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## **The Cobblestones of Good Intentions: Substantive Due Process and Infant Genital Normalizing Surgery**

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Benjamin Sweeney\*

### INTRODUCTION

“[I]n its function, the power to punish is not essentially different from that of curing or educating.” – Michel Foucault<sup>1</sup>

Practitioners and scholars of law must always be cognizant of the immense power of law as a tool of benevolence and magnanimity. The pursuit of justice does not end at the edge of law’s function as a punitive mechanism; furtherance of justice must also address the wounds created by misinformed attempts at benevolence. The most vulnerable members of society, those who most need the protection of the law, are often the most affected by misplaced goodwill. Children, in particular, comprise a group that deserves the law’s attention, but has little voice within the law. Children are especially vulnerable to misguided attempts of assistance, particularly where the law does not understand or accept the realities of their lives. A particularly stark demonstration of this dynamic is in the choices made on the behalf of intersex children, where the State’s attempts to protect the child’s best interests can instead cause irreparable harm to the child’s body and ability to define and realize their<sup>2</sup> own identity.

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<sup>1</sup> MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 303 (Alan Sheridan, trans., Vintage Books 2d ed. 1995) (1977).

<sup>2</sup> Current linguistic conventions do not provide a clear means of resolving the conflict between third person singular pronouns and ambiguities of sex and gender. In lieu of the binary-reaffirming “his or her,” or somewhat unfamiliar gender-neutral pronouns I will

Prior to December 11, 2006, M.C. was a ward of the State of South Carolina.<sup>3</sup> M.C.'s mother had been declared unfit and her parental rights had been terminated, while M.C.'s father's parental rights were terminated as a result of abandonment.<sup>4</sup> While under the State's care, medical staff determined that M.C. exhibited "true hermaphroditism," that is, possessed ambiguous genitalia such that a sex determination as male or female was unclear.<sup>5</sup> Physicians recommended that M.C. undergo surgical alteration in order to appear female, and the State approved the procedure.<sup>6</sup> The operating physician removed all of M.C.'s testicular tissue and removed most of his phallus in order to create the appearance of a clitoris.<sup>7</sup> M.C. was 16 months old.<sup>8</sup> Throughout this process, Pamela and John Mark Crawford were navigating the foster parent and adoption systems, and formally adopted M. C. on December 11, 2006.<sup>9</sup> Despite their efforts to adopt M.C., at no point were Mr. and Mrs. Crawford involved in the decision to subject M.C. to this surgery.<sup>10</sup>

Years after surgery, M.C. began exhibiting traits much more common in little boys than in little girls.<sup>11</sup> For example, M.C. chose to play with trucks

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be using gender neutral third person plural when referring to individuals without demonstrated gender identity.

<sup>3</sup> Complaint, M.C. v. Aaronson, No. 2:13-cv-01303, 2013 WL 1961775 (D.S.C. May 14, 2013).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; Answer to Complaint, M.C. v. Aaronson, No. 2:13-cv-01303, 2013 WL 5000957 (D.S.C. May 14, 2013).

<sup>6</sup> Complaint, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *The Crawfords Speak About Groundbreaking Intersex Case*, YOUTUBE.COM (May 14, 2013), <http://www.youtube.com/watch?v=0qH4P5PtC4w&feature=youtu.be>.

<sup>11</sup> *Id.* This article assumes several presumptions and overgeneralizations regarding gender expression and identity that deserve a more nuanced and detailed analysis. Chief among them is the presumption that certain traits and behaviors are typologically gendered. For more detailed discussion about the origins, nature and consequences of this method of categorization, this author recommends: THOMAS LAQUEUR, MAKING SEX: BODY AND

and action figures, rather than with dolls.<sup>12</sup> Today, M.C. is living as a boy with the full support of his family and community, but his physical body is configured such that it does not reflect his gender identity.<sup>13</sup> Medical science is unable to repair much of what was taken from him, such as his ability to procreate.<sup>14</sup> M.C. and his parents brought a lawsuit in May of 2013 against the medical personnel who participated in M.C.'s surgery and the State of South Carolina, accusing them of medical malpractice and of violating M.C.'s substantive due process rights.<sup>15</sup>

The plaintiffs' legal theory in *M.C. v. Aaronson* provides the impetus for this analysis.<sup>16</sup> Can a substantive due process analysis serve as a suitable legal tool to accomplish justice in intersex cases? This article's response to that inquiry is that surgical sex assignment of intersex children is a violation of their rights provided through substantive due process. The capacity to determine and express one's identity is fundamentally shaped by a physical sexual assignment. The oppression of a child's ability to identify and experience their gender and sex expression constitutes injustice; infant sex assignment surgeries performed for the bare purpose of reinforcing cultural boundaries should not enjoy the endorsement of the law as an adequate interest of the state. The Supreme Court should recognize and protect the individual right to freedom from harmful and unnecessary surgery for this purpose. Unfortunately, current US jurisprudence does not adequately address many of the harms suffered by intersex persons. Where substantive

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GENDER FROM THE GREEKS TO FREUD (1990); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Trans., Robert Hurley, 1990).

<sup>12</sup> *The Crawford's Speak About Groundbreaking Intersex Case*, *supra* note 10.

<sup>13</sup> Complaint, *supra* note 3; *The Crawford's Speak About Groundbreaking Intersex Case*, *supra* note 10.

<sup>14</sup> *Id.*; Order Denying Defendant's Motion To Dismiss, *M.C. v. Aaronson*, No. 2-13-cv-01303, 2013 WL 5000957 (D.S.C. 2013), available at [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) (last visited Aug. 31, 2014).

<sup>15</sup> See Complaint, *supra* note 3; Complaint, *M.C. v. Aaronson*, No. 2013CP4002877, 2013 WL 2143761 (S.C.Com.Pl. May 14, 2013).

<sup>16</sup> See Complaint, *supra* note 3.

due process does not provide adequate recourse, affirmative legislation barring the practice of infant sex assignment should be drafted to protect the rights of the intersex infants.

First, I will provide the backdrop for my reasoning of how the District Court should decide *M.C. v. Aaronson* through a close analysis of the relevant contexts surrounding intersexed persons, gender and sex norms, and medical practice. Second, I will examine the particular facts of *M.C. v. Aaronson*, including the framing of the discussion by the parties involved. Third, I will discuss a just resolution of the substantive due process claim, both in *M.C. v. Aaronson* and in a more general context. Fourth, I will take this discussion and the emergent reasoning and apply them to local constitutional rights law, analyzing the capacity for protecting Washingtonian intersex infants through use of the state constitution's article I, section 3 protections. Fifth, I will consider the jurisprudential limits of substantive due process claims, which are, unfortunately, inadequate to address the core roots of harm that are evinced in cases like *M.C. v. Aaronson*. Acknowledging this, I will end my discussion by considering legislative and non-jurisprudential resolutions to these harms, inviting further analysis about how to best further justice for intersex persons.<sup>17</sup>

#### *A. Legal Analysis Concerning Intersex Persons*

M.C.'s story is not an isolated circumstance. Somewhere between one hundred and two hundred surgeries of this type are performed each year. Though the physicians in M.C.'s case referred to him as "hermaphroditic," modern terminology would consider him to have been born intersex.<sup>18</sup> Though bright-line definitions quickly become problematic, generally, "'Intersex' is a . . . term used for a variety of conditions in which a person is

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<sup>17</sup> Sara A. Aliabadi, *Gender Assignment Surgery for Intersexed Infants: How the Substantive Due Process Right to Privacy Both Supports and Opposes a Moratorium*, 12 VA. J. SOC. POL'Y & L. 170, 179 (2004).

<sup>18</sup> Complaint, *supra* note 3.

born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male."<sup>19</sup> Any attempt to effectuate justice must include an examination of M.C.'s circumstances while also bearing in mind the surrounding social, cultural, and medical contexts. Any legal solution that does not do so runs the risk of confounding justice through poor reasoning and shortsightedness.

Both in this case and generally, justice requires that we recognize that surgical sex assignment of intersex children is a violation of their rights provided through substantive due process. Fundamental components of an individual's rights, such as the capacity to determine and express one's identity, are restricted by external physical sexual assignment. Not only is the limitation of a child's freedoms and opportunities offensive to their rights, the decision to reify narrow cultural boundaries in the bodies of unwitting infants is an act of injustice. For these reasons, the Supreme Court should recognize that the individual right to freedom from harmful and unnecessary surgeries of this type is protected as a substantive due process right.

Much of the discussion in M.C.'s case involves analysis of gender, sex identity, and gender identity in the legal context. Because these are academically robust topics, I will not attempt to condense, or even localize, all of the theories and perspectives available for analysis. For the sake of discussion, I assume certain definitions and understandings with the awareness that these definitions and understandings do not reflect all persons' realities.

While other works are able to provide a more robust discussion of the contrast between sex and gender, this article assumes a basic and generalized distinction. For the purposes of this article, I acknowledge the generally accepted definition of sex as "[t]he biological and physiological

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<sup>19</sup> *What is Intersex?*, THE INTERSEX SOCIETY OF NORTH AMERICA, [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Aug. 31, 2014).

differences between males and females[.]” though the very premise of this paper challenges the underlying assumptions of that definition.<sup>20</sup> Generally, gender is considered the more fluid of the two, as a categorization that is “socially constructed by a particular society and ascribes . . . norms to individuals within that society . . . [and] is a process that may vary and reflects sociocultural expectations.”<sup>21</sup>

Both gender and sex are important considerations within this discussion, but the topic of intersex rights (and discussion of M.C.’s specific harms) has a great deal to do with sex and gender identity. Gender identity, a concept gaining more widespread recognition, is widely considered the understanding of the self as male or female as measured by social norms and practices.<sup>22</sup> Sex identity, on the other hand, challenges the immutability and plasticity of sex and gender as defined above. Sex identity is one’s *understanding of the self* as immutably, often biologically, male or female, “[w]hile gender identity is understood as a cultural phenomenon, which may have elements of artificial construction, you’ve ‘got to be real,’ (i.e., naturally binary), when it comes to [sex] identity.”<sup>23</sup>

In other words, M.C.’s gender and gender identity are relatively easily understood as male, as measured by his coopting of social norms. The definition of M.C.’s sex is problematized due to “ambiguous genitalia,” but physical realities, as we see in his case, can be modified through procedures such as surgery. Absent further surgery, M.C.’s “immutable” nature is female, and he could therefore be considered female under a classic definition of sex. Any definition of M.C.’s sex identity, however, is bound to be much more tenuous than a definition of his sex. M.C.’s sex identity cannot conform to sex-binary narratives and any attempt to establish a

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<sup>20</sup> HEESOOON JUN, SOCIAL JUSTICE, MULTICULTURAL COUNSELING, AND PRACTICE 127 (Kassie Graves et al. eds., SAGE Publications, Inc., 2010).

<sup>21</sup> *Id.* at 127–28.

<sup>22</sup> *Id.* at 128.

<sup>23</sup> Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Reform*, 88 N.C. L. REV. 357, 366 (2010).

“male” or “female” label would be categorically flawed. This is because sex-binary narratives presuppose a first nature as either male or female that existed separately from physical sex. In order to fully understand the impact of the law and the social order it condones or censors, we must disregard the allure of looking at sex identity through binary narratives and intersexuality must be considered a sex identity on par with male or female sex identities.

*B. The Importance of Sex Identity: More Than Just Modified Gender Identity*

Expression of one’s sex identity is integral to operation within our present day social systems. Vital life events require affirmation of sex identity. The experiences of transsexual persons, who express gender identities that can conflict with their physical sex, have highlighted the dissonance created when one attempts to assert a sex identity that does not conform to one’s assigned sex.<sup>24</sup> A lack of a societally acknowledged sex identity can have severe consequences for an individual including the failure of parents to relate to them, alienation from society, the perception of embarrassment around the topic of their sex or gender, and fragmentation of their family systems.<sup>25</sup>

These interpersonal harms are the result of pervasive social systems, specifically of rigid narratives about binary sex and sex identity that eliminate the possibility of recognizing intersex as a valid sex identity. Conformity with binary narratives is, presumably, one method of eliminating these harms, but this is not truly viable when the non-conformity is the result of “immutable” sex identities.<sup>26</sup> Many intersex

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<sup>24</sup> See, e.g., *id.* at 366.

<sup>25</sup> See Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics, and the Law*, 11 ANNALS HEALTH L. 195, 230–31 (2002) (discussing studies that indicate that, despite surgical alterations, many families had significant difficulties in processing the fact that their child was intersex).

<sup>26</sup> *But see id.* at 230–33 (recommending that children be gendered, presumably alongside a binary gender structure, because we live in a gendered society; the premise being that

activists have analogized the repression of intersex reality to the political struggles of queer persons to “pursue freedom from normative gender constructions.”<sup>27</sup> Not only does the existence of intersex persons disrupt the tendency of society and law to view the world “in binary terms—of color or white, gay or straight,” but it threatens the immutability and naturalness of binary sex, a cornerstone of mutually exclusive dichotomies.<sup>28</sup>

*C. Substantive Due Process as a Means to Protecting Intersex Persons*

In *M.C. v. Aaronson*, M.C.’s remedy lies largely in his substantive due process rights. The Fourteenth Amendment to the US Constitution provides that no state shall “deprive any person of life, liberty, or property without due process of law.”<sup>29</sup> The concept of substantive due process as a general remedy to protect intersex persons from deprivations of liberty is tempting, given that the jurisprudence surrounding substantive due process limits the capacity for pervasive and majoritarian prejudices to infringe on minorities.<sup>30</sup> In reality, however, it is unlikely that the Supreme Court would explicitly expand the “discrete and insular minority” categorization to cover intersex persons, given other recent, gender-based Supreme Court cases dealing with fundamental rights.<sup>31</sup> This does not rule out substantive due process as a legal protection against the harms that M.C. suffered, but any protection will likely need to come from more generalized loci than “discrete and insular minority” protection. As will be discussed in more

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conformity to a gendered binary, a reflection of a binary sex, will help mitigate the social harms intersex persons are subject to).

<sup>27</sup> DEBORAH T. MEEM ET AL., *FINDING OUT: AN INTRODUCTION TO LGBT STUDIES* 183 (Todd R. Armstrong et al. eds., SAGE Publications, Inc., 2010).

<sup>28</sup> *Id.* at 4.

<sup>29</sup> U.S. CONST. amend. XIV.

<sup>30</sup> *See, e.g.*, *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938) (“prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

<sup>31</sup> *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

detail, the individual rights to be asserted can fall under a variety of categorizations derived from substantive due process jurisprudence.

## I. INTERSEX CONTEXTUALIZED

Unlike populations identified via race or binary sex, intersex individuals do not occupy a space in the community discourse. Any discussion of solutions must first begin with an understanding of the harms that the solutions seek to address. This can be difficult in the context of intersex persons, as there often is not sufficient background information present in the academic or legal discourse to appreciate the harms that cultural and legal systems impose on intersex persons. A level of understanding is integral to the empathy and awareness needed, not only to understand the harms, but also to meaningfully weigh solutions and their resultant impacts.

### A. Defining Intersex

Intersexuality remains ambiguously defined both medically and socially, and this imprecision creates difficulties in discussing how law and policy should assess the needs of intersex persons.<sup>32</sup> The imprecision of social definitions comes from a lack of universally held standards upon which groups can agree. Without a clear, objective standard, the term “intersex” is used very generally to describe people living in a state of sexual otherness.<sup>33</sup> The medical definition reflects this vagueness by defining intersex as “a group of conditions where there is a *discrepancy* between the external genitals and the internal genitals (the testes and ovaries)”<sup>34</sup> and failing to

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<sup>32</sup> See *What is Intersex?*, *supra* note 19 (offering the generalized description of intersex as “a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male[,]” but acknowledging that definition of intersex can become “a semantic game that never ends”).

<sup>33</sup> See *id.*

<sup>34</sup> Neil K. Kaneshiro, *Intersex*, MEDLINE PLUS (August 2, 2011), <http://www.nlm.nih.gov/medlineplus/ency/article/001669.htm> (emphasis added) (It is intrinsically unclear what discrepancies are being measured against, and without appeal to an externally

take into account the significant cultural narratives at work. There are a variety of circumstances in which an individual would manifest ambiguity in regard to binary sexual assignment, and therefore demonstrate such a “discrepancy.” For example, an otherwise “female” infant could exhibit male gonad development during gestation, something that is potentially apparent by external observation.<sup>35</sup> However, the definition could also include infants who possess Partial Androgen Insensitivity Syndrome, where the hormone receptors do not process androgen the same way that other XY chromosome (“male”) humans do.<sup>36</sup> Because of this definitional imprecision there is no definitive or universally recognized figure for the number of intersex persons born or living.<sup>37</sup> Therefore, intersex births could range anywhere from one in 100 births to being a practical impossibility.<sup>38</sup> However, most experts place the figure somewhere between one in 1,500 to one in 2,000 births, using the definition of intersex as “so noticeably atypical in terms of genitalia that a specialist in sex differentiation is called in.”<sup>39</sup>

*B. Harmful Narratives: Specific Challenges Faced by Intersex Persons in Narrative Exclusion*

Intersex persons face a variety of difficulties relating to the restraints imposed by medical and social sex binaries. The scope of this paper encompasses the specific harms that are imposed upon the 1.7–4 percent of the world’s population that are born with primary or secondary sexual characteristics that are not clearly male or female.<sup>40</sup> It is these infants who

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imposed conception of sexual binary, excludes many of those considered to be intersex by virtue of “sexual ambiguity”).

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *How Common is Intersex?*, THE INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/frequency> (last visited Aug. 31, 2014).

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41 (2004).

are the potential subjects of sex assignment surgery.<sup>41</sup> An estimated 100–200 such sex assignment surgeries occur each year in the United States.<sup>42</sup>

As will be discussed in greater detail, there is a clear social component to the designation of intersex persons as a group that, temporarily or permanently, exists outside of a rigid sex-binary. However, for a variety of reasons, it is difficult to classify intersex persons as a social group, rather than as a class sharing certain medical or physiological traits.<sup>43</sup> Identification with a gender and a sex is presumed, with intersex being a temporary condition prior to transition into an immutable and “real” sex.<sup>44</sup> Even where surgical alterations are not performed immediately, intersex children are still expected to conform to a binary sex identity, to which their bodies will later be brought into conformity.<sup>45</sup>

There is very limited information about the psychological wellbeing of individuals who undergo this alteration.<sup>46</sup> This lack of information coincides with the sublimation of intersex as a “real” sex identity. The goal of normalizing renders the normalized invisible and relatively disabled from advocacy or redress. As a result, one of the harms associated with infant sex assignment is the sublimation that occurs; where doctors attempt to “cure” intersexuality in infancy there is greater difficulty in establishing intersexuality as a legitimate sex identity.<sup>47</sup>

Like other areas of gender, sex, and sexuality, intersex has been present throughout human history, but this is not immediately apparent. Intersex persons can be found in the cultural histories of our own and other

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<sup>41</sup> *Id.*

<sup>42</sup> Aliabadi, *supra* note 17, at 179.

<sup>43</sup> Haas, *supra* note 40.

<sup>44</sup> See Bloom, *supra* note 23, at 365–66.

<sup>45</sup> See Hermer, *supra* note 25, at 208–11.

<sup>46</sup> See *id.* at 212.

<sup>47</sup> See RIKI WILCHINS, QUEER THEORY, GENDER THEORY: AN INSTANT PRIMER 77–78 (Riki Wilchins, ed., 1st ed. 2004) (demonstrating that “[i]through a series of silences and erasures” the political and social power of one identity is transferred to a new identity).

societies.<sup>48</sup> The impulse to consider intersex as a “new” medical categorization, rather than a “natural” state, is more the result of modern cultural zeitgeist than objective scientific fact.<sup>49</sup> There is historical precedent to support an alternative to eliminating intersex persons through surgical alteration. Historical sources indicate that medical, legal, and social authorities found ways to reconcile intersex persons with the gendered environment in which the world operated.<sup>50</sup> At a basic level, “surgeries [serve] no purpose except to make the intersexed child more appealing to parents and to their culture,”<sup>51</sup> with the only benefits being collateral to conformity with a narrative that ignores an individual’s personal reality. Therefore, if the harms of infant surgical assignment outweigh the benefits, further harm through continued surgeries should be prevented on this basis.

### C. Medical Treatment of Intersex Persons

Modern medical practice has supported the normalization of intersex bodies through surgery since the 1950s.<sup>52</sup> For the last 60–70 years, the birth of an intersex child has been considered a medical emergency.<sup>53</sup> The prevailing medical perspective has been largely based on the studies of Dr. John Money, a psychologist who, in 1967, began a radical experiment in infant sex assignment. Dr. Money’s study involved Bruce Reimer, an infant whose penis was mutilated beyond repair following circumcision complications.<sup>54</sup> At Dr. Money’s recommendation, Bruce underwent genital

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<sup>48</sup> Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 76–77 (2006).

<sup>49</sup> Kishka-Kamari Ford, “First, Do No Harm”—*The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersex Infants*, 19 YALE L. & POL’Y REV. 469, 471 (2001).

<sup>50</sup> Tamar-Mattis, *supra* note 48, at 76–77.

<sup>51</sup> MEEM ET AL., *supra* note 27.

<sup>52</sup> See Hazel Glenn Beh & Milton Diamond, *An Emerging Medical and Ethical Dilemma: Should Physicians Perform Sex Assignments on Infants with Ambiguous Genitalia?*, 7 MICH. J. OF GENDER & L. 1, 2–3 (2000).

<sup>53</sup> Tamar Mattis, *supra* note 48, at 65.

<sup>54</sup> *Id.* at 59–60.

construction surgery to simulate female genital appearance and his parents were instructed to raise him as “Brenda,” complete with typical gender socializing parenting techniques, a hormone regimen, and complete secrecy about Brenda’s sex assignment.<sup>55</sup> Dr. Money’s report indicated that the experiment was a great success. Brenda, according to the report, followed normatively feminine patterns of behavior (for example, the study emphasized that Brenda played with dolls instead of trucks) in contrast to her twin brother, who followed normatively masculine patterns of behavior.<sup>56</sup>

Though Bruce was not born intersex, physicians began using Dr. Money’s study to support their recommendations to parents of intersex children.<sup>57</sup> Following Dr. Money’s model, doctors routinely prescribed “normalizing” genital surgery, hormone treatment, and secrecy about the child’s sexual ambiguity.<sup>58</sup> Reflecting the importance of concealment and immediate normalization to this treatment method, the American Academy of Pediatricians has, until recently, described the birth of an intersex infant as a “social emergency.”<sup>59</sup> In selecting a sex to assign, physicians consider a variety of factors, though none are dispositive.<sup>60</sup> These factors include chromosomal patterns, future reproductive capacity, and “positive surgical outcome.”<sup>61</sup> Often times surgeons will recommend that a child be surgically altered along female guidelines because “it [is] far easier to make a *functional* female than a male.”<sup>62</sup>

Even where the ease of the surgical process is not dispositive, it is clear that, when making their recommendations to parents or—as in the case of

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 60.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*; Aliabadi, *supra* note 17, at 178; Haas, *supra* note 40, at 45.

<sup>59</sup> Bloom, *supra* note 23, at 404.

<sup>60</sup> *See, e.g.*, Tamar-Mattis, *supra* note 48, at 66.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (emphasis added).

M.C.—the state guardian, surgeons project their own perspectives of gender and sex narratives. For example, when considering the “functionality” of the assigned genital-type, physicians follow antiquated and patriarchal conceptions of binary sex roles.<sup>63</sup> Specifically, suitable male sex organs are those which can, at maturity, penetrate a vagina, while suitable female sex organs are able to be penetrated by a penis.<sup>64</sup> The stark prioritization of “normalcy” as the predominant factor in the interests of the child is very clear in early clitoridectomy of children with “abnormally” large clitorises that were not able to be modified into a phallus.<sup>65</sup> Modern surgeries generally attempt to preserve as many nerve clusters as possible, but the underlying premise of doctors’ decisions to remove “abnormally” large clitorises (which are massive nerve clusters) is that social “normalcy” is more important to the wellbeing of the child than nerve sensation.<sup>66</sup>

These procedures are all performed with the hope that the child and family will ultimately benefit from the child’s smoother integration into an assigned sex and gender. However, the hallmark study that supported these concealment methods was based on inherently misleading grounds. Over the course of his research, Dr. Money failed to publish the troubling signs that his method was not working as well as he had hoped. Brenda exhibited a variety of male traits beyond the mild “tomboyishness” reported by Dr. Money, including standing to urinate and demanding, at age fourteen, to be allowed to live as a boy.<sup>67</sup> When his parents responded by telling him about

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<sup>63</sup> JOCELYN ELDERS & DAVID CHANOFF, JOCELYN ELDERS, M.D.: FROM SHARECROPPER’S DAUGHTER TO SURGEON GENERAL OF THE UNITED STATES OF AMERICA 153 (1996) (quoted in Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 66 (2006)) (emphasis added).

<sup>64</sup> See Tamar-Mattis, *supra* note 48, at 66.

<sup>65</sup> *Id.*

<sup>66</sup> See Karen Gurney, *Sex and the Surgeon’s Knife: The Family Court’s Dilemma. Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 AM. J.L. & MED. 625, 633 (2007).

<sup>67</sup> *Id.*

the procedure, he underwent surgery and began living as a man until he ended his life by committing suicide in 2004.<sup>68</sup> The true results of Dr. Money's method were not published until 1997.<sup>69</sup>

Without an empirically verifiable benefit, in terms of synthesizing a person's identity and body with an assigned sex identity, Dr. Money's concealment method could not provide adequate justification for the variety of harms that came to light regarding infant sex assignment surgery and the concealment method generally. Similar to cultural genital cutting (for example, female circumcision, sometimes called female genital mutilation), sex assignment surgeries can irreparably damage nerve systems and impede sexual functioning or enjoyment.<sup>70</sup> Intersex infants can have their reproductive functions irreversibly eliminated.<sup>71</sup> Finally, even the basic goal of integrating children into "normalcy" is frustrated when "the surgeries and repeated medical displays of the child's genitals can themselves be sources of a deep and lasting sense of shame[,] and continued surgical and hormonal treatments interrupt their day-to-day lives."<sup>72</sup>

#### *D. Modern Responses and Advocacy for Intersex Persons*

In response to increased awareness about the misinformed and harmful practices being performed on intersex infants, intersex advocacy groups began to organize and seek policy changes.<sup>73</sup> The Intersex Society of North America was founded in 1994 by Cheryl Chase specifically to address medically localized injustices against intersex persons.<sup>74</sup> Activists have

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<sup>68</sup> Samantha S. Uslan, *What Parents Don't Know: Informed Consent, Marriage, and Genital-Normalizing Surgery on Intersex Children*, 85 IND. L.J. 301, 302–03 (2010).

<sup>69</sup> *Id.* at 303.

<sup>70</sup> See Hermer, *supra* note 25, at 203.

<sup>71</sup> Julie Greenberg, Marybeth Herald, & Mark Strasser, *Beyond the Binary: What Can Feminists Learn From Intersex and Transgender Jurisprudence?*, 17 MICH. J. GENDER & L. 13, 38 (2009); Tamar-Mattis, *supra* note 48, at 91.

<sup>72</sup> Tamar-Mattis, *supra* note 48, at 72.

<sup>73</sup> *Id.* at 72–73.

<sup>74</sup> See, e.g. WILCHINS, *supra* note 47, at 77.

drawn on many political and philosophical perspectives used by LGBT, transgender, and queer-rights activists, emphasizing the importance of individual identity expression, tolerance of difference, and freedom from restrictive social identity narratives.<sup>75</sup>

While activists have thus far had some successes, such as in the education of the public and of medical professionals, there have not been significant legal responses to the current medical standard of care or the rights of intersex persons.<sup>76</sup> Society and its laws recognize binary options for gender and sex identification.<sup>77</sup>

It is beyond the scope of this paper to address all of the ways in which binary sex structures are represented and reinforced within the cultures and laws of the United States. However, certain international family courts have begun to reject arguments that sex is immutable in the context of youth transsexualism, and are more willing to recognize and tolerate plans for intersex youths to acquire treatment for erroneous sex assignment.<sup>78</sup> While these holdings do not create specific protections against sex assignment, they do demonstrate legally cognizable theories of sex identity as a legitimate interest; while the binary is upheld, the immutability of sex is thrown into question. These victories carve out space for further argument and advocacy about the importance of individual sex identification and freedom from restrictive structures that restrict this identification.

These small cracks in the legal and cultural narratives are overshadowed by ubiquitous affirmations of natural, immutable, and binary sex. While certain courts may be receptive to circumstances in which an individual is clearly being harmed by their inability to express their gender and sex

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<sup>75</sup> Cheryl Chase, *What is the Agenda of the Intersex Patient Advocacy Movement?*, THE INTERSEX SOCIETY OF NORTH AMERICA (June 23, 2004), <http://www.isna.org/agenda>.

<sup>76</sup> See MEEM ET AL., *supra* note 27, at 185; see Gurney, *supra* note 66, at n.34.

<sup>77</sup> Aliabadi, *supra* note 17, at 179–80.

<sup>78</sup> See Jennifer Rellis, “Please Write ‘E’ In This Box” *Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223, 242 (2008).

identity, legislative and executive actors continue to reaffirm restrictive narratives. One example of this is the Food and Drug Administration's (FDA) regulations surrounding silicone gel implants. In response to litigation concerning the health hazards of silicone gel implants, the FDA declared a moratorium on all use of these implants, except in cases where they were being used to reconstruct breasts lost to mastectomy.<sup>79</sup> The FDA rationalized this distinction by citing the psychological and emotional needs of these recipients.<sup>80</sup> This exception indicates the FDA's acceptance of delineation between "natural" and "unnatural," presuming that "natural" women would experience an emotional or psychological harm from the absence or loss of their breasts that would not be experienced by those who were not born into the female side of the sex-binary.<sup>81</sup>

These obstacles in the political arena highlight the reality that any protection that specifically addresses intersex persons is most likely going to come from the courts. Even then, relying on or building on transgender-focused legal remedies may not be the most effective avenue for change, as legal evaluation of transgender persons tends to reassert the existence of a sex-binary, even as the immutability of placement within that binary is eroded.<sup>82</sup> For this reason, protections based on sex identity must originate from other jurisprudential loci than protections centered on gender identity.<sup>83</sup>

Recognizing the unique nature of intersex persons in the context of their personal realities and the social narratives that surround them, it is now possible to focus analysis on the specific facts of *M.C. v. Aaronson*.

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<sup>79</sup> See, e.g., Gurney, *supra* note 66, at 644–51.

<sup>80</sup> Bloom, *supra* note 23, at 409.

<sup>81</sup> *Id.*

<sup>82</sup> See *id.* at 409–10.

<sup>83</sup> See *id.* at 382.

## II. *M.C. v. AARONSON*

M.C.'s biological father and mother both relinquished their parental rights, so determinations in the interest of M.C.'s wellbeing were left to the State. While he was a ward of the State, medical professionals discovered that M.C. fell into the medical definition of intersex in that he had characteristics of both male and female reproductive organs,<sup>84</sup> both externally and internally (this circumstance is medically defined as "ovotesticular difference" or DSD).<sup>85</sup> After recommendations by medical practitioners, the South Carolina Department of Social Services (DSS) approved surgically altering M.C. to create the appearance of female genitalia.<sup>86</sup> Personnel within the DSS did all the paperwork, processing, and decision making.<sup>87</sup>

Physicians used extensive surgical methods to modify M.C.'s body. As a part of the procedure, physicians removed M.C.'s external testicular tissue and the partial testicular tissue on his internal gonads.<sup>88</sup> Physicians also made additional surgical alterations to encourage the appearance of female genitalia, including the removal of M.C.'s phallus.<sup>89</sup> These alterations effectively sterilized M.C., who would have potentially had the capacity to produce viable sperm.<sup>90</sup> The Crawfords gained custody of and adopted M.C., intending to raise him as a girl according to his gender assignment.<sup>91</sup>

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<sup>84</sup> At this point it is constructive to point out that the use of masculine pronouns is a reflection of M.C.'s gender identity as male, not a reflection of any inherent maleness that stems from sex or sex identity.

<sup>85</sup> Order Denying Defendant's Motion To Dismiss at 2, *M.C. v. Aaronson*, No. 2:13-cv-01303 at 2 (D.S.C. Aug. 29, 2013), available at [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).

<sup>86</sup> Complaint, *supra* note 3, at 49; Order Denying Defendant's Motion To Dismiss, *supra* note 85, at 3.

<sup>87</sup> Complaint, *supra* note 3, at 39; Order Denying Defendant's Motion To Dismiss, *supra* note 85, at 3.

<sup>88</sup> Complaint, *supra* note 3, at 51; Order Denying Defendant's Motion To Dismiss, *supra* note 85, at 3.

<sup>89</sup> *Id.*; Order Denying Defendant's Motion To Dismiss, *supra* note 85, at 3.

<sup>90</sup> Complaint, *supra* note 3, at 51.

<sup>91</sup> *Id.*; *The Crawfords Speak About Groundbreaking Intersex Case*, *supra* note 10.

However, as time went on, M.C. did not act in accordance with his assigned gender and instead began developing a more masculine gender identity (measured according to the mannerisms, interests, and play styles that are culturally associated with male gender identification).<sup>92</sup> As M.C.'s gender identity developed more clearly along masculine lines, his parents recognized the limitations that had been imposed on him through early sex assignment and joined with the Southern Poverty Law Center (SPLC) to file complaints in federal and state courts against South Carolina and the physicians for violating M.C.'s fundamental rights.<sup>93</sup>

*A. Goals of Litigation: Allegations of the Complaint*

M.C.'s parents have said that the purpose of the lawsuit is to uphold constitutional principles protecting infants from an imposition of "correct" sex characteristics and protecting the integrity of their bodies.<sup>94</sup> While groundbreaking, the legal argument offered by SPLC fell short of an argument for an individual right to *be* intersex.<sup>95</sup>

The plaintiffs' complaints forwarded several theories of why the surgeries performed on M.C. were violations of his fundamental rights. Rather than highlighting that M.C. was born intersex, they emphasized the limitations on his expression of his gender identity.<sup>96</sup> M.C.'s parents alleged that the defendant physicians and DSS officials could not have known if M.C.'s identity would develop as a man or as a woman.<sup>97</sup> This argument

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<sup>92</sup> Complaint, *supra* note 3, at 13; *The Crawford's Speak About Groundbreaking Intersex Case*, *supra* note 10.

<sup>93</sup> *M.C. v. Aaronson*, SOUTHERN POVERTY LAW CENTER (Sep. 16, 2014) [www.splcenter.org/get-informed/case-docket/mc-v-aaronson](http://www.splcenter.org/get-informed/case-docket/mc-v-aaronson).

<sup>94</sup> *The Crawford's Speak About Groundbreaking Intersex Case*, *supra* note 10.

<sup>95</sup> This foregone argument essentially argues that a person has a right to sex identification outside of binary sex. Many of the same personal liberty interests asserted within this article could be brought to bear on this argument, particularly since limitation to binary sex forms the paradigmatic basis for assigning a sex to intersex infants in the first place.

<sup>96</sup> Complaint, *supra* note 3 (characterizing the harm as the mis-assignment of a female sex upon M.C., and the limitations imposed on him as a male because of surgery).

<sup>97</sup> *Id.* at 49.

acknowledges the lack of credibility in Dr. Money's concealment method; if physicians are aware that gender identity cannot be imposed through concealment, socialization, and hormone treatment, then they should also be aware that gender identity can develop independent of surgically assigned sex. Additionally, the plaintiffs for M.C. asserted that surgery could have been postponed either until M.C. was able to make an informed decision on his own or until more observational data could be collected about M.C.'s gender identification.<sup>98</sup>

Both of the complaints submitted by the plaintiffs address errors made by physicians, but ordinary medical malpractice does not necessarily substantiate a substantive due process claim. The surgery performed on M.C. was not subject to a hearing or robust legal determination that weighed potential harms to M.C.<sup>99</sup> Medical personnel made their own determinations and recommendations and the DSS officials consented, on behalf of M.C., to the recommended treatment options.<sup>100</sup> The plaintiffs argued that M.C.'s fundamental, substantive due process rights were violated when the state gave its approval for the irreversible medical procedure without investigating its necessity.<sup>101</sup>

As mentioned previously, the plaintiffs did not emphasize a fundamental right to ambiguous sex identity. Rather, they argued that M.C. had a "fundamental right to bodily integrity, privacy, liberty and procreation."<sup>102</sup> The plaintiffs implicated M.C.'s more general rights (or liberty interests) as being broad enough to protect his particular vulnerabilities as an intersex person instead of creating an entirely new categorization of fundamental rights.<sup>103</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*; Order Denying Defendant's Motion To Dismiss, *supra* note 85, at 4.

<sup>102</sup> Complaint, *supra* note 3, at 12.

<sup>103</sup> *Id.*

The plaintiffs also alleged statutory tort claims against the physicians under South Carolina law.<sup>104</sup> Though the statutory claims arise under state law, constitutional limitations necessarily affect the extent to which state law can operate to curtail a person's Fourteenth Amendment rights. Many of the same harms that are addressed through a substantive due process claim, such as loss of procreative rights, freedom of choice, or future enjoyment, can also be addressed via medical torts.

In their complaint, the plaintiffs in *M.C. v. Aaronson* emphasized the deleterious impact of the surgery on M.C.'s gender identity expression. In general, there is no discussion in the complaint of any specific rights that are tied to M.C.'s status as intersex. This creates the paradoxical situation in which the theory of harm is based on M.C.'s fundamental right to express his male gender identity. The complaint goes so far as to emphasize that M.C. was originally categorized by physicians as male prior to the determination that he should be assigned a female sex.<sup>105</sup>

*B. The Answer to the Complaint: Framing of the Discussion*

The defendants' approach to the case differs from the plaintiffs' in that it focuses on M.C.'s intersexuality as a justification for their behavior. The defendants acknowledge M.C.'s male gender identity, but emphasize M.C. as a person of "ambiguous" physical sex.<sup>106</sup> Their perspective seems to be that M.C.'s "ambiguous genitalia" indicated that things could have gone either way.<sup>107</sup> The defendants thus frame the case as one where they were asked to anticipate the development of a gender identity, and where the court is now asked to decide whether the physicians would or should have been able to anticipate the development of a male gender identity. If the legal argument is characterized in that manner, then there is little

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<sup>104</sup> Complaint, *supra* note 15, at 13–14.

<sup>105</sup> Complaint, *supra* note 3, at 12. ("M.C.'s doctors identified him as male in both the labor and delivery summary and the newborn identification form").

<sup>106</sup> See Answer to Complaint, *supra* note 5, at ¶3.

<sup>107</sup> See *id.*

jurisprudential benefit to intersex persons as a whole, as body-modifying surgery would be appropriate where a child developed a gender identity to match their assigned sex.

Research is still limited, but preliminary results indicate that surgical alteration (the concealment method specifically) does not significantly impact the direction of gender identity development.<sup>108</sup> If the legal remedy and protection for intersex persons hinges on whether physicians are able to accurately predict the gender identity (or avoid liability when there is no clear indication of binary sex identity to correspond to gender identity), then intersex persons will only have a legal recourse when physicians can be shown to have been negligent in predicting a child's eventual gender identity. This conception of a remedy is unreasonable for the very reason that infant surgical sex assignment is unreasonable for intersex persons: the formation of gender identity cannot be determined at such a young age.<sup>109</sup>

The defendants' position precludes an appropriate substantive due process claim, while the plaintiffs' position limits the viability of using substantive due process in a variety of circumstances. A theory that incorporates a wider application of substantive due process would better serve the needs of intersex persons by providing remedies and protections from unnecessary surgery.

### III. DUE PROCESS ANALYSIS

#### *A. Theory of Fundamental Rights: Bodily Integrity, Privacy, Liberty, and Procreation*

A more expansive and inclusive set of rights is not only preferable to address the specific contextual needs of intersex persons, but is constitutionally viable as well. There is no exhaustive list of what fundamental rights are protected under the US Constitution, nor are there

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<sup>108</sup> See Hermer, *supra* note 25, at 212–13.

<sup>109</sup> See *id.*

finite limits on how those rights can be triggered or exercised.<sup>110</sup> Generally, however, the Supreme Court has considered substantive rights to be protected by the Due Process Clause of the Fourteenth Amendment where the practices protected are “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if [the right] were sacrificed.”<sup>111</sup> These rights or protected practices must also be “deeply rooted in this Nation’s history and tradition.”<sup>112</sup> If the right is too imprecisely defined or abstract, it will not gain judicial acceptance, though this seems to pertain more to the application of the right to a definite practice than the wider application of a general right.<sup>113</sup>

In addition to recognizing an explicit due process protection against sterilization, courts have recognized due process rights to privacy, liberty, and preservation of bodily integrity as part of a more abstract scope of rights.<sup>114</sup> Though there are distinct jurisprudential differences between these rights, they would operate in a similar fashion in the context of protecting intersex persons from infant sex assignment surgery. Approaching them together has strategic benefit as well, as there are “[n]umerous court decisions [that] support the general contention that on a fundamental level, the right to privacy protects an individual’s right to be free from unwanted invasion of his or her person.”<sup>115</sup> The Supreme Court has also emphasized the interconnectedness of these rights, holding that the substantive due process rights of the Fourteenth Amendment include the “most basic decisions about family and parenthood, . . . as well as bodily integrity.”<sup>116</sup>

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<sup>110</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (indicating that the Court’s consideration of substantive due process rights “has not been reduced to any formula; its content cannot be determined by reference to any code”) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)).

<sup>111</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>112</sup> *Id.* at 721.

<sup>113</sup> See, e.g., *Planned Parenthood*, 505 U.S. at 833.

<sup>114</sup> See *Planned Parenthood*, 505 U.S. at 849.

<sup>115</sup> Aliabadi, *supra* note 17, at 184.

<sup>116</sup> *Planned Parenthood*, 505 U.S. at 849.

The plaintiffs' complaint claims that the violation of substantive due process takes four distinct forms.<sup>117</sup> They assert that M.C. has rights of bodily integrity, privacy, liberty, and procreation, and that all of these were infringed upon as result of his sex assignment surgery.<sup>118</sup> These distinctions and categorizations are useful in distinguishing exactly what rights are threatened by infant sex assignment surgery, but they are not equally applicable to all intersex persons.

First, both bodily integrity and privacy could fairly easily be applied to most intersex persons subjected to surgical alteration. Surgery is necessarily invasive of a person's privacy and bodily integrity. Liberty, a more general right, can be elusive in definition. Certainly the right could reiterate the liberty of being free from unnecessary surgery, but the liberty protected by the Fourteenth Amendment can also encompass "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>119</sup> Because of the wider potential application of the liberty right under the Fourteenth Amendment, it could encompass the right to decide one's gender or even sex identity. Some theorists note that modern jurisprudence is becoming considerably more open to justifying rights to alternative gender and sex identities in the context of the liberty protection.<sup>120</sup> However, it is questionable whether the Supreme Court would allow for a fundamental right to identify outside of a deeply ingrained legal narrative such as binary sex identification. The final right identified is the

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<sup>117</sup> Complaint, *supra* note 3, at 77.

<sup>118</sup> *Id.*

<sup>119</sup> *Planned Parenthood*, 505 U.S. at 851.

<sup>120</sup> *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (recognizing that the Fourteenth Amendment protects same-sex couples from targeted deprivations of rights under the Fourteenth Amendment, while not explicitly acknowledging a fundamental right to same-sex marriage or partnership unencumbered by restrictions); *see also*, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (holding that people in same-sex relationships enjoyed the rights to individual autonomy protected by the right to privacy); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that the state could not specifically target non-heterosexual people with a deprivation of rights).

right to procreation.<sup>121</sup> This is, perhaps, the strongest argument put forward by the Plaintiffs in *M.C. v. Aaronson*, as it is the most narrowly applicable and unambiguous right.<sup>122</sup> In removing M.C.’s testicular tissue, the doctors removed any chance he had to reproduce.<sup>123</sup> However, not all intersex persons share M.C.’s initial capacity for reproduction in the first place.<sup>124</sup> Additionally, this remedy would necessarily exclude intersex persons whose reproductive function is preserved.

A protection centered on reproduction and procreative rights would likely have the impact of encouraging intersex surgical alterations to eliminate sex traits that do not coincide with potential reproductive function. A remedy limited to this right would be under-inclusive, as it would not protect the interests of intersex persons who do not identify with their “procreative sex.” Emphasis on procreative rights also encourages a perspective on sex identity as being limited to binary reproductive roles. Finally, a procreative right would exclude those intersex persons who do not have an easily observable “dominant” reproductive function.<sup>125</sup>

The court order dismissing the defendants’ motion for summary judgment limited its discussion to the procreative right.<sup>126</sup> Though the District Court was not required to discuss the liberty, bodily integrity, and privacy rights asserted for the purposes of addressing a summary judgment motion, the court’s sole emphasis on procreative rights could indicate that it is more receptive to arguments about procreative rights than about other, more inclusive rights.

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<sup>121</sup> Complaint, *supra* note 3, at 71–77.

<sup>122</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that the right to procreation is a “basic liberty”).

<sup>123</sup> Complaint, *supra* note 3.

<sup>124</sup> Haas, *supra* note 40, at 59–60.

<sup>125</sup> See Hermer, *supra* note 25, at 209–10 (discussing how fertility is only an issue of import with a distinct set of intersex infants who exhibit certain physiological traits that can be difficult to identify and medically respond to).

<sup>126</sup> Order Denying Defendant’s Motion To Dismiss, *supra* note 85, at 10.

While there may be merit to a more incremental approach to jurisprudence that considers the rights of intersex persons, reliance on protection from sterilization is inadequate as a remedy. Though there is value to asserting generalized and widely-recognized individual rights, it would not protect intersex infants from genital-altering sex assignment surgery. Even if an intersex infant possessed the biological capacity for reproduction and developed a gender identity that “matched” their reproductively based sex, they still would be subject to genital normalizing surgery that would threaten their future sexual enjoyment and psychological wellbeing.

However, any remedy that relies upon a nexus between reproductive capacity and sex identity will be of little use to one whose gender identity does not conform to their reproductively based assigned sex. In the circumstance where a child does not identify with the sex that corresponded to their reproductive capacity, the child would be precluded from any sort of legal remedy, while still incurring all of non-reproductive harms associated with sex assigned surgery. For example, if physicians had identified M.C.’s potential male fertility and surgically modified him to appear male, then M.C. would have no remedy under this theory if he had developed a female gender identity. In these circumstances we must question what the value of procreative capacity is when one would be forced to transgress a fundamental component of their identity in order to exercise that right. A weighing of these rights, absent the wishes and expressed interests of the individual is a hazardous task; any surgical alteration should therefore be delayed until the intersex person is able to weigh these interests on their own.

#### *B. Viability of a Substantive Due Process Remedy*

Recent US Supreme Court cases have not only integrated the discussion of these various, similar interests in their application of substantive due process, but have also been using an approach to substantive due process

rights in the individual, sexually non-normative sense to expand rights to marginalized communities.<sup>127</sup> In these more modern cases, the Supreme Court emphasized that the liberty interests of certain individuals were protected from targeted deprivation.<sup>128</sup> As a matter of definition, intersex persons are uniquely targeted by binary sex imposition. Indeed, the nature of an intersex person is one who is physiologically differentiated from binary sex.<sup>129</sup>

On the other hand, the Court's discussion in *United States v. Windsor* acknowledges the applicability of substantive due process in the context of state protections for individuals. This is due, at least in some part, to the conflict specific to *Windsor*.<sup>130</sup> However, because the Supreme Court has not explicitly established a protection doctrine that would apply independent of state protections, intersex persons might be unable to exercise this federal due process right where the state has not established legal protections to cover them.<sup>131</sup> Regardless of the merits of this argument, it would behoove advocates to consider the state rules as an alternate mechanism of redress. Alternatively, the state rules could be used to could be used to expand jurisprudential consideration for groups and practices traditionally excluded from substantive due process protection.

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<sup>127</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

<sup>128</sup> *See, e.g., Windsor*, 133 S. Ct. at 2692; *Lawrence*, 539 U.S. at 574; *Romer v. Evans*, 617 U.S. 620, 635 (1996).

<sup>129</sup> *What is Intersex?*, *supra* note 19.

<sup>130</sup> *See Windsor*, 133 S. Ct. at 2693–96. *Windsor* specifically addressed the effect a federal statute had on the state-endowed rights of same-sex spouses, and therefore involved an asymmetry in the recognition of rights by the federal and state governments. The question the court considered was whether the US federal government could create legal distinctions that denied federal benefits to same-sex spouses who were authorized to enter into marriage under state law.

<sup>131</sup> *Windsor* was limited to the scenario in which federal law was in conflict with state laws in terms of how it limited the State's ability to protect the rights of its citizens. *See id.* at 2695–96.

## IV. CONTRASTING WASHINGTON'S INDIVIDUAL LIBERTY CLAIM

Washington State has no specific legislation that addresses the rights of intersex infants, but the State does have a constitutional provision analogous to the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Article I, section 3 of the Washington Constitution reads, “No person shall be deprived of life, liberty, or property without due process of law[,]”<sup>132</sup> which is fundamentally similar to the Federal Constitution’s mandate that the states not deprive their citizens of due process rights.<sup>132</sup> State common law has recognized the relative and potential congruence of the federal and state constitutional protections, and resolves them sequentially where they are both at issue, beginning with the state constitutional issue.<sup>133</sup> The Washington Supreme Court has acknowledged that there are circumstances in which the state constitution might create individual rights that extend beyond the scope of the Federal Constitution; presumably, this creates an opportunity for protection even in situations in which the federal claim falls short.<sup>134</sup> The state courts will consider claims for protection in light of state constitutional history, preexisting state law, structural differences between state and federal constitutions, and unique interests the state might have in the subject matter.<sup>135</sup>

The Federal Fourteenth Amendment protections could conceivably fail to cover intersex infants, but the state constitution is far more likely to include protections for intersex infants. If we apply the principles of *Windsor*, in which the Supreme Court struck down federal legal classifications that deprived individuals of individual rights that the State was attempting to protect, we are left with an odd legal paradox that seems to run up against the Supremacy Clause.<sup>136</sup>

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<sup>132</sup> U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3.

<sup>133</sup> See *King v. King*, 174 P.3d 659, 666 (Wash. 2007).

<sup>134</sup> See *id.*

<sup>135</sup> *Id.*; *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

<sup>136</sup> See *Windsor*, 133 S. Ct. at 2694–96 (2013). If the state constitution acknowledges specific rights to intersex persons that deserve a greater degree of protection, while the

Washington State courts have held that article I, section 3 of the state constitution relies upon the same reasoning and interpretations as the Fourteenth Amendment of the Federal Constitution.<sup>137</sup> Given that there are no guiding state statutes or constitutional common law precedent that would indicate a specific state interest in perpetuating surgical sex assignment for intersex infants, the state constitution has been interpreted as providing at least the same degree of protection as the Fourteenth Amendment.<sup>138</sup>

Washington State often considers the state constitution's protections to be more expansive than those covered by the Federal Constitution.<sup>139</sup> The Washington Supreme Court considers the following factors when deciding whether the state constitution exceeds the Federal Constitution: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."<sup>140</sup>

The textual and structural factors indicate parity between the federal and state protections, as the text of the state constitution<sup>141</sup> is nearly identical to the text of the Federal Constitution.<sup>142</sup> Although the differing grammatical subjects of the sentences establishing due process rights in each constitution

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Fourteenth Amendment excludes intersex persons categorically as an unqualified class for protection, then the federal courts may be required to recognize the state protections. *Windsor* differed from this hypothetical situation in that it contrasted federal and state statutes. Presumably, however, the underlying principle that the federal government cannot specifically deprive a group of rights that are derived from state protection can be extrapolated to constitutional interpretation. This discussion is somewhat beyond the scope of this analysis, but would be highly relevant in the situation where the court does not agree with this paper's prescription of including intersex persons within the Fourteenth Amendment's protection.

<sup>137</sup> See *King*, 174 P.3d at 666–67 (holding that federal court analysis of the Fourteenth Amendment was suitable to discussing the same liberty interests protected by the state constitution).

<sup>138</sup> See *id.* at 666–67; *Gunwall*, 720 P.2d at 811.

<sup>139</sup> *Gunwall*, 720 P.2d at 814.

<sup>140</sup> *Id.* at 58.

<sup>141</sup> WASH. CONST. art. I, § 3.

<sup>142</sup> U.S. CONST. amend. XIV.

could create legal distinction, Washington courts have interpreted a state actor requirement into the meaning of section three's text.<sup>143</sup> Additionally, no preexisting state law addresses intersex rights, nor are the problems of intersex infants so localized as to be a matter for specific local concern. Therefore, the Washington Constitution does not necessarily expand beyond the confines of the Fourteenth Amendment, but protects the same rights as its federal counterpart.

If both the state and federal constitutions protect the liberty, privacy, and bodily integrity of intersex persons then, even under a limited *Windsor* interpretation, the state would be required to show an interest that rises above bare rational basis.<sup>144</sup> Given what is known about intersex persons, the impact of the concealment method's early infant surgical alteration, and the importance of gender identity, the government would not be able to rely on its interest in protecting the welfare of people born intersex.<sup>145</sup> At first glance, it would seem that the government could articulate a compelling interest in preserving binary sex as a socially vital norm or value, but this argument fails the targeted deprivation standard of the line of cases extending from *Romer v. Evans*. These cases established that a government policy is not constitutionally enforceable when its purpose is to reinforce cultural narratives that deprive culture-transgressing individuals of their fundamental rights.<sup>146</sup> For these reasons, intersex persons like M.C. should be able to rely on state and federal substantive due process protections against sex assignment surgery. Unfortunately, recognition of this right does not completely address the harms suffered by intersex persons.

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<sup>143</sup> See, e.g., *Maas v. Corporation of Gonzaga University*, 618 P.2d 106, 110 (Wash. 1980).

<sup>144</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

<sup>145</sup> See Greenberg, Herald, & Strasser, *supra* note 71, at 37; Tamar-Mattis, *supra* note 48, at 72–73.

<sup>146</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 559–60 (2003); *Romer v. Evans*, 617 U.S. 620, 634 (1996).

## V. PUBLIC VERSUS PRIVATE ACTIONS: THE LIMITATIONS OF SUBSTANTIVE DUE PROCESS

### A. Informed Consent: Rights Held by Parents

A due process claim relies upon the existence of a state actor, both in the federal and state instances.<sup>147</sup> The circumstances of M.C.'s case present a situation in which M.C. was unable to consent to a surgery that had a drastic, harmful impact on him later in life.<sup>148</sup> The state DSS officials consented to the surgery on his behalf because of M.C.'s status as a ward of the state.<sup>149</sup> The substantive due process claim relies on the fact that the actor who consented to M.C.'s surgery was a government actor. If M.C.'s mother had given consent, prior to the termination of her parental rights, then the claim of a substantive due process violation would likely not have survived the motion for summary judgment.

The substantive due process rights of an infant are considered to be protected when parents give consent on the infant's behalf.<sup>150</sup> If M.C.'s parents had been the ones to agree to the recommendation of the physicians, then the Fourteenth Amendment would not have been available as a remedy. Clearly, this is problematic for those seeking to use the Fourteenth Amendment as a means of protecting intersex infants generally, as the vast majority of parents would likely consent to surgeries recommended by physicians. Even if misled by physicians or subjected to direct and willful impositions of restrictive sex identity classifications, the Fourteenth Amendment is powerless, as it "erects no shield against merely private conduct, however discriminatory or wrongful."<sup>151</sup>

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<sup>147</sup> See *United States v. Morrison*, 529 U.S. 598, 621 (2000); *Maas*, 618 P.2d at 110.

<sup>148</sup> Complaint, *supra* note 3, at 1–2.

<sup>149</sup> *Id.* at 1–2.

<sup>150</sup> *Id.* at 7–8; See *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941).

<sup>151</sup> *Morrison*, 529 U.S. at 621.

*B. Merits of Substantive Due Process Claims in Light of the State Actor Requirements*

In addition to protecting infants who are wards of the state, the right to be intersex could be used to prevent other forms of government encouragement of or complicity in these surgeries; grants, public funding, and other regulatory incentives could be attacked as supporting or providing for private actions that infringe on intersex persons' fundamental rights. Most importantly, a judicial designation of a fundamental liberty interest in protection from unnecessary surgery has a profound impact on the culture and discussion of intersex persons' rights. Many parents agree to physicians' recommendations of surgery in a relative vacuum, unaware of the long-term implications or available alternatives.<sup>152</sup> Legal recognition of a right establishes a foothold for non-binary sex identity within the larger cultural narrative.

If the narrative of gender and sex identity changes, or counter-narratives of non-binary possibilities for sex identification begin to emerge, then there is greater social impetus and possibility for collateral protections for intersex infants. These protections could take the form of altered medical practices, legislative protections, or alterations to the cultural systems that perpetuate the harms to intersex persons.

## VI. AUXILIARY SOLUTIONS AND REMEDIES

*A. Medical Reform and Medical Torts: Standard of Care Endorsement of Surgery Moratoriums*

Some advocates have emphasized the importance of an alteration in the medical practices and standards of physicians, focusing on the practices that harm intersex persons rather than on legal solutions.<sup>153</sup> This approach has distinctive advantages over a solution rooted in legal constitutional

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<sup>152</sup> Uslan, *supra* note 68, at 71.

<sup>153</sup> See Hermer, *supra* note 25, at 236.

protections. Medical standards of care and internal medical policies, ultimately, are the targets of legal action. Additionally, a self-enforced moratorium on infant sex assignment surgery undertaken by the medical profession could bypass problems of disparities between private and public actors.

This solution focused on medical practices has appeal for legal advocates as well, as medical practices can be changed through consistently successful litigation centered on medical tort claims.<sup>154</sup> Until fairly recently, the viability of tort claims was significantly diminished due to US jurisprudence regarding medical torts that protected doctors from liability where “the medical procedures are consistent with the custom of the profession and where they have obtained the patient’s consent.”<sup>155</sup> However, gradually changing understandings and standards have eroded the justifiability of surgical sex assignment and concealment, creating the opportunity to challenge infant sex assignment as outside of the custom of medical practice.<sup>156</sup>

As a result of increased advocacy by activists and others, as well as new revelations about the effects of infant sex assignment for intersex persons, the medical profession is gradually backing away from the concealment method as the protocol for dealing with intersex infants.<sup>157</sup> There is increased awareness and recognition that sex is created, rather than discovered, in intersex infants.<sup>158</sup> Legal advocates can build on this momentum to bring medical tort claims against “hold outs” who continue to adhere to Dr. Money’s conception of sex and gender creation by physicians. Medical tort claims are at issue in *M.C. v. Aaronson*’s claims under state

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<sup>154</sup> See *id.* at 211.

<sup>155</sup> Bloom, *supra* note 23, at 393–94.

<sup>156</sup> Tamar-Mattis, *supra* note 48, at 62.

<sup>157</sup> Kaneshiro, *supra* note 34, at 68.

<sup>158</sup> Bloom, *supra* note 23, at 393–94; Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination “Because of . . . [Perceived] Sex,”* 34 N.Y.U. REV. L. & SOC. CHANGE 55, 68 (2010).

law and it would behoove advocates to monitor discussion of the “custom of the profession” in surgically assigning sex to intersex infants.<sup>159</sup>

### *B. Statutory Remedies*

The other promising avenue by which intersex persons can be protected from unnecessary surgeries is through statutory protection. Although strong arguments can be made to justify and advocate for legislative protections for intersex infants, significant obstacles must be overcome. Federal statutes could potentially conflict with constitutional limitations that also restrict their application to state actors, as can be observed in the application of Title VII protections. Additionally, legislative solutions and protections create, by necessity, a class of persons to be protected. If individuals are required to fit into a specific class for legislative protection, rather than allowed to retain an individually vested right, then we run into the very problem that intersex exclusion identifies: potential under inclusion due to restrictive narratives.<sup>160</sup>

Additionally, legislative action that does target the private actions of parents would likely encounter strong opposition. Parents would likely object to regulation of their parental autonomy to determine the best interests of their children.<sup>161</sup> Strong cultural and legal customs permit as much parental autonomy as possible in the raising of children, including the power to make medical decisions on children’s behalf.<sup>162</sup> Legislative action, though more flexible than the Fourteenth Amendment, could well be inadequate for addressing the private behaviors of parents.

Cultural recognition and endorsement of intersex rights could be far more effective remedies than stand-alone formalistic protections, although these are less auxiliary solutions to substantive due process rights protection than

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<sup>159</sup> Complaint, *supra* note 3.

<sup>160</sup> See Gelfman, *supra* note 159, at 108.

<sup>161</sup> See Aliabadi, *supra* note 17, at 191–92.

<sup>162</sup> Uslan, *supra* note 68, at 308 (relaying, “parents are afforded a great deal of deference in making decisions for their children and in controlling their children's upbringing”).

they are necessary components of any significant social and legal change. Intersex-specific legal protections benefit from collateral cultural awareness in the same sense that gender and sexuality protections simultaneously propel and are the product of cultural awareness and society-wide understanding. The problems faced by intersex persons result from the exclusion of intersex identity from traditional cultural narratives; the harms they suffer are the result of third parties magnanimously or fearfully trying to drag them into these ill-fitting narratives. The underlying goal of tort litigation, legislative protections, or constitutional recognition should be to address the harms of these narratives and the injustice created by legal endorsement of their ubiquity.<sup>163</sup>

## VII. CONCLUSION

“Anything that gives us new knowledge gives an opportunity to be more rational” – Herbert Simon<sup>164</sup>

The law, perhaps more than any other component of our society, holds itself out as an institution in which reason and intellect are harnessed to the benefit of the misunderstood. Intersex persons, like many other groups who are marginalized by cultural narratives, have suffered from others’ inability to see anything but their transgression from a restrictive “reality.” Without consideration, study, and reflection, the law runs the risk of continuing the unfortunate traditions that have harmed intersex persons. Children like M.C. should not be chained to bodies imposed on them by the lack of flexibility or thoughtfulness of society. It is my hope that advocates and judges will

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<sup>163</sup> Gelfman, *supra* note 159, at 109 (“The focus for the dialogue should be whether the law can avoid reifying sex categories, or whether it can reinforce them to a lesser extent, while still providing protection to victims of sex stereotyping . . . [if the goal is to] eliminate rather than reinforce stereotypical categories, then courts should not assign individuals, or require individuals to assign themselves, to sex categories [including intersex].”).

<sup>164</sup> Byron Spice, *CMU's Simon Reflects on How Computers Will Continue to Shape the World*, POST GAZETTE (Oct. 16, 2000), <http://old.post-gazette.com/regionstate/20001016simon2.asp>.

exercise inclusiveness and thoughtful consideration of intersex realities. I hope that with knowledge, and a genuine desire to do justice, advocates and judges will recognize that human dignity and respect far outweigh our need to preserve convenient illusions.