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# ETHICS IN MEDICINE: WITH A SPECIAL FOCUS ON THE CONCEPTS OF SEX AND GENDER IN INTERSEX MANAGEMENT

NATASCHA GRUBER, PH.D.\*

## I. INTRODUCTION

“Open Sex—Undoing Gender” (“Open Sex”) is a research project for the Beatrice Bain Research Group on Gender (BBRG) at the University of California, Berkeley. This article discusses some of the main topics and questions that the author addresses in her work on a multiple sex/gender model. The thesis focuses on the issue of whether a manifold of sexes and genders will provide an alternative model to the rigid binary system in existence today. Secondly, as related to intersexuality, the research explores whether a multiple sex/gender model can contribute to the humanization of the incisive medical, surgical, and therapeutic practices currently applied in intersex treatment. The research originally began with a basis on theories of gender and homosexuality but the focus deepened and changed as it expanded to intersexuality. The author, although not purposely opposed to a “multiple” model, has gradually determined that the model raises problems on other levels.

## II. ON THE CONCEPTS OF SEX AND GENDER

The “Open Sex” research deals with the interrelation between the concepts of sex, gender, sexuality, and their impact on the existing concepts of intersexuality and intersex management. In 1993, biologist Anne Fausto-Sterling proposed to replace the binary classification currently employed with a five sex system of female, male, herm, merm and ferm.<sup>1</sup> Fausto-Sterling subsequently accepted Suzanne Kessler’s suggestion to redirect the focus from genital morphologies and discrete categories to a wider range of gender performances. In *Sexing the Body*, Fausto-Sterling raised the idea of an open sex/gender system which would present a more radical reconsideration of the current binary system. “It is possible to

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\* University of Vienna, Austria. My contribution to this special issue has evolved from a presentation I gave at the Intersex Education, Advocacy and the Law Symposium at the Benjamin N. Cardozo School of Law in New York in February 2005. The title of the presentation is the same as that of my research project at the University of California, Berkeley. This article is an outline of the forthcoming research but it is not a presentation of the results.

<sup>1</sup> Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, Sci., Mar. 1993, at 20-24, available at 1993 WLNR 3328785.

envision a new ethic of medical treatment, one that permits ambiguity to thrive, rooted in a culture that has moved beyond gender hierarchies.”<sup>2</sup> In her work, Judith Butler offered the theoretical grounds for the idea that biological concepts of sex are determined by social constructs of gender, that is, the concepts of bodies are embedded within discourse and certain normative contexts.<sup>3</sup>

Intersex advocates work toward a society that accepts bodies as they are. Intersex activists call for an end to normalization surgery and to provide the opportunity to infants born with intersexed conditions to choose their gender freely as they grow up. Such self-determination would render superfluous incisive and drastic surgical procedures that are often accompanied by personal and psychological trauma of the patients. Against this backdrop the author’s research examines some of the medical treatment and procedures intersexed babies have had to undergo from infancy to childhood in order to conform their bodies to a certain sex. Although it is important to provide the best possible legal and medical assistance for a self-chosen sex/gender adjustment *for adults*, it is equally if not more critical to end normalization surgeries performed on intersexed babies, infants and juveniles, as they are the ones who cannot adequately consent to such medical procedures. The practices of normalization surgery are already widely and openly criticized. In May 2004, the Human Rights Commission of San Francisco was the first to hold a public hearing on this issue, and officially recognized practices of normalization surgery on infants as a human rights violation.<sup>4</sup>

### A. *Gender as a Cultural Imperative*

Sex and gender are currently the primary analytic categories of feminist theory and political practice. The normative ideal is that a stable sex is expressed through a stable gender. Gender, under this view, is the foundational category that regulates sex and sexual differences in a binary code of opposition. Therefore, the concepts of sex and sexual differences result from the gender ideology of a society, which in turn influences the perception of bodies as “sexed” and thereby determines the body parts, standards, and measures that account for sex assignment.

Butler argued that there is no subject “before” discourse or outside the “law.”<sup>5</sup> In addition to finding support from philosophical, psychoanalytical and political materials, Butler relied heavily on Michel Foucault’s theory that the

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<sup>2</sup> ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 101 (2000).

<sup>3</sup> See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) [hereinafter *GENDER TROUBLE*].

<sup>4</sup> See MARCUS DE MARÍA ARANA, SAN FRANCISCO HUMAN RIGHTS COMMISSION, *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 & COUNTY OF SAN FRANCISCO* (2005), available at [http://www.sfgov.org/site/uploadedfiles/sfhumanrights/Committee\\_Meetings/Lesbian\\_Gay\\_Bisexual\\_Transgender/SFHRC%20Intersex%20Report\(1\).pdf](http://www.sfgov.org/site/uploadedfiles/sfhumanrights/Committee_Meetings/Lesbian_Gay_Bisexual_Transgender/SFHRC%20Intersex%20Report(1).pdf).

<sup>5</sup> See *GENDER TROUBLE*, *supra* note 3.

subject is brought into being through juridical and discursive power.<sup>6</sup> The constructive character of gender is based on the idea of sex as its natural ground or origin. Such a concept of sex allowed the term “gender” to obscure at the same time that it produced sex as its own “natural” condition. Gender is not merely a descriptive feature of a subject, but a normative ideal of the “heterosexual matrix” that Butler defined as a cultural grid through which bodies, genders, and desires are regulated.<sup>7</sup> As to gender identity, Butler argued that the category is constituted by a various range of performative acts<sup>8</sup> and “defined through the compulsory practice of heterosexuality.”<sup>9</sup>

One of Butler’s strongest arguments is that the creation of a realm of the intelligible obscures its dependency on the abjected, on the “outside,” as one of its necessary conditions.<sup>10</sup> Butler raised questions about the regulatory norms through which sex is materialized, and how such materialization of the norm produces a domain of abjected bodies that simultaneously fortify and fail to qualify for those very norms.<sup>11</sup> Within the context of the existing society and its culture, gender receives meaning and intelligibility through the heterosexual matrix. The concept of gender intelligibility assumes a stable sex, expressed through a stable gender and gender identity. Under this framework, bodies, genders, sexualities, and desires are not only regulated and normalized, but also naturalized; a realm is created of not only the accepted and normal, but also the abjected and abnormal. Therefore, the very notion of personhood is put into question for those incoherent, not intelligible, or discontinuous gendered subjects who appear to be persons, but who fail to fit into the gender norms of cultural intelligibility.<sup>12</sup>

In this sense, “sex” is the naturalized effect that gender produces as its own precondition. On one hand, it is difficult to step beyond the ideological and cultural context in which sex and gender are understood. On the other hand, the idea that sex and gender are inevitable categories obscures the historical and contingent creation of these terms *as* inevitable and “quasi-universal.”

### B. *The History of Gender Identity*

In *Making Sex*, Thomas Laqueur traced the history of the ancient and early modern view of the body based on a one-sex model to the two-sex model employed today.<sup>13</sup> In *Changing Sex*, Bernice Hausman traced the historical development of the phenomenon of transsexualism and intersexuality, as well as the roots of the

<sup>6</sup> *See id.*

<sup>7</sup> *See* JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* 151 n.5 (1993).

<sup>8</sup> *See id.*

<sup>9</sup> *Id.* at 151.

<sup>10</sup> *See id.* Butler applied this argument to the concept of gender, as well as other cultural and political categories, such as race, color, ethnicity, sexual orientation, and the practice of religion.

<sup>11</sup> *Id.* at 10, 16.

<sup>12</sup> *See* GENDER TROUBLE, *supra* note 3, at 2.

<sup>13</sup> THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

introduction of the concepts for gender and gender identity.<sup>14</sup> Hausman primarily referred to medical discourses to demonstrate that the emergence of intersexuality and transsexuality hinged on technological progress in medicine *and* cultural, social, and individual demands.<sup>15</sup> Hausman's analysis showed in striking detail that the concepts of gender and gender identity, as it is used today, arose from a cultural construction of sex in the twentieth century—within the medical context and psychosexual discourse about intersexuality and transsexuality—and the concepts were strongly linked with certain views regarding social roles and behavior prevalent at that time.<sup>16</sup> A large part of the “Open Sex” research involves the historic dimension of the perception of bodies as “sexed” and the genealogy of the notions of sex, sexuality, gender, gender identity, and the interrelations between them. The focus is on the development of gender as a “cultural construction of sex” at a certain time in the twentieth century.

The notion of gender, gender roles, gender identity, and the differentiation between sex and gender was introduced in the 1950s by the work of intersex researchers John Money and Joan and John Hampson (“Money et al.”).<sup>17</sup> At that time, the idea of gender was linked to the idea of identity as an internally felt sense. Further, gender was part of emerging discourse resulting from technological progress in medicine; namely plastic surgery and endocrinology. These new developments led to significant changes concerning the relation between the body and its sex.

Before the 1950s, physicians undertook great effort to find adequate language to describe the bodies of intersex patients to implement new treatment methods available through advancements in diagnostics, endocrinology and plastic surgery. To a certain extent, they accepted the idea of “plural” sexes, or rather, intersexuality as a variation of physiological and anatomical sex. However, most physicians who dealt with intersexuality cases at that time believed in a binary gender system as a necessary social code. New technology combined with a certain dualistic and heterosexist ideology led to the recognition of variability and multiplicity of sexual signifiers in the human body as well as the adaptation of intersex bodies into one singular sex. Thus, developments in technology allowed physicians to enforce a binary gender system by creating males and females out of intersex-conditioned bodies.

In this context, the concept of gender helped physicians in treating patients with intersex conditions, whose physical and anatomical morphology transgressed

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<sup>14</sup> BERNICE L. HAUSMAN, CHANGING SEX: TRANSSEXUALISM, TECHNOLOGY AND THE IDEA OF GENDER (1995).

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See, e.g., John Money, Joan G. Hampson & John L. Hampson, *Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex, and Psychologic Management*, 97 BULL. JOHNS HOPKINS HOSP. 284 (1955) [hereinafter *Hermaphroditism*]; John Money, Joan G. Hampson & John L. Hampson, *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 BULL. JOHNS HOPKINS HOSP. 301 (1955) [hereinafter *An Examination*].

the binary opposition of female and male. Because the bodies of subjects with intersex conditions did not signify their sex unambiguously, specific behavior patterns such as clothing, toy preferences, or sexual orientation helped to identify a subject's sex within a *heterosexual paradigm*. As the physical body turned out to be an unreliable signifier of a person's sex, the "internally felt sense" or "gender identity" became crucial. Hence, there occurred the development or transformation from the not always clear and sometimes ambiguous notion of sex to the notion of a presumably stable gender identity that researchers thought could be clearly assigned to any patient.

In the "Pre-Money" era, sex assignment was based on the gonadal and reproductive genital structure of the subject, i.e., ovaries and uterus for females, testicles and penis for males. During, and subsequent to, the work of Money et al. and the concept of gender identity, the reproductive paradigm became less important, which gave way to an ideology that focused more on the patients' heterosexuality—the ability to perform the "appropriate" gender behavior—than on the acceptance of homosexuality as a potential sexual orientation while maintaining the patients' reproductive structure and fertility. Money et al. drew their ideas significantly from the notion that " 'there can be no *true* sex, if no single, kind of sex' (chromosomal, gonadal, hormonal, among others) can be invoked infallibly as the final indicator of sex identity, as gonadal sex had been in the previous century."<sup>18</sup> Their work demonstrated the gradual shift away from the idea of a "true sex" toward the idea of the "best sex"—the sex that is most appropriate given the individual's genital morphology and psychosocial conditions or dispositions. This ultimately led to the conclusion and practice of adapting the body to an assigned gender so that the body's anatomical variations may be subsumed under the perceived optimal sex and forecasted gender identity.

Throughout the work of Money et al., one can trace the development of the concept of psychosocial sex identity into a concept of gender role as a social behavior, which in turn, evolved into gender identity as an internal and personal sense of one's gender. The work also led to the idea of "sex of assignment and rearing" as a path to stable gender identity in adulthood. This idea had wide-ranging consequences. According to their theory, an infant's future gender became fixed somewhere between the age of eighteen months and two years. Therefore, Money et al. opted for surgical correction of children with intersex conditions, which would adapt their bodies to the assigned sex and predicted gender as soon as possible.<sup>19</sup> Until the 1940s, however, physicians found it hard to believe that a subject could be happy as a female without having a uterus and ovaries, or that a male could not be happy without having a penis and testicles.

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<sup>18</sup> HAUSMAN, *supra* note 14, at 78-79.

<sup>19</sup> It is this approach, also known as the "Concealment-Centered Model" or "Concealment-Paradigm," that is criticized severely by intersex advocates and organizations like the Intersex Society of North America. See generally Intersex Society of North America, at <http://www.isna.org> [hereinafter ISNA].

In the 1950s, Money et al. reported that their patients were doing quite well as members of their assigned “sex” based on the appropriate performance of their gender role. “A gender role is not established at birth, but is built up cumulatively through experiences encountered and transacted . . . . In brief, a gender role is established in much the same way as is a native language.”<sup>20</sup> They argued that neither hormonal, chromosomal, gonadal, internal reproductive structures nor external genital morphology were as important in determining an individual’s gender role and orientation in adulthood as the “assigned sex and sex of rearing.”<sup>21</sup> With this concept, Money and his colleagues summed up a prevalent trend in medical intersex management. However, Money did not want to continue to use the term “sex role,” a term which was already in circulation, because he did not want to suggest that the kind of role and identity acquisition *he* had in mind had anything to do with the biological sex of his patients.

In another article, Money et al. argued that sex assignment and rearing was the best indicator of gender role and orientation.<sup>22</sup> They claimed that “from the sum total of hermaphroditic evidence, the conclusion that emerges is that sexual behavior and orientation as male or female does not have an innate, instinctive basis.”<sup>23</sup> However, this did not mean that a gender role is easily modifiable simply because it is not innate and established during postnatal development. In fact, Money et al. strongly opposed the idea, stating that “[t]he evidence from examples of change or reassignment of sex in hermaphroditism . . . indicates that gender role becomes not only established, but also indelibly imprinted.”<sup>24</sup>

Money et al.’s gender identity paradigm was adopted and further developed in the 1960s and 1970s by many physicians and intersex researchers like Robert Stoller and sociologist Harold Garfunkel before the term was adopted by feminist theory. Today, the paradigm provides the theoretical basis for intersex treatment protocols *and* serves as the leading notion within feminist, gender, queer and transgender discourses. Furthermore, the protocols codified the preference for heterosexuality into medical practice, even at the expense of fertility. Attempting to invent consistent, reliable criteria for treatment protocols, Money et al. established a new conceptual division between “sex” and “gender.” Their idea was that subjects, whose bodies were unable to represent a sex “authentically,” could simulate one through an adequate performance of gender. “In other words, if you aren’t born into a sex, you can always become one through being a gender.”<sup>25</sup>

Hausman remarked that the new constructivism of “gender” came along with a new essentialism.<sup>26</sup> “While Money and the Hampsons can be seen as having

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<sup>20</sup> *Hermaphroditism*, *supra* note 17, at 285.

<sup>21</sup> *Id.*

<sup>22</sup> *An Examination*, *supra* note 17, at 308.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 309-10.

<sup>25</sup> HAUSMAN, *supra* note 14, at 100.

<sup>26</sup> In contrast to Money et al.’s essentialism, Hausman suggested that to theorize the body, it is necessary to have an approach where the materiality of the body is in fact seen as problematic. In

asserted a constructionist, rather than an essentialist position concerning the relationship between physiological sex and the development of 'psychological sex' or gender role, they established a new essentialism that fixed gender role and orientation within an exclusively heterosexual framework."<sup>27</sup> Hausman concluded that today "[g]ender, like the phallus, is a master signifier that everyone lacks . . . [but] everyone hopes to achieve."<sup>28</sup> Furthermore, "as it is currently deployed, gender is a concept meaningful only within heterosexuality and in advocacy of heterosexuality—after all, its signification is the heterosexual subject."<sup>29</sup>

Suzanne Kessler stated in her study on case management of intersexed infants that "[t]he process and guidelines by which decisions about gender (re)constructions are made, reveal the model for the social construction of gender generally."<sup>30</sup> The cases she investigated showed both the (hetero-)sexist biases involved in the process and the means by which medicine upheld the two-gender system through masking or eliminating bodies of newborns and infants that transgressed that system. According to Kessler, the most important factors which determine current intersex management practices are advancements in surgery and the employment of the theory of "gender identity."<sup>31</sup>

### C. *Various Questions on a Multiple Sex/Gender Model*

Provided the background of the concepts of sex and gender, and their history and theoretical interrelations, the author's research proposes the following questions: What about "opening sex" or "undoing gender"? What about the vision of a multiple sex/gender model? Is this possible, thinkable, and even desirable? To answer the questions, the "Open Sex" research explores two different but interrelated fields of discourse.

First, the research field of intersexuality shows that "nature" offers a variety of bodies which are subsumed into two sexes—female and male—by certain medical practices. Such treatment practices of intersexed bodies follow the present socio-cultural view that there are basically two genders as well. Corresponding to this gender system is the consideration that there are two and only two types of intelligible bodies into which every human body must adjust. Some alternative views to this two-sex/gender schema are: (1) a third sex category—the intersex; (2) as Fausto-Sterling suggested but later revisited—five-sex categories of male,

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medicine, for example, practitioners have to deal with the *materiality* of bodies. Further, the perception of a body, as always already "sexed," is in fact a normalizing regulation of matter, of material, "because it is in these contexts that we can see in striking detail how the practitioners who must deal with the body's material constraints . . . perceive, justify, and theorize their practices. These are precisely those theoretical constraints that produce the body as a normativized construction whose very materiality depends on discourse." *Id.* at 182.

<sup>27</sup> *Id.* at 97.

<sup>28</sup> *Id.* at 193.

<sup>29</sup> *Id.* at 194.

<sup>30</sup> Suzanne L. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 *SIGNS* 4 (1990).

<sup>31</sup> *See id.*



female, herm, merm, and ferm;<sup>32</sup> (3) a multiplicity of gender and sexes based on a fluid continuum of bodies and identities; and (4) no categories of sex and/or gender altogether.

As to intersex management, the author agrees with the “patient-centered model” recommended by the Intersex Society of North America (ISNA).<sup>33</sup> The model advocates a female or male sex assignment to newborns but also recognizes that gender assignment to any infant, including those with intersex conditions, as preliminary, thereby allowing the child to decide to change the assigned gender later in life. Any surgical intervention or correction may be done with the patients’ consent and explicit demand. The model does not support the introduction of a third sex or a multiple number of discrete gender categories because such a model does not guarantee equality and might even contribute to further discrimination and/or traumatization of a child.

Second, the field of Lesbian, Gay, Bisexual, Transsexual (LGBT) studies claims that there are many genders independent of one’s personal sex. On first glance, it seems that the argument begins with the idea of two sexes and then transcends biological constraints through various performances of gender. The field’s most radical assertion is that there are as many genders as there are persons. How can such a multiplicity of gender be understood? As a *category*, gender has an epistemological function. The function of a category is precisely to allow subsumption, to reduce complexity, and to organize the “manifold.” Therefore, gender as a *category* would lose its meaning with an arbitrary multiplication of it. In LGBT debates, the idea of multiple elements with a binary basis seemingly forms the grounds for discussions about multiple genders. Persons who identify themselves as “transgender” or “gender benders” cross gender from one to the other; this, however, does not necessarily agree with surgical or hormonal adjustments in practice. Rather, it should be the *performance*—the presentation and representation of gender—that is multiple and even unlimited.

### III. TOWARD A NEW CULTURE OF SEXUALITY AND DESIRE?

What role do sexual experiences, particularly the “event” of penetration and orgasm, play in the constitution of one’s gender identity, and the way one experiences his/her body? In the documentary *Gendernauts*, theorist Sandy Stone stated: “As personnauts we swim in the ocean of identity, as gendernauts we swim in the ocean of desire.”<sup>34</sup> The link between gender and desire is significant. Within the context of sexual orientation, people may be attracted to members of the same sex, opposite sex, or both sexes. This suggests that a two-sex model of sexuality and desire is also constructed through culture.

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<sup>32</sup> See Fausto-Sterling, *supra* note 1.

<sup>33</sup> See ISNA, at <http://www.isna.org>.

<sup>34</sup> GENDERNAUTS: A JOURNEY THROUGH SHIFTING IDENTITIES (Hyena Films 1999). For more information, visit [http://www.hyenafilms.com/gend\\_en.html](http://www.hyenafilms.com/gend_en.html).

Here, the author's perhaps counterintuitive hypothesis is that the prevalent cultural concept of sexuality and desire is *under-focused* in many debates. It is not to say that there is no mention of the topic of sexuality, but rather that most debates already imply a certain understanding of what sexuality is or has to be—specifically as related to a “functional” sexuality, including the sexual practices and/or plays that are expected to accompany such concepts of sexuality and desire.

The ideals of heterosexuality and reproduction currently form the leading paradigms in intersex treatment. According to developments in biomedical and reproductive technologies, it is likely that in the near future, no more than a single egg and one sperm would be needed to reproduce humans in a test-tube. Hence, the reproduction paradigm and the goal of attaining a “normal” reproductive male or female does not justify surgical interventions to adjust an intersexed body. However, providing functional sexuality—often thought to be a heterosexual one—remains the goal of most physicians. Cheryl Chase, the founder of ISNA, claimed that providing and maintaining functional physiological structures to fulfill sexual encounters is not *just* important, but it is a “human right.”<sup>35</sup>

Yet sexuality, often based on the image of penile-vaginal penetration, not only enforces certain empirical standards for vaginas and penises, but also reinforces normative guidelines in genital surgery, the outcome of which in many cases is (re)constructed organs that in fact “function” but fail to bring about orgasm during intercourse. Other forms of penetration or sexual play, e.g. oral and anal intercourse, synthetic phalluses, are rarely considered as equally pleasurable and valuable in this context. To recognize a broader range of sexual possibilities in general and for patients would subvert and replace heterosexist ideologies in current intersex management in the long run. When considering new approaches in intersex treatment, this topic raises many important questions that should be taken into account.

#### IV. CONCLUSION

This article presented only a few of the questions and topics that will be included in the “Open Sex” research project. For example, issues about parental coaching and counseling, sex education, and gender socialization in early childhood are no less important. Research on intersexuality and intersex management requires not only theoretical analysis and reflection, but also an interdisciplinary approach. The author looks forward to open discussions with researchers from various fields, like humanities, education, medicine, and law, as all are crucial and essential to further understanding of the complexity of intersexuality.

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<sup>35</sup> See generally ISNA, at <http://www.isna.org>.

