
One of the few fundamental aspects of life is that of sex. . . . To visualize individuals who properly belong to neither one sex nor to the other is to imagine freaks, misfits, curiosities, rejected by society and condemned to a solitary existence of neglect and frustration. . . . The tragedy of their lives is the greater since it may be remediable; with suitable management and treatment, especially if this is begun soon after birth, many of these people can be helped to live happy well adjusted lives (p. 11).1

INTRODUCTION

Perhaps no question is heard more often by a parent-to-be than, “Is it a boy or a girl?” The question is more than an inquiry into the chromosomal status of the fetus: raising a boy means Tonka trucks and blue overalls, while having a girl implies pink bonnets and dolls. This traditional childhood narrative carries over into adulthood, where women are expected to be feminine, men are expected to be masculine, and both are expected to be heterosexual and cisgender.2

Feminists and the LGBT community have long challenged the male/female binary and the corresponding assumptions about gender roles and identity. That is, sexual anatomy does not determine a person’s gender presentation, gender identity, or sexual orientation. The existence of people with an intersex condition serves to bolster these arguments, as intersex bodies fundamentally challenge the male/female binary.3 In Intersexuality and the Law, Julie A. Greenberg recognizes that intersexuality provides the “perfect rhetorical device for challenging traditional notions of sex, gender, and sexual orientation” (p. 3). However, she argues that groups who use the existence of intersexuality to promote the expansion of rights to other groups often “fail to consider the effects that these arguments will have on members of the intersex community” (p. 3).

Intersexuality and the Law is Greenberg’s response to what she perceives as a failure by the legal community to address the issues that directly impact

2. The term “cisgender” refers to people who identify as the gender they were assigned at birth (i.e. non-transgender).
3. Greenberg uses the term “intersex” broadly to include “anyone with a congenital condition whose sex chromosomes, gonads, or internal or external anatomy do not fit clearly into the binary male/female norm” (p. 1).
people with an intersex condition (p. 1). According to Greenberg, the primary focus of the intersex movement is—or should be—questioning the routine performance of “medically unnecessary cosmetic genital surgeries . . . on infants with an intersex condition” (p. 4). Like feminists and the LGBT community, advocates for intersex rights are also concerned with eliminating pernicious sex stereotypes. However, the intersex community faces a unique challenge in securing legal protection against unnecessary and unconsented bodily modification (p. 4).

**INTERSEXUALITY AND MEDICAL PROTOCOL**

Part I of *Intersexuality and the Law* focuses on the medical practices surrounding the treatment of individuals with an intersex condition. Greenberg briefly reviews the typical sex differentiation of fetuses, which she identifies as involving at least eight attributes (p. 11). For most people, these attributes align along the traditional male/female binary. However, many people have ambiguous sex indicators (p. 12). Greenberg states that people who “do not follow the typical sexual differentiation path” number in the millions, although she does not explain how she arrives at this number (p. 12).

Greenberg then explores how the medical community has historically determined a person’s sex in cases where the sex indicators are indeterminate. From the late nineteenth to the early twentieth century, scientists and physicians focused exclusively on a person’s gonads: a person with ovaries was female, and a person with testes was male (p. 15). By the 1950s, the focus had shifted to the appearance of the external genitalia (p. 15). This shift allowed physicians to take a more active role in “treating” intersex infants, since surgical techniques had developed that made it possible to modify the appearance of external genitalia (p. 16). At that time, there was a corresponding rise in the popularity of the idea that gender identity is based on nurture rather than nature (p. 16). The result was the development of a medical protocol focused on surgically altering children with atypical genitalia, with the belief that the children would grow up content with their assigned sex (p. 16).

Greenberg argues that the sex determination of intersex infants (and the

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4. These include genetic or chromosomal sex (typically XX or XY), gonadal sex (testes or ovaries), external morphological sex (genitalia), internal morphological sex (seminal vesicles, prostate, vagina, uterus, and fallopian tubes), hormonal sex (androgens or estrogens), phenotypic sex (secondary sex characteristics such as facial hair or breasts), assigned sex (sex assigned at birth or through rearing), and gender identity (p. 11-13).

5. Some people, such as those with Turner syndrome (XO), do not have XX or XY chromosomes. Others have typical chromosomes, but do not develop corresponding sex characteristics. For example, some XY infants cannot process androgens (Complete Androgen Insensitivity Syndrome) and thus develop external female genitalia (p. 14).

6. According to the Intersex Society of North America, about 1 percent of infants have some variation in sex development. *How Common is Intersex?*, INTERSEX SOC’Y N. AM., http://www.isna.org/faq/frequency (last visited Feb. 14, 2013). Between .05 percent and .067 percent of infants are born with noticeably atypical genitalia. *Id.*
resulting surgical interventions) relied on unquestioned assumptions about the nature and role of men and women (p. 16). For example, XY infants with small penises or otherwise ambiguous genitalia were almost always surgically altered to appear female, based on the notion that a real man required an “adequate” penis—i.e. one capable of penetrating a vagina (p. 16). Generally, the medical protocol determined that intersex children should only be raised as males if they could engage in conventional sex acts with women as adults, and raised as females if they were capable of reproducing (p. 17).

Resistance to the dominant medical protocol arose during the 1990s, when intersex activists and experts in a variety of other fields began to reevaluate the assumptions underlying the standard treatment practices (p. 18). Three primary objections were made. First, psychologists and sociologists began to reject the idea that gender identity is purely a social construct (p. 19). Second, many psychiatrists and intersex advocates were unconvinced that cosmetic genital surgery prevented more harm than it caused (pp. 21-22). Although many physicians believed that it would be psychologically damaging for a child to grow up with atypical genitalia, other experts protested that the potential consequences of surgery (including scarring, pain, and loss of sexual function) were worse, especially since infants cannot consent to the procedure (pp. 21-22). Finally, many intersex advocates claimed that the standard protocol pathologized intersexuality, thereby exacerbating any humiliation or shame that an intersex child may already feel (p. 24).

Greenberg ends her discussion of medical practices and intersexuality by examining the question of who should have the right to determine when surgery on an infant is appropriate, especially if the surgery is not medically necessary. Currently, no state or country has enacted legislation prohibiting cosmetic genital surgery on infants (p. 29). The law typically accords great deference to the right of parents to make medical decisions on behalf of their children, even when treatment presents a significant risk of harm (p. 31). However, there are circumstances in which courts will not completely defer to parental decisions regarding a child’s medical treatment; for example, courts will carefully scrutinize any procedure that involves sterilization of a minor (p. 31). Greenberg argues that parental consent to cosmetic genital surgery should also receive some kind of oversight (pp. 32-34). She discusses three proposed alternatives to the current standard of consent. The first is the “enhanced inform consent” model, under which parents would be fully informed regarding the physical and psychological harm which may result from surgery (p. 38). The second approach would be to give full deference to a child’s autonomy and delay any decision until the child is old enough to take part in the decision (p. 40). The third alternative would involve granting decision-making authority to the courts or an independent ethics board (p. 40).

7. At the same time, a survey revealed that a majority of a group of intersex persons supported the use of “corrective” surgery (p. 29).
Greenberg states that each of these proposals presents challenges and drawbacks, and so she suggests a fourth alternative: a two-step approach that would require both the advice of an ethics board and approval from a court before a surgery can take place (p. 42). The ethics board would be composed of psychiatrists, pediatricians, and experts in other relevant fields (p. 42). The board would issue an advisory opinion to the court, and the court would then make the final decision (p. 42). Greenberg also recommends that the court appoint a child advocate to represent the interests of the child (p. 43).

It is not clear that Greenberg’s proposal presents an advantage over the three alternatives she rejects. During her discussion of those alternatives, she suggests that some judges may “substitute their own judgment for that of the affected parties,” (p. 41) and that committees such as ethics boards may not make objective decisions about controversial issues (p. 42). If neither a court nor an ethics board is reliable on its own, it seems unlikely that collaboration between the two will always, or even often, yield an appropriate result. Furthermore, child advocates like guardians ad litem are in short supply. Even if it were possible to provide a child advocate for each intersex child, those advocates may be just as likely as parents or judges to rely on their own preconceived notions about sex and gender. They may therefore favor unnecessary surgical intervention while believing they are acting in the best interests of the child. In sum, Greenberg’s proposal represents significant time and financial costs while not clearly promising much in return.

In addition, Greenberg’s analysis of a complete moratorium on infant genital surgery seems strangely perfunctory. She briefly describes the view that no medically unnecessary procedures should ever be performed on infants, since they cannot consent to the procedure and it may severely damage them physically and psychologically (p. 37). She then seems to dismiss this view, pointing out that “impressionable teenagers” may be pressured into obtaining surgery in order to conform their genital appearance to typical sex and gender norms (p. 40). It seems unlikely that many teenagers would jump at the opportunity to receive major surgery, especially on their genitals, unless their gender identity were so fixed that they were certain surgery was the best option. Given that Greenberg often stresses the necessity of removing the shame and secrecy surrounding intersex conditions, it seems as though the real focus should be on providing intersex youth with the kind of support and resources they need in order to make a fully informed decision.

**Legal Sex Classification: Marriage and Public Accommodation**

In Part II, Greenberg examines the legal ramifications of sex classification on marriage, identification, housing, and bathroom use. She draws heavily on the parallels between transsexuality and intersexuality, since both transsexual and

8. Greenberg defines a transsexual as “a person who does not have an intersex condition whose gender self-identity does not match the sex assigned at birth” (p. 2).
INTERSEXUALITY AND THE LAW

intersex individuals encounter issues surrounding their legal sex. Throughout this section, Greenberg critiques the myriad and often-inconsistent sex classification tests used by state legal systems, noting that “a person’s legal sex could change as a state line is crossed” (p. 49).

First, Greenberg examines the consequences of sex classification for the purposes of marriage. She claims that protecting marriage as a heterosexual institution is “the major impetus for sex distinctions” (p. 49). Jurisdictions that do not allow same-sex marriages carefully police marriages involving a transsexual or intersex spouse, believing that such marriages might open the door for same-sex marriages (p. 54). Such thinking can often lead to bizarre results, as exemplified by an Australian case in which an intersex individual was deemed neither a man nor a woman and thus could not marry at all (p. 52). In other cases, intersex people have had to defend the validity of their marriage by presenting intimate details regarding their genital appearance to a court (p. 53).

Since only two appellate courts—one Australian and the other English—have ruled on the validity of marriages involving an intersex individual, Greenberg claims that future courts will probably rely on the rules established in marriage cases involving a transsexual spouse (pp. 57-58). Even these rules, however, have been vastly inconsistent (p. 59). Some courts, as in New York and Ohio, have determined legal sex by looking only at the chromosomes, gonads, and genital appearance of an individual (p. 58). Other jurisdictions, such as New Jersey, have used a broad approach that includes factors like hormones and gender identity (pp. 58-59). Greenberg argues that the confusion and inconsistency among courts will continue until same-sex marriage is no longer illegal, or until the matter is resolved by statute.

Greenberg next considers how transsexual and intersex individuals can create their own legal identity through having the ability to choose the name and sex marker that appears on their identity documents. This ability often depends on a given jurisdiction’s willingness to amend a person’s birth certificate, since a birth certificate usually determines the sex marker that appears on other forms of identification (p. 67). Although most jurisdictions are willing to issue a new or amended certificate if the original contains a mistake, it is typically much more difficult to have a jurisdiction recognize a legal “sex change,” where an intersex or transsexual individual wishes to change the sex assigned to them at birth (p. 67). For transsexual people, many jurisdictions in the United States require proof, usually a letter from a physician, that the person seeking to amend their sex marker has undergone permanent sexual reassignment surgery (p. 68). Some jurisdictions do not allow transsexual individuals to change the sex marker on their birth certificate regardless of their transition status (p. 68).

According to Greenberg, there are four main justifications offered by jurisdictions that limit the ability of people to change their legal sex marker (p. 70). First, some courts have ruled that such limitations prevent fraud (p. 70). Second, it is argued that allowing easy access to legal sex changes could lead to reclassification for illegitimate purposes, such as same-sex marriage (p. 70).
Third, some courts argue that the legal system should not assist the fantasies of “psychologically ill people” (p. 71). Lastly, courts have reasoned that a birth certificate is a historical record that should “accurately reflect the true facts as they existed at the time of the birth.” (p. 70). Greenberg disputes all of these justifications, deftly exposing them as pretexts for bigotry against transgender individuals.

Greenberg then turns to the problems many transsexual and intersex individuals encounter in sex-segregated housing and bathroom facilities (p. 74). She focuses in particular on sex segregation in the penal context (p. 77). Most prisons do not have separate facilities for gender-nonconforming individuals (p. 77); as a result, transsexual women in prison often face the choice between being housed with the general male population or being held in administrative segregation that “effectively constitute[s] solitary confinement” (p. 77). Greenberg argues that the “naturalness” of sex-segregated housing and bathrooms “should not be an axiomatic presumption” (p. 79). In fact, she contends, strict enforcement of sex segregation only serves to reinforce harmful gender stereotypes that “women are vulnerable and men are predators” (p. 79). Greenberg calls for a more nuanced approach to sex-segregated facilities (p. 79), but unfortunately does not elaborate on what this might look like. This omission may be frustrating for readers who agree with Greenberg’s criticisms of the dominant view but are unsure how to implement large-scale reform.

Given the number of parallels Greenberg draws between transsexual and intersex people in this section, it is startling that she completely eschews a discussion of people who are both transsexual and intersex. She essentially defines away the issue at the beginning of the book by stating that transsexual people are non-intersex individuals whose gender identity does not match their assigned sex (p. 2). Greenberg does not explain why transsexual people are non-intersex, a problem that becomes glaring later in the book when she explains that many scientists believe a person’s gender identity is one of many aspects of their sex (p. 11). If this is the case, as Greenberg seems to agree it is, then any person with a gender identity that does not match their assigned sex might be fairly classified as intersex. On the flip side, Greenberg fails to acknowledge that some intersex people who live as a gender other than the one they were assigned at birth identify as transsexual or transgender. Since, by Greenberg’s own admission, up to one quarter of intersex people might not identify with the gender they are assigned at birth, ” a significant portion of the intersex population may also be transgender. Acknowledging this issue may have better informed Greenberg’s later discussion of potential alliances between the transsexual and intersex communities.

Moreover, although Greenberg briefly acknowledges the existence of non-transsexual transgender people, her discussion of trans-related issues focuses

9. “In some intersex conditions, the dissatisfaction rate with the assigned gender may be as high as 25 percent” (p. 20).
exclusively on binary-identified transsexuals. Although transgender issues are not the focus of the book, a more inclusive dialogue might have benefited Greenberg’s analysis, given that not all intersex people identify as strictly male or female. In addition, a more thorough recognition of those who share common ground with the intersex movement would have served to bolster Greenberg’s subsequent argument in favor of forming effective alliances between various social justice movements.

**LEGAL PATHS TO ENHANCING THE LIVES OF PEOPLE WITH AN INTERSEX CONDITION**

In the final section of the book, Greenberg examines potential legal avenues that intersex advocates might use to advance the rights of intersex people. She begins with a history of the intersex activist movement in order to illustrate the relationship between this other social justice movements (p. 84).

The first intersex activist group, the Intersex Society of North America (ISNA), was founded in 1993 (p. 85). ISNA sought to form alliances with other social justice groups, including gay rights organizations, AIDS activists groups, and feminists (pp. 86-87). These efforts met with mixed success, and intersex advocates initially had little influence on the dominant medical protocol (p. 87). During the late 1990s, experts in various fields began taking an interest in intersexuality (p. 88). Legal scholars started to publish articles on the subject, and intersex advocates began pursuing legal arguments against the traditional medical protocol (p. 88). Intersex issues attracted media attention when the now-famous story of David Reimer came to light (p. 88). The rise of interest in intersex issues has had a positive effect on the medical field; most doctors now believe that gender identity is innate rather than constructed (p. 89). Consequently, instead of basing their surgical decisions solely on the genital appearance of an intersex child, doctors now consider a number of factors in determining a child’s likely gender identity, including their sensitivity to the influence of different hormones (p. 89).

Despite the advances made by the intersex community in the past decade, the fight for intersex rights continues, although the movement has often been marred by internal conflict (p. 89). Modern intersex advocates have three primary goals: (1) to eliminate or limit unnecessary cosmetic surgeries on intersex infants, (2) to end the shame and secrecy surrounding intersex issues,

10. David Reimer was a non-intersex male whose penis was severely damaged during a botched circumcision when he was eight months old (p. 88). His parents allowed doctors to surgically alter his genitalia to appear female and to administer estrogen treatments (p. 88). His parents and doctors hoped that David, renamed Brenda, would develop a female gender identity, since the dominant belief at the time was that gender identity is socially constructed rather than innate (p. 19). The experiment was unsuccessful; David consistently expressed a male gender identity throughout his youth, and, when he had learned what had happened to him as an infant, transitioned back to male as an adult (p. 19). Tragically, David committed suicide after the death of his twin brother (p. 19).
and (3) to develop counseling and support systems for intersex people and their families (p. 89). Intersex activists do not all agree on the best way to accomplish these goals (p. 89). For example, some believe that the intersex movement should form alliances with the medical community in order to better inform current medical practice about the particular needs of intersex individuals (p. 90). Other advocates argue that aligning with the medical community will only serve to further pathologize intersexuality (p. 92).¹¹

Greenberg also examines the intersex movement as an identity movement, similar to feminism and the gay rights movement (p. 94). She says that some intersex people self-identify as intersex, and believe that “intersex” should be considered a third sex category (p. 94). Other activists claim that intersex is a medical condition or a disorder, and therefore is not a proper candidate for an identity (p. 94). Those who support an identity politics approach are more likely to align with other identity groups like the LGBT community (p. 94). Other intersex advocates are reluctant to ally themselves with gay and transgender organizations, fearing that parents of intersex children will be more likely to choose surgery if they believe their child will grow up with an atypical sexual orientation or gender identity (p. 101). Some intersex advocates also believe that the LGBT movement has inappropriately co-opted intersex identity in order to strengthen their own claims for equality (p. 102).

Greenberg believes that examining the tensions between different social justice movements can provide useful information to intersex advocates who are interested in aligning themselves with other groups (p. 97). Early intersex advocates believed that feminist theory provided a useful framework for criticizing sex and gender norms, and it therefore seemed natural to align with feminist groups (p. 98). Perhaps surprisingly, many feminists have been reluctant to ally themselves with the intersex community (p. 98). Greenberg criticizes this reluctance, arguing that feminist opposition to female genital cutting closely resembles the intersex movement’s opposition to cosmetic genital surgery (p. 98). Furthermore, she argues that the traditional medical protocol reinforces harmful sex stereotypes, a primary concern of the feminist movement (p. 99).

Greenberg concludes with a discussion of the legal frameworks other social justice movements have used that may prove effective in advancing intersex rights (p. 107). She claims that lawsuits involving intersex people are likely to increase, and therefore it will become imperative to identify the legal strategy most likely to accomplish the intersex movement’s goals (p. 107). Greenberg examines three potential legal frameworks that could provide the basis for legal challenges on behalf of intersex individuals: human rights, disability rights, and sex discrimination (p. 106).

Only one human rights organization, the Human Rights Commission of the

¹¹ A related argument surrounds the use of the term “intersex.” Some activists recommend using the term “disorders of sex development” instead, while others believe that “disorder” is pejorative and would further stigmatize the intersex community (p. 92-93).
City of San Francisco, has specifically concluded that unnecessary cosmetic surgeries violate the human rights of intersex children (p. 110). However, “the Colombian Constitutional Court relied on the United Nations Convention on the Rights of the Child in determining that the current medical protocol does not adequately protect the fundamental human rights of intersex infants” (p. 111). Greenberg suggests that future courts may find that current medical practices violate certain provisions of the Convention, including the prohibition on discrimination against children on the basis of sex (pp. 111-112). Ultimately, however, Greenberg concludes that the Convention will be of limited use in the United States, since the country has not yet ratified the convention (p. 113).

Greenberg next looks at a disability rights model as a potential framework for protecting intersex rights (p. 113). Disability claims could be based on the Americans with Disabilities Act or on state statutes prohibiting discrimination on the basis of disability (p. 113). Greenberg recognizes that some intersex activists oppose the use of a disability framework, since they fear the potential of further stigmatization and pathologization of intersex individuals (p. 118). Greenberg responds to these concerns by explaining that, under a critical disability theory, “disabilities are only impairments if society is not structured so that those with disabilities are able to participate fully” (p. 118). She argues that the “disability” affecting intersex individuals is not an inherent disorder, but is rather created by the social pressure to conform bodies to a “normal” gender binary (p. 119). Once the stigma associated with being intersex has disappeared, intersex people will no longer need to appeal to a disability rights framework since the “perception that they are impaired and in need of fixing will have been debunked” (p. 119).

Finally, Greenberg examines the possibility of applying sex discrimination arguments to intersex individuals (p. 119). She explains that, although many federal and state statutes prohibit discrimination on the basis of sex, the term “sex” in these laws has not been fully developed (p. 119). Some courts have held that discrimination on the basis of gender role performance or gender identity constitutes sex discrimination, so it is possible that intersex advocates could successfully pursue sex discrimination claims as well (p. 121). Since the Supreme Court has held that Title VII prohibits discrimination on the basis of sex stereotyping, intersex advocates may be able to argue that cosmetic genital surgeries impermissibly enforce sex and gender norms (p. 124).

Although Greenberg recognizes the possibility of using any of these three frameworks (human rights, disability rights, or sex discrimination) to advance intersex interests, she ultimately concludes that the ideal outcome would be specific legislation that protects people with an intersex condition (p. 125). She points out that many jurisdictions have specifically extended protections based on sexual orientation and gender identity, so these statutes might also be amended to include intersex status (pp. 125-126). Regardless of which legal strategy intersex advocates ultimately employ, Greenberg concludes that their

efforts will be more likely to succeed if they can form effective alliances with other subordinated groups (p. 126).

Greenberg’s analysis in this section provides a solid foundation for those who are interested in pursuing legal claims relating to intersex status. However, given that this section will be the most important for intersex advocates, Greenberg could have pushed her analysis further in places. For example, in discussing sex discrimination claims, Greenberg focuses almost exclusively on sex stereotyping claims under *Price Waterhouse*. The other kind of sex discrimination addressed in Title VII claims, usually referred to as sex discrimination *per se*, prohibits discrimination that is literally on the basis of sex. Greenberg references this kind of sex discrimination claim only once, when she mentions a 1987 case in which a federal district court ruled that “hermaphrodites” are not protected under Title VII (p. 120).13 Given her short treatment of sex discrimination *per se*, it appears that Greenberg does not believe that intersex people can succeed in bringing this kind of sex discrimination claim. However, as Greenberg herself states throughout the book, the scientific understanding of sex has greatly expanded since the 1980s. It is possible that a modern court would hold that discrimination against intersex people is literally discrimination because of sex. It would be interesting and informative to read a more updated discussion on this point.

**Conclusion**

Despite the relatively minor issues identified in the previous sections, *Intersexuality and the Law* is an insightful overview of the legal challenges faced by intersex individuals. The book is not too theoretical or academic to appeal to a wide audience and is sufficiently thorough to satisfy those familiar with the topic. Greenberg deftly humanizes intersex issues in a way that is sure to compel and interest even those with no prior exposure to the topic, and readers who are familiar with the field are likely to benefit from Greenberg’s detailed legal analyses and the historical information she provides. Portions of the book do not delve as far into the details and arguments as an intersex advocate might hope, but it certainly paves the way for more thorough discussions in the future.

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