Introduction

Media interest in intersexuality has blossomed over the past decade. Stories about people with an intersex condition have been the focus of dozens of books, movies, television dramas, and documentaries. Similarly, in academia, intersexuality has moved from being a relatively obscure topic, examined in a handful of medical journals, to becoming the central topic of numerous books and articles in a variety of disciplines, including psychology, history, anthropology, and medical ethics.

Intersexuality has also become a hot topic in legal circles. In the past ten years, more than a hundred legal articles and books have included a discussion of intersexuality. Most of these publications do not focus on the issues that have a direct effect on the lives of people with an intersex condition. Instead, most of these publications have used the existence of intersexuality to support the expansion of rights of other sexual minorities, including members of the lesbian, gay, bisexual, and transsexual (LGBT) communities.

Understanding how the issues that are critical to people with an intersex condition can be conflated with the issues affecting other people who challenge sex and gender norms requires a basic understanding of the nature of intersexuality. The meaning of the term intersex has varied and the issue is still a topic of sometimes heated discussion. Although doctors and activists in the intersex community continue to debate exactly what conditions qualify as “intersex,” I am using the term in its broadest sense to include anyone with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female norm. Some intersex conditions involve an inconsistency between a person’s internal and external sexual features. For example, some people with an intersex condition may have female appearing external genitalia, no internal female organs, and testicles. Other people with an intersex condition may be born with genitalia that do not appear to be clearly male or female. For example, a girl may be born with a larger than average clitoris and no vagina. Similarly, a boy
may be born with a small penis and a divided scrotum that resembles labia. Some people with an intersex condition may also be born with a chromosomal pattern that does not fall into the binary XX/XY norm.

Not all intersex conditions are apparent at the time of birth; some conditions are not evident until a child reaches puberty and fails to develop typical male or female traits. For example, the condition may be discovered when a girl reaches puberty and fails to menstruate.

Because experts do not agree on exactly which conditions fit within the definition of intersexuality and some conditions are not evident until years after a child is born, it is impossible to state with precision exactly how many people have an intersex condition. Most experts agree that approximately 1–2 percent of people are born with sexual features that vary from the medically defined norm for male and female. Approximately one in fifteen hundred to one in two thousand births involve a child who is born with genitalia so noticeably atypical that a specialist in sex differentiation is consulted and surgical alteration is considered.²

Some people are confused about how intersexuality compares to transsexuality and transgenderism. The meaning of these latter two terms also varies. The term transsexual is commonly used to refer to a person who does not have an intersex condition whose gender self-identity does not match the sex assigned at birth. The term includes preoperative, postoperative, and nonoperative transsexuals. Many people use the word transgender as an umbrella term that encompasses anyone who transgresses sex or gender boundaries. The term transgender may include transsexuals, transvestites, or others whose dress or behavior fails to conform to gender norms.

Society and legal institutions frequently confuse intersexuality and transsexuality and inappropriately conflate the discrete concepts of sex, sexual orientation, gender presentation/gender role,³ and gender identity. Table 1 illustrates prevailing societal presumptions about men and woman and the groups that directly challenge those assumptions.

Society presumes that men display the attributes in the first column and women display the characteristics in the second column. In other words, men are presumed to have male anatomy, to be sexually attracted to females, to appear masculine and fulfill male roles, and to self-identify as men. Women are presumed to have female anatomy, to be sexually attracted to men, to be caregiving and feminine, and to self-identify as women. These presumptions are not true for millions of people and they are being challenged by people with an intersex condition, gays, lesbians, bisexuals, feminists, men and women who do not conform to gender stereotypes, and transsexuals.
The existence of people with an intersex condition whose bodies combine aspects of male and female anatomy provides a perfect rhetorical device for challenging traditional notions of sex, gender, and sexual orientation. Because intersex bodies fail to fit neatly into the traditional male/female binary construct, intersexuality can be used to call into question our basic notions of what it means to be a man or a woman. If we cannot easily establish what makes a man a man or a woman a woman, feminists can assert that the rationale for any sex based distinctions is seriously undermined. Furthermore, if society cannot straightforwardly differentiate men from women, then gays, lesbians, and bisexuals can argue that same-sex relationships cannot be legitimately condemned. Finally, if gender identity does not necessarily develop in concert with sexual anatomy, as recent studies of children with an intersex condition indicate, then transsexuals’ claims for legal recognition of their self-identified gender are bolstered. In other words, the existence of people with an intersex condition can be used to advance equality claims by feminists, gays, lesbians, bisexuals, and transsexuals. When other groups use the existence of intersexuality to bolster their claims, they sometimes fail to consider the effects that these arguments will have on members of the intersex community.

### Table 1

**Assumptions about Males and Females and the People Who Challenge Those Assumptions**

<table>
<thead>
<tr>
<th>Sexual/ reproductive anatomy</th>
<th>Males: assumptions</th>
<th>Females: assumptions</th>
<th>Challengers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual orientation</td>
<td>Toward women</td>
<td>Toward men</td>
<td>Gays, lesbians, and bisexuals</td>
</tr>
<tr>
<td>Gender presentation/gender role</td>
<td>Masculine</td>
<td>Feminine</td>
<td>Feminists and men and women who fail to conform to gender stereotypes</td>
</tr>
<tr>
<td>Gender identity</td>
<td>Male</td>
<td>Female</td>
<td>Transsexuals</td>
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Activists working to enhance the rights of people with an intersex condition and advocates working on behalf of other sexual minorities, especially transsexual activists, share the common goal of eliminating harmful practices based on sex and gender stereotypes. In addition, both groups seek to enhance the right to sexual self-determination. The primary focus of each group differs, however.

The primary goal of the intersex movement is to eliminate or decrease the number of medically unnecessary cosmetic genital surgeries being performed on infants with an intersex condition. Intersex advocates believe that these medical interventions often result in physical and emotional trauma. They argue that no evidence exists that these surgeries are beneficial. Thus, they believe that these surgeries should not be performed on children and should only be undertaken with the informed consent of patients when they reach an age at which they can fully understand the risks and benefits and can decide for themselves whether they want to undergo cosmetic genital surgery.

The primary focus of the transsexual movement is to eliminate discriminatory practices that deny transsexuals the right to be treated as their self-identified sex. Although transsexual activists disagree about whether the ultimate goal should be eliminating entirely the gender binary norm or allowing transsexuals to freely cross the gender divide, transsexual activism has developed as an identity movement. Transsexual activists have aligned themselves closely with gay and lesbian organizations. They believe that the nature of the discrimination they suffer stems from the same animus directed against gays and lesbians. Their goal is to end discriminatory practices against people whose gender behavior and sexual practices do not conform to societal norms.

The intersex activist movement is still in its infancy and is in the process of developing its advocacy strategies. Some people in the intersex movement feel closely allied to LGBT activist groups. They believe that the societal and legal issues facing people with an intersex condition are similar to the issues confronting other sex and gender nonconformists. In addition, they think of “intersex” as an identity, similar to gay, lesbian, and transsexual identities. They believe that joining forces with LGBT organizations will assist people with an intersex condition in two ways. First, LGBT groups can offer the emotional support that a group identity movement can provide. In addition, some intersex activists view the legal issues facing LGBT people and people with an intersex condition as closely related and believe that working with the larger, well established LGBT organizations will help enhance the rights of people with an intersex condition.
Others in the intersex community do not feel closely allied with the LGBT movement. They believe that the primary harm threatening people with an intersex condition is the medical practice of surgically altering infants and cloaking the treatment in shame and secrecy. They recognize that the current medical protocol is based on stereotyped gender assumptions and heteronormativity. They believe, however, that altering the current medical protocol for the treatment of infants with an intersex condition can best be advanced by focusing on issues emphasized by disability rights advocates, including the right to autonomy and bodily integrity. These intersex advocates believe that the legal issues confronting people with an intersex condition are distinct from the primary focus of the LGBT movement and that forming alliances with LGBT groups may actually hinder their goal of ending surgeries on infants with an intersex condition. Some of these activists believe that adopting the strategies of the critical disability movement will be a more effective tool to protect people with an intersex condition.

Although scholars in a variety of disciplines, including medical ethics, history, psychology, sociology, and anthropology, have published books on intersexuality, none has examined the role that the law can play in enhancing the lives of people with an intersex condition. This book fills that gap. It explores the potential effectiveness of using legal challenges to accomplish the intersex movement’s goals. It discusses the legal frameworks used by other social justice movements that have effectively brought challenges to discriminatory practices and explores whether the intersex movement can form mutually beneficial alliances with these other movements and use similar legal strategies.

Part I focuses on the medical practices that attempt to eliminate evidence of intersexuality by surgically altering infants so that they conform or blend into a medically created definition of normal genitalia. Chapter 1 explains the sex, gender, and disability assumptions underlying the current medical protocol. Although most intersex conditions are not disabling, pose no physical risk, and require no medical intervention, infants with an intersex condition are often subjected to invasive cosmetic surgeries to alter their genitalia so that their bodies conform to a binary sex norm. For example, female infants who are born with a clitoris that is considered too large are frequently subjected to clitoral reduction surgery. Similar interventions are undertaken on males whose penises appear atypical. These surgeries provide no medical benefit and have not been proven to enhance the child’s psychological well-being, but they often lead to a number of problems. These surgeries may render women incapable of experiencing an orgasm. They may also result
in infection, scarring, incontinence, and other severe physical complications. Many medical experts, scholars, and people who have been subjected to these surgeries assert that these medical procedures often cause stigma, psychological trauma, and lifelong physical complications, without proof of any benefit to the child. They have advocated in favor of a moratorium on these medically unnecessary cosmetic surgeries.

Chapter 2 examines the legal approaches that could be adopted to successfully challenge these medical practices. It analyzes whether parents, in consultation with doctors, should have the legal power to consent to genital modification surgery on behalf of their children with an intersex condition. The Constitutional Court of Colombia, the only high court to address this issue, has placed severe restrictions on parents’ ability to consent to cosmetic genital surgery because of concerns that parents may be discriminating against their own children. This chapter discusses the potential for courts in the United States and other countries to adopt a similar approach to ensure that the child’s constitutional rights are adequately protected.

Part II of this book explores the areas in which the concerns of people with an intersex condition and the concerns of transsexuals may converge. It examines the state’s role in determining a person’s legal sex for those people who do not conform to sex and gender stereotypes. If the intersex movement succeeds in stopping medically unnecessary cosmetic surgeries, adults with an intersex condition may face the same legal obstacles that currently confront transsexuals. Chapter 3 provides an overview to the subjects discussed in this part.

Chapter 4 examines the most litigated area related to sex determination: establishing a person’s sex for purposes of marriage. Recent court decisions have adopted diverse and contradictory approaches. Some states make this determination by relying on biological factors present at birth, including chromosomes, genitalia, and the ability to beget or bear children. Courts in these states typically find that a person’s legal sex is permanently established at birth. Other states focus on the sex indicators that exist at the time a person seeks to marry and place a greater emphasis on the gender role in which the person is living. These states typically rule that legal sex may be different from the sex assigned at birth. Therefore, the legal sex of a person with an intersex condition or a transsexual may vary depending on the state in which the issue is litigated. Chapter 4 discusses these contradictory rulings that could potentially lead to the anomalous result that a person with an intersex condition or a transsexual could legally marry a man in some states, legally marry a woman in other states, and potentially be barred from marrying at all under some state definitions of male and female.
Chapter 5 discusses identity documents and analyzes whether people with an intersex condition and transsexuals should be allowed to create their own legal identity through the use of the name and sex indicator they choose on their official documents. As in the other areas discussed in this section of the book, courts and legislatures have adopted a kaleidoscope of approaches. Most states allow birth records and other identity documents to be amended so that the name and sex indicator correspond to the person’s gender self-identity. In contrast, some states do not allow identity documents to be modified to reflect a sex or name change. In addition, the federal government has adopted rules for federal documents that vary from the rules adopted in the states. Thus, people may have some of their official documents indicate that they are male, while other documents indicate that they are female. This chapter examines the different viewpoints that have led to these contradictory outcomes.

Chapter 6 discusses sex classification for purposes of determining appropriate housing and restroom use. Courts have been asked to determine the sex of a person with an intersex condition or a transsexual for the purpose of establishing appropriate housing in prisons and bathroom use in public facilities. In making such determinations, courts have considered the privacy interests and safety concerns of the other people sharing the facility. This chapter explores these issues and analyzes whether society’s sense of propriety and morality should be used to determine another person’s right to sexual self-determination.

Part III explores how the intersex movement can most effectively frame legal arguments and build alliances with other progressive social justice movements to help advance its goals. Chapter 7 introduces the issues discussed in this part. Chapter 8 discusses the birth of the intersex movement and the development of its goals and strategies. Chapters 9 and 10 explore whether the intersex movement could advance its goals by developing legal arguments in conjunction with other social justice movements. Chapter 9 sets the stage by providing a history of the development of social justice movements that focus on discrimination based on sex, gender, sexual orientation, gender identity, and disability. It examines the problems that have arisen among the feminist, gay/lesbian/bisexual, transsexual, and intersex movements. Chapter 10 builds on chapter 9 by examining the legal arguments that other social justice movements have developed and discusses whether the intersex movement could effectively use similar approaches. The book concludes by discussing the benefits of forming mutually beneficial alliances with other movements challenging similar discriminatory actions.
The intersex movement is at a critical crossroads in its development. It could align itself with and frame its legal arguments in terms similar to those used by organizations fighting for sex and gender equality, it could adopt a critical disability framework and focus on the right to bodily autonomy, or it could adopt some combination of the two approaches. The goal of this book is to help shed light on which legal strategies may most effectively end discriminatory practices against people with an intersex condition and potentially assist other marginalized groups.