108</sup> The court ultimately declared the marriage null on the grounds that the husband was neither male nor female. Due to him being intersex, the husband was literally treated as being “outside of law,” and denied even the right to marry any other human being.<sup>109</sup> Bird also discusses the subsequent use of intersex as its own distinct category within the Australian Capital Territory (ACT).<sup>110</sup> By legally recognizing the existence of intersex individuals,<sup>111</sup> Bird asserts that the intersex community is now within the law and more likely to fall within its protection concerning such issues as cosmetic, non-consensual genital “normalizing” surgery.<sup>112</sup>

Focusing on the government’s use of mandated sex identification on identity documents, Professor Elizabeth Reilly argues, “It is problematic enough when the law fails to recognize a pattern of exclusionary behavior as deserving of legal remedy. It is much worse for the law to be the very mechanism that requires and enforces exclusionary behavior.”<sup>113</sup> Highlighting the government’s mandated need to know the proper sex of each individual from the moment of birth, Professor Reilly proposes a “radical tweak” to the system: “We must cease using the Birth Certificate to assign sex to a child.”<sup>114</sup> In

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105. Bird, *supra* note 34, at 66.

106. *Id.* at 79–80.

107. *Id.* at 66.

108. *Id.* at 77 (citing *C. v. D.*, FAM. L.R. 90 (1979)).

109. *Id.*

110. *Id.* at 77 n.52 and accompanying text.

111. Bird, *supra* note 34, at 77.

112. *Id.* at 79–80.

113. Reilly, *supra* note 92, at 300.

114. *Id.* at 308.



doing so, Professor Reilly asserts that it is the requirement of filling out the birth certificate that “helps convert intersexuality into a medical ‘problem’ during which the strictures of informed consent ethics and law can be notably suspended.”<sup>115</sup> Notably, Professor Reilly suggests that the elimination of the sex binary system at *all* levels of society is not necessarily the ultimate goal of her proposal; her proposal “simply refuses to give the legal imprimatur of truth and permanence to the assignment on behalf of any given individual.”<sup>116</sup> In making this distinction, Professor Reilly recognizes that while individuals may want to personally self-identify themselves in a particular category, such identification should not be governmentally enforced as a permanent and binding construction upon that person (and particularly upon individuals who, at the time, lack the ability to self-identify).<sup>117</sup>

Ultimately, Professor Reilly expresses the hope that her proposal will allow parents to avoid the pressure of making the “right” choice.<sup>118</sup> As parents will no longer need to place a sex on the birth certificate, there will no longer be an impetus to “match” the chosen sex with the physical sex characteristics of the child through cosmetic, non-consensual genital “normalizing” surgery.<sup>119</sup> As a consequence of removing the impetus, these surgeries would no longer be seen as “reasonable.”<sup>120</sup> This would also bolster the movement of intersex activists to seek a moratorium on these surgeries and highlight the harms to the child.<sup>121</sup>

### *B. Intersex Community Perspective*

While intersex activists have noted theoretical challenges to the male/female sex binary as laudable for addressing a factor justifying the use of cosmetic, non-consensual genital “normalizing” surgery,<sup>122</sup>

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115. *Id.* at 310.

116. *Id.* at 324.

117. For additional material assessing this theory and implementation at the international level, see Dorian Needham, *A Categorical Imperative? Questioning the Need for Sexual Classification in Québec*, 52 C. DE D. 71, 86 (2010) (assessing Canada’s identity documentation system).

118. Reilly, *supra* note 92, at 328.

119. *Id.* at 330.

120. *Id.* at 331.

121. *See id.*

122. Herndon, *supra* note 96 (“[I]t’s true that the urge to perform surgeries on intersex children’s sex anatomies is sometimes born out of the belief that children must have sex anatomies that are clearly male or female in order to be comfortable in either a male or female gender (and this is clearly a harmful belief born out of antiquated notions about gender identity corresponding directly to genital anatomy) . . .”).

not to mention representing the viewpoint of certain individuals within the community, they have also explicitly noted that such solutions are not synonymous with the larger movement's mission.<sup>123</sup> Intersex activists have actually asserted the opposite: the *focus* of legal scholars and theorists on breaking the male/female sex binary may actually be inadvertently creating greater barriers in the fight to obtain a moratorium on these procedures by creating societal confusion and misplaced emphasis around intersex individuals, and whether or not they desire to, or are asserting, any particular self-identity classification.<sup>124</sup>

In fact, intersex activists have been quite explicit in stating that the intersex community is NOT necessarily in support of breaking the male/female sex binary, despite being a possible target of its construction.<sup>125</sup> To suggest that the existence of the intersex community itself, found outside of the typical binary, requires and/or creates the expectation that all or most members of the community are against the sex binary, creates a false generalization.<sup>126</sup> Intersex activists

123. Astorino & Vioria, *supra* note 9 (“While some intersex individuals may agree that sex and gender are not binary concepts, the goals of intersex activists are to raise awareness and to gain the right to consent to what is and is not done to our bodies.”); see also Herndon, *supra* note 96 (“We hope that scholars, particularly those invested in helping members of marginalized groups gain a voice in conversations about themselves, will take seriously the concerns about surgery, secrecy, and shame raised by intersex people and understand that ISNA and the majority of its constituency don’t necessarily share the goal of eradicating the very notion of gender”).

124. Hida Vioria, *Calling a Spade a Spade; Intersex is Intersex*, ORG. INTERSEX INT’L (Apr. 12, 2013), <http://oiiinternational.com/2786/calling-a-spade-a-spade-intersex-is-intersex> [<http://perma.cc/S27Z-3GKQ>] (“[I]ntersex people must break through people’s *cultural* resistance to accepting us in order for ‘normalizing’ surgeries to stop, and the last thing we need is confusion about who we are and what we deal with.”).

125. Astorino & Vioria, *supra* note 9 (“Intersex activists are not explicitly trying to bring down the binary.”); see also Herndon, *supra* note 96 (“[M]any intersex people are perfectly comfortable adopting either a male or female gender identity and are not seeking a genderless society or to label themselves as a member of a third gender class.”).

126. *Intersex FAQ*, *supra* note 7 (“Many people with intersex conditions identify solidly as a man or as a woman, like many non-intersex people. There are some who identify as a member of an alternative gender, like some non-intersex people do. While we support everyone’s right to define her or his own identities, we do not believe that people with intersex conditions should be expected to be gender-transgressive just because of their physical condition.”); see also Herndon, *supra* note 96 (“[M]any of the people with intersex we know—both those subjected to early surgeries and those who escaped surgery—very happily accepted a gender assignment of male or female (either the one given them at birth or one they chose later for themselves later in life). Instead, adults with intersex conditions who underwent genital surgeries at early ages most often cite those early genital surgeries and the lies and shame surrounding those procedures as their source of pain. Later in life, like many people with typical anatomies, intersex people take pleasure in what some gender scholars (like Judith Butler) might call *doing* their gender. Thus, intersex people don’t tell us that the very concept of gender is oppressive to them. Instead, it’s the childhood surgeries performed on them and the accompanying lies and shame that are problematic.”).

often remind nonmembers of the community that their main concern is the forced, permanent, non-consensual assignment of sex through surgery before the child has the ability to consent to such a procedure.<sup>127</sup> In terms of whether or not the community embraces the sex binary later on in life, these intersex activists, perhaps somewhat ironically to legal scholars and theorists, recommend and affirm the notion that children should be assigned a gender, male or female, based on appropriate medical factors at the time of infancy which can then be further affirmed through surgery later on in life once the child has the ability to consent.<sup>128</sup> Notably, many of these comments and recommendations concerning the adoption of the sex/gender binary are based on ensuring the safety of intersex individuals, particularly children, a concern likely rooted in the lived experiences of harm and social ostracizing that can occur from gender or sex nonconformity.<sup>129</sup>

Under an allyship framework, it is the duty of legal scholars and theorists, who are attempting to assist the intersex community, to at least acknowledge these criticisms and concerns expressed by intersex activists.<sup>130</sup> Although this process may be difficult, these intersex activists and members of the intersex community bear the greatest and most immediate consequences of any solution sought; movements and allies must ensure that these voices direct and lead any movement.<sup>131</sup> Moreover, if there is evidence that alternative voices and proposals are actually hurting the community's mission and goals, allies must recognize the need to step back, stand down, and even withdraw an asserted position to ensure the community's overall success.<sup>132</sup>

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127. See *supra* notes 85–86 and accompanying text.

128. Consortium, *supra* note 48, at 38 (“[W]e’re going to recommend delaying genital surgeries until your child is old enough to participate in such a decision.”). But see Ben-Asher, *supra* note 29, at 72 (“[T]his same reasoning is used by John Money and others to justify intersex surgery: the child will adjust better to the environment with ‘normal’ looking genitals than with genitals that are unintelligible. Therefore, challenging sex assignment while using the same logic to justify gender assignment deserves rethinking.”).

129. *Does ISNA Think Children with Intersex Should Be Raised Without a Gender, or in a Third Gender?*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/faq/third-gender> [<http://perma.cc/DNU5-6Q6X>] (“[W]e are trying to make the world a safe place for intersex kids, and we don’t think labeling them with a gender category that in essence doesn’t exist would help them. (Duh, huh?)”); see also Ben-Asher, *supra* note 29, at 71 (“[C]hildren do not need to take on the burden of being heroes for a movement without first assenting to such a role. In this sense, categorization has its place and cannot be reduced to forms of anatomical essentialism.”) (quoting JUDITH BUTLER, *UNDOING GENDER* 7–8 (2004)).

130. See Rigby, *supra* note 1.

131. See *id.*

132. See *id.*

## IV. INTERNATIONAL ADOPTION AND IMPLEMENTATION

*I recognize that giving my moment in the spotlight or chair at the table may be the ultimate triumph of an ally.*<sup>133</sup>

Aside from the concerns expressed by intersex activists regarding the divergence in goals, there is some evidence that the alternative proposals suggested by legal scholars and theorists are having a negative effect on the movement's goals beyond the world of academia.<sup>134</sup> Despite the intersex community's long-standing request for an immediate moratorium on cosmetic, non-consensual genital "normalizing" surgeries, the international scene seems to be listening more to the solutions proposed by legal scholars and theorists than intersex activists.<sup>135</sup> Many countries have implicitly or explicitly passed recognition of "third gender"/"intersex" categories of identity. Meanwhile, only three countries, Colombia, the United States, and most recently Malta, have ever specifically addressed the practice of cosmetic, non-consensual genital "normalizing" surgery itself.<sup>136</sup> Despite the expressed intent of countries to assist, protect, and recognize the intersex community within society, the feedback from intersex activists on the adoption and implementation of these laws has been largely negative.<sup>137</sup> This is primarily because, at the end of the day, these efforts at breaking down the male/female sex binary system fail to address the more immediate harms arising from the legal sanction of violent acts of medical interference with intersex bodies.<sup>138</sup> Aside from trying to regulate and change the reasons underlying these acts, intersex activists are simply looking for an end to the practice in the first place.<sup>139</sup>

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133. *Id.*

134. *See* Astorino & Vilorio, *supra* note 9.

135. *See Intersex Variations and Genital Autonomy*, GENITAL AUTONOMY (Apr. 5, 2014), <http://www.genitalautonomy.org/intersex> [<http://perma.cc/3XZD-Q43P>].

136. *See Colombia's Highest Court Restricts Surgery on Intersex Children*, INTERSEX SOC'Y OF N. AM., <http://www.isna.org/colombia> [<http://perma.cc/SWN8-AWVF>]; Dreger, *supra* note 56, at 33–34; *Press Release: OII-Europe Applauds Malta's Gender Identity, Gender Expression and Sex Characteristics Act*, ORG. INTERSEX INT'L EUROPE (Apr. 1, 2015), <http://oiieurope.org/press-release-oiieurope-applauds-maltas-gender-identity-gender-expression-and-sex-characteristics-act> [<http://perma.cc/D838-AHBK>].

137. *See* Astorino & Vilorio, *supra* note 9.

138. *Id.*

139. *Id.*

### A. Puerto Rico

Puerto Rico recognizes the category of “ambiguous genitalia”<sup>140</sup> to be used on identity documents through the Puerto Rico Vital Statistics Registry,<sup>141</sup> although only temporarily.<sup>142</sup> At the time of birth, individuals born with “ambiguous genitalia” are allowed to mark the category labeled as such on Formulary RD-103, administratively referred to as the addendum to the birth certificate.<sup>143</sup> In allowing this process, Puerto Rico seems to have ascribed to the solution of granting legal recognition to a third gender category, one encompassing the intersex community.<sup>144</sup>

Unfortunately, as noted by Frances Nieves, this solution ultimately fails to provide any true protection whatsoever to the intersex community.<sup>145</sup> Not only does the term “ambiguous genitalia” fail to protect all members of the community,<sup>146</sup> the temporariness of the category merely reinforces the pressure on parents to medically determine the “right” sex, quickly, and enforce that decision through cosmetic, non-consensual genital “normalizing” surgery.<sup>147</sup> Additionally, the temporariness of the category also shows how the solution fails to successfully challenge any male/female sex binary. By labeling the category “ambiguous,” and only allowing such categorization for a very short period of time, the category reinforces the normal state of affairs of “male” and “female” and suggests that time is only granted to allow the infant to be properly assigned in one of these categories. A third sex existing independently of the male/female binary is not permanently endorsed.

### B. India

India, in some circumstances, legally recognizes the existence of a “third gender”/third sex category: “E,” standing for eunuchs.<sup>148</sup>

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140. Frances Lorey González Nieves, Article, *The Unarticulated Premise Underlying the Medical and Legal Management of Intersex People in Puerto Rico: Some Constitutional and Gender Issues*, 79 REV. JUR. U.P.R. 1233, 1233 (2010) (defining an individual with “ambiguous genitalia” as one “whose genitals—clitoris/labia and penis/scrotum—do not have the typical appearance of one or other sex . . .”) (emphasis omitted).

141. *See id.* at 1234.

142. *See id.* (noting how the category only is allowed for 30 days at a maximum).

143. *See id.* at 1237.

144. *See id.* (noting how the category “ambiguous genitalia” actually fails to encompass the entire intersex community).

145. *See id.* at 1234.

146. *See Nieves, supra* note 140, at 1234.

147. *Id.* at 1246 (“In Puerto Rico, sex-assignment surgeries need to be performed within a period of thirty (30) days after the birth of an intersex child occurs. Otherwise, the medical community would not be able to meet the legal mandate of defining the sex for purposes of the Birth Certificate.”).

148. Jennifer Rellis, “Please Write ‘E’ In This Box:” *Toward Self-Identification and*

Eunuchs is the less commonly used term<sup>149</sup> referring to India's historical community of "hijras."<sup>150</sup> On Indian passports, voter registration documents,<sup>151</sup> and on the 2011 federal census,<sup>152</sup> the hijra community has been able to legally check "E" when asked for their sex identity.<sup>153</sup> As all hijras have a female gender identity,<sup>154</sup> this recognition was likely done to make travel easier for the hijra community so that they will no longer have to break their gender performance and dress as men to match the sex identifier on their passports when traveling through airports.<sup>155</sup>

Due to their cultural significance and acceptance in Indian society, many theorists challenging the existence of the male/female sex binary use the illustration of the hijra community as an example of a socially accepted "third gender" category.<sup>156</sup> Indeed, there is evidence that the Indian community has come to accept the hijra community to a greater degree than the American community has accepted intersex individuals.<sup>157</sup> At the same time, however, hijras still are forced to live on the periphery of society as "objects of fear, abuse, ridicule, and sometimes pity."<sup>158</sup> The greater recognition of the community's "third gender" category on passports, allowing for easier travel, has not transferred to Indian society as a whole. Other identity documents, such as the state identity card, do not recognize the category, thereby denying the community access to many legal rights granted to individuals that fall into the male/female sex binary.<sup>159</sup> Most importantly, the social, and now legal, acceptance of the hijra community has also not empirically led to the protection

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*Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223, 233 (2008).

149. *Id.* at 227 n.15 ("Indian society seems to use the terms eunuch and hijra interchangeably, even though hijras do not prefer the term eunuch.").

150. *See id.* at 227-29 (noting the history and social position of the hijra community).

151. Michael Bochenek & Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 EMORY INT'L L. REV. 11, 29 (2012).

152. *Id.* at 32 n.114.

153. Rellis, *supra* note 148, at 233.

154. *Id.* at 228.

155. *Id.* at 233.

156. *Id.* at 229.

157. *Id.* (noting such recognition seems to stem from the historical and religious weight associated to hijras through the practice of badhai, a ceremony where hijras bless births and marriages).

158. *Id.* at 229 (quoting SERENA NANDA, *NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA* 13 (2nd ed. 1999)).

159. *See* Rellis, *supra* note 148, at 231 (citing People's Union for Civil Liberties, Karnataka, *Human Rights Violations Against the Transgender Community* 17 (2003), <http://ai.eecs.umich.edu/people/conway/TSPUCL/PUCL%20Report.pdf>).

of individuals born with an intersex condition from cosmetic, non-consensual genital “normalizing” surgery.<sup>160</sup>

### C. Nepal

Nepal began recognizing a “third gender” through court order.<sup>161</sup> In 2007, the Supreme Court of Nepal, in *Pant v. Nepal*,<sup>162</sup> legally established a gender category beyond the male/female binary, to be referred to as “other” (anya)<sup>163</sup> on official documents.<sup>164</sup> The court also asserted that identification within this category was not to be based on any medical criteria—the only criterion to be “anya”<sup>165</sup> is self-identification as such.<sup>166</sup> Since that decision, the government of Nepal has slowly but steadily implemented legislation recognizing and sanctioning the category.<sup>167</sup>

“Nepal stands as the world’s example of comprehensively introducing a third gender category for people who do not identify within the male-female binary.”<sup>168</sup> Soon, Nepal’s constitution, new civil code, and new criminal code will be finalized to reflect the change in society in recognizing this third gender.<sup>169</sup> For all intents and purposes, at least for now, considering its infancy, it seems as if Nepal serves as the ideal illustration of the challenge to the male/female sex binary system. Yet, despite all of this success, no statement has been made concerning a ban on the continued practice of non-consensual genital “normalizing” surgery. While some might argue that more time is

160. Mercedes Allen, *The Facts About India’s Infant “Sex Changes,”* DENTED BLUE MERCEDES (July 22, 2011), <http://dentedbluemercedes.wordpress.com/2011/07/22/the-facts-about-indias-infant-sex-changes> [<http://perma.cc/AVT9-2A97>] (quoting a senior consultant urologist at the Sitaram Bhartia Institute in Delhi justifying genital “normalizing” surgery for intersex infants stating: “Each year, many children are born with ‘manufacturing defects’ in their sexual organs like undescended testes . . . Left untreated, they grow up into imperfect adults . . . Correction of ambiguous genitalia is a legal and validated procedure and it shouldn’t be confused with ‘sex change.’”).

161. See Bochenek & Knight, *supra* note 151, at 11.

162. *Id.* at n.1 (citing *Pant v. Nepal*, Writ. No. 917 of the Year 2064 BS (2007 AD), translated in NAT’L JUD. ACAD. L.J. 2008, at 262).

163. *Id.* at 13 (citing Interview with Sunil Babu Pant, President, Blue Diamond Soc’y, in Kathmandu, Nepal (March 2012)).

164. *Id.*

165. *Id.* (defining “anya” “to describe biological males who have ‘feminine’ gender identity or expression and biological females who have ‘masculine’ gender identity or expression”).

166. *Id.* at 19–20 nn.30–34 and accompanying text (noting identity categories that may fall into this category of “anya”: intersex, transgender, homosexual, metis and kothis, tas, bisexuals, hijras, transsexuals, and transvestites).

167. Bochenek & Knight, *supra* note 151, at 31–32 (noting recognition on Nepal’s national citizenship ID, registry to vote, and on Nepal’s 2011 federal census).

168. *Id.* at 41.

169. *Id.*

needed to see if the sex binary experiment will allow for a true societal change/impetus against the medical procedure, it is notable that while we wait (eight years since the 2007 decision), infants born with intersex conditions may still be subjected to non-consensual medical interference with their bodies every day.<sup>170</sup> This reflects the other problem with the theoretical approach. Even in the best of circumstances, challenging the male/female sex binary takes considerable time to be effective. Society's assumptions concerning sex will take a while to deconstruct, and the immediacy of the harms being suffered by the intersex community should not have to wait that long.

#### D. Germany

Germany is the most recent nation to attempt to assist the intersex community through a challenge to the legal male/female sex binary system.<sup>171</sup> On November 1, 2013, Germany became the first European country<sup>172</sup> to recognize a "third sex"<sup>173</sup> category on birth certificates by allowing children to leave the gender blank.<sup>174</sup> Analysts have said this functionally recognizes an "undetermined,"<sup>175</sup> "unspecified,"<sup>176</sup> or "indeterminate"<sup>177</sup> gender designation that may be affirmed later on through the selection of an "x option"<sup>178</sup> on passports instead of "M" or "F."<sup>179</sup> The impetus behind the law was an ethics report released by the German Ethics Council.<sup>180</sup> In this report, the Ethics Council stated:

Irreversible medical sex assignment measures in persons of ambiguous gender infringe the right to physical integrity, to preservation of sexual and gender identity, to an open future and often also to procreative freedom. The decision concerned is personal. The Ethics Council therefore recommends that *it should always*

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170. See Astorino & Vioria, *supra* note 9.

171. Michelle Castillo, *Germany to Allow Third Gender Designation on Birth Certificates*, CBS NEWS (Nov. 1, 2013, 3:56 PM), <http://www.cbsnews.com/news/germany-to-allow-third-gender-designation-on-birth-certificates> [<http://perma.cc/J9S5-4PSP>].

172. See James, *supra* note 85.

173. Castillo, *supra* note 171.

174. *Id.*

175. *Id.*

176. *Germany Allows 'Indeterminate' Gender at Birth*, BBC NEWS (Nov. 1, 2013), <http://www.bbc.co.uk/news/world-europe-24767225> [<http://perma.cc/X3M3-MPZ7>].

177. *Id.*

178. Castillo, *supra* note 171.

179. *Id.*

180. See *German Ethics Council: Intersex People Should Be Recognized, Supported and Protected from Discrimination*, DEUTSCHER ETHIKRAT (Feb. 23, 2012), <http://www.ethikrat.org/press/press-releases/2012/press-release-2012-01.pdf> [<http://perma.cc/NL2R-8XKL>].



*be taken solely by the individual concerned. In the case of a minor, such measures should be adopted only after thorough consideration of all their advantages, disadvantages and long-term consequences and for irrefutable reasons of child welfare. This is at any rate the case if the measure concerned serves to avert a serious concrete risk to the life or physical health of the affected individual.*

.....  
 The Ethics Council also believes that personal rights and the right to equality of treatment are unjustifiably infringed if persons whose physical constitution is such that they cannot be categorized as belonging to the female or male sex are compelled to register in one of these categories. *Provision should be made for such persons to register not only as “female” or “male” but also as “other,” or for no entry to be made until they have decided for themselves.*<sup>181</sup>

Notably, the Ethics Council distinguished its two recommendations on restricting the practice of cosmetic, non-consensual genital “normalizing” surgery and the creation of an “other” category as two distinct issues.<sup>182</sup> The law Germany subsequently passed, unfortunately, seems to ignore this distinction and treats the two issues as one.<sup>183</sup>

The stated purpose of Germany’s law—allowing infants to leave the gender blank on birth certificates—was “to take the pressure off parents who might make hasty decisions on sex-assignment surgery . . . .”<sup>184</sup> By explicitly asserting this connection to the intersex community’s fight against cosmetic, non-consensual genital “normalizing” surgery, the law affirms the theoretical proposals stressing the deconstruction of the male/female sex binary system as an *a priori* requirement to eliminate the need for these surgeries.<sup>185</sup>

While progressive groups have hailed the law as a success for intersex rights, intersex activists have not expressed the same sentiments.<sup>186</sup> While appreciative of the attention and concern being drawn

181. *Id.* (emphasis added).

182. *See id.*

183. *See* Castillo, *supra* note 171.

184. James, *supra* note 85 (“The law gives parents some space not to have to rush into making decisions themselves . . . . It gives them the time to do some tests and figure it out . . . . We don’t have to rush into surgery that is irreversible.”) (quoting Arlene Baratz).

185. *See* Jacinta Nandi, *Germany Got It Right By Offering a Third Gender Option on Birth Certificates*, THE GUARDIAN (Nov. 10, 2013, 6:30 AM), <http://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate> [<http://perma.cc/GY8A-USSQ>] (“[T]he German government and legal experts are keen to stress that this third blank box isn’t an official third gender, or the ‘other’ box—so it doesn’t actually mean that there are now three recognized genders in Germany. It’s seen as a temporary solution for very specific intersex cases—the children aren’t expected to live their lives as X’s, but to make a decision to be male or female at a non-specified point in the future.”).

186. *See id.*

to the issue, intersex activists have strongly denounced the law as failing to really address the community's biggest concerns.<sup>187</sup>

Some intersex activists have noted that the fear of the blank box may actually encourage parents to be “under more pressure than ever to avoid being forcibly outed by the state . . . .”<sup>188</sup> In a desperate desire to “fit in,” parents may actually be more likely to consent to these non-consensual genital surgeries.<sup>189</sup> Others have reaffirmed the sentiment that the “right” gender has never been the primary issue of the intersex community.<sup>190</sup> In fact, intersex activist organizations have actually encouraged the ordinary selection of a male/female gender at the time of infancy until such time as the child has the capacity to affirm or change such selection.<sup>191</sup> In creating a “third gender,” but one lacking any other relevancy in terms of basic services (health insurance, marriage rights, etc.), the law intentionally leaves those who choose that option even more “outside the law” than usual.<sup>192</sup>

The most common criticism, however, has been that the German law simply does nothing to affect the practice of cosmetic, non-consensual genital “normalizing” surgery, either by restricting them or by placing a moratorium on the practice.<sup>193</sup> As such, the law does not actually address the immediate quality of life concerns of individuals within the intersex community. In fact, the law may actually encourage increased medical intrusion on intersex individuals because of how the law is worded: “If the child can be assigned to neither the female nor the male sex, then the child has to be entered into the register of births without such a specification.”<sup>194</sup> As noted by OII,

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187. See Castillo, *supra* note 171.

188. Nandi, *supra* note 185 (quoting Daniela Truffer of *zwischenengeschlecht.org*); see Hida Viloría, *Op-Ed: Germany's Third-Gender Law Fails on Equality*, ADVOCATE.COM (Nov. 6, 2013, 8:00 AM), <http://www.advocate.com/commentary/2013/11/06/op-ed-germany-s-third-gender-law-fails-equality> [<http://perma.cc/4D3C-AQDQ>] (“[W]hat parent wants to have no gender marker on their child with no other regulation that would protect this non-status?” (quoting Ins Kromminga, Spokesperson for OII Germany)).

189. See Nandi, *supra* note 185 (quoting Daniela Truffer).

190. See James, *supra* note 85 (quoting Anne Tamar-Mattis, executive director of Advocates for Informed Choice, stating “[a] lot of activists are concerned that what the German rule will do is encourage parents to make quick decisions and give the child an ‘undetermined’ . . . . We are afraid it will encourage intervention. We think a better process is assigning male or female sex, then waiting.”).

191. *Id.*

192. See Viloría, *supra* note 188.

193. See Castillo, *supra* note 171 (quoting Silvan Agius of IGLA-Europe, “[I]t does not address the surgeries and the medicalization of intersex people and that’s not good—that has to change . . . .”); Viloría, *supra* note 188 (“Intersex people in Germany and around the globe have been calling for this ban for decades. However, rather than banning intersex genital mutilation, the German government instead created a law that local intersex advocates believe puts intersex babies at greater risk . . . .”).

194. See Viloría, *supra* note 188 (quoting language from the German law).

the determination of whether the child “can be assigned to neither the female nor the male sex” is one made by the medical community,<sup>195</sup> thus reasserting the medical community’s role in assessing the “appropriateness” of intersex bodies.<sup>196</sup>

### *E. Colombia*

Until recently, Colombia was the only country that had ever considered addressing the practice of cosmetic, non-consensual genital “normalizing” surgery in and of itself.<sup>197</sup> In *Sentencia No. T-477/95* [hereinafter *Gonzalez*],<sup>198</sup> the Colombia Constitutional Court was asked to determine the legality of the practice of cosmetic, non-consensual genital “normalizing” surgery.<sup>199</sup> The court found that Gonzalez’s “fundamental right to human dignity and gender identity” had been violated by the surgery.<sup>200</sup> In doing so, the court held that “doctors could not alter the gender of a patient, regardless of the patient’s age, without the patient’s own informed consent.”<sup>201</sup>

Two subsequent cases followed the *Gonzalez* decision: *Sentencia No. SU-337/99* [hereinafter *Ramos*]<sup>202</sup> and *Sentencia No. T-551/99* [hereinafter *Cruz*].<sup>203</sup> In *Ramos*, the court upheld the lower court’s decision to deny Ramos’s mother the right to consent to “genital reconstruction surgery” on Ramos’s behalf;<sup>204</sup> in doing so, the court found “that it would be wrong for anyone to consent to a sex change operation other than the child herself.”<sup>205</sup> In *Cruz*, the court qualified its

195. *See id.*

196. *Id.*

197. *See* Greenberg, *supra* note 50, at 876.

198. Kate Haas, *Who Will Make Room for the Intersexed?* 30 AM. J.L. & MED. 41, 49 (2004) (note that the names chosen to humanize and simplify the parties in these Colombian cases was a decision originally made by Kate Haas in her article. The names chosen are not the names of the parties in the case. For consistency purposes, particularly considering my use of Haas’s breakdown of these cases, I have maintained the use of these chosen names in this Article.).

199. *See id.*; *see also Case 1 Part 1 (Sentencia SU-337/99)*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/node/166> [<http://perma.cc/3NPV-6CRX>]; *Case 2 (Sentencia T-551/99)*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/node/126> [<http://perma.cc/J2LG-M27L>]. For a translation of a portion of decision SU-337/99 into English, *see* Nohemy Solórzano-Thompson, *The Rights of Intersexed Infants and Children: Decision of the Colombian Constitutional Court, Bogotá, Colombia*, 12 May 1999 (SU-337/99), in *TRANSSEXUAL RIGHTS* 122 (Paisley Currah et al. eds., 2006).

200. Haas, *supra* note 198, at 49.

201. *Id.* at 50.

202. *Id.* at 50, n.104.

203. *Id.* at 50, n.100.

204. *See id.* at 52.

205. *Id.* (also noting that the court justified its holding through the “lack of evidence of any psychological harm to children that are not operated on, and the existence of actual evidence of psychological harm to children that have had such operations”); Davidian,

previous holdings by stating that “parents should be allowed to consent to surgery on children under age five”<sup>206</sup> because children younger than five lack the capacity to have formed a gender identity.<sup>207</sup> The standard for parental consent concerning children under five would require “informed consent.”<sup>208</sup>

While the final holding on cosmetic, non-consensual genital “normalizing” surgery in Colombia ultimately fails to protect those intersex infants most vulnerable to the procedure,<sup>209</sup> the surgery issue was at least addressed and a higher form of “consent” required by the Court.<sup>210</sup> By requiring “informed consent” of the parents, some of the secrecy and shaming practices underlying the medical standard could be mitigated and surgeries ultimately prevented.<sup>211</sup>

At the same time, it is necessary to note the widespread criticisms of the parental “informed consent” model. The intersex community itself has repeatedly asserted that informed consent must be given by the person being operated on, not the parents.<sup>212</sup> It is the infant/child’s bodily autonomy that is being violated through medical interference, and their voice that is silenced when any cosmetic,

*supra* note 53, at 15 (“The Court acknowledged that the treatment proposed was invasive, proven to cause grave and irreversible harm to the patient and that its usefulness remains in doubt.”).

206. Haas, *supra* note 198, at 53.

207. *Id.*

208. *Id.* at 53–54 (noting that “three criteria must be met: (i) detailed information must be provided, and the parent must be informed of the pros and cons that have sparked the current debate; (ii) the consent must be in writing, to formalize the decision and to ensure its seriousness; and (iii) the authorization must be given in stages.”).

209. *See id.* at 53.

210. *Id.* at 54 (“Despite the Colombian Court’s reticence about banning infant genital reconstruction surgery, Colombian law still provides far more protection for intersex children than current American law.”).

211. *See id.* at 62 (“The Colombian standard of informed consent ensures that doctors provide parents with all of the known information about intersex conditions over a prolonged period of time. Doctors must provide surgical and non-surgical options for treatment, and refer parents to support organizations for intersexed individuals. This model ensures that parents are not deceived about their child’s prognosis, and that they understand that genital reconstruction surgery is not the only solution for their child.”).

212. *See What Does ISNA Recommend for Children with Intersex?*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/faq/patient-centered> [<http://perma.cc/62KF-L2QX>] (“Surgeries done to make the genitals look ‘more normal’ should not be performed until a child is mature enough to make an informed decision for herself or himself. Before the patient makes a decision, she or he should be introduced to patients who have and have not had the surgery. Once she or he is fully informed, she or he should be provided access to a patient-centered surgeon.”); *see also* Consortium, *supra* note 48, at 3 (“Delay elective surgical and hormonal treatments until the patient can actively participate in decision-making about how his or her own body will look, feel, and function; when surgery and hormone treatments are considered, health care professionals must ask themselves whether they are truly needed for the benefit of the child or are being offered to allay parental distress . . .”) (emphasis omitted).

genital “normalizing” surgery is approved by parental consent.<sup>213</sup> Additionally, parents may not be in the ideal state of mind to truly develop an “informed” decision concerning the surgery.<sup>214</sup> Some parents may even place their own comfort and interests over that of the still infant child.<sup>215</sup> Even in the United States, there are areas of particular note where the authority of parents to make medical decisions on behalf of their children has been rejected.<sup>216</sup>

#### F. *United States of America*

Early in 2014, the United States seemed poised to follow Colombia’s route and directly assess the practice of cosmetic, non-consensual genital “normalizing” surgery through the judicial system.<sup>217</sup> For the first time in the U.S., a lawsuit was filed on behalf of an intersex individual alleging a violation of constitutional rights due to the practice of cosmetic, non-consensual genital “normalizing” surgery.<sup>218</sup>

The plaintiff, M.C.,<sup>219</sup> was determined to be a male at birth but had genitals “sufficiently indeterminate that surgeons removed his ambiguous phallus, a testis, and testicular tissue on one gonad, and surgically created an ostensible approximation of female genitals.”<sup>220</sup> This procedure was done to M.C. while he was sixteen months old and in the foster care system of the South Carolina Department of Social Services<sup>221</sup>—it was South Carolina officials themselves that approved M.C.’s genital “normalizing” surgery.<sup>222</sup>

213. See Uslan, *supra* note 83, at 321.

214. See Haas, *supra* note 198, at 63.

215. See Davidian, *supra* note 53, at 17 (“A common reason given for performing early surgery on intersex infants is the belief that without surgery, parents are unable to bond with their children.”).

216. *Id.* at 18 (recognizing potential conflicts of interests, such as consent to sterilization or organ donation, that have been held by the court to require judicial oversight over the decision of the parents); see also Greenberg, *supra* note 50, at 869–70; Uslan, *supra* note 83, at 308.

217. For a more comprehensive look at this case, *M.C. v. Amrhein*, and a discussion of the possibilities it presented, see Ashley Huddleston, Note, *Intersex Children in Foster Care: Can the Government Elect Sex Assignment Surgery?*, 22 J.L. & POL’Y 957 (2014); Erin D. Thorn, Note, *Drop the Knife! Instituting Policies of Nonsurgical Intervention for Intersex Infants*, 52 FAM. CT. REV. 610 (2014); Ryan L. White, Note, *Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson*, 37 FORDHAM INT’L L.J. 777 (2014).

218. *Landmark Case: M.C. v. Aaronson*, S. POVERTY LAW CTR., <http://www.splcenter.org/seeking-justice/case-docket/mc-v-aaronson> [<http://perma.cc/CN7J-HNPF>].

219. *Id.*

220. Elizabeth Reis, *Do No Harm: Intersex Surgeries and the Limits of Certainty*, NURSING CLIO (May 17, 2013), <http://nursingclio.org/2013/05/17/do-no-harm-intersex-surgeries-and-the-limits-of-certainty> [<http://perma.cc/RB3J-AC77>].

221. See S. POVERTY LAW CTR., *supra* note 218.

222. *Id.*

As a result of the surgery, M.C. was irreversibly denied the ability to decide what to do with his body; currently, M.C. has renounced ever having lived as a girl and only identifies as a boy.<sup>223</sup> He has already asked his adoptive mother, “When will I get my penis?”<sup>224</sup> There is also a possibility that M.C. was sterilized through the procedure.<sup>225</sup>

The complaint alleged that there was no medically necessary reason for this surgery—the procedure was merely “cosmetic.”<sup>226</sup> In consenting to the procedure, South Carolina therefore violated M.C.’s substantive due process rights of procreation, sexual autonomy, and bodily integrity under the Fourteenth Amendment.<sup>227</sup> The complaint also asserted a violation of M.C.’s procedural due process rights under the Fourteenth Amendment by subjecting M.C. to this procedure “without notice or a hearing to determine whether the procedure was in M.C.’s best interest.”<sup>228</sup> Unfortunately, the Fourth Circuit Court of Appeals recently dismissed M.C.’s case against the South Carolina Department of Social Services officials and doctors under the doctrine of qualified immunity.<sup>229</sup> In doing so, the Fourth Circuit reversed the decision of the district court,<sup>230</sup> which had recognized M.C. as having sufficiently alleged both a violation of his substantive due process right to procreation<sup>231</sup> and his procedural due process right to a pre-deprivation hearing.<sup>232</sup> The Fourth Circuit held that M.C.’s asserted rights—in particular the rights “of an infant to delay medically unnecessary sex assignment surgery,”<sup>233</sup> to a “pre-deprivation hearing,” and to weigh the risks and benefits of the surgery<sup>234</sup>—were not sufficiently clear at the time of the operation as to give officials reasonable fair warning of their violation.<sup>235</sup>

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223. *Id.*

224. *See* Reis, *supra* note 220.

225. *See* S. POVERTY LAW CTR., *supra* note 218.

226. Claudia Astorino, *South Carolina Intersex Lawsuit a Major Step in Ending Non-consensual Surgery to “Fix” Intersex Kids*, AUTOSTRADDLE (May 15, 2013, 3:00 PM), <http://www.autostraddle.com/south-carolina-intersex-lawsuit-a-major-step-in-ending-nonconsensual-surgery-to-fix-intersex-kids-177169> [<http://perma.cc/DQ84-ELYN>].

227. *See* S. POVERTY LAW CTR., *supra* note 218.

228. *Id.*

229. M.C. *ex rel.* Crawford v. Amrhein, 598 F. App’x 143, 148 (4th Cir. 2015).

230. Order, M.C. v. Aaronson, No. 2:13-cv-01303-DCN (D.S.C. Aug. 29, 2013), [http://www.splcenter.org/sites/default/files/downloads/case/order\\_denying\\_def\\_motion\\_to\\_dismiss\\_0.pdf](http://www.splcenter.org/sites/default/files/downloads/case/order_denying_def_motion_to_dismiss_0.pdf) [<http://perma.cc/D4G3-PEXR>] (order denying defendants’ motion to dismiss).

231. *Id.* at 9–10 (citing Carey v. Population Servs., Int’l, 431 U.S. 678, 684–85 (1977); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Buck v. Bell, 274 U.S. 200, 206–07 (1927); Avery v. Burke Cnty., 600 F.2d 111, 115 (4th Cir. 1981); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975)).

232. *Id.* at 11–12.

233. Crawford, 598 F. App’x at 148.

234. *Id.* at 149.

235. *Id.*

Fortunately for M.C., this Fourth Circuit dismissal is not the complete end of his tale. M.C.'s state law case against the Medical University of South Carolina and the Greenville Hospital System, alleging medical malpractice,<sup>236</sup> and the South Carolina Department of Society Services, alleging gross negligence,<sup>237</sup> is currently at the discovery stage before the South Carolina Court of Common Pleas, County of Richland.<sup>238</sup>

### G. Malta

In notable contrast to all previous legislative efforts by nations attempting to address the issue, Malta recently became the first country in the world to pass legislation banning the practice of cosmetic, non-consensual genital “normalizing” surgery.<sup>239</sup> Malta’s legislation, the Gender Identity, Gender Expression, and Sex Characteristics Act,<sup>240</sup> reasserts the significance of the right of bodily integrity and personal autonomy;<sup>241</sup> in so doing, the act makes illegal “non-medically necessary treatment on the sex characteristics of a person without informed consent.”<sup>242</sup> The act also creates a new basis for the application of antidiscrimination law: “sex characteristics,” including “atypical sex characteristics.”<sup>243</sup> Finally, the act also mandates the

236. Complaint at \*13–17, *M.C. ex rel. Crawford v. Med. Univ. of S. Carolina*, No. 2013 CP4002877 (S.C. Ct. C.P. May 14, 2013), [http://www.splcenter.org/sites/default/files/downloads/case/Crawford\\_State\\_Complaint\\_Filed.pdf](http://www.splcenter.org/sites/default/files/downloads/case/Crawford_State_Complaint_Filed.pdf) [<http://perma.cc/KZU5-ESP6>].

237. *Id.* at \*17–18.

238. Public Index Search for Case No. 2013CP4002877, RICHLAND CTY. 5TH JUD. CIR. PUB. INDEX (2013), <http://ww5.rcgov.us/SCJDWEB/PublicIndex/CaseDetails.aspx?County=40&CourtAgency=40002&Casenum=2013CP4002877&CaseType=V> [<http://perma.cc/FB48-CY5X>].

239. Leslie J, *A Red Letter Day as Malta Makes History!*, ORG. INTERSEX INT’L IN THE U.K. (Apr. 1, 2015), <http://oiiuk.org/1027/a-red-letter-day-as-malta-makes-history> [<http://perma.cc/B42V-N8AT>].

240. Gender Identity, Gender Expression and Sex Characteristics Act (Act No. 11/2015) (Malta), [http://tgeu.org/wp-content/uploads/2015/04/Malta\\_GIGESC\\_trans\\_law\\_2015.pdf](http://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf) [<http://perma.cc/HWL4-8MQN>].

241. Leslie J, *supra* note 239; Gender Identity, Gender Expression and Sex Characteristics Act § 3(1).

242. Leslie J, *supra* note 239; *see also* Gender Identity, Gender Expression and Sex Characteristics Act § 14(1) (“It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent . . .”).

243. Leslie J, *supra* note 239; *see also* Gender Identity, Gender Expression and Sex Characteristics Act § 19(a) (“[I]n sub-article (1) thereof, in the definition of the term ‘discrimination’, the words ‘gender identity and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds and “discriminate” shall be construed accordingly;’ shall be substituted by the words ‘gender identity, gender expression or sex characteristics and includes the treatment of a person

inclusion of a gender-neutral “x” category on official documentation, including passports.<sup>244</sup>

It is of paramount importance for other nations, legal scholars and theorists, and other allies interested in assisting the intersex community, to note the response by intersex activists to this legislation.<sup>245</sup> Despite the actions taken by previous nations attempting to create “third gender”/“no gender” categories of identity on legal documentation, it was the additional step taken by Malta, to explicitly prohibit cosmetic, non-consensual genital “normalizing” surgery, that is being praised by the community.<sup>246</sup> OII issued a press release concerning the legislation calling April 1 a “Red Letter Day” for the intersex community, “the first time in history a government anywhere has adopted laws to protect intersex people from the human rights abuses directed at them simply for their state of being.”<sup>247</sup> Intersex activists working in other countries have since pushed for similar legislation to be passed in their countries.<sup>248</sup>

#### CONCLUSION

*I will remember at all times that working for justice  
is not a gift, but a duty.*<sup>249</sup>

This Article was intended to highlight the struggles of the intersex community ally. It focuses on ally-proposed solutions, which are ultimately rejected by community members. This is probably the hardest point in time for an ally, that point in which they feel excluded or treated as an outsider despite the best of intentions. This is also, therefore, the most critical time for individuals, who self-ascribe as allies, to live up to the true maxims and values of an allyship framework. Because it is the lived experiences of community members that should be at the forefront of any movement, sometimes noncommunity member allies should step back, stand down, or even withdraw their voices in order to ensure the larger success of the community.

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in a less favourable manner than another person is, has been or would be treated on these grounds and “discriminate” shall be construed accordingly . . .”).

244. Leslie J, *supra* note 239.

245. *Id.*

246. *Malta the First Country to Outlaw Forced Surgical Intervention on Intersex Minors*, STAR OBSERVER (Apr. 2, 2015), <http://www.starobserver.com.au/news/international-news-news/malta-passes-law-outlawing-forced-surgical-intervention-on-intersex-minors/134800> [<http://perma.cc/PY84-FW6G>].

247. Leslie J, *supra* note 239 (emphasis omitted).

248. See STAR OBSERVER, *supra* note 246.

249. Rigby, *supra* note 1.



Intersex activists have long fought for a moratorium on the practice of cosmetic, non-consensual genital “normalizing” surgery. This procedure can have significant adverse physical and psychological effects later on in life, particularly as it is almost always done in infancy, before the child has any ability to consent. This is the struggle, and the focus of the movement. Unfortunately, while there has been recent notable progress on this front, the adoption and implementation of alternative solutions by international actors suggests that the voices of the intersex community are not always the loudest. Other voices and other proposed solutions, including those promoting a change to the male/female sex binary, sometimes resound more clearly, and are accepted by decision-makers as the proper direction to pursue.

Individuals seeking to be true allies to the intersex community in its struggles should recognize this disconnect and reflect on their position and advocacy in the movement. Until there is a prohibition on the practice of cosmetic, non-consensual genital “normalizing” surgery, proposals for an alternative solution must take a step back; efforts should be directed towards recognizing and supporting actions—such as those taken by Colombia, the United States, and Malta—to explicitly implement this prohibition into the law.

Hopefully, someday soon, activists and allies alike will be able to join in celebration, together, in witnessing the end of the practice of cosmetic, non-consensual genital “normalizing” surgery, the re-emergence of the importance of sexual autonomy and bodily integrity, and the fundamental protection of infants born with intersex conditions. And it will be then, after the immediate harms borne by intersex individuals have been halted, that we can turn to the—not-so-small—issues of ending society’s obsession with the male/female sex binary.