"They Treated Me Like a Lab Rat": The Legal Creation of a False Gender Binary and the Ostracism of Intersex Individuals Through Gender-Affirming Care Bans

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I. INTRODUCTION

A. The Story of M.C. Crawford

When M.C. Crawford was sixteen months old and in the legal custody of the South Carolina Department of Social Services (SCDSS),

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M.C. was given an "irreversible, invasive, and painful" sex assignment surgery.[1] From birth, M.C. presented his doctors with what they saw as a dilemma; M.C. was born with one testicle, one ambiguous gonad containing both testicular and ovarian tissue, "'extremely elevated' testosterone levels, a phallus, a scrotalized labia, a short vagina, and no uterus."[2] M.C. was diagnosed with "ovotesticular difference/disorder of sex development."[3] Plainly, M.C. was intersex. Initially, M.C. was identified as male in hospital records, but his doctors later referred to M.C. as female, with no clear medical reason for this change.[4] Shortly after birth, SCDSS gained custody of M.C., giving SCDSS the power to make medical decisions for M.C., and while in the state's custody, M.C. underwent extensive medical examinations, and ultimately, upon his doctors' recommendations, had genitoplasty surgery to remove his typically male genitalia and create typically female genitalia.[5]

Later in childhood, M.C. came to identify as male, and ultimately, through his adoptive parents, sued the doctors that recommended and performed the genitoplasty.[6] In the suit, M.C. argued that the doctors' actions violated his constitutional right to procreation and his constitutional rights to bodily integrity and privacy.[7] According to M.C., the surgery was not medically necessary and doctors did not adequately inform his caregivers of the surgical risks.[8] Despite having "no compelling biological reason to raise M.C. as either male or female," and the doctors' knowledge that they could postpone the surgery which carried risks of "complete loss of sexual function, scarring, loss of male fertility, gender misassignment, and lifetime psychological distress," his doctors recommended the genitoplasty anyway.[9] Ultimately the case settled out of court, but it was a landmark moment for intersex individuals and advocates, as this was the first time an intersex individual openly challenged the norm of medically unnecessary genital surgeries on infants.[10]

1. M.C. v. Amrhein, 598 F. App'x 143, 146 (4th Cir. 2015).
2. *Id.* at 145.
3. *Id.*
4. *Id.*
5. *Id.* at 145-46.
6. *Id.* at 145.
7. *Id.* at 146, 148.
8. *Id.* at 146.
9. *Id.*
10. Azeen Ghorayshi, *A Landmark Lawsuit About an Intersex Baby's Genital Surgery Just Settled for $440,000*, BUZZFEED NEWS (July 27, 2017), https://www.buzzfeednews.com/article/azeenghorayshi/intersex-surgery-lawsuit-settles.

M.C.'s experiences are not unique.[11] Recently, a growing number of intersex individuals have spoken out about the life-long effects of having nonconsensual, medically unnecessary surgeries as infants and young children, which were often performed in an attempt to "normalize" the child.[12] While genital surgeries on intersex youth are less common than they once were, these nonconsensual, medically unnecessary surgeries are still recommended by doctors for around one in two thousand infants, and these surgeries still occur on infants and children who are too young to comprehend—let alone consent to—these surgeries.[13]

B. The Rise in Gender-Affirming Care Bans and Anti-Transgender Legislation and Their Effects on Intersex Children

Recently, there has been a sharp increase in state legislation to limit or ban gender-affirming care for transgender youth.[14] These bills make it extremely difficult or impossible for transgender youth to receive treatments like puberty blockers, hormone therapy, and other medical interventions.[15] Despite what seems like a total ban on gender-affirming care, many of these bills have an explicit exception, allowing intersex children to receive medical services related to their gender.[16] Many of these bills, along with stating that children with a "medically verifiable disorder of sex development" can receive treatment, specify that the same surgeries performed on intersex children are not considered "gender transition procedures," even though they would be considered so if performed on a non-intersex individual.[17]

While it may initially appear that these bills could potentially give intersex youth the power and freedom to decide their own gender-related medical care, these exceptions do not actually empower intersex youth.

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11. "*I Want to Be Like Nature Made Me" Medically Unnecessary Surgeries on Intersex Children in the US*, Human Rights Watch (July 25, 2017), https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us.

12. *Id.*

13. *Id.*

14. Minami Funakoshi & Disha Raychaudhuri, *The Rise of Anti-Trans Bills in the US*, REUTERS (Aug. 19, 2023), https://www.reuters.com/graphics/USA-HEALTHCARE/TRANS-BILLS/zgvorreyapd/.; *Mapping the Intersex Exceptions*, Human Rights Watch, https://www.hrw.org/feature/2022/10/26/mapping-the-intersex-exceptions.

15. *Id.*

16. *US: Anti-Trans Bills Also Harm Intersex Children*, Human Rights Watch (Oct. 26, 2022), https://www.hrw.org/news/2022/10/26/us-anti-trans-bills-also-harm-intersex-children; Kate Sosin, *Most State Bans on Gender-Affirming Care for Trans Youth Still Allow Controversial Intersex Surgery*, THE 19TH (Mar. 23, 2023), https://19thnews.org/2023/03/bills-gender-affirming-care-trans-intersex-youth/; *see generally* Ala. Code § 26-26-4.

17. *Id.*

The proponents of these bills frequently argue that the point of these limitations or bans on gender-affirming care for minors is to ensure that minors do not make any uninformed, dangerous decisions and to ensure that a child's parents or caregivers are not forcing them to medically transition.[18] Further, proponents of these bills also claim that transgender youth should not receive gender-affirming care as minors because they are too young to know if this decision is something they want—something that is truly the individual's choice, uninfluenced by outside factors. Additionally, another frequent claim is that the bills serve to ensure that children, whether cisgender or transgender, are not being coerced by their parents or other individuals into receiving gender-affirming care, with some calling gender-affirming care for minors "child abuse"[19] For example, at a recent hearing about transgender youth, Louisiana Representative and Speaker of the House Mike Johnson stated, "a parent has no right to sexually transition a young child . . . [our] American legal system recognizes the important public interest in protecting children from abuse and physical harm. No parent has the right to injure their children."[20]

While using the guise of wanting to ensure that children have a choice in their medical care and gender expression and are not unnecessarily medically transitioning solely at the whim of their parents, these bills simultaneously take away the power of choice from both transgender youth and intersex youth by creating an exception for, or perhaps even encouraging, caregivers of intersex infants and children to seek genital surgeries before the child is old enough to consent. Furthermore, despite the frequent claim that anti-gender-affirming care bills serve to, in the words of Representative Marjorie Taylor Greene, "end the genital mutilation of kids" by limiting or preventing gender-affirming medical interventions on children, these exceptions coupled with anti-transgender bills at large encourage the surgical "normalization" of the bodies of intersex children.[21] These exceptions in gender-affirming

18. Ariana Figueroa, *U.S. Rep Mike Johnson: Parents Have 'No Right to Sexually Transition a Young Child'*, LOUISIANA ILLUMINATOR (July 27, 2023), https://lailluminator.com/2023/07/27/parents-have-no-right-to-allow-their-childrens-gender-transition-republicans-say/; Karen Brooks Harper, *His Public Custody Battle Helped Ignite a Movement Against Transgender Health Care for Kids. Will it Carry Him to the Texas House?*, TEXAS TRIBUNE (Mar. 14, 2022), https://www.texastribune.org/2022/03/14/jeff-younger-transgender-care-house/.

19. Harper, *supra* note 18.

20. *Id.*

21. Matt Lavietes, *New House Speaker's Views on LGBTQ Issues Come Under Fresh Scrutiny*, NBC NEWS (Oct. 26, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/mike-johnson-house-speaker-lgbtq-views-scrutiny-rcna122317.

care bans do nothing to ensure that intersex youth are consenting to or involved in their own care, and, along with the general trend of anti-transgender legislation and rhetoric which force the existence of a legal gender binary, these exceptions ultimately encourage forced surgeries on intersex infants and children before the child is old enough to be involved in their own care.

By creating exceptions for intersex youth to receive genital surgeries, even though it may initially seem like intersex children could have more power in choosing their gender-affirming care, these bills limit the rights of intersex children to give consent and drive their own medical care. If proponents of anti-gender-affirming care bills want to ensure that children are only receiving the "right" care—care that the individual is fully certain they need—then should there not be protections to ensure that intersex and transgender children both have the power to decide their own care? Instead, these bills, and anti-transgender legislation as a whole, while dehumanizing transgender children and preventing them from accessing life-saving and life-changing gender-affirming care, also put intersex children in a vulnerable position to receive surgeries they may not want or need that can cause a litany of long-term negative consequences because these bills put immense legal and societal pressure on parents and caregivers to make their children fit into a flawed, legal gender binary system.

For transgender youth, gender-affirming care is life-saving care, and gender-affirming surgeries rarely happen on transgender individuals under the age of eighteen.[22] But for intersex children, surgeries are not uncommon, particularly surgeries that children cannot consent to given their young age, so their doctors and caregivers must decide for them.[23] Intersex adults have spoken out about the long-term negative physical and mental consequences of these surgeries, ranging from chronic pain, infertility, and the need for hormones, to the mental distress that can occur if their parents or doctors choose wrong and their surgically created

22. Lindsey Tanner, *What Medical Treatments do Transgender Youth Get?*, A. P. (Apr. 22, 2022), https://apnews.com/article/science-health-mental-ce8f5a9ee53768af 03c3c65d5331045b; *Doctors Agree: Gender-Affirming Care Is Life-Saving Care*, AMER. C. L. UNION (Apr. 1, 2021), https://www.aclu.org/news/lgbtq-rights/doctors-agree-gender-affirming-care-is-life-saving-care; Kareen Matouk & Melina Wald, *Gender-Affirming Care Saves Lives*, Columbia University, Columbia University Department of Psychiatry (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives.

23. Julie Compton, *Intersex People Have Been Challenging 'Gender-Normalizing Surgery.' Doctors Are Starting to Listen*, NBC (Oct. 28, 2021), https://www.nbcnews.com/nbc-out/out-health-and-wellness/intersex-people-challenging-gender-normalizing-surgery-doctors-are-sta-rcna3815; *"I Want to Be Like Nature Made Me", supra* note 11.

genitalia does not align with their gender identity.[24] A transgender adolescent can actively participate in and drive their own gender-affirming care. Alternatively, an intersex infant or very young child, who is at the young age range when these surgeries are often performed, simply does not have that capacity yet.[25] Additionally, it was once commonplace for parents and doctors to hide from their intersex children the fact that they were intersex and to instead tell the child they were receiving surgeries for some other condition.[26] While a transgender adolescent is aware of their gender identity and sex assigned at birth and can use this information to make informed decisions about their medical care, intersex adolescents who had their condition hidden from them and received surgery under the guise of a different condition could not give full informed consent.

For intersex individuals, especially intersex youth, anti-transgender bills as a whole pose a special threat to societal acceptance of intersex individuals. Beyond legislation that bans gender-affirming care for transgender youth, anti-transgender bills by and large send a message to intersex youth that they do not belong in society as they are born and should be "normalized." Anti-transgender bathroom bills, sports bills, and gender-affirming care bills reinforce an inherently false strict male-female binary.[27] But these bills are built upon a false premise—this male-female binary does not truly exist in the natural world. Intersex individuals have existed as long as humans have existed, and they are born with a variety of physical characteristics that inherently do not fit into a rigid binary system.[28] Anti-transgender bills are based on the false, existence of a rigid medical and scientific sex and gender male-female binary. Using this false premise of a strict medical sex binary, these bills create a strict legal sex binary, and this binary prevents intersex individuals from comfortably, safely, and legally using bathrooms, playing sports, having medical

24. *"I Want to Be Like Nature Made Me", supra* note 11.

25. *"I Want to Be Like Nature Made Me"*, *supra* note 11; February 2023 Resolution of ABA House of Delegates [hereinafter ABA Resolution]; https://www.americanbar.org/news/reporter_resources/midyear-meeting-2023/house-of-delegates-resolutions/511/
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26. *"I Want to Be Like Nature Made Me"*, *supra* note 11.

27. Anne Branigin, *Intersex Youths Are Also Hurt by Anti-Trans Laws, Advocates Say*, WASH. POST (July 16, 2022), https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/; Jenna Barackman, *'Caught in the Crossfire:' How Anti-Transgender Legislation Affects Intersex Kansans*, KANSAS CITY STAR (May 5, 2023), https://www.kansascity.com/news/politics-government/article272893730.html.

28. *Intersex*, Cleveland Clinic (July 19, 2022), https://my.clevelandclinic.org/health/articles/16324-intersex.

autonomy, and generally participating in life. If scientific and medical professionals acknowledge that sex and gender do not and cannot exist in a strict binary, then how can legislators attempt to write intersex kids out of existence by enforcing a strict legal male-female binary? Anti-transgender bathroom and sports bills force intersex youth to fit in or be forced out, and bills that ban gender-affirming care while having exceptions for intersex youth create a system for intersex youth to be medically "normalized" and forced to "fit in" without their consent.

The pervasive culture surrounding intersex individuals and genital surgeries is one of shame, secrecy, and forced normalization that has deprived many intersex children of the ability to make fully informed decisions about their medical care and their lives generally.[29] Anti-transgender bills as a whole and intersex exceptions within gender-affirming care bans reinforce this culture of shame and forced normalization by excluding intersex youth from the functions of daily life and limiting the medical and bodily rights of intersex youth.

II. WHAT IS INTERSEX?: THE HISTORY OF INTERSEX MEDICAL INTERVENTIONS

According to the Cleveland Clinic, intersex individuals are people who are born with chromosomes or reproductive or sexual anatomy that "[does not] fit into an exclusively male or female (binary) sex classification."[30] Intersex disorders, also referred to as medically verifiable disorders of sex development, present in a variety of ways. For example, while individuals assigned male at birth typically have XY chromosomes, and individuals assigned female at birth typically have XX chromosomes, intersex individuals can have a mix of chromosomes, such as XXY, or have some cells with XY chromosomes and others with XX.[31] Additionally, intersex individuals may have both ovarian and testicular tissue like M.C., ambiguous internal and external reproductive and sexual organs that have traits of both typically male and female genitalia, or hormone levels that are more closely associated with one sex while having external genitalia that is typical of another sex.[32] While there is little research available about the frequency of intersex conditions, it is estimated that up to about two percent of the population is intersex, with about one in one hundred Americans having an intersex condition.[33]

29. *"I Want to Be Like Nature Made Me"*, *supra* note 11.
30. Clevland Clinic, *supra* note 28.
31. *Id.*
32. *Id.*
33. *Id.*

Additionally, it is possible that this estimate could increase in the future, as research into intersex conditions is a newer, evolving field, and there is debate about medical conditions that may or may not be considered an intersex condition.[34]

Historically, intersex infants and young children have often received surgical intervention to align their reproductive anatomy with what is typical of their assigned sex; even if these surgeries were not medically necessary, they were considered vital to the psychological wellbeing of the child.[35] Beginning in the 1950s, it was common for intersex infants and children to receive medically unnecessary surgeries to "normalize" their genitalia.[36] During this time, the dominant psychological theories on intersex individuals argued that the main determinant of gender was socialization.[37] Under this theory, it was believed the gender of intersex individuals could be successfully assigned male or female at birth, so long as the child was socialized under the corresponding gender norms.[38] Thus, this theory was used to justify genital "normalization" surgeries on intersex infants because it was believed that with the proper socialization, intersex children would comply with their assigned sex.[39] Further, for most of the history of genital surgeries on intersex children, it was believed that intersex children would be psychologically damaged if the child did not have "normal" genitalia.[40] "Normalizing" the genitals of intersex children is still a significant driver of genital surgeries on intersex children, with proponents of these surgeries still arguing that it is ideal for the psychosocial well-being of the child.[41] For example, a common justification for performing genitoplasty to create a penis is that it will allow an intersex child who has been assigned male to stand while urinating, an experience that supporters of genital surgeries say is small but important for the child to feel normal.[42]

34. Kay Aranda & Laetitia Zeeman, *A Systematic Review of the Health and Healthcare Inequalities for People with Intersex Variance*, INT'L J. OF ENV'T RSCH. AND PUB. HEALTH (Sept. 8, 2020), https://doi.org/10.3390/ijerph17186533.

35. *"I Want to Be Like Nature Made Me", supra* note 11; *What's the History Behind the Intersex Rights Movement?*, *in* INTERSEX SOCIETY OF NORTH AMERICA, https://isna.org/faq/history/.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *"I Want to Be Like Nature Made Me", supra* note 11.

41. *Id.*

42. *Id.*

In addition to these early-in-life surgeries that prevented intersex children from having a say in their care, many intersex individuals had their conditions completely concealed from them well into adulthood, further preventing them from making truly informed care decisions later in life and often leading to feelings of distress.[43] It used to be quite common for parents and doctors to decide to withhold the fact that a child is intersex, believing this would help the child live a more normal life.[44] In addition to this goal of hoping to ensure a normal life, intersex adults have stated that many of their parents and doctors withheld this information because "everybody [felt] uncomfortable with how [their] body was."[45]

Because of the shame and stigma around intersex conditions and intersex surgeries, many intersex individuals, if they were old enough to comprehend that they were having some sort of surgery, often were not told the true nature of their procedures.[46] Instead, intersex youth were frequently told by their parents and doctors that they were being treated for some other health condition, such as cancer, when the youth was actually being surgically sterilized.[47] For example, in 1975, Patty, an intersex woman, underwent surgical sterilization and clitoral reduction without her knowledge. Patty was unaware that she was intersex; instead, her parents told her she was having surgery to remove cancer cells.[48] Patty later said of the experience, "it was clear to me that there was a lot of lying, but it made no sense to me. If there were pre-cancerous cells in there, you take them out. What's the rest of this secretive behavior?"[49] Further, Patty's doctors reinforced this veil of secrecy around her surgery and intersex condition. Her doctor told Patty to "be careful, and that unless [she] was seeing a specialist, not to tell them anything about this procedure—'they won't understand.'" Patty said these experiences impressed on her that "something was horrifically wrong with [her] that we shouldn't talk about."[50]

For some intersex individuals, this concealment of their conditions led to further physical health problems or significant mental distress. In the 2017 study "I Want to Be Like Nature Made Me" about the

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

experiences of intersex individuals who received nonconsensual, non-medically necessary surgeries as infants and young children, several intersex adults recounted the toll that this concealment, done in attempt to give them a normal happy life, took on their mental health.[51] In the study, Ruth, who did not know she was intersex until middle age despite receiving multiple surgeries, said of her childhood:

> Doctors always deflected my questions and stonewalled me when I asked why I had so many appointments. I developed PTSD and dissociative states to protect myself while they treated me like a lab rat, semi-annually putting me in a room full of white-coated male doctors, some of whom took photos of me when I was naked.[52]

This culture of secrecy extends far beyond childhood for intersex individuals. Even when a patient is well into adulthood and has a right to their own medical information, doctors have refused access to the patient's own medical records.[53] As an adult, Ruth experienced a medical emergency that necessitated vaginal repair surgery, at which point her then-doctor realized something was different and asked Ruth for her childhood medical records.[54] However, when Ruth requested her medical records, her childhood doctor refused to release them.[55] Ultimately, Ruth only learned of her intersex condition after breaking into the doctor's office and stealing her medical information.[56] The first page of Ruth's medical file stated, "male pseudo-hermaphrodite, complete female phenotype . . . patient does not know [diagnosis]."[57] After reading this, Ruth was overwhelmed with mixed emotions, but initially felt relieved and happy.[58] Ruth's joy quickly became anger though, calling her doctors and parents "fucking bastards," who "lied to me all the time," and stating, "I wish I had known there were others like me . . . why would you deliberately try to make a person feel like a freak?"[59] Finally, however, Ruth felt empowered by her newfound knowledge, saying "[this] feels good . . . they can't hide it from me, I can protect myself now."[60]

51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

Currently, even though these surgeries are still quite common and there is increasing acceptance of intersex individuals, many doctors are unwilling to openly discuss the surgeries of intersex individuals, and their medical care is largely considered taboo. In "I Want to Be Like Nature Made Me," an endocrinologist specializing in intersex conditions stated:

> I've gone to a number of the [intersex] Continuing Medical Education days, and if you're in a group [with] physicians and you say "who would do surgery on this child?," no one raises their hand. And then if you look at [the data] . . . surgery is happening on almost 100 percent of these kids. But when you go to meetings no one says it. I think no one's reporting what's actually happening in the United States and I think it's really important to get an accurate representation of what's actually going on because . . . depending on who you're talking to you're getting a very different view.[61]

III. MODERN PERCEPTIONS OF INTERSEX INDIVIDUALS AND GENITAL SURGERIES

A. The Rise of Intersex Advocacy Groups

While genital surgeries on intersex children are less common than they once were, these surgeries and the culture of shame and secrecy continue for intersex children, their parents, and their doctors. Notwithstanding this, discomfort surrounding discussions of intersex people has begun to lessen, and in the 1990s, intersex advocacy began to blossom, providing intersex individuals, their parents, and their doctors with emotional, legal, and medical support.[62] In 1993, intersex advocate Cheryl Chase founded the Intersex Society of North America (ISNA), which initially began as a support group for intersex individuals who experienced medically unnecessary, nonconsensual genital surgeries as children.[63] ISNA quickly grew from a peer support group to an advocacy group.[64] Initially ridiculed by medical professionals, ISNA has become a significant source for intersex education, developing intersex-focused curriculums for medical schools and fostering increased public education about intersex conditions.[65]

61. *Id.*
62. INTERSEX SOCIETY OF NORTH AMERICA, *supra* note 35.
63. *Id.*
64. *Id.*
65. *Id.*

Shortly after the founding of ISNA, the first and primary legal advocacy group for intersex people was founded.[66] In 2006, attorney Anne Tamar-Mattis began the intersex advocacy group interACT, previously known as Advocates for Informed Choice, with the "mission of ending harmful medical interventions on intersex children."[67] Largely because of ISNA, there was already an established history of organizations that focused on intersex peer support, awareness, and advocacy in the medical community, but interACT was the first legal advocacy group for the rights of intersex children.[68] Since its inception, interACT has been heavily involved and instrumental in the creation of and advocacy for medical-legal protections for intersex children.[69]

Further, interACT has condemned medically unnecessary, nonconsensual genital surgeries performed to cosmetically "normalize" the bodies of intersex children.[70] interACT's director of law and policy has likened these surgeries to female genital mutilation, explaining,

> [we] don't condone female genital mutilation, nor should we condone the medically unnecessary, deeply harmful interventions like clitoral reductions and sterilizations that constitute intersex genital mutilation . . . [T]his is an issue that transcends party lines because it is easy to understand the basic humanity of these vulnerable children.[71]

B. Modern Medical and Legal Critiques of Medically Unnecessary, Nonconsensual Genital Surgeries

Largely because of the increase in intersex advocacy and the studies they prompted about intersex individuals, some hospitals and professional medical groups have condemned medically unnecessary genital surgeries on intersex infants.[72] In 2020, The Ann & Robert H. Lurie Children's

66. *Mission and History*, interACT, https://interactadvocates.org/about-us/mission-history/.

67. *Id.*

68. *Id.*

69. *Intersex Legislation and Regulation*, interACT, https://interactadvocates.org/intersex-legislation-regulation/; *Intersex Court Cases*, interACT, https://interactadvocates.org/intersex-in-the-courts/.

70. *Mission and History*, *supra* note 67.

71. Susan Miller, *California Becomes First State to Condemn Intersex Surgeries on Children*, USA TODAY (Aug. 28, 2018), https://www.usatoday.com/story/news/nation/2018/08/28/intersex-surgeries-children-california-first-state-condemn/1126185002/.

72. Ashley Pria Persaud, *US Hospital to Stop Harmful Intersex Surgeries on Children*, Human Rights Watch (Oct. 29, 2020), https://www.hrw.org/news/2020/10/29/us-hospital-stop-harmful-intersex-surgeries-children; Thomas Shanley et al., *Intersex Care at Lurie Children's and Our Sex Development Clinic*, Ann & Robert H. Lurie Children's Hospital of Chicago (July 28,

Hospital of Chicago ("Lurie Children's") was the first hospital in the United States to pledge to stop performing medically unnecessary surgeries on intersex children and apologize for the harms these surgeries caused.[73] The hospital issued a statement saying,

> Historically care for individuals with intersex traits included an emphasis on early genital surgery to make genitalia appear more typically male or female. As the medical field has advanced, and understanding has grown, we now know this approach was harmful and wrong. Ann & Robert H. Lurie Children's Hospital of Chicago and our Sex Development Clinic recognizes this truth. We empathize with intersex individuals who were harmed by the treatment that they received according to the historic standard of care and we apologize and are truly sorry.[74]

Further, in their statement, Lurie Children's acknowledged the role that intersex advocacy groups had in changing the hospital's policy, attributing the policy change to the "brave individuals, both those affected by these conditions and medical professionals who recognized the problems," who spoke out.[75] As a result of this advocacy, Lurie Children's policy now states that surgeries "with the sole goal of changing the appearance of genitalia," will not be performed unless "patients can participate meaningfully in making the decision for themselves, unless medically necessary."[76] Shortly after Lurie Children's announcement, Boston Children's hospital followed suit and is the only other hospital in the country to do so. Similar to Lurie Children's, Boston Children's stated it "will not perform clitoroplasty or vaginoplasty in patients who are too young to participate in a meaningful discussion of the implication of these surgeries, unless anatomical differences threaten the physical health of the child." Since Boston Children's and Lurie Children's announcements in 2020, only one other hospital system in the country, New York City Health and Hospitals, has followed suit.[77]

Similarly, medical groups in the United States oppose medically unnecessary, nonconsensual genitoplasty on intersex infants and

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2020), https://www.luriechildrens.org/en/blog/intersex-care-at-lurie-childrens-and-our-sex-development-clinic/.

73. Shanley, *supra* note 72.

74. *Id.*

75. *Id.*

76. *Id.*

77. Kyle Knight, *New York City Hospitals Prohibit Unnecessary Intersex Surgeries* (July 16, 2021), https://www.hrw.org/news/2021/07/16/new-york-city-hospitals-prohibit-unnecessary-intersex-surgeries.

children.[78] In 2018, the American Academy of Family Physicians (AAFP) issued a policy opposing non-medically necessary genital surgeries on intersex infants and children.[79] Specifically, the AAFP stated that "[s]cientific evidence does not support the notion that variant genitalia confer a greater risk of psychosocial problems."[80] Further, the AAFP stated that intersex individuals who were subjected to "genitalia-altering surgeries in infancy and early childhood without their consent" can experience a wide range of negative consequences, including "infertility, chronic pain, inaccurate sex/gender assignment, patient dissatisfaction, sexual dysfunction, mental health conditions, and surgical complications."[81] Additionally, the AAFP stated that, barring situations where there is a true, urgent, medically necessary reason for genital surgery, "elective genital surgeries should be delayed until intersex children are able to actively participate in the informed consent process."[82] Three former U.S. surgeons general have echoed this stance, stating that "there is insufficient evidence that growing up with atypical genitalia leads to psychological distress . . . . [W]hile there is little evidence that cosmetic infant genitoplasty is necessary to reduce psychological damage, evidence does show that the surgery itself can cause severe and irreversible physical harm and emotional distress."[83]

Further, human rights groups have largely condemned surgeries on intersex infants and children.[84] The United Nations Office of the High Commissioner for Human Rights (OHCHR) has stated explicitly that these surgeries on intersex infants are akin to torture.[85] According to the OHCHR, forced and coercive medical interventions are human rights abuses against intersex individuals, stating,

> Intersex children are frequently subjected to unnecessary surgical and other procedures for the purpose of trying to make their appearance conform to the binary sex stereotypes. These often irreversible procedures can cause permanent infertility, pain, incontinence, loss of sexual sensation, and

78. Kyle Knight, *US Medical Association Stands Against Unnecessary Intersex Surgeries*, Human Rights Watch (Sept. 17, 2018), https://www.hrw.org/news/2018/09/17/us-medical-association-stands-against-unnecessary-intersex-surgeries.

79. *Genital Surgeries in Intersex Children*, AMERICAN ACADEMY OF FAMILY PHYSICIANS (July 2018), https://www.aafp.org/about/policies/all/genital-surgeries.html.

80. *Id.*

81. *Id.*

82. *Id.*

83. *"I Want to Be Like Nature Made Me"*, *supra* note 11.

84. *Intersex People*, United Nations, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people.

85. *Id.*

> lifelong mental suffering, including depression. Regularly performed without the full, free and informed consent of the person concerned, who is frequently too young to be part of the decision-making, these procedures may violate their rights to physical integrity, to be free from torture and ill-treatments, and to live free from harmful practices.[86]

In addition to these harsh criticisms from intersex individuals, medical, and humanitarian experts, the American Bar Association (ABA) adopted a resolution opposing medically unnecessary surgeries on intersex infants and stressing the importance of informed consent.[87] The ABA stated it opposes "all federal, state, local, territorial, and tribal legislation, regulation, and agency policies that attempt to impose medical or surgical intervention on minors with intersex traits . . . without the minor's informed consent or assent."[88] Further, the ABA highlighted the necessity of consent for these surgeries, explaining that medically unnecessary surgeries on intersex infants "violates principles of informed consent, bodily autonomy, and self-determination."[89] Infants inherently cannot give informed consent.[90] While parents can make medical decisions for their children, the Chair of the ABA Commission on Youth at Risk explained that even though adults "assume we should make the decisions for children," it is better to wait until the child is old enough to decide their own medical care because "most of the time, they really do know—because they're in their own bodies."[91] Additionally, when parents consent to genital surgeries for their intersex children, these parents have to rely on assumptions about their child that carry significant consequences. Bria Brown-King, the engagement director of interACT, has explained that these surgical decisions are often based on "fear and ignorance," and require parents "to make a lot of assumptions about what gender they think their child would grow up to identify with and what type of body they think their child would want to have."[92]

86. *Id.*
87. ABA Resolution, *supra* note 25.
88. *Id.*
89. *Id.*
90. *Id.*
91. Kyle Knight, *American Bar Association Backs Intersex Autonomy*, HUM. RTS. WATCH (Feb. 9, 2023), https://www.hrw.org/news/2023/02/09/american-bar-association-backs-intersex-autonomy#:~:text=Now%20the%20ABA%20has%20made,or%20surgical%20intervention%20on%20minors; *The ABA Opposes Nonconsensual Surgeries on Intersex Children*, INTERACT (Feb. 10, 2023), https://interactadvocates.org/the-aba-opposes-nonconsensual-surgeries-on-intersex-children/.
92. Branigin, *supra* note 27.

As an alternative to a child providing informed consent, the ABA noted that depending on their age and maturity, children might be able to give their assent, but "children are not required to provide consent in the healthcare process."[93] Further, while parents can consent for their children, the ABA raised concerns about the ability of parents and caregivers "to provide true informed consent," when doctors recommend medical interventions that are not medically necessary.[94] This concern is due in part to "a traditional healthcare delivery system's procedures [which can cause] fear and shock on the part of new parents who all prioritize normalizing the gender binary over the long-term health effects on the infant or the autonomy of the individual to make their own healthcare decisions."[95]

IV. IMPACTS OF ANTI-TRANSGENDER LEGISLATION ON INTERSEX YOUTH

A. Exceptions in Gender-Affirming Care Bans

Since 2021, several states have introduced or enacted legislation to severely restrict or ban gender-affirming care for transgender minors, but many of these bills have explicit exceptions for intersex children.[96] These bills, which have names like the "Save Adolescents From Experimentation Act (SAFE Act)," and "Vulnerable Child Compassion and Protection Act;" prevent transgender youth from accessing a variety of gender-affirming care, including hormone treatments and surgical treatments.[97] Most of these bills, however, have an explicit exception for children with a "medically verifiable disorder of sex development," another term for intersex conditions, to receive these medical treatments that are otherwise banned.[98] Under these bills, the same surgeries and medical treatments that would be considered gender-affirming care for transgender youth are deemed not gender-affirming care when performed

93. ABA Resolution, *supra* note 25.

94. *Id.*

95. *Id.*

96. Minami Funakoshi & Disha Raychaudhuri, *The Rise of Anti-Trans Bills in the US*, REUTERS (Aug. 19, 2023), https://www.reuters.com/graphics/USA-HEALTHCARE/TRANS-BILLS/zgvorreyapd/.; *Mapping the Intersex Exceptions*, Human Rights Watch, https://www.hrw.org/feature/2022/10/26/mapping-the-intersex-exceptions.

97. Jeff McMillan et al., *Many Transgender Health Bills Came From a Handful of Far-Right Interest Groups, AP Finds*, A. P. (May 20, 2023), https://apnews.com/article/transgender-health-model-legislation-5cc4a7cb4ab69150f670d06fd0f361ab; Kim Chandler, *Explainer: What Do New Alabama Laws Say on Transgender Kids*, A. P. (Apr. 12, 2022), https://apnews.com/article/business-health-lawsuits-legislature-medication-ef5d8545d5a5028f80042d3d01e34822.

98. *Mapping the Intersex Exceptions*, *supra* note 14; Ala. Code § 26-26-4, *supra* note 16.

on intersex children.[99] Many of these bills are similar or identical in their language, as the majority of them are based off of model legislation from the conservative interest group the Family Research Council.[100] According to the organization's director of family studies, these SAFE acts "give[] minors a chance to experience development before imposing lifelong . . . surgical procedures that increasingly show evidence of psychological and physiological harm."[101] Because many of these gender-affirming care bans are virtually identical, this paper will focus on the Alabama as an example, as Alabama was one of the first states to enact a gender-affirming care ban for transgender youth that contained an exception for intersex children.

In 2022, Alabama enacted the Alabama Vulnerable Child Compassion and Protection Act. The act states that:

> No person shall engage in or cause any of the following practices to be performed upon a minor if the practice is performed for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex.[102]

The banned practices include prescribing or administering puberty-blocking medications, hormone replacement therapy, sterilization surgeries, "surgeries that artificially construct tissue with the appearance of genitalia that differs from the individual's sex," and removal of any "healthy or non-diseased body part or tissue."[103] Additionally, violation of the act is punishable as a felony.[104] However, the act contains an exception for children with "a medically verifiable disorder of sex development."[105] The ban created by the act does not apply when the procedures are being performed on an intersex child to "treat" their disorder of sex development.[106] In defending this ban, Alabama has stated that the ban "serves the compelling [state] interest of protecting children from unproven, life-altering medical interventions."[107] While the state was referring to gender-affirming care for transgender adolescents as "unproven," the medical and surgical procedures that are designated as

99. Ala. Code § 26-26-4, *supra* note 16.
100. McMillan, *supra* note 97.
101. *Id.*
102. Ala. Code § 26-26-4, *supra* note 16.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1127 (11th Cir. 2023).

"unproven" medical treatments for transgender adolescents are the same medical and surgical procedures that are widely accepted as the norm or the ideal standard for intersex infants and children.[108] Despite the risks of medically unnecessary, nonconsensual genital surgeries for intersex children, these surgeries are openly accepted in the language of these bills when considering intersex children, but the same gender-assignment surgeries and less permanent treatments are condemned when performed on consenting transgender children.

The exceptions for intersex children in these gender-affirming care bans are not only hypocritical but are likely also harmful for intersex children. Countless intersex individuals and advocates across the country have expressed deep concern about these exceptions because of their own experiences with medically unnecessary, nonconsensual genital surgeries.[109] In Texas, one intersex advocate, Koomah, founder of the Houston Intersex Society, has described these exceptions as putting intersex people "in the crossfire of [transgender] hatred."[110] Koomah was born with ambiguous genitalia, but through court order was forcibly given medically unnecessary, nonconsensual surgery to "normalize" their genitalia.[111]

B. The Legal and Societal Othering of Intersex Individuals

These exceptions to anti-transgender bills reinforce the notion that there is something inherently wrong with intersex children, who need to be fixed and made "normal." In addition to gender-affirming care bans, states, school districts, and sports organizations across the country have adopted bills and regulations that prevent transgender individuals from using bathrooms or playing on sports teams that correspond to their gender identities.[112] Instead, these bathroom and sports regulations state that children and adults must use the bathroom of or play on the sports

108. *"I Want to Be Like Nature Made Me"*, *supra* note 11.

109. Jojo Macaluso, *Where Gender-Affirming Care for Youth Is Banned, Intersex Surgery May Be Allowed*, NPR (Apr. 11, 2023), https://www.npr.org/2023/04/11/1169194792/some-states-that-ban-gender-affirming-care-for-trans-youth-allow-intersex-surger; Kiara Alfonseca & Mary Kekatos, *Amid Transgender Care Bans, Exceptions Made for Surgery on Intersex Children*, ABC NEWS (July 18, 2023), https://abcnews.go.com/Health/intersex-surgeries-ignite-controversy-bans-gender-affirming-care/story?id=100452871; Kate Sosin, *Intersex Surgery Is Condemned by the United Nations. Anti-Trans Bills Are Allowing It*, THE 19TH (Mar. 23, 2023), https://19thnews.org/2023/03/bills-gender-affirming-care-trans-intersex-youth/; *US: Anti-Trans Bills Also Harm Intersex Children*, *supra* note 16.

110. Barackman, *supra* note 27.

111. *Id.*

112. Branigin, *supra* note 27; *id.*

team of their biological male or female sex.[113] Pursuant to these sports regulations specifically, athletes have been subjected to extensive medical testing to determine whether factors like their hormone levels correspond to that which is deemed normal of their biological sex.[114] Intersex children and adults, however, often fall into a gray zone with respect to these regulations. When a child's "biological sex" is unclear and fails to conform to the typical male-female binary, this could prevent the child from safely and legally using a bathroom, which is a necessary part of life, or from playing sports, which is a valuable childhood experience.[115] For example, the "Women's Bill of Rights," a proposed anti-transgender bill "defines sex based on the presence of ova in females and the ability to fertilize ova in males," and uses these definitions to prevent transgender individuals from entering bathrooms and locker rooms that do not correlate with their "biological" gender.[116] Intersex people, however, may fit neither or both proposed definitions for male and female, which "could prevent intersex people from entering any single-sex space and isolate intersex people from the rest of society."[117]

Parents of intersex children have felt the pressure of these bills. Kristina Turner, the parent of Ori, an intersex child, explained that she felt she had to push Ori away from sports out of fear that Ori would be discriminated against.[118] This fear of discrimination against intersex children may cause parents to pursue medically unnecessary genital "normalization" surgeries on their intersex children when the parents may not have done so otherwise. Additionally, the exceptions for the treatment of intersex conditions in gender-affirming care bans may encourage these surgeries through a three-step process.

First, these gender-affirming care bans, and other anti-transgender regulations, enforce a strict male-female binary.

Second, by legally enforcing this strict male-female binary, these gender-affirming care bans and anti-transgender bills contribute to the exclusion of intersex individuals from society by excluding them from the normal facets of daily life.

Third, by enforcing this male-female binary and contributing to discrimination against intersex children, these bills create and reinforce a feeling of shame and fear for parents of intersex children, potentially

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. Barackman, *supra* note 27.

encouraging these parents to pursue medically unnecessary, nonconsensual genital surgeries for their intersex children, which is possible through the exceptions in gender-affirming care bans.

Because these bills and regulations contribute to the exclusion of intersex individuals from daily life, these regulations reinforce the idea that intersex bodies are abnormal and need to be fixed to participate in society. Brown-King has explained that these bills create a picture of a typical male and a typical female, and "if you have a body that doesn't fit within that box, well, then it's on you to do something about that," and exceptions in gender-affirming care bans allow for this "fix" regardless of whether the intersex individual consents.[119]

C. Roadblocks for Later-in-Life Gender-Affirming Care for Intersex Youth

While this is not yet an issue that has found its way to the courts, it is possible that receiving nonconsensual gender "normalization" treatment as an intersex child could later leave the child at risk of losing their right to pursue future medical treatment related to their gender. For example, if an intersex infant or young child receives nonconsensual, medically unnecessary genital surgery to align their genitalia with that which is typical of their assigned sex, but the individual later, while still a minor, realizes the genitalia their parents or doctors chose for them does not actually align with their gender, these bills could make it impossible for these children to receive gender-affirming care at that point. It is still the case that intersex children often have surgeries while they are too young to consent or be involved in the decision-making process, and there is a legitimate chance that their caregiver or doctor makes a surgical decision that turns out to be the wrong one. These bills could then bar those children from receiving care if the individual is seen as transgender. Having an intersex condition and being transgender are not mutually exclusive, but if these bills treat surgeries on intersex infants as "correcting" intersex youth, then it is possible that intersex adolescents may be later barred from receiving gender-affirming care that does not align with the sex that was chosen for them. The language of these bills assumes that a child can be exclusively either transgender or intersex, without considering how transgender intersex youth could fall into a tricky gray area.

119. *Id.*

D. Attempted Legal Protections of Intersex Youth

Through the advocacy and support of interACT, California and Rhode Island have both attempted to pass legal protections limiting the use of medically unnecessary, nonconsensual genital surgeries in intersex infants and young children, but these bills have largely failed.[120] Between 2018 and 2023, the California legislature attempted to pass several bills limiting the performance of these surgeries.[121] In 2018, in partnership with interACT, the California Senate passed State Senate Concurrent Resolution 110 (SCR 110), a non-binding resolution encouraging the medical community to delay medically unnecessary, nonconsensual, and irreversible genital surgeries on intersex children until the individual reached the age of informed consent, which the resolution did not designate.[122] In passing SCR 110, California became the first state to condemn these medically unnecessary nonconsensual surgeries.[123] Advocates in the intersex community saw this as a landmark achievement, with the executive director of interACT describing that the resolution "means for the very first time a U.S. legislative body has affirmatively recognized that intersex children deserve dignity and the right to make decisions about their body—just like everyone else."[124] Rhode Island and California have both attempted to pass binding legislation to ensure that surgeries were performed on intersex children who were providing full informed consent and were old enough to do so.[125] Despite strong support from intersex individuals and advocates, these bills have failed in both Rhode Island and California for a litany of reasons, including the effects of lobbying groups against the bills and the need for further studies about intersex conditions and the surgeries, which have historically been understudied due to the stigma surrounding intersex conditions, and about informed consent by children.[126]

It is of the utmost importance to note that intersex advocates are *not* encouraging a ban on all gender-affirming care, including surgeries, for all minors. Conversely, intersex advocates overwhelmingly support access to gender-affirming care for both intersex and transgender youth. The difference between genital surgeries on intersex infants and gender-

120. *Intersex Legislation and Regulation*, *supra* note 69.
121. *Id.*
122. *Id.*
123. Miller, *supra* note 71.
124. *Id.*
125. *Intersex Legislation and Regulation*, *supra* note 69.
126. *Intersex Legislation and Regulation*, *supra* note 69.

affirming care for transgender adolescents is consent. Intersex activist Sean Saifa Wall explained this difference, stating,

> [There are] trans young people who are like, "these experiences during puberty are making me feel uncomfortable, and I want to be able to stop that." Intersex young people don't get to make those decisions about their bodies. It's more so, we're told that these procedures need to be done for our wellness. But what is underlying that, is that we're actually abnormal, that we actually need to be fixed to be normal. And those are just lies, and it's paranoia.[127]

The key difference between gender-affirming care for a transgender child who is actively making that choice and participating in their medical care versus an intersex child who is far too often kept in the dark about their condition is the power of choice. Gender-affirming care bans strip this power of choice from all children.

Further, it is important to recognize that the stigma surrounding intersex conditions does not only affect the intersex child or individual themselves. Intersex advocates have stressed the importance of support for parents of intersex children. Often, surgical recommendations are made "before [the parents are] actually getting psychological support."[128] Discussions about intersex conditions and intersex individuals are largely still taboo, which promotes a sense of shame and fear for intersex individuals and their parents, leaving both parties uninformed. Parents want to make the decision that they feel is best for their child, but how can parents be expected to make the best decision when they are being deprived of valuable information because the discussion is too taboo? When intersex conditions are primarily discussed in hushed voices by medical professionals and legal, political, and social figureheads are extolling the importance of keeping kids "normal" and separating people into solely male and female categories, it is only reasonable that many parents will feel pressured to "normalize" their intersex child in pursuit of keeping their child safe from legal prejudice and social persecution. When parents are confronted with a reality for which they are unprepared, it is vital that parents and children receive the necessary information and emotional support to equip them to make fully informed decisions.

Protecting intersex children necessitates protecting their rights to bodily autonomy, self-determination, and to give informed consent, while equipping parents and caregivers with the support and information they need. While these bills containing exceptions for intersex youth to receive

127. Macaluso, *supra* note 109.

128. *Id.*

gender-affirming care may allow for intersex adolescents to make their own medical decisions, these bills do not protect the rights or well-being of all children—intersex and non-intersex, cisgender and transgender. These gender-affirming care bans strip transgender children of their rights to bodily autonomy and self-determination while simultaneously doing nothing to ensure that intersex children gain these rights to bodily autonomy, self-determination, and informed consent, which intersex individuals have been deprived of for far too long. Further, the social and legal othering of intersex children and the dangers that othering brings will not truly end until we, as a society, recognize that a male-female gender binary system inherently does not exist, and we stop forcing the existence of such a binary onto our laws, onto our medical care, and onto our children's bodies.