HACKING THE GENDER BINARY MYTH: RECOGNIZING FUNDAMENTAL RIGHTS FOR THE INTERSEXED

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I had miscalculated [Doctor] Luce. I thought that after talking to me he would decide that I was normal and leave me alone. I was beginning to understand something about normality. Normality wasn't normal. It couldn't be. If normality were normal, everybody could leave it alone. They could sit back and let normality manifest itself. But people—and especially doctors—had doubts about normality. They weren't sure normality was up to the job. And so they felt inclined to give it a boost.[1]

I. INTRODUCTION

Currently, children who are born intersexed (having some characteristics of both males and females, either genetically or physically) have no constitutional right to choose whether to remain intersexed or to *become* male or female. The current practice allows parents to "choose" their child's physical sex at birth.[2] Parents assume that by raising a child in a specific gender the child will grow up "normal." Therefore, parents of intersexed children often make the tragic decision to create a vagina, shorten a clitoris that is "too large," remove gonads, or change a penis that is "too small" to function into a clitoris.

Unfortunately, because it is difficult to find the requisite state action and the patient is normally just a child, constitutional issues have not been raised in cases of intersex genital reconstruction/mutilation.[3] Most legal research surrounding this issue rests on the informed consent doctrine. Some legal scholars argue that a higher standard should be used when informing parents about the possible options

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[1] JEFFREY EUGENIDES, MIDDLESEX 446 (Picador 2002).

[2] Parents agree to the surgery; however, it has been shown that doctors may not provide them with adequate information to make an informed decision under the "emergency" doctrine. Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J. L. & MED. 41, 61-64 (2004).

[3] The nomenclature of genital reconstruction/mutilation is used here to demonstrate the rift between intersex advocates (who refer to the surgery as mutilation) and the medical profession's reference to genital reconstruction. To avoid repetition, the surgery will simply be referred to throughout the paper as genital surgery.

for dealing with intersex children.[4] However, it is my intent, in this Article, to formulate a thesis under which the focus turns from the concerns of the parents to the fundamental rights of the child.

Today, organizations like the Intersex Society of North America ("ISNA") and Bodies Like Ours provide a sounding board for women and men who were forced into the gender binary that society accepts as true and binding. Many of them suffer from gender dysphoria, inability to orgasm, inability to reproduce, scarred genitals, psychological trauma and many other social and personal issues associated with the current treatment of the intersexed. Intersex children are arguably harmed by the process of genital surgery, but how can the law be used to give intersexuals,[5] when they reach the appropriate age, the right to say "no?"

The fundamental rights that will be discussed in this Article, the right to bodily integrity, personality, sexuality, and gender identity, can only be exercised by adults. However, by allowing parents and doctors to perform genital surgery on children who do not yet have the ability to voice their concerns and opinions, a child's future freedom of choice is foreclosed.[6] Thus, by effectively enjoining parents and doctors from making decisions for their children, the fundamental rights of intersexual adults can be protected.

This Article will transform the typical legal arena for the intersex rights debate by focusing attention on the fundamental rights of the intersexed. By infusing constitutional law principles into the informed consent doctrine, the rights of the intersexed (and not their parents) can be formulated and protected. Through its protection of bodily integrity, personality, sexuality, and gender identity, the informed consent doctrine is given the capacity to protect the only party that can give truly informed consent for genital surgery on an intersexed child: not the parents, not the doctors, not the judges, and not society, but the intersexual individual him/herself.

In Part II, this Article first delineates who is included in the term intersexed and outlines the current medical practices concerning children with ambiguous genitalia. Part III explains how intersex rights are typically treated under the doctrine of informed consent. The Article continues with its informed consent analysis in Part IV by breaking the public/private distinction of state action in order to import constitutional values into the doctrine of informed consent. Part V begins with a brief survey of fundamental rights jurisprudence and then expounds the fundamental rights that the informed consent doctrine should import to protect the

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[4] *See generally* Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dillemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1 (2000).

[5] SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 84-85 (Rutgers Univ. Press 1998) (noting that some intersexed adults have adopted the term "intersexual" to refer to their identity). Note that the terms intersex, intersexed, and intersexual will be used interchangeably in this Article. At times, the term intersexual will be used to denote a mature adult who is capable of making the choice to live his/her life without conforming to any particular gender.

[6] Dena Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, 28 RUTGERS L. J. 549, 563 (1997) (recognizing a child's right to an "open future").

interests of the intersexed: bodily integrity, personality, sexuality, and gender identity. Part VI balances the rights of the parents seeking genital surgery against the fundamental rights of the child.

II. DEFINING THE CLASS AND REDEFINING THE PROBLEM: TREATING THE INTERSEXED

A. Who Are the Intersexed?

Scholars continue to engage in extensive debates regarding how to quantify the class of intersexed people. Figures ostensibly reflecting the percentage of intersex births in America are published and withdrawn.[7] For purposes of this Article, however, the intersexed will include any child who could be considered a candidate for genital surgery.[8] It is important to consider all children who are born with genitalia that would be considered abnormal and/or unacceptable by the medical community, otherwise the number of children who suffer from such medical intervention would be underestimated.[9] The definition of intersexuals will also include any "individual who deviates from the platonic ideal of physical dimorphism at the chromosomal, genital, or hormonal levels."[10] Under this definition, an estimated one point seven percent of all children are born intersexed,[11] with approximately 65,000 intersex births worldwide every year.[12] Although this number has been criticized for including conditions that are not intersexual in the clinical sense,[13] they are the children who suffer from a lack of

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[7] Anne Fausto-Sterling, *The Five Sexes, Revisited*, THE SCIENCES, July/Aug., 2000, at 19 (previously estimating the percentage of intersexual births to be 4%, but revising it to 1.7%).

[8] This definition is essentially the same that was used by the Human Rights Commission of the City and County of San Francisco in their intersex report: "the term intersex [is used] to describe people with anatomies that are not considered 'standard' for either male or female bodies." *A Human Rights Investigation Into the Medical "Normalization" of Intersex People*, A Report of a Public Hearing by the Human Rights Commission of the City and County of San Francisco 4, *available at* www.sfgov.org/site/sfhumanrights_page.asp?id=5902 (Apr. 28, 2005) (definition obtained from the Intersex Society of North America/ISNA) [hereinafter HRC Report].

[9] Alice Domurat Dreger, *"Ambiguous Sex"—or Ambivalent Medicine?*, 28 HASTINGS CENTER REP. 24 (May/June, 1998) (noting that the frequency of intersexed births rises dramatically if any child who is subject to genital surgery is included in the estimate).

[10] M. Blackless, et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000).

[11] This number includes percentages of children born with each of the following medical conditions: Congenital Andrenal Hyperplasia ("CAH"), Late-Onset CAH, Androgen Insensitivity Syndrome ("AIS"), Partial AIS, Turner Syndrome, Klinefelter Syndrome, Vaginal Agenesis, True Hermaphrodites, Idiopathic, and other non-XX or non-XY conditions. ANNE FAUSTO-STERLING, SEXING THE BODY 53 Table 3.2 (Basic Books 2000) [hereinafter SEXING THE BODY].

[12] HRC Report, *supra* note 8, at 8.

[13] Leonard Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RESEARCH 174 (Aug., 2002). Fausto-Sterling's 1.7% figure is criticized as including many medical conditions that are not classic intersex conditions, including Late-Onset Congenital Andrenal Hyperplasia ("LOCAH"), Sex Chromosome Aneuploidies, Klinefelter syndrome, Turner syndrome, and other chromosomal variants. *Id.* If these other syndromes are eliminated, the percentage of predicted intersex births drops to 0.018%. *Id.* It could be argued that children with LOCAH should not be considered for purposes of this Article because the condition does not present itself in a woman until she reaches the age of 24 (boys generally do not show any abnormality until even later in life). *Id.*

informed consent to genital surgery and will be considered the applicable class of intersexuals.

B. The Surgical Solution

Until very recently, medical professionals relied heavily on John Money's research of the treatment of intersex children in establishing standardized procedures for children with ambiguous genitalia.[14] Money tried to establish that gender is entirely socially constructed and that a child's gender is well established by the age of two. Money's early research was based on his study of the John/Joan case. John was a patient whose penis had been accidentally castrated at the age of eight months.[15] After counseling, the parents decided that the young boy should undergo sex-reassignment surgery and be raised as a girl, Joan.[16] Although Money published findings that Joan had grown up to become a "normal" little girl, his research was later discredited. It was subsequently disclosed that John later made the difficult decision to switch back to his male identity and live as a man with a wife and family.[17]

Today, although doctors no longer treat Money's research as gospel,[18] it is generally still assumed that genital surgery is necessary and proper for intersex children.[19] Three main considerations influence current attitudes towards the medical treatment of the intersexed. Primarily, doctors have a greater ability to fashion "natural" looking genitals.[20] Second, the ability to procreate is no longer the primary factor considered.[21] And third, due to psychologists' focus on gender identity, or one's sense of belonging to the gender of male or female, doctors insist that gender assignment be made as quickly as possible.[22]

However, if a little girl displays classic LOCAH symptoms before reaching a mature age, such as significant clitoral growth, she could be subject to genital surgery. *Id.*

14 Beh & Diamond, *supra* note 4, at 16-17.

15 *Id.* at 6.

16 *Id.*

17 *Id.* at 10; *see also* JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL (2000).

18 Beh & Diamond, *supra* note 4, at 3 ("Although professional literature has recently questioned the surgical approach to the treatment of infants, controversy surrounding treatment persists and the medical community is now divided."). Also, note that while the American Academy of Pediatrics used to state that a person's sexual body image is largely a function of socialization, they have revised their standards to be more cautious about Dr. Money's rhetoric. *Compare* AMERICAN ACADEMY OF PEDIATRICS, *Timing of Elective Surgery on the Genitalia of Male Children with Particular Reference to the Risks, Benefits, and Phsycological Effects of Surgery and Anesthesia*, 97 PEDIATRICS 590 (1996) *with* AMERICAN ACADEMY OF PEDIATRICS, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 PEDIATRICS 138 (2000) [hereinafter AAP 2000 Policy].

19 Beh & Diamond, *supra* note 4, at 18; *see also* KESSLER, *supra* note 5, at 14 (currently "intersexuality is considered a treatable condition of the genitals, one that needs to be resolved expeditiously"). While this paper only deals with post-birth surgical treatments of the intersexed, Fausto-Sterling points out that there are now pre-birth genetic remedies for interested parents. SEXING THE BODY, *supra* note 11, at 54-56.

20 KESSLER, *supra* note 5, at 14.

21 *Id.*

22 *Id.*

The American Academy of Pediatrics ("AAP") currently recommends that doctors consider multiple factors before deciding on the "sex of rearing" for the child.[23] According to the AAP, doctors should consider: fertility potential, capacity for normal sexual function, endocrine function, malignant change, testosterone imprinting, and the timing of surgery.[24] Although this newer method appears to give far more consideration to the complex issues presented by cases of ambiguous genitalia, the current approach taken by the AAP still clings to some of the assumptions of John Money.

For example, the AAP report starts with the statement that an intersex birth "constitutes a social emergency."[25] This appears to conform to Money's insistence that ambiguous genitalia be dealt with quickly. Also, under Money's approach, which placed the greatest emphasis on "erotic functioning," most intersex children would be turned into girls regardless of their genetic make-up.[26] Although the AAP recommendations clearly refute Money's research, positing that "caution should be exercised when a recommendation is made that the sex of rearing should differ from chromosomal sex[,]"[27] they still appear to cling to the idea that the size of a boy's penis should be the deciding factor regarding how to raise a child. Thus, boys with micropenises should be "raised as a boy only where there is a very good response [to testosterone injections.]"[28] In other words, "[t]iny penises, under one inch, aren't allowed."[29]

To their credit, the AAP cites to Milton Diamond and Keith Sigmondson's progressive approach to treating intersexuality in their policy recommendations.[30] Diamond and Sigmundson argue for a moratorium on intersex genital surgery unless it is necessary for the child's physical health.[31] Similarly, the Intersex Society of North America recommends that parents and doctors avoid "harmful or unnecessary genital surgery on infants and children."[32] Also, the Human Rights Commission of the City and County of San Francisco publicly announced their findings regarding the medical "normalization" of intersex people, recommending that any procedures that are not medically necessary be delayed "until the patient

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[23] AAP 2000 Policy, *supra* note 18, at 140.

[24] *Id.* at 140-41.

[25] *Id.* at 138.

[26] John Colapinto, *The True Story of John/Joan*, ROLLING STONE, Dec. 11, 1997, at 54.

[27] AAP 2000 Policy, *supra* note 18, at 141.

[28] *Id.*

[29] Martha Coventry, *The Tyranny of the Esthetic: Surgery's Most Intimate Violation*, 7 ON THE ISSUES: PROGRESSIVE WOMEN'S Q. 1 (July 31, 1998).

[30] AAP 2000 Policy, *supra* note 18, at 141 (noting that some suggest "that the current early surgical treatment be abandoned in favor of allowing the affected person to participate in gender assignment at a later time").

[31] Milton Diamond & H. Keith Sigmundson, *Management of Intersexuality: Guidelines for Dealing with Individuals with Ambiguous Genitalia*, 151 ARCHIVES PEDIATRIC ADOLESCENT MED. 1046 (1997).

[32] Intersex Society of North America, ISNA's Recommendations for Treatment (Jan. 1, 1994), *available at* http://isna.org/drupal/node/view/138.

can make informed consent."[33] However, the AAP did not adopt Diamond and Sigmundson's principled cessation approach, rather it insists that the AAP guidelines will minimize any problems or conflicts between psychosexual orientation and genital appearance or function.[34] Thus, the medical community continues to view unique genitals as offensive and support the practice of genital surgery on the intersexed.

III. INTERSEX RIGHTS UNDER THE DOCTRINE OF INFORMED CONSENT

The doctrine of informed consent is designed to protect a patient's right to bodily integrity, self-determination[35] and a person's "liberty interest in refusing unwanted medical treatment."[36] Originally, informed consent was analyzed under the tort of battery.[37] Modern informed consent law is considered a malpractice action under a negligence theory. Although some jurisdictions still use a reasonable physician standard for judging the standard of medical care, others employ the more modern patient-oriented standard.[38] Legal informed consent requires the fulfillment of three prerequisites: first, the decision must be informed or based on adequate information; second, the decision must be voluntary or not coerced; and third, the decision must be competent or made with "appreciation of the nature, extent, and probable consequence of the conduct consented to."[39]

Generally, only parents or guardians have the legal capacity to give consent for their minor children with a limited exception for medical emergencies. Very young children are unable to give informed consent themselves because of their inability to understand the nature of the medical treatment.[40] Therefore, parents are entitled to give consent for medical treatments that are in the "best interest" of the child.[41] Generally, doctors and courts defer to the parents' judgment of whether a surgery is in the child's best interest in order to protect the privacy of the family.

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[33] HRC Report, *supra* note 8, at 25.

[34] AAP 2000 Policy, *supra* note 18, at 141.

[35] Beh & Diamond *supra* note 4, at 34 (recognizing that informed consent protects two main interests: the right to bodily integrity and to self-determination).

[36] Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

[37] Kisha-Kamari Ford, Note, *"First, Do No Harm"—The Fiction of Legal Parental Consent to Genital Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL'Y REV. 469, 473 (2001).

[38] Beh & Diamond, *supra* note 4, at 35-36 (noting that "in jurisdictions employing a patient-oriented standard of informed consent, patient autonomy rights prevail over medical-community standards").

[39] Ford, *supra* note 37, at 475 (quoting Lois A. Weithorn, *Children's Capacities in Legal Contexts*, *in* CHILDREN, MENTAL HEALTH, AND THE LAW 35 (N. Dickon Reppucci et al. eds., 1984) (citing RESTATEMENT (SECOND) OF TORTS § 892B (1979)).

[40] Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U.J. GENDER SOC. POL'Y & L. 87, 101-102 (1999).

[41] Beh & Diamond, *supra* note 4, at 38.

However, if parents decide to act contrary to the interests of the child,[42] doctors will generally bring the case to court where a judge (under the doctrine of *parens patrie*) will determine how to protect the child.[43]

In cases of intersexed children, doctors and parents generally agree that the proper course of treatment is genital surgery; hence the parents' decision never gets challenged in a court of law. However, scholars posit that the parents' consent was never truly informed due to a myriad of reasons, including the doctors' failure to impart complete information, the clinicians' false sense of urgency, the aura of secrecy and deception surrounding intersex genitalia, and the failure to disclose and to research long term effects of genital surgery.[44] Due to the problem of a lack of truly informed consent on behalf of the parents, scholars generally insist either that informed consent be more meaningful or that a moratorium on the intersex genital surgery on children be declared.[45]

Many legal scholars addressing the issue of intersex genital surgeries agree that an all-out ban on these surgeries should be declared. However, this position has been criticized as being "shortsighted" because "the legal system is ill-equipped to deal with the cultural and social issues underlying intersex surgeries."[46] Those critical of an all-out ban on such surgeries argue for more research on the effects of genital surgeries, better counseling for both the intersexed child and their parents, and more complete explanation of the benefits and downfalls of such surgery prior to decision-making.[47] This so-called "middle approach" has been attacked because it fails to recognize the childrens' constitutional rights that are at stake, the fact that intersexuality is not a medical disease,[48] parents' inability to make informed decisions regarding the genitalia of their children,[49] and doctors' interest in promoting intersex surgery while absolving themselves of legal liability.[50]

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[42] In the context of genital surgery on young children, parents could be construed as acting contrary to the interests of the child by consenting to the surgery. In fact, scholars argue that the only interest parents have in mind when consenting to such surgeries is their *own* interest in raising a "normal" child. Alyssa Connell Lareau, Note, *Who Decides? Genital-Normalizing Surgery on Intersexed Infants*, 92 GEO. L.J. 129, 143 (2003) (citing Alice Domurat Dreger, *When Medicine Goes Too Far in the Pursuit of Normality*, N.Y. TIMES, July 28, 1998, at F4) ("Some studies have shown that while parents are afraid to have an 'abnormal' child, they would not choose to undergo surgery if they possessed a nonconforming trait themselves.").

[43] J. Steven Svoboda et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61, 84 (2000).

[44] Beh & Diamond, *supra* note 4, at 43-58; *see also* Ford, *supra* note 37, at 473; Haas, *supra* note 2, at 61-64; Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics, and the Law*, 11 ANNALS HEALTH L. 195 (2002); Lareau, *supra* note 42.

[45] *Id.*

[46] Hermer, *supra* note 44, at 199. Hermer argues that our legal system is ill equipped to challenge the gender norms that produced genital surgery. Even if we ban the surgery in the legal system, she argues, the rapid end to such surgeries "threatens to leave in place the norms which brought about the surgical practice in the first place." *Id.*

[47] *Id.* at 231-34.

[48] Lareau, *supra* note 42, at 135-46.

[49] Ford, *supra* note 37, at 486-89.

[50] Lareau, *supra* note 42, at 150-51.

Once courts have had the opportunity to apply constitutional rights to informed consent issues, a moratorium on genital surgery would become the legally recognized standard of care, at least until the child reaches an age of maturity and could choose to consent to the surgery him/herself. However, how would these issues initially arise in court?

The state may ask the court to exercise its *parens patrie* powers to intervene in medical decisions affecting children's constitutional rights.[51] Judicial deference to parents and doctors "can be overcome if it is shown that the parent decisionmaker has a conflict that has impaired his or her ability to consider the best interests of the child."[52] Such a conflict arises when the medical condition involves a decision that must consider the constitutional rights of the child.[53] In this instance, a neutral third party, or the judge, would review the medical decision. Examples of such state initiatives include cases involving proposed sterilization of incompetents.[54] Admittedly, it would be rare for the state to intervene on its own prerogative in the issue of intersex rights.

In order to best protect "the child's right to an open future,"[55] the unquestionably preferable timing for addressing these issues would be before the genital surgery occurs. However, the most likely way for these constitutional rights to appear before a court is through the petition of an adult intersexual who has been the unwilling victim of genital surgery.[56]

IV. IMPORTING CONSTITUTIONAL PRINCIPLES INTO THE DOCTRINE OF INFORMED CONSENT

Issues of constitutional law do not generally get raised by the plaintiff or addressed by the courts during litigation of tort law claims of assault, battery or negligence raising the issue of informed consent. Tort law has traditionally been recognized as a body of law categorized in the realm of "private" rights.[57] Thus, when considering a plaintiff's rights in tort law cases, judges have not had to consider constitutional concerns due to the "private" nature of tort law. Even if a

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[51] Povenmire, *supra* note 40, at 107.

[52] *See* Lareau, *supra* note 42, at 142.

[53] *Id.*

[54] *In re* Romero, 790 P.2d 819, 821 (Colo. 1990) (recognizing that every individual has a fundamental right to procreation and requiring a showing of clear and convincing evidence that the incapacitated individual is incompetent to make his/her own decision regarding sterilization and that the individual's condition is not likely to improve before allowing a guardian to consent to the procedure).

[55] Davis, *supra* note 6, at 592 ("The concept of the child's right to an open future . . . [focuses] on the autonomy of the child (present or future) as a limit on the autonomy of the parents.").

[56] In fact, that is exactly how the issue was raised in the Columbian Constitutional Court, the only court to issue an opinion regarding informed consent and intersex rights. Haas, *supra* note 2, at 49. The plaintiff was a teenager when he learned that he had been changed into a girl after he was accidentally castrated. *Id.* He sued the doctors and the hospital claiming a lack of informed consent. *Id.*

[57] Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982). When categorizing general bodies of law as either private or public, contracts, torts, property, and commercial law were historically placed in the private law genre while constitutional, criminal, and regulatory law were posited in the public law realm. *Id.*

plaintiff raises constitutional concerns, judges are reluctant to "officially" cross the boundary between tort law and constitutional law. Ironically, the informed consent doctrine was molded out of an individual's constitutional right to liberty.[58] Unfortunately, even if a plaintiff attempts to raise his/her constitutional fundamental rights in an informed consent case, the court will adhere to common state action principles and throw out the claim unless the hospital is public. It is my contention that intersex patients' constitutional liberty rights, such as the fundamental right to bodily integrity, personality, sexuality, and gender identity, must be protected under the informed consent doctrine even if the doctor involved is a private actor working at a private hospital.

The state action doctrine was designed to limit the federal government's intrusion into areas left to the common law of the states.[59] Under the state action doctrine, only those "private"[60] plaintiffs that can demonstrate that their harm was caused by or can be attributed to the state will be protected by the federal Constitution.[61] However, there are a few instances where constitutional rights could apply to protect the rights of intersexual children against genital surgery.

First, if the child is subjected to genital surgery in a public hospital, then the child's fundamental constitutional rights can be raised in court.[62] The public nature of the hospital allows for a plaintiff to demonstrate that state action was present in the actions of the hospital employees. However, if the intersexual child is taken to a private hospital, can s/he demonstrate state action? Perhaps, however the circumstances would have to be very particular. For instance, if one parent challenges the directions of the doctors and the other parent's insistence on genital surgery, the issue could end up in state court. If the state court judge then orders the doctors to perform the surgery, the unhappy parent could appeal the judicial decision. At that point, state action is arguably present under the precedent set by *Shelley v. Kraemer*[63] because the judge's order constituted the involvement of the state. However, this scenario is unlikely to occur.

It is much more probable that constitutional issues would be raised in the first instance, by a child subjected to genital surgery in a public hospital. In that case, the court could apply constitutional principles in order to balance the constitutional rights of the child against those of the parent and to recognize that, due to the fundamental rights of the child, the doctor cannot obtain informed consent until a child is of a mature age and makes the decision him or herself. After such a ruling,

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[58] *Cruzan*, 497 U.S. at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

[59] Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1797 WASH. U. L. Q. 757, 758 (1979).

[60] I put private in brackets here because numerous scholars have argued that tort law is not private law at all. *See, e.g.*, Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 3 (1959).

[61] *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985); Richard S. Kay, *The State Action Doctrine, The Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 330 (1993).

[62] *See* Haas, *supra* note 2, at 57.

[63] Shelley v. Kramer, 334 U.S. 1, 13 (1948); *Id.*

courts interpreting informed consent issues would have to take heed of the constitutional ruling. Judges would probably rule that the any violation of the constitutional fundamental rights of a child automatically fails to meet the informed consent standard of care.[64] Thus, a constitutional ruling from a court could affect the informed consent standard of care and both public and private hospitals would be forced to take the child's future right to choice into account.

V. FUNDAMENTAL RIGHTS

The doctrine of fundamental rights is not a clear, well-defined area of jurisprudence. In fact, it is very difficult to predict how the current members of the Supreme Court would treat new areas of rights. Yet, it is important to understand the ambiguities of this area in order to fashion new principles extending existing rights or recognizing new ones.

Substantive Due Process jurisprudence provides the framework for the fundamental rights analysis. The Fourteenth Amendment right to life, liberty, and property guarantees more than just procedural protection from the state. However, deciding which rights are fundamental and protected under substantive due process is complex. Originalists claim that the only rights protected as fundamental are those that are explicitly stated within the text of the Constitution itself or clearly intended by the framers of the Constitution.[65] Thus, the rights protected under the Bill of Rights are fundamental, whereas unenumerated rights (such as privacy) are not. Arguably, the originalist approach breaks down when originalists are faced with the Ninth Amendment: the Constitution tells them to look beyond the text of the document.[66] Hence many other non-originalist approaches have emerged. Basically, the nonoriginalist approaches find no conflict in recognizing fundamental rights that are not specifically listed in the Constitution.[67] While it is easy to summarize the originalist approach to constitutional interpretation, "[n]onoriginalist approaches run the gamut."[68]

Fundamental rights jurisprudence began with the *Lochner v. New York*[69] era. In *Lochner*, the Supreme Court recognized a constitutional right to liberty of contract. In the late 1930s the *Lochner* precedent regarding liberty of contract was

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[64] For this point I am indebted to Julie Greenberg's insight.

[65] David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 898 (1993).

[66] WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, AMERICAN CONSTITUTIONAL INTERPRETATION 1065 (2d. ed. 1995).

[67] Anders, *supra* note 65, at 899-900; *see also* Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 106 (2002) (noting that nonoriginalist theories range from natural law justifications to the representation-reinforcement and constitution-perfecting theories).

[68] *Id.*

[69] Lochner v. New York, 198 U.S. 45 (1905).

discarded, but the fundamental rights doctrine remained.[70] The Court then proceeded to incorporate most of the rights contained in the Bill of Rights into the Due Process protections of the Fourteenth Amendment.[71] But, the first major development in post-*Lochner* unenumerated fundamental rights occurred in footnote 4 of *U.S. v. Carolene Products*,[72] extending heightened protection to "discrete and insular minorities."[73]

The Supreme Court's extension of fundamental rights jurisprudence continued when Justice Frankfurter opined that a fundamental right inquiry should ascertain whether forbidding the conduct would "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."[74] He also queried whether the conduct at issue was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[75]

In 1965, in *Griswold v. Connecticut*,[76] the Court extended Substantive Due Process jurisprudence by recognizing a right to privacy. This privacy right, the Court held, stemmed from the penumbra of rights protected by the First, Third, Fourth, and Fifth Amendments.[77] Rejecting the penumbra rationale, Justice Harlan asserted in his concurring opinion that fundamental rights protected by the Due Process clause are those "basic values implicit in the concept of ordered liberty."[78] Other theories of fundamental rights employed by the *Griswold* Court included precedent and tradition.[79]

Over the next twenty years "while fundamental rights was gaining near unanimous acceptance, the judiciary lacked a coherent uniform approach to finding them."[80] Arguably, however, modern courts tend to apply tradition as the key component when analyzing fundamental rights.[81] In fact, in the most recent major fundamental rights decision, *Lawrence v. Texas*,[82] the Supreme Court spent a good deal of its opinion discussing the history of sodomy laws and treatment of homosexuality in this country.[83] While Justice Scalia argued in his *Lawrence* dissent "the Court must name a [specific] activity and find its protected status to be

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[70] David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 52 (2003).

[71] *Id.*

[72] U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

[73] *Id.* at 153 n.4.

[74] Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Malinski v. New York, 324 U.S. 401, 416-417).

[75] *Rochin*, 342 U.S. at 169 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[76] Griswold v. Connecticut, 381 U.S. 479 (1965).

[77] *Id.* at 484.

[78] *Id.* at 500 (Harlan, J., concurring).

[79] Wolf, *supra* note 67, at 112.

[80] *Id.*

[81] *Id.* at 113.

[82] Lawrence v. Texas, 539 U.S. 558 (2003).

[83] *Id.* at 568-74.

'deeply fundamental,'"[84] Justice Kennedy's majority opinion "protected liberties at higher levels of generality."[85] The question that remains is not whether tradition is important for a fundamental rights analysis, but what version of tradition is assessed by the Court?

The notion requiring that only rights rooted in American tradition be recognized as fundamental appears to be an oxy-moron. Why would a right need to be protected at all if everyone recognizes it as fundamental?[86] Another problem with searching for tradition is that judges often look to their own tradition, that is, the "historical perspective of straight, white, wealthy males."[87] However, judges may rely on tradition as viewed from the minority standpoint or ignore tradition altogether.[88] While originalist-leaning jurists like Justice Scalia view tradition as a strictly historical inquiry,[89] a more reasoned approach, which does not suffer from Scalia's refusal to recognize evolving social rights, is two-fold.

First, as Justice Marshall points out in his dissenting opinion in *San Antonio Independent School District v. Rodriguez*,[90] the crucial inquiry is "to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution."[91] Thus, the closer the nexus between the traditionally guaranteed right and the unenumerated interest, the stricter the scrutiny that must be applied by the Court to protect that right.[92] Marshall's view of tradition recognizes that not every constitutional right was explicitly named in the Constitution. However, the key inquiry when recognizing unenumerated fundamental rights, is to consider which "interests are . . . interrelated with constitutional guarantees."[93] For example, the Supreme Court has protected a defendant's right of access to the criminal appellate process because of its close connection to the due process guarantee of the Fourteenth Amendment.[94] Thus, the closer the connection between a historically recognized constitutional guarantee and a proposed fundamental right, the greater degree of protection the unenumerated right deserves. This version of tradition recognizes that some rights that have not been recognized by the courts and are not explicitly named in the Constitution are nonetheless constitutionally protected due to their close relationship with historically protected enumerated rights.

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[84] Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1922 (2004) (quoting *Lawrence*, 381 U.S. at 587 (Scalia, J., dissenting)).

[85] *Id.* at 1934.

[86] Wolf, *supra* note 67, at 115.

[87] *Id.* at 154.

[88] *Id.*

[89] Anders, *supra* note 65, at 920.

[90] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[91] *Id.* at 102 (Marshall, J. dissenting).

[92] *Id.* at 102-03.

[93] *Id.* at 103.

[94] *Id.*

Second, judges should use "tradition" in an aspiring sense, viewing the constitution as an ever-evolving document.[95] Justice Harlan recognized tradition as a "living thing" in his 1961 dissent from *Poe v. Ullman*.[96] He noted that Due Process requires courts to find a balance between liberty and the "demands of organized society."[97] The balance is struck by giving due regard "to what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke."[98] The Court's analysis of tradition is not always confined to an analysis of what American tradition actually was, but at times must involve an inquiry as to what our tradition should have been in light of current moral principles.[99] Furthermore, in the words of Justice Holmes, to follow a rule of law simply because "it was laid down in the time of Henry IV" is horrendous.[100] "It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[101] And, in response to originalists who insist that this type of tradition leads to individual Supreme Court judges imposing their own values on society, Justice Harlan responds that where a Supreme Court opinion radically departs from the traditions of this nation, the decision likely will not survive long.[102] This has been the fate of the recent reversal of the *Bowers v. Hardwick*[103] decision, where "tradition" was the pinnacle of the majority's opinion.[104]

A. Bodily Integrity

An individual's right to bodily integrity is already a well-recognized fundamental right.[105] This right stems from a person's privacy interest and is deemed to protect "individuals from intrusion by the government into their health care decisions."[106] A person's interest in protecting their bodily integrity includes

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95 CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 59 (2004) ("The American Constitution is a flexible instrument, one that allows for a great deal of change over time.").

96 Poe v. Ullman, 367 U.S. 497, 542 (1961).

97 *Id.*

98 *Id.*

99 Anders, *supra* note 65, at 920-21.

100 Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

101 *Id.*

102 *Ullman*, 367 U.S. at 542.

103 Bowers v. Hardwick, 478 U.S. 186 (1986).

104 *Bowers* was reversed in *Lawrence*, where the Supreme Court re-analyzed the tradition analysis of *Bowers* and recognized that "the sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in the opposite direction." *Id.* at 572. *See also* SUNSTEIN, *supra* note 95, at 123 (listing numerous examples of instances where the Supreme Court has veered from precedent and/or reversed former constitutional jurisprudence).

105 Rochin v. California, 342 U.S. 165, 172-73 (1952); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992); *Cruzan*, 497 U.S. at 278-79.

106 Haas, *supra* note 2, at 58.

a right to choose whether or not to bear a child,[107] have an abortion,[108] or refuse medical treatment.[109]

As noted above,[110] there are certain categorical exceptions to the requirement that a doctor must obtain parental consent to the medical treatment of a minor. One such exception exists when the parents may be unable to consider the best interests of their child due to the child's conflicting constitutional rights.[111] Another exception exists when the minor is considered mature enough to make his or her own medical decision.[112] Exceptions also exist for "children seeking treatment for drug addiction, mental health treatment, and testing and treatment for sexually transmitted diseases."[113] These afflictions are considered too personal to require a child to consult a parent regarding treatment.[114] Furthermore, children would probably forego treatment rather than consult a parent.[115]

It has previously been argued that "[t]he right to choose whether or not to undergo genital reconstruction surgery should be an exception to the general rule allowing parental consent to treatment of minors."[116] Arguably, intersex genital issues fall under two of the previously recognized exceptions mentioned above. First, the genital issues of the intersexed are too personal to require a child to consult a parent regarding treatment. However, due to the fact that the child is usually just a baby when the decision to conduct genital surgery is made, this argument will probably fail. Second, intersex issues involve a constitutional right of the child: bodily integrity. In fact, "[g]enital reconstruction surgery is arguably the ultimate infringement of an individual's bodily autonomy."[117] Parents and doctors normally point to the harmful effects on the child if the surgery is not performed,[118] but the surgery itself can cause a child extreme psychological and physical pain.[119]

Intersexed children are harmed psychologically from genital surgery. As one intersexual aptly relates, "[t]he truth is that the very thing surgery claims to save us from—a sense of differentness and abnormality—it quite unequivocally creates."[120] This emotional trauma from feeling different is no doubt created from the silence that pervades the surgery and its aftermath. They also suffer from the feeling that something has happened to them without the knowledge of their

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107 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
108 *Casey*, 505 U.S. at 896.
109 *Cruzan*, 497 U.S. at 278-79.
110 *See infra* notes 48-50 and accompanying text.
111 *Id.*
112 Belotti v. Baird, 443 U.S. 622 (1979).
113 Haas, *supra* note 2, at 58.
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 SHARON E. PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 12 (2003).
119 Haas, *supra* note 2, at 58.
120 Coventry, *supra* note 29.

medical history[121] as well as expressing symptoms of post-traumatic stress syndrome as a result of the secrecy and lies.[122]

Trips to the doctor can create a feeling of abnormality and illness in both gender identified boys and girls. Citing Goffman's theory on social stigma, Sharon Preves explains that "differences become socially stigmatized" when they are exposed to others.[123] Therefore, children with genital differences will remain socially accepted so long as their difference is not apparent to others or "readily visible."[124] However, children with genital differences are subjected to repeated medical examinations, often with a slew of doctors in attendance, which creates a feeling of loss of control and a lack of autonomy.[125] As Goffman's theory recognizes, the stigmatized person is left with the feeling that they "'can be approached by strangers at will.'"[126] Intersexuals relate stories of being viewed by twenty or thirty people at the same time and describe the experience of visiting the doctor for a routine genital exam as a "parade" in which the doctors would stare and gawk at his/her genitals.[127] Some patients recalled these experiences from the tender ages of "three, four, [and] five."[128] Preves notes that all children lack autonomy because they are in their parent's control, but intersexual children suffer from a feeling that they lack control over their own bodies, which can negatively impact the child's development of a "coherent self-concept."[129]

Furthermore, the upkeep procedures of vaginoplasty[130] could have long-lasting harmful psychological effects on young girls. Some of these vaginoplasty procedures require fashioning a vagina from material taken from the patient's bowel. These vaginal openings can "smell like bowel . . . necessitate the constant use of sanitary napkins," and "frequently require repeated surgical revisions."[131] Not only must the girl tolerate scores of visits to doctors who only want to "'look up [her] crotch,'"[132] but after the surgery she must also dilate her vagina with a

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[121] Colapinto, *supra* note 26 ("The twins developed a conviction that everyone, from their parents to Dr. Money and his colleagues, was keeping something from them . . . . 'We knew that at a very early age. But we didn't make the connection. We didn't know.'"); Coventry, *supra* note 29, at 3 ("After I had my clitorectomy, my innocent life became filled with fear and guilt. The secrecy surrounding my surgery began to undermine my entire sense of identity.").

[122] HRC Report, *supra* note 8, at 17-18.

[123] PREVES, *supra* note 118, at 66.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 66-69.

[128] PREVES, *supra* note 118, at 67.

[129] *Id.* at 72.

[130] Vaginoplasty is "an operation to construct or reconstruct a vagina." Wikipedia, the Free Encyclopedia, *available at* http://en.wikipedia.org/wiki/Vaginoplasty.

[131] HRC Report, *supra* note 8, at 21.

[132] KESSLER, *supra* note 5, at 59; *see also* SEXING THE BODY, *supra* note 11, at 86 (noting that "multiple genital surgeries can have negative psychological as well as physical effects").

plastic applicator on a daily basis.[133] Physicians admit that the task of dilating the vagina on a daily basis is "'quite a psychological burden.'"[134]

If the child is very young, her parent(s) must perform this unwelcome duty. Granted, it is psychologically stressful for a child to dilate her own vagina, but if the parent does it, what makes doctors think that the child will understand that this is a medically proscribed procedure and not sexual abuse?[135] In fact, many intersexuals later describe medical exams and procedures that they were subjected to as children as sexual abuse.[136] For example, a woman with congenital adrenal hyperplasia (CAH) testified to the San Francisco Human Rights Commission that she was subjected to numerous group examinations as a teenager, resulting in her acquisition of a venereal disease. Her experience with the medical attention "taught her that her body was unacceptable and something of which to be ashamed."[137] Due to her experience, which she feels could be characterized as "institutionalized sexual abuse," she was "unable to form bonds or a relationship."[138]

It would seem prudent to postpone invasive surgery on young children until they are able to assert some control over their own bodies and ask their doctors questions in order to better understand the procedures that are being performed. Interestingly, surgery completing the vaginal canal is best performed on young adults, not children, when the body is full-grown.[139] Similarly, physicians are not concerned that delaying reconstructive vaginal surgery on women beyond the neonatal period is traumatic.[140]

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[133] KESSLER, *supra* note 5, at 59.

[134] *Id.*

[135] *Id.* This begs the question, what makes intersexual medical examinations and surgeries any different for young women than routine gynecological exams or surgeries? Unlike a routine gynecology exam that is performed on women generally beginning at the age of puberty (for most girls gynecology exams begin two years after a girl first begins menstruating), vaginoplasty and other medical procedures are performed on intersexed children throughout early childhood years. This distinguishing factor, namely the patient's age, may explain why some intersexuals describe a feeling of sexual abuse from parents and/or doctors during medical examinations of their genitals. However, there are studies demonstrating that due to the invasiveness of the gynecological examination, even adult women suffer from stress and trauma when going to the doctor. Alice D. Domar, *Psychological Aspects of the Pelvic Exam:Individual Needs and Physician Involvement*, 10 WOMEN & HEALTH 75-76 (Winter 1985-86). Unsurprisingly, studies tend to demonstrate that where women have more control over the gynecology examination and feel comfortable stopping the examination at any time, women suffer from less anxiety. *Id.* at 78-80. Unfortunately, very young intersexual children cannot understand the surgical procedures and examinations that are being performed on them. While adult women may ask questions during a routine gynecology examination in order to assert some control over the situation, young children may not have the capacity and understanding to ask such questions. These studies, too, acknowledge that adolescents who are experiencing their first gynecology exam "are generally very self-conscious; body image is important and uncertainties and ambivalence about sexuality can magnify anxiety." *Id.* at 83.

[136] PREVES, *supra* note 118, at 72-73 ("After I got to be a teenager, I could see a very clear parallel [between the consequences of sexual abuse and medical treatment of intersex] because you have somebody who is able to examine your body, and you don't have the right to say, 'No, you can't do this.'").

[137] HRC Report, *supra* note 8, at 31.

[138] *Id.*

[139] KESSLER, *supra* note 5, at 16.

[140] *See id.*

The physical suffering of intersex children is, in many cases, egregious. Genital surgery is not a simple, one-time procedure. Thirty to eighty percent of all children undergoing genital surgery have multiple procedures, ranging from three to five such operations.[141] In many instances it involves complicated upkeep, multiple surgeries, and painful side effects. The stories of pain and anguish relating to genital surgery are too numerous to relate here, but it is only mildly surprising to hear of an intersexual being subjected to sixteen surgeries to correct a genital "abnormality."[142] These multiple surgeries could be caused by any number of reasons. One man who was subjected to sixteen surgeries suffered from severe hypospadias, which required multiple surgeries to graft skin from other places on his body to his penis in order to move the urethral opening from the shaft to the tip of the penis.[143] Iatrogenic complications, or problems resulting from the surgeries themselves, often develop in cases of genital surgery, requiring more and more visits to the doctor. Chimera, an intersexual adult, describes her painful childhood:

> When I was eighteen months old, they performed surgery; removed the hood of my clitoris, most of my labia, which left me wide open for urinary tract infections, which I had on a regular basis. Of course there were weekly examinations at the hospital. My childhood was a nightmare as far as I'm concerned.[144]

The results of these multiple surgeries are hard to summarize because, despite the large numbers of surgeries being performed, there "are no meta-analyses from within the medical community on levels of success."[145] Furthermore, almost no long-term studies of the effects of such surgeries have been conducted.[146] However, two conclusions can be drawn from the research regarding 314 vaginoplasty patients: the frequency of complication and multiple surgeries is high and the success rate of the surgery, with "success" measured in terms of "normal" vaginal opening size, is low.[147]

Sexual malfunctioning is another critical physical effect of genital surgery. Although doctors often report in follow up studies that the sexual functioning of their patients is "adequate" or "satisfactory," it appears that the doctors apply very different standards when evaluating the function of a vagina versus a penis. A "normal" penis must: be large enough; be able to become erect and flaccid and expel semen at the appropriate time; have a urethral opening at its tip; and have a normal shape and color.[148] A functional vagina, on the other hand, must simply be

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141 SEXING THE BODY, *supra* note 11, at 86.

142 Beh & Diamond, *supra* note 4, at 42.

143 PREVES, *supra* note 118, at 31.

144 *Id.* at 81.

145 KESSLER, *supra* note 5, at 53.

146 Domurat Dreger, *supra* note 9, at 9-10 (noting that there is a lack of follow up studies for clitoral and vaginal reconstructive surgeries); *see also* Coventry, *supra* note 29, at 4.

147 SEXING THE BODY, *supra* note 11, at 87.

148 Domurat Dreger, *supra* note 9, at 5.

a hole that can accommodate a typical-sized penis.[149] Similarly, a clitoris is adequate as long as it is not too large.[150] With physicians using "a hole" as their criteria, it is not surprising that many women are disappointed with the sexual functioning of their post-surgery vaginas. Additionally, when physicians resort to using archaic methods such as the clitorectomy—the complete removal of the clitoris—there is no doubt that they are not taking into account the future sexual fulfillment of their patient.

Furthermore, when clinicians do take the time to study the effects of the surgery on a patient's sexual experiences, they may look at the results of electrodiagnostic tests.[151] These tests are simply used to determine whether the nerves attached to the sexual organ (the clitoris) are showing normal firing patterns post-surgery.[152] However, in a 1995 study claiming that clitoral reduction surgery techniques "*may* permit normal sexual function in adulthood[,]" evaluations were conducted on children who had not yet fully healed from their surgery, with no follow-up consultations.[153] Also, oncology literature regarding reconstructive surgery for women suffering from genital cancers acknowledge that, "as a consequence of genital surgery, libido and coitus frequency are reduced."[154] For those lucky few who retain the ability to reach orgasm post-surgery, the orgasms have turned into something less than sexual apex that was once possible: If the feeling the patient associated with her "orgasms before the [clitoral] recession were a deep purple, now they are a pale, watery pink."[155]

By far the most offensive outcome of current intersex management protocol occurs in those cases where the child is rendered sterile as a result of genital surgery. As noted above, where a child is born with a micropenis, his gender is often labeled "female" and reconstructive surgery ensues.[156] In these cases, little concern is given regarding the child's ability to reproduce.[157] For example, a woman born with "testicles in a body that looked like a baby girl's" was operated on as a child to make her look like a girl.[158] The adult woman testified to the San

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[149] *See id.*

[150] KESSLER, *supra* note 5, at 27.

[151] *Id.* at 57.

[152] *Id.* (citing the results of a 1995 study "that measured pudendal-evoked potentials before and after erectile tissue from the enlarged clitoris had been removed").

[153] *Id.*; *see also* Domurat Dreger, *supra* note 9, at 4 (revealing that long-term post-surgery studies have never been conducted).

[154] KESSLER, *supra* note 5, at 57-58.

[155] Domurat Dreger, *supra* note 9, at 1.

[156] Colapinto, *supra* note 26 ("Placing the greatest possible emphasis on the child's projected 'erotic functioning' as an adult . . . . The vast majority of intersexual children . . . would be turned into girls.").

[157] Although the AAP guidelines claim to concern themselves with the child's future right to procreate, the exact same guidelines still prefer rearing an XY chromosome male as a girl if he does not respond to testosterone treatment. AAP 2000 Policy, *supra* note 18, at 141. In other words, "contemporary sexing decisions ultimately revolve around the size and capacity of an infant's penis/clitoris." PREVES, *supra* note 118, at 56.

[158] HRC Report, *supra* note 8, at 34.

Francisco Human Rights Commission that the removal of her testicles "took away the chance of fathering a child which is something she wants very much."[159]

While conducting ethical consultations with physicians, Kenneth Kipnis found that there was little to no concern paid to the ability to procreate, with physicians focusing on the simple, yet fallible logic that "penis = boy, no penis (or inadequate penis) = girl."[160] However, Doctor Justine Marut Schober recognizes that good evidence exists to support rearing an XY child with a micropenis as a male, as well as rearing as boys babies born with cloacal exstrophy (boys who generally have functional testes, but lack a penis) because they can have normal male gender recognition while preserving their fertility.[161]

Fundamental rights jurisprudence demands this result as it adamantly protects an individual's right to reproductive capacity.[162] For instance, handicapped children cannot be sterilized even at the request of their parent unless, after appointing a guardian ad litem to speak to the interests of the child, the court determines by clear and convincing evidence that the operation is in the child's best interest.[163] In cases where the child's future fertility is at stake, the child's right to bodily integrity, incorporating issues of reproductive rights, must prevent parents and doctors from unnecessarily choosing to assign a baby's gender according to their personal preferences at birth.

One case is particularly illustrative of the extent to which the constitution protects an individual's bodily integrity: *Rochin v. People of California*.[164] In *Rochin*, policemen watched as the defendant swallowed drugs after they entered his apartment on suspicion that he was selling narcotics. The police ordered hospital staff to pump the suspect's stomach in order to obtain crucial evidence for his conviction.[165] The Supreme Court held that the action of the police violated the defendant's fundamental right to bodily integrity because forcing someone to vomit against his or her will "shocks the conscience."[166] In *Rochin*, the conduct at issue was the police's insistence that the defendant take an emetic solution to induce vomiting. In the case of intersexuals, doctors are cutting, removing, and shaping the genitals of babies . . . sometimes even preventing intersexuals from ever being able to procreate. Elective genital reconstructive surgery on babies and children is behavior that truly shocks the conscience.

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159 *Id.* at 34

160 PREVES, *supra* note 118, at 57 (citing Kenneth Kipnis & Milton Diamond, *Pediatric Ethics and the Surgical Assignment of Sex*, 9 J. CLINICAL ETHICS 398 (1998)).

161 Justine Marut Schober, *A Surgeon's Response to the Intersex Controversy, in* INTERSEX IN THE AGE OF ETHICS, at 165 (Alice Domurat Dreger ed. 1999).

162 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (expounding that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

163 *See, e.g.*, Estate of CW, 640 A.2d 427 (Pa. Super. Ct. 1994).

164 Rochin v. People of Cal., 342 U.S. 165 (1952).

165 *Id.* at 166.

166 *Id.* at 172.

The intersex child's well-established fundamental right to bodily integrity provides the framework for a halt on genital surgeries. Not only are these surgeries physically and psychologically harmful to the child, they could affect issues as important as reproduction. While parents and doctors argue that the surgery is necessary due to the countervailing psychological harm to the child if they grow up as an "it" with genitalia resembling those of both a male and female, these claims are not currently backed up with any hard evidence. In fact, numerous studies demonstrate that intersexed children suffer from such surgeries,[167] while there are currently no studies indicating that a lack of surgery harms the child.[168] Furthermore, studies of hermaphrodites and intersexuals living without surgery demonstrate that intersexuals can lead happy and healthy lives without normalized genitalia.[169]

B. Fundamental Right To Personality

A fundamental right to personality would protect the individual's interest in self-expression as an absolute as long as that person's exploration and expression of their individuality does not harm others. John Stuart Mill argues that this concept allows individuals the ability to live their lives and develop their unique sense of self, absent any injury to others.[170] The right to personality can be seen as an extension of both the right to expression under the First Amendment and the fundamental right to privacy.

The First Amendment of the United States Constitution explicitly protects an individual's right to self-expression. This right to expression comprises more than oral vocalizations, it also protects the right to conduct in certain circumstances. The First Amendment is limited, however, in that it does not protect any action "whenever the person engaging in the conduct intends thereby to express an idea."[171] One legal scholar argues that, primarily, it must be determined which element is predominant, the action or the expression. If the expression is the predominant element in the conduct at issue, the First Amendment is implicated.[172] Alternatively, it has been argued that the First Amendment only protects conduct meant to express a message or understood by others as communicating a message.[173]

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167 KESSLER, *supra* note 5, at 55-58, 61-64, 72; *see also* SEXING THE BODY, *supra* note 11, at 85-87.

168 Coventry, *supra* note 29, at 4; *see also* SEXING THE BODY, *supra* note 11, at 85 (recognizing that "long term studies of genital surgery" are scarce).

169 SEXING THE BODY, *supra* note 11, at 92-95.

170 JOHN STUART MILL, *ON LIBERTY*, UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 124 (Everyman 1993) (arguing that "free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them").

171 U.S. v. O'Brien, 391 U.S. 367, 376 (1968).

172 THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80, 84 (1970).

173 David Cole & William Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HAR. C.R.-C.L. L. REV. 319, 320 (1993) [hereinafter Cole & Eskridge].

Arguably, the First Amendment protects a person's right to remain an intersexual (or defer genital surgery) because their decision to remain intersexed would be an expression counter to the normative values of gender/sexuality in society.[174] Furthermore, to the extent that intersexuality is meant to convey a sexual expression, it is important to individual development and "possesses deep communicative significance."[175] For instance, the Supreme Court has recognized that nude dancing in public is expressive conduct because it communicates an idea or emotion to others.[176] Other public acts of sexual expression, such as hand holding and kissing, similarly communicate an emotion.[177] However, because intersexuality is generally an inconspicuous condition involving genitalia, most intersexuals would not be protected by the First Amendment because they would not be seen as expressing any message.[178] A right to personality would extend protection of the individual's right to individuality absent such an intended or perceived public message. For example, if an intersexual adult decides to live out his/her life as both a man and a woman, or as a third gender type rejecting typical gender categories,[179] this would be protected by the right to personality, even if s/he wasn't expressing any ideal or message through his/her behavior.

Tort law protection of a citizen's privacy interests developed from an inherent right to personality for every citizen of the United States.[180] This initial right to inviolate personality was viewed within the context of a tort privacy interest in a freedom from unwanted publicity and a more general "right of the individual to be let alone."[181] Thus, this right to personality incorporated into tort law protected the right to privacy for "thoughts, emotions and sensations, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial

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174 KESSLER, *supra* note 5, at 122.

175 Cole & Eskridge, *supra* note 173.

176 Barnes v. Glen Theatre, Inc., 501 U.S. 550, 565 (1991).

177 Cole & Eskridge, *supra* note 173.

178 City of Cincinnati v. Adams, 330 N.E.2d 463, 464 (Ohio 1974) (refusing to protect a transsexuals cross-dressing because his decision to wear women's clothing did not represent a "philosophy or ideal").

179 Although this scenario may seem far-fetched, numerous individuals who self-identify as intersexuals are challenging gender/sexual norms. For instance, one intersexual started a support group for those intersexed adults who consider themselves to be "neuters" or "asexual." KESSLER, *supra* note 5, at 77-78. This particular group did not thrive. *Id.* at 78. However, Cheryl Chase and the Intersex Society of North America has had a wealth of success in connecting intersexuals to sympathetic listeners, influencing the medical treatment of the intersexed, and spurring the formation of additional intersex support groups. *Id.* at 78-80.

180 *See* Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

181 *Id.* at 205. Brandeis later mentioned this right in a Supreme Court dissenting opinion in the context of an alleged violation of the fourth amendment, stating that "[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

expression."[182] Thus, it is not at all foreign for United States courts to discuss individual rights under personality nomenclature.

In fact, Justice Jackson referred to the "dignity and personality" of the individual defendant when addressing the mandatory sterilization of repeat criminal offenders.[183] Also, constitutional law recognizes, under the penumbra of rights located in the First, Third, Fourth, Fifth, and Ninth Amendments, a right to privacy that "implicates a concern for maintaining the conditions necessary to sustain normatively valued individuation through which the integrity of one's personhood and identity is established and developed."[184] A primary reason for the constitutional protection of privacy is the role of protecting a person's right to "self-definition."[185] Arguably, the right to personality is based on the constitutional right to privacy. However, a fundamental right to personality is broader than the basic privacy right. To date, courts have been unable to protect a person's right to gender and/or sexual self-expression and identity under the fundamental right to privacy, the First Amendment, or Title VII of the Civil Rights Act.[186] The personality right would extend basic privacy rights beyond the physical ability to choose whether to have genital surgery or the ability to live out any sexual or lifestyle preference in whichever gender or sexual identity one desires.

When interpreting "tradition" under the fundamental rights doctrine, the Supreme Court may consider laws and court decisions of other Western nations.[187] Although the practice has been debated,[188] with more frequency the Supreme Court is citing and considering legal doctrine from other nations.[189] Coincidentally,

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[182] *Id.* at 206.

[183] Skinner v. State of Oklahoma, 316 U.S. 535, 546 (Jackson, J., concurring).

[184] Jonathon Kahn, Article, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 386 (2003).

[185] Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

[186] Hasan Shafiqullah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195, 204, 207-08 (1997) (explaining that a transsexual's right to cross-dress is not a "philosophy or ideal" protected by the First Amendment and both the 7th and 9th Circuits refuse to protect transsexuals under Title VII); *see also* Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 345, 379-71 (1999) (citing Ashlie v. Chester-Upland Sch. Dist., No. Civ. A. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *13 (E.D. Pa. May 9, 1979) ("holding that a transsexual who transitions on the job may not seek protection from state government employer job discrimination under the privacy doctrine")).

[187] *Lawrence*, 539 U.S. at 573 (considering laws passed by British Parliament and a decision of the European Court of Human Rights when deciding whether laws criminalizing homosexual sodomy were constitutional).

[188] John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, Public Law and Legal Theory Research Paper Series (2004), downloaded from http://ssrn.com/abstract=615962 (arguing that the Supreme Court should never treat foreign law as precedent).

[189] *See, e.g., Lawrence*, 539 U.S. at 573; *see also* Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, AU Washington College of Law (Jan. 13, 2005) (Justice Breyer argued that it is appropriate for the Supreme Court to consider and cite decisions from other nations because "law is more and more international; and of course, human rights, too, are more and more international.").

Germany's Constitution has an informative provision protecting every citizen's fundamental right to personality. Article 2(I) of the German Constitution provides everyone with "the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code."[190] When interpreted in conjunction with Article 1(I) of the Constitution, protecting human dignity as "inviolable,"[191] the right to personality "guarantees the free development of a person's abilities and strengths."[192]

Both American law, through its protection of a fundamental right to privacy, and German law, through the right to personality, protect every person's right to dignity. Germany's personality clause applies to two separate spheres of life: freedom of action and the personal sphere.[193] The concept of the personal sphere of personality under German law contains elements of self-determination and autonomy, which overlaps with America's protection of privacy. Germany's personality clause addresses many of the same concerns as America's privacy cases.[194] The key difference between the two systems lies in their concept of dignity. As noted above, the American version of privacy focuses solely on the right to be free from governmental intrusion into one's personal affairs. However, the German model of dignity "imposes obligations as well as endows freedom."[195] Thus, in Germany, human dignity requires every citizen to be concerned with the social and moral community. The German constitution codifies the principle requiring all individuals to respect others' claims to dignity in order to "foster a community of mutual cooperation and solidarity."[196]

Under this right to personality, the German Constitutional Court has recognized a transsexual's right to be legally recognized as the "sex with which he is psychologically and physically identified."[197] The Court noted that the principle in German law and society that each person is either gender identified as a man or a woman is independent of genital anomalies, recognizing that "[v]arious forms of biological intersexuality are known to modern medicine."[198] The German Court's recognition of an individual's ability to choose his or her own gender without regard to conflicting genitalia is progressive. It appears to agree with modern queer theorists that gender is a socially constructed concept, which is severable from biological sex.[199] The Court did note that there is a limit on one's right to choose his/her own gender—the moral code—but dismissed this limit regarding the

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190 Grundgesetz [GG] [Constitution] art. II, s. 1 (F.R.G.).

191 Grundgesetz [GG] [Constitution] art. I, s. 1 (F.R.G.).

192 DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 331 (2d ed. 1997) (translating BVerfGE 49, 286 (1979)).

193 Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 979 (1997).

194 *Id.* at 1024-25.

195 *Id.* at 1034.

196 *Id.*

197 KOMMERS, *supra* note 192, at 331.

198 *Id.*

199 *See infra* notes 224-28 and accompanying text for a discussion of modern gender theories.

transsexual issue because the sex change operation was deemed medically necessary.[200] Thus, the Court reserved the issue of whether an individual's choice to have a sex-change operation that was not medically required would offend the moral code.[201]

Similar to the German Constitution, the Colombian Constitution protects an individual's right to the free development of his/her personality.[202] Recently, the Colombian Constitutional Court was the first court in the world to address intersex genital surgery issues head on. Citing Article 16, the development of personality, among other constitutional provisions, the court held that a child has a "right to develop his or her gender identity as a part of the development of his or her personality."[203] Furthermore, the court noted that there have been no studies of the alleged psychological harm to children resulting from their untreated intersexual condition.[204] On the other hand, the court explained, an abundance of evidence proves that genital surgery causes psychological trauma to children.[205] Unfortunately, while the court's first decisions dealing with this issue held firm to a moratorium on intersex genital surgery, its later decision compromised and held that parental consent could be deemed sufficient if the child was under five years old and the parent was provided with detailed information, gave their consent in writing, and authorized medical procedures in stages.[206] The court stated that the child's gender identity would not be well formed at such a young age and these decisions belong to the "realm of family privacy."[207] But, "[f]or children over five, parents cannot consent, because the child has achieved an autonomy that must be respected, and because the child has already developed a gender identity, which reduces the urgency of a decision as well as any potential benefits of surgery."[208]

Both the German and Colombian constitutions provide a framework for a fundamental right to personality in the United States. They also provide some historical data regarding the treatment of such rights abroad. The decisions of the Colombian Constitutional Court provide a measure of hope for future intersex rights. However, the court backtracked when it gave more deference to the rights of the parents then that of the intersexed child. Although a child's gender identity may not be fully formed as a baby or a child, genital surgery will close some doors of gender and personality exploration forever. These types of personal decisions

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200 KOMMERS, *supra* note 192, at 331.

201 *Id.*

202 Constitucion Politica de Colombia Art. 16, translated in CONSTITUTIONS OF THE WORLD (1998).

203 Haas, *supra* note 2, at 51. Note that throughout this portion of the Article I am discussing three cases together, all of which addressed the issue of intersex genital surgery.

204 *Id.* at 52.

205 *Id.*

206 *Id.* at 53-54.

207 *Id.*

208 Julie A. Greenberg & Cheryl Chase, *Background of Columbia Decisions*, ISNA, http://www.isna.org/node/21.

must be left to the intersexed, who can explore their developing gender identity best without having crucial, life-changing choices made for them at birth.

C. *Fundamental Right to Sexuality*

"Pleasure is an inalienable right."[209] The traditional approach to sexuality under the law was one of stringent rules and regulations: laws were passed forbidding access to birth control, abortions, and obscenity. Eventually, however, the Supreme Court began to strike down these types of regulations in the name of privacy. Today, a fundamental right to sexuality exists in this country, stemming either from the liberty or privacy interest embedded in the Due Process Clause.[210] In the context of intersexual rights, a fundamental right to sexuality could protect young intersexed children from invasive, and often sexually damaging, genital surgery.

"The articulation of a right to sexual privacy grew directly out of the birth control movement."[211] In *Griswold v. Connecticut*,[212] the Supreme Court struck down a law prohibiting the sale or use of contraceptives. The Court recognized that the "zone of privacy" created by the First, Third, Fourth, Fifth, and Ninth Amendments protects the "sacred precincts of marital bedrooms."[213] Without saying the words explicitly, the Court laid the framework in *Griswold* for protecting marital sexual practices. The same right to contraception (and sexual practices) was expanded to non-married couples in *Eisenstadt v. Baird*.[214]

In *Stanley v. Georgia*,[215] the Court extended the right to sexual privacy to protect an individual's preference for viewing obscenity or pornography in the home. Later, the Court also protected a woman's right to choose abortion as part of her marital or non-marital sexual conduct.[216] Interestingly, in none of the above-mentioned cases did the court directly state that citizens have a right to sexuality or sexual practices. Instead, the Court used privacy language as a method to side-step the issue of sexuality.

Finally, in *Lawrence v. Texas*,[217] the Supreme Court was forced to put into the plain text of its decision the true undertones of the sexual privacy cases . . . matters "touching upon the most private human conduct, *sexual behavior*, and in

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209 PATRICK CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM 218 (2d ed. 2003).

210 As discussed in the following section on gender identity, it is unclear whether the recent sexuality decision, *Lawrence v. Texas*, was based on a right to privacy or a liberty interest. For purposes of this section, I will address it as both a privacy case and a liberty case because it is an extension of the typical privacy cases such as *Eisenstadt v. Baird* and *Roe v. Wade*.

211 WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 3 (Foundation Press 2d ed. 2004) [hereinafter ESKRIDGE & HUNTER].

212 Griswold v. Connecticut 381 U.S. 479 (1965).

213 *Id.* at 485.

214 Eisenstadt v. Baird 405 U.S. 438 (1972).

215 Stanley v. Georgia, 394 U.S. 557 (1969).

216 Roe v. Wade, 410 U.S. 113 (1973).

217 *Lawrence*, 539 U.S. 558.

the most private of places, the home."[218] Essentially, the *Lawrence* Court held that citizens have "a liberty interest in private sexual conduct."[219] There is one important question remaining; is an individual's interest in private sexuality fundamental? Although the Court never says the word "fundamental" in its decision, based on the development of the sexual privacy doctrine, from contraception to pornography to abortion to sodomy, there can be no other conclusion. *Lawrence* is the pinnacle case that builds on Supreme Court precedence.[220] It is not addressing a "new" right that had never been addressed by the Court. Instead, the *Lawrence* Court more fully exposed an important basis for the *Eisenstadt*, *Roe*, and *Stanley* line of reasoning: the right to sexuality.

Critics will argue that simply because the Court used words implying a rational basis test, such as "legitimate interest," in the opinion, the Court must not have meant for this right to be viewed as fundamental.[221] To this concern I have two responses. One, the Court struck down the Texas statute in *Lawrence* stating that the state had no rational basis for the criminalization of sodomy because it was the preliminary stage of the analysis in the opinion. This is a simple rule of constitutional interpretation. Where the statute can be struck down for lack of a legitimate state interest, the Court has a duty to do so, instead of addressing matters of fundamental concern. Secondly, as mentioned above, the Court had already laid the groundwork for the fundamental right to sexual privacy. In *Lawrence*, the Court was not creating a new right, but simply explaining the logical extension of its previous jurisprudence.[222]

As detailed above, genital reconstructive surgery has severe sexual consequences for many intersexuals. In many instances, genital surgery involves the destruction or removal of the clitoris, which impairs the ability to achieve orgasm.[223] The newly articulated sexual privacy right can protect intersexuals against these injustices. By protecting their future right to sexuality and sexual exploration, courts can give intersexuals the power to choose when and whether to submit to genital surgery; a right to sexual privacy that citizens, married and single, gay and straight, male and female, take for granted every single day as they enjoy their sexuality in the privacy of their homes.

D. Fundamental Right to Gender Identity

Today, the growing visibility of the transsexual community has created an alternative: to identify as transgendered rather than female or male, and

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218 *Id.* at 558.

219 ESKRIDGE & HUNTER, *supra* note 211, at 93.

220 Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1114 (2004) (noting that the reasoning from the Lawrence "holding relies on a series of cases in which the Court did recognize a fundamental right: *Griswold*, *Eisenstadt*, *Roe*, and *Casey*").

221 *See, e.g.*, Lofton v. Sect. of Dept. of Children and Family Services, 358 F.3d 804, 815-16 (11th Cir. 2004); Williams v. Attorney General of Alabama, 378 F.3d 1232, 1298 (11th Cir. 2004).

222 *See supra* notes 201-09 and supporting text.

223 *See supra* notes 146-47 and supporting text.

> *question the binary gender system that generates those labels. People who cannot "pass" as men or women have little to lose by becoming outspoken gender activists. It feels better to fight oppression, even though it is hard work, then it does to run away from it and try to hide.*[224]

While the rights to personality and sexuality are founded in a privacy based interest, the right to gender identity stems from the Due Process Clause's liberty interest. Though the Supreme Court continued to address rights under the nomenclature of privacy since 1973 in *Roe v. Wade*,[225] the Supreme Court has preferred to categorize the right to privacy as rooted in the Due Process Clause's protection of liberty.[226] It is evident in the *Lawrence v. Texas*[227] decision that the Supreme Court is moving away from addressing core individuality rights (such as the right to engage in sodomy in the privacy of one's own home) under the nomenclature of privacy to a newly invigorated liberty interest.[228] Hence, modern courts may be more willing to accept a gender identity right derived from an individual's liberty interests, rather than a personality right stemming from the right to privacy.

The constitutional right to liberty traditionally protects "matters . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[229] The right to liberty has been applied to protect a transsexual's right to cross-dress in accordance with his/her preparation for sex-reassignment.[230] Potentially, a narrowly construed right to gender identity may prove futile at protecting the intersexed child from genital surgery, which some would argue, is aimed at the child's sex and not gender. However, a right to gender identity[231] should protect an individual's right to identify with their gender of choice "without regard to sex" as well as their freedom to "control and change [their] own body cosmetically, hormonally, or surgically" at will.[232] The International Bill of Gender Rights, adopted by the International Conference on Transgender Law and Employment Policy in 1995, similarly strives for the right of

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224 CALIFIA, *supra* note 209, at 225.

225 Roe v. Wade, 410 U.S. 113 (1973).

226 *See id.* at 153.

227 *Lawrence*, 539 U.S. 558.

228 Hunter, *supra* note 220, at 1105.

229 *Casey*, 505 U.S. at 851.

230 *See* City of Chicago v. Wilson, 389 N.E.2d 522, 524 (Ill. 1978).

231 Obviously, a right to gender identity assumes that every person has a gender identity that should be protected. However, some gender theorists, including Judith Butler, do not believe that a gender identity exists. JUDITH BUTLER, GENDER TROUBLE 33 (Routledge 1999) (arguing that there is no such thing as "gender identity behind the expressions of gender"). To the extent that a right to gender identity allows individuals to "act out" their gender preference in any way they see fit, the right does not seem to contradict the argument that gender is made up of nothing more than gender expressions. In fact, a right to gender identity might serve to get rid of the term "gender identity" and lead to a more realistic term relating to a right to "gender expression." Whatever the nomenclature of the legal right, Butler's point is advanced, not hindered, by recognizing a right to gender identity. *Id.*

232 Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 566-67 (2000).

every person "to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role."[233]

However, inherent in a discussion of a right to gender identity is the relationship between the legal discourse of rights and the normative social structures of society. This general debate leads to further specific inquiries regarding the essential separation between gender and sex. Is one's gender inextricably tied to one's sex? Modern gender theorists claim that gender is a social performance or something that we "do,"[234] while sex refers to "the biological components of maleness and femaleness,"[235] such as genitals, hormones and DNA. Gender identity is defined as "an individual's own feeling of whether she or he is a woman or a man [or a combination thereof][236] . . . . In essence, gender identity is self-attribution of gender."[237] Obviously, biological sex alone is not easy to classify in terms of a clear male/female binary.[238] However, current legal analysis further complicates this conundrum by attempting to bind biological sex to performative gender in the context of a gender binary structure.

The law assumes that a gender binary is strictly in place in society. The gender binary model posits that only two sexes exist and that every person must fit easily into the category of male or female.[239] For example, the law generally upholds prison policy against constitutional challenges, where anyone with a penis is male and must be kept in male quarters, regardless of his/her gender identity.[240] Some courts, however, ignore the plaintiff's "natural" genitalia and look to the congruence between the plaintiff's psychological interior and his/her new anatomical sex.[241] Yet this simple formula only applies when the new genitalia conform to the person's social gender.[242] Thus, even where the court seems to privilege a person's internal gender identity, it will only do so when it conforms to society's assumptions regarding the correctness of that person's genitalia.

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233 The International Conference on Transgender Law and Employment Policy, Inc., The International Bill of Gender Rights (adopted on June 17, 1995 in Houston, TX), *available at* http://www.pfc.org.uk/gendrpol/gdrights.htm.

234 Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 132 (June 1987); *see also* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265 (1999) (noting that "[g]ender is generally used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex.").

235 SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 7 (Univ. of Chicago Press 1978).

236 *Id.* at 8; *see also* JOHN MONEY, GENDERMAPS 25 (Continuum 1995) [hereinafter GENDERMAPS]. "Scientists generally agree that there are seven gender traits that constitute one's gender identity: 1) Chromosomes; 2) Gonads; 3) Hormones; 4) Internal reproductive organs; 5) External genitalia; 6) Secondary sexual characteristics; and 7) Self identity." Rosenblum, *supra* note 232, at 504.

237 SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 7 (Univ. of Chicago Press 1978); *see also* GENDERMAPS, *supra* note 236, at 25.

238 SEXING THE BODY, *supra* note 11, at 52-53 (describing the various forms of intersex conditions).

239 Greenberg, *supra* note 234.

240 *See* Rosenblum, *supra* note 232, at 518.

241 Susan Etta Keller, Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity, 34 HARV. C.R.-C.L. L. REV. 329, 359-60 (1999).

242 *Id.* at 360.

A fundamental right to gender identity would place an individual's description of his/her gender as his/her legal gender, without reference to his/her biological make-up.[243] Thus, a person could qualify as a man for gender purposes even if he had a vagina, XX chromosomes, and female hormones. The right to gender identity would re-categorize the gender binary into a variable spectrum of gender induced identities.[244] After all, the existence of the transsexual and transgender movements have proven that gender is imprinted by the age of eighteen months, with gender role well developed by the age of two and a half.[245] This conclusion has been blatantly contradicted by the John/Joan case,[246] as well as the desire of transsexuals to "change" their gender as adults. In reality, gender is more akin to a spectrum, rather than a binary. Gender theorists posit that there are myriad different types of genders,[247] some even insisting that there are as many genders as there are individuals.[248] Instead of constantly trying to classify individuals within a gender category contrary to their understanding of self, the law should defer to the individual's gender categorization because "[t]he most accurate way to define a child's gender is to allow them to assert it."[249]

VI. PARENTAL CONTROL VERSUS CHILDREN'S CHOICE: A BALANCING ACT

If American courts import constitutional principles into informed consent law, they will inevitably be forced to engage in a balancing act. In this case, the court must balance the constitutional right of the child to choose his/her own future versus the right of the parent to control the upbringing of his/her own child. While American constitutional jurisprudence sheds some light on this type of parent/child balancing, this case presents a novel issue of constitutional jurisprudence.

Time and time again the Supreme Court reminds us that parents have a fundamental right to "direct the upbringing . . . of children under their control."[250] This right has been asserted to allow parents to direct their children to attend private schools,[251] encourage their children to learn a foreign language at a young age,[252] or stop attending school before graduation at the direction of their

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243 Rosenblum, *supra* note 232, at 566 (proposing a "fundamental right to determine gender without regard to sex").

244 Anne Bolin, *Transcending and Transgendering: Male-to-Female Transsexuals, Dichotomy and Diversity, in* THIRD SEX, THIRD GENDER 485 (Gilbert Herdt ed., 1994) (recognizing that "[t]he transgenderist harbors great potential either to deactivate gender or to create in the future the possibility of 'supernumerary' genders as social categories no longer based on biology") (citing THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD (Harvard Univ. Press, 1990)).

245 GENDERMAPS, *supra* note 236, at 22.

246 Colapinto, *supra* note 26.

247 SEXING THE BODY, *supra* note 11, at 108 (explaining Martine Rothblatt's system of gender, which contains up to 343 "shades of gender.").

248 Rosenblum, *supra* note 232, at 504.

249 HRC Report, *supra* note 8, at 23.

250 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

251 *Id.*

252 Meyer v. Nebraska, 262 U.S. 390 (1923).

parents.[253] Although these issues do not seem to correlate easily with a right to control a child's gender and/or genitalia, more similar factual scenarios do exist. For example, parents have claimed a right to control the fertility of their children,[254] an interest that directly conflicts with the child's right to privacy, when combating a child's choice to obtain an abortion.

The Supreme Court has protected the right of mature minors to make abortion decisions in the first term of their pregnancy without allowing the parents the ability to overrule the decision.[255] The Court acknowledged that "minors, as well as adults, are protected by the Constitution and possess constitutional rights."[256] In balancing the child's right against the state's interest in protecting the family unit and parental authority, the Court found the child's interest to prevail.[257] The Court acknowledged that parents generally have a right to make medical decisions for their children, however, it limited that authority by recognizing that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."[258]

Although a parent is granted significant control of their children's health, safety, and welfare, parents and guardians do not have "an absolute right to make medical decisions for their children."[259] When balancing the parents' right to control the upbringing of their child against the child's right to an open future, courts must consider the child's right to bodily integrity, personality, sexuality and gender identity. The Colombian Constitutional Court engaged in this very same balancing task when it considered whether the parental interest in raising a "normal" child who allegedly would be free from psychological damage trumped the child's "right to develop his/her own gender identity as a part of the development of his or her personality."[260]

When, in *Ramos*,[261] the Court was faced with the case of an eight year-old female identified "girl" with a small penis, gonads, and no vagina, the Court ordered that the doctors abstain from genital surgery until the young girl could consent herself. The Court recognized that there was no evidence showing that the child would suffer psychological trauma if she did not have the operation and the Court recognized that the girl would be distraught if she decided later in life to reject her assigned sex.[262] Thus, the Court put the constitutional interest of the

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253 Wisconsin v. Yoder, 406 U.S. 205 (1972).

254 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

255 *Id.*

256 *Id.* at 74.

257 *Id.* at 75.

258 *Id.* at 74.

259 *In re* Doe, 418 S.E.2d 3, 10 n.6 (Ga. 1992).

260 Haas, *supra* note 2, at 51.

261 Sentencio No. SU-337/99.

262 Haas, *supra* note 2, at 52.

child ahead of those asserted interests of her parent and preserved the freedom of choice for the child.

But, soon after the *Ramos* case was decided, the Court, in *Cruz*,[263] was faced with a three year old child with XX (female) chromosomes and male genitalia whose parents had already obtained a clitoral reduction or removal in order to make her look more like a little girl. The Court could have followed its *Ramos* decision, but it decided to allow parents to consent to genital surgery on behalf of their children so long as the child is under the age of five.[264]

In *Cruz*, the parents of the child brought the informed consent claim to Court after the surgery because the medical staff gave them the impression that surgery was the only option for their child and they were misled into believing that the surgery would make their child "normal."[265] The Court found that the parents lacked informed consent in this case and that the rights of Cruz were violated in this case, but they refused to uphold the *Ramos* moratorium on such surgeries. Instead, the Court stated that it would be "intruding into the realm of family privacy" if it banned such surgeries and that a prohibition on genital surgeries "would be like a social experiment in which children were the subjects."[266] The Court did raise the standard for informed consent and required doctors to provide parents with more information, but it is unclear why they drew the arbitrary line at the age of five.

Although there is a competing interest of parents to control their child, it is clear that the Colombian Constitutional Court gave preference to the wishes of the child when the child was even arguably old enough to voice his/her own opinion. In fact, it appears as though the *Ramos* opinion is a bit short-sighted in that it argues that intersexed children over the age of five must give their informed consent before undergoing reconstruction surgery without giving any indication of how to determine whether a child is mature enough to make such a choice. Surely a five year old is still at the mercy of his/her parents when making such an important life decision due to a lack of autonomy. But, the *Cruz* decision is even less informed because it appears to make two crucial assumptions: (1) a child's gender identity somehow becomes fixed at the age of five; and (2) prohibiting genital surgery on children would turn them into the subjects of a massive social experiment.

As to the first point, as noted above in this article, John Money's claim that gender identity is malleable up until the age of two has been completely discredited.[267] Keeping that in mind, how did the Colombian Court come up with the arbitrary age of five? The *Cruz* Court asserted that a two year-old child was too young to have a gender identity; how did they come to the conclusion that a five

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263 Sentencio No. T-551/99.

264 Haas, *supra* note 2, at 52.

265 *Id.*

266 *Id.* at 53.

267 *See supra* note 17.

year old would be able to determine which gender, if any, is the "right" one? Furthermore, if the Court is genuinely interested in protecting the child's right to gender identity and personality, why didn't the Court stick to its *Ramos* decision and protect the child's future choice?

Secondly, allowing intersex children to grow up in their natural state is not a novel social experiment. In fact, before genital surgery was an available option due to the advancement of medical science, "parents gendered their children through social means (through naming, clothing, etc.)."[268] The "social experiment" language of the Court veils a distinct fear of allowing children to grow up different. However, the reality is that genitalia are generally covered in modern society and studies of intersexuals throughout the ages demonstrate that they are not at all psychologically damaged by the experience.[269] It appears that the Court is really masking its one true paranoia: that the gender binary will be disturbed by the presence of a third sex or a third gender. Obviously, if the Court recognizes that every individual has a right to gender identity and the free development of their personality, this true motive of the Court must fail.

If the United States' courts take the opportunity to weigh in on the significant concerns that have been previously ruled upon by Colombia's highest court, the balancing task will not be an easy one. However, where the arguments posed by the parents are not founded in proof of an actual medical emergency and their claims of psychological trauma to their child do not hold water, United States Courts, like the *Ramos* Court, should allow the children to make their own choice as to their future identity as they have done with a mature child's right to choose abortion.

VII. CONCLUSION

Our lives are proof that sex and gender are much more complex than a delivery room doctor's glance at genitals can determine, more variegated than pink or blue birth caps. We are oppressed for not fitting those narrow social norms. We are fighting back.[270]

The fundamental rights outlined above, the right to bodily integrity, personality, gender identity, and sexuality are not limited in scope to only protect intersexuals. Although the focus of this Article was aimed at protecting the fundamental rights of the intersexed, the very same protections listed throughout this paper could be used to protect transgendered rights as well. A transgendered person's right to bodily integrity, personality, gender identity, and sexuality could

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268 PREVES, *supra* note 118, at 32.

269 SEXING THE BODY, *supra* note 11, at 93-95 ("Dogma has it that without medical care, especially early surgical intervention, hermaphrodites are doomed to a life of misery. Yet there are few empirical investigations to back up this claim. In fact, the studies gathered to build a case for medical treatment often do just the opposite.").

270 LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE 5 (Beacon Press 1998).

protect their ability to marry, to transition from one gender to another, and, indeed, to lead a complete and protected life under the law.

As our society recognizes that the gender binary is simply a myth put into place to protect social mores,[271] we will be more willing to recognize that there are other ways to live out one's life than to consistently be defined as man or woman. On that day, transgendered and intersexuals alike will truly know what it means to be free. Until then, they will live within the binary prison enforced by the legal system, constantly being confined to the label "man" or "woman," without the ability to fulfill their need for true individuality.

[271] HRC Report, *supra* note 8, at 22 (recognizing that the "[r]ationales for 'normalizing' medical interventions are based upon social mores and norms and are not evidence-based.").