OUTSIDE THE LAW: INTERSEX, MEDICINE AND THE DISCOURSE OF RIGHTS

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"Texts and research dealing with intersexuality make no provision for intersexuality to exist except as a pathological condition. Instead of using the knowledge to designate a space in which intersexuality constitutes a sex or set of sexes which is consistent with the forms that the human body may take . . . the knowledge is used in order to make diagnoses which . . . lead to the erasure of physical states that challenge this vision of human existence."[1]

"Intersexuality is not a disease . . . I'm not even gonna say it's an abnormality. I simply say it's a variation."[2]

"To be lied to as a child about your own body, to have your life as a sexual being so ignored that you are not even given the decency of an answer to your questions, is to have your heart and soul relentlessly undermined."[3]

INTRODUCTION

It is only very recently that the treatment of intersex has been recognised as a human rights issue.[4] The main purpose of this paper is to look at the hurdles that exist to legal visibility of the medical treatment of intersex as an international human rights abuse, and to outline some of the possible strategies that might be used in this process of recognition.

An article written in 2003 in the *Journal of Pediatrics and Children's Health*, stated that "[n]ext to perinatal death, genital ambiguity is likely to be the most devastating condition to face any parent of a newborn."[5] Why is intersex

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[1] Morgan Holmes, *Re-Membering a Queer Body*, UNDERCURRENTS, May 1994, at 13.

[2] Interview by Sharon Preves with Jana, an intersex man, SHARON PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 117 (2003).

[3] Martha Coventry, *Finding the Words*, CHRYSALIS, 1997, at 27.

[4] *See, e.g., A Report of a Public Hearing by the Human Rights Commission of the City and County of San Francisco, A Human Rights Investigation into the 'Normalization' of Intersex People* [hereinafter *Intersex Report*]; Tony Briffa, *Letter to Nature: Intersex Surgery Disregards Children's Human Rights*, 428 NATURE 695 (2004); Jo Bird, *When Sex Means 'Condition' or 'Impairment': Evaluating the Human Rights of Transgender and Intersex Peoples*, 5 S. CROSS U. L. REV. *passim* (2001).

[5] Y. Low, J. Hutson et al., *Rules for Clinical Diagnosis in Babies with Ambiguous Genitalia* 39 J. PEDIATRICS & CHILDREN'S HEALTH 406 (2003).

considered the most devastating condition to face a parent, more so than a physically painful or life-threatening illness?

I argue that the classification of the "condition" as "devastating" has as much to do with legal understandings of humanity as with medical conceptions. To 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. The body is rendered human through surgery, that is, it is given a sex. This is one of the problems that activists face in arguing that surgery consists of an assault to human dignity or to human rights. The surgery itself is considered to mark the child as a human being, to bestow upon the child the humanity which "it" never possessed prior to medical intervention. The surgery is a gift of a rights-bearing body and an existence as a legal subject and a citizen.

There is a second reason why surgery is not considered to be a human rights violation. In recent history, intersex has been discursively produced as a medical rather than a legal issue; intersex is a "disease," a "condition" or "impairment" rather than a viable legal identity. Intersex has been constructed as "outside of law."

To *legally* recognise intersex as a sex (rather than as a condition to be cured or erased from the body) is a tactic in a struggle. One cannot argue that there does exist, or should exist, a social and cultural space for a third (or more) sex (although I am aware of the arguments for and against the utopian vision of such a world).[6] It is not to force those defined as intersex to lead culturally "inter-gendered lives."[7] However, one of the likely effects of the creation of a legal space for intersex would be the increasing social space for those who choose to occupy it. Existing in the realm of the medical, "[t]he goal of many leading teams treating intersex is to make intersex disappear."[8]

Instead of being a mark to be erased from the body, intersex can be embraced by definitions of humanity under international human rights law. The Corte Constitucional de Colombia, the only court in the world to recognize that the

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[6] A number of scholars have argued against the social and medical dogma that there exist only two sexes. For example, Fausto-Sterling argued that there is a biological basis for the recognition of at least five distinct sexes. Anne Fausto-Sterling *The Five Sexes: Why Male and Female are Not Enough*, SCIENCES, March/April 1993, at 20. *See also* GILBERT HERDT, THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMOPHISM IN CULTURE AND HISTORY (1994) (Herdt writes about a cross-cultural acceptance of a third sex throughout history.). By contrast, some intersex scholars have spoken of the pressure they feel to embody the "gender deconstruction" fantasies of the non-intersexed. Emi Koyama argues that the five sex theory "exoticizes" and "sensationalizes" intersex people, and is "artificial and useless for improving the lives of intersex people." *See* INTRODUCTION TO INTERSEX ACTIVISM: A GUIDE FOR ALLIES, A PUBLICATION OF THE INTERSEX INITIATIVE 4 (2003); Kira Triea writes "I go blank when people tell me that 'in other cultures, intersexed people were respected as shamans.'" *See* Kira Triea, *Power, Orgasm and the Psychohormonal Research Unit*, CHRYSALIS, 1997, at 23.

[7] Joy Shaffer has argued in favour of a social "intergendered" status for intersex children. *See* Joy Shaffer, *Intergendered: Between the Worlds*, HERMAPHRODITES WITH ATTITUDE, Q. PUBLICATION INTERSEX SOC'Y OF N. AM., Summer 1995, at 5.

[8] *Intersex Report*, *supra* note 4, at 14.

treatment of intersex can amount to a rights violation, insists, "the public authorities, the medical community, and citizens in general, we must open a space to these people, until now silenced."[9]

This essay is divided into three parts. In part one, I explore further my contention that intersex has been constructed as a biological as opposed to a legal issue. I develop this argument further by considering the hidden relationship between law, medicine and popular cultural representations of intersex. In part two, I consider what human rights, as they are articulated through various international instruments, could potentially be used as a shield to prevent current medical practices that are experienced by many as abusive, dehumanizing and soul-destroying. I also consider the hurdles to be overcome in invoking such rights-based recognition. Part three compares the inclusion of intersex in the antidiscrimination laws of the United States and Austrailia.

I. MAKING INTERSEX A LEGAL ISSUE

In recent history, intersex has been constructed as being purely biological in nature. A medical text makes the claim that "[i]ntersex is a biological, but not a legal phenomenon."[10] Suzanne Kessler has exposed the connection between cultural anxiety about intersex and medical practices of genital intolerance.[11] In her seminal article in *Signs*, she claims that physicians do not discover sex, but act as "interpreters" and "determiners" of gender.[12] In this "history of the present"[13] of intersex, this article shows how cultural fears about intersex also permeate *legal* theory and practice. This article argues that recognizing intersex as a legal "phenomenon" creates room for political negotiation in the field of human rights law.

The law determines which bodies are allowed to exist without surgical intervention and legitimates the alteration of the hormonal, anatomical and endocrinological features of those whose bodies are designated to be abnormal. The intersex body is deemed to be biologically anomalous at the same time it is deemed to be legally anomalous. There is no such thing as the purely biological body unmediated by law. Such profound physical alterations to children's bodies under

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[9] Julie A. Greenberg & Cheryl Chase, *Colombia's Highest Court Restricts Surgery on Intersex Children: Background of Columbia Decisions, available at* http://www.isna.org/book/print/515.

[10] Heinz Gelbke, *Plastic Surgery, in* INTERSEXUALITY 474 (Claus Oversizier ed., 1963).

[11] SUZANNE KESSLER, LESSONS FROM THE INTERSEXED 34 (1998).

[12] *See generally* Suzanne Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 SIGNS 3 (1990). Similarly, Sharon Preves and others have argued that intersex is a social and not a medical problem. *See* PREVES, *supra* note 2, at 11.

[13] The author takes the term "history of the present" from Michel Foucault. Foucault's method is genealogical and involves seeing history as non-linear and as a result of a series of accidents or contingent events, rather than as "progress." Sources of present meaning come from multiple sites and are the result of historical power struggles over what constitutes truth. *See* Michel Foucault, *Nietzsche, Genealogy, History, in* AESTHETICS, METHOD, AND EPISTEMOLOGY: ESSENTIAL WORKS OF FOUCAULT, 1954-1984, Vol. II (James D. Faubion ed., 1999).

any other circumstance would be regarded as discriminatory treatment—contrary to the rights of the child—or as violent criminal assaults.

The meanings of body and surgery are intertwined. Where the body is deemed abnormal, surgical and hormonal procedures are understood as cures for disease and deformity. If the body is proclaimed normal—that is, a normal female—then the surgical alteration of the genitals without consent is deemed a criminal act. When the body is considered abnormal, then the surgery is understood as giving the child something which it lacked—the gift of a relationship to and through law.

What is biological and what is legal becomes blurred because the law sanctions corporeal alterations to intersex bodies. In the case of the intersex infant, medicine determines what a "disease" is and what "pathology" is. The law turns a blind eye to the practices of medicine, legitimizing practitioners' internal claims that what they do is curative and has nothing to do with law.

A. Comparing The Law's Attitude Towards Intersex and Transgender Children

The case of *Re Alex* took place in Australia in 2004. This case concerned a thirteen year-old transgender child. Alex was a biological female who identified as male. Alex's guardian sought hormonal treatment for Alex. The court held that Alex did not have the maturity to consent to "the grave nature . . . of the proposed treatment[s]," and maintained that its authorization was required, not only for surgery, but also for hormonal intervention in children with gender dysphoria.[14]

The law regards surgery or hormonal intervention as being of such a grave nature that a child who expresses a desire for the treatment cannot consent to it, without a court order. Under the same legal system, intersex infants and children—with no understanding of the procedures—are subjected to the procedures without the requirement of obtaining a court order. Further, adult individuals who desire sex change surgery must go through a rigorous gate-keeping process in order to determine whether they are "true transsexuals." These types of bodily alterations are not freely available to consenting adults in Australia, yet similar types of surgical and hormonal interventions are routinely carried out on non-consenting infants and children. This evidence supports the contention that intersex people are regarded as less than human by the law.

Intersex surgery is constructed as being more urgent than the treatment of any life threatening disease, because sex is a requirement of citizenship. Citizenship marks a child as being fully human. Those without citizenship are not granted the full gamut of human rights. The birth certificate is the most fundamental document in many countries, to give the child citizenship status. One of the key contents of that document is the classification of maleness or femaleness. Without this document, the child is politically and geographically marked as outsider, alien, or other.

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[14] Re Alex: *Hormonal Treatment for Gender Identity Dysphoria*, FAM. L.R. 297, ¶¶ 168-69 (2004).

B. The Connection Between Medical and Popular Cultural Representations of Intersex and the Failure of Human Rights Discourse

Intersex is portrayed through numerous discourses from medical to popular cultural representations as amounting to that which is not fully human. Surgery is believed to give the body a sex, and hence to render the body human. Speaking of human rights in the area of intersex is difficult, because although rights discourse makes claims to gender neutrality, rights do not precede the sexed (male/female) body.

The article contends that cultural fears permeate not only medical practice, but also legal practice, and the application and inapplication of human rights law. Medical and legal discourses have produced a truth that to be human is to have a sex, and that the intersex child does not have a sex, but rather a "condition," an "anomaly," or an "impairment." To be intersex is in some way to be sexless. It is also to have a "dangerous" sex.[15] There is a fear not only that intersex is a disease and a deformity, but that it is contagious and contaminating—not only to the individual biological body, but to the social and political body as well.

C. Intersex as Lower Animal Life-Form

In the literature from the 1950s and 1960s, a discourse emerged which likens intersex with "lower life-forms." Medical textbooks on the subject consistently make reference to animal studies in an attempt to "throw light upon" the mysteries of sexual ambiguity. A 1962 medical book was titled *Human Intersex*,[16] as if to highlight the strangeness of the words "human" and "intersex" appearing together. The first chapter of the book, "The Nature of Sex," outlines different modes of reproduction found in nature.

Hence, "with the increase in complexity of bodily organization in animals higher up the evolutionary tree the extent of sex dimorphism has increased," and "in most animal species the two sexes are separated, i.e., there are male and female individuals and the hermaphrodite state no longer exists."[17] The authors refer to the "para-sexual intermingling" that "takes place in the conjugation of virus particles."[18]

Both books represent the hermaphroditic body as one which is an evolutionary "throw back" to an age of dinosaurs, closer to "lower-life forms" such as amoeba and bacteria, fruit flies and marine worms.

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[15] As Kira Triea speaks of her experience with the John Hopkins Research Unit where she was treated by John Money, "I can think of no other reason why they would invest so much energy in my genitals. They must have been profoundly awed by my genitals!" Triea, *supra* note 6, at 25.

[16] DAVID ASHLEY, HUMAN INTERSEX (1962).

[17] *Id.* at 9-10.

[18] *Id.* at 12.

There is a continuing proliferation of articles focusing on discovering the origin and causes of intersex in animals and insects.[19] Arguably, this interest in studying animals as a field of knowledge has as little to do with humans as it did in the 1950s. However, Robert Blizzard in a 2002, article argues that researchers seeking to "solve" the "conundrum" surrounding the medical and cultural treatment of intersex infants "should capitalize on animal studies" of intersex.[20]

D. Intersex As Pollution And Contagion

One author who has capitalized on animal studies of intersex is Leonard Sax. Writing in 2001, Sax makes an appeal to studies of animal intersex in connection with humans. He argues that there is a link between increasing levels of intersex in animals and "the feminisation" of culture.[21]

For Sax, both intersex and the feminisation of culture are the result of pollution, of increased toxins in the environment. Both intersex and feminisation are conflated in this article, as is the idea of environmental pollution with a kind of psychic or cultural pollution. The intersex body is the incarnation of, and comes to stand for the "feminisation of culture" and is feared as the key causal element in what Sax refers to as "the decline and fall of the male American empire."

As a site of environmental and cultural contamination, the intersex body is one which is deemed dangerous, and in need of quarantine and correction. Sax exposes what is more frequently an unconscious and unspoken fear of intersex. Sax lays bare the fear that intersex is an unnatural form, and a pollution which can spread and have profound consequences for a patriarchal economy. As such, the "remedy" of surgical and hormonal intervention, can be seen not only as a cure for a diseased individual, but as a form of punishing the deviant body and as a means of salvaging and protecting society.

An explicit link between sin and intersex is made in an article by fundamentalist Christian, Chuck Colson. Colson writes that "the bible teaches that the fall into sin affected biology itself—that nature is now marred and distorted from its original perfection. This truth gives us a basis for fighting evil, for working to alleviate diseases and deformity—including those unfortunate children born with genital deformities."[22]

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[19] *See, e.g.*, K. Davis & G. Ludwig, *Hormonal Effects and Sex Differentiation in Sunshine Bass Morone ChrysopsxMorone Saxatilis*, 231 AQUACULTURE 587 (2004); Aravindakshan Jayaprakash et al., *Consequences of Xenoestrogen Exposure on Male Reproductive Function in Spottail Shiners (Notropis hudsoniu)*, 78 TOXICOLOGICAL SCIENCES 156 (2004); Yukio Hanamura & Susumo Ohtsuka, *Occurrence of Intersex Individuals in the Sergestid Shrimp (Acetes Sibgae) in Darwin Harbour Northern Territory, Australia*, 76 CRUSTACEANA 749 (2003).

[20] Robert M. Blizzard, *Intersex Issues: A Series of Continuing Xonundrums*, 110 PEDIATRICS 616, 620 (2002).

[21] Leonard Sax, *The Feminization of American Culture—Human Biology and Modern Chemicals* 16 WORLD AND I 262 (2001).

[22] Chuck Colson, *Blurred Biology: How Many Sexes Are There*, Breakpoint Online: A Christian Perspective on Today's News and Trends, No 61016, *available at* www.pfmonline.net (Oct. 16, 1996).

Arguably, the ideas of Sax and Colson have nothing to do with legal or medical discourse. However, this article contends that through its silences, the law legitimizes these conservative ideas about intersex. The anxieties expressed in a blatant manner by Sax and Colson permeate, in less obvious ways, the language of medicine and law. As Foucault points out, "historically hermaphrodites were criminals, or crime's offspring, since their anatomical disposition, their very being confounded the law that distinguished the sexes and prescribed their union."[23]

Intersex is not a subject heading at the University of Melbourne library. Rather "hermaphroditism" is the term retained by the University of Melbourne, Australia. The University, like many others worldwide, bases its catalogue on the Library of Congress subject authority headings. This terminology resonates with plant and animal literature, and stories of a mythical beast.

E. The Myth of Hermaphroditus in Medicine and Law

Medical texts frequently make detailed reference to the myth of Hermaphroditus. This myth has been the subconscious underpinning of medical theory and practice, both historically and to the present day. There is a fear that the blurring of what are seen as male and female body parts and systems results from the engulfment of masculinity by femininity, as in the myth of Hermaphroditus.

The first chapter of a 1971 medical text is devoted to this myth. Extracts of the story as it is presented in that text are provided as an example of the medical fascination with it. The authors recount that a nymph Salmacis, who refused to exercise, and only engaged in the leisure of bathing and combing her hair, caught sight of the boy Hermaphroditus, and "longed to possess him." She crept up on him while he was bathing, and pounced upon him. In the author's words:

> Finally in spite of all his efforts to slip from her grasp, she twined around him, like a serpent when it is being carried off into the air by the king of birds, for, as it hangs from the eagle's beak, the snake coils around his head and talons and with its tail hampers his beating wings . . . . Her prayers found favour with the gods, for as they lay together, their bodies were united and from being two persons they become one. As when a gardener grafts a branch on to a tree, and sees the two unite as they grow, and come to maturity together, so when their limbs met in that clinging embrace the nymph and the boy were no longer two, but a single form, possessed of a dual nature, which could not be called male or female, but seemed to be at once both and neither.[24]

Historically in the medical texts about intersex, one sex is conceived of as having "invaded" the body of the other, just as in the myth of Hermaphroditus. The separateness of the sexes within the wider culture must be maintained, there is a

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[23] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. I, 38 (1979).

[24] HOWARD JONES & WILLIAM SCOTT, HERMAPHRODITISM, GENITAL ANOMOLALIES AND RELATED ENDOCRINE DISORDERS 7-9 (Willams & Wilkins Co., 1971).

belief that the intersex body violates this law of spacial separateness *within* the individual physical body, which reflects cultural and legal anxieties about the separation *between* the sexes in the social body. The myth of Hermaphroditus informs this description given by Hugh Young, in a medical text written in the 1930s:

> [A]t this moment the problem seemed to me to be that of a normal-looking man, with masculine instincts, who was found to have a normal tube and functioning ovary in the left groin. What was the character of the scrotal contents on the right side? If these were also undoubtably female, should they be allowed to remain outside in the scrotum? If male, should the patient be allowed to continue through life with a functioning ovary in the abdomen on the left side? If the organs of either side should be extirpated, what should be removed? It seemed imperative to make an incision in the right scrotum to determine the nature of its contents.[25]

This discourse propounds that certain laws or rules, based on a geography of the body must be adhered. Female gonadal material should not be permitted to remain "outside" the body, that is, in the scrotal sac. Female gonadal material should remain inside the body. If the contents are male, then the clinician must ask whether the patient should be "allowed" to live life with a functioning ovary "inside" the body.

This is why, from the clinician's perspective, it is imperative to determine and to classify the "nature" of the scrotum's contents. The medical imperative of surgery cannot be separated from the legal imperative for social cohesion. There is a further coercive, that is, penal question about what an abnormal body is "allowed" to do, and what it cannot be permitted to do; in this case, to exist without the discipline of the scalpel's incision. The doctor is acting in a penal manner, determining the abnormal body's guilt, and coercively correcting the body. The patient as self-determining subject is virtually absent from this text. The body and its contents are spoken of as what must be disciplined, as if the patient's body has broken a legal prohibition. Hence, if the contents of the scrotum on the right side are female, should 'they' be allowed to remain inside the scrotum?

For Foucault, since the classical age, the body is the "object and target of power."[26] And further, "discipline increases the forces of the body (in economic terms of utility) and diminishes these same forces (in political terms of obedience)."[27] In one of the Colombia court's decisions, the judges felt that there was a possibility that intersex surgery would be experienced by the child as "an aggression, a mistreatment, and a *punishment.*"[28] As Kessler points out, "the

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[25] HUGH YOUNG, GENITAL ABNORMALITIES: HERMAPHRODITISM AND RELATED ADRENAL DISEASES 162 (1937).

[26] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 137 (1977).

[27] *Id.* at 138.

[28] Senencia SU 337/99 Part III, ¶ 85, *available at* http://www.isna.org/node/110 (emphasis added). The word punishment is indicated by the Spanish *un castigo*.

medical point of view is that large clitorises and small penises are wrong, and need to be, in the words of the medical management, 'corrected.' The word 'correction' not only has a surgical connotation, but a disciplinary one as well."[29]

II. THE POTENTIAL APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS DISCOURSE TO INTERSEX

A. Human Rights and Bioethics: Freedom from Medical Experimentation

Under international law there exists historically a string of instruments which regulate medical ethics. For example, the Hippocratic Oath, the Nuremberg Code, the Declaration of Helsinki, [30] the Declaration of Geneva,[31] and the International Code of Medical Ethics.[32] Broadly speaking, these instruments outline the following principles: first, do no harm; second, the centrality of the patient against the interests of society and the medical profession; third, the strict requirements for informed consent of patients to any kind of medical intervention or experimentation.

What is significant for this discussion is that there has been a recent convergence of bioethics and international human rights law, particularly with the drafting of the Universal Declaration of Bioethics and Human Rights.[33] The international ethical codes concerning the treatment of patients by the medical profession is increasingly being framed as a human rights issue. The draft declaration provides that any medical decision or practice must "respect cultural diversity and pluralism, shall not be discriminatory, in that those practices must not have the effect of infringing "the human dignity, human rights or fundamental freedoms of an individual, nor shall such grounds be used to stigmatize an individual, family or group."[34] Further, Article 9 provides that "any decision or practice shall respect the autonomy of persons to make decisions, and to take responsibility for those decisions while respecting the autonomy of others."[35]

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29 KESSLER, *supra* note 11, at 39.

30 Declaration of Helsinki (June 1964). Amended by the 29th World Medical Assembly, Tokyo, Japan, October, 1975, and the 35th World Medical Assembly, Venice, Italy, October 1983. Provides in Article I, Section 5 that "the interest of the subject must always prevail over the interests of science and society" and that in Article III, Section 4 that: "In research on man, the interest of science and society should never take precedence over considerations related to the well-being of the subject." *Id.*

31 WORLD MEDICAL ASSOCIATION, Declaration of Geneva (1964) *available at* http://www.wma.net/e/policy/b3.htm (providing that for the physician "the health of my patient will be my first consideration").

32 International Code of Medical Ethics, 1(3) WORLD MEDICAL ASSOCIATION BULLETIN 109, 111 (Oct. 1949) (providing that "a physician shall act only in the patient's interest when providing medical care which might have the effect of weakening the physical or mental condition of the patient").

33 TA Faunce, *Will International Human Rights Subsume Medical Ethics?*, 31 J. MED. ETHICS 173 (2004).

34 Universal Declaration of Bioethics and Human Rights, Art. 8.

35 *Id.*

B. The Rights of the Child

The Declaration of the Rights of the Child contains provisions which place obligations on state signatories to protect children from "all forms of physical and mental violence, injury and abuse, neglect or negligent treatment."[36] Similarly, the United Nations Convention on the Rights of the Child calls for states to adopt measures to protect children from all forms of violence.[37]

Yet, even those commentators who agree that surgery can cause profound trauma to those who are subjected to it argue that the interests of the child must be balanced with those of the child's parents, family and society. For example, Laura Hermer argues that "it must be recognised that the parental or familial needs driving this choice may be just as intense as the intersex individual him/herself may experience."[38] Further, she confuses and conflates the interests of the child and parents, contending that "if the surgery permits those parents to better relate to their child, then both the parents and the child will have benefited from it, not withstanding any ill effects the surgery may ultimately have on the child him/herself."[39]

The "best interests of the child" is a legal and a human rights based concept. Yet here the notion becomes blurred with the medical and the familial. The implication is that the child has no right to autonomy over his or her own body due to the child's intersexuality. The child's body and psyche are both metaphorically and literally buried by this argument. The idea is that the child possesses a body which is not solely his or her own. The body is other than the child's own, rather, it is a social or familial body.

Scientific journals often make reference to, yet frequently hold no critical attitude in respect of, the social anxiety that is caused by the existence of the child's "anomalous" body.[40] For example, in the *Journal of Paediatrics and Child Health*, the authors state that in most cases, ambiguous genitalia occurs unexpectedly and *causes stress* in both medical and nursing staff, *let alone the parents*.[41] This statement legitimizes the hospital staff's and parent's needs to alleviate their "naturally" occurring anxieties, the cause of which is the child's "unnatural" body.

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[36] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), Art. 19(1), U.N. Doc. A/1386 (Nov. 20, 1951). The convention has been ratified by 192 nations. The United States of America and Somalia are the only two countries yet to ratify the Convention. Ratified by Australia in 1990.

[37] *Id.*

[38] Laura Hermer, *Paradigms Revisited: Intersex Children, Bioethics and the Law*, 11 ANNALS HEALTH L. 195, 235 (2002).

[39] *Id.*

[40] There are some exceptions, *see, e.g.* Joel Frader et al., *Health Care Professionals and Intersex Conditions*, 5 ARCHIVES PAEDIATRICS ADOLESCENT MED. 426 (2004). The authors conclude that "medicine can reflect common social prejudices or it can help society develop tolerance and appreciation for human diversity. We endorse the latter." *Id.* at 428.

[41] J. Srinivasan et al., *When is Intersex Not Intersex? A Case of Penile Agenesis Demonstrates How to Distinguish Non-Endocrine Disorders in Neonates with Genital Anomaly*, 39 J. PAEDIATRICS & CHILD HEALTH 629 (2003).

Medical texts emphasise something which, although not framed in terms of right, is spoken of as if there exists a right of a *parent* to alter a child whose genitals they do not consider to be that of a "normal" male or female infant. This "right" of the parents is never weighed against the rights of the child which international law purports to apply equally to every child. That is, as stated above, the right to be free from all forms of physical and mental violence, injury and abuse, which results from non-consensual cosmetic surgery.[42]

C. *Freedom from Genital Mutilation*

Without consent, any kind of surgery is an assault. International human rights law[43] and criminal law in the United States protect female children from genital mutilation.[44] A crime is not committed if it can be shown that the operation is necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner.[45] Thus it is the definition of surgery and medical discourse and rights discourse that are crucial. The legislation needs to be altered, to *specifically* outlaw the mutilation of intersex infants' genitals and also to make a reference to the removal of gonadal (testicular or ovarian) tissue that is frequently a part of these surgeries. The intersex body is unrecognised by law, it is invisible to law, and hence such violence goes unrecognised as being just that—violence.

Activists are currently working to implement a bill which would ban male circumcision. They are arguing that the Fourteenth Amendment equal protection should apply so that male infants, as well as females can be protected against procedures which they deem to be genital mutilation. Matthew Hess, president of the Male Genital Mutilation bill argues that the equal protection clause of the Fourteenth Amendment also outlaws the genital mutilation of intersex children.

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[42] Further examples of this "parental right" can be found in statements such as the following: "Early reconstruction of female-type external genitalia is essential since *parents will find it difficult* to consider their child as a girl as long as a male type perineum exists." C. Nihoul-Fekete & N. Josso, *Intersexuality, the Keys to Diagnosis and the Decision Concerning the Sex to Rear the Child During the 1st Years of Life*, BULL SOC. SCI. MED. GRAND DUCHE LUXEMB., 244, 247-48 (1987) (emphasis added). And again, in the same text, under the heading *Micturition in a Seated Position*, "this functional aspect of feminizing genitoplasty is of paramount importance since in early childhood, for it *strengthens the family's conviction* that the child is a girl." *Id.* at 248.

[43] Convention for the Elimination of Discrimination Against Women requires states to work towards "the elimination of prejudices and customary and all other practices that are based on the inferiority or superiority of either of the sexes." *Id.* at art. 5.

[44] *See, e.g.*, Illegal Immigration and Immigrant Responsibility Act § 116(a) (1996) (providing that "whoever knowingly circumcises, excises or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years" has committed a criminal offence).

[45] *Id.* at 8. § 116(b)1. CENTRE FOR REPRODUCTIVE RIGHTS, *Female Genital Mutilation (FGM): Legal Prohibitions Worldwide, available at* http://www.crlp.org/pub_fac_fgmicpd.html.

D. Freedom from Cruel, Inhuman, or Degrading Treatment

Triea speaks of the doctor's "quest to neutralize my hermaphroditic genitals."[46] Cruel, inhuman or degrading treatment is condemned under the Universal Declaration of Human Rights and under Article 7 of the International Covenant of Civil and Political Rights.[47] Castration is something that is done to curtail the reproductive function and sexual behaviour of animals, and sometimes to treat or punish serial sex offenders. A number of legal scholars have argued that a surgical or chemical castration of sex offenders can be considered to be a form of cruel and unusual punishment. [48] If the removal of the gonads, or the hormonal reconstitution of the adult offender's body can be considered a rights violation, then why can't the same procedures when conducted on innocent children be understood as a form of degrading and inhuman treatment and a violation of human rights?

E. Freedom from Eugenic Practices

Also of significance is that certain medical practices involving the removal of gonads may sterilize the individual. Sterilization without consent was a part of the eugenics movement and is recognised under international law as a form of genocide.[49] I argue that one of the outcomes, if not the purposes, of gonadectomies is to prevent intersex infants from growing into persons who might become the biological parents of children. The removal of the gonads is, in part, fuelled by the idea that intersex conditions might be passed from one generation to the next, and that to sterilize the intersex infant will have the effect of reducing the future numbers of intersex births. Ironically, with all the emphasis that is placed on rendering the genitals amenable to heterosexual intercourse, the future reproductive rights of the intersex infant are treated as non-existent.

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[46] Triea, *supra* note 6, at 23.

[47] Article 5 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to torture or cruel, unusual or degrading treatment or punishment." *See also* Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. Doc. A/3452 (Dec. 9, 1975); Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Opened for Signature, ratification and accession, G.A. Res. 39/46 (Dec. 10, 1984).

[48] For a review of the human rights implications of chemical castration, see B. Keene, *Chemical Castration: An Analysis of California's "Cutting-Edge" Policy Towards Sex Offenders,* 49 FLA. L. REV. 801 (1997), and L. Spalding, *Florida's Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 17 (1998). *See also* J. Michael Bailey & Aaron Greenberg, *Symposium: The Science and Ethics of Castration: Lessons from the Morse Case*, 92 NW. U. L. REV. 1225, 1245. Physicians are reluctant to remove the gonads of sex offenders due to the "unusual" nature of the procedure and the difficulty of obtaining voluntary, non-coerced consent for the surgery. *Id.*

[49] Article 2(d) provides that "[i]mposing measures intended to prevent births within the group" is a form of genocide. *See* Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. A/260 (Dec. 9, 1948).

III. ANTI-DISCRIMINATION LAW—INCLUSION OR NON-INCLUSION? A COMPARISON BETWEEN US AND AUSTRALIA

A. Australian Law

Australia has a history of denying the rights of the intersexed. For example, in the case of *C. v. D.*, a marriage between a biological woman and her intersex husband was declared a nullity on the grounds that he was biologically neither male nor female.[50] If he had been married to a man, the marriage would also have been declared a nullity. Such a legal outcome places the intersex person in a position "outside of law," in which they do not have the right possessed by every other citizen to marry another human being.

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 recognised as intersex in lieu of male or female."[51] Following the struggles of Briffa and other activists, intersex has become a legally present category in the Australian Capital Territory (ACT).[52] In the same Territory, legislation regarding police searches also includes intersex.[53] It is believed that this legal recognition of intersex, being written into legislation, is a world first. Further, the anti-discrimination law in a number of Australian states makes reference to persons of "indeterminate sex," which is encompassed in the definition of gender identity.[54]

B. Anti-Discrimination Law: Inclusion or Non-Inclusion?

It has been argued that intersex should be included as a category which is separate to sex, sexuality, or transgender, or gender identity under Australian anti-discrimination law. Hence:

> if intersex were explicitly added to the definition of disability, this might provide more certainty about people's rights and responsibilities under anti-discrimination law and ensure that people who make a complaint of

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[50] C. v. D., FAM. L .R. 90 (1979).

[51] Tony Briffa for and on behalf of the Androgen Insensitivity Syndrome Support Group Australia (AISSFA), Submission to the ACT Chief Minister and Department of Justice and Community Safety, Regarding Discrimination Against People Affected by Intersex Conditions (2003).

[52] The Legislation Act 2001 § 169B provides that "an intersex person is a person who because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female."

[53] When carrying out forensic procedures, clothing or body searches, an intersex person can require either a male or a female to conduct the procedures. *See, e.g.,* Crimes (Forensic Procedures) Act § 49A (2000); Drugs of Dependence Act § 189 (1989). *See also* Custodial Escort Regulation Reg 6A (2002); Casino Control Act § 108 (1988); Confiscation of Criminal Assets Act § 211 (2003); Intoxicated Persons (Care and Protection) Act § 6C (1994); Periodic Detention Act § 50 (1995); Remand Centres Regulation Reg 7 (1976); Children and Young Persons Act § 400 (1999).

[54] The Equal Opportunity Act § 4 (1995); The Anti-Discrimination Act Queensland § 4 (1991).

> disability discrimination do not have to argue each time that their condition is a disability for the purposes of the act.[55]

There is a symbolic reason for the law to recognise intersex. Anti-discrimination legislation is one of the key ways that the state implements various human rights declarations and conventions.

There are a number of arguments why intersex should not be added to anti-discrimination legislation. One reason is because for most intersex people, intersex is experienced as a condition rather than an identity. As Emi Koyama expresses it, the "vast majority of people born with intersex conditions live as a woman or a man, and do not view themselves as a member of a different gender/sex category. Most people born with intersex conditions do not think "intersex" to be who they are; it is simply a medical condition, or a lived history of medicalization."[56]

However, I argue that the presence of disability as a category of anti-discrimination law does not mean that a person with a disability regards the disability to be the defining feature of their identity. It is rather, a legal recognition that harms; and a discrimination that occurs against people on this ground.

Another reason given against inclusion is that intersex is best covered by some other ground existing under anti-discrimination legislation. The following has been argued:

> When people say that they were discriminated against because of their intersex condition, what they usually mean is that they were discriminated against on the basis of their *perceived* sexual orientation, gender identity, or gender expression. These types of discrimination should be treated as that, the discrimination on the grounds of perceived sexuality and gender; intersex people who are perceived to have a different sexuality or gender are better protected by establishing and strengthening LGBT civil rights laws rather than creating an entirely new protected class of "intersex".[57]

The concept of "gender expression" is not in itself a ground for discrimination under Australian anti-discrimination law. Yet frequently, because the intersex person's "gender expression" is anomalous or ambiguous that they confront a human rights violation. The concept of gender expression also one faces transgenders who are covered as a group under anti-discrimination legislation. Yet unless intersex is included as a ground for discrimination, the situation of discrimination on the basis of the intersex person's gender expression would not be covered by the legislation.

Another argument given against including intersex as a ground for discrimination is that intersex is a "hidden status." Therefore, unless the person has "come out" as intersex, it is unlikely that the discriminator would know that the

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[55] 55 EQUAL TIME 6, 7 (2003).

[56] Emi Koyama, *What Is Wrong with 'Male, Female, Intersex'*, *in* INTRODUCTION TO INTERSEX ACTIVISM, *supra* note 6.

[57] INTERSEX INITIATIVE, *Intersex in Non-Discrimination Law: Why We Oppose the 'Inclusion'*, http://www.intersexininitiative.org/law/nondiscrimination.html (last visited Mar. 29 2006).

person is intersex, and discriminate against the person for that reason. "The whole point of intersex human rights violation is that it is erased out of existence, and as such one is rarely recognized as an 'intersex' person unless that information is disclosed."[58]

I argue that the very *process of erasure* is what constitutes a rights violation, and it is based on one's recognisability (by doctors, nurses, parents) as intersex. This recognisability is a situation which is specific to one's status as intersex. I contend that the greatest argument for inclusion of "intersex" in anti-discrimination legislation, therefore, is that the infant or child is subjected to discriminatory treatment (non-consensual surgery, humiliating medical examinations) *precisely* on the grounds that their intersex status is both *visible* and *known*. Intersexuality is hardly a "hidden status" to the doctors who classify, diagnose and "treat." It is precisely the process of hiding, and of erasing the child's intersex status, without the child's consent, that can be deemed the discriminatory act. Intersex cannot be described as hidden status for the child in a medical context. For as soon as the child is deemed to be intersex, it is that very status which exposes the child's body and psyche to teams of medical experts, and to the very Foucauldian discipline of the annals of decades of scientific and quasi-scientific knowledge.

The intersex initiative stresses that discrimination occurs on the basis of other people's perception, rather than the person's own identity status, and that intersex is not felt to be "an identity" for every person who falls under this medical classification.

CONCLUSION

Foucault has argued that the human body is "the ultimate material which is seized upon and shaped by all political, economic and penal institutions. Systems of production, domination and socialisation fundamentally depend upon the successful subjugation of bodies."[59] The medical pronouncement of sex after a brief surveillance of the infant's genitals, intersecting with the compulsory seal of M/F on the birth certificate, the most fundamental document of identification in our culture, and the marking of the child as a legal citizen, and as a human being are immensely importantly practices. Through such practices, male and female are produced as truth, as origin, without which, the child is not considered to be fully human, and thus the subject of human rights. The institutions of law and medicine are unable to think "difference," and actively produce and discipline bodies as particularly sexed subjects.

Human rights discourse makes claims to neutrality and universality. Yet an investigation of the applicability of instruments that make reference to the universal rights of the child, of the right to be free from genital mutilation, of the right to be

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[58] *Id.*

[59] ADRIAN HOWE, PUNISH AND CRITIQUE: TOWARDS A FEMINIST ANALYSIS OF PENALTY 88 (Routledge 1994).

free from cruel and unusual punishment, or the right to be free from medical experimentation are not applied to intersex people. Why have these legal avenues been unable to protect the intersex child from such violence despite the numerous accounts from intersex adults which attest to the physical and psychological trauma caused by these practices? Human rights law must become accountable for failing to include intersex in its definition of universal humanity, and for creating the sense of isolation, alienation, and shame, the feeling of being 'the only person in the world like me" so often recounted by intersex people.

There is no linguistic space in law, particularly international human rights law, to recognise the wrongs and the violence that are done to intersex people. Without this space, it is almost impossible to say that the violation of the rights of a human being has occurred. The kinds of violence occur in large part through the silence of being written *out of* the domain of law, and of being endlessly written *into* the realm of the medical, the domain of the purely biological, within which law does not, and refuses to concern itself.