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## The Role of International Human Rights Law in Mediating Between the Rights of Parents and Their Children Born with Intersex Traits in the United States

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THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW  
IN MEDIATING BETWEEN THE RIGHTS OF PARENTS  
AND THEIR CHILDREN BORN WITH INTERSEX  
TRAITS IN THE UNITED STATES

CRISTIAN GONZÁLEZ CABRERA\*

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## INTRODUCTION

Daniela was born with ambiguous genitalia.<sup>1</sup> Not able to tell whether she was a boy or a girl, the doctors diagnosed her with congenital adrenal hyperplasia and an enlarged clitoris and “cut [her] between [her] legs looking for a vagina.”<sup>2</sup> Then, when she was two months old, doctors “opened [her] abdomen and found healthy testes, which they threw in the garbage bin.”<sup>3</sup> Later, after tests showed that Daniela was chromosomally male, her “castration” was declared a mistake and the doctors explained that they had to “continue this way and the small patient [had to] be made a girl.”<sup>4</sup> As a result of these procedures, Daniela spent much of her childhood in medical facilities “suffering countless examinations of [her] genitals and urethral opening.”<sup>5</sup> According to her medical records, Daniela’s parents never provided informed consent for the procedures.<sup>6</sup>

Despite decades of intersex activism,<sup>7</sup> physicians in the United States routinely perform medically unnecessary genital “normalizing” surgeries on children like Daniela born with intersex traits,<sup>8</sup> often without the full informed consent of the children’s parents, and certainly without the consent of the children. These cosmetic surgical interventions—often made in infancy to alleviate the societal discomfort associated with deviations from the male-female

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1. Daniela Truffer, *It’s a Human Rights Issue!*, in *NORMALIZING INTERSEX: PERSONAL STORIES* 26, 26 (2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. The now-defunct Intersex Society of North America (ISNA), one of the first intersex organizations, was founded in 1993 and advocated “for patients and families who felt they had been harmed by their experiences with the health care system,” particularly by “unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female.” *Dear ISNA Friends and Supporters*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org> [<http://perma.cc/U7U3-8LMU>]. Other intersex activist organizations working to stop such surgeries include ISNA’s direct successor, Accord Alliance, interACT (formerly Advocates for Informed Choice), AIS-DSD Support Group, and the Organization Intersex International. See ACCORD ALL., <http://www.accordalliance.org> [<http://perma.cc/J5C2-HQW3>]; INTERACT, <http://interactadvocates.org> [<http://perma.cc/WFF3-G3RJ>]; AIS-DSD SUPPORT GRP., <http://aisdsd.org> [<http://perma.cc/BFP3-D8QM>]; ORG. INTERSEXINT’L, <https://oiiinternational.com> [<http://perma.cc/7KVY-8T7G>]. See also Robert Hupf, *Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital “Normalizing” Surgery*, 22 WM. & MARY J. WOMEN & L. 73, 79–80 (2015).

8. Generally, members of the community do not employ the term “intersex” as a self-identity gender category. Instead, “intersex” is used to describe sex traits possessed by individuals within the community. For consistency, this Article will employ the term in this manner, recognizing and validating the fact that there are people who do indeed label themselves as “intersex.” Hupf, *supra* note 7, at 75–76.

gender binary—result in a host of long-term medical, social, and psychological repercussions for the children.<sup>9</sup> These repercussions include psychological trauma, loss of sexual response and pleasure, infections, urinary incontinence, sterility, and surgically altered genitalia incongruent with gender identity.<sup>10</sup>

This Article recognizes that intersex activists in the United States (and abroad, for that matter) have been clear in their desire for a moratorium on medically unnecessary, non-consensual genital “normalizing” surgeries.<sup>11</sup> It thus hopes to contribute to the academic legal literature on executing that goal, particularly as it relates to the untangling of the competing rights of parents versus those of their children in this context. More specifically, this Article aims to analyze these legal issues from the perspective of international human rights law, a frame that has been underexplored in U.S. intersex legal scholarship and activism despite its potential to, *inter alia*, clarify and fill gaps in U.S. constitutional jurisprudence, particularly relating to the Substantive Due Process Clause of the Fourteenth Amendment.

Part I of this Article will offer an introduction to the biology of intersex traits, as well as an overview of the current common medical protocol and its repercussions. It will first give an overview of the umbrella term “intersex” and the various congenital conditions it is used to denote. These conditions, which result in being born with certain sex characteristics that do not fit within the standard male-female binary, include congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, Turner syndrome, and Klinefelter syndrome. Next, it will present and problematize the common practice for treating infants born with different types of intersex traits: medically unnecessary, non-consensual genital “normalizing” surgical intervention. In particular, it will explain the repercussions of these interventions, including psychological trauma, gender dysphoria, and chronic health problems like loss of sexual response and pleasure, genital pain or discomfort, and infections.

Part II will survey and analyze proposed solutions in U.S. legal scholarship to the problems posed by medically unnecessary, non-consensual “normalizing” surgeries. Specifically, it will highlight the tensions between children’s rights and parents’ rights under U.S.

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9. See *Fact Sheet: Intersex*, U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R, [http://ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE\\_FactSheet\\_Intersex\\_EN.pdf](http://ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Intersex_EN.pdf) [<http://perma.cc/BSN6-TGJ7>].

10. See Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 *LOY. L.A. L. REV.* 849, 860 (2012); *Fact Sheet: Intersex*, *supra* note 9.

11. Hupf, *supra* note 7, at 74.

law and evaluate scholars' proposed statutory and judicial interventions. By highlighting the murkiness of U.S. law in this context, this part will underscore the need to look at international human rights law as an additional legal guidepost.

Part III will analyze the surgeries and the rights of parents and children from the perspective of international human rights law. Drawing from binding and persuasive international legal sources, it will first identify the human rights issues and the relevant legal obligations that are at stake for intersex children when it comes to medically unnecessary, non-consensual "normalizing" surgeries, including the right to liberty and security of person, the right to respect for private life, and the prohibition of torture and inhuman or degrading treatment. Here, it will also explicate the benefits of the human rights frame as compared to U.S. constitutional protections, including the Substantive Due Process Clause of the Fourteenth Amendment. Next, drawing from international sources again, it will reveal what international law says regarding parents' rights and how that applies to the intersex context. Lastly, it will begin to clarify the tension between the rights of intersex children and the rights of their parents by looking at three parallel human rights issues where children's rights and parents' rights are in conflict, namely female genital mutilation, child marriage, and corporal punishment of children.

After having outlined international human rights law's capabilities in the intersex context, Part IV will critically examine the concrete impact that the legal regime has had, both doctrinally and institutionally, for the rights of intersex people around the world. It will first discuss how, in Colombia, international human rights and state obligations have played a role in vindicating the rights of intersex children in national courts. Next, it will describe how, in Chile, activists were able to leverage international legal institutions, particularly treaty bodies and their mechanisms, to push for government action in this context. Lastly, it will consider how, in Malta, activists employed the language of human rights and international human rights advocacy networks to bring about a legislative moratorium on medically unnecessary, non-consensual "normalizing" surgeries.<sup>12</sup> Through these analyses, the section will shed light on how the legal regime and its institutions can be harnessed strategically to effect change in the United States.

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12. For clarity, I will hereinafter refer to "medically unnecessary, non-consensual genital 'normalizing' surgeries" as simply "normalizing surgeries" or "intersex surgeries," except for the term's first mention in a section. However, the reader should note that references to "normalizing surgeries" and "intersex surgeries" in this Article always refer to those surgeries on people born with intersex traits that are medically unnecessary and non-consensual.

Part V will conclude this Article by explicitly highlighting the unique ways that human rights law can effect change for children born with intersex traits in the United States. First, it will discuss how the unique legal claims permitted by international human rights law should be employed. Second, it will discuss the potential of treaty body mechanisms, including the Human Rights Committee and the Committee Against Torture, to effect change for intersex children in the United States. Lastly, it will explain how developing and strengthening transnational intersex human rights networks could help create a paradigm shift for intersex children in the United States.

## I. INTERSEX 101: BIOLOGY AND COMMON MEDICAL PROTOCOL

### A. *Biology*

The umbrella term “intersex” is employed to denote various congenital conditions in which a person is born with certain sex characteristics—like genitals, gonads, or chromosome patterns—that do not fit within the standard male-female binary.<sup>13</sup> Having existed for millennia,<sup>14</sup> these traits are estimated to affect between 0.05% and 1.7% of the world population, the upper estimate being akin to the number of red-haired people in the world.<sup>15</sup> Caused by different chromosomal and hormonal irregularities, the most common intersex conditions include congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, Turner syndrome, and Klinefelter syndrome.<sup>16</sup> Respectively, these conditions may result in, *inter alia*, the virilization of genitalia of children with XX (typically female) chromosomes, the non-virilization of genitalia of children with XY (typically male) chromosomes, atypical gonad (testes or ovary) development, a urethral opening that is not at the tip of the penis, gonadal dysgenesis, and small or not particularly active testes in males born with XXY chromosomes that sometimes causes infertility.<sup>17</sup> “In the United States, it is

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13. See Alice Domurat Dreger, *A History of Intersexuality: From the Age of Gonads to the Age of Consent*, 9 J. CLINICAL ETHICS 345, 345 (1998); *Fact Sheet: Intersex*, *supra* note 9.

14. Christine Muckle, Comment, *Giving a Voice to Intersex Individuals Through Hospital Ethics Committees*, 2006 WIS. L. REV. 987, 995 (2006).

15. *Fact Sheet: Intersex*, *supra* note 9.

16. Muckle, *supra* note 14, at 993–94.

17. *Id.* For a more comprehensive overview of the different types of intersex traits and their causes, see also Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278–92 (1999); Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANNALS HEALTH L. 195, 204–08 (2002).

thought that approximately 1500 to 2000 children are born with ambiguous external genitalia annually. . . .”<sup>18</sup> While many intersex traits are discovered at birth, some traits do not become apparent until later in life, including during puberty.<sup>19</sup>

### *B. Common Medical Protocol*

Since the 1950s, the common practice for treating infants born with intersex traits has been medically unnecessary, non-consensual genital “normalizing” surgical intervention.<sup>20</sup> In the case of female (XX) infants who are born with CAH and an “enlarged” clitoris as a result of atypical adrenal function in utero, doctors may perform a cosmetic clitoral reduction, which involves reducing the size of an “unacceptable” clitoris.<sup>21</sup> This medical intervention, which will often destroy the ability to enjoy sexual intercourse, is based on the unproven assumption that a clitoral reduction will improve a girl’s “psychological well-being.”<sup>22</sup> Moreover, there is scant data on

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18. Erin Lloyd, *From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children*, 12 *CARDOZO J. L. & GENDER* 155, 157 (2005).

19. *Id.* at 158. One example of an intersex trait that reveals itself later is 5-alpha reductase. See Peggy T. Cohen-Kettenis, *Gender Change in 46,XY Persons with 5α-Reductase-2 Deficiency and 17β-Hydroxysteroid Dehydrogenase-3 Deficiency*, 34 *ARCHIVES SEXUAL BEHAV.* 399, 399 (2005) (“Individuals with 5α-reductase-2 deficiency (5α-RD-2) and 17β-hydroxysteroid dehydrogenase-3 deficiency (17β-HSD-3) are often raised as girls. Over the past number of years, this policy has been challenged because many individuals with these conditions develop a male gender identity and make a gender role change after puberty.”).

20. During the 1950s, two developments changed the manner in which medicine approached intersex traits. First, surgical technology advanced to the point where genitalia could be modified to be “cosmetically acceptable.” Second, the idea that gender identity was based upon nurture and not nature became scientifically accepted, a theory later advanced and popularized by psychologist John Money and his infamous “John-Joan” case study. Looking to prove that gender identity was primarily learned, Money advised the parents of an infant boy whose penis was accidentally destroyed during a botched circumcision to reassign him as a girl and raise him as a female. Despite the child later rejecting the female gender and transitioning to live as David Reimer when he was a teenager, Money misrepresented his findings and widely reported that the sex reassignment surgery was a success. David committed suicide at age thirty-eight after suffering from years of depression. See Greenberg, *supra* note 10, at 856–57; Anne Puluka, *Parent Versus State: Protecting Intersex Children from Cosmetic Genital Surgery*, 2015 *MICH. ST. L. REV.* 2095, 2101–03 (2015); *David Reimer*, 38, *Subject of the John/Joan Case*, N.Y. TIMES (May 12, 2004), [http://www.nytimes.com/2004/05/12/us/david-reimer-38-subject-of-the-john-joan-case.html?\\_r=0](http://www.nytimes.com/2004/05/12/us/david-reimer-38-subject-of-the-john-joan-case.html?_r=0) [https://perma.cc/AQ3K-F3CG].

21. Greenberg, *supra* note 17, at 272; Lloyd, *supra* note 18, at 161. See also Sarah Creighton et al., *Timing and nature of reconstructive surgery for disorders of sex development—Introduction*, 8 *J. PEDIATRIC UROLOGY* 602, 603 (2012) (“Clitoroplasty is essentially a cosmetic procedure. The aim of surgery is to reduce the size of the clitoris whilst maintaining a feminine appearance.”).

22. Greenberg, *supra* note 10, at 889. See also Creighton et al., *supra* note 21, at 603.

what this clitoral surgery should consist of, including on what the appropriate size and site for incisions is.<sup>23</sup> In addition, girls who are born with complete androgen insensitivity syndrome (CAIS) may be born without a vagina or with a shortened vaginal canal, an intersex trait that may prompt a doctor to surgically create a vagina or to expand the shortened vagina.<sup>24</sup> As women with CAIS will never menstruate or bear children due to the absence of a uterus, the only reason for such an early intervention is to give the infant the possibility of future heterosexual intercourse,<sup>25</sup> assuming that the infant will indeed desire heterosexual intercourse.<sup>26</sup> Doctors will also perform surgery to “correct” hypospadias, an intersex trait where the urethra is found somewhere other than the tip of the penis, to make genitalia look more typical, allow for urinating in a standing position, and achieve a straight erection.<sup>27</sup> Again, despite the fact that in most cases the procedure is often cosmetic<sup>28</sup> and there is no immediate medical reason to move the urethral opening, doctors will perform the surgery to prevent hypothetical future “emotional trauma” resulting from atypical genitalia.<sup>29</sup>

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23. Creighton et al., *supra* note 21, at 603 (“There is much debate but little data on all aspects of clitoral surgery including the appropriate size and site for incisions on skin and crura, whether or not to anchor the clitoris to the bony pelvis, how much corporal tissue to remove as well as the requirement for reduction of the glans clitoris and what techniques best achieve this.”).

24. Greenberg, *supra* note 17, at 286; Greenberg, *supra* note 10, at 893; Hermer, *supra* note 17, at 206.

25. Creighton et al., *supra* note 21, at 604–05 (“Since the vagina has no function in early childhood, vaginoplasty could be postponed until after puberty. . . . Even in cases where the UGS is long and vaginal entry high, vaginal surgery may be delayed until adolescence as, in most cases, menstruation can occur through the common urogenital sinus. In theory, obstruction to menstruation may occur, although there are no reports in the literature of this.”).

26. See Greenberg, *supra* note 10, at 893–94. See also Creighton et al., *supra* note 21, at 604 (“There is a perception that girls with virilized genitalia left intact may suffer unwarranted social interactions with their peers (e.g., the locker room time at school), leading to embarrassment and social withdrawal. Furthermore, the idea of ‘doing nothing’ sometimes represents a stressful concept for some parents who have difficulties coping with the appearance of their child’s genitalia, especially if not adequately followed by a supportive multidisciplinary team.”).

27. Creighton et al., *supra* note 21, at 607; Greenberg, *supra* note 10, at 894; Lloyd, *supra* note 18, at 161.

28. Creighton et al., *supra* note 21, at 607 (“[T]he cosmetic aspect of the operation should not be underestimated, since over 70% of adults followed after hypospadias repair reported that appearance was as important as having a functionally appropriate phallus.”).

29. See Creighton et al., *supra* note 21, at 607–08; Greenberg, *supra* note 10, at 895. There are studies reporting a higher complication rate in hypospadias procedures after one year of age, but the conclusiveness of these studies are debated. For example, many of the patients studied were undergoing a hypospadias procedure to fix a hypospadias surgery that was done in the patient’s infancy. Creighton et al., *supra* note 21, at 607–08.



To be sure, of the many medical conditions that can cause intersex traits, a small minority results in anatomical variations that could, “on rare occasion, require[] surgery out of medical necessity.”<sup>30</sup> These medical conditions, however, are not the subject of this Article. These necessary surgeries include the necessary “removal of obstruction of the urinary tract”; the “repair of bladder exstrophy (when a child is born with internal organs exposed)”; and the surgical prevention of infertility in boys with undescended testes.<sup>31</sup> In addition, some intersex traits may increase a child’s chances of suffering from gonadal cancer.<sup>32</sup> “[I]f cancer is present, treatment is medically necessary.”<sup>33</sup> If cancer risk is low, however, surgical intervention can “safely be delayed until after puberty.”<sup>34</sup>

It should also be noted that certain medical treatments have fallen out of recommended practice. However, they may still occur around the country (and around the world), especially where doctors are not abreast of new standards of care. For example, male (XY) infants born with “inadequate” penises—i.e., penises that will be incapable of penetrating a vagina or that will not allow a boy to urinate while standing—were often surgically altered, given hormones, and raised as girls.<sup>35</sup> When a male was diagnosed with a “micropenis,” doctors would reassign the child’s sex to female<sup>36</sup> by “surgically recessing and reducing the phallus to become a ‘clitoris,’ building a vagina from the colon or other tissue, and using the testicular tissue to create the labia.”<sup>37</sup> Though it is much less common now for a child with micropenis to be assigned female since

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30. HUMAN RIGHTS WATCH, “I WANT TO BE LIKE NATURE MADE ME”: MEDICALLY UNNECESSARY SURGERIES ON INTERSEX CHILDREN IN THE US 23 (2017), [https://www.hrw.org/sites/default/files/report\\_pdf/lgbtintersex0717\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/lgbtintersex0717_web_0.pdf) [<https://perma.cc/R7F8-RWCE>].

31. *Id.* at 24.

32. *Id.*

33. *Id.*

34. *Id.*

35. Greenberg, *supra* note 10, at 857. Puluca, *supra* note 20, at 2100 n. 34 (saying “[t]he average clitoris length at birth is approximately 0.85 centimeters or shorter, [while] the average penis length at birth is between approximately 2.5 and 4.5 centimeters. . . [a]nything that falls between 0.85 centimeters and 2.5 centimeters is medically unacceptable, calling for corrective surgery.”) (citing a “Phall-O-Metrics” diagram in ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 59 (2000)).

36. Lloyd, *supra* note 18, at 160. The medical literature will talk about “male” and “female” children in terms of chromosomes and some doctors insist that surgery is only a sex assignment if they are assigning a sex that is discordant with chromosomes. However, it should be noted that many advocates disagree with those characterizations. They argue that intersex children by definition have mixed markers of sex and chromosomes are not the definitive marker, and that genital “normalizing” surgeries on infants are always an *attempt* to assign sex, one that often fails.

37. *Id.*

phallus length is no longer the only driver of a gender assignment decision, this decision may ultimately be dependent on the viability of the child's testes. In the case of AIS (complete or partial), where an infant's genitalia were not virilized or only partially virilized, doctors would typically remove the testes to prevent cancer and perform a cosmetic vaginoplasty to "create a vagina capable of 'receiving' a penis."<sup>38</sup> Though some of the male infants with PAIS would have functional testicles and thus the ability to reproduce, doctors would eliminate their reproductive capacity under the assumption that living with an "inadequate" penis is too traumatic.<sup>39</sup> Often, however, this procedure is still pushed on teenagers.

### *C. The Repercussions of the Common Medical Protocol*

Despite doctors' concerns for children's future psychological well-beings, adults born with intersex traits who have undergone genital "normalizing" surgeries consistently report that these medical interventions do more harm than good. First, they highlight that the concealment-based medical protocol—whereby doctors, at worst, conceal from parents and children the nature of intersex traits or, at best, mislead parents and children about safety and necessity of "normalizing" surgery—inadvertently leads to psychological trauma as it perpetuates shame "by reinforcing cultural norms of sexual abnormality."<sup>40</sup> Second, this model—which in truth may not be as widespread today in the United States given recent Consensus Statements (though concrete data on this is lacking)<sup>41</sup>—also leads to doctors telling parents half-truths about their children's traits in an effort to shield them from the uncomfortable realities of having a child born with intersex traits, an issue that calls into question whether these surgeries are performed with informed consent.<sup>42</sup> Third, for children who are surgically assigned a sex, intersex activists highlight that "interventions could lead to irreversible [and harrowing] harm if the child's gender identity [does] not develop in conformity with the surgically altered genitalia."<sup>43</sup> Fourth, adults

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38. *Id.* at 160–61.

39. Greenberg, *supra* note 10, at 857–58.

40. *Id.* at 859–60.

41. *Infra* notes 51–54.

42. Alice Domurat Dreger, "Ambiguous Sex"—or Ambivalent Medicine?: *Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CTR. REP., 24, 27–28 (1998). A doctor's own biases may also inform the manner in which she discusses the available options to the parent of an intersex child. For example, she may caution, without scientific evidence, that not operating can lead to "problems" of gender identity or sexual orientation. See Lloyd, *supra* note 18, at 171.

43. Greenberg, *supra* note 10, at 860.

who underwent a procedure also explain that these surgical interventions create a plethora of chronic health problems, including a loss of sexual response and pleasure, “genital pain or discomfort, infections, scarring, urinary incontinence, and [ironically,] cosmetically unacceptable genitalia.”<sup>44</sup> For example, boys who undergo surgery for hypospadias may require multiple invasive surgeries, which can result in difficulty urinating, scarring, and poor cosmetic results.<sup>45</sup> Lastly, people who were subjected to such surgeries say that the surgery amounts to “a sexual violation leading to a profound loss of their autonomy [and personal privacy] and extreme humiliation.”<sup>46</sup> Activists and even many doctors argue that the negative consequences that arise from these cosmetic surgical interventions, in conjunction with the fact that there is often no evidence that the surgeries are done for an objectively clear medical reason, suggest that “normalizing” surgeries are medically unnecessary.<sup>47</sup>

#### *D. Limited Progress*

Though surgical intervention for treating infants born with intersex traits continues to be the common medical protocol, the efforts of intersex activists have not been in vain. In 2006, their push to raise awareness finally led to the United States–based Lawson Wilkins Pediatric Endocrine Society<sup>48</sup> and the European Society for Paediatric Endocrinology<sup>49</sup> creating “a task force of physicians to analyze the issue and develop a new treatment method.”<sup>50</sup> This task force produced a Consensus Statement<sup>51</sup> encouraging a shift to a more patient-centered model and emphasizing that “open communication with patients and families is essential, and participation in decision-making is encouraged. . . .”<sup>52</sup> The Consensus Statement also noted that systematic evidence supporting the idea that the surgeries must be performed in the first year of life was ultimately

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44. *Id.*

45. *Id.* at 895.

46. *Id.* 859–60.

47. Recent medical Consensus Statements themselves recognize that it is not necessary to do most of these surgeries in infancy, in that they recognize postponement as an option. *See, e.g., infra* note 54.

48. *See About Us*, PEDIATRIC ENDOCRINE SOC’Y, <https://www.pedsendo.org/about/index.cfm> [<http://perma.cc/T8RU-6KGN>].

49. *See About*, EUR. SOC’Y FOR PAEDIATRIC ENDOCRINOLOGY, <https://www.eurospe.org/about> [<http://perma.cc/K584-W535>].

50. Puluka, *supra* note 20, at 2105.

51. Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e488 (2006).

52. *Id.* at e490.

lacking, opening the door to the idea that the surgeries should be postponed until the child is able to consent.<sup>53</sup> There was also a 2016 update to the Consensus Statement, which further urges respect for the autonomy:

With some variations, guidance from clinicians and ethicists has focused on principles and processes aimed at fostering the overall well-being of the child and future adult by: (1) minimizing physical and psychosocial risk; (2) preserving potential for fertility; (3) upholding the individual's rights to participate in decisions that will affect their now or later; (4) leaving options open for the future by avoiding irreversible treatments that are not medically necessary until the individual has the capacity to consent; (5) providing psychosocial support and PS; (6) supporting the individual's healthy sexual and gender identity development; (7) using a shared decision-making approach that respects the individual's and parents' wishes and beliefs; (8) respecting the family and parent-child relationships, and (9) providing patients with full medical information appropriate for age, developmental stage and cognitive abilities. While each of these principles is important, striking the appropriate balance among them becomes challenging in the clinical setting. For example, respecting parents' wishes for early genital surgery may impinge on the child's right to participate in decision making and may reduce the child's options for the future.<sup>54</sup>

More recently, the North American Society for Pediatric and Adolescent Gynecology released a statement that represents a significant step toward ending medically unnecessary surgery on intersex children who are too young to consent.<sup>55</sup> Urging respect for the autonomy of intersex children and for their active participation in decisions about surgical procedures, the statement held:

We believe that surgery alone does not address all the implications associated with DSD conditions.<sup>56</sup> Some DSD conditions require early surgical intervention to optimize health and fertility.

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53. *See id.* at e491.

54. Peter A. Lee et al., *Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care*, 85 HORMONE RES. PÆDIATRIS 158, 176 (2016) (internal citation omitted).

55. NASPAG POSITION STATEMENT ON SURGICAL MANAGEMENT OF DSD, N. AM. SOC'Y FOR PEDIATRIC & ADOLESCENT GYNECOLOGY (2017), [http://c.ymcdn.com/sites/www.naspag.org/resource/resmgr/pdfs/NASPAG\\_Statement\\_on\\_DSD\\_PES\\_.pdf](http://c.ymcdn.com/sites/www.naspag.org/resource/resmgr/pdfs/NASPAG_Statement_on_DSD_PES_.pdf) [<https://perma.cc/59EA-U7VQ>].

56. To clarify, the medical community sometimes refers to intersex traits as disorders of sex development (DSD). *See, e.g.*, Lee et al., *supra* note 51, at e488.

Ideally, if surgical interventions could be safely delayed, patients would have time to express their gender identity and to be actively involved in the decision making process. True informed consent or assent includes an accurate discussion of the options, benefits, known short and long term complications, expected pain and recovery, as well as need for reoperation. Finally, we believe that if there is a possibility for fertility, that this should be preserved and optimized.<sup>57</sup>

The statement was endorsed by the Pediatric Endocrine Society, another major medical professional association.<sup>58</sup> Despite these wins for intersex activists, the statements did not call for an end to genital “normalizing” surgeries, and such medical interventions that continue to take place routinely around the United States and around the world.

## II. PROPOSED SOLUTIONS UNDER U.S. LAW

In recent years, legal scholarship has grappled with the role of law in the intersex community’s fight against medically unnecessary, non-consensual genital “normalizing” surgeries in the United States. Though some disfavor legal interventions in this context,<sup>59</sup> most scholars conclude that the law does indeed have a place in mediating the competing rights at stake when addressing such surgeries. By interrogating the proposed statutory or judicial solutions, this part aims to highlight the tensions between children’s rights and parents’ rights in U.S. law in this context and to underscore the need to look at international human rights law as an additional legal guidepost to understand this interplay.

### A. Statutory Solutions

In response to calls for a moratorium on genital “normalizing” surgeries from intersex activists, legal scholarship has explored the viability of statutory solutions restricting the practice of such surgeries on children born with intersex traits.<sup>60</sup> One such solution calls for a ban on performing, aiding, or abetting such surgeries unless a parent obtains an order from a family court.<sup>61</sup> In justifying

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57. NASPAG POSITION STATEMENT ON SURGICAL MANAGEMENT OF DSD, *supra* note 55.

58. *Id.*

59. See, e.g., Sara A. Aliabadi, Note, *You Make Me Feel Like a Natural Woman: Allowing Parents to Consent to Early Gender Assignment Surgeries for Their Intersexed Infants*, 11 WM. & MARY J. WOMEN & L. 427, 427–28 (2005).

60. See *supra* text accompanying note 7.

61. Lloyd, *supra* note 18, at 190–92.

this statutory approach, its proponents highlight that U.S. constitutional law does not give parents absolute trust in protecting the interests of their children.<sup>62</sup> For instance, minors have an interest in receiving life-saving medical treatment over their parents' objections.<sup>63</sup> Moreover, proponents point to statutes requiring neutral third parties to determine the best medical interests of a child when parents intend to subject their children to experimental medical treatment, or when parents' medical decisions implicate their children's substantive due process constitutional rights, like that of procreation.<sup>64</sup> Such medical cases represent "categorical conflicts of interest"<sup>65</sup> between parents and children, a paradigm in which the case of genital "normalizing" surgeries falls squarely. Consequently, legislatures can and should vindicate children's rights by statutorily restricting the ability of parents to make the decision to perform such surgeries on their children without court approval. Accordingly, the proponents also call for a "standard of clear and convincing evidence of medical necessity, rather than the best interests of the child, so to avoid placing undue weight on the wishes of the parents, or the [hypothetical] psychological effects to the child."<sup>66</sup> This statutory solution, Lloyd contends, will bring about an "open

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62. *Id.* at 166–67. Though parents' rights, including the rights to make decisions on behalf of their children, are constitutionally protected, in *Prince v. Massachusetts*, 321 U.S. 158, 167 (1994), the Court noted that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[.]" Under the doctrine of *parens patriae*, courts have recognized an ability to intervene when a parent's action or inaction may put a child's health or life in jeopardy, or when it is in the best interest of a child. See *Parham v. J.R.*, 442 U.S. 584, 603 (1979). See also *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

63. See, *e.g.*, *Jehovah's Witnesses in the State of Wash. v. King Cty. Hosp.*, 278 F. Supp. 488, 504–05 (W.D. Wash. 1967) (finding that a state can override parents' religious objections to blood transfusions when a child's life or health is at risk), *aff'd*, 390 U.S. 598 (1968), *reh'g denied* 391 U.S. 961 (1968).

64. Lloyd, *supra* note 18, at 181–82. These statutes regulate when parents wish to donate their children's organs, remove life support for them, expose them to experimental treatment, or force-sterilize them. The statutes include: ARK. CODE ANN. § 28-65-302(a)(1)(B) (2005); ARK. CODE ANN. § 28-65-302(a)(1)(C) (2005); ARK. CODE ANN. § 28-65-302(a)(2)(A) (2005); CONN. GEN. STAT. § 45a-698 (2005); D.C. CODE § 21-2047(c)(1) (2005); D.C. CODE § 21-2047(c)(3) (2005); GA. CODE ANN. § 31-20-3 (2005); N.D. CENT. CODE § 23-12-13(4) (2005); N.D. CENT. CODE § 25-01.2-09(4) (2005); 11 R.I. GEN. LAWS § 11-9-17 (2005).

65. Lloyd, *supra* note 18, at 181. The author borrows this term from Jennifer L. Rosato, *Using Bioethics Discourse to Determine When Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1, 43 (2000), and uses it to "refer to circumstances where the risk of conflicts of interest is so high that judicial intervention should always be called for, or to circumstances where the law already imposes judicial intervention." *Id.*

66. *Id.* at 190.

exploration of the issues as they relate to a particular child”—a process many individuals born with intersex traits are deprived of—before a “neutral arbiter” in the less adversarial context of a family court.<sup>67</sup> Though comprehensive, this statute would likely require significant political organizing to pass, as it significantly elevates children’s rights at the expense of parents’ rights to make decisions on behalf of their children and doctors’ discretion to recommend surgeries. The proposal also has the downside of immediately judicializing a conflict between the interests of a child and those of his or her parents before exploring nonjudicial mediation.

Anticipating some of these problems, another statutory proposal recommends that the state act as *parens patriae* and require the decision to perform such a surgery “to be independently approved by a professional trained to act in the child’s best interests.”<sup>68</sup> Recognizing that courts are indeed disinclined to permit interference with parental rights to raise children as they wish, Puluka identifies that an exception to this general rule exists when it comes to providing children with life-saving treatment.<sup>69</sup> In the case of children born with intersex traits whose health and fundamental rights, including their substantive due process right to privacy, are implicated,<sup>70</sup> state intervention is equally necessary.<sup>71</sup> Puluka calls for states to require that hospitals have available at least one social worker with a background in intersex traits who can provide counseling to confused parents and advise them to postpone any surgery that is

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67. *Id.* at 188.

68. Puluka, *supra* note 20, at 2131.

69. *Id.* at 2123–27. The author notes that parents often refuse such treatment on the basis of religious beliefs and courts are required to carefully weigh, *inter alia*, the parents’ rights to freedom of religion and family autonomy with children’s interest in receiving life-saving treatment. See *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 771–74 (Ill. 1952) (finding that a child could be taken from a parent and placed with a guardian when the parents refused to consent to a life-saving blood transfusion for the child on religious grounds); *In re Willmann*, 493 N.E.2d 1380, 1383, 1390 (Ohio Ct. App. 1986) (holding that parents’ religious decision not to consent to remove a malignant tumor from a child’s arm was not protected under the Constitution); *Commonwealth v. Nixon*, 761 A.2d 1151, 1152–53 (Pa. 2000) (finding that parents could be held criminally liable for “anointing” their deceased daughter in the church instead of providing medical treatment for her sickness).

70. Puluka, *supra* note 20, at 2128 (“Genital surgery in infancy implicates the child’s substantive due process right to privacy by depriving the child of the opportunity to define his or her gender, an aspect of identity that will shape the child’s growth and have a continuing impact throughout the child’s life.”). Of course, the privacy rights implicated include not only the right to define gender (which is still a tenuous right under U.S. constitutional law), but also the more established rights to sexual expression, per *Lawrence v. Texas*, 539 U.S. 558, 574, 578 (2003), and, in many cases, to control reproduction, per, *inter alia*, *Roe v. Wade*, 410 U.S. 113, 153 (1973).

71. Puluka, *supra* note 20, at 2128.

medically unnecessary.<sup>72</sup> Only if it is then necessary to resolve disputes between parents and the social worker should a case be referred to a hospital ethics board or an administrative judge to determine what is truly in the child's best interest.<sup>73</sup> "Such a law would effectively do away with the concealment-based method of intersex case management, instead allowing parents to understand their child's medical condition and avoid any adverse psychological impact that the concealment-based model has traditionally caused."<sup>74</sup> "[R]equiring consultation with a professional [with experience in the intersex context], and possibly a neutral decisionmaker, states would be intruding only minimally on the parent's right to make medical decisions on behalf of the child."<sup>75</sup> This proposal appropriately takes a more holistic stance, attempting to educate confused parents about what their child's intersex trait entails before resorting to judicial mechanisms to vindicate a child's fundamental rights.

A third proposed statutory scheme mandates a consultation with a hospital ethics committee (HEC) comprised of diverse professionals and members of the intersex community, which would recommend a course of action to the doctors and parents considering a genital "normalizing" surgery.<sup>76</sup> Though the author acknowledges and validates the concerns of the intersex community, she also indicates that certain studies have shown successful outcomes of these surgical interventions,<sup>77</sup> that a moratorium could make doctors fearful of performing medically necessary surgeries, and that parents and others are, too, affected by a child's intersex traits.<sup>78</sup> For this reason, the author proposes a "middle ground," a mandatory procedural process administered by an HEC that mediates between all stakeholders, including "intersex[] children and the adults they will become, their parents, and the medical community."<sup>79</sup> This process could encourage the expression of every viewpoint and option for an infant before a decision is adopted.<sup>80</sup> Though this approach

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72. *Id.*

73. *Id.*

74. *Id.* at 2132–33 (internal citation omitted).

75. *Id.* at 2128–29.

76. Muckle, *supra* note 14, at 1020–22.

77. *Id.* at 1004 (citing Lisa Melton, *New Perspectives on the Management of Intersex*, 357 LANCET 2110, 2110 (2001); Arianne B. Dessens et al., *Gender Dysphoria and Gender Change in Chromosomal Females with Congenital Adrenal Hyperplasia*, 34 ARCHIVES SEXUAL BEHAV. 389, 393 (2005); Susan J. Bradley et al., *Experiment of Nurture: Ablatio Penis at 2 Months, Sex Reassignment at 7 Months, and a Psychosexual Follow-up in Young Adulthood*, 102 PEDIATRICS 132, 132–33 (1998)).

78. *Id.* at 1004–05.

79. *Id.* at 1005.

80. *Id.*



would allow for a thorough discussion of the issues, it has the potential of being a long, burdensome process with no differentiation between parents who are already partially informed and those who are not at all. A more tailored approach to the needs of parents and their child would likely be more efficient and cost-effective.

### *B. Judicial Solutions*

Finding that statutory solutions undesirable (because they are not tailored to the specific situation) or impractical (because they require political organizing), other legal scholarship relating to the rights of children born with intersex traits has focused instead on judicially imposed restrictions on the practice of genital “normalizing” surgeries. Certain judicial solutions have proposed a more nuanced application of the informed consent doctrine<sup>81</sup> to protect the fundamental rights of children.<sup>82</sup> For instance, one such proposal calls for labeling the current model for treating ambiguous genitalia as “experimental,”<sup>83</sup> an assessment that allows the treatments to be held to the higher informed consent standard applied to other forms of experimental treatment on infants.<sup>84</sup> Another suggestion, highlighting higher informed consent standards proposed by different

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81. The doctrine is based on the legal principle of battery, holding that “an offense to personal dignity occurs when one person violates another’s bodily integrity without full and valid consent.” See Kishka-Kamari Ford, Note, “*First, Do No Harm*”—*The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POLY REV. 469, 474–75 (2001). Generally, if a doctor attains “consent” from a patient for a medical procedure, but does not fully inform a patient about the nature and consequences of the procedure, the “consent” is not “informed.” Three criteria must be met before a medical decision will be considered legally informed: 1) the decision must be informed, requiring doctors to provide patients with adequate information, including alternatives, regarding a treatment; 2) the decision must be voluntary, including free from coercion or improper influence; 3) the decision must be competent, requiring that a patient “have an ‘appreciation’ of the nature, extent, and probable consequence” of the procedure. *Id.*

82. *Id.* See also Alison Davidian, *Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children*, 26 WIS. J.L., GENDER & SOC’Y 1, 18–19 (2011); Patricia L. Martin, *Moving Toward an International Standard in Informed Consent: The Impact of Intersexuality and the Internet on the Standard of Care*, 9 DUKE J. GENDER L. & POLY 135, 136 (2002).

83. Ford, *supra* note 81, at 482.

84. *Id.* at 481–82 (“From the study of cases in the organ donation context, it becomes apparent that in addition to the basic requirements of legal informed consent, certain criteria must be satisfied before a parent may submit their minor to an experimental treatment. First, if the treatment is not medically necessary for the minor, it must not be unreasonably harmful. Second, the treatment must be to the benefit of the minor, and not just to the benefit of the minor’s parents or other family members. The best interests of the minor are at the forefront of the decision to permit or deny an experimental treatment. With these criteria in mind, the arguments against allowing parental consent to genital-normalizing surgery on their otherwise healthy intersexed infant are strong.”).

domestic and local actors, suggests that courts can raise the informed consent standard like the Constitutional Court of Colombia did for intersex children in 1999.<sup>85</sup> There, the Court established there must be “qualified, persistent informed consent” with the following elements:

- (1) Parental authority depends on the “exigency and urgency” of the procedure, the invasiveness, and the “age and autonomy” of the child.
- (2) Parents may consent only if they have been given accurate information about risks and alternate treatment protocols.
- (3) Consent must be written, and must be given over an extended period of time, not just at the initial surgery.
- (4) Parents cannot consent for children over age five. These children are autonomous, and have identified with a gender.<sup>86</sup>

Revisions of the informed consent standard effectively steer the conversation away from parents’ rights versus children’s rights, and towards the responsibilities of medical providers, alleviating some of the legal tension in ruling on intersex issues.<sup>87</sup>

Another judicial solution takes the notion of rethinking the informed consent standard and argues for a “categorical exception” to the manner in which medical decisions are made for children born with intersex traits that would give courts jurisdiction to intervene and protect their fundamental rights.<sup>88</sup> This proposal looks to the existing categorical exceptions for a model of decision-making that ensures the independent consideration of a child’s interests.<sup>89</sup> Tamar-Mattis notes that genital “normalizing” surgeries on infants implicate three major factors underlying the requirement of judicial oversight in other contexts and which would allow judicial intervention: “1) there is no demonstrated or expected medical benefit to the procedure; 2) there is the potential for parental conflict of interest; and 3) genital-normalizing surgeries can infringe on fundamental rights of the child, namely those of bodily integrity, privacy, and sometimes reproduction.”<sup>90</sup> Unlike other solutions that call for judicial

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85. Martin, *supra* note 82, at 166–67.

86. *Id.*

87. Cf. Claudia Wiesemann et al., *Ethical principles and recommendations for the medical management of differences of sex development (DSD)/intersex in children and adolescents*, 6 EUR. J. PEDIATRICS 671, 673 (2010).

88. See Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 98–107 (2006).

89. Like Lloyd and Puluka, Tamar-Mattis draws from analogous jurisprudence on parental conflicts of interest in the case of children who are potential organ donors or who face elective sterilization. *Id.* at 98.

90. *Id.* at 99 (internal citation omitted).

or third-party intervention to be mandated statutorily,<sup>91</sup> the author here argues that a courtroom strategy can be implemented without political organizing.<sup>92</sup> Moreover, she argues, this judicial intervention may be more palatable to the general public than a moratorium on the surgeries because “it is an individualized, best-interest determination rather than a sweeping restriction.”<sup>93</sup> From a strategic perspective, this proposal may be the easiest to execute.

Still another proposal considers a revision of the rule of negligence in the medical malpractice context whereby physicians may be held not merely to the prevailing custom or practice of similar physicians,<sup>94</sup> but also to that practice which is reasonable to expect given the state of medical knowledge at the time of treatment.<sup>95</sup> This revised legal standard may motivate the medical community to re-evaluate the medical protocol to treat children born with intersex traits to avoid liability, especially since there are no large-scale studies of the long-term outcomes of such surgeries (only small studies and anecdotal evidence suggesting that intersex surgeries are actually harmful).<sup>96</sup> The new standard may thus spur much-needed research and may even immediately halt some of the most controversial surgeries. Nevertheless, it will likely not have a significant impact on the majority of the current treatments for children as the subset of the medical community—who created and perpetuate the current common medical protocol—would be responsible for questioning its own methods and investing in long-term research goals.<sup>97</sup> Moreover,

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91. See, e.g., Lloyd, *supra* note 18, at 188.

92. Tamar-Mattis, *supra* note 88, at 103.

93. *Id.* at 104.

94. In general tort claims, a defendant is held to the standard of care which a “reasonable person” would exercise under the circumstances. In medical tort claims, however, physicians determine the standard of care to which the members of their profession are legally held. For intersex individuals looking to sue their former surgeons for malpractice, this means that their surgeon cannot be found negligent in most cases because the professional standard of care was indeed what they will have followed. Hermer, *supra* note 17, at 215.

95. *Id.* at 218–20.

96. *Id.* at 218. For one of the most recent and comprehensive studies, see TIFFANY JONES ET AL., INTERSEX: STORIES AND STATISTICS FROM AUSTRALIA 3–4 (2006) (finding, *inter alia*, that “[m]ost participants considered their mental health as good (or positively) at the time of the survey. The most frequently reported mental health diagnoses included depression, anxiety and PTSD. Wellbeing risks were high—42% of participants had thought about self-harm and 26% had engaged in it; 60% had thought about suicide and 19% had attempted it—specifically on the basis of issues related to having a congenital sex variation. The group mostly attributed their wellbeing risks to negative social responses from others, difficulties around having undergone interventions or issues around gender/identity. Overall their mental health service experiences were mixed. Overall, 44% of the group reported receiving counselling/training/pressure from institutional practitioners (doctors, psychologists etc.) on gendered behaviour; and 43% from parents. Many participants desired improvements in training for mental health services/workers.”).

97. Hermer, *supra* note 17, at 220.

though it shifts the conversation from one of parents' rights versus children's rights to one of medical responsibility, a judge would likely be disinclined to revise a legal standard for one medical issue.<sup>98</sup>

Though a valid criticism of these judicial solutions is that they essentially require an injured plaintiff to challenge the surgery determination made on his behalf as a child (likely decades after the determination is made), federal courts have seen one case relating to the rights of children born with intersex traits. In 2013, the Southern Poverty Law Center filed a lawsuit on behalf of the adoptive parents of M.C., a child who, at sixteen months old, underwent a sex assignment surgery while he was in the care of the South Carolina Department of Social Services.<sup>99</sup> The plaintiffs alleged that the State of South Carolina violated M.C.'s substantive due process rights under the Fourteenth Amendment—including his right to reproduction, bodily integrity, and privacy—when doctors surgically removed “most of M.C.'s phallus, his testicle, and the testicular tissue in his ovotestis” while he was in foster care.<sup>100</sup> The plaintiffs also alleged that the defendants violated M.C.'s procedural due process rights under the Fourteenth Amendment by subjecting M.C. to this unnecessary surgery without notice or a hearing to determine whether the procedure was in M.C.'s best interest.<sup>101</sup> The Fourth Circuit ultimately dismissed the case under the qualified immunity doctrine because it held that the defendants did not violate M.C.'s “clearly established” constitutional rights.<sup>102</sup> Though this case involved a child in state and not parental custody, where the state was making decisions on behalf of the child, it represents the way other federal circuits and, ultimately the U.S. Supreme Court, may look at the claims related to genital “normalizing” surgeries. In light of this, the limits of viewing this issue exclusively from the perspective of U.S. law becomes apparent. While the parameters of U.S. law can likely incorporate the rights of intersex children, it may behoove activists to look at legal sources beyond constitutional jurisprudence to make claims, particularly constitutional ones, on behalf of intersex children or, later, adults.

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98. It is noteworthy that certain advocates hold that parents are uninformed by their doctors, and often are bullied or misled into approving surgery, and that they often regret it afterwards. Those who are well-informed often will not choose surgery. So while many doctors would like to frame this as parents' rights versus children, it is really both parents and children who are having their rights violated, to the detriment of the whole family unit. That said, even fully informed parents may be willing to make this choice. *See supra* note 42.

99. *M.C. v. Aaronson*, S. POVERTY LAW CTR., <https://www.splcenter.org/seeking-justice/case-docket/mc-v-aaronson> [<http://perma.cc/7L5L-APER>].

100. *M.C. v. Amrhein*, 598 F. App'x 143, 146–48 (4th Cir. 2015).

101. *Id.* at 149.

102. *Id.* at 149–50.

### III. A NEW LEGAL PERSPECTIVE: THE INTERNATIONAL HUMAN RIGHTS FRAME

As outlined above, legal scholarship has proposed various solutions that U.S. law can offer to mediate the tensions between children's rights and parents' rights in the intersex context. While some proposals find common ground,<sup>103</sup> others contradict each other,<sup>104</sup> underscoring the murkiness of U.S. law in this context. What academic literature has not fully scrutinized is what international human rights law can offer to clarify this complex legal patchwork of overlapping rights, an oversight this part aims to rectify. Indeed, unlike U.S. constitutional law, international human rights law has done more to theorize and accept children's rights, and starts from a much more affirmative position on the issue.<sup>105</sup> From this understanding, this part will underscore the potential of international human rights law to, *inter alia*, clarify U.S. constitutional protections and fill gaps in constitutional jurisprudence, particularly with regards to the Substantive Due Process Clause of the Fourteenth Amendment. Section III.A will identify the human rights issues and the relevant legal obligations that are at stake for children when it comes to medically unnecessary, non-consensual genital "normalizing" surgeries. This section will also explicate the aforementioned benefits of the human rights frame in this context.<sup>106</sup> Section III.B

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103. For instance, proposals requiring an intermediary—like a family court, a professional trained to act in a child's best interests, or a hospital ethics committee—to approve or guide any decision to perform a genital "normalizing" surgery on a child; or, proposals reinterpreting or changing legal standards—like informed consent or negligence—to abate such surgeries.

104. For example, proposals pushing for statutory solutions versus those that eschew such interventions for concern that they are politically unfeasible.

105. See Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2099 (2011) ("For almost two centuries, children were largely absent from the class of constitutional rights-holders."); Jonathan Todres & Sarah Higinbotham, *A Person's a Person: Children's Rights in Children's Literature*, 45 COLUM. HUM. RTS. L. REV. 1, 23 (2013) ("International human rights law recognizes that every child has rights. Adopted by the U.N. General Assembly in 1989, the Convention on the Rights of the Child ("CRC") offers the most comprehensive articulation of children's rights, enshrining the civil, political, economic, social and cultural rights of the child."); Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 8–9 (1999) ("Children have few clearly articulated or firmly established constitutional rights in the United States of America. Children enjoy few independent rights outside the context of criminal or administrative proceedings, because children's rights (generally called 'interests') are conceptualized as subsumed within the rights of parents.").

106. For the purposes of this Article, I will compare international human rights law to U.S. constitutional law, as the international legal regime generally focuses on the obligations of states as whole, and not on its federal subparts (though the international treaties that the United States has ratified certainly bind them too). However, this is not to

will then consider what international law says regarding parents' rights. Lastly, Section III.C will untangle the tension between the rights highlighted in the first two sections and begin to clarify what a human rights–based solution can look like. It will do this by looking at three parallel human rights issues where children's rights and parents' rights are in conflict, namely female genital mutilation, child marriage, and corporal punishment of children.

*A. The Rights of Intersex Children: Human Rights Issues and State Obligations*

*1. The Right to Liberty and Security of Person*

Per its legally binding obligations under the International Covenant on Civil and Political Rights (ICCPR), the United States must protect an individual's right to liberty and security of person.<sup>107</sup> The Human Rights Committee, the interpretative and monitoring treaty body of the ICCPR, has explained that security of person under the Covenant concerns freedom from injury to the body and the mind, or bodily and mental integrity.<sup>108</sup> Moreover, the Committee has specifically noted that States parties must respond to patterns of such violence immediately, including when it is perpetuated against children, persons with disabilities, and persons on the basis of their sexual orientation or gender identity.<sup>109</sup> This obligation exists irrespective of whether the violence is perpetrated by state or private actors.<sup>110</sup>

Consequently, allowing the unrestricted practice of genital “normalizing” surgeries on intersex children can amount to a violation of the right to liberty and security of person under international human rights law. As explained in Part I, these medical procedures invariably inflict long-term and often debilitating physical and psychological harm to children who exhibit uncommon biological variations in sexual development.<sup>111</sup> At times, these surgeries are

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suggest that the U.S. state law is not relevant in this context. In fact, even in U.S. international legal scholarship, there are proposals to implement the United States' international legal obligations on a U.S. state level given the federal government's unwillingness to pass treaty implementing legislation. *See, e.g.*, David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 98 (2013).

107. International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR]. *See also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 3 (Dec. 10, 1948).

108. Human Rights Comm., General Comment No. 35, ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter Human Rights Comm., U.N. Doc. CCPR/C/GC/35].

109. *Id.* ¶ 9.

110. *Id.*

111. *See supra* notes 42–45.

also performed on the basis of unfounded fears of future atypical sexual orientation or gender identity.<sup>112</sup> Whether the harm is perpetrated by the state, such as in a public hospital, or by private actors, such as in private clinics, the United States is under an obligation to disallow the unrestricted practice of these surgeries.

While these protections and obligations may appear analogous to those offered under the Substantive Due Process Clause of the Fourteenth Amendment of the U.S. Constitution,<sup>113</sup> the right to liberty and security of person under international human rights helps to fill some gaps in U.S. constitutional jurisprudence. Firstly, it is more unambiguous in its encompassing of mental integrity. Though the right to bodily integrity has a long history and tradition in U.S. constitutional law,<sup>114</sup> the right to mental integrity does not enjoy the same legal clarity.<sup>115</sup> Despite the fact that the Constitution protects freedoms such as those of religion and speech,<sup>116</sup> these constitute protections of “mental autonomy,” not of “mental integrity” *per se*. The former protections connote freedom *to* engage in a variety of intellectual or psychological endeavors or decisions, while the latter connote freedom *from* government interference that upsets one’s intellectual or psychological capacities.<sup>117</sup> Indeed, when constitutional

112. Greenberg, *supra* note 10, at 859–60.

113. The Substantive Due Process Clause protects rights that are deemed “fundamental” and prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

114. JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 229 (2008). *See also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (explaining that “in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] to . . . bodily integrity”) (citations omitted); Rochin v. California, 342 U.S. 165, 172 (1952) (finding that the use of capsules obtained by forcibly extracting them from a defendant’s body as evidence in court violated the Due Process Clause); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (holding that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”).

115. *See* Stephan Beyer, Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497, 503–04 n.30 (1980).

116. U.S. CONST. amend. I.

117. *Cf. id.* An individual can make two different types of claims against a state: “freedom *to* and freedom *from*.” As Beyer explains:

These freedoms are clearly correlative: freedom *to* tattoo one’s body involves a freedom *from* state constraints upon tattooing; freedom *from* compulsory state tattoos involves a freedom *to* keep one’s body untattooed. Yet there remains an important conceptual distinction between freedom *to* tattoo oneself if one wants and freedom from the state compelling one to be tattooed if one does not. Freedom *to* (tattoo oneself, have an abortion, smoke marijuana) may conveniently be called *autonomy*; freedom *from* (compulsory tattoos, police searches of the rectum, unwanted blood transfusions) may conveniently be called *integrity*.

Beyer, *supra* note 115, at 502 (internal citations omitted).

jurisprudence seems to suggest that the Constitution disallows intrusion in one's mental processes,<sup>118</sup> it is generally referring to the freedom *to*, for example, use contraceptives, possess obscene materials, or have an abortion.<sup>119</sup> On the other hand, international human rights law bodies have been more explicit in holding that the protection of mental integrity is part of the right to liberty and security of person,<sup>120</sup> making it possible for activists to argue credibly that people born with intersex traits have a right to be free *from* surgeries that harm their psychological well-being.<sup>121</sup>

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118. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

119. One notable exception to this general tendency is illustrated by U.S. constitutional jurisprudence on the government's right to administer anti-psychotropic medication to persons in the criminal justice system, including for the purposes of inducing competence to stand trial. See, e.g., *Sell v. United States*, 539 U.S. 166, 179 (2003) (holding that “the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.”); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (finding that the state did not satisfy due process requirements as it did not demonstrate that treatment with antipsychotic medication was “medically appropriate, and considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others”); *Washington v. Harper*, 494 U.S. 210, 236 (1990) (holding that a state prison's involuntary medication procedures satisfied due process protections as it provided “accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others.”).

120. For example, in a 2003 General Comment from the Committee on the Rights of the Child on adolescent health and development, the Committee found that its Convention ensures “[p]rotection *from* all forms of abuse, neglect, violence and exploitation” (emphasis added) and, in particular, “the physical, sexual and mental integrity of adolescents with disabilities.” Comm. on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, ¶ 8, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter Comm. on the Rights of the Child, U.N. Doc. CRC/GC/2003/4]. In the context of violence against women, the Committee on the Elimination of Discrimination Against Women has explained that its Convention offers protection *from* violence that includes “deprivations of liberty” like “acts that inflict physical, mental or sexual harm or suffering.” Comm. on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence Against Women, ¶ 6, U.N. Doc. CEDAW/A/47/38 (1992).

Relating to “laws that allow for the deprivation of liberty,” the Committee on the Rights of Persons with Disabilities explained that people must even be free from all mental health services or treatments that are not performed with the informed consent of the person concerned. Comm. on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention (Spain), ¶ 36, U.N. Doc. CRPD/C/ESP/CO/1 (Oct. 19, 2011); Comm. on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention (Tunisia), ¶¶ 25, 28, U.N. Doc. CRPD/C/TUN/CO/1 (May 13, 2011).

121. See Greenberg, *supra* note 10, at 859–60. It is true, however, that some doctors



Secondly, unlike U.S. constitutional law, international human rights law is unequivocal in holding that the right to bodily integrity applies to children, as well as adults. Under U.S. law, the scope of children's bodily integrity is unclear beyond cases related to children under government control, such as in school or juvenile detention centers.<sup>122</sup> Moreover, when parents consent to bodily interventions on behalf of their children, constitutional protections for children's rights are fuzzy beyond the abortion and contraception contexts, often being regulated by a patchwork of state statutory and common law.<sup>123</sup> Conversely, international human rights law has confirmed that children have a right to bodily integrity in various other contexts, including at the expense of their parents' rights to consent to bodily interventions on their behalf.<sup>124</sup> As will be elaborated upon in Section III.C, this includes in the context of female genital mutilation and corporal punishment.<sup>125</sup>

## 2. *The Right to Respect for Private Life*

In accordance with the ICCPR, the United States also has an obligation not to arbitrarily or unlawfully interfere with one's privacy or family.<sup>126</sup> International human rights conceives of "privacy" as a capacious term, and the Human Rights Committee has held that it refers in part to "the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone."<sup>127</sup> It has thus found that it encompasses, *inter alia*, the right to choose one's sexual identity and engage in adult consensual sex in private,<sup>128</sup> the right to choose one's own name,<sup>129</sup> and the right to choose the way one looks and one's manner of dress.<sup>130</sup> The term "family" is similarly elastic with the Committee noting that the objectives of the Covenant demand

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will argue that the surgeries are intended to benefit psychological well-being, though the science is still inconclusive. *See* Creighton et al., *supra* note 21, at 6.

122. B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L. J. 1295, 1302-04 (2015).

123. *Id.* at 1304-08.

124. Comm. on the Rights of the Child, CRC/GC/2003/4, *supra* note 120, ¶ 8.

125. *See infra* notes 162-64.

126. ICCPR art. 17. *See also* Universal Declaration of Human Rights art. 12.

127. *Coeriel v. The Netherlands*, Communication No. 453/1991, ¶ 10.2 U.N. Doc. CCPR/C/52/D/453/1991 (Oct. 31, 1994).

128. *Toonen v. Australia*, Communication No. 488/1992, ¶ 8.2 U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

129. *See Coeriel v. The Netherlands*, Communication No. 453/1991, *supra* note 127, ¶ 10.2.

130. Human Rights Comm., General Comment No. 28, ¶ 13, U.N. Doc. HRI/GEN/1/Rev.9 (Mar. 29, 2000).

a broad interpretation of it in order to accommodate all culturally specific understandings of it.<sup>131</sup>

The unrestricted practice of genital “normalizing” surgeries on intersex children may thus constitute a violation of their right to respect for private life under international human rights law. Indeed, the surgeries may infringe upon a victims’ “privacy” by ultimately robbing them of the opportunity to make fundamentally private decisions about who they are and how they express that identity. For example, the surgeries have a profound impact on victims’ sexual identities, sexual practices, gender identities, and expected gender roles.<sup>132</sup> The surgeries also curtail victims’ rights to respect for their “family.” Not only do victims report that the surgeries unduly influence their roles in their immediate family settings, but some reported that the surgeries—which may sterilize the victims—ultimately deprive them of the choice to found a biological family.<sup>133</sup>

Again, U.S. constitutional law has comparable, but underdeveloped, protections for the right to respect for private life which international human rights law can help clarify. Although the U.S. Constitution contains no express right to privacy, the U.S. Supreme Court has held that certain guarantees in the Constitution have “penumbras” that create zones of privacy.<sup>134</sup> Nevertheless, the Court has invoked the privacy right in only a limited number of diverse contexts, most notably in respecting aspects of an individual’s identity, like sexuality, and in respecting their right to parenthood and to marriage.<sup>135</sup> While it is true that human rights bodies have not yet interpreted the right to privacy under international human rights law to mandate respect for an individual’s intersex traits, it is not unlikely that their understanding of the right as flexible would permit this view, particularly in light of the right’s history in yielding advances on the basis of sexual orientation and gender

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131. See Human Rights Comm., CCPR General Comment No. 16, ¶ 5 (Apr. 8, 1998).

132. See *supra* notes 42–45.

133. See, e.g., Greenberg, *supra* note 10, at 857–58.

134. *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965).

135. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the state cannot criminalize “freedom of thought, belief, expression, and certain intimate conduct,” or, more narrowly, private, consensual sexual conduct); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right to privacy encompasses the right to decide whether to reproduce); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). See also *Obergefell v. Hodges*, 576 U.S. \_\_\_, at \*3 (2015) (finding that the fundamental right to marry is guaranteed to same-sex couples); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding that sterilization amounts to the denial of the fundamental right to procreation).

identity on the international level.<sup>136</sup> Indeed, this history began with a series of cases that addressed the criminalization of consensual homosexual conduct,<sup>137</sup> but international bodies have further developed the right to privacy to include:

[A] more nuanced analysis of the obligations not to discriminate and to guarantee equality in contexts such as the family, the employment sector, in pension benefits, and in custody settings, in order to prevent contravention of the right to equality, the obligation not to discriminate, and the protection of the right to privacy of persons.<sup>138</sup>

As the right continues to be interpreted internationally, it may thus be strategic for activists to take advantage of its demonstrated malleability and push for international human rights law to help inform and develop U.S. constitutional privacy protections liberally in this context.<sup>139</sup>

### 3. *The Prohibition of Torture and Inhuman or Degrading Treatment*

The United States is bound by the prohibition of torture and other cruel, inhuman, or degrading treatment under international human rights law.<sup>140</sup> Diverse acts can constitute torture and other

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136. Rosa M. Celorio, *The Case of Karen Atala and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women*, 15 CUNY L. REV. 335, 372 (2012).

137. See, e.g., *S.L. v. Austria*, App. No. 45330/99, 37 Eur. H.R. Rep. 39 (2003); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 3–4 (1981); *Toonen v. Australia*, Communication No. 488/1992, *supra* note 128, ¶ 1.

138. Celorio, *supra* note 136, at 372. See also *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 31417/96 and 32377/96, Eur. Ct. H.R. ¶ 12 (2000); *Smith and Grady v. United Kingdom*, App. Nos. 33985/96 and 33986/96, 136 Eur. Ct. H.R. at 3 (1999); *Young v. Australia*, Communication No. 941/2000, ¶¶ 10.4–13, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003).

139. U.S. constitutional jurisprudence has indeed taken explicit note of developments relating to the right to privacy under international human rights law. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (noting four European Court of Human Rights privacy decisions relating to consensual homosexual conduct and highlighting that “[t]he right [of privacy] the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”).

140. ICCPR art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, 23 I.L.M. 1027, 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter CAT]. The prohibition is also well established under customary international law as *jus cogens*, that is a norm from which no derogation is permitted. See *The Legal Prohibition Against Torture*, HUMAN RIGHTS WATCH (June 1, 2004), <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture> [http://perma.cc/3XU5-DBZP]. See also Universal Declaration of Human Rights art. 5. Notably, also U.S. law.

cruel, inhuman, or degrading treatment.<sup>141</sup> The mandate of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment has recognized that any medical intervention of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment if enforced or administered without the free and informed consent of the person concerned.<sup>142</sup> The mandate has also highlighted that such medical interventions are especially suspect when performed on patients from vulnerable groups—which includes intersex populations<sup>143</sup>—“notwithstanding claims of good intentions or medical necessity.”<sup>144</sup>

Permitting the practice of genital “normalizing” surgeries on intersex children may thus rise to a violation of the prohibition of torture and inhuman or degrading treatment. As outlined in Part I, the surgeries are often intrusive, irreversible, medically unnecessary, and routinely performed without the informed consent of either the intersex child in question or the parents.<sup>145</sup> To back these findings, there is a growing consensus amongst international actors that the surgeries can rise to the level of torture. In 2013, the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Juan E. Méndez, regretted that “[t]here is an abundance of accounts and testimonies of persons being . . . subjected to . . . a variety of forced procedures such as sterilization, . . . hormone therapy and genital-normalizing surgeries under the guise of so called ‘reparative therapies.’”<sup>146</sup> Specifically, the Special Rapporteur explained that “[c]hildren who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without their informed consent, or that of their parents, ‘in an attempt to fix their sex,’ leaving them with permanent, irreversible infertility and causing severe mental suffering.”<sup>147</sup> Moreover, the Committee Against Torture has, through its concluding

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See 18 U.S.C. § 2340 (1994).

141. CAT art. 1.

142. Manfred Nowak (Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman, or degrading treatment or punishment), *Torture and other cruel, inhuman or degrading treatment or punishment*, ¶¶ 40, 47, U.N. Doc. A/63/175 (July 28, 2008).

143. Juan E. Méndez (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment) *Rep. on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 38, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

144. *Id.* ¶ 32.

145. See HUMAN RIGHTS WATCH, *supra* note 30.

146. Méndez, *supra* note 143, ¶ 76.

147. *Id.* ¶ 77.

observations mechanism, reprimanded six States parties to the Torture Convention—Germany,<sup>148</sup> Switzerland,<sup>149</sup> Austria,<sup>150</sup> Hong Kong,<sup>151</sup> Denmark,<sup>152</sup> and France<sup>153</sup>—for their inaction towards eliminating the practice of these surgeries. In every instance, the Committee urged the States parties to take legislative, administrative, or other measures to guarantee respect for the physical integrity and autonomy of intersex persons. In 2015, the Office of the High Commissioner for Human Rights (OHCHR) also cautioned that the surgeries “may violate their rights to physical integrity, to be free from torture and ill-treatment, and to live free from harmful practices.”<sup>154</sup> States parties to the Convention against Torture (CAT) are obliged to protect persons from torturous treatment both in public and private spaces, thus including where such practices are committed by private clinics and physicians.<sup>155</sup> A government that allows torture to take place *de facto* consents to the practice and is in breach of the Convention against Torture.<sup>156</sup>

Here, too, international human rights law can clarify U.S. constitutional law’s analogous provisions on torture. U.S. constitutional law has long prohibited torture, albeit not explicitly, per its ban on “cruel and unusual punishments,”<sup>157</sup> as well as relevant case law.<sup>158</sup>

148. Comm. against Torture, Consideration of reports submitted by States parties under Article 19 of the Convention (Germany), ¶ 20, U.N. Doc. CAT/C/DEU/CO/5 (Dec. 12, 2011).

149. Comm. against Torture, Concluding observations on the seventh periodic report of Switzerland, ¶ 20, U.N. Doc. CAT/C/CHE/CO/7 (Sept. 7, 2015).

150. Comm. against Torture, Concluding observations on the sixth periodic report of Austria, ¶ 44–45, U.N. Doc. CAT/C/AUT/CO/6 (Jan. 27, 2016).

151. Comm. against Torture, Concluding observations on the fifth periodic report of China with respect to Hong Kong, China, ¶¶ 28–29, U.N. Doc. CAT/C/CHN-HKG/CO/5 (Feb. 3, 2016).

152. Comm. against Torture, Concluding observations on the combined sixth and seventh periodic reports of Denmark, ¶¶ 42–43, U.N. Doc. CAT/C/DNK/CO/6-7 (Feb. 4, 2016).

153. Comm. against Torture, Concluding observations on the seventh periodic report of France, ¶¶ 34–35, U.N. Doc. CAT/C/FRA/CO/7 (June 10, 2016).

154. *Fact Sheet: Intersex*, *supra* note 9.

155. Comm. against Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

156. *Id.* ¶ 18.

157. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

158. See DAVID LUBAN, TORTURE, POWER, AND LAW 204 (2014). The relevant case law includes *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that official “conduct that shocks the conscience” violates the constitutional guarantee of due process of law); *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (finding that torture is still prohibited, even when Paraguayan victims sued their home-state torturers in U.S. court); and *U.S. v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974) (holding that a criminal suspect could not be tried if allegations that he was tortured while being brought to the United

Notably, the United States has also passed legislation implementing the CAT, which, though only applicable to conduct “outside the United States,”<sup>159</sup> provides a working definition of torture under U.S. law: “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>160</sup> Neither the Eighth Amendment nor CAT legislation jurisprudence has considered that genital “normalizing” surgeries can rise to torture. The international human rights regime can thus be helpful for activists looking to highlight the dire consequences of such surgeries. It can also help to inform the interpretation of torture under U.S. constitutional law.

#### 4. Other Relevant Rights

The rights above were presented in detail because they are legally binding to the United States. In other words, the right to liberty and security of person, the right to respect for private life, and the right to be free from torture and inhumane or degrading treatment are found in treaties that the United States has signed and ratified. However, there is a world of important human rights treaties that the U.S. federal government has signed but not ratified, or on which it has not taken any action at all.<sup>161</sup> Some of these treaties—including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD)—are sources of important rights and state obligations that, while not formally binding on the United States,<sup>162</sup> reveal the full potential of international human

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States were true). See also Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 281 (2003) (arguing that torture is barred by the Fifth, Eighth, and Fourteenth Amendments).

159. 18 U.S.C. § 2340A(a) (1994).

160. *Id.* § 2340(1).

161. For an overview of some of these treaties, including some not pertinent to the intersex context, as well as the importance of ratification, see generally *United States Ratification of International Human Rights Treaties*, HUMAN RIGHTS WATCH (July 24, 2009, 12:24 PM), <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> [<http://perma.cc/8XUF-4UEQ>].

162. There is, however, some debate on the extent that signing but not ratifying a treaty imposes obligations on the signing state. For example, some scholars note that signatory states are bound not to violate any of the “core” or “important” provisions in the treaty. See generally Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 308 (2007).

rights law in this context.<sup>163</sup> One of these rights, particularly important in the intersex context, is the right to health. Similarly, the rights of the child (although not a single right but rather a collection of rights and principles applied to children), recognized in the CRC, are especially pertinent.

The right to health<sup>164</sup> is enshrined in Article 12 of the ICESCR, Articles 17, 23, and 24 of the CRC, Article 25 of the CRPD, and Article 12 of CEDAW.<sup>165</sup> According to this right, everyone has the right to the highest attainable standard of physical and mental health, without discrimination. People born with intersex traits could therefore have two potential claims under this right when it comes to genital “normalizing” surgeries: they have a right to not be subjected to treatment that will be detrimental to their physical and mental health; and they have the right to access medical care that is appropriate and respectful of the sex characteristics with which they were born.<sup>166</sup> The rights of the child, on the other hand, are guaranteed, generally, by the CRC. Though many articles in the Convention are relevant to children born with intersex traits, Article 3, establishing that the “best interests” of the child should be the primary consideration in decisions affecting them,<sup>167</sup> and Article 12, guaranteeing a child’s right to increasingly form and express his or her views freely regarding such decisions as he or she grows,<sup>168</sup> are particularly salient. Read together, the articles could be interpreted to require that surgeries permanently modifying children’s bodies and affecting their sexual function and fertility be expressly consented to by the children in line with their best interests.<sup>169</sup> It should also be noted that while the federal government has not assumed international obligations with regards to the right to health

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163. Indeed, many of these Conventions’ treaty bodies have already issued statements denouncing the practice of genital “normalizing” surgeries. See Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia T-477/95 (p. 5–7) (Colom.).

164. Although not a treaty, the right is also mentioned in Article 25 of the UDHR, a document the United States has signed. Universal Declaration of Human Rights art. 25.

165. Convention on the Rights of Persons with Disabilities, art. 25, December 13, 2006, 46 I.L.M. 433, U.N. Doc. A/RES/61/106 [hereinafter CRPD]; Convention on the Rights of the Child arts. 17, 23, 24, *adopted* Nov. 20, 1989, 28 I.L.M. 1448 (1989), *corrected* at 29. I.L.M. 1340 (1990) (*entered into force* Sept. 2, 1990) [hereinafter CRC]; International Covenant on Economic, Social and Cultural Rights art. 12, *adopted* Dec. 16, 1966, 993 U.N.T.S. (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]; Comm. on the Elimination of Discrimination against Women, General Recommendation No. 24, ¶ 1 U.N. Doc. A/54/38 (1999).

166. COUNCIL OF EUR. COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS AND INTERSEX PEOPLE 32 (2015), <https://rm.coe.int/16806da5d4> [<http://perma.cc/JNR8-456B>].

167. CRC art. 3.

168. *Id.* at art. 12.

169. COUNCIL OF EUR. COMM’R FOR HUMAN RIGHTS, *supra* note 166, at 33.

and rights of the child, many state-level governments are ahead of the curve and have provided citizens these rights. For instance, thirteen state constitutions refer to the right to health specifically.<sup>170</sup>

*B. The Rights of Parents: The Integrity of Family Under International Law*

In the face of the human rights issues described above is the right to the integrity of family, an aspect of the right to respect for private life protected by international human rights law.<sup>171</sup> Constituting the integrity of the family involves weighing a variety of competing values, including the special rights of children (like those described in Section III.A) and the rights of adults to raise children. Unsurprisingly, international law fails to clearly resolve the tensions between these values given that they are “held and deeply contested among and [even] within cultures.”<sup>172</sup> That said, Article 17 of the ICCPR states: “No one shall be subjected to *arbitrary or unlawful interference* with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation. . . . Everyone has the right to the protection of the law against such interference

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170. See generally Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1347 n. 91 (2010) (citing ALA. CONST. art. IV, § 93.12; ALASKA CONST. art. VII, § 4; ARK. CONST. art. 19, § 19; HAW. CONST. art. IX, §§ 1, 3; ILL. CONST. p.mbl.; LA. CONST. art. XII, § 8; MICH. CONST. art. 4, § 51; MISS. CONST. art. IV, § 86; MO. CONST. Art. 4, § 37; MONT. CONST. art II, § 3; N.Y. CONST. art. 17, §§ 1, 3; S.C. CONST. art. XII, § 1; WYO. CONST. art. 7, § 20).

171. ICCPR arts. 17, 23; Universal Declaration of Human Rights arts. 12, 16. Though the right to the integrity of family is often engaged in cases where, for example, the State separates family members by, *inter alia*, deporting one member of a family group (see, e.g., Human Rights Comm., International Covenant on Civil and Political Rights, ¶¶ 6.3, 7.1, 7.3, U.N. Doc. CCPR/C/72/D/930/2000 (Aug. 16, 2001)), the right has been invoked in areas analogous to the rights of intersex children. For instance:

A number of countries have declared the applicability of child protection laws to female genital mutilation, while others have enacted and applied specific provisions for the elimination of harmful practices, including female genital mutilation. Child protection laws provide for state intervention in cases in which the State has reason to believe that child abuse has occurred or may occur. They may enable authorities to remove a girl from her family or the country if there is reason to believe that she will be subjected to female genital mutilation. These laws focus on ensuring the best interests of the child.

WORLD HEALTH ORG. ET AL., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 18 (2008), [http://www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/Interagency\\_Statement\\_on\\_Eliminating\\_FGM.pdf](http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf) [<http://perma.cc/Y5VJ-47WD>]. For an overview of the diverse cases that Europe has interpreted this right in, see generally *Parental Rights*, EUR. COURT OF HUMAN RIGHTS (Oct. 2017), [http://www.echr.coe.int/Documents/FS\\_Parental\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Parental_ENG.pdf) [<http://perma.cc/53K6-EQRB>].

172. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 213–14 (2003).



or attacks.”<sup>173</sup> Therefore, whatever the vagueness of international human rights law on the aforementioned tensions may be, “arbitrariness” is the legal standard by which a potential interference with the family needs to be measured, including one looking to address parents’ decision-making relating to the intersex traits of their children.

It is useful to look at other relevant human rights instruments to inform what a nonarbitrary, or lawful, interference in the family context might look like. As the seminal modern human rights document, the Universal Declaration of Human Rights provides some guidance, stating that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>174</sup>

A reading of the right to the integrity of family that is in the spirit of human rights is thus informed by this limitation, an approach that has indeed been validated by regional human rights mechanisms.<sup>175</sup> Specifically, the consideration of “the rights and freedoms of others” when interpreting the right to the integrity of family is in harmony with other obligations that the United States has under international human rights law, including the obligation to protect the human rights of children by virtue of their status as minors.<sup>176</sup>

The case of intersex children who undergo genital “normalizing” surgeries thus warrants a nonarbitrary interference with the right to the integrity of family in light of the human rights violations obligating the United States to intervene, as well as the fact that

173. ICCPR art. 17 (emphasis added).

174. Universal Declaration of Human Rights art. 29.

175. Article 8 of the European Convention on Human Rights provides similar protection to family integrity, but it spells out explicitly the conditions under which the state may interfere with family life:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, *for the protection of health or morals, or for the protection of the rights and freedoms of others.*

European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos. 3, 5, 8, and 11 *which entered into force* on 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 *respectively* [hereinafter ECHR] (emphasis added).

176. *Id.* See also Article 24(1) of the ICCPR: “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

the surgeries are often carried out at the request of intersex children's parents. The interference must thus constrain a parent's ability to consent to the practice of genital "normalizing" surgeries on their children born with intersex traits. However, this lawful interference could be, but is not necessarily, a blanket ban as the interference must simply have the sole purpose of "securing due recognition and respect" for the rights of intersex children, including their right to liberty and security of person, their right to respect for private life, and their right to be free from torture and inhuman or degrading treatment. As this is new legal territory, it is helpful to refer, as will be done in the next section, to analogous human rights issues where parents' rights are also at stake to understand what might constitute a lawful interference in parents' rights.

On an even more doctrinal level, however, framing the rights of parents using international human rights law offers a distinct advantage to activists. It is true that international human rights law, like U.S. constitutional law, shows deference to parental rights. While the U.S. Supreme Court consistently holds that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children,"<sup>177</sup> the human rights regime upholds the right to integrity of family. Nevertheless, the way the two different bodies of law envision a curtailment of parental rights is noteworthy. The Supreme Court developed the doctrine of *parens patriae*, which states have often invoked to protect the welfare of children in cases of child abuse, and which activists have contemplated in the fight against genital "normalizing" surgeries.<sup>178</sup> In defining the doctrine, the Court has noted that the state has a "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."<sup>179</sup> Though this constitutional doctrine mirrors the doctrine of a nonarbitrary interference in the family under international human rights law, the latter is more forceful. While *parens patriae* is conceived as an *interest* that the state has in protecting children, a nonarbitrary interference, on the other hand, is a legal *obligation* under international law as a consequence of the children's rights that are at stake. In terms of advocating for a legislative solution to the situation of children born with intersex traits, the international human rights frame may thus prove more useful, at least rhetorically.

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177. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). See also Puluka, *supra* note 20, at 2115–18.

178. Puluka, *supra* note 20, at 2118.

179. *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 607 (1982)). For an in-depth overview of the doctrine, see *id.* at 2118–27.

*C. Untangling The Rights of Children and Parents' Rights:  
Lessons from Other Human Rights Issues*

Lawful interferences in the rights of parents to raise children is not unprecedented and has been prescribed in other contexts by international human rights law. For instance, in the comparable context of female genital mutilation (FGM),<sup>180</sup> a practice often perpetrated against young girls at the behest of their parents,<sup>181</sup> the Human Rights Committee limited parents' abilities to make decisions for daughters. Citing Articles 7 and 24 of the ICCPR, the Committee vindicated a girl's right to be free from torture and non-consensual medical experimentation by suggesting that States parties take measures, including protective and remedial measures, to eliminate the practice.<sup>182</sup> Other persuasive international treaty bodies have also taken similar positions on the supremacy of children's rights over parents' rights when it comes to FGM. Though they did not engage in a balancing inquiry *per se*, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, and the Committee on Economic, Social and Cultural Rights have all upheld girls' and adolescents' rights to health and have mandated protections for girls against the "harmful traditional practice," including via legislative intervention, monitoring mechanisms, awareness-raising campaigns, and education programs.<sup>183</sup> In essence, human rights law seems to suggest that when

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180. FGM, also called "female genital cutting":

[R]efers to all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. Between 100 and 140 million girls and women in the world are estimated to have undergone such procedures, and 3 million girls are estimated to be at risk of undergoing the procedures every year.

See WORLD HEALTH ORG. ET AL., *supra* note 171, at 1. FGM "violates a series of well-established human rights principles, norms and standards, including the principles of equality and non-discrimination on the basis of sex, the right to life when the procedure results in death, . . . the right to freedom from torture or cruel, inhuman or degrading treatment or punishment...[and] the right to the highest attainable standard of health." *Id.* at 9.

181. *Id.* See also *Nigeria: Whether parents can refuse female genital mutilation for their daughters; protection available to the child*, IMMIGRATION & REFUGEE BD. OF CAN. (Nov. 21, 2012), <http://www.refworld.org/docid/50c84b9c2.html> [<http://perma.cc/F7MF-NU2R>].

182. Human Rights Comm., CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 11, U.N. Doc. CCPR/C/21/REV.1/ADD.10 (Mar. 29, 2000).

183. See, e.g., Comm. on the Rights of the Child, CRC/GC/2003/4, *supra* note 120, ¶¶ 20, 35; Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶¶ 22, 35, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); Comm. on the Elimination of Discrimination against Women, CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), ¶¶ 12, 15, U.N. Doc. A/54/38/Rev.1 (1999); Comm. on the Elimination of Violence against Women,

the medical repercussions on children are as severe as in this context, and the only reason for engaging in the practice is tradition, children's rights must prevail at the expense of parental wishes.<sup>184</sup>

Another context where international human rights law limits parents' rights to the benefit of children's rights is in the case of child marriage,<sup>185</sup> a practice whose underlying causes include a "parental desire to prevent sexual relations outside marriage and the fear of rape. . . and traditional notions of the primary role of women and girls as wives and mothers."<sup>186</sup> The Human Rights Committee has indicated that the age for marriage must enable each spouse to give his or her free and full consent pursuant to Article 23 of the ICCPR, even when one of the factors motivating the marriage is "statutory or customary law [whereby] a guardian, who is generally male, consents to the marriage instead of the woman herself. . . ."<sup>187</sup> Moreover, it has urged states, albeit not always explicitly referencing parents' rights, that they must ensure that the minimum age complies with international standards, adopt active measures to prevent early marriage of girls, and generally promote awareness of children's

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General Recommendation No. 19: Violence Against Women, ¶¶ 20, 24, U.N. Doc. A/47/38 (1992); Comm. on the Elimination of Violence against Women, CEDAW General Recommendation No. 14: Female Circumcision, U.N. Doc. A/45/38 (1990).

184. It is noteworthy that United States federal law prohibits FGM, thus unequivocally limiting parental rights in this area. See 18 U.S.C. § 116 (2013) (stipulating "(a) Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both. (b) A surgical operation is not a violation of this section if the operation is—(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; . . . (c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual."). 24 states in the United States also have laws against FGM. Some activists note that FGM is akin to "normalizing" surgeries in certain cases and that those laws could potentially apply in this context, at least with regards to intersex females. See, e.g., Sylvan Fraser, *Constructing the female body: using female genital mutilation law to address genital-normalizing surgery on intersex children in the United States*, 9 INT'L J. HUM. RTS. IN HEALTHCARE 62, 66 (2016).

185. Child marriage impacts millions of children, particularly girls, around the world. The practice violates different "interconnected rights, including, the right to equality on grounds of sex and age, the right to marry and found a family, the right to life, the right to the highest attainable standard of health, the right to education and development and the right to be free from slavery. . . ." UNICEF, CHILD MARRIAGE AND THE LAW: LEGISLATIVE REFORM INITIATIVE PAPER SERIES I (2007), [https://www.unicef.org/french/files/Child\\_Marriage\\_and\\_the\\_Law.pdf](https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf) [<http://perma.cc/M8M5-MWBQ>].

186. *Id.* at 31.

187. Human Rights Comm., General Comment No. 28: Article 3 (The equality of rights between men and women), ¶ 23, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 29, 2000). See also Human Rights Comm., General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 4 (July 27, 1990).

rights.<sup>188</sup> Similarly, the Committee Against Torture has recognized that child marriages consented to by guardians may constitute cruel, inhuman or degrading treatment, particularly where governments have failed to establish a minimum age of marriage that complies with international standards.<sup>189</sup> Other interpretative bodies of international human rights law that have prescribed an end to child marriage at the expense of parental rights include the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, the Special Rapporteur on the sale of children, child prostitution and child pornography, and the Special Rapporteur on contemporary forms of slavery, including its causes and consequences.<sup>190</sup> Though human rights bodies in this context have not explicitly engaged in balancing inquiries vis-à-vis parents' rights, they acknowledge the victims' lack of consent and the role of guardians as particularly problematic. Their unequivocal

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188. See, e.g., Human Rights Comm., Concluding observations on the fifth periodic report of Uruguay, ¶ 11, U.N. Doc. CCPR/C/URY/CO/5 (Dec. 2, 2013); Human Rights Comm., Concluding observations of the Human Rights Committee, Islamic Republic of Iran, ¶ 9, U.N. Doc. CCPR/C/IRN/CO/3 (Nov. 29, 2011); Human Rights Comm., Concluding observations of the Human Rights Committee, Kuwait, ¶ 10, U.N. Doc. CCPR/C/KWT/CO/2 (Nov. 18, 2011); Human Rights Comm., Concluding observations of the Human Rights Committee, Yemen, ¶ 10, U.N. Doc. CCPR/CO/75/YEM (Aug. 12, 2002).

189. See Comm. against Torture, Concluding observations of the Committee against Torture, Yemen, ¶ 31, U.N. Doc. CAT/C/YEM/CO/2/Rev.1 (May 25, 2010). See also Comm. against Torture, Concluding observations of the Committee against Torture, Bulgaria, ¶ 26, U.N. Doc. CAT/C/BGR/CO/4-5 (Dec. 14, 2011) [hereinafter Comm. against Torture, U.N. Doc. CAT/C/BGR/CO/4-5].

190. See, e.g., Comm. on the Rights of the Child, Concluding observations: Togo, ¶¶ 30, 58, U.N. Doc. CRC/C/TGO/CO/3-4 (Mar. 8, 2012); Comm. against Torture, U.N. Doc. CAT/C/BGR/CO/4-5, *supra* note 189, ¶ 26; Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women, Montenegro, ¶ 39, U.N. Doc. CEDAW/C/MNE/CO/1 (Nov. 4, 2011); Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women, Zambia, ¶¶ 13–14, U.N. Doc. CEDAW/C/ZMB/CO/5-6 (Sept. 19, 2011); Najat Maalla M'jid (Special Rapporteur on the sale of children, child prostitution and pornography), Building rights-based and comprehensive national child protection systems to prevent and combat the sale of children, *child prostitution and child pornography*, ¶ 28, U.N. Doc. A/66/228 (Aug. 2, 2011); Comm. on the Rights of the Child, Concluding observations: Mauritania, ¶ 62, U.N. Doc. CRC/C/MRT/CO/2 (June 17, 2009). See also Gulnara Shahinian (Special Rapporteur on the contemporary forms of slavery, including its causes and consequences), *Mission to Madagascar (10 to 19 December 2012)*, ¶ 125, U.N. Doc. A/HRC/24/43/Add.2 (July 24, 2013); Gulnara Shahinian (Special Rapporteur on the contemporary forms of slavery, including its causes and consequences), Thematic report on challenges and lessons in combating contemporary forms of slavery, ¶ 29, U.N. Doc. A/HRC/24/43 (July 1, 2013); Gulnara Shahinian (Special Rapporteur on the contemporary forms of slavery, including its causes and consequences), *Thematic report on servile marriage*, ¶ 14, U.N. Doc. A/HRC/21/41 (July 10, 2012); Comm. on the Elimination of Discrimination against Women, General recommendation No. 21: Equality in marriage and family relations, ¶ 36 (Apr. 12, 1994).

vindication of children's rights over parents' rights here thus suggests that it is not that parents cannot consent for children, but rather that the magnitude of consenting for a child in this context is too great, warranting an interference in parents' rights.

A final example of an area of international human rights law where parental rights are significantly limited is corporal punishment of children.<sup>191</sup> For instance, in reference to the prohibition pursuant to cruel, inhuman or degrading treatment or punishment pursuant to Article 7 of the ICCPR, the Human Rights Committee explained that "the prohibition must extend to corporal punishment, including excessive chastisement ordered . . . as an educative or disciplinary measure" and that "[i]t is appropriate to emphasize in this regard that article 7 protects, in particular, children. . . ."<sup>192</sup> Similarly, the Committee Against Torture declared that the "continuing application" of corporal punishment "could constitute in itself a violation. . . of the Convention."<sup>193</sup> Meanwhile, the Committee on the Rights of the Child held that Article 19 of the Convention "does not leave room for any level of legalized violence against children" and that "[c]orporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them."<sup>194</sup> Other persuasive bodies that have interpreted international human rights law to limit parental rights in this context include the Committee on Economic, Social and Cultural Rights.<sup>195</sup>

On the contrary, international human rights law does not always categorically vindicate the alleged rights of a child and will show deference to the rights of parents in certain contexts. For

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191. According to the Committee on the Rights of the Child, corporal punishment is: [A]ny punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement—a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).

Comm. on the Rights of the Child, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), ¶ 11, U.N. Doc. CRC/C/GC/8 (June 2, 2006).

192. Human Rights Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 5 (Mar. 10, 1992).

193. Comm. against Torture, Rep. of the Committee against Torture, ¶ 169, U.N. Doc. A/50/44 (July 26, 1995).

194. Comm. on the Rights of the Child, *supra* note 191, ¶ 18.

195. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13: The Right to Education (Art. 13), ¶ 41, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

example, in one European Court of Human Rights case interpreting Article 8 of the European Convention on Human Rights (ECHR) (the equivalent of Article 17 of the ICCPR<sup>196</sup>), a married couple complained about the state's removal of their two adopted children and the revocation of their adoption.<sup>197</sup> The state did this following an incident during which the adopted son "was badly burnt at home and had to go to hospital for treatment," an event that made authorities suspect child abuse.<sup>198</sup> Despite the very serious allegation against the parents, putting their interests in tension with those of the adoptive children, "the Court [found] that the Russian courts had made a superficial assessment of the allegation that the [plaintiffs] had failed to look after the children's health."<sup>199</sup> It held that suspicion alone was insufficient to warrant the extreme decision to revoke the adoption.<sup>200</sup> Moreover, no assessment had been made as to the emotional bond between the children and parents, which may have been strong enough to trigger emotional distress following separation.<sup>201</sup> In addition, the Court found that the fact that the parents and children were separated for a period of fourteen months also constituted a violation of Article 8 of the ECHR given its extremity.<sup>202</sup> In essence, international human rights law demands a thorough examination of the facts and relevant factors before the right to respect for family life is infringed.

From these examples, the manner in which international human rights law mediates between children's rights and parent's rights becomes clearer. On the one hand, the field will often champion the rights of children when it comes to, *inter alia*, their right to liberty and security of person, their right to marry and found a family, and their right to freedom from torture or cruel, inhuman or degrading treatment or punishment. Indeed, international human rights bodies demand that States parties take concrete measures, including legislative, protective, and remedial measures, to eliminate the problematic practices, not just to limit them. A human rights-based, nonarbitrary solution to the problems posed by genital

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196. Compare ECHR art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence") with ICCPR art. 17 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.").

197. Eur. Ct. H.R. Press Release No. 122, Decision to revoke adoption based on unproven suspicion of child abuse was unjustified (Apr. 18, 2013) (reporting on the Court's judgement on Ageyevy v. Russia, application no. 7075/10).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

“normalizing” surgeries might thus look like a statutory ban on performing, aiding, or abetting such surgeries, such as the ones presented in Section II.A. On the other hand, however, international human rights law does not completely eclipse or disregard the parents in the contexts presented above. First, it recognizes that parents’ consent to harmful practices like FGM, child marriage, and corporal punishment are rooted in “traditional practices.”<sup>203</sup> In response to this, international human rights law accentuates the need for awareness-raising for parents, including via campaigns and education programs.<sup>204</sup> Whereas the U.S. law-based solutions in Part II present awareness-raising as an aftereffect (if at all), international human rights requires this to be an integral part of a state-sanctioned solution. Moreover, the legal regime requires a thorough investigation of the facts of a case before the rights of parents are curtailed indefinitely.

#### IV. INTERNATIONAL HUMAN RIGHTS LAW’S ROLE THUS FAR AND ITS POTENTIAL

As presented in Part III, international human rights law requires governments to protect the rights of children born with intersex traits. The legal regime also provides guidance on how best to do this in the face of competing children’s rights and parents’ rights. However, beyond these outlined capabilities, international human rights law has already had a concrete impact on progress in the intersex context around the world. Drawing from developments in Colombia, Chile, and Malta, this Part aims to critically examine the practical role that international human rights law has played in ending or limiting the practice of medically unnecessary, non-consensual genital “normalizing” surgeries and mediating between children’s and parents’ rights. More importantly, through this analysis, this Part sheds light on how the legal regime and its institutions can be harnessed strategically to effect change, particularly in the United States. Section IV.A will look at how the discourse of international human rights and state obligations have given intersex activists in Colombia leverage to vindicate their grievances in uncharted legal territory. Section IV.B will then address how institutions created by international human rights law, particularly treaty bodies and their mechanisms, have helped shape positive developments in Chile. Lastly, Section IV.C will discuss how international

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203. See, e.g., *supra* text accompanying note 171.

204. *Id.*



human rights advocacy networks, spurred by the human rights regime, have helped to bring about change in Malta.

*A. Colombia: Leveraging International Human Rights & State Obligations*

It was not until the late 1990s that human rights and other legal considerations entered the public discourse surrounding the medical predicament of people born with intersex traits.<sup>205</sup> Until then, activists, at least in the United States, mainly employed media visibility as an advocacy tool.<sup>206</sup> However, once a “rights” discourse began to develop, activists started, for example, to attend legal conferences, look to broader legal issues, and consolidate struggles transnationally to contextualize their concerns.<sup>207</sup> Indeed, the language of “rights,” as well as that of corresponding state obligations, gave intersex activists a tool with which to successfully articulate and push for an issue that does not fit neatly in existing domestic laws, including as it relates to the tension between children’s versus parents’ rights. This is particularly observable in Colombia where a series of decisions by the Constitutional Court of Colombia between 1995 and 2008 not only changed the treatment of children born with intersex traits, but also showcased the power of framing “normalizing” surgeries as human rights violations in court.

In *Sentencia T-477/95*, the Court considered the case of a teenager who, after finding out that he had been accidentally castrated as an infant and subsequently subjected to sex reassignment surgery and raised as a girl, sued the doctors and hospital responsible.<sup>208</sup> There, the Court found that the sex of a child could not be altered without the child’s informed consent.<sup>209</sup> A few years later, in *Sentencia SU-377/99*, the seminal intersex case, the Court was confronted with a mother’s suit to compel a hospital wary of *Sentencia T-477/95* to accept her consent to genital surgery for her eight-year-old child born with an intersex trait.<sup>210</sup> Finding that the need for parental consent decreases with age and that by the age of five

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205. Sharon E. Preves, *Out of the O.R. and into the Streets: Exploring the Impact of Intersex Media Activism*, 12 CARDOZO J.L. & GENDER 247, 278–79 (2005).

206. *Id.* at 277–79.

207. *Id.* at 279.

208. See Corte Constitucional [C.C.][Constitutional Court], octubre 23, 1995, *Sentencia T-477/95* (p. 5–7) (Colom.).

209. *Id.* at 33 (“El expreso consentimiento informado del propio paciente es indispensable para cualquier tratamiento médico de readecuación del sexo.”).

210. See Corte Constitucional [C.C.][Constitutional Court], mayo 12, 1999, *Sentencia SU-377/99* (p. 4–5) (Colom.).

children have developed a gender identity,<sup>211</sup> the Court held that the mother's consent could not be substituted for that of the eight-year-old child in this case.<sup>212</sup> However, the Court also held that, in certain situations, parental consent could be substituted if it was "informed, qualified, and persistent."<sup>213</sup> Later, in *Sentencia T-912/08*, the Court applied its earlier reasoning to hold that parental consent could not be substituted for that of a five-year-old intersex child.<sup>214</sup> There, it held that once all the facts were known, the child and the parents together could give joint consent, but no surgery could be performed if the child's decision did not accord with that of his parents.<sup>215</sup>

Though *Sentencia SU-377/99*, the seminal intersex case, did not ban genital "normalizing" surgeries, it severely limited parents' abilities to consent to these surgeries on behalf of their children using, *inter alia*, international human rights legal standards. With no jurisprudence on intersex issues at the time,<sup>216</sup> activists like the Intersex Society of North America (ISNA) rushed to present the Court with legal arguments that "[b]oth the Nuremberg Code and basic principles of human rights law prohibit subjecting a child to . . . [such] surgeries."<sup>217</sup> Listening to activists, the Court looked to its ICCPR and CRC obligations, in addition to the Colombian Constitution, for guidance.<sup>218</sup> In finding the aforementioned limitations on parents' abilities to consent for their children, the Court noted that, in accor-

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211. *Id.* at 51 ("[A] los cinco años un menor no sólo ha desarrollado una identidad de género definida sino que, además, tiene conciencia de lo que sucede con su cuerpo y posee una autonomía suficiente para manifestar distintos papeles de género y expresar sus deseos.").

212. *Id.* at 52 ("Por ende, la Corte concluye que, como no existe un evidente riesgo de que se comprometa el derecho a la vida de la menor si no se practica la operación, no es posible que, en el presente caso, la madre autorice la intervención y los tratamientos hormonales para su hija, que ya tiene más de ocho años. Por consiguiente, esas intervenciones sólo podrán ser adelantadas con el consentimiento informado de NN y por ello la tutela no debe ser concedida, pues no se acogerá la solicitud concreta de la madre que pretendía la autorización de los procedimientos. Sin embargo, es necesario que el juez constitucional tome las medidas necesarias para proteger los derechos fundamentales de la menor.").

213. *Id.* at 50 ("... la niña puede contar con especial apoyo de su madre, quien deberá gozar de un 'consentimiento informado, cualificado y persistente[.]'").

214. Corte Constitucional [C.C.][Constitutional Court], septiembre 18, 2008, *Sentencia T-912/08* (p. 1)(Colom.).

215. *Id.* at 7.

216. Corte Constitucional [C.C.][Constitutional Court], mayo 12, 1999, *Sentencia SU-377/99* (p. 5) (Colom.).

217. *ISNA's Amicus Brief on Intersex Genital Surgery*, INTERSEX SOC'Y OF N. AM. 5 (Feb. 7, 1998), <http://www.isna.org/node/97> [<http://perma.cc/2TH8-2BQR>].

218. The Court actually thanked ISNA for its collaboration in its opinion and referenced it and its documents more than 25 times. *See, e.g.*, Corte Constitucional [C.C.][Constitutional Court], mayo 12, 1999, *Sentencia SU-377/99* (n. 78) (Colom.) (thanking ISNA).

dance with Article 7 of the ICCPR, patients have the right to decide if they will participate in medical procedures on the basis of objective understanding of all the risks and benefits.<sup>219</sup> It also observed that, per Article 12 of the CRC, children must be accorded an increasingly certain level of autonomy relating to issues that affect them as they grow, including when it comes to medical decisions that impact them.<sup>220</sup> Addressing parents' rights directly, the Court points out that while human rights treaties do recognize parents' rights to raise their children,<sup>221</sup> including their ability to consent to medical procedures on their child's behalf, this right is not limitless. It highlights that Article 19 of the CRC mandates that states adopt all measures to protect children against any form of harm or physical or mental abuse even while they are under the custody of their parents.<sup>222</sup> It also acknowledges that under Article 20, the CRC even requires the state to provide special assistance to children in cases where their best interest is to be temporarily or permanently separated from their parents.<sup>223</sup> Buttressing its arguments with the discourse of international human rights and state obligations in an underdeveloped area of the law, the Court, partially at the behest of activists, was able to reach a conclusion that moved the needle forward for the rights of people born with intersex traits.

### *B. Chile: Using International Human Rights Mechanisms*

In addition to taking advantage of the "rights-obligations" discourse under international human rights law, intersex activists have also benefited from another feature of international human rights law: treaty bodies and their mechanisms. When states accede to international human rights treaties, they also consent to having "treaty bodies" monitor their implementation of the treaties via procedures that include periodic reporting obligations.<sup>224</sup> Generally, under the reporting procedure, governments will submit reports to a human rights treaty body about their implementation of that treaty, which will be followed by a discussion of these reports with governments in public proceedings where domestic NGOs and the press

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219. *Id.* ¶ 12.

220. *Id.* ¶ 23.

221. *Id.* ¶ 39.

222. *See id.*

223. *See id.*

224. For an overview of the state reporting processes of international human rights treaty bodies, see PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 768–89 (2012).

may be present.<sup>225</sup> Before these public proceedings, however, NGOs are also permitted to submit “shadow reports” to the treaty body that serve both to critique the government’s report, as well as to raise other human rights issues not present in the government’s report.<sup>226</sup> These shadow reports, if accurate, detailed, and concise, may have a huge impact on the discussion and, ultimately, on the government’s engagement with troublesome or omitted issues.<sup>227</sup> Activists around the world take regular advantage of this mechanism to challenge their governments’ positions on human rights, including in the intersex context.<sup>228</sup>

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225. *Id.* at 768.

226. *Id.* at 769.

227. *Id.* For assessments of the goals and efficacy of the state reporting procedures and NGO shadow reports, see Human Rights Comm. A Strategic Approach to Public Relations, Including Relations with the Media, U.N. Doc. CCPR/C/94/3 (Jan. 15, 2009); U.N. Secretariat, *Concept Paper on the Commissioner’s Proposal for a Unified Standing Treaty Body*, ¶ 8, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006); Ann Marie Clark, *The normative context of human rights criticism: treaty ratification and UN mechanisms*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 125–44 (Thomas Risse et al. eds. 2013).

228. To date, activists have succeeded in using the state reporting mechanism of six different treaty bodies (Committee against Torture, Committee on the Rights of Persons with Disabilities, Committee on the Elimination of Discrimination against Women, Committee on the Rights of the Child, Committee on Economic, Social and Cultural Rights, and the Human Rights Committee) to highlight the conditions of intersex children in sixteen countries (Australia, Chile, Denmark, France, Germany, Hong Kong (China), Ireland, Italy, Morocco, Nepal, Netherlands, New Zealand, Spain, South Africa, Switzerland, United Kingdom, Uruguay). See Human Rights Comm., Concluding observations on the sixth periodic report of Australia, ¶¶ 25–26, U.N. Doc. CCPR/C/AUS/CO/6 (Nov. 9, 2017); Comm. on the Rights of the Child, Concluding observations on the fifth periodic report of Denmark, ¶¶ 12, 24, U.N. Doc. CRC/C/DNK/CO/5 (Oct. 26, 2017); Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, ¶¶ 40–41, U.N. Doc. CRPD/C/GBR/CO/1 (Oct. 3, 2017); Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of Morocco, ¶¶ 36–37, U.N. Doc. CRPD/C/MAR/CO/1 (Sept. 5, 2017); Human Rights Comm., Concluding observations on the fourth periodic report of Switzerland, ¶¶ 24–25, U.N. Doc. CCPR/C/CHE/CO/4 (Aug. 22, 2017); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of France, ¶¶ 18–19, U.N. Doc. CEDAW/C/FRA/CO/7-8 (July 25, 2016); Comm. on Econ., Soc. & Cultural Rights, Concluding observations on the fifth periodic report of Australia, ¶¶ 49–50, U.N. Doc. E/C.12/AUS/CO/5 (July 11, 2017); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland, ¶¶ 24–25, U.N. Doc. CEDAW/C/IRL/CO/6-7 (Mar. 9, 2017); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Germany, ¶¶ 23–24, U.N. Doc. CEDAW/C/DEU/CO/7-8 (Mar. 9, 2017); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Switzerland, ¶¶ 24–25, U.N. Doc. CEDAW/C/CHE/CO/4-5 (Nov. 25, 2016); Comm. on the Elimination of Discrimination against Women, Concluding observations on the sixth periodic report of the Netherlands, ¶¶ 21–22, U.N. Doc. CEDAW/C/NLD/CO/6 (Nov. 24, 2016); Comm.

Chile is a country where activists looking for government regulation on this issue succeeded in leveraging the outcome of these reporting procedures to compel action from the government, culminating in the country's landmark directive on the "healthcare of intersex boys and girls" in December 2015.<sup>229</sup> This directive, issued by the Ministry of Health, calls for a stop to "unnecessary 'normalization' treatments for intersex children, including irreversible genital surgeries, until they are old enough to make decisions regarding their bodies."<sup>230</sup> The release of this guidance is the first time that a

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on the Rights of the Child, Concluding observations on the second periodic report of South Africa, ¶¶ 23–24, 39–40, U.N. Doc. CRC/C/ZAF/CO/2 (Oct. 27, 2016); Comm. on the Rights of the Child, Concluding observations on the fifth periodic report of New Zealand, ¶¶ 15, 25, U.N. Doc. CRC/C/NZL/CO/5 (Oct. 21, 2016); Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of Uruguay, ¶¶ 43–44, U.N. Doc. CRPD/C/URY/CO/1 (Sept. 30, 2016); Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of Italy, ¶¶ 45–46, U.N. Doc. CRPD/C/ITA/CO/1 (Oct. 6, 2016); Comm. against Torture, Concluding observations on the seventh periodic report of France, ¶¶ 34–35, U.N. Doc. CAT/C/FRA/CO/7 (June 10, 2016); Comm. on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Nepal, ¶¶ 41–42, U.N. Doc. CRC/C/NPL/CO/3-5 (July 8, 2016); Comm. on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, ¶¶ 21–22, 46–49, 58–59, 64–65, U.N. Doc. CRC/C/GBR/CO/5 (July 12, 2016); Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of Chile, ¶¶ 41–42, U.N. Doc. CRPD/C/CHL/CO/1 (Apr. 13, 2016); Comm. against Torture, Concluding observations on the sixth and seventh periodic reports of Denmark, ¶¶ 42–43, U.N. Doc. CAT/C/DNK/CO/6-7 (Feb. 4, 2016); Comm. against Torture, Concluding observations on the fifth periodic report of China with respect to Hong Kong, China, ¶¶ 28–29, U.N. Doc. CAT/C/CHN-HKG/CO/5 (Feb. 3, 2016); Comm. on the Rights of the Child, Concluding observations on the fifth periodic report of France, ¶¶ 47–48, U.N. Doc. CRC/C/FRA/CO/5 (Feb. 23, 2016); Comm. on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, ¶¶ 27–28, 39–40, U.N. Doc. CRC/C/IRL/CO/3-4 (Mar. 1, 2016); Comm. against Torture, Concluding observations on the sixth periodic report of Austria, ¶¶ 44–45, U.N. Doc. CAT/C/AUT/CO/6 (Jan. 27, 2016); Comm. on the Rights of the Child, Concluding observations on the combined fourth and fifth periodic reports of Chile, ¶¶ 24–25, 34–35, 48–49, U.N. Doc. CRC/C/CHL/CO/4-5 (Oct. 30, 2015) [hereinafter Comm. on the Rights of the Child, U.N. Doc. CRC/C/CHL/CO/4-5]; Comm. against Torture, Concluding observations on the seventh periodic report of Switzerland, ¶ 20, U.N. Doc. CAT/C/CHE/CO/7 (Sept. 7, 2015); Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, ¶¶ 37–38, U.N. Doc. CRPD/C/DEU/CO/1 (May 13, 2015); Comm. on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Switzerland, ¶¶ 42–43, U.N. Doc. CRC/C/CHE/CO/2-4 (Feb. 26, 2015); Comm. against Torture, Concluding observations of the Committee against Torture, Germany, ¶ 20, U.N. Doc. CAT/C/DEU/CO/5 (Nov. 18, 2011); Comm. on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Spain, ¶ 24, U.N. Doc. CRC/C/ESP/CO/5-6 (Feb. 2, 2018).

229. MINISTERIO DE SALUD, CIRCULAR NO. 18: INSTRUYE SOBRE CIERTOS ASPECTOS DE LA ATENCIÓN DE SALUD A NIÑOS Y NIÑAS INTERSEX (2015), <https://oii.org.au/wp-content/uploads/2016/01/Circular-08-22.12.15-Instruye-Sobre-Ciertos-Aspectos-de-la-atencion-de-Salud-a-Ninos-y-Ninas-Intersex.pdf> [http://perma.cc/VY9C-N5AA].

230. *Id.* (author's translation).

governmental health agency has, independently of legislation or legal action, taken such a step in recognition of the human rights of people born with intersex traits. Notably, the directive also calls for the creation of a working group in every regional Health Service “staffed by professionals from different specializations, including endocrinology, gynecology, psychiatry, pediatrics, family doctor, that, together with the ethics committee of the Health Service, shall determine what action to take. This proposal will come before a central committee for final review during preparation of a protocol that will regulate treatment.”<sup>231</sup>

Like with the Colombian Constitutional Court and *Sentencia SU-377/99*, the Chilean Ministry of Health grounded its directive quite explicitly in international human rights law and, particularly, in the findings of international human rights mechanisms. In 2015, the Committee on the Rights of the Child addressed Chile’s record on intersex surgeries during its periodic reporting cycle.<sup>232</sup> Chilean intersex activists were present during the public proceedings.<sup>233</sup> In its Concluding Observations, the Committee recommended that Chile “expedite the development and implementation of a rights-based health-care protocol for intersex children that sets the procedures and steps to be followed by health teams. . . [to] protect the rights of the children concerned to physical and mental integrity, autonomy and self-determination. . . .”<sup>234</sup> Spurred by activists’ demands, the Chilean Ministry of Health’s landmark directive on the medical treatment of children born with intersex traits alludes precisely to these concerns and recommendations to develop a protocol “to ensure people born with intersex conditions will not be subjected to surgeries until they are old enough to make decisions on their bodies themselves.”<sup>235</sup> Remarkably, the government also acknowledged that the creation of such a protocol “means the recognition of the progressive autonomy of children as a cross-cutting principle of the Convention on the Rights of the Child, ratified by the Chilean government in 1990.”<sup>236</sup> The directive also references

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231. *Id.* (author’s translation).

232. See Comm. on the Rights of the Child, U.N. Doc. CRC/C/CHL/CO/4-5, *supra* note 228, ¶ 48.

233. Morgan Carpenter, *Chilean Ministry of Health issues instructions stopping “normalising” interventions on intersex children*, ORG. INTERSEX INT’L AUSTL. LTD. (Jan. 11, 2016), <https://oii.org.au/30250/chilean-ministry-stops-normalising> [http://perma.cc/LKV9-8R46] (Andrés Rivera Duarte “appeared as a civil society representative before the UN Committee on the Rights of the Child in Geneva” in 2015).

234. Comm. on the Rights of the Child, U.N. Doc. CRC/C/CHL/CO/4-5, *supra* note 228, ¶ 49.

235. MINISTERIO DE SALUD, *supra* note 229 (author’s translation).

236. *Id.* (author’s translation).

other human rights mechanisms, albeit in less detail. It acknowledges the findings of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights regarding genital “normalizing” surgeries,<sup>237</sup> as well as findings by the regional Inter-American System of Human Rights in 2013 and 2015 that such surgeries are systematic violations of human rights and possibly constitute torture.<sup>238</sup>

While it would be hasty to overstate the Committee’s influence on a government’s decision-making, the lack of mention of Chilean law in the directive suggests that the treaty body’s reporting mechanism did provide additional impetus and guidance for the Chilean government to take this issue on. Moreover, one of the activists behind the campaign in Chile explained that when meeting with the Minister of Health and her advisors, he only “gave them a draft human rights protocol, . . . United Nations reports, and general human rights information” and that “[t]hat day they promised to change the situation and to create a working group.”<sup>239</sup> Leveraging the country’s obligations under the international legal regime and its mechanisms, activists in Chile looking for government regulation succeeded in getting their government to effect change for people born with intersex traits.

### *C. Malta: Tapping into Human Rights Transnational Advocacy Networks*

For activists, equally important to the rights-obligations paradigm and the mechanisms of international human rights law is the framework that the system provides for the socialization of these international rights in domestic systems. This framework, which some political scientists have aimed to capture and called the “spiral model” of human rights change,<sup>240</sup> is composed of causal relationships between various state and non-state actors and associated

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237. Comm. on the Rights of the Child, U.N. Doc. CRC/C/CHL/CO/4-5, *supra* note 228, ¶¶ 48–49.

238. See Inter-American Judicial Committee, Sexual Orientation, Gender Identity and Gender Expression CJI/doc.417/12, at 5 (2013), [http://www.oas.org/en/sla/iajc/docs/ijc\\_current\\_agenda\\_Sexual\\_orientation.pdf](http://www.oas.org/en/sla/iajc/docs/ijc_current_agenda_Sexual_orientation.pdf) [<https://perma.cc/V6DV-Y394>]; INTER-AMERICAN COMM’N ON HUMAN RIGHTS, VIOLENCE AGAINST LGBTI PERSONS, ¶¶ 182–95 (2015), <http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf> [<https://perma.cc/65Z3-9X5Z>].

239. Carpenter, *supra* note 233.

240. This model was first developed in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 3* (Thomas Risse et al. eds. 1999) and later revisited in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 5–7* (Thomas Risse et al. eds. 2013) [hereinafter *THE PERSISTENT POWER OF HUMAN RIGHTS*].

processes that ultimately lead to “behavioral change and sustained compliance with international human rights.”<sup>241</sup> Some of these relationships have been labeled “transnational advocacy networks,” i.e., the web of interactions between activists united by human rights principles or values.<sup>242</sup> These networks, by linking civil societies, states, and international organizations, increase exchange and may contribute to the convergence of social and cultural norms regionally and internationally.<sup>243</sup> Where domestic political and judicial actors are unwilling to recognize rights, individuals and domestic groups may develop and activate these networks to express their concerns and, in the most egregious situations, to protect their lives.<sup>244</sup> In addition, they may also aim to mobilize international allies to bring pressure on their government, a strategy of influence political scientists have called “the boomerang pattern.”<sup>245</sup> Under this scheme, contacts abroad can “‘amplify’ the demands of domestic groups, pry open space for new issues, and then echo these demands back into the domestic arena”<sup>246</sup> in the hopes of prompting a change in the behavior of a state. The networks’ strategies may include: 1) “information politics, [i.e.,] the ability to strategically move politically [salient] information quickly and credibly. . .”; 2) “symbolic politics,” i.e., the ability to effectively employ symbols, actions, or stories to portray a situation or argument to a removed audience; 3) “leverage politics,” i.e., the ability to prompt powerful actors to intervene in contexts where members of a network are unlikely to have influence; and 4) “accountability politics,” i.e., the ability to compel powerful actors to act in accordance with policies or principles they have formally endorsed.<sup>247</sup> Today, with cheaper air travel and more accessible communication technologies, as well as the proliferation of international organizations and conferences, initiating and maintaining these networks is increasingly feasible for human rights activists.<sup>248</sup> These networks have played a key role in the positive developments in the intersex context, most notably in Malta.

In Malta, transnational human rights advocacy networks played a pivotal role in precipitating the most celebrated development

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241. See *Introduction and Overview* to THE PERSISTENT POWER OF HUMAN RIGHTS, *supra* note 240, at 7.

242. Margaret E. Keck & Kathryn Sikkink, *Transnational advocacy networks in international and regional politics*, 51 INT’L SOC. SCI. J. 89, 89–101 (1999).

243. *Id.* at 89.

244. *Id.* at 93.

245. *Id.*

246. *Id.*

247. *Id.* at 95.

248. Keck & Sikkink, *supra* note 242, at 95.



recognizing the rights of people born with intersex traits: Malta's April 2015 Gender Identity, Gender Expression, and Sex Characteristics (GIGESC) Act.<sup>249</sup> In adopting this law, Malta became the first country in the world to ban genital "normalizing" surgeries on infants and young children born with intersex traits.<sup>250</sup> The Act makes it illegal "for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent."<sup>251</sup> The Act also takes note of "exceptional circumstances" for which treatment may be provided and not deferred once agreement is reached between an "interdisciplinary team" and a child's guardians, provided that the medical intervention is not "driven by social factors."<sup>252</sup> The Act mandates that the interdisciplinary team be appointed by the Minister of Social Dialogue, Consumer Affairs, and Civil Liberties and composed of relevant professionals.<sup>253</sup>

This extraordinary legislative achievement by activists was thanks, in part, to transnational advocacy networks opening up the political space. For example, a prominent voice in the passage of the bill, the Human Rights Policy Coordinator at the Maltese Ministry for Social Dialogue, Consumer Affairs, and Civil Liberties, had previously helped to bring together a global intersex community through his work at the International Gay, Lesbian, Transsexual, Transgender, and Intersex Association (ILGA),<sup>254</sup> an international federation of organizations campaigning for LGBTI rights.<sup>255</sup> In a display of "information politics" and "leverage politics,"<sup>256</sup> he had helped to create the first ever international convention of intersex advocates

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249. Gender Identity, Gender Expression and Sex Characteristics Act, Act No. XI of 2015 (Malta), [http://tgeu.org/wp-content/uploads/2015/04/Malta\\_GIGESC\\_trans\\_law\\_2015.pdf](http://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf) [<http://perma.cc/8DHT-ZWM8>]. For examples of activists celebrating its passage and highlighting the human rights standards that underpin the law, see Leslie J., *A Red Letter Day as Malta Makes History!*, ORG. INTERSEX INT'L IN THE U.K. (Apr. 1, 2015), <http://oiiuk.org/1027/a-red-letter-day-as-malta-makes-history> [<https://perma.cc/B2U6-V478>]; *Malta the First Country to Outlaw Forced Surgical Intervention on Intersex Minors*, STAR OBSERVER (Apr. 2, 2015), <http://www.starobserver.com.au/news/international-news-news/malta-passes-law-outlawing-forced-surgical-intervention-on-intersex-minors/134800> [<https://perma.cc/66AY-XZDX>].

250. See *supra* text accompanying note 249.

251. GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS ACT § 15(1) (Malta) (2015).

252. *Id.* § 15(2).

253. *Id.* § 15(3–4).

254. Mark Hay, *What Will Malta's New Intersex Law Mean for the Rest of the World?*, VICE (Apr. 7, 2015), [https://www.vice.com/en\\_us/article/exqn77/maltas-new-intersex-legislation-is-the-most-progressive-in-the-world-192](https://www.vice.com/en_us/article/exqn77/maltas-new-intersex-legislation-is-the-most-progressive-in-the-world-192) [<http://perma.cc/S329-W2CM>].

255. *About Us*, ILGA, <http://ilga.org/about-us> [<http://perma.cc/HB4A-VTKC>].

256. See Keck & Sikkink, *supra* note 242, at 95.

called the International Intersex Forum during his tenure at ILGA, a gathering he and other activists later brought to Malta and to which they invited the Maltese Minister for Social Dialogue, Consumer Affairs, and Civil Liberties.<sup>257</sup> Indeed, the provisions of the Act have been seen by activists worldwide to meet several key demands of the Public Statement by the Third International Intersex Forum drafted in Malta by “34 activists representing 30 intersex organisations from all continents.”<sup>258</sup> Moreover, the Minister confirmed that the government considered the “constructive feedback” of international human rights groups,<sup>259</sup> including GATE, ILGA-Europe, OII Australia, OII Europe, STP, Transgender Europe, and UNHCR, during the bill’s public consultation.<sup>260</sup> Further evidence of the work of transnational advocacy networks in the passage of the Act is that, like with the developments in Colombia and Chile, the discourse of international human rights overtly informs the relevant provisions of the Act. In the most obvious display of this, the Act predicates the prohibition of “normalizing” surgeries on the country’s obligation to protect the “right to bodily integrity and physical autonomy,” a human right that did not explicitly exist under Maltese domestic law previously and was, in fact, introduced by the Act.<sup>261</sup> While new to the Maltese legal system, the right to bodily integrity and physical autonomy has long been cultivated by international human rights law,<sup>262</sup> a fact of which the Act takes advantage.<sup>263</sup>

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257. See Hay, *supra* note 254.

258. See *Public Statement by the Third International Intersex Forum*, ILGA EUR., <https://www.ilga-europe.org/print/what-we-do/our-advocacy-work/trans-and-intersex/intersex/events/3rd-international-intersex-forum> [<https://perma.cc/7T6G-KFXR>]. See also Morgan Carpenter, *We celebrate Maltese protections for intersex people*, ORG. INTERSEX INT’L AUSTL. LTD. (Apr. 2, 2015), <https://oii.org.au/28592/we-celebrate-maltese-protections-for-intersex-people> [<https://perma.cc/4MD8-4LC2>].

259. Helena Dalli, *Malta breaks EU taboo on trans-gender rights*, EU OBSERVER (Apr. 17, 2015), <https://euobserver.com/opinion/128364> [<https://perma.cc/NC3A-BGJ3>].

260. MINISTRY FOR SOC. DIALOGUE, CONSUMER AFFAIRS, & CIVIL LIBERTIES, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTIC ACT: PUBLIC CONSULTATION (Oct. 29, 2014), [http://meae.gov.mt/en/Public\\_Consultations/MSDC/Documents/2014%20-%20GIGESC/Public%20Consultation%20GIGESC%20Final%20-en.pdf](http://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2014%20-%20GIGESC/Public%20Consultation%20GIGESC%20Final%20-en.pdf) [<https://perma.cc/XT3S-8347>].

261. *Id.* (The proposal “introduces a right to bodily integrity and physical autonomy for all persons[.]”).

262. See, e.g., Universal Declaration of Human Rights art. 3; Human Rights Comm., U.N. Doc. CCPR/C/GC/35, *supra* note 108, ¶ 3; ICCPR art. 9.

263. See, e.g., Ronald Cassar, *Malta and LGBTIQ equality, one year on*, TIMES OF MALTA (Sept. 14, 2016), <https://www.timesofmalta.com/articles/view/20160914/life-%20features/malta-and-lgbtiq-equality-one-year-on.624868> [<https://perma.cc/7F8W-TSHA>] (quoting Gabi Calleja, Chairwoman of the LGBTIQ Consultative Council, an advisory body set up by Malta’s Minister for Social Dialogue, Consumer Affairs and Civil Liberties, which developed the GIGESC bill: “With respect to the right to bodily integrity and the protection of intersex persons, there was the challenge of developing the legal text

## V. INTERNATIONAL HUMAN RIGHTS LAW'S POTENTIAL FOR INTERSEX RIGHTS IN THE UNITED STATES

As demonstrated above, international human rights law has helped to effect change for intersex children around the world, both in the courts and in legislatures. In the United States, it too can play a role by complementing and strengthening domestic legal claims. For example, when analyzing the impact of medically unnecessary genital “normalizing” surgeries on children’s substantive due process rights, legal arguments can take advantage of the analyses that international legal institutions have already undertaken with respect to the right to liberty and security of person and the right to respect for private life to fill in gaps in constitutional jurisprudence. Even these institutions’ take on how “normalizing” surgeries may amount to violations of the right to be free from torture and inhuman or degrading treatment may prove useful. Though the torture argument may seem unorthodox in the United States—particularly as the country continues to become recalcitrant on this particular human rights issue<sup>264</sup>—framing the problem in this manner may raise the stakes for triers of fact and garner heightened legal attention to the issue.<sup>265</sup> Interpretations of the rights to health and the rights of the child, while not technically binding to the United States, can also help inform legal reasoning around this issue as they help

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without much to rely on, given that Malta was the first to establish such protections. I believe that the ministry’s broad consultation with international organisations active in the field of LGBTIQ rights was hugely beneficial in this process. . . .”). Other provisions of the Act also show deference to the international legal regime. For example, the Act mandates that the Minister of Social Dialogue, Consumer Affairs, and Civil Liberties, in consultation with the Minister of Health, appoint a working group to review the current medical treatment protocols for intersex traits, a group that must include three experts in human rights issues. Gender Identity, Gender Expression and Sex Characteristics Act, Act. No. XI of 2015 §16 (Malta) (2015). Given that the working group is to have only nine experts (the others being from the medical and psychosocial fields), the Act seems to recognize the extent to which international human rights law played a role in the passage of this law. In addition, in cases where a minor born with an intersex trait later expresses a desire to undergo genital surgery and his or her guardian consents, medical professionals shall, *inter alia*, “ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration.” *Id.* § 14(5)(a). This explicit reference to the CRC standard also recognizes the value of the international legal frame in this context.

264. See, e.g., *USA and Torture: A History of Hypocrisy*, HUMAN RIGHTS WATCH (Dec. 9, 2014), <https://www.hrw.org/news/2014/12/09/usa-and-torture-history-hypocrisy> [<https://perma.cc/L393-WYGD>].

265. See, e.g., Pierre Mouriouand et al., *The ESPU/SPU standpoint on the surgical management of Disorders of Sex Development (DSD)*, 10 *J. PEDIATRIC UROLOGY* 8, 8 (2014) (explaining, in either disbelief or annoyance, that “surgical management of DSD has been the target for much criticism coming from various sources including a recent UN report on torture (!) [sic] and a Swiss ethical committee.”).

to underscore what legal standards *should* look like. This may be particularly persuasive since many U.S. state constitutions do have specific provisions relating to these rights,<sup>266</sup> demonstrating that these rights are not foreign to the U.S. legal system. Indeed, where direct legal precedent is scarce, as is the case with intersex rights, legal arguments enhanced by international legal authorities may have a significant persuasive character.

In that same vein, activists in the United States seeking legal resolutions should continue to resort to advocacy and adjudication before treaty body mechanisms to which the United States is held accountable, including the Human Rights Committee and the Committee Against Torture. With at least one U.S. court showing reluctance to adjudicate claims relating to intersex children,<sup>267</sup> these international institutions are an ideal venue to begin obtaining authoritative judgments relating to the practice of genital “normalizing” surgeries in the United States. Moreover, these institutions have shown their willingness to issue statements on this issue and continue to do so regularly. Though it is true that in the United States the influence of these human rights institutions may depend significantly on an administration’s position on the United Nations and international law more generally—a reality that given the election of Donald J. Trump as President is worrying<sup>268</sup>—a Committee may compel the United States to at least acknowledge the issue and “shame” it publicly through its review system.<sup>269</sup> Though the result may not be as fruitful as it was in Chile, these official responses to the activists’ complaints could serve as an effective tool in advocacy and, in the long term, facilitate change with a new administration. Moreover, these decisions directed at the United States may particularly impact the decisions of U.S. courts given the lack of legal precedent, as explained above.

Finally, the power of transnational intersex rights human rights networks, like the ones that were at play in Malta, should not be overlooked. Activists can push for bringing the International Intersex Forum to the United States, which can help spur a comparative legal perspective as the United States reexamines its stance on this

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266. See, e.g., Leonard, *supra* note 170, at 1325.

267. *M.C. v. Amrhein*, 598 F. App’x 143, 149–50 (4th Cir. 2015).

268. Cf. Max Fisher, *What Is Donald Trump’s Foreign Policy?*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/world/what-is-donald-trumps-foreign-policy.html> [http://perma.cc/UZJ6-4TEK]; Carol Morello, *Iran nuclear deal could collapse under Trump*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/world/national-security/iran-nuclear-deal-could-collapse-under-trump/2016/11/09/f2d2bd02-a68c-11e6-ba59-a7d93165c6d4\\_story.html?utm\\_term=.71d344980cb8](https://www.washingtonpost.com/world/national-security/iran-nuclear-deal-could-collapse-under-trump/2016/11/09/f2d2bd02-a68c-11e6-ba59-a7d93165c6d4_story.html?utm_term=.71d344980cb8) [http://perma.cc/V6UC-DDRY].

269. See *supra* text accompanying note 228.

issue. For instance, examining what other constitutional structures are capable of achieving for children in this context and how the human rights system plays a role in that change may reveal possibilities in the United States. Moreover, given the fact that the “normalizing” surgeries originated in the United States, activists around the world may welcome a change in this country in particular. An event such as this in the United States could also garner the attention of the mainstream media to the benefit of domestic campaigns since the issue may be considered as affecting more people. In addition to hosting such an event, activists in the United States could take advantage of these advocacy networks to connect with activists from countries like Chile and Malta, where intersex rights have been recognized, to get their governments to push the United States to shift its position. The influence of such countries on the United States may be magnified in official forums like the UN Universal Periodic Review.<sup>270</sup>

#### CONCLUSION

In response to the agonizing repercussions that medically unnecessary, non-consensual, “normalizing” surgeries have on the lives of children born with intersex traits, U.S. legal scholarship has dutifully put forth solutions that may begin to address some of the issues that this common medical protocol presents to children in the United States. Scholars have even begun to address the thorny tension between children’s rights and parents’ rights in this context. Nevertheless, scholarship has largely ignored the role and potential of international human rights law in pushing for change and, in particular, mediating between the rights of parents and their children born with intersex traits. By clarifying how this legal regime fills gaps in underdeveloped U.S. constitutional jurisprudence with regards to “normalizing” surgeries, this Article hoped to push scholars and advocates in the United States to more actively employ this frame. In addition to presenting the regime’s capabilities, this Article also aimed to present examples of positive developments where

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270. Universal Periodic Review, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> [https://perma.cc/7ECP-VEVP] (“The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.”).

international human rights law, both doctrinally and institutionally, has played a successful role in shifting the status quo for intersex children. Though the legal regime can help to effect change in the United States in a myriad of ways, this Article ended with three distinct observations that may help promote a paradigm shift for intersex children in the United States.

Given the speed at which international human rights law is recognizing the rights of people born with intersex traits, there will likely soon be even more authoritative sources of international law demanding that the United States change course. Indeed, intersex rights may even experience the same unexpected cascading success that the recognition of some transgender rights has had in recent years, thanks, in part, to the work of international institutions.<sup>271</sup> Though it may seem more convenient and effective for scholars and advocates to focus on domestic legal strategies as a means of change in the United States, to do so would disregard the immense potential of the international legal regime. In addition, it would sacrifice the wealth of knowledge and connections that viewing the issue more universally can bring to advocates locally. As the legal community begins to employ the human rights frame more seriously, victims of “normalizing” surgeries may begin to see a change in the way that the United States approaches the medical procedures. More importantly, the universalist frame may begin to help victims like Daniela<sup>272</sup> regain the dignity that has often been taken from them.

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271. See, e.g., *Historic UN Human Rights Resolution covers Transgender People*, TRANSGENDER.EUR. (June 17, 2011), <http://tgeu.org/historic-un-human-rights-resolution-covers-transgender-people> [<http://perma.cc/8FYG-W87Q>]; Kyle Knight & Neela Ghoshal, *Recognizing the Rights of Transgender People*, HUMAN RIGHTS WATCH (Feb. 13, 2016), <https://www.hrw.org/news/2016/02/13/recognizing-rights-transgender-people> [<https://perma.cc/ZKQ8-6X42>]; *Twelve UN agencies issue unprecedented joint statement on rights of lesbian, gay, bisexual, transgender & intersex people*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Sept. 29, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=%2016511&LangID=E> [<http://perma.cc/A5P3-4HMR>].

272. See Truffer, *supra* note 1, at 111.

