THE UNARTICULATED PREMISE UNDERLYING THE MEDICAL AND LEGAL MANAGEMENT OF INTERSEX PEOPLE IN PUERTO RICO: SOME CONSTITUTIONAL AND GENDER ISSUES

ARTICLE

FRANCES LOREY GONZÁLEZ NIEVES*

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INTRODUCTION

"AN INTERSEX INDIVIDUAL IS ONE WHO IS BORN WITH GENITALIA AND/OR secondary sex characteristics that cannot be classified exclusively as male nor female, or which combine features of the male and female sexes."[1] Although this concept is often confused with *ambiguous genitalia*, the difference between them relies in the fact that the former includes the latter but not inversely. In other words, while an individual with *ambiguous genitalia* is one whose genitals – clitoris/labia and penis/scrotum - do not have the *typical appearance* of one or other sex,[2] an intersex individual is one whose genitalia *and/or other secondary sex characteristics* are ambiguous.

* The author is a third-year law school student at the University of Puerto Rico, School of Law. She graduated in 2007 as the most outstanding student from the bachelor degree in Political Sciences of the same university. . This article was prepared as a substantial writing requirement for the *Gender and Law* course she took while studying her third year at the University of Arizona, James E. Rogers College of Law.

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1 Juan C. Jorge et al., *Male Gender Identity in an XX Individual with Congenital Adrenal Hyperplasia*, 5 J. SEX. MED. 122 (2008).

2 DEPARTMENT OF HEALTH, ANNUAL REPORT 2008: MONITORING SYSTEM FOR BIRTH DEFECTS OF PUERTO RICO (2008).

This difference between concepts is important to our present discussion because in Puerto Rico *ambiguous genitalia*, instead of *intersexual*, is the classification used for purposes of vital statistical data. Since "ambiguous genitalia" does not include all types of intersex manifestations, relying on this category for recording purposes keeps the intersex reality somehow distorted.

By not taking into account other manifestations of intersexualism, and therefore by concealing them, the Puerto Rico's Vital Statistics Registry fails to comply with one of the fundamental purposes of its Statute, as well as of Puerto Rico's Constitution: the Equal Protection of the Law.[3] Moreover, by taking into consideration *ambiguous genitalia* only as a temporary category – 30 days at maximum[4] - Puerto Rico's Vital Statistics Registry legitimates, and therefore promotes, the medical management of intersex people.

As it will be exposed, the medical management of intersex people is based on a binary system of sexual classification. The latter can be translated into the performance of sex-assignment surgeries within the first two years of life of intersex individuals in order to fit them into the traditional female or male categories.[5] This current standard of medical management, which is followed not only in Puerto Rico but also across the United States, makes invisible, at the end, not only *ambiguous genitalia* but also other intersex variations found in between the two traditional sexual poles. As a consequence, Equal Protection of the Law cannot be given to intersex individuals because they do not *properly* exist for the system. Puerto Rico's Vital Statistics Registry Act has been construed as not allowing any changes on the sex category after the birth registration.[6] Therefore, it denies legal protection to the intersex individuals in other areas of the Law, some examples include Family Law - especially the marriage and joint adoption sub-areas - and Inheritance Law.

The manner in which the Supreme Court of Puerto Rico has construed Puerto Rico's Vital Statistics Registry Act[7] is of transcendental importance to our discussion since some intersex manifestations do not express themselves after puberty.[8] Consequently, in construing Puerto Rico's Vital Statistics Registry Act as not allowing changes in the sex category, the legal system denies intersex individuals the possibility to change their sex in order to conform it to their reality.

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3 *See* P.R. CONST., art. II, § 7; Puerto Rico's Vital Statistics Registry Act, P.R. LAWS ANN. tit. 24 § 1131 (2002) (amended 2007); Act No. 111 of August 15, 2007, Statement of Motives, 2007 P. R. Laws .

4 P.R. LAWS ANN. tit. 24, § 1131 (2002) (amended 2007).

5 Milton Diamond & Keith Sigmundson, *Sex reassignment at birth: long-term review and clinical implications*, 151 ARCHIVES OF PEDIATRICS AND ADOLESCENT MEDICINE 298 (1997).

6 *Ex parte* Delgado Hernández, 165 P.R. Dec. 170 (2005).

7 *See id.*

8 *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 281-92 (1999).

Therefore, it denies them not only the legal protection but also the space in society to which they are entitled.

Even though the Court's opinion involved a *post-surgery transsexual*, the silence and lack of discussion regarding the intersex reality among the legal actors in Puerto Rico – including the Legislature, the Judicature and the Legal Scholars –produces a great level of uncertainty concerning the future resolution of a case that involves an intersexual. Given that by definition an intersexual is different from a transsexual, it is relevant that by means of this article we educate the readers about what an intersex individual is and how *he or she* can be distinguished from a transsexual for legal purposes - at least for Vital Statistics purposes. With the latter we are not saying that transsexuals do not deserve legal protection, but that there are some differences that must be taken into account when addressing some of the legal controversies that both sectors share: for example, the change of sex in the Birth Certificate.

Although we recognize that there are other legal controversies that arise from the legal and medical management of intersex people - for example controversies related to the right to body integrity, to self-identity, to an informed consent - for purposes of this article we are going to address only the Equal Protection of the Law issue that arises from Puerto Rico's Vital Statistics Registry's management of intersex people. We will also discuss some gender implications that can be derived from the medical management of intersex individuals. Our selection for these two legal issues is explained not only by space restrictions but also by the complementary relationship between these issues.

The second (II) and third (III) section of this article configures the body of the present work, while the fourth (IV) section is its conclusion. The second section (II) has been subdivided into two main parts: Part A and Part B. Part A focuses on the management that Puerto Rico's Vital Statistics Registry has given to intersex individuals and which we already described in general. Part B, however, focuses on the medical management of intersex people. In this part, we describe the standard of medical management of intersex people and the criteria that is taken into consideration in that standard. Therefore, the second (II) section constitutes the theoretical framework of this article.

On the other hand, the third (III) section focuses on the legal implications that can be derived from the legal and medical management of intersex people in Puerto Rico. Since we already mentioned, in general, some of the main legal concerns related to the Equal Protection of the Law that arise from the management that Puerto Rico's Vital Statistics Registry has given to intersex individuals, section three (III) focuses more on the gender implications that can be derived from both legal and medical management of intersex people. It is in this section, where we expose how gender stereotypes define the medical criteria that are taken into consideration at the sex-assignment-surgery stage. By pointing out the gender considerations and stereotypes that drive the medical standard, we show at the same time, how the medical and legal systems conceal and perpetuate what can be ultimately considered as sex discrimination.

As the above discussion suggests, this article has the purpose of stimulating intellectual discussion about some of the legal consequences of the current medical and legal management of intersex people in Puerto Rico. It is the lack of expression from Puerto Rico's legal structure what constitutes the engine of this work. Therefore, the main reason of this research is to encourage discussion about the intersex reality in Puerto Rico. Hence, we expect that, by discussing the intersex reality, we can eventually achieve equal and fair treatment, as well as results, for this significant sector of Puerto Rico's citizenship.

I. THE MANAGEMENT OF INTERSEX PEOPLE IN PUERTO RICO

A. Legal Management: Puerto Rico's Vital Statistics Registry

Article 17 of Puerto Rico's Vital Statistics Registry Act establishes that "[t]he requirement of birth declaration and registration . . . [is] of obligatory and universal application in view of the *compelling interest of the Commonwealth to ensure the protection of the rights of all the persons born within its jurisdiction*."[9] With respect to the indicated State interest, Act Num. 111 of August 15, 2007 – statute that amended Article 17 - points out in its preamble the following:

> *Among these compelling interests is the function of protection of public health, which requires the state to keep track demographic and reliable vital statistics, and even above it the fundamental interest of ensuring constitutional rights and equal protection of the law for every human being present in the jurisdiction of Puerto Rico.*[10]

In order to enforce its two fundamental purposes, namely the protection of public health and the assurance of constitutional rights and equal protection of the law, Article 17 of Puerto Rico's Vital Statistics Registry Act provides that the declaration of birth of any human being shall be made before any keeper of the Vital Statistics Registry within thirty (30) days of the date on which the birth occurred.[11] Furthermore, it provides that the "medical-hospital institution shall be under the obligation to notify the Vital Statistics Registry . . . within ten (10) days of the last day of the month in which the birth occurred."[12] "In those cases in which the place of birth is not an institution, the person attending the birth shall be under the obligation to notify the Vital Statistics Registry within the term previously stated."[13]

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9 P.R. LAWS ANN. tit. 24, § 1131 (2002) (amended 2007) (emphasis added).

10 Act No. 111 of August 15, 2007, Statement of Motives, 2007 P. R. Laws ____.

11 P.R. LAWS ANN. tit. 24 § 1131 (2002) (amended 2007).

12 *Id.*

13 *Id.*

Related to the imposed deadline and to the issue under study, Article 19 of Puerto Rico's Vital Statistics Registry Act establishes that the sex of the newly-born child, along with other required information, is necessary for the legal, social and health purposes sought by registering the birth.[14] However, even though Article 19 states that the sex of a newly-born child is vital for the purposes sought with the birth registration, the concept of *sex* is not defined by Puerto Rico's Vital Statistics Registry Act or by its corresponding regulation.[15] Furthermore, the sexual categories allowed for purposes of the birth certificate are neither specified nor defined.

These omissions constitute one of the fundamentals critiques that has been made to statutes and regulations that, like Puerto Rico's, allude to the sex but do not provide a definition. Regarding this issue, it has been expressed:

> Until recently, however, legal authorities generally have been blind to the need to define the terms "male" and "female" for legal purposes. The law typically has operated under the assumption that the terms "male" and "female" are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true.[16]

Furthermore, the absence of definitions and categories around the concept of *sex* is not corrected by the two formularies that are provided by Puerto Rico's Vital Statistics Registry for purposes of birth declaration and registration. The first of these formularies is Formulary RD-103, which is administratively known as *addendum to the birth certificate*; the second one is Formulary RD-78, which is known as the *birth certificate*.

Formulary RD-103 provides in the corresponding space three sexual classifications: (1) male, (2) female, and (3) *ambiguous genitalia*. Although it might seem that Puerto Rico's Vital Statistics Registry takes into account intersex individuals by counting *ambiguous genitalia* as a third sexual category, this is far from being true. As it was previously mentioned, *ambiguous genitalia* does not take into account other intersex manifestations that, in the same way, impose challenges to the binary system of sexual classification. Furthermore, taking into consideration that the other formulary – Formulary RD-78 – does not enumerate the possible sexual categories, it can be concluded that *ambiguous genitalia* figures only as a temporary category. What can be considered in Formulary RD-103 as a third sexual category disappears in Formulary RD-78, which is the one administratively considered as the *birth certificate*. The latter is compatible not only with the traditional binary system of sexual classification but also with the medical management of intersex people: the sex-assignment surgeries.

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14 P.R. LAWS ANN. tit. 24 § 1133 (2002).

15 Vital Statistics Regulation No. 1 on registration of births, marriages and deaths ("Vital Statistics Regulation"), Department of Health (February 10, 1932).

16 Greenberg, *supra* note 8, at 266-67.

Related to the medical management of intersex people and to the fact that some intersex manifestations do not arise until after puberty,[17] Puerto Rico's Vital Statistics Registry Act establishes that:

> [O]missions or defects appearing on any certificate before being registered in the Department of Health may be corrected by inserting in red ink the necessary corrections or additions in said certificate, *but after the same has been filed in the Department of Health, no correction, addition, or amendment substantially altering it, shall be made thereon unless by virtue of an order of the District Court. . .*
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> . . . .
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> The rectification addition or amendment of a certificate already filed in the General Registry of Vital Statistics shall be made by inserting therein the corrections, additions or amendments authorized by the court. The necessary scratches shall be made in such manner that the scratched word is always legible.[18]

Although it might seem that Puerto Rico's Vital Statistics Registry provides a remedy for those intersex people that either discover their intersex condition after puberty or that were assigned the incorrect sex at birth,[19] this is not totally accurate given the Supreme Court of Puerto Rico's interpretation of Article 31 of Puerto Rico's Vital Statistics Registry Act.

In *Ex parte Delgado Hernández*,[20] a petition for changing sex in the birth certificate was presented by a post-surgery transsexual. Ignoring the sentence delivered by the court five years before – *Ex parte Andino Torres*[21] - the Supreme Court of Puerto Rico denied the petition. According to the majority of the court, Article 31 should be construed in a restrictive way. Since Article 31 explicitly mentions the possibility of changing, adding or modifying a name or surname of an individual,[22] the Supreme Court of Puerto Rico decided that this provision is *numerus clausus*, instead of being a *numerus apertus* one. Therefore, the Court concluded that there is no margin for a liberal or expansive interpretation of Puerto Rico's Vital Statistics Registry dispositions.[23]

According to the Supreme Court of Puerto Rico, in the absence of specific legislation, courts are not allowed to recognize as viable a substantial change in the birth certificate of what is a vital fact of a person: its sex.[24] Therefore,

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17 *See* Greenberg, *supra* note 8, at 281-92.

18 P.R. LAWS ANN. tit. 24, § 1231 (2002) (amended 2007) (emphasis added).

19 *See* Juan C. Jorge, *Statistical management of ambiguity: bodies that defy the algorithm of sex classification*, VOL. 1, NUM. 1, DATACRÍTICA: INTERNATIONAL JOURNAL OF CRITICAL STATISTICS 19 (2007).

20 165 P.R. Dec. 170 (2005).

21 151 P.R. Dec. 794 (2000).

22 P.R. LAWS ANN. tit. 24, § 1231 (2002) (amended 2007).

23 *Ex parte* Delgado Hernández, 165 P.R. Dec. 170 (2005).

24 *Id.*

"[w]here the Vital Statistics Registry Act provides that a substantial amendment to the records of the birth certificate is appropriate only under a 'court order', the order will only proceed if the legal order authorizes the change requested by specific law to that effect."[25]

Although according to the IV Diagnostic and Statistical Manual of Mental Disorders intersex conditions are not classifiable as a specific Gender Identity Disorder,[26] as opposed to transsexuals, the absoluteness of this ruling makes applicable to both the ban on changing sex for purposes of Birth Certificate. If an intersex individual wants to change *his/her* sex in the Birth Certificate, *he/she* must wait until the Legislature decides to act. There is no indication this will happen in an immediate future.

B. Medical Management

Since the 1950s, the medical management of intersex people has revolved around sex assignment surgeries. It was not until the medical community was faced with a case that involved a boy with a penis accidentally burned to ablation during a circumcision[27] that sex-assignment surgeries were adopted as a way to treat children with intersex conditions or with significantly traumatized genitalia. The medical community adopted the proposition that established that "a clinical decision regarding sex assignment should take place prior to the second year of life."[28] This policy relied on some of the arguments suggested in the work of John Money and his colleagues. The main premise was that individuals are psychosexually neutral at birth, that a healthy psychosexual development is dependent upon the appearance of the genitals and that the sex of rearing plays a pivotal role in gender identity formation,[29] Although sex-assignment surgeries are still considered the axis of the medical management of intersex people, the American Academy of Pediatrics has emitted some commentaries that could be interpreted as an effort to depart from the extreme views which, at the beginning, informed the management of intersex people.

The American Academy of Pediatrics has stated that "the generalization that the age of 18 months is the upper limit of imposed gender reassignment should

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25 *Id.* at 191.

26 AMERICAN PSYCHIATRIC ASSOCIATION, IV DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 302.6 (4th ed. 2000). *See also* AMERICAN PSYCHIATRIC ASSOCIATION, IV DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DIAGNOSTIC CRITERIA FOR GENDER IDENTITY DISORDERS (4th ed. 2000)(explaining that in order to have a Gender Identity Disorder the disturbance must not be concurrent with a physical intersex condition).

27 Diamond & Sigmundson, *supra* note 5.

28 Jorge et al., *supra* note 1, at 123.

29 *Id.*at 123.

be treated with caution and viewed conservatively."[30] According to the American Academy of Pediatrics "[g]ender identity development begins before the age of 3 years, but the earliest age at which it can be reliably assessed remains unclear."[31] However, although the American Academy of Pediatrics has recognized that the established deadline to perform sex-assignment surgeries should be treated with caution, it has not abandoned the idea that children with intersex conditions should undergo sex-assignment surgeries.[32] Regarding this, the American Academy of Pediatrics has stated:

> Psychosocial care provided by mental health staff with expertise in [Disorders of Sex Development] should be an integral part of management to promote *positive adaptation. This expertise can facilitate team decisions about gender assignment/reassignment, timing of surgery, and sex-hormone replacement. . . . Once the child is sufficiently developed for a psychological assessment of gender identity, such an evaluation must be included in discussions about gender reassignment*.[33]

Moreover, if it is taken into consideration that according to the American Academy of Pediatrics the results of the investigations typically performed to intersex children for sex assignment purposes "are generally available within 48 hours and [are] *sufficient for making a working diagnosis,*"[34] its statement concerning the established deadline can be putted into question. Sex-assignment surgeries are still performed on intersex children in an early stage of life, even prior to the first year of life. In the case of Puerto Rico, sex-assignment surgeries need to be performed within the first 30 days of life of the intersex child.[35] Otherwise, the medical community would not be able to meet the legal mandate of defining the sex for purposes of the Birth Certificate.[36]

Given that scientists and physicians are limited by our current binary system of sexual classification, they "are required to discover the 'true sex' of an intersex phenotype."[37] In order to do so, scientists and physicians perform a series of medical tests which include karyotyping, imaging (abdominopelvic ultrasound), measurement of 17-hydroxyprogesterone, testosterone, gonadotropins, anti-Mullerian Hormone and serum electrolytes, and urinalysis.[38] The problem, how-

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30 Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, VOL. 118, NUM. 2 PEDIATRICS: OFFICIAL JOURNAL OF THE AMERICAN ACADEMY OF PEDIATRICS e488, e492 (2006).

31 *Id.*

32 *Id.*

33 *Id.* (emphasis added).

34 *Id.* at e491.

35 *See* P.R. LAWS ANN. tit. 24, § 1131 (2002) (amended 2007).

36 *See* P.R. LAWS ANN. tit. 24, § 1133 (2002).

37 Jorge, *supra* note 19, at 20.

38 Lee et al., *supra* note 30, at e491.

ever, is that the results of these tests do not always point out an individual's *true sex*.[39] Furthermore, and even more problematic, the results of these tests need to be corroborated with the proportions of the genitalia. "Once 'true sex' has been assigned . . . [an] ultimate medical intervention to safeguard the classification system must be performed: 'sex' must become apparent in the proportions of the sex organs."[40]

"The criteria for establishing whether the sexual anatomy at birth is normal or not, comes from statistical reasoning."[41] "A micropenis, [for example], is . . . defined as having a *stretched length* of less than two and a half standard deviations below the mean for age or stage of sexual development."[42] "The consensus in the literature is that the measurement of a stretched penis is preferable over the measurements of a flaccid penis since the first correlates better with the size of an erect penis."[43] "Although there is also a correlation between lengths and diameter or circumference, the latter is usually not taken into consideration for establishing normality."[44]

Even though a "small penis does not necessarily create sex ambiguity, a medical diagnosis of 'micropenis' is considered an intersex condition because of the way it has been treated by physicians."[45] "When a child is diagnosed with 'micropenis', doctors may make the recommendation for reassignment to a female sex by surgically recessing and reducing the phallus to become a 'clitoris'."[46] Because "[t]he adequacy of the penis is judged by whether it has the potential to be big enough to be readily recognizable as a real penis and whether it has the capacity to penetrate a vagina,"[47] most of the children born with a "micropenis" are often labeled as "female" and reconstructive surgery ensues.[48] "In these cases, little concern is given regarding the child's ability to reproduce."[49]

On the contrary, when a child has a phallus that "is considered to be 'too large' to meet the guidelines for a typical clitoris, it is surgically reduced even if it means that her capacity for satisfactory sex may be reduced or destroyed."[50]

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39 *See* Jorge, *supra* note 19, at 22-24.

40 *Id*. at 22.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 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, 158 (2005).

46 *Id.* at 160.

47 *Id.* at 158.

48 Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31, 48 (2005).

49 *Id.*

50 Greenberg, *supra* note 8, at 272.

Therefore, although "[t]he decision to raise the child as a male centers around the potential for the phallus to function adequately in later sexual relation,"[51] this is not the same criterion applied for a *female* sex assignment.

According to the American Academy of Pediatrics, "[f]eminizing genitoplasty as opposed to masculinizing genitoplasty requires less surgery to achieve an acceptable outcome and results in fewer urologic difficulties."[52] Given that it is easier to make a hole (vagina) than to build a pole (penis),[53] "[an] overwhelming majority of intersex children are sexed as female."[54] In fact, "ninety percent of intersex surgery is aimed at changing the intersex child into a girl."[55]

Thus, even though a child's physical makeup is of a male, "unless the medical team deems the infant's phallus to be of adequate size, capable of 'proper' urination while standing, and likely to pass as heterosexually 'normal,' the child will be surgically and hormonally constructed as female."[56] The latter does not differ too much from a statement made in the early stages of the medical management of intersex individuals:

> The choice of gender should be based on the infant's anatomy. . . Often it is wiser to rear a genetic male as a female. It is relatively easy to create a vagina if one is absent, but is not possible to create a really satisfactory penis if the phallus is absent or rudimentary. Only those males with a phallus of adequate size which will respond to testosterone at adolescence should be considered for male rearing. Otherwise, the baby should be reared as a female.[57]

Therefore, although the American Academy of Pediatrics has tried to depart from the extreme views that gave birth to the current management of intersex individuals, its efforts have not been completely fruitful. Sex-assignment surgeries are still performed on intersex children in an early stage of life, even when "the vast majority of intersexual conditions are not life-threatening and do not require immediate surgery."[58] Moreover, notions about normalcy, adequate sexual function, and medical practicability continue to permeate the still regrettable standard for medical management of intersex people. The adopted model for medical management has not only resulted with the suicide of the individual

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51 Diamond & Sigmundson, *supra* note 5, at 298.

52 Lee et al., *supra* note 30, at e496.

53 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, 255 (2005).

54 *Id.*

55 Jennifer Rellis, *"Please write 'E' in This Box" Toward Self-Identification and Recognition of a Third Gender: Approaches in the US and India*, 14 MICH. J. GENDER & L. 223, 237 (2008).

56 Preves, *supra* note 53, at 255.

57 Diamond & Sigmundson, *supra* note 5, at 299.

58 Christine Muckle, *Giving a Voice to Intersex Individuals Through Hospital Ethics Committees*, 2006 WIS. L. REV. 987, 998 (2006).

whom it was based on[59] but also with the lack of legal protection for hundreds of intersex children.

II. LEGAL IMPLICATIONS

The performance of sex-assignment surgeries or genital-normalizing surgeries in children with "micropenis" and "clitoromegaly" – enlarged clitoris – when they do not present any type of ambiguity which "could *justify*" such treatment raises suspicion about the criteria that truly informs the medical management of intersex individuals. Even though scientists and physicians are required to perform a series of medical tests in order to discover the child's *true sex*, at ultimate instance the sex of an intersex child is not defined by scientific criteria; rather, it is defined by a disturbingly unscientific criteria and methodology.

As it was previously mentioned, the sex resulting from the medical tests performed to intersex children needs to be corroborated with the proportions of the genitalia. The latter means that if the genitalia comply with the established standards of normalcy, then a sex-assignment or genital-normalizing surgery is not necessary. But if, on the other hand, the genitalia do not comply with the established standards of normalcy, a sex-assignment or genital-normalizing surgery is required.

Although it is still questionable if there is something like a good and normal looking penis and vagina, the problem that those *normalcy* considerations present for us is that they are based upon gender stereotypes and sexist considerations. As it was exposed earlier, "the potential for the *phallus* to function adequately in later sexual relations is a central criterion for classifying the intersex child *as a male*."[60] Nevertheless, that is not the same criterion used for a female sex assignment. In the latter case, medical practicability and sexist reproductive notions determinates the sex of an intersex child.

"Although doctors often report in follow up studies that the sexual functioning of their patients is 'adequate' or 'satisfactory,' it appears that the doctors apply very different standards when evaluating the function of a vagina versus a penis."[61] Accordingly, "[a] 'normal' penis must: be large enough; be able to become erect and flaccid and expel semen at the appropriate time; have a urethral opening at its tip; and have a normal shape and color."[62] "A functional vagina, on the other hand, must simply be a hole that can accommodate a typical-sized penis."[63] "Similarly, a clitoris is adequate as long as it is not too large."[64] There-

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59 *Id.*

60 Diamond & Sigmundson, *supra* note 5, at 298.

61 Benson, *supra* note 48, at 47.

62 *Id.*

63 *Id.* at 47-48.

64 *Id.* at 48.

fore, surgeons specializing in intersexuality do not require that a constructed vagina be self-lubricating or even, at all, sensitive.[65] Thus, sexual functioning is not taken into consideration for a female sex-assignment.

On the other hand, a disturbingly sexist reproductive rationale determinates a female sex-assignment. While "[a] genetic male with an 'inadequate' penis (one that is incapable of penetrating a female's vagina) is 'turned into' a female even if it means destroying his reproductive capacity . . . [a] genetic female who may be capable of reproducing . . . is generally assigned the female sex to preserve her reproductive capability regardless of the appearance of her external genitalia."[66] This, of course, reproduces traditional reproductive roles.

Therefore, sex-assignment and genital-normalizing surgeries are driven by a double standard that has been built upon gender stereotypes. These can be ultimately translated into gender and sex discrimination.

Although "[s]ex is a reflection of one's biology, as opposed to gender, which is generally considered to be socially constructed",[67] the medical management of intersex people erases that traditional difference between terms. Given that the sex of intersex children are assigned by using gender stereotypes, "[s]ex . . . can be viewed as a social construct rather than a biological fact."[68] Therefore, in the case of the medical management of intersex individuals, what it is in theory *gender* turns to be *sex* in practice.

It is our contention, then, that the medical management of intersex people in Puerto Rico results not only in the legitimization of *gender discrimination* but also in the legitimization of "sex discrimination." Differences between *gender* and *sex* cannot longer be sustained for legal purposes, not in this particular case where the medical management of intersex people has been built upon gender roles.

Article II, Section 1, of Puerto Rico's Constitution establishes, among other things, that no discrimination shall be made *on account of sex*.[69] However, even though what it is constitutionally banned is *sex discrimination* and not *gender discrimination*, if it is taken into consideration that sex-assignment surgeries are informed by a sexist rationale and gender stereotypes it can be concluded that the medical management of intersex people crosses the line of gender and violates that fundamental right. Furthermore, taking into consideration the inviolability of the human dignity, guaranteed by Article II, Section 1 of Puerto Rico's Constitution, sex-assignment surgeries on intersex children before they even reach their second year of life can be viewed as a violation of that dignity. Even

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65 Kishka-Kamari Ford, *"First, Do No harm"- The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL'Y REV. 469, 472 (2001).

66 Greenberg, *supra* note 8, at 271-72.

67 *Id.* at 271.

68 *Id.* at 272.

69 P.R. CONST. art. II, § 1.

more, early gender assignment surgeries share many of the abhorrent characteristics of female circumcision and sexual abuse.[70]

The management that Puerto Rico's Vital Statistics Registry gives intersex individuals represents, also, legal problems. As it was suggested earlier, "the legal response to intersexuality is bound by wholesale acceptance of the deeply rooted assumption that sex identity is simple and binary - male or female."[71] "This acceptance . . . has made the legal system an active enforcer of differentiation that operates inexorably to exclude intersexuals from basic protections of the law."[72]

Because the "law tags each of us with a sexual identity and renders the intersexed invisible,"[73] the law cannot offer intersex people Equal Protection of the Law. Furthermore, because Puerto Rico's Vital Statistics Registry keeps the intersexed invisible it "reinforce[s] the legal belief that sex discrimination occurs only if the discrimination is because one is a male or because one is a female."[74] In that way, Puerto Rico's Vital Statistics Registry not only denies intersex people Equal Protection of the Law, but also it enforces an exclusionary behavior that is based on the unarticulated premise of gender and sex discrimination.

The legal system should not enforce such exclusionary behavior. "It is problematic enough when the law fails to recognize a pattern of exclusionary behavior as deserving of legal remedy; [but] it is much worse for the law to be the very mechanism that requires and enforces exclusionary behavior."[75]

CONCLUSION

"[I]ntersexed infants' genitals are altered mainly because they do not conform to dominant conceptions of what it means to be male (having a penis that allows standing urination and vaginal penetration) or female (having a 'normal'-sized clitoris and a vagina that will permit penetration)."[76] "Genitals (and children) who do not conform to these norms are seen as 'pathological,' not because

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70 Sara A. Aliabadi, *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 (2005).

71 Elizabeth Reilly, *Radical Tweak-Relocating the Power to Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality*, 12 CARDOZO J.L. & GENDER 297, 299 (2005).

72 *Id.* at 299-30.

73 *Id.* at 298.

74 *Id.* at 310-11.

75 *Id.* at 300.

76 Emily A. Bishop, *A Child's Expertise: Establishing Statutory Protection for Intersexed Children who Reject Their Gender of Assignment,* 82 N.Y.U. L. REV. 531, 540 (2007).

they are actually diseased, but because they do not fit within a socially constructed gender framework."[77]

"Surgery is thus an easy fix for the cultural 'problem' of intersex, allowing doctors and parents to evade the more difficult task of persuading society 'to accept the genitals'."[78] "Instead of embracing intersexuality as an indisputable symbol of sexual variation, and admitting the 'social nature of our ideas about sexual difference,' society has attempted to 'police bodies of indeterminate sex' through invasive surgical techniques and questionable gender assumptions."[79]

In Puerto Rico, sex-assignment surgeries need to be performed within a period of thirty (30) days after the birth of an intersex child occurs. Otherwise, the medical community would not be able to meet the legal mandate of defining the sex for purposes of the Birth Certificate.

Puerto Rico Vital Statistics Registry demands that the declaration of birth of any human being shall be made within a period of thirty (30) days computed from the date on which the birth occurred.[80] At the same time, that declaration of birth is constrained by a traditional and simplistic binary system of sexual classification. Although Formulary RD-103 provides as a third sexual category *ambiguous genitalia*, Formulary RD-78 does not provide any sexual category at all. Therefore, by omitting that third sexual category in what is administratively considered the *birth certificate*, Puerto Rico's Vital Statistics Registry legitimates and, therefore, promotes the medical management of intersex children: a medical management that has been driven by gender stereotypes and considerations.

Now that we have achieved our purpose of articulating the underlying premise of both the medical and legal management of intersex people in Puerto Rico - gender and sex discrimination - we hope that this discussion can serve as an incentive to future discussion on medical and legal remedies to the intersex population in Puerto Rico. Only by discussing the intersex reality in Puerto Rico we can achieve fair and just results for this significant sector of Puerto Rico's citizenship.

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77 *Id.*

78 *Id.*

79 Kristine J. Namkung, *The Defense of Marriage Act: Sex and the Citizen*, 24 U. HAW. L. REV. 279, 306 (2001).

80 P.R. LAWS ANN. tit. 24 § 1131 (2002) (amended 2007).