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HANGING IN THE BALANCE: THE INTERSEX CHILD, THE PARENT, AND THE STATE

Alexandra Akre

Florida State University College of Law, allieakre@gmail.com

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Cover Page Footnote

J.D. Candidate 2016, Florida State University College of Law. My thanks to Professor Courtney Cahill for her support and feedback

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Alexandra Akre*

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I. INTRODUCTION: THE BINARY & THE INTERSEX

A joyful mother announces, “It’s a boy!” at her baby’s “gender reveal” party as blue balloons fill the room. And suddenly, the “it” becomes human. Our gender makes us worthy of a pronoun. Without gender do we really exist? In a society where gender is the most relevant category, it can be hard to imagine where a genderless individual would fit in society. As Judith Butler explains, individuals

who do not fit into the binary frame of gender identity, male or female, are disconcerting to society because they have the perceived effect of destabilizing the “coherence and continuity among sex, gender, sexual practice, and desire.”¹ It is no wonder then, that those children born intersex or with ambiguous genitalia are treated as requiring immediate medical intervention—as something that needs to be “corrected.”² A child born without a gender is analogous to an individual without a State—the very documents conferring citizenship require an affirmative “male” or “female” designation.³

This Article considers the interests at stake in the decision to subject a child to “corrective” intersex surgery by weighing the benefits of allowing the surgery against the potential violation of a child’s fundamental rights. Given the nature of the interests involved, only constitutional safeguards provide sufficient protection for intersex children. Part I provides a working definition of intersex and briefly outlines past and current medical discourse. Because this Article deals with constitutional rights, the Fourteenth Amendment in particular, Part II explicates State action in the intersex context, suggesting that the State should be involved as a third-party arbiter. Part III explores the constitutional rights of intersex children and their parents by weighing each right against relevant State interests. Part IV concludes with the recommendation that, before any medical action is taken, a neutral party should consider all of these competing interests in order to ensure every decision is grounded in fundamental constitutional norms.

II. PART I: DEFINING INTERSEX

According to the Intersex Society of North America (ISNA), “‘Intersex’ is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that does not

* J.D. Candidate 2016, Florida State University College of Law. My thanks to Professor Courtney Cahill for her support and feedback.

¹ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 23 (1990).

² Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants*, 21 *BERKELEY J. GENDER L. & JUST.* 59, 83 (2006) (“Only in a society in which sex is understood in binary terms (everyone is either male or female) does the hermaphroditic body become abnormal. Rather than conceptualizing such individuals as . . . occupying various points along a sex continuum, our society chooses to see them as suffering abnormalities that require repair.”).

³ Jo Bird, *Outside the Law: Intersex, Medicine and the Discourse of Rights*, 12 *CARDOZO J.L. & GENDER* 65, 68 (2005).

seem to fit the typical definitions of female or male.”⁴ A number of conditions are classified as “intersex.” For example, an intersex infant may have “normal” male genitalia and female hormones,⁵ or the intersex infant may be born with ambiguous genitalia and XY chromosomes.⁶ Globally, while some scholars suggest that between 1.7% and 4% of individuals experience some degree of intersexuality,⁷ other scholars estimate that merely 0.08% of infants are potentially subjected to genital “normalization” surgery each year.⁸

What to do about intersexuality, or whether anything should be done at all, remains controversial in the medical and legal communities. Historically, intersexuality was considered to be a medical emergency, and “treatment” for the condition was founded on a nurture-based theory of gender identity.⁹ Under this theory, “a child who has normative-looking genitals from a very early age, and is raised ‘unambiguously’ in the gender that matches those genitals, will develop the desired gender identity regardless of chromosome pattern, body structure at birth, or hormone exposure in the womb.”¹⁰ As such, sex was primarily assigned based on the infant’s external genitalia and the best possible surgical outcome for “normal” genitalia.¹¹

In 2006, the American Academy of Pediatrics (AAP) endorsed revised guidelines that outlined the best practices for intersex clinical management and suggested a number of factors that should influence gender assignment:

Optimal clinical management of individuals
with DSD [disorders of sexual development]

⁴ *What is Intersex?*, INTERSEX SOCIETY OF NORTH AMERICA, http://www.isna.org/faq/what_is_intersex (last visited Apr. 7, 2016).

⁵ Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41, 43 (2004).

⁶ Sara A. Aliabadi, *Gender Assignment Surgery for Intersexed Infants: How the Substantive Due Process Right to Privacy Both Supports and Opposes a Moratorium*, 12 VA. J. SOC. POL’Y & L. 170, 173 (2004).

⁷ Benjamin Sweeney, *The Cobblestones of Good Intentions: Substantive Due Process and Infant Genital Normalizing Surgery*, 13 SEATTLE J. SOC. JUST. 153, 162 (2014).

⁸ Laura D. Hermer, *A Moratorium on Intersex Surgeries?: Law, Science, Identity, and Bioethics at the Crossroads*, 13 CARDOZO J.L. & GENDER 255, 260 (2007).

⁹ Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 3 (2000).

¹⁰ Tamar-Mattis, *supra* note 2, at 64.

¹¹ *Id.* at 66-67 (“A ‘positive surgical outcome’ for a male-assigned baby is a penis that is capable of penetration at maturity, and that can be used to urinate from a standing position; a ‘positive surgical outcome’ for a female-assigned baby is a vagina that can be penetrated by a penis.” (citation omitted)).

should comprise the following: (1) gender assignment must be avoided before expert evaluation in newborns; (2) evaluation and long-term management must be performed at a center with an experienced multidisciplinary team; (3) all individuals should receive a gender assignment; (4) open communication with patients and families is essential, and participation in decision-making is encouraged; and (5) patient and family concerns should be respected and addressed in strict confidence.”¹²

Gender assignment should be expedited because “[i]nitial gender uncertainty is unsettling and stressful for families,” and factors to be considered “include diagnosis, genital appearance, surgical options, need for lifelong replacement therapy, potential for fertility, views of the family, and, sometimes, circumstances relating to cultural practices.”¹³ The guidelines make plain that “[e]mphasis is on functional outcome rather than a strictly cosmetic appearance.”¹⁴ However, the authors note that “[i]t is generally felt that surgery that is performed for cosmetic reasons in the first year of life relieves parental distress and improves attachment between the child and the parents.”¹⁵ While the AAP-endorsed guidelines recognize the complex interplay of sex, gender, and society, it is evident that remnants of historical practices permeate the current medical dialogue because non-medically necessary “corrective” intersex surgeries are still being performed.¹⁶ Moreover, it is important to remember that these are guidelines and not necessarily an indication of modern practice.¹⁷

Contrary to the AAP-endorsed guidelines, some intersex advocates have demanded that there be a moratorium on all non-

¹² Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS 488, 490 (2006).

¹³ *Id.* at 491.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See, e.g., *M.C. ex rel. Crawford v. Amrhein*, 598 F. App’x 143, 145 (4th Cir. 2015).

¹⁷ As the ISNA points out, “[A]s wonderful and historic as these changes are, no institution has fully implemented them. There are no mechanisms . . . in place to foster implementation nor to evaluate to what extent these changes improve health care experiences and outcomes for persons and families affected by DSDs.” *Dear ISNA Friends and Supporters*, INTERSEX SOC’Y OF N. AM., http://www.isna.org/farewell_message (last visited Apr. 7, 2016).

medically necessary surgery for intersex infants.¹⁸ Moratorium advocates point to factors such as the number of complications faced by individuals who received “corrective” intersex surgery.¹⁹ According to some studies, the average number of surgeries an intersex child undergoes is between three and five.²⁰ Individuals who were subjected to the procedure recount “repeated surgeries throughout childhood, limited or absent sexual response, painful and scarred genitals, a sense of shame stemming from repeated and unexplained medical examinations of their genitals, infertility, difficulty forming relationships, and depression.”²¹ Another study reveals that many intersex individuals would not have chosen the surgery for themselves and “express regret and anger that surgery was imposed on them as children.”²² Some scholars go as far as comparing non-medically necessary surgery performed on children born intersex to female genital mutilation and suggest that “corrective” intersex surgery, too, should be prohibited by statute.²³ Proponents of the

¹⁸ Interestingly, there is a consensus that all children should be assigned a gender—the controversy stems only from the role of surgical intervention. See April Herndon, *Why Doesn't ISNA Want to Eradicate Gender?*, INTERSEX SOC'Y OF N. AM. (Feb. 17, 2006, 1:28 PM), http://www.isna.org/faq/not_eradicating_gender.

¹⁹ See Aliabadi, *supra* note 6, at 177 (“Numerous reports describe intersexed individuals who were assigned as females, and later declared themselves male. In addition to rejecting their assigned gender in adulthood, surgically-assigned intersexed individuals also can experience loss of sexual sensation, loss of sexual function, loss of reproductive potential, and physical pain during sexual activity.”); Samantha S. Uslan, Note, *What Parents Don't Know: Informed Consent, Marriage, and Genital-Normalizing Surgery on Intersex Children*, 85 IND. L.J. 301, 303 (2010).

²⁰ Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices,”* 40 HARV. C.R.-C.L. L. REV. 71, 105 (2005); Kishka-Kamari Ford, “First, Do Not Harm” – *The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL'Y REV. 469, 476 (2001) (“Despite the fact that intersexuality is not a life-threatening disorder, medical professionals have continued to treat it as an emergency by focusing not on the physical dangers of ambiguous genitalia but on the psychosocial problem of intersexuality.”).

²¹ Tamar-Mattis, *supra* note 2, at 61.

²² Ford, *supra* note 20, at 485.

²³ Darra L. Clark Hofman, *Male, Female, and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law*, 21 TUL. J.L. & SEXUALITY 1, 9-10 (2012) (“Clitoridectomies, performed to make the child's genitals cosmetically pleasing, have the same effect on Western intersexed children that they do on African girls—loss of sexual function and sensation, loss of ability to achieve orgasm, and psychological trauma. The difference between the two is in the discourse, not the surgery. We have orientalized clitoridectomies performed on African girls as a sexist, barbaric practice, often called ‘female genital mutilation,’ while reassuring ourselves that sex-assignment surgery on Western intersexed

surgery often counter such assertions by pointing to the successes of gender assignment surgery, the importance of protecting a child's psychosocial health, and respecting parental decision-making.²⁴

In sum, although the discourse has evolved to include more nuanced positions on gender and sexuality, there is no consensus about how society should react to intersexuality. While this Article does not propose a definite course of action, it does provide a constitutional framework for balancing the interests of children, parents, and the State to serve as guideposts for making medical decisions.

III. PART II: FINDING STATE ACTION IN THE INTERSEX CONTEXT

Common law protections are generally insufficient to prevent "corrective" intersex surgery from being performed on children. A common law standard, in which the court considers whether parental action constitutes abuse or neglect, is problematic for several reasons.²⁵ First, the standard only considers whether a minimal level of acceptable conduct has been met.²⁶ In the intersex context, however, the conduct at issue is not so simple—instead, parents must make difficult decisions in areas where social consensus is lacking.²⁷ Second, the standard is too amorphous and lacks clear guiding principles regarding when judicial deference to parental decisions is appropriate.²⁸ For these reasons, a family court is unlikely to rule against the professional medical opinion recommending surgery, especially when given in conjunction with the parents' wishes.

Instead, invoking constitutional rights adequately protects the interests of the child. Instead of searching for a minimal level of acceptable conduct, courts applying constitutional principles will apply a more searching inquiry—ensuring that the State does not unduly infringe upon certain individual rights. For an individual to be afforded constitutional protections under the Due Process Clause of the Fourteenth Amendment, there must be State action. The Due Process Clause "offers no shield" against private conduct, "however wrongful or discriminatory."²⁹ There must be "a sufficiently close nexus

children is a scientific procedure, neutral and civilized because it makes intersexed children 'normal.'"); see also 18 U.S.C.A. § 116 (West 2013).

²⁴ Aliabadi, *supra* note 6, at 178 (describing arguments in favor of intersex surgery).

²⁵ Jennifer L. Rosato, *Using Bioethics Discourse to Determine When Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1, 2 (2000).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2-3.

²⁹ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974).

between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”³⁰

In a small number of scenarios, State action will be apparent. For example, when a State has legal custody of the intersex child or when a State hospital board approves gender assignment surgery, there is little question about whether the State has acted.³¹ However, the vast majority of cases will involve private action. Some scholars suggest that State action is implicated by the very nature of the family-State relationship.³² Under this theory, a parent, in the legal sense, is a creature of common law, statute, and constitutional protections.³³ Furthermore, because parental custody and control is subject to State regulation and judicial enforcement, the State is, in some sense, always acting.³⁴ As such, discussing State action in terms of intervention or nonintervention is an incoherent concept in the family law context.³⁵

While an enticing theory, the argument that State action is inherent in the parent-child relationship would conceivably invite constitutional law into every aspect of private life. There are many areas of the law in which the State ensures or enforces rights—such as private property and contracts—but extending constitutional protections to entirely private actions in these areas may raise concerns about government over-intrusiveness.

Furthermore, the argument that State action is implicated by the nature of the parent-child relationship is not supported by case law. In *Shelley v. Kraemer*, the U.S. Supreme Court promulgated a broader view of the State action doctrine, holding that judicial enforcement of a private agreement constituted State action and, thus, implicated the Equal Protection Clause of the Fourteenth Amendment.³⁶ The Court stated:

These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which

³⁰ *Id.* at 351.

³¹ See *M.C. ex rel. Crawford v. Amrhein*, 598 F. App’x 143, 146 (4th Cir. 2015) (involving a State actor authorizing gender assignment surgery on infant M.C.).

³² B. Jessie Hill, *Constituting Children’s Bodily Integrity*, 64 DUKE L.J. 1295, 1338 (2015).

³³ *Id.*

³⁴ Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835-37 (1985) (“[T]he state is deeply implicated in the formation and functioning of families . . .”).

³⁵ *Id.*

³⁶ 334 U.S. 1, 19 (1948).

the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights.³⁷

Similarly, in *Burton v. Wilmington Parking Authority*, the Court stated:

By its inaction . . . the State[] has not only made itself a party . . . but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence . . . as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so “purely private” as to fall without the scope of the Fourteenth Amendment.³⁸

These cases, enunciating the entanglement exception doctrine, seem to support a more expansive view of State action doctrine—however, such holdings have been strictly limited to racial discrimination. Indeed, the Supreme Court ruled out such an expansive view in *DeShaney v. Winnebago County Dep’t of Social Services*, holding that the State is not constitutionally liable for failing to intervene to protect a child from his abusive father.³⁹

In order to warrant Fourteenth Amendment protections for intersex children, State action must be more explicit. This can be accomplished in a number of ways, but the surest way to preemptively protect an intersex child’s fundamental rights is to require the State to serve as a neutral third-party arbiter, thus forcing the State into an affirmative relationship with the child. Unlike *DeShaney*, where the harm suffered by the child was only indirectly related to the State,⁴⁰ the action allowing (or disallowing) intersex surgery would be directly attributable to the State. Practically, each State would need to require medical facilities to submit any case involving a child born with ambiguous genitalia to the State review board, prior to any medical intervention. The State, acting through the neutral arbiter, would ultimately decide whether or not medical treatment is appropriate. For

³⁷ *Id.*

³⁸ 365 U.S. 715, 725 (1961).

³⁹ 489 U.S. 189, 202 (1989).

⁴⁰ *Id.* at 203.

reasons discussed below, such requirements are not unprecedented. In fact, most jurisdictions require parents to seek judicial authorization before sterilizing their child—regardless of whether or not the parents and doctors are in agreement.⁴¹ This is normatively beneficial because it ensures the best interests of the child are taken into consideration. Even more importantly, this requirement guarantees that the child will receive fundamental right protections both *ex ante* and *ex post*. First, before taking any action, the court or neutral arbiter will be cognizant of the constitutional implications when reaching a conclusion. Second, a child may potentially have a legal remedy if it can be proven that he or she was not afforded adequate due process.

IV. PART III: BALANCING INTERESTS

In order to assess the different interests at stake in the “corrective” intersex surgery context, a four-step fundamental rights analysis must be applied. First, it must be determined whether the right at issue is fundamental.⁴² A right is fundamental when it is deeply rooted in history and tradition and is implicit in the concept of ordered liberty.⁴³ History and tradition, however, are not the “outer boundaries” of the fundamental rights analysis.⁴⁴ Instead, “[w]hen new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”⁴⁵ How specific the right is defined is also critical to this analysis.⁴⁶ Second, it must be determined whether the State has infringed upon that fundamental right.⁴⁷ The State’s infringement must be substantial.⁴⁸ Third, it must be determined whether the State has a sufficient justification for the infringement.⁴⁹ Fourth, and relatedly, it must be determined whether the State’s means are sufficiently related to the purpose.⁵⁰ For fundamental rights, the Court typically applies a strict scrutiny analysis, which requires that the

⁴¹ Uslan, *supra* note 19, at 310.

⁴² *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

⁴³ *Id.* But see *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (recognizing that this Nation’s history and tradition “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

⁴⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

⁴⁵ *Id.*

⁴⁶ *Glucksberg*, 521 U.S. at 721 (“[W]e have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.”).

⁴⁷ *Id.*

⁴⁸ *Id.* at 766-67 (Sotomayor, J., concurring).

⁴⁹ *Id.* at 721.

⁵⁰ *Id.*

State's interest be compelling and the means be narrowly-tailored to that interest.⁵¹

While there is no question that children possess certain fundamental constitutional rights,⁵² there is ambiguity about what those rights are and what constitutes a constitutional infringement. Oftentimes, a child's rights are balanced against the constitutional rights of his or her parents and the interests of the State.⁵³ Part III applies the fundamental rights framework to the intersex surgery context. First, Part III looks at whether "corrective" intersex surgery implicates a child's fundamental rights. Second, it examines parental fundamental rights. Finally, it concludes by looking at the State's competing interests—respecting parental rights and protecting the child's—and considering possible means for the State to effectuate its goals.

A. The Child's Fundamental Rights

The Due Process Clause of the Fourteenth Amendment provides that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law."⁵⁴ The Due Process Clause contains "a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'"⁵⁵ The Supreme Court defines substantive fundamental liberty rights broadly: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe,

⁵¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵² *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("[Children] in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."); *see also* Skylar Curtis, *Reproductive Organs and Differences of Sex Development: The Constitutional Issues Created by the Surgical Treatment of Intersex Children*, 42 *MCGEORGE L. REV.* 841, 852 (2011) ("The Supreme Court has recognized that children have full constitutional rights that co-exist with parental rights. However, parents sometimes exercise these constitutionally-protected rights on their child's behalf, particularly those rights that relate to their ability to consent to or decline medical treatment.").

⁵³ *See Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) ("[W]hether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."). Despite implicating a fundamental right against bodily intrusions, the Court rarely applies strict scrutiny in this context. *See Caitlin E. Borgmann, The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 *U. ILL. L. REV.* 1059, 1069 (2014). Instead, the Court utilizes a simple balancing test and weighs all relevant interests. *Id.*

⁵⁴ U.S. CONST. amend. XIV, § 1.

⁵⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

and of the mystery of human life.”⁵⁶ The breadth of liberty protections afforded to adults is often limited for children. When a parent’s fundamental rights come into conflict with his or her child’s, the parent’s rights will prevail in most circumstances.⁵⁷ For example, the Court has held that a child has a substantial liberty interest in not being subjected to unnecessary medical treatment, but, in the same breath, it also recognized a parent’s constitutional right to make medical decisions for his or her child absent a finding of neglect or abuse.⁵⁸

Crucial to this inquiry is how the fundamental right is defined. If defined narrowly, the right has very little probability of receiving protection. For example, courts are unlikely to recognize the fundamental right to live with ambiguous genitalia or the right to live as an intersex person.⁵⁹ Instead, the right must be defined in a way that closely resembles traditional notions of fundamental rights. Moreover, there must be a substantial infringement. The harms must be significant enough to trigger Due Process concerns. This Section of the article examines two fundamental liberty rights recognized by the Supreme Court—the right to bodily integrity and the right to procreate—as applied to children and how “corrective” intersex surgery has the potential to substantially interfere with each.

i. Bodily Integrity

The right to bodily integrity is perhaps one of the oldest and most ingrained traditions of our law.⁶⁰ “Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed State incursions into the body repugnant to the interests protected by the Due Process

⁵⁶ *Id.* at 851.

⁵⁷ See Hill, *supra* note 32, at 1312-13 (“An exception to the model of broad parental discretion exists only in those cases in which there is a strong likelihood of the parent confronting a conflict of interests—for example, when a parent seeks to permit a child to donate an organ or tissue to a sibling.”).

⁵⁸ Parham v. J. R., 442 U.S. 584, 604 (1979).

⁵⁹ See Michael H. v. Gerald D., 491 U.S. 110, 126 (1989) (“What Michael asserts here is a right to have himself declared the natural father and thereby to obtain parental prerogatives. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them.” (emphasis omitted) (citation omitted)).

⁶⁰ Mary Koll, Note, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child’s Right to Bodily Integrity*, 2010 U. ILL. L. REV. 225, 236 (2010).

Clause.”⁶¹ Moreover, it is relatively uncontroversial that a child’s liberty interest encompasses the right to be free from arbitrary bodily invasion.⁶² Critical to this inquiry is that the bodily invasion is *arbitrary*, thus, medically necessary surgery would not be unconstitutional.⁶³ Courts have found violations of a child’s right to bodily integrity primarily in the school and juvenile-detention contexts, where there is excessive corporal punishment or sexual abuse by a State actor.⁶⁴ In the private sphere, courts have been reluctant to extend such rights. For example, in *Deshaney*, the Supreme Court held that the Due Process Clause does not protect children from parental abuse.⁶⁵ However, lower courts have upheld the right to bodily integrity when private actors attempt to subject mature minors to unwanted medical treatment.⁶⁶

As case law suggests, a minor’s right to bodily integrity is not absolute. In the abortion and contraception context, however, the Court has consistently recognized the right as one not subject to parental interference. For example, in *Planned Parenthood of Central Missouri v. Danforth*, the Court invalidated parental consent requirements for minors seeking abortions, holding 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, regardless of the reason for withholding the consent.”⁶⁷ Similarly, in *Carey v. Population Services International*, the Court, relying on *Danforth*, suggested that a minor’s right to contraceptives was equal in breadth to an adult’s right to contraceptives because the same privacy concerns were

⁶¹ *Cruzan ex rel. Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring).

⁶² See *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (“While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.” (footnote omitted)).

⁶³ Hill, *supra* note 32, at 1316-17.

⁶⁴ *Id.* at 1303.

⁶⁵ 489 U.S. 189, 195 (1989).

⁶⁶ Hill, *supra* note 32, at 1304 (“[I]n *In re L.*, a trial court asserted that a sixteen-year-old minor had a right to ‘free[dom] from unwanted infringements of bodily integrity’ that weighed against her putative father’s request that she undergo a blood test. Because the father had sought a court order requiring the test to establish his legal paternity, the court took into account the minor’s right to bodily integrity against the state. Relatedly, in the case of *In re E.G.*, a state supreme court alluded to the possibility that minors have bodily integrity rights with respect to end-of-life care.” (citations omitted)).

⁶⁷ 428 U.S. 52, 74 (1976); see also *Bellotti v. Baird*, 428 U.S. 132, 151 (1976) (reaffirming the unconstitutionality of absolute parental veto power over abortions).

implicated.⁶⁸ Underpinning both of these decisions was the idea that the State cannot impose its “scheme of values”⁶⁹ by “prescrib[ing] pregnancy and the birth of an unwanted child . . . as punishment for fornication.”⁷⁰

Expanding the minor abortion/contraception right doctrine to include other grave interferences with bodily integrity is not difficult, especially given the language the Court has used when describing the liberty right implicated in the abortion cases. In *Casey*, the Court clarified that “*Roe [v. Wade]*, however, may be seen not only as an exemplar of *Griswold [v. Connecticut]* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”⁷¹ This suggests that the liberty right should be interpreted broadly to include any medical treatment that infringes on a minor’s right to bodily integrity.

However, despite dicta to the contrary, it is unlikely the Court will expand the minor abortion/contraception doctrine to include other violations of bodily integrity. This is because, in the abortion context, the Court relies heavily on the concept of maturity. One scholar defines maturity as “[the] foundational concept in all law related to children [a]cross numerous areas of the law—including family law, criminal law, labor law, health law, and other areas—when children are involved, maturity determinations are pivotal to outcomes.”⁷² In *Danforth*, the Court emphasized that “our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.”⁷³ Similarly, the judicial bypass of parental veto power upheld in *Bellotti v. Baird* turned on whether a minor possessed a sufficient level of maturity to make an informed decision to terminate pregnancy.⁷⁴ In contrast, although relying heavily on abortion cases, the majority in *Carey* did not rely on maturity and instead looked at the interests at stake

⁶⁸ 431 U.S. 678, 693 (1977) (“Of particular significance to the decision of this case, the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”).

⁶⁹ *Id.* at 695.

⁷⁰ *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972)).

⁷¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992).

⁷² Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1109-10 (2012) (citations omitted).

⁷³ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976).

⁷⁴ 428 U.S. 132, 147 (1976) (“In this case, we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent.”).

regardless of age.⁷⁵ The *Carey* approach makes more sense, normatively, because it does not make a child's constitutional rights contingent upon an abstract concept of maturity. Otherwise, the concept of constitutional rights devolves into a common law concept of informed consent. Confusing the latent nature of a child's constitutional rights with the notion that they are not absolute is problematic.⁷⁶ It is critical to realize that the significant consequences of a violation of an individual's bodily integrity are the same regardless of age or maturity.⁷⁷

As such, it would seem "corrective" intersex surgery would fit squarely within a broad definition of the right to bodily integrity. Clearly, any decision a parent or medical professional makes about a child's gender identity would severely impair a child's right to "define one's own concept of existence."⁷⁸ Moreover, the sheer invasiveness of the procedure—oftentimes not medically necessary—is enough to trigger constitutional considerations.⁷⁹ As discussed, "corrective" intersex surgery involves multiple invasive surgeries, potentially resulting in painful scarring and sexual dysfunction.⁸⁰ The procedure has even been compared to the trauma of childhood sexual abuse.⁸¹

Although an infant is incapable of making such complex medical decisions, allowing a third party (e.g., a parent) to make a decision that implicates the right to bodily integrity in such a significant way seems contrary to the text of the Due Process Clause

⁷⁵ *Carey*, 431 U.S. at 693.

⁷⁶ See Curtis, *supra* note 51, at 859 ("Children have some rights that cannot be exercised until an older age. For instance, all Americans are constitutionally guaranteed the right to vote as a method of participating in American democracy, but may not do so until the age of 18 This latent right to vote exists, even though it cannot be readily exercised. As another example, a child is not legally competent to marry, but the child's right to choose a spouse upon attaining the age of consent cannot be infringed by parents 'irrevocably [betrothing the child] to someone.' Likewise, parents cannot force a child to marry, even if state law permits the teen to marry with parental consent. Similarly, a young child has the right to procreate, even though he or she may not yet be physically capable of doing so." (citations omitted)).

⁷⁷ See Hill, *supra* note 32, at 1314 ("One might argue that pregnant minors are in a unique situation in that they are facing a decision with profound long-term effects on the minor's future—a decision that cannot, moreover, be delayed until the minor reaches maturity. However, many minors—such as those suffering from terminal cancer, drug addiction, or sexually transmitted diseases—are virtually indistinguishable from pregnant minors in terms of the gravity of their situations and the need for immediate treatment.").

⁷⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

⁷⁹ Ford, *supra* note 20, at 476.

⁸⁰ See *infra* Part I.

⁸¹ Tamar-Mattis, *supra* note 2, at 70.

and surrounding precedent. Defaulting to parental choice because a minor is not mature enough to make this deeply personal and intimate decision does not adequately protect the child's constitutional right to bodily integrity.⁸²

ii. Procreation

Closely related to the right to bodily integrity, the right to procreation is also protected by the Fourteenth Amendment's Due Process Clause. In *Skinner v. Oklahoma*, the Supreme Court suggested the existence of a right to procreate, stating that "[the State] deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring."⁸³ The Court further expressed:

The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.⁸⁴

This "basic liberty" is afforded to all individuals, presumably children and adults alike.⁸⁵

In fact, most jurisdictions require judicial authorization before a parent can opt to sterilize his or her child.⁸⁶ For example, after investigating the sterilization of a severely developmentally-disabled six-year-old girl, the Washington Protection and Advocacy System concluded that a court order was required under Washington state law before a sterilization procedure of a minor could commence, and,

⁸² *Id.* at 91 ("Any non-consensual surgery implicates the rights to liberty and bodily integrity. This in itself does not disqualify the parents from serving as decision-makers. However, the particular invasion of this medical intervention is extreme, potentially including major reshaping of genitals, removal of orgasmic tissue, clitorodectomy, and removal of gonads and other internal organs." (citations omitted)).

⁸³ 316 U.S. 535, 536 (1942); *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (affirming the right to procreate).

⁸⁴ *Skinner*, 316 U.S. at 541.

⁸⁵ *See* *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If 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.").

⁸⁶ Uslan, *supra* note 19, at 310.

moreover, that “[c]ourts [also have] limited parental authority to consent to other types of medical interventions that are highly invasive and/or irreversible, particularly when the interest of the parent may not be identical to the interest of the child.”⁸⁷ Thus, the idea that children are afforded the right to procreate is relatively uncontroversial.

Despite the relatively straightforward precedent, it is unclear whether the courts would expand the right to procreate to include the right not to be subjected to “corrective” intersex surgery. As one scholar points out, to extend this line of cases to intersex surgery one would have to prove that the surgery interfered with the right to procreate, not just the quality of his or her sexuality.⁸⁸ Although there is significant evidence that the “corrective” surgery interferes with the quality of an individual’s sex life,⁸⁹ it might be the case that not every “corrective” surgery interferes with the fundamental right to procreate. Moreover, given the revised AAP-endorsed guidelines emphasizing the importance of reproductive function, perhaps, as time goes on, fewer procreative rights will be implicated. However, by removing an individual’s reproductive organs, there is a very real possibility that the child will be rendered sterile.⁹⁰ Because the right to procreate is so fiercely protected by the Court, it would be contrary to expectations to ignore the substantial risk “corrective” intersex surgery poses.

iii. Application of a Child’s Fundamental Rights in the Intersex Context

A recent case out of the Fourth Circuit illuminates both the right to bodily integrity and the right to procreate in the context of “corrective” intersex surgery.⁹¹ In April 2006, sixteen-month-old M.C., who was in the legal custody of the South Carolina Department

⁸⁷ Koll, *supra* note 59, at 233-34 (citing David R. Carlson & Deborah A. Dorfman, Investigate Report Regarding the “Ashley Treatment” 1 (Wash. Prot. & Advoc. Sys., 2007), http://www.disabilityrightswa.org/sites/default/files/uploads/Full_Report_InvestigativeReportRegardingtheAshleyTreatment.pdf).

⁸⁸ Hermer, *supra* note 8, at 270.

⁸⁹ *See id.* at 266 (discussing studies that evaluated the sexual problems postoperative intersex individuals suffered); Erin Lloyd, *From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children*, 12 CARDOZO J.L. & GENDER 155, 179-80 (2005) (providing anecdotal evidence of the sexual dissatisfaction of postoperative intersex individuals).

⁹⁰ Joshua C. Albritton, *Intersexed and Injured: How M.C. v. Aaronson Breaks Federal Ground in Protecting Intersex Children from Unnecessary Genital-Normalization Surgeries*, 24 TUL. J.L. & SEXUALITY 163, 174 (2015).

⁹¹ *M.C. ex rel. Crawford v. Amrhein*, 598 F. App’x 143, 147 (4th Cir. 2015).

of Social Services (SCDSS), was subjected to a gender assignment surgery.⁹² M.C. was born intersex and was determined to have “‘extremely elevated’ testosterone levels and . . . genitalia consist[ing] of a testicle, an ovotestis with ovarian and testicular tissue, a phallus, scrotalized labia, a short vagina, and no uterus.”⁹³ Despite the lack of medical necessity, doctors elected a “feminizing genitoplasty” and removed M.C.’s phallus, testicle, and testicular tissue.⁹⁴ Although originally raised as a girl, as he grew older, M.C. identified himself as a male and now currently lives as a boy.⁹⁵ M.C.’s adoptive parents brought suit against the doctors, who performed the surgery, and SCDSS for violating M.C.’s constitutional rights.⁹⁶ Plaintiffs alleged: “Defendants’ decision to perform irreversible, invasive, and painful sex assignment surgery was unnecessary to M.C.’s medical well-being.”⁹⁷ Specifically, Plaintiffs argued that the State violated M.C.’s constitutional right to procreate by allowing the doctors to “permanently destroy[] M.C.’s potential male reproductive function.”⁹⁸ Plaintiffs further alleged that M.C.’s constitutional right to bodily integrity was violated when the decision was made to perform highly invasive, medically unnecessary surgery that “deprived M.C. of the opportunity to make his own deeply intimate decisions about whether to undergo genital surgery.”⁹⁹ The District Court held that M.C. had alleged sufficient facts to survive summary judgment, specifically finding that M.C.’s right to procreate was implicated by SCDSS’s actions.¹⁰⁰ However, the Fourth Circuit dismissed the case on qualified immunity grounds.¹⁰¹ M.C.’s experience highlights the serious constitutional implications of intersex gender assignment surgery.

In sum, it seems the individual’s right to make decisions about intersex surgery falls under the protection of the Fourteenth Amendment’s Due Process Clause.¹⁰² As the Supreme Court notes:

⁹² *Id.* at 145.

⁹³ *Id.*

⁹⁴ *Id.* at 146.

⁹⁵ *Id.*

⁹⁶ Complaint at 3, M.C. *ex rel.* Crawford v. Amrhein, 598 F. App’x 143 (4th Cir. 2015) (No. 2:13-cv-01303-DN) (filed May 14, 2013).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Order Denying Defendant’s Motion to Dismiss, M.C. *ex rel.* Crawford v. Amrhein, 598 F. App’x 143 (4th Cir. 2015) (No. 2:13-cv-01303-DCN) (issued Aug. 29, 2013).

¹⁰¹ *Crawford*, 598 F. App’x at 149-50.

¹⁰² *Carey v. Population Servs., Int’l*, 431 U.S. 678, 684-85 (1977).

While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage . . . procreation . . . contraception . . . family relationships, and child rearing and education”¹⁰³

The choice to undergo intersex surgery involves many, if not all, of these concerns. Despite the strong textual and doctrinal support, it is unlikely that any court will apply such a straightforward analysis because of the strength of the competing issues at stake. Instead, a balancing of all the interests involved will likely be the methodology of choice. We must thus consider the other actors involved, the parent and the State, before coming to any conclusion about the constitutionality of “corrective” intersex surgery.

B. Parental Constitutional Rights

Just as the Fourteenth Amendment protects the fundamental rights to bodily integrity and procreation, the Due Process Clause also “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁰⁴ This Section examines the constitutional right to parent, practical considerations of deferring to parents, and whether deference is warranted in the “corrective” intersex surgery context.

i. The Right to Parent

The Court has an extensive history of recognizing the fundamental nature of parental control over children and has afforded the right to parent broad protections.¹⁰⁵ The constitutional right to

¹⁰³ *Id.* (citations omitted).

¹⁰⁴ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

¹⁰⁵ *See, e.g., Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); *Meyer v. Nebraska*, 262 U.S. 390, 399

parent stems from a concern for family privacy, parental autonomy, and self-determination—spheres of liberty where State interference is sharply limited.¹⁰⁶ While the contours of the right to parent are not clearly defined beyond “care, custody, and control,” it has been broadly interpreted to a number of things, such as body modification and corporal punishment.¹⁰⁷ Unquestionably included in the right to parent is the parents’ right to make medical decisions on behalf of their children, with few limitations.¹⁰⁸

In addition to having robust constitutional protections, a number of practical concerns also motivate courts to defer to parental choice. Given that a child may not be competent to make complex decisions, the law presumes that a parent will act in the best interests of the child.¹⁰⁹ It has been suggested that deference to parental decisions benefits the parent, child, and society at large.¹¹⁰ Much like the constitutional standard, the best interest standard is vague at best. In the medical decision-making context, the spectrum of parental deference covers everything from medically necessary procedures to benign unnecessary surgeries that pose no threat to the child’s health.¹¹¹ For example, the Supreme Court of Oregon upheld the right of a father to impose circumcision on his son.¹¹² Similarly, lower courts have consistently upheld the ability of parents to consent to nontherapeutic operations on behalf of a minor.¹¹³ Lower courts have

(1923) (“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to establish a home and bring up children.”).

¹⁰⁶ Alicia Ouellette, *Shaping Parental Authority over Children’s Bodies*, 85 IND. L.J. 955, 977-78 (2010).

¹⁰⁷ Hill, *supra* note 32, at 1319.

¹⁰⁸ Rosato, *supra* note 25, at 5.

¹⁰⁹ Beh & Diamond, *supra* note 9, at 38-39.

¹¹⁰ Rosato, *supra* note 25, at 5.

¹¹¹ 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, 105-06 (1999).

¹¹² *In re Marriage of Boldt*, 176 P.3d 388, 394 (Or. 2008) (“We conclude that, although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States. We also conclude that the decision to circumcise a male child is one that generally falls within a custodial parent’s authority.”).

¹¹³ See, e.g., *Bonner v. Moran*, 126 F.2d 121, 123 (D.C. Cir. 1941) (requiring parental consent for a skin graft of a fifteen-year-old boy); *Hart v. Brown*, 289 A.2d

also recognized the right of parents to refuse medical treatment. In *Newmark v. Williams*, after balancing the interests of the child, the parents, and the State, the Supreme Court of Delaware permitted three-year-old Colin's parents to refuse treatment for Burkitt's Lymphoma.¹¹⁴ A summary of the best interest standard is best provided by Anne Tamar-Mattis: "As long as these decisions are in line with an accepted medical standard of care, courts will rarely intervene in them."¹¹⁵

ii. Limitations on the Right to Parent

Although the spectrum on which parental constitutional rights fall is broad, it is not unlimited. The Supreme Court curtailed the right to parent when it stated, "[the] rights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."¹¹⁶ The presence of a conflict of interest, or a situation where it cannot be said that the parents' interests are identical to those of the child, may be sufficient to overcome the best interest presumption.¹¹⁷ Conflicts of interest often occur when medical treatment is unreasonable or particularly extraordinary and when countervailing constitutional rights are involved.¹¹⁸ A court may also find a conflict of interest when the proposed medical treatment provides no medical benefit to the child.¹¹⁹ Two circumstances where a court will find in favor of intervention have already been discussed: sterilization and organ donation.¹²⁰ The existence of a conflict of interest warrants heightened judicial scrutiny.

386 (Conn. Super. Ct. 1972) (allowing parents to consent to a kidney transplant from one seven-year-old twin to another); *Strunk v. Strunk*, 445 S.W.2d 145, 148 (Ky. Ct. App. 1969) (allowing the mother of a legally incompetent adult to consent to a kidney transplant).

¹¹⁴ *Newmark v. Williams/DCPS*, 588 A.2d 1108, 1120 (Del. 1991) ("Colin's best interests were served by permitting the Newmarks to retain custody of their child. Parents must have the right at some point to reject medical treatment for their child.").

¹¹⁵ Tamar-Mattis, *supra* note 2, at 79.

¹¹⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citations omitted).

¹¹⁷ See Koll, *supra* note 59, at 248; Rosato, *supra* note 25, at 43 ("Although not explicitly named, categorical conflicts have been found to exist in types of cases where the risk of conflict is so high that court intervention is deemed necessary.").

¹¹⁸ See *supra* note 116 and accompanying text.

¹¹⁹ Tamar-Mattis, *supra* note 2, at 94.

¹²⁰ Curtis, *supra* note 51, at 851 (suggesting that these two circumstances implicate three major concerns of the court: "(1) the parents' potential conflict of interest; (2)

Moreover, a court will always intervene when the child's life is in danger. The Supreme Court affirmed this principle in *Cruzan v. Director, Missouri Department of Health* when it refused to allow the parents to remove their daughter's artificial feeding and hydration equipment absent clear and convincing evidence of the patient's wishes.¹²¹ Similarly, although the Supreme Court of New Jersey upheld a father's decision to end life-sustaining treatment for his daughter, the court emphasized that his authority did *not* stem from his constitutional right to parent.¹²²

iii. Application of Parental Rights in the Intersex Context

Clearly, concerns about conflicts of interest are present when a parent subjects his or her child to "corrective" intersex surgery. Thus, there should be judicial intervention before any procedures are elected. In these instances, a parent's liberty rights come directly into conflict with the child's. Moreover, some scholars suggest that any "corrective" intersex surgery constitutes "unreasonable, extraordinary medical intervention[s] that impact significant constitutional interests of the child."¹²³ Deference is unwarranted particularly in the intersex context for several reasons, including: (1) the fact that a parent has no way of understanding the best interests of a newborn with respect to gender identity, and (2) the presumption that familial love underpinning the best interest standard may not be complete or present when parents are required to make these decisions.¹²⁴ Drawing on bioethicist ideals, others have suggested that conflict exists because any intersex procedure irreversibly interferes with a child's right to an open future.¹²⁵

While these arguments are compelling, how likely will a court curtail parental decision-making powers? Parents electing to subject

the impairment of the child's fundamental rights; and (3) the lack of medical benefit to the child").

¹²¹ 497 U.S. 261 (1990).

¹²² *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976) ("[W]e agree with Judge Muir's conclusion that there is no parental constitutional right that would entitle him to a grant of relief Insofar as a parental right of privacy has been recognized, it has been in the context of determining the rearing of infants and, as Judge Muir put it, involved 'continuing life styles.'").

¹²³ Hermer, *supra* note 8, at 267-68 (quoting Hazel Glenn Beh & Milton Diamond, *David Reimer's Legacy: Limiting Parental Discretion*, 12 CARDOZO J.L. & GENDER 5, 26-27 (2005)).

¹²⁴ Lloyd, *supra* note 88, at 167-69 (citing research suggesting that there is a familial parent-child bond that does not always exist, particularly with children who have a disability).

¹²⁵ Uslan, *supra* note 19, at 310-11.

their child to “corrective” intersex surgery are often well-intentioned and rely on the opinions of medical professionals.¹²⁶ Under these circumstances, a court evaluating the best interests of a child may very well defer to the parent and doctor.¹²⁷ In a fundamental rights stalemate, it is not hard to imagine the constitutional parental right trumping other interests—especially since life or death does not hang in the balance.¹²⁸ Thus, it is necessary to consider the State’s intervening interest in “corrective” intersex in order to draw any further conclusions.

C. *The State’s Interest*

As indicated, the State’s interest in regulating “corrective” intersex operations is multifold. First, the State has a constitutional duty not to arbitrarily interfere with an individual’s bodily integrity. However, the Court has recognized a number of State interests that justify the intrusion, including: “(1) protecting public safety or public health; (2) protecting the individual’s own health or safety; (3) determining guilt or innocence or searching for evidence of a crime; (4) imposing discipline or punishment; and (5) protecting the integrity of the medical profession.”¹²⁹ Second, the State has a constitutional duty not to impermissibly interfere with an individual’s right to procreate.¹³⁰ Again, the Court has found exceptions.¹³¹ Third, the State also may not interfere with a parent’s constitutional right to the “care, custody, and control” of their children.¹³² The exceptions to this rule are related to another State responsibility: the duty to safeguard a child’s welfare.¹³³ This Section first looks at what State interests might justify an interference with a child’s fundamental rights. This Section will then balance those interests against the State’s obligation not to interfere with parental rights.

i. State Interests Justifying Interference

Typically, for a State to interfere with a fundamental right, the intrusion must satisfy a strict scrutiny analysis—the State’s interest

¹²⁶ Rosato, *supra* note 25, at 5.

¹²⁷ *Id.*

¹²⁸ Although, one could argue that a “corrective” intersex surgery results in the “death” of the child’s gender identity.

¹²⁹ Borgmann, *supra* note 52, at 1067 (citations omitted).

¹³⁰ See U.S. CONST. amend. XIV.

¹³¹ See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (finding the sterilization of disabled women constitutional).

¹³² *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

¹³³ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (describing the doctrine of *parens patriae*).

must be compelling and narrowly-tailored.¹³⁴ However, in the context of a child's fundamental rights, particularly a child's right to bodily integrity, courts have applied a less stringent tripartite balancing test—weighing the child's interest against the interests of the State and the parents.¹³⁵ Even so, the State must have some rational basis for its decision to interfere with a child's fundamental rights.¹³⁶ This Part considers two interests the State might have in allowing infants to be subjected to “corrective” intersex surgery: (1) protecting the child from social harms, and (2) disgust. Despite these interests, this Part concludes by arguing that the State has a stronger interest in disallowing the subjection of young children to “corrective” intersex surgery.

a. Stigma

The Supreme Court has held that the State has an interest in protecting children from social or psychological harm.¹³⁷ The Court in *Prince v. Massachusetts* held that the State was allowed to protect children from “emotional excitement and psychological or physical injury” and also stated that parents had no right to make martyrs out of their children.¹³⁸ Similarly, in holding that “separate but equal” educational facilities violated the Fourteenth Amendment's Equal Protection Clause, the Court in *Brown v. Board of Education* relied heavily on social science data when it suggested that “[t]o separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹³⁹ More recently, the Supreme Court recognized the importance of protecting children from social harms in *Obergefell v. Hodges*.¹⁴⁰ In its explanation why the Constitution protects the right to marry for same sex-couples, the Court stated:

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children

¹³⁴ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, n.4 (1938).

¹³⁵ See *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (“Accordingly, whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.”); Borgmann, *supra* note 52, at 1069.

¹³⁶ *Id.*

¹³⁷ *Prince*, 321 U.S. at 170.

¹³⁸ *Id.*

¹³⁹ 347 U.S. 483, 494 (1954).

¹⁴⁰ 135 S. Ct. 2584 (2015).

suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.¹⁴¹

These cases suggest that the State has a significant interest in protecting children from stigmatic harm. As such, humiliation, inferior treatment, or feeling “less than” are all harms from which the State can protect children.¹⁴²

Although protecting a child from stigma may be a legitimate, or even compelling, State interest—it is limited to protecting a child from stigma caused by State action. The law does not recognize private biases as a legitimate source of stigma—thus, it cannot be the basis for a law. The Supreme Court in *Palmore v. Sidoti* foreclosed on the possibility of the law giving effect to private biases.¹⁴³ In *Palmore*, a Florida court found that it was in the child’s best interest to live with her father because of the stigmatization the child might be subjected to if she lived with her mother, who was married to a man of a different race.¹⁴⁴ Recognizing the potential “pressures and stresses” of a child living with a stepparent of a different race, the Supreme Court nonetheless struck down the ruling, concluding that “[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹⁴⁵ Thus, while the State has an interest in not promoting laws that subject children to stigma, those laws also cannot be based on the private biases of society. Although under *Brown* and *Obergefell* stigma can be constitutionally problematic because it is the product of State action, *Palmore* suggests that when the law gives effect to private bias, it perpetuates the stigma and, therefore, is equally unconstitutional.¹⁴⁶

¹⁴¹ *Id.* at 2600-01.

¹⁴² See *In re Sampson*, 37 A.D.2d 668, 669 (N.Y. App. Div. 1971) (authorizing a cosmetic surgery for a child suffering from a facial deformity, by stating that “[a]ppellant argues that State intervention is permitted only where the life of the child is in danger by a failure to act. This, in our opinion, is a much too restricted approach. As things now exist, Kevin can never lead a normal life or be of much benefit to himself or society.”).

¹⁴³ 466 U.S. 429 (1984).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 433.

¹⁴⁶ *Id.*

Stigma in the intersex context is problematic. Proponents of “corrective” intersex surgery argue that there are a number of “social” harms that can result from not performing gender assignment surgery at birth. One argument suggests that a child with ambiguous genitalia would be subject to “locker room teasing,” and, as a result, a child might suffer from low self-esteem.¹⁴⁷ Perhaps more grave, another argument suggests that a genderless child living in a gendered society might be treated as a second-class citizen, the consequences of which could include the “failure of parents to relate to them, alienation from society, the perception of embarrassment around the topic of their sex or gender, and fragmentation of their family systems.”¹⁴⁸ Similarly, others have suggested that parents may not bond with or may even reject a child with ambiguous genitalia, which would imaginably lead to many other negative consequences for the child.¹⁴⁹ In short, proponents of early “corrective” intersex surgery are concerned the child will be stigmatized if he or she has ambiguous genitalia.

“[S]tigma exists when labeling, negative stereotyping, exclusion, discrimination, and low status co-occur in a power situation that allows these processes to unfold.” Stigma is a significant force in most, if not all, societies. It may be that issues involving stigma, as much as anything else, can explain the reason that the parents in the [intersex surgery] study . . . would agree to cosmetic genital surgery on their daughters even if they knew surgery might result in diminished genital sensitivity. Parents generally want their children to “fit in.”¹⁵⁰

Allowing early surgical intervention, then, will supposedly spare intersex children from humiliation and social stigmatization. Proponents of surgery point to the anecdotal evidence of adults who are satisfied with their gender-assignment and lead normal, healthy

¹⁴⁷ Tamar-Mattis, *supra* note 2, at 72-73 (discussing the arguments of moratorium opponents).

¹⁴⁸ Sweeney, *supra* note 7, at 159; *see also* Bird, *supra* note 3, at 74 (“For example, in the Journal of Pediatrics and Child Health, the authors state that in most cases, ambiguous genitalia occurs unexpectedly and causes stress in both medical and nursing staff, let alone the parents.”).

¹⁴⁹ Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANNALS HEALTH L. 195, 231 (2002) (discussing justifications for early surgery).

¹⁵⁰ Hermer, *supra* note 8, at 270-71 (citations omitted).

lives post-surgery.¹⁵¹ The proponents assert that the psychological and cultural benefits of “corrective” intersex surgery outweigh almost any medical risk, especially given improved medical technology, which may preserve sexual function and fertility.¹⁵² Invoking the slippery-slope argument, proponents suggest that a moratorium on “corrective” intersex surgery may prevent parents from consenting to other “cosmetic,” non-medically necessary procedures, such as correcting a cleft palate or removing facial deformities.¹⁵³

Although a child with ambiguous genitalia might be treated differently, this cannot be the basis of State action for two reasons: (1) there is not enough evidence to support the conclusion that intersex children are subject to stigmatization, and (2) even if there was evidence supporting such a conclusion, the law cannot give effect to society’s biases. First, there is very little data concerning how well children with ambiguous genitalia interact with their peers, parents, or other members of society.¹⁵⁴ There is evidence, however, of the trauma of multiple “corrective” surgeries.¹⁵⁵ The medical procedures themselves and their aftermath undermine the very purpose of making the child “normal.”¹⁵⁶ What’s more, a small study revealed that, despite consenting to “corrective” intersex surgery on their infant, many parents still did not consider their child to be “normal.”¹⁵⁷ Without stronger evidence demonstrating actual harm to intersex children with ambiguous genitalia, any State interest is difficult to justify. Second, any statute allowing “corrective” intersex surgery to be performed on a child would clearly violate the holding in *Palmore*—the surgery itself is motivated by society’s prejudices.¹⁵⁸ Much like the child in *Palmore*, intersex children, if stigmatized at all, are only stigmatized by society’s private biases, furthered by the existence of the gender binary.

¹⁵¹ Sara A. Aliabadi, *You Make Me Feel Like a Natural Woman: Allowing Parents to Consent to Early Gender Assignment Surgeries for Their Intersexed Infants*, 11 WM. & MARY J. WOMEN & L. 427, 437 (2005).

¹⁵² *Id.* at 436-37.

¹⁵³ *Id.* at 453.

¹⁵⁴ Hermer, *supra* note 148, at 233.

¹⁵⁵ Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices,”* 40 HARV. C.R.-C.L. L. REV. 71, 107-08 (2005) (“While studies of the psychological effects of intersex treatments are shockingly few, testimonials from intersex treatment recipients repeatedly mention the sense of shame, humiliation, and violation that physical examinations and surgical treatments engender.”).

¹⁵⁶ Tamar-Mattis, *supra* note 2, at 72-73.

¹⁵⁷ Hermer, *supra* note 148, at 231.

¹⁵⁸ *Cf. Palmore*, 466 U.S. at 434.

b. Disgust

Closely related to stigma, another possible motivation for State interference with a child's fundamental rights in the intersex context is disgust.¹⁵⁹ Disgust plays a powerful role in shaping our laws.¹⁶⁰ Disgust "marks out moral matters for which we can have no compromise."¹⁶¹ Justice Scalia invoked disgust in his concurring opinion in *Barnes v. Glen Theatre, Inc.*, stating:

Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist . . . there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."¹⁶²

Similarly, the majority in *Gonzales v. Carhart* relied on disgust when it upheld the ban on a particular type of abortion procedure: "The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives . . . Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."¹⁶³

By allowing infants to be subjected to "corrective" intersex surgery, one could argue that the State is motivated by morality or

¹⁵⁹ However, it is unlikely that a State would not assert such a motivation.

¹⁶⁰ Martha C. Nussbaum, *Secret Sewers of Vice: Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW 19, 20 (Susan A. Bandes ed., 1999).

¹⁶¹ Dan M. Kahan, *The Progressive Appropriation of Disgust*, in THE PASSIONS OF THE LAW 63, 64 (Susan A. Bandes ed., 1999) (quoting WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 194 (1997)).

¹⁶² 501 U.S. 560, 575 (1991) (Scalia, J., concurring).

¹⁶³ 550 U.S. 124, 158 (2007); see also *id.* at 181 (Ginsburg, J., dissenting) ("But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion.").

disgust. Disgust for intersexuality can best be explained by Mary Douglas' "matter out of place" theory.¹⁶⁴ Disgust is our cultural response to "any object or idea likely to confuse or contradict cherished classifications."¹⁶⁵ It is a reaction to disorder and an attempt to maintain systems and boundaries.¹⁶⁶ For example, shoes—not inherently disgusting when worn on feet—become dirty when they are placed on the dining room table.¹⁶⁷ Ambiguity or anomalies are by definition unclassifiable—"matter out of place"—and thus elicit a strong reaction of disgust.¹⁶⁸ For example, Douglas suggests that if penguins lived in the Near East during biblical times, they would have been labeled "unclean" because they possess both fishlike and birdlike characteristics.¹⁶⁹ Similarly, syrup is disgusting because it is both a liquid and a solid.¹⁷⁰ Intersex children—in some sense a "hybrid" of both genders—are "matter out of place" and, thus, are marginalized or "corrected."¹⁷¹ The State's response to children born with ambiguous genitalia, essentially recognizing the condition only as a medical disorder, is an attempt to reestablish order and maintain boundaries.

Interestingly, disgust may also support an argument against "corrective" intersex surgery. The court in *Littleton v. Prange*, when describing the plaintiff's gender reassignment surgery, suggested the surgery "would make most males pale and perspire to contemplate."¹⁷² Indeed, the specifics of "corrective" intersex surgery may invoke a reaction of disgust, much like Congress's reaction to the abortion procedure at issue in *Carhart*.¹⁷³

Despite the prevalence of disgust in our laws, the State cannot use disgust divorced from harms to justify an interference with a child's fundamental rights. A pure disgust or morality rationale will not stand constitutional muster.¹⁷⁴ This principle was affirmed by the Supreme Court in *Lawrence v. Texas*: "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection

¹⁶⁴ See MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 36-50 (2002).

¹⁶⁵ *Id.* at 45.

¹⁶⁶ *Id.* at 2-3.

¹⁶⁷ *Id.* at 44.

¹⁶⁸ *Id.* at 46-47.

¹⁶⁹ *Id.* at 71.

¹⁷⁰ *Id.* at 47.

¹⁷¹ *Id.* at 44.

¹⁷² 9 S.W.3d 223, 231 (Tex. App. 1999).

¹⁷³ *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

¹⁷⁴ See *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).

Clause.”¹⁷⁵ Thus, unless the Supreme Court finds some other concomitant State interest, moral disapproval of intersexuality will not be a sufficient justification for allowing “corrective” intersex surgeries to be performed on children.

ii. State Interests in Protecting Right to Parent

As discussed, if a State acts to protect a child’s fundamental rights, it is likely that a parent’s fundamental rights will be infringed upon. Thus, the State’s power to intervene is limited to preventing abuse, neglect, or other harms to the child.¹⁷⁶ In order to exercise its *parens patriae* powers, the State must provide a court with clear and convincing evidence that intervention is necessary.¹⁷⁷ It has been suggested that in instances where competing fundamental rights are at stake, the State’s *parens patriae* powers are at their strongest.¹⁷⁸ If that is the case, the State should have broad powers to intervene and prevent parents from consenting or subjecting their child to “corrective” intersex surgery. Although the right to parent is indeed fundamental, the interests at stake for a child—bodily integrity, procreation, dignity, and autonomy—are much weightier. The significant challenge the State would face in protecting an intersex child’s fundamental rights would be providing clear and convincing evidence that “corrective” intersex surgery is actually harmful to the child. Given that the data available is chiefly anecdotal, it would be difficult to prove that it would be more likely than not that “corrective” surgery would harm a child more than postponing the operation or doing nothing. However, given that the surgery often offers no true medical benefits, the State could argue that the supposed psychosocial benefits of cosmetic gender-assignment surgery are unsupported.

iii. Application of a State’s Rights in the Intersex Context

An interesting comparison between mandatory vaccination laws and “corrective” intersex surgery demonstrates the difficulty of balancing State interests and competing parental interests. As Professors Chemerinsky and Goodwin explain in depth, compulsory vaccination laws are constitutional.¹⁷⁹ First, they cite to extensive case law recognizing the constitutionality of compulsory vaccination laws.

¹⁷⁵ *Id.*

¹⁷⁶ Hill, *supra* note 32, at 1300.

¹⁷⁷ Povenmire, *supra* note 110, at 106-07.

¹⁷⁸ *Id.* at 107.

¹⁷⁹ Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. ____ (forthcoming 2016).

Specifically, the Supreme Court has held that “laws promoting public health or safety fall under a state’s police power . . . individual rights may need to yield to the state’s police power in order to preserve the public health or safety.”¹⁸⁰ Second, the professors consider competing parental interests—namely freedom of religion and the constitutional right to parent—and conclude that neither right is sufficient to overcome the State’s interest in protecting the health of minors.¹⁸¹

It is unclear which way the compulsory vaccination precedent cuts. For example, in *Buck v. Bell*, the Court cited to the Supreme Court’s previous mandatory vaccination holding as support for the constitutionality of cutting an institutionalized woman’s fallopian tubes.¹⁸² Moreover, there is no constitutional case law that specifically protects or forbids genital “normalization” surgery. Therefore, the answer turns on whether the State’s interest in protecting a child from a non-medically necessary, and highly invasive, surgery is comparable to compulsory vaccination. First, the police power rationale does not apply as strongly in the intersex context. In addition to protecting the child from disease, mandatory vaccinations also create “herd immunity” and protect the community at large from contracting deadly illnesses.¹⁸³ Whether children are, or are not, subjected to “corrective” intersex surgery—they pose no risk to the health of others. Second, as discussed earlier, it is hard to say what action is protective of a child’s health. Normatively, it seems clear that removing a child’s healthy genital tissue and reproductive organs is not a form of protection. Practically, however, without clear guidance suggesting otherwise from a doctor or a surgeon assigned to the individual child’s case, maybe the State’s interest, or at least the State’s argument, is weakened. This uncertainty perhaps underscores the need for clearer and stronger constitutional protections for intersex children.

In sum, the State’s strongest interests in allowing “corrective” intersex surgeries—protecting the child from psychosocial harms and imposing morality—are unsupported and unconstitutional. Moreover, the State’s interest in respecting parental autonomy is limited by the potential for grave violations of a child’s fundamental rights. As such, inaction by the State could possibly result in liability for violating a child’s Fourteenth Amendment rights.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² 274 U.S. 200, 207 (1927) (“The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.” (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905))).

¹⁸³ *Id.*

V. PART IV: RECOMMENDATIONS

Given the complicated nature of gender, sexuality, and sexual orientation, this Article's recommendation is not a "one-size-fits-all" solution. For example, "corrective" intersex surgery may not implicate a child's fundamental right to procreate in every instance. Similarly, the State may have a more compelling interest to intervene when such issues are present. As such, a third-party neutral—such as a family court or a special tribunal—should evaluate each case before any irreversible medical procedures are performed. When considering whether surgery is appropriate, the intermediary should weigh each of the interests discussed above and any particular set of facts that may affect the decision. In many circumstances, foregoing or postponing surgery will best protect a child's fundamental rights.

The courts of Colombia provide a model for what an intersex tribunal may look like. In 1995, the Constitutional Court of Colombia held that a team of doctors had violated a child's constitutional right to identity when it performed genital normalization surgery on him.¹⁸⁴ In 1999, the Constitutional Court of Colombia limited a child's parents' ability to consent to genital normalization by creating a heightened standard for consent.¹⁸⁵ Three months later, the Constitutional Court of Colombia clarified the heightened consent standard, explaining that it required "[giving parents] detailed information about the advantages and disadvantages of surgically altering their child's genitalia, [allowing] ample periods of time to consider the alternatives to genital-normalizing surgery, and [making] decisions in consideration of their child's best interests."¹⁸⁶ This standard would be appropriate for importation in U.S. courts as it appropriately recognizes the serious constitutional implications at stake. However, while the standard is appropriate, I would advocate for mandatory ex ante procedures. The child from the 1999 Colombian case was spared irreparable harm because the doctors refused to perform surgery without court approval—and, ultimately, the Constitutional Court of Colombia concluded that the surgery was unconstitutional.¹⁸⁷ This should also be the standard in the United States.

¹⁸⁴ Ryan L. White, Note, *Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson*, 37 FORDHAM INT'L L.J. 777, 795-96 (2014).

¹⁸⁵ *Id.* at 797.

¹⁸⁶ *Id.* at 800-01.

¹⁸⁷ *Id.* at 798.

VI. PART V: CONCLUSION

The issues surrounding intersexuality highlight a number of broader legal questions, including questions about gender in the law and competing liberty interests. For this reason, instead of treating genital “normalization” surgery as a purely medical concern, it is important to consider all legal ramifications before any action is taken. A constitutional floor, bolstered by the State’s interest in protecting minors, must be established and recognized in order to adequately protect the fundamental rights of intersex children against the constitutional rights of their parents.