

Intersex Rights and Wrongs: The Consequences of Obsessive Sexing

There's this idea that the binary between male and female, and the "corresponding" genders typically associated with them, is natural and significant--because sex is beyond our control, there must be some sort of importance behind it, and thus we should place weight on the "essential differences" between male and female. However, science has proven that the binary is easily corrupted, especially when one takes into consideration what "sex" is determined by--genitals, internal sex organs, hormones, chromosomes, or any combination of them. Being intersex, or having sex characteristics of any form that may not fit perfectly into the two-sex model, is a naturally occurring variation in 1-2% of humans (or more, as we cannot know just how many people are intersex).¹ Disregard by the general public of being intersex stands in the way of gender justice, as much of the patriarchal institutions in place use sex as a manner of justifying discrimination. Despite being natural, intersex people are far from normalized. If one of the goals of the gender justice project is to not have sex dictate gender identity, recognizing the reality of intersex bodies and normalizing intersexuality is precisely what is needed in order to begin dismantling the sex and gender binaries that dictate social spaces and procedures. This will, in turn, further the trans and non-binary rights movements by proving not only that the sex binary has no concrete foundation, but also that there is inherent harm in sexing bodies and then expecting that assigned sex to dictate social behaviors.

Though knowledge of intersexuality dates back to more than 4000 years ago, written records of sex and gender essentialism date back to at least Ancient Greece.² The classical philosophy of male-female essentialism postulated that members of species share essential

¹ "What Is Intersex? Frequently Asked Questions." interACT, n.d. <https://interactadvocates.org/faq/#howcommon>

² Bem, S. (1993). *The Lenses of Gender: Transforming The Debate On Sexual Inequality*. Yale University Press, p. 2

capacities and features, i.e., capacities and features without which they are not the things they are and, further, that females cannot develop those capacities fully. For example, all humans have capacities and features essential to the human species, but females are incapable of developing them fully.³ The result is the thought that females behave differently than males and must be treated differently. Intersex bodies trouble these ideas, as the distinction between bodies is not so clear. According to Amnesty International, an estimated 1.7% of children in the world are born every year with variations of sex characteristics. These variations are broad, including ambiguous genitalia, differences in internal anatomy, chromosomes, visible secondary sex characteristics, hormones, etc. that would mean that a body does not fit neatly into the category of male or female.⁴ Though knowledge of intersex people has existed for a long time, consideration was not afforded to them when establishing systems such as male-female essentialism, which unfortunately became the basis for many of the social systems that have been implemented that are considered normal today. These flaws become more evident when one considers the conservative, but still widely accepted, belief that sex and gender identity are inherently linked, or are perhaps even the same thing. In reality, the sex binary is a two-pole system superimposed onto a spectrum that forces those who exist somewhere in the middle or perhaps outside of the spectrum, those who we would consider “intersex,” to pick a side or risk being forced into one. The sex and gender binaries unfairly pressure individuals to conform their gender identity to their sex characteristics, or risk stigmatization, body dysmorphia, or bureaucratic roadblocks.

³ Philosophy & Feminism Notes, taught by Christia Mercer

⁴ “The Rights of Children Born Intersex.” Amnesty International.
<https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/>.

This is to say that even though intersex bodies are “natural,” they are not considered “normal.” In his seminal work, *The Trouble With Normal*, Michael Warner analyzes the tendency of socio-political theorists of gender and sexuality to assume that what is observed more frequently--in his case, patterns of sexuality--is normal, and thus to be expected. He highlights the fallacy in this supposition: "If normal just means within a common statistical range, there is no reason to be normal or not."⁵ In assuming what is statistically more likely is normal, Warner warns that there begins to develop a hierarchy of normality, which inherently puts others who are not consistent with the statistical normal below those who are. They become the outliers, the unexpected, the 'othered,' so to speak. In some cases, being outside of the statistical norm can be preferred, or even romanticized. For instance, the percentage of people who have hazel or green eyes is much lower than those who have brown eyes. Though it is likely based in the championing of eurocentric beauty standards, having colored eyes or seeking a partner with colored eyes has become preferable to many. In other cases, being outside of the statistical norm can be deadly, whether it be for medical reasons or from how others react to one's outlier condition.

For intersex people, society's commitment to the sex binary and "corresponding" gender identities has led to discrimination stemming from many angles. Accordingly, the intersex rights movement is a movement against sex discrimination and gender discrimination, and often incorporates elements that aim to combat both at the same time. According to the Equality and Human Rights Commission,⁶ sex discrimination occurs when someone is subjected to different

⁵ Warner, M. (1999). *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life*. New York: Free Press. Pg. 54

⁶ “Sex Discrimination.” Sex discrimination | Equality and Human Rights Commission. <https://www.equalityhumanrights.com/en/advice-and-guidance/sex-discrimination#what>.

or unequal treatment based on the biological differences between male and female, or the perceived differences in ability because of them. Gender discrimination, which can be related to sex discrimination, but is not interchangeable with the term, refers to discrimination based on social behaviors related to gender identities, such as nonconformance to gender or gender roles, including discrimination based on sexual orientation or gender expression. Intersex people, whose existence challenge both the sex and gender binaries, often face both types of discrimination. Within the legal framing of the intersex rights movement, there exist two main types of cases: those against hospitals/doctors who ordered and/or performed "correction" surgeries or hormone therapies on intersex individuals (often as babies), or those against local/state governments who refuse to legally recognize the intersexuality of an individual.

Of the former, the intersex rights movement focuses on co-opting the language of conservative movements, particularly that of "nature," in order to question the function and feasibility of the two-sex binary, especially insofar as sexing bodies. In particular, there's overlap between the conservative sex/gender binary ideology that says transgender people should not be allowed physical and bureaucratic gender-affirmation procedures that also affirms that those that are intersex *should* undergo physical and bureaucratic gender/sex-restrictive procedures, often at very young ages, in order to fit within the binary.⁷ These include, but are not limited to, a slew of surgeries, hormone therapies, and psychological conditioning sessions. Many of these procedures are irreversible and lead to a lifetime of sex and gender identity issues, body dysmorphia, and reproductive issues. "Correction" surgeries, hormone therapies, etc. being performed at young

⁷ Knight, K. "I Want to Be Like Nature Made Me': Medically Unnecessary Surgeries on Intersex Children in the US." Human Rights Watch, August 30, 2017. <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>.

ages, usually on newborns, is a form of sex discrimination, as they are violations of bodily autonomy that are done for purely cosmetic purposes in order to reaffirm the sex binary. An even larger problem arises when the secondary sex characteristics that become more evident during puberty do not match the sex assigned at birth, as intersex people whose genders may not be reaffirmed by their secondary sex characteristics face discrimination in a similar way to transgender and non-binary individuals.

For these reasons, there has been an uptick in intersex individuals or their guardians levying lawsuits against hospitals and doctors who advocated for or pressured parents of intersex children into medically unnecessary surgeries and "therapies." Christiane Völling was the first intersex person to have successfully sued for damages in a legal case brought forth over medically unnecessary surgeries, which she described as "a non-consensual sex reassignment" surgery. In 2008, she was awarded €100,000 by the Regional Court of Cologne for a surgery that took place in 1977 that she did not consent to.⁸ Perhaps the most famous of such cases in the U.S. was one that was very recently decided--that of M.C. Crawford, whose adoptive parents filed a lawsuit against three doctors and several members of the South Carolina Department of Social Services after M.C. was forced to undergo a surgery at 16 months old, while he was a ward of the state, in order to have his genitalia resemble that of a female⁹. Despite this surgery, M.C. never identified as a female, and faced a slew of issues related to body dysmorphia and identity because of the procedure. After four years, the case was decided in 2017: M.C. would be paid \$440,000 over the next 16 years for having their sex decided for them and for the surgery

⁸ Deutsche Welle. "German Gender-Assignment Case Has Intersexuals Hopeful: DW: 12.12.2007." DW.COM. <https://www.dw.com/en/german-gender-assignment-case-has-intersexuals-hopeful/a-3000902>.

⁹ "Lawsuit Filed Regarding Genital Mutilation of Intersex Child - Attorneys for the Rights of the Child: ARC Law." Attorneys for the Rights of the Child | ARC Law, April 19, 2019. <https://www.arclaw.org/news/lawsuit-filed-regarding-genital-mutilation-of-intersex-child>.

that was meant to make them “normal.”¹⁰ The presence of lawsuits like this, as well as changing public opinion on consent and bodily autonomy, have made it so that these procedures are not recommended as heavily as they once were, but many doctors of intersex newborns still suggest correction surgeries and therapies to their parents, upholding the sex binary and perpetuating sex discrimination against intersex individuals. However, as more and more intersex individuals step forward to tell their stories and seek justice, the future of correction surgeries look (justifiably) grim.

As for other lawsuits, one such case of an individual seeking legal recognition of intersexuality is that of *Zzyym v. Pompeo*, a federal discrimination lawsuit that was filed against the U.S. State Department for denying a U.S. passport to Dana Zzyym, an intersex individual, because they could not choose male or female on the passport application form.¹¹ The application requires that the applicant select a gender marker of either ‘male’ or ‘female,’ offering no other options or space to designate another gender or, more accurately, sex. It also requires a copy of the applicant’s birth certificate--Zzyym’s birth certificate lists their sex as “sex unknown,” so they submitted a letter requesting “X” be placed next to gender, as well as confirmation from their doctor that they were intersex, but was denied, as the State Department uphold their binary-only gender/sex, as they see them as the same thing, markers. This decision was appealed and on September 19, 2018, the United States District Court for the District of Colorado decided that the U.S. Department of State could not reject the passport application because the

¹⁰ Lambert, O. “Boy Wins Court Case after Doctors Decided His Gender.” NewsComAu, July 30, 2017. <https://www.news.com.au/lifestyle/health/health-problems/mc-crawford-wins-legal-battle-over-intersex-surgery/news-story/453e822281e6e7598202110946018b13>.

¹¹ “ZZYYM v. POMPEO: 341 F.Supp.3d 1248 (2018): ...: 20180919h14.” Leagle. United States District Court, D. Colorado. <https://leagle.com/images/logo.png>. <https://www.leagle.com/decision/infcco20180919h14>.

applicant's gender identity did not fit within its binary-only gender marker policy.¹² Cases such as this, those seeking legal recognition of intersex people, have become more prevalent. In an effort to combat gender discrimination, the mid to late 2010s saw a slew of states beginning to allow "third gender," as designated by "X," or non-binary options on drivers licenses. At least 14 states have adopted such policies and/or allow birth certificates to read "undesigned/nonbinary" for individuals, rather than an assigned sex that is not consistent with the individual's true sex identity.¹³

However, there still exists a number of states and institutions that are adhering to the binary-only system, just as the State Department attempted to do, and are denying intersex people legal recognition. Many intersex people who were unsure of what to record as their sex/gender or were requesting non-binary identification were told that they would receive identification that recorded their gender as what is closest to their gender presentation, due to ambiguity in sex. This is a form of gender discrimination, as it reaffirms that there is a certain way a person of a gender identity should look, and to not conform to that is wrong and abnormal. Further, the use of "gender" to really indicate "sex," or vice versa, in many of these documents is a form of gender discrimination, as it presumes that someone's sex lines up exactly with their gender, even though one is a biological facet of themselves and the other is a social expression of their identity. To equate the two can cause irreversible harm to millions of intersex, non-binary, transgender, and gender non-conforming individuals.

¹² "Decision." Lambda Legal, September 19, 2018. https://www.lambdalegal.org/in-court/legal-docs/zzyym_co_20180919_decision.

¹³ Silverman, H. "2 More States Will Offer a 3rd Gender Option on Driver's Licenses." CNN. Cable News Network, August 1, 2019. <https://www.cnn.com/2019/08/01/health/washington-pennsylvania-gender-x-id/index.html>.

These identities and movements are far from interchangeable, but progress for one often has rippling effects for the others. All of these movements find purchase in actively fighting against the notion that sex identity is indicative of gender identity, or that they are even inherently connected. Insofar as intersexuality goes, a recognition of intersex rights and normalization of intersexuality is precisely what is needed in order to begin dismantling the sex and gender binaries that dictate social spaces and procedures, and will, in turn, further the trans and non-binary rights movements by proving that the sex binary has no real foundation. This will be accomplished through addressing and rectifying the hermeneutical injustice associated with the intersex human condition and the intersex rights movement. As explained by Miranda Fricker in her work *Epistemic Injustice: Power and the Ethics of Knowing*, Hermeneutical injustice is “the injustice of having some significant area of one’s social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource.”¹⁴ This is to say, we cannot change what we cannot recognize and, further, what we cannot express in words. Intersex people have largely not been able to live non-binary lives their entire life or be given the opportunity to choose their genders, leading to hermeneutical injustice in what it means to not only be between or outside of the binary, but also the reality of sex and gender not being related.

By allowing intersex people to live non-binary lives, or choose the gender or sex they align themselves with, those who are not intersex, but who identify as non-binary or transgender, will have the hermeneutical and legal resources necessary to justify their want, need, and ability to do the same. In short, recognizing intersex people and the need for intersex rights will domino

¹⁴ Fricker, M. *Epistemic Injustice: Power and the Ethics of Knowing*. Oxford: Oxford University Press, 2011. Pg. 155

into a more just world for everyone, but especially those who are being discriminated against because of their non-conformity to gender and sex binaries. The first step, of course, is recognizing the reality of intersex bodies, i.e. accepting that sex is a spectrum. Though science has ample proof that the sex-binary is not accurate, many are hesitant to reject the binary. Whether it be for religious, political, or social reasons, many are content with the erasure of intersexuality, with upholding the "normal" even if that does not coincide with the "natural." However, there is a valid criticism in stating that we should not be basing social structures around something so flimsy as a binary that cannot be proven as a fact. The next step will be to dissolve the perceived connections between the sex binary, perhaps now a spectrum, and what we understand to be the gender spectrum. Though it may be "normal" for many males to identify as men and females to identify as women, the expectation that that is true for all causes immense harm to both individuals and our well-being as a society. We need to move away from the current "normal," as Warner describes it, because as long as we embrace the normal, there will be those who are more valued and those who are stigmatized. In the upholding of the 'sex designating gender' system, we are stigmatizing intersex individuals, as well as those who are non-binary, trans, genderfluid, and any other form of gender-queer.

There are, however, concerns to keep in mind. A possible consequence of normalizing intersexuality is that intersex people being recognized as non-binary may lead to some trying to reinforce the (perceived) sex to gender relationship. One possible argument that could be levied by such individuals may be that non-binary individuals who are not intersex cannot be non-binary because they have a biologically distinct sex, and it is only intersex people that can consider themselves non-binary. Further, some may even argue that intersex people cannot

identify as male or female and man or woman, even if they would like, but would instead be identified as intersex and non-binary. Instead of dismantling the binary and recognizing a spectrum of sex, we will have instead have a sex ternary that still has three distinct sets, even though there are many different ways to be intersex. This is not ideal, as the goal is not to add more categories of sex, even though we should formally and socially understand sex to be a spectrum and not a binary, but stop putting so much focus on the sexing of bodies in society.

Despite the history of intersex individuals dating back to over 4000 years ago, most progress can be tracked to the last 100 years. While this may be frustrating, it's understandable. There are fewer differences in others that most people identify as easily as what they perceive their sex to be and, assuming they fit within the "normal," what their gender identity is. These understandings have been accepted for so long, decades will pass before most of the world ditches the binary. However, such must be done in order to have gender justice. If one of the goals of the gender justice project is to not have sex dictate gender identity, recognizing the reality of intersex bodies is a necessary first step. If another goal, after having accomplished that, is to eventually get rid of sexed identities entirely--except perhaps when necessary for medical considerations and procreation--then one must examine why we even put so much focus on sex and what we get out of sexing bodies, both on personal and society-wide levels. Before one can get to accomplishing those goals, however, we need to work towards ensuring that no one is discriminated against for their gender and/or sex identity, nor are they subject to medical and bureaucratic intervention in order to make them "normal." If the goal, for now, is harm reduction, a recognition of intersex rights is the first, and most important, step, not only for intersex people but also for those who are trans and genderqueer.

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