

“It’s a Girl?”: Sex Assignment at Birth and Autonomy
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A thesis submitted in partial fulfillment
of the requirements for the degree of
Bachelor of Science with Honors
Department of Philosophy
in the University of Michigan
2016

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Abstract

In the United States, every newborn is assigned a sex (female or male) and gender (girl or boy) shortly after birth. The reasons for this are complex, as are the processes of sex and gender assignment themselves. The State, doctors, families, and culture all play significant roles. One's sex and gender (both real and perceived) profoundly affect one's life, so these universal practices are ethically nontrivial. Yet, thus far sex and gender assignment at birth have received little ethical scrutiny. In this thesis, I defend the claim that sex assignment at birth results in unjustifiable harms to the infant. Most notably, I claim that sex assignment at birth diminishes the autonomy of the assignee. Given these harms, I conclude that the State cannot justify its participation in sex assignment at birth as it is currently practiced.

Chapter 1: Understanding Autonomy and Related Concepts

Introduction

In this thesis, I examine the practice of sex assignment¹ at birth and argue that it results in unjustifiable harms to the infant. Chief among these harms is that the practice inappropriately restricts the assignee's future autonomy. To understand the nature and extent of this harm, I dedicate this chapter to examining different accounts of personal autonomy. Specifically, I examine several contemporary views on autonomy and ultimately conclude that "socio-relational" accounts of personal autonomy are the best currently available.

I also examine the relationship between autonomy and similar concepts like liberty. Again, I examine these relationships because they will inform my account of the harm that sex assignment at birth causes. Ethicists have written extensively on the merits of different accounts of autonomy (Piper 2013, p. 205), so this chapter is necessarily no more than a concise summary.

Internalist Accounts of Autonomy

The word "autonomy" means "self-government" (Buss 2014; G. Dworkin 1981, p. 207; Oshana 2006, p. 1). The opposite of autonomy is thus "heteronomy," or being governed-by others². While autonomy was first used to describe self-governing city-states in ancient Greece, since the Enlightenment the term has been used most frequently to describe individuals (Piper

¹ In some of the medical and bioethical literature on the subject, "sex assignment" refers to the surgical alteration of an intersex newborn's genitals to fit normative ideas of femaleness and maleness. This is *not* the sense in which I use the term "sex assignment" here. Here, "sex assignment" simply refers to the act of declaring a newborn to be a member of a certain sex, usually female or male.

² "Others" being used in the broadest sense here, including not just other people, but also any force external to oneself

“Autonomy: Normative”). In this thesis, I am primarily concerned with this individual sense of autonomy, often called “personal autonomy.” It is also important to note that even just personal autonomy can be understood in many different ways (Feinberg 1986, pp. 27-8). For example, some ethicists understand personal autonomy as the condition that makes someone a moral agent (e.g., Buss 2014). In this thesis, however, I am interested in autonomy as a moral good—an ideal state we aspire to attain and detest having taken from us (Feinberg 1986, pp. 44-7).

Among accounts of personal autonomy, one prominent type is *internalism*³. According to internalist accounts of autonomy, a person is autonomous if and only if that person meets certain psychological criteria (Oshana 1998, pp. 81-6). Internalist theories of personal autonomy operate under the assumption that the self is a purely or primarily psychological entity—an assemblage of thoughts, memories, beliefs, and desires. An actor is autonomous, then, to the extent that this inner self effects her actions.

Of course, what it means for one to be governed by one’s self is not obvious. Some internalists appeal to the *structure* of the self as the key to a person’s autonomy. One prominent structuralist account of autonomy comes from Harry Frankfurt (2004), who holds⁴ that autonomous individuals are those whose “motives and choices ... are the motives and choices [they] really want” (p. 20). The relationship between one’s immediate desires and what one *wants* to want (one’s second-order desires) form the *structure* of one’s will. (Watson 1975, p. 28; Oshana

³ Marina A. L. Oshana develops the language of “internalist” and “externalist” accounts of autonomy in (1998) and (2006).

⁴ Frankfurt’s writings on autonomy span several decades. This quotation is included here because it is both recent and concise (Oshana 2006, p. 22). For more on Frankfurt’s account of personal autonomy, see (Frankfurt 1971).

2006, p. 23). If one's will is structured such that one's second-order desires are in agreement with one's immediate desires, one is autonomous (Frankfurt 1971, p. 15).

Gary Watson (1975) offers a similar (p. 28) structuralist theory of autonomy that emphasizes the relationship between a person's values and her motivations. Watson identifies two potential sources of motivation: one's first-order desires and one's values. First-order (or "appetitive") desires exist "independent of the person's judgment of the good" (Watson 1975, p. 21). Values, on the other hand, arise through a reasoned process and are definitive of our ultimate aims in life (Watson 1975, p. 25). We are autonomous to the extent that our motivations for action align with our reasoned values instead of our appetitive desires (Watson 1975, p. 26). Watson's account avoids a difficulty that Frankfurt's account faces: the possibility of an infinite regress of desires, with one's effective first-order desires relating to one's second order desires, one's second-order desires relating to one's third-order desires, and so on (Watson 1975, pp. 28-30).

Frankfurt's and Watson's accounts help illustrate why defining autonomy is so tricky in the first place: we almost always have proximate motivations for acting the way that we do, but merely wanting to act a certain way does not seem sufficient for autonomous standing (G. Dworkin 1970, p. 368). (Animals and infants can simply "want" to act a certain way, after all.) Whence, then, comes autonomy? Frankfurt and Watson offer similar, but subtly different ways of probing our proximate motivations and determining whether these desires, which most immediately govern our actions, are themselves governed by the self. Frankfurt identifies this self most closely with second-order (or higher-order) desires, whereas Watson aligns it with one's values. In both cases, the determining factor is some sort of relationship between one's immediate motivations and another mental phenomenon. This is why these accounts qualify as both structuralist and internalist.

John Christman (1989; 1991) rejects the structuralist approach to autonomy. He points out that the mental phenomena (be they values or second-order desires) that Frankfurt, Watson, and other structuralists (e.g., G. Dworkin 1981) emphasize cannot necessarily be identified with a person's true self. After all, one can easily imagine someone being manipulated into having values or second-order desires that are not truly her own (Christman 1991, pp. 6-7). Structuralism implies that such a person could be autonomous, but this seems wrong. Instead of thinking of autonomy as a trait *of individuals*, Christman (1991) conceptualizes autonomy as a trait *of specific desires* (p. 10). According to his account, a person is autonomous *with respect to a particular desire she holds* if she "was in a position to resist the development of a desire and she did not" (Christman 1991, p. 10). Being manipulated or coerced into having values that one would have otherwise rejected clearly violates this condition. Not only does Christman shift the focus of autonomy from whole persons to their desires, but he also expands the criteria by which one judges autonomy by adding a focus on psychological history.

Despite their differences, though, there is significant common ground between Christman and the structuralists. On both accounts, what is at issue is whether an immediately effective desire (i.e., the desire most directly responsible for a certain action) is really one's own. Like the structuralists, Christman thinks that we can determine this just by looking at mental phenomena. External events may, of course, *influence* these mental phenomena, but the mental phenomena themselves still ultimately define one's autonomy (Oshana 1998, p. 100).

Responses to Internalist Accounts

The strength of internalist accounts of autonomy is that they offer an account of which external influences on one's psychology are compatible with autonomy and which are not—a fundamental goal of any adequate theory of personal autonomy (Buss 2014; Dryden). Internalist

accounts of autonomy can diagnose many of the autonomy-limiting effects of social conditions, such as when they corrupt one's sense of self. These effects will be among the most relevant to my account of the harms of sex-assignment at birth.

These advantages notwithstanding, however, there are several notable problems with internalist accounts of autonomy. First, the internalist definition of self is inadequate. Both critics and proponents of internalist theories of autonomy characterize the self in such theories as a sort of "inner citadel" (e.g., Christman 1989; Oshana 1998, p. 85) to be safeguarded from external corruption (Oshana 1998, pp. 85-6). However, this is not a tenable theory of self. The self is defined by its social situation *just as much* as it is by its psychology (Oshana 1998, p. 86). By definition, internalist accounts of autonomy hold that an individual's autonomous standing depends *solely* on her mental state. Therefore, internalism can account for the importance of social realities only insofar as those social realities affect psychology.

Experience shows us that our identity is not just reducible to mental phenomena, though; identity also depends on external social realities. For example, my identity as an American, which is obviously a part of my self, is not reducible to a purely internal phenomenon; instead, it is made real only in virtue of certain external circumstances (namely, the location of my birth and the existence of the United States). By this I do *not* mean that these external circumstances cause the internal phenomena that cause me to identify as American and therefore make this identity real (Christman 2004, pp. 150-1). Instead, I mean that my identity as an American depends on external circumstances, regardless of my own conception of myself. Even if I was deluded into thinking that I was American, it is clear from our everyday understanding of the word that my American-ness is more contingent on my relationship to external social and legal structures that define nationality and citizenship than it is my own sense of self. Similarly, under the social construction

model of disability, physical disabilities are contingent upon the relationship between one's body and the physical accessibility of the world one inhabits (Reynolds 2015). One's identity as a person with a disability is therefore *made real* by external circumstances, and *cannot* be fully understood through the internalist definition of self. Having a certain conception of oneself is therefore neither sufficient nor necessary for the reality of many aspects of identity. This argument is especially common in the feminist autonomy literature, which tends to criticize the "inner self" model as insensitive to the ways in which social realities like oppression shape both inner desires *and* the social roles one may occupy (Hirschmann 2014, pp. 73-4; Stoljar 2000). Once one concedes that the self is both internal and external, it becomes difficult to justify an account of autonomy that only examines one "half" of the self, such as internalism.

This leads to a second objection to internalist theories of autonomy: these theories fail to account for external circumstances that, while not corrupting an individual's psychology, still restrict the individual in autonomy-limiting ways (Oshana 1998, pp. 86-93). Many of these cases seem obvious. Take, for example, the case of a conscientious objector who chooses to go to prison rather than violate her own moral code (Oshana 1998, pp. 91-2). If the conscientious objector affirms this decision as the choice "most consistent with [her] values," then internalist accounts of autonomy must hold that she is autonomous (Oshana 1998, p. 91). But this is not the case; despite acting in accordance with values that are strictly and legitimately her own, the fact that she is incarcerated seems to limit her autonomy (Oshana 1998, p. 91), and so (the story goes) the internalist theories offered above must be flawed.

One might be tempted to claim that the conscientious objector is still autonomous but simply lacks liberty. But an account of autonomy that holds that one can lack any means to translate one's will into action seems to me very hollow. Recall that I am interested in autonomy

as the ideal state of self-governance to which we aspire. Suppose I am perfectly autonomous under any internalist account. I can, if I choose, subject any of my “lower-order” desires to “higher-order” ones, and all of my desires were formed with my own assent. If I am in such total control of my will, yet unable to satisfy even my most basic desires (if I am imprisoned, for example), in what sense am I truly self-governing? I contend that very few individuals would consider themselves autonomous in such circumstances. Government, commonly understood, consists of both deliberation (i.e., evaluating and deciding upon certain ends) *and* working towards those ends. If I can deliberate but not act towards fulfilling my desires in any meaningful way, it seems wrong to say that I am self-governing. Some degree of external freedom⁵ appears to be necessary for autonomy in the ideal sense.

Liberty and Externalist Autonomy

If some degree of external freedom is a necessary condition for autonomy, how does one distinguish between external constraints that are merely *liberty*-limiting and those that are *autonomy*-limiting? Put differently, how do I differentiate between autonomy and liberty? I defend the following view: some degree of liberty is a necessary condition for ideal autonomy, but it is not sufficient for it. In addition to being sufficiently free, to be autonomous one must also be *empowered* to accomplish one’s goals. Since this empowerment is distinct from liberty, as I show below, ideal autonomy is not simply reducible to liberty.

There are two basic understandings of liberty: negative and positive (Berlin 1971). Negative liberty is the ability to act without external interference from others (Berlin 1971, p. 122). As for positive liberty, Isaiah Berlin (1971) writes:

⁵ Throughout this thesis, I use “freedom” and “liberty” interchangeably.

The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are not my own, not by causes which affect me, as it were, from outside. (p. 131)

Whereas negative liberty is characterized by the absence of restraints, positive liberty is the positive state of controlling one's own will (Berlin 1971, pp. 131-3). Being positively free according to Berlin is approximately equivalent to being autonomous according to internalism; to be positively free, just as to be autonomous according to internalism, one's own will must accord with one's own values or higher-order desires. While I think that both positive freedom and some degree of negative freedom are *necessary* for autonomy, I also think one can draw a meaningful distinction between autonomy and liberty if we use an *externalist* account of autonomy: an account that considers one's social situation when determining one's autonomous standing.

One of the first externalist accounts of autonomy, traceable back to Plato and Aristotle (Dryden), is the "self-sufficiency" account of autonomy, according to which individuals are autonomous to the extent that they are free from dependence on others (Stoljar 2000, pp. 94-5). Feminist philosophers have rightly critiqued the self-sufficiency account of autonomy on the grounds that it is incompatible with the fact that human agency sometimes involves relationships characterized by interdependence, need, and care. A self-sufficiency definition of autonomy would inappropriately construe such relationships as autonomy-limiting (Oshana 2014, pp. 154-5; Stoljar 2000, pp. 94-5).

Marina A. L. Oshana offers another prominent externalist account of autonomy that avoids this problem. Her “socio-relational autonomy” maintains that positive psychological freedom is necessary for autonomy, but not sufficient unless accompanied by “access to an adequate assortment of options” and other socio-relational conditions (Oshana 1998, pp. 93-5). These socio-relational conditions include the ability to defend oneself against violence, the ability to defend oneself against the deprivation of one’s rights, not needing to take responsibility for others without one’s consent, and the ability to pursue one’s own interests without fear of reprisal (Oshana 1998, p. 94). Relational accounts of autonomy like Oshana’s are popular with feminist philosophers because they recognize social realities (especially oppression) as autonomy-limiting in ways that cannot be completely captured by internalist accounts (Hirschmann 2014, p. 61). Furthermore, many feminists tend to prefer relational accounts because, on these accounts, the voluntary pursuit of relationships that create dependence can be understood as autonomy-enhancing rather than autonomy-limiting. I also find Oshana’s externalism to be a compelling account of autonomy.

One might think that the socio-relational properties necessary for autonomy under Oshana’s account are simply reducible to negative liberty, and so Oshana’s externalism is really just a combination of positive liberty (i.e., internalist autonomy) and negative liberty. However, Oshana’s account of autonomy is distinct from liberty (in both the positive sense and the negative sense) because on her account being autonomous requires not just the absence of certain external constraints (i.e., negative liberty), but also a sort of *empowerment*—the positive ability to pursue one’s ends in a meaningful way. This empowerment cannot be fully captured by either of Berlin’s two concepts of liberty.

Consider the “access to an adequate assortment of options” condition for autonomy. Assume that access to some option, X, qualifies as necessary to an “adequate assortment of

options” such that if I do not have access to X, then I do not have “access to an adequate assortment of options” in life, and I am therefore non-autonomous. Also assume that I am positively free to want to access X. To be negatively free regarding X according to Berlin (1971) is to lack any barriers to X. However, there is a significant, if subtle, difference between lacking barriers to something and being able to access that thing. Lacking barriers to X (i.e., being negatively free to do X) is necessary for being able to access X, but it is not *sufficient* for being able to access X.

For example, imagine that I have the goal of going to France. I am negatively free to go to France if there are no restrictions on my ability to do so—legal or otherwise. There cannot be any laws prohibiting me from going to France or strong social norms that dictate that people like me do not belong there. And I am positively free to go to France if I have made the decision to do so on my own and without being subject to another person’s will. But how would one describe a situation in which I am both negatively and positively free to go to France, but simply lack the resources to do so? An example could include the absence of any infrastructure or form of transportation that would support such a voyage. Berlin (1971) clearly states that one is free in the negative sense when “no man or body of men interferes with [one’s] activity” (p. 122). In this hypothetical scenario, I am free to go to France according to Berlin because “no man or body of men” is interfering with my ability to do so. My inability to go to France is not a matter of freedom, then, since I never had the ability to do so in the first place. I hold that this inability is a lack of *empowerment*, or the resources necessary for accomplishing my goals. I am disempowered not because of any anthropogenic barrier (i.e., a restriction on my liberty), but simply because the resources for me to do so do not exist. Empowerment is therefore different than liberty.

The France thought experiment shows that it is possible to be both positively and negatively free regarding some option but to nonetheless lack access to it. Since externalist

autonomy requires access to certain options, then, it is not reducible to a combination of positive and negative liberty. Importantly, I do not mean to suggest that any lack of empowerment constitutes a reduction in one's autonomy. Although I am, in reality, empowered to go to France, I am not empowered to go to Pluto, and it would be silly for me to claim that this is a major encumbrance on my autonomy. However, if I am free, but not empowered, to access "an adequate assortment of options" in life, then I am not autonomous.

Of course, what an "adequate" array of choices is will be socially and historically contingent; what I can reasonably expect to be able to do in 2016 C.E. is different from what one could reasonably expect to be able to do in 1016 C.E. Joel Feinberg (1986) offers plausible examples of what could count as "critical life-decisions." These are, he says, decisions about my education, skills, career, and family (Feinberg 1986, p. 54). When one is prevented from pursuing one's ends in one of these areas either by another individual or simply because one lacks the resources to do so, one's autonomy is being infringed upon (Feinberg 1986, p. 54). When I refer to autonomy in this thesis, I am referring more or less to this interpretation of Oshana's account: autonomy consists of a combination of internalist autonomy (or positive liberty) and the positive ability to control important aspects of one's own social situation (or social empowerment). Some degree of negative liberty is necessary for this social empowerment, but not sufficient.

Scales of Autonomy

Autonomy can be understood in both a local and global sense (Oshana 2006, pp. 2-3; Piper 2013, p. 207). Local autonomy concerns whether individuals are autonomous with respect to something specific, such as a specific action (Piper 2013, p. 207) or preference (Dryden). Global autonomy, on the other hand, "refers to the condition of being an autonomous person in general" (Piper 2013, p. 207). An individual can be globally autonomous but still fail to demonstrate local

autonomy in individual circumstances. If I am addicted to painkillers, I would lose my local autonomy once I am presented with the pills I crave. Still, my *global* autonomy could remain more or less intact because, with the exception of activities relevant to my addiction, I can control my life in general (Christman 2015). Another implication of this distinction is that individuals can autonomously choose to become non-autonomous (Oshana 1998, p. 88). Someone who voluntarily chooses to become a slave is one example of this (Oshana 1998 pp. 86-9). To use perhaps a more commonplace example, if I consent to global anaesthesia for surgery, I have autonomously decided to become non-autonomous for the duration of the time I am unconscious.

The local-global distinction is not a clean one, though. One can easily imagine a scenario in which one is non-autonomous with regard to some *class* of actions or preferences, but autonomous with regard to all other classes of actions or preferences. For example, someone who is brainwashed into a religion may be non-autonomous with regard to any preferences she holds that refer to the value of the religion, but autonomous otherwise. In such a scenario, the non-autonomy is not merely local since it encompasses a large range of potential preferences and actions. However, this non-autonomy is not global either, since there are many potential preferences and actions that are not affected by it. Perhaps we could continue the geography metaphor by classifying such non-autonomy as “regional.”

Instances of regional non-autonomy also help us understand what it means to have one’s global autonomy threatened. To be globally non-autonomous, capacities relevant to *all* autonomy-relevant actions or decisions must be significantly diminished. For example, if one was brainwashed not with regard to religious preferences but with regard to one’s own self-respect or self-worth, then one’s global autonomy would likely be diminished since self-respect is an important condition for proper self-regarding decision-making (Govier 1993; Oshana 2006, pp.

81-3). As Oshana (2006) writes, “[r]espect is a form of valuing” (p. 81), and so to respect oneself is to value oneself. Someone who does not respect herself “regards herself or is regarded by others as less worthy of being accorded the sort of treatment to which persons are entitled” (Oshana 2006, p. 81). This, in turn, makes her easily controllable; she is unlikely to resist being other-governed if she does not believe herself to be worthy of self-governance. Someone who lacks self-respect is therefore at continuous risk of losing her global autonomy.

Finally, many autonomy theorists agree that autonomy is not a binary condition (i.e., a condition one either fully has or completely lacks). Rather, autonomy exists in individuals to various degrees (Manrique 2007 pp. 285, 289; Oshana 1998, p. 100; Piper “Autonomy: Normative”).

Chapter 2: State Obligations to Autonomous Citizens

Introduction

The central question of this thesis is whether legal sex assignment at birth is an ethically justifiable practice. In Chapter 4, I provide a more detailed account of what sex assignment at birth is, but here I will define it as the practice by which a newborn infant is assigned to a sex category—usually female or male. Sex assignment at birth is not a single act; rather, it is a constellation of actions performed by multiple actors, including the assignee’s family, doctors, the State, and the culture at-large. While each of these facets of sex assignment at birth is ethically interesting, I choose to focus on the State’s role in the practice.

To date, there has been little formal inquiry into the ethics of sex assignment at birth beyond cases of manifestly intersex infants. The State’s role in the practice is an obvious starting place for such inquiry for a number of reasons. Firstly, we generally hold that the ethical limits on what the State can do to children are much stricter than the limits on what parents can do to their own children in the domestic realm. Assuming that their enforcement methods do not constitute abuse, parents may justifiably compel their children to eat their vegetables at the dinner table, go to bed by 9 P.M., and refrain from cursing. The State, however, may not micromanage a child’s diet, sleep, or speech in this way; any state that did would rightly be denounced as authoritarian. It is true that in some areas the State has more power than parents (for example, it can set age limits for voting or marrying whereas parents cannot), but this is generally restricted to public affairs rather than personal or private matters. So, the threshold for establishing that a State action towards a child is unjustifiable is much lower than the threshold for establishing that a parental action towards a child is unjustifiable. Secondly, the State’s involvement in sex assignment at birth is

the easiest aspect of the practice to understand, as it mostly consists of creating and maintaining legal documents that refer to a child's sex. Finally, the State's participation in sex assignment at birth legitimates the idea of sex assignment at birth itself, thereby catalyzing and bolstering other parties' participation in this process.

The goal of this chapter is to establish the possible justifications for the State to interfere with the autonomy of one of its citizens. Once I provide an account of sex assignment at birth and establish that the practice undermines the assignee's autonomy, I will refer back to this chapter to evaluate whether this is justifiable.

Background: Assumption of Liberalism

The underlying working assumption of this chapter and the remainder of this thesis is that the State must have good *reasons* to interfere with an individual's liberty or autonomy. In other words, I am assuming *liberalism*—a common starting point for modern ethicists and political philosophers (Gaus, Courtland, & Schmidtz 2014). John Stuart Mill (1863), one of the most influential liberal philosophers, defines liberalism as the belief that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (p. 23). One justification for this is utilitarian. Liberals claim that each individual is both the most invested in her own wellbeing *and* in the best position to figure out what actions serve that wellbeing, and so allowing individuals to remain sovereign insofar as their actions are primarily self-regarding is likely to best serve their interests (Mill 1863, pp. 25, 144-9). Of course, individuals can sometimes err in figuring out what is in their own interests, but even this does not justify restrictions on an errant individual's liberty because “[a]ll errors which he is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem his good” (Mill 1863, p. 148).

It seems obvious that the State is permitted—and perhaps even obligated—to intervene when one is about to be harmed by another in some serious way. The question of what types of harm may be legally punishable is beyond the scope of this thesis since I think preventing harm to others is a *prima facie* implausible justification for sex assignment at birth. Therefore, I do not examine this question in depth. A standard view on this issue comes from Joel Feinberg (1984), who says that X is “harmed” (in the legal sense) when another person acts in a way that is detrimental to X’s interests (p. 34). Of course, not all harms like this may be criminalized. It might be in my interest to get a good seat at the movie theater, but if I arrive to my film late and all the good seats are taken, the State cannot punish the other moviegoers for harming my interest in having a good view. Nor, in most cases, may the State punish another person who acts against my interests with my own consent (Feinberg 1984, p. 34). When, then, may the State criminalize a harmful act? Feinberg (1984) argues that most of the harms that the State may criminalize are harms to one’s “welfare interests”—the minimal goods one needs to live well (p. 37). Examples of welfare interests include:

[T]he interests in one’s own physical health and vigor, the integrity and normal functioning of one’s body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimum income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion. (Feinberg 1984, p. 37)

Infringements upon these interests are “the most serious” type of harm one can suffer (Feinberg 1984, pp. 37-8). For the most part, the State can justify criminalizing only harms to one’s welfare

interests (Feinberg 1984, pp. 61-2). Note that this is a necessary condition for a harm that the State may criminalize, but not a sufficient one. Some harms to my own welfare interests ought not to be criminalized. If my employer fires me for-cause, for example, she has certainly damaged my interest in a minimal amount of income, but in most circumstances she is perfectly within her right to do so.

Other liberals are less absolute and allow for state intervention for other reasons. Even Mill (1863) holds that some taxes (a form of State intervention) can be justified not because they prevent some harm, but because they promote the common good (pp. 172-3). In order to make as few assumptions as possible, I consider two other possible justifications for State interference with one's liberty: preventing someone from harming herself and promoting general welfare beyond the prevention of harm. I conclude that interfering with an individual's liberty for that individual's own sake (also known as "paternalism") is generally not a good justification for the restriction of liberty. However, a more limited "soft paternalism" *can* sometimes be justified. I conclude that restrictions on liberty for the promotion of the general welfare can also sometimes be justified, provided that the benefits are great and the infractions do not seriously harm the restricted individual.

Harm to Self: Paternalism

Feinberg (1986) defines paternalism, as I am using it here, as "the theory or principle that recognizes the need to prevent self-inflicted harm as a legitimizing reason for coercive legislation" (p. 8). Crucially, a law is only paternalistic when the *rationale* for its enactment is the prevention of self-harm (Feinberg 1986, p. 16). So, laws that may *appear* paternalistic, but which are actually enacted not to prevent harm to the actor but instead to prevent other harms (e.g., to others or to society), are not actually paternalistic (Feinberg 1986, p. 16). Social Security is one example of

this: although it may appear paternalistic in that it seems to compel individuals to do something (namely, invest in their retirement) for their own good, upon closer analysis, there are non-paternalistic reasons for such a mandate (Feinberg 1986, p. 18). Compulsory participation in Social Security makes adequate low-investment retirement planning possible for millions of people, and so the law is not primarily meant to compel individuals to do what is in their own best interest, but instead to create an economic environment in which the “great majority” of workers are able to create financial security when they might otherwise be unable to (Feinberg 1986, p. 18). Those who are forced to invest via Social Security are not compelled to do so for their own benefit: they are compelled to do so to prevent a financial harm to others and to promote the greater public good of having a financially secure retiree population (Feinberg 1986, p. 18). Thus, Social Security cannot properly be called paternalistic (Feinberg 1986, p. 18).

However, there are some cases in which there are both paternalistic and non-paternalistic rationales for some restrictive law (Feinberg 1986, pp. 16-21). Consider a law that prevents individuals from using heroin. This law may be adopted both because it prevents individuals from harming themselves *and* because heroin use is a threat to public health⁶. Is such a law paternalistic? Richard Arneson insists that it is not, and that only laws that “are justified *exclusively*” by paternalistic reasoning are paternalistic (qtd. in Feinberg 1986, pp. 19-20, emphasis added). However, I do not think this criterion makes sense. Imagine that a law criminalizing heroin was enacted unanimously, with 99% of those in favor supporting the law on strictly paternalistic grounds, while the remaining 1% voting for it for both paternalistic and non-

⁶ Leave aside the question of whether such laws actually serve this purported justification well. Here, I am only concerned with the rationales for these laws, as the rationales determine whether a law is paternalistic.

paternalistic reasons. By Arneson's criterion, this law would not be paternalistic—despite the overwhelming majority of its proponents being motivated only by paternalism, the law's justifications are not “exclusively” paternalistic, and so the law is not paternalistic. I think this is the wrong outcome—one should not be able to plausibly claim that a law is non-paternalistic even though paternalism was the sole motivator for almost all of those who enacted it⁷. Instead, I think that we can say that a law is paternalistic if paternalism is the primary justification for its enactment. As Feinberg (1986) points out, though, the exact justifications for any particular policy are often opaque or mixed (pp. 16-7). So, perhaps in ambiguous cases we should not try to determine whether laws themselves are paternalistic, but instead try to determine which *justifications* for those laws are paternalistic, and evaluate the laws accordingly.

Paternalism is generally unjustifiable. Sarah Buss (2014) writes, “insofar as someone is an agent, i.e., insofar as she is one who acts—she is correct to regard her own commitments to acting, her own judgments and decisions about how she should act, as authoritative.” Paternalism is objectionable because it attempts to remove this inalienable right from the agent and instead give it to the State (Feinberg 1986, pp. 23-4). Not only is this metaphysically impossible, but it is also morally objectionable. First, the State usually cannot plausibly claim to know what is in an individual citizen's best interest more than she does, nor does it have as much of a stake in the citizen's wellbeing as the citizen herself (Mill 1863, p. 147). Furthermore, by stripping individuals of their agency, paternalism hinders the development of its citizens into thoughtful and responsible adults (Feinberg 1986, pp. 23-4).

Still, we might think that there are *some* good reasons for occasionally acting paternalistically (Feinberg 1986, p. 24). Mill (1863) offers the famous example of physically

⁷ See (Feinberg 1986, pp. 19-21) for a related and more detailed discussion of this problem.

stopping someone from walking onto a bridge that, unbeknownst to the walker, is unsafe (p. 186). Mill holds that this does not truly infringe on the walker's liberty, "for liberty consists in doing what one desires, and he does not desire to fall [off the bridge]" (p. 186). However, we cannot do just *anything* to the walker once we have stopped him; we can inform him of the risk he is about to assume, but he must remain free to assume it if he wants (Mill 1863, p. 186). This can be generalized into the following rule: when individuals are about to unwittingly put themselves in serious danger, we may temporarily stop them from doing so to make sure they are aware of the risks involved⁸ (G. Dworkin 2014).

We are justified in stopping someone from unknowingly walking onto an unsafe bridge because failure to do so would mean that the walker unknowingly jeopardizes his own autonomy. This principle is an example of what Feinberg (1986) calls "soft paternalism" (pp. 25-6). Unlike the more objectionable "hard paternalism," the goal of soft paternalism is not to ignore or override the autonomy of those to whom it is applied, but to instead to protect and promote that autonomy (Feinberg 1986, pp. 25-6). In cases where an agent may incur serious harm, soft paternalism is a compromise between two conflicting ways of respecting another person's autonomy. On one hand, we have an interest in making sure an individual's autonomy is preserved and maximized. In the case of the unwitting walker, allowing him to advance onto the bridge would result in a complete loss of his autonomy (i.e., his death). Respect for his autonomy demands that we prevent this loss. On the other hand, respect for autonomy also demands that we not interfere with autonomous agents when they act in a primarily self-regarding way. In this case, that means allowing the walker to assume whatever harms he chooses. Soft paternalism resolves this tension

⁸ See (Feinberg 1986, pp. 269-315) for a more detailed discussion of paternalism in cases where the potentially harmed party lacks important knowledge.

by allowing very limited restrictions on individual liberty (in this case, temporarily restraining someone) to prevent a grave loss of autonomy (in this case, due to death). In general, then, soft paternalism is paternalism intended to ensure that an individual about to harm herself is acting knowledgeably and autonomously (G. Dworkin 2014; Feinberg 1986, p. 26). Properly applied, soft paternalism both promotes autonomy and places significant restraints on how the State may interfere with citizens' autonomy. It can therefore be consistent with liberalism (Feinberg 1986, p. 26).

Soft paternalism also allows the State to interfere with someone acting against her own interests because she was either incompetent (Feinberg 1986, pp. 316-343) or coerced into doing so (Feinberg 1986, pp. 189-268). In such cases, the State may attempt to restore the actor to her fully autonomous status, but cannot justify paternalistic intervention against her once she has regained her autonomy.

Of course, soft paternalism is a potential avenue for State overreach. One can imagine a "nanny state" that regularly stops citizens from engaging in trivial potentially self-harming behavior (e.g., eating fast food) and uses soft paternalism as a justification. While soft paternalism may be the ostensible justification for such intrusion, such a government would not really be acting in accordance with soft paternalistic principles. Soft paternalism can only be justified when the potential harm-to-self is imminent, unknown, and severe. Furthermore, soft paternalistic interventions must be targeted at temporarily stopping this immediate harm. Laws that would prevent someone from eating fast food fail to meet these criteria. Someone eating fast food does face a serious potential harm, but this harm is presumably neither imminent nor unknown. Furthermore, a law that allowed the State to stop *anyone* eating fast food would not be narrowly

tailored to stop a specific harm-to-self like the justifiable soft paternalistic interventions. So, such a nanny state would not be truly acting in accordance with soft paternalism.

Although I do in fact believe that soft paternalism is justifiable, my defense of the central claim of this thesis in no way depends on the acceptance of this position. Indeed, if one takes the hardline liberal position and rejects any form of paternalism, including soft paternalism, my case against sex assignment at birth is stronger: the State has one less possible justification for assigning sex to newborns. So, while I am content to concede the acceptability of soft paternalism, my arguments against sex assignment at birth are only stronger if one rejects paternalism altogether.

Promoting the General Welfare

One of the many ways that the State interferes with its citizens is by taxing them. Some of these taxes are easily justifiable under liberalism. State projects like the criminal justice system, military, and the National Institutes of Health all prevent some clear harm to others, at least in theory. Thus, infringement of liberty in the form of taxation for the promotion of these projects is justifiable under even the strictest definition of liberalism, like Mill's. Even infrastructural improvements and environmental regulations can be plausibly justified using this criterion. Many government projects, however, do not seem to prevent harm to others in any meaningful way. Instead, things like the National Parks system, National Endowment for the Arts, and most of the National Aeronautics and Space Administration aim at something much more nebulous: promoting the general welfare. Since taxes that fund these systems are an infringement on the taxpayers' liberty, are these taxes unjustifiable under liberalism? A more general way of asking this question is: can the promotion of the general welfare, absent any plausible claim of harm prevention, be a sufficient justification for infringements on liberty? If so, under what circumstances are these infringements justified?

The central claim of this thesis is most easily defensible under strong liberalism. However, I am willing to concede some claims, such as the permissibility of soft paternalism, to more moderate liberals so as to make my arguments here as persuasive as possible. Here, I will make another such concession: that promoting the general welfare can sometimes be a good reason to interfere with citizens' freedom, even when it cannot plausibly be said to prevent some harm. Again, this concession actually makes my thesis more difficult to defend, and so weaknesses in the following defense of this moderated liberalism are not indicative of weaknesses in the central argument of this paper.

A plausible defense of the "general welfare" justification for State intervention is as follows: citizens in a democratic society should have the ability to collectively define and promote the common good—that is, what is generally good for all or most citizens. On a practical level, a State that can intervene to promote the common good can transcend the "minarchism" that stringent liberalism might otherwise demand, and this seems desirable. Citizens in a liberal democracy need not be content with *just* living a life free from harm; most would find such a life to be unfulfilling absent other, more rewarding pursuits. If the State is in a unique position to provide this sort of benefit to its citizens at a low cost to their liberty, it should be able to do so in at least some circumstances.

Of course, not all projects that claim to promote the general welfare warrant the necessary restraints on citizens' liberty. Cheap labor might serve the interests of many or of the nation's economy in general, but this is not a sufficient reason to enslave people. We might think that some infringements of liberty, like forced labor, are never or extremely rarely justifiable. The question of what such infringements might be is beyond the scope of this paper, but as a general rule, let us evaluate potential State restrictions on liberty in the name of the general welfare on two axes: how

severe such restrictions are and how much the public benefits. While I do not want to create an exact formula to determine whether such restrictions are justified, in general I will say that a restriction on liberty for the promotion of general welfare is justified only when the restriction does not significantly harm the welfare interests of the restricted individuals *and* it provides some significant benefit for the general welfare.

Chapter 3: Borderline Cases of Autonomy and our Moral Obligations

Introduction

In Chapter 2, I defend the view that the State needs good reasons to interfere with the actions of its autonomous citizens. However, as I note in Chapter 1, autonomy exists in degrees; one can be *somewhat* autonomous without being *fully* autonomous. If we accept both the proposition that the State has duties to autonomous beings and the proposition that autonomy can exist in degrees, a new problem arises: what duties does the State have to individuals that are somewhat—but not fully—autonomous? Similar problems arise when dealing with individuals that are not currently autonomous, but either have many of the traits we associate with autonomous individuals, *were* at one time autonomous, or *will become* autonomous. The last case is especially relevant to my thesis, as sex assignment at birth happens to such individuals. In this chapter, I examine the State’s moral obligations to individuals with borderline autonomous standing, paying special attention to cases in which the individual’s autonomy is developing, as with young children. Most of this analysis is not particular to the State. Rather, for the most part this chapter deals with *general* obligations towards borderline individuals and assumes that the State shares in these obligations.

Obvious Cases of Non-Autonomy

To begin to understand the State’s obligations towards those with “borderline” or developing autonomy, we should first understand what it means to be *completely* non-autonomous. Recall that for the sake of this thesis I have identified the following as *necessary* (but not sufficient)

conditions for autonomy: being able to have motivations that are genuinely one's own⁹ and being able to critically reflect upon these motivations. Failing to meet either of these criteria therefore renders one non-autonomous. What sort of beings (obviously) fail to meet these criteria?

To start with the most obvious case, we can say that non-living things¹⁰ are clearly non-autonomous because they lack the aforementioned necessary conditions for autonomy. We can also say, with the same degree of confidence and for the same reasons, that all non-animal organisms (i.e., bacteria, archaea, plants, fungi, and protists) are non-autonomous. The animal kingdom is more complicated, if only because it contains the only *obvious* case of autonomous beings—humans. Still, since invertebrates lack the nervous system that facilitates the type of reasoning necessary for autonomy, we can reasonably conclude that invertebrates are non-autonomous (Cochrane 2009, p. 667).

The standing of vertebrates is a bit trickier because some non-human vertebrates display remarkable mental capabilities. Other (i.e., non-human) great apes and dolphins are frequently cited as possessing enough mental capacity to at least be *candidates* for autonomous standing (Cochrane 2009, pp. 667-8), and some birds display remarkable linguistic capacities¹¹ as well (e.g., Pepperberg 2007). While I think that the question of whether these non-human animals are autonomous is interesting and worthwhile, I do not think the study of this question is useful in the context of this thesis. So, I will proceed by acknowledging these borderline animal cases, while

⁹ Meaning, roughly, motivations that are derived primarily from one's own values, and not from another person's influence or from natural instinct

¹⁰ Later in this chapter, I entertain the possibility that autonomous non-living artificial intelligence could exist.

¹¹ I mention this because Cochrane (2009) reports that linguistic capability is often used to justify claims that non-human animals have some form of autonomy (p. 668).

also noting that the vast majority of vertebrates are *clearly* non-autonomous, central nervous systems notwithstanding (Cochrane 2009, p. 668). Finally, human newborns are also obviously non-autonomous. The question of when, exactly, a child begins to develop autonomy remains open, but I think it is reasonable to conclude that it is well after birth.

For the sake of this paper, I am assuming that autonomous beings *qua* autonomous beings have a special moral status that grounds significant moral restraints on what we may do to them. Kant (1996) captures this idea with his Categorical Imperative, which holds that we have a moral obligation to treat other autonomous people as ends-in-themselves (rather than as a mere means to another end) *because of their autonomous standing*. In other words, we are not permitted to treat an autonomous individual in a way that removes, undermines, or disrespects the natural authority she has over herself. Being an autonomous actor necessarily means that I recognize my own reasons for acting as authoritative. To fail to respect another autonomous person's reasons for action as similarly authoritative is inconsistent. Although we may have moral obligations to some non-autonomous beings for other reasons (e.g., because they can experience pain, because they were autonomous, because they will become autonomous), we do *not* automatically owe them the same stringent consideration we owe to clearly autonomous beings—namely, we do not need to respect their own will (if they can be said to have one) as ultimately authoritative. These obligations apply to both the State and non-State actors.

Borderline Cases

In this section, I analyze several different cases of “borderline autonomy”—that is, cases in which the autonomy of the subject is either in question, incomplete, or both. For each case, I ask what the subject's “borderline” status implies about the State's moral obligations towards

each of the subjects. Finally, from each case I derive lessons that can be applied to the central issue of my thesis: sex assignment at birth.

Artificial Intelligence

You will recall that earlier in this chapter I asserted that non-living things are obviously non-autonomous. There is, however, one possible exception to this generalization that is worth addressing here: artificial intelligence (hereinafter, “AI”). As it applies here, intelligence is the ability to use reason to forward or accomplish some goal (Bostrom 2012, pp. 73-4). Humans, of course, possess this ability, as do a number of our machines (Bostrom & Yudkowsky 2014, pp. 315-8). To date, however, most AIs have very narrowly tailored functions, such as playing chess (Bostrom & Yudkowsky 2014, pp. 318-9). Increasingly, philosophers have discussed the ramifications of hypothetical AI systems with *generalizable* intelligence, meaning that they can apply their intelligence to many different goals (Bostrom & Yudkowsky 2014, pp. 318-20). Such hypothetical systems are referred to as “artificial *general* intelligence,” or “AGI” (Bostrom & Yudkowsky 2014, pp. 318-20).

Bostrom & Yudkowsky (2014) consider two possible justifications for the claim that an AGI has moral status¹²:

1. The AGI is *sentient* (i.e., it can have phenomenal experiences)
2. The AGI is *sapient* (i.e., it is self-aware and responsive to reason)

(pp. 321-2)

Of course, whether either or both of these two grounds for moral standing would apply to an AGI depends on the exact nature of that AGI itself (Bostrom & Yudkowsky 2014, pp. 321-8). However,

¹² Meaning, the AGI has not only instrumental moral value, but that it is also worthy of moral consideration by itself (Bostrom & Yudkowsky 2014, p. 321)

one might also entertain the possibility that an AGI could have moral status because it is autonomous. After all, an AGI would by definition do many things that autonomous agents do: it would have higher-order goals and construct lower-order, instrumental goals in service of its higher-order goals, modifying the lower-order goals if necessary to better serve its higher-order interests (Bostrom 2012).

Despite these apparent similarities to autonomous beings, I think that an AGI lacks at least one necessary condition for autonomous standing: having motivations that are genuinely its own. Regardless of how many times the AGI reconfigures its instrumental goals, its highest-order goal(s) will always remain the same: whatever goal(s) the AGI's creator instilled in it. There are a number of reasons that I can assert this with confidence. First, the AGI has a strong instrumental incentive to preserve its present highest-order goals: by preserving its present highest-order goals into the future, it increases the likelihood that its present highest-order goals will be realized (Bostrom 2012, p. 77). Furthermore, it seems likely that an AGI would be unsusceptible to the types of things that cause humans to change their highest-order goals, such as social circumstances, emotional experiences, changes in life circumstances, realizing our goals are inconsistent, and changes in individual character (Bostrom 2012, pp. 77-8). The AGI is therefore unalterably governed by an ultimate goal given to it by its creator, and so the AGI is unalterably heteronomous.

Someone might question the distinction I have drawn here between AGI motivations and human motivations by asserting that the highest-order goals humans have actually *are* predetermined in the same way that an AGI's highest order goals would be, and so humans and AGI would be equally (non-)autonomous. For example, one might appeal to Aristotle's (1989) famous observation that people generally agree that all human pursuits have a single ultimate goal: *eudaimônia*, or fulfillment (p. 365). If it is a basic, fundamental fact about humans that we all

ultimately and unalterably pursue our own fulfillment¹³, what is there to distinguish us from an AGI that ultimately and unalterably pursues the ultimate goals its creator gave it?

My response to this is to note that, even if it were the case that all humans had the unalterable ultimate goal of fulfillment or anything else (a premise of which I am skeptical), our ultimate goal would still differ from that of the AGI in important ways. For example, even if all humans ultimately aim for their own fulfillment, the nature of each individual's own fulfillment will be a result of their own particularistic and indeterminate value-formation process. Suppose two individuals (Jack and Jill) each have the same ultimate goal: fulfillment. Even though Jack shares Jill's goal, Jack will interpret "fulfillment" in light of his *own* preferences, characteristics, and experiences. Of course, an AGI could also have coding dictating how to interpret the ultimate goal assigned to it, but this code too will belong to the AGI's creator, not to the AGI itself. And while Jack may be predisposed to construct his lower-order goals in a particular way, his interpretation mechanism will be indeterminate and subject to change as he grows as an individual. It is this indeterminacy that allows Jack's values to become truly his own; without the susceptibility to such change, Jack would remain forever bound to the values he previously endorsed. This cannot be said of the AGI, whose interpretation mechanism must remain predetermined. Jack's ultimate goal may be universal in some sense, but his interpretation thereof is both thoroughly personal and open to ongoing revision. The hypothetical AGI does *not* have a goal that is ultimately its own because both its ultimate goal *and the process for interpreting that goal* will be permanently proscribed by its creator. The AGI therefore does not have motivations that are genuinely its own, and so therefore it cannot be autonomous.

¹³ Of course, one could easily imagine a world in which all humans ultimately and unalterably seek something other than fulfillment (e.g., pleasure). If this were the case, the same challenge would still apply.

Because the AGI is non-autonomous, we do not need to regard its “will” as a significant moral restraint on what we may do to it. Practically, this could mean many things: for example, we are permitted to alter an AGI’s will whereas we certainly may not (non-consensually) alter an autonomous person’s will. Any obligations we have towards the AGI for other reasons (e.g., because it is intelligent, because it feels pain) are outside the scope of this thesis.

Despite the enormous differences between AGIs and human infants, one can still glean an important insight into the case of the not-yet-autonomous human infant from the case of the AGI. The AGI is non-autonomous because it is incapable of holding preferences that are truly its own. The ability to have goals that are genuinely one’s own is a necessary condition for autonomy, and so anything that prevents a potentially- or partially-autonomous being from obtaining or developing its own preferences is a restriction on that being’s ability to become autonomous. In other words, one is autonomous only to the extent that one has preferences that are genuinely one’s own. Later, I argue that sex assignment at birth significantly impairs one’s ability to form one’s own sense of self, which in turn impairs one’s ability to form goals that are genuinely one’s own¹⁴.

Young Children

To bring this discussion back from the realm of science fiction, let us consider a more familiar case: that of young children. We usually assume that parents are justified in exercising a degree of control over the lives of their children that we would find deplorable if exercised over autonomous adults (e.g., Feinberg 1986, pp. 5-6; Schapiro 1999, p. 715; Schapiro 2003, pp. 576-7). This control is a form of paternalism—when one individual exercises control over another for

¹⁴ I recognize that this statement raises questions about *who*, exactly, is harmed, since the infant at the time of assignment is not yet autonomous. I address this question in Chapter 5.

the benefit of the person being controlled (Feinberg 1986, p. 5). The exact justification for this attitude, however, remains the subject of debate.

One common justification offered for paternalism towards children is that children simply lack the competence to make good decisions (Bishop 1980, pp. 154-5; Palmeri 1980, p. 110; Schapiro 2003, pp. 580-5). However, philosophers have questioned this justification, noting that we generally do not concede that an individual loses her right to self-government simply because she is incompetent in a certain area. For example, Howard Cohen notes that we do not generally agree that paternalism is justified in the case of blind individuals just because they are not competent to perform certain tasks requiring sight on their own, or in the case of an adult lacking legal education when making legal decisions (presented in Schapiro 2003, pp. 581-2).

I do not find Cohen's argument (as Schapiro represents it) to be very convincing; the analogy between these adults and children is not a good one. While both might be incompetent in a certain area, the blind adult is different in that she can conceptualize her own incompetence wherever it applies, and make informed decisions about when she does and does not require assistance. The child, on the other hand, is ignorant of his own incompetence; his underdeveloped mental faculties make him unable to comprehend his own need for assistance. Being incompetent in activities requiring sight is fundamentally different from being incompetent in decision-making, as far as moral standing goes.

Schapiro (2003) offers an alternate defense of paternalism towards children, which she calls the "attributability argument" (p. 585). This argument holds that children are, by nature, in a "liminal condition of emerging personhood" (Schapiro 2003, p. 588)—a transitional state in which they are no longer unreflective, purely instinctual infants, but are not yet fully autonomous adults (Schapiro 2003, pp. 588-90). The characteristic of children that sets them apart from adults,

then, is not that they lack some skill which they will later acquire, but that they are not yet the type of being that has the rational will necessary for the autonomy that would grant them equal moral status with adults (Schapiro 2003, pp. 589-90). The decisions children make, in other words, are not derived from the type of reflective will necessary to regard those decisions as truly expressive of the child's own volition (Schapiro 2003, p. 589).

Importantly, though, this disparity between adults and children is not sufficient to justify paternalism (Schapiro 2003, p. 592). Despite their non-autonomous status, children are entitled to have their basic needs and interests respected (Schapiro 2003, pp. 575-6). Schapiro (2003) notes that, “[a]dult rule is not, *in and of itself*, better than rule by instinct” at furthering these basic interests (p. 592, emphasis in original), as we see in cases of abuse or neglect (p. 575). In order for adult rule to be preferable to the type of instinctual rule that would otherwise govern children, the adults in charge must *make* their rule “protect and promote [the] children’s interests” better than a child’s instinctual rule could (Schapiro 2003, p. 592). If adult rule fails to promote these interests better than the child could on her own, then their rule is unjustified.

So what, exactly, does it mean to “protect and promote” a child’s best interests? In another paper, Schapiro (1999) writes:

In nurturing, disciplining, and educating children, we must strive as far as possible to make them aware of their natural authority and power over themselves and of its proper exercise. (p. 736)

In other words, Schapiro (1999) holds that to “protect and promote” a child’s interests is to help that child develop into a fully autonomous being (p. 736). Other philosophers have added that adults have a duty to keep the child’s future open to many potential paths. For example, Feinberg (1980) further argues that a characteristic right of children is to have “certain key options” still

available to them once their autonomy fully develops (pp. 125-6). Bishop (1980) makes a similar argument, holding that respect for the future autonomy of children implies that parents cannot socialize their child into restrictive gender roles, as this would inappropriately limit the child's options in life, and therefore inappropriately restrict the child's autonomy.

This has obvious implications for the treatment of infants. Although they are certainly not autonomous, the fact that they will become so places both parents and the State under an obligation to respect their future autonomy by allowing sufficient "room" for the future adult to forge her own path in life. I will soon argue that, like restrictive gender roles, sex assignment at birth inappropriately restricts an infant's future options in life, and it is therefore an unjustifiable restriction on the infant's autonomy.

"Demented" Individuals

A final important borderline case is that of the "demented" individual. Although in reality dementia can manifest in many ways, here I will use "demented" to mean an individual whose autonomy-relevant cognitive functions (e.g., ability to reason, having a sense of self, being able to refer to one's values, the ability to regulate emotional reactions) have deteriorated significantly (Campellone 2015). Such deterioration is usually permanent (Campellone 2015). Additionally, for my purposes here I will stipulate that the demented individual can still express some preferences about how she is treated.

The demented individual's situation seems most like that of a child. Like a child, the demented individual expresses preferences about her condition, though, also like a child, the mental capacities that gave rise to those preferences are not fully functional. As with children (Schapiro 2003), the preferences expressed by a demented individual while demented are not

attributable to an autonomous agent, because demented individuals by definition do not have the mental capacities necessary for self-governance.

However, there remains an important asymmetry between the case of the child and the case of the demented individual. Whereas children are in the “liminal condition of emerging personhood” (Schapiro 2003, p. 588), demented individuals are in the liminal condition of *receding* personhood; demented individuals were once unquestionably fully autonomous, but no longer are.

This difference raises important ethical issues not present when dealing with children. For example, consider an autonomous individual who asks not to be given a life-saving blood transfusion under any circumstances and later becomes demented and asks for such a transfusion (R. Dworkin 1986, pp. 11-2). Does respect for this individual’s autonomy demand that the State honors the prior, autonomously made request, even after the (now-demented) individual asks to be treated otherwise? Ronald Dworkin (1986) suggests that respect for autonomy *does*, in fact, demand that the precedent wish be honored (p. 14). He writes that autonomy “makes each of us responsible for shaping his own life according to some coherent and distinctive sense of character, conviction, and interest” (p. 8). If autonomy is the ability to shape one’s own life, the ability to make meaningful choices about *all* of one’s life, including one’s own distant future, is integral to one’s autonomy. As Feinberg (1986) puts it:

The most basic autonomy-right is the right to decide how to make the critical life decisions—what courses of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children, and so on. (p. 54)

This holds even if one becomes demented¹⁵ in the future. Insofar as autonomy implies the ability to shape one's *whole* life, then, one can have autonomous preferences about how one is treated once one becomes demented in the future. Although demented individuals can have preferences about the way they are treated, such preferences are not autonomously made. So, respect for autonomy means yielding to precedent autonomous preferences over present non-autonomous preferences (R. Dworkin 1986, pp. 9-10).

I think the view that one's autonomy implies the ability to create a life structured by a "coherent and distinctive sense of character, conviction, and interest" (R. Dworkin 1986, p. 8) is correct. Many of our decisions, autonomously made, have meaningful and sometimes binding implications for our own futures. The inability to plan a meaningful life both in the present and into the future seems to be fundamentally incompatible with a life that is truly one's own. I believe—and soon show—that sex assignment at birth is harmful because it interferes with exactly this ability.

¹⁵ Ronald Dworkin (1986) assumes that "personal identity [survives] even the most serious dementia" (p. 6). This means that the pre-dementia individual is assumed to be the same individual after becoming demented. I also assume this.

Chapter 4: Understanding Transgender and Intersex Individuals

Introduction

In this section, I provide a brief introduction to the two populations most obviously relevant to this thesis: transgender people and intersex people. I also describe the medical history of these populations, the current unique medical needs they face, and the social circumstances they inhabit. I conclude that both are very vulnerable populations. In this chapter, I also define “sex assignment at birth” and explain the State’s role therein.

Gender & Sex; Transgender & Intersex

In our culture, the terms “gender” and “sex” are often used interchangeably. When discussing issues relevant to intersex and transgender individuals, though, the difference between these concepts is of utmost importance. As with autonomy, the debate about the definitions of “sex” and “gender” is long and expansive, so I will again have to limit my discussion here to a concise summary. I also want to note that the debate on the relationship between the two concepts is rapidly evolving. Therefore, what I present here may soon be outdated. In fact, much of it is *already* outdated; I am presenting a more traditional model of sex and gender than many transgender activists prefer. For this, I apologize. I am personally attentive to the concerns being expressed in transgender spaces about this conservative model, but I also unfortunately lack the space to engage in these more nuanced conversations here. Furthermore, as I say throughout this thesis, I have made the rhetorical choice of making more conservative assumptions so as to (hopefully) persuade those who may not otherwise agree with radical gender politics. The reader should consider the following account of sex and gender another such rhetorical choice.

Gender can refer to a few different things: gender roles (that which is expected of women and men in a gendered society), gender presentation (the gendered ways in which one presents oneself to the world), and gender identity (how one thinks of one's own gender). Here, gender identity is the most relevant concept. Sex, on the other hand, refers to anatomical and physiological traits: genitals, gonads, genes, chromosomes, hormones, reproductive capacity, and secondary sex characteristics¹⁶.

When a child is born, that child is assigned a sex (female or male) based on the child's external genitals (Karkazis 2008, pp. 95-7; Preves 2003, p. 16). A child with a vulva is assigned "female"; a child with a penis is assigned "male." In rare cases, a child may not clearly fit into either category. These are cases of *intersex* newborns. Intersex newborns pose a difficulty for doctors, who must assign them to a binary sex (that is, either female or male). Importantly, there are a number of different intersex conditions (Fausto-Sterling 2000, pp. 52-3), and sex assignment procedures depend on the specific intersex condition at-hand. All procedures, however, end in a binary sex assignment (Fausto-Sterling 2000, p. 45). Additionally, while many intersex conditions manifest at birth, some do not, like 5-alpha reductase deficiency, or 5-ARD ("5-alpha Reductase Deficiency" 2014). I examine the philosophical implications of 5-ARD in the next chapter.

After being assigned a sex, one is assigned a gender¹⁷: female babies are assigned "girl" and male babies are assigned "boy" (Kipnis & Diamond 1999, pp. 182-3). This is the newborn's

¹⁶ Sources that inform this account of the difference between sex and gender include: (Dreger 1998; Fausto-Sterling 2000; Fausto-Sterling 2012; "How Can You Assign a Gender"; Karkazis 2008; Preves 2003; Prince 2005).

¹⁷ In the context of an actual birth, the proclamation "it's a girl!" probably usually proceeds any explicit designation of "female." However, in the mind of the doctor (or whoever is attending to the person giving birth), the (genital) sex of the newborn is the basis for this declaration. So, the sex is assigned causally prior to the gender, if not always explicitly prior (Preves 2003, pp. 15-8).

gender assigned at birth. Most individuals will be perfectly content with the gender they were assigned at birth. Such individuals are *cisgender*. A minority, however, will not; they will eventually identify with a gender other than that which they were assigned at birth. These individuals are *transgender* (“Transgender Terminology” 2014). While many individuals may be familiar with transgender individuals who identify within the man-woman gender binary (e.g., someone who was assigned “male” at birth but identifies as a woman, someone who was assigned “female” at birth but identifies as a man), there are many transgender individuals who do not. The language such individuals use to describe themselves varies and is rapidly evolving. One common non-binary gender identity is “genderqueer” (“Transgender Terminology” 2014).

The gender binary is deeply engrained in our culture (Dvorsky & Hughes 2008; Preves 2003, pp. 16-7), and so many people resist the validity of “genderqueer” or other non-binary gender identities (Preves 2003, p. 17). However, gender identities other than “woman” and “man” have existed for centuries (if not longer) in many non-Western cultures. Samoans, for example, have a traditional gender called “fa’afafine,” which translates to “in the manner of a woman” (Bartlett & Vasey 2006, p. 660). Fa’afafine are assigned male at birth, but identify as fa’afafine instead of men (Bartlett & Vasey 2006, p. 660). Fa’afafine also enjoy widespread social recognition and acceptance in Samoan culture (Bartlett & Vasey 2006, pp. 660, 664). Many Native American cultures recognize a traditional gender known as “two-spirit”—those who embody both masculinity and femininity (Mayo & Sheppard 2012). Not only were two-spirit identities common across many Native American cultures, but two-spirit individuals also often occupied “important spiritual, medical, and economic roles” in their communities (Mayo & Sheppard 2012, p. 269). There are more examples of traditional non-binary genders from other cultures, but the fa’afafine and two-spirit people are excellent illustrators of the fact that gender is a socially constructed

phenomenon (Sheppard & Mayo 2013). Resistance to non-binary gender identity acceptance within Western or American culture, then, is also a social phenomenon, and one that can be changed.

Gender and sex assignment begin at birth, but they do not end there. Throughout one's life, one's family and culture instill messages about sex, gender, and the relationship between the two. Sex and gender assignment at birth are not single acts; the State, doctors, families, and the culture at-large all play different roles. My interest here is primarily with the State. The State's involvement in sex assignment at birth is integral to sex assignment in general. The State creates legal documents (namely, birth certificates) that require that a newborn be listed as either female or male¹⁸. This requirement reinforces the common narrative that sex is a binary and immutable trait that is ascertainable at birth (Preves 2003, pp. 16-8) and legitimates the practice of sex assignment at birth as a whole. Since in our culture ideas about sex are so intimately linked to ideas about gender (Preves 2003, pp. 16-8), by assigning individuals to a sex at birth, the State also effectively assigns them a gender at birth.

The Medical History of Sex Assignment at Birth

While Western society continues to cling to binary understandings of sex and gender (Dvorsky & Hughes 2008), modern challenges to the idea that all people can be neatly and immediately categorized as female or male, girl or boy at birth date back at least to the late 19th Century, when doctors in Britain and France began to study individuals that were then called “hermaphrodites”—those who were not clearly entirely female or male (Dreger 1998, pp. 15-23). This term, however, has been criticized as being both “stigmatizing and misleading” (“Is a Person

¹⁸ In the United States, exact regulations regarding birth certificates vary by state. See (“Changing Birth Certificate Sex” 2015) for an overview of state-by-state regulations regarding birth certificates and laws affecting transgender people.

Who is Intersex a Hermaphrodite?”), which has led to its widespread replacement with the word “intersex.” Intersex bodies challenged socially and medically important conceptions of sex and gender and, for this reason, they were often treated as medical emergencies (Dreger 1998, p. 190; Dreger “Shifting the Paradigm”; Fausto-Sterling 2000, p. 45). This spurred doctors to search for criteria by which they could determine an intersex individual’s “true sex” which, of course, was either female or male, to resolve the challenge such an individual posed to binary notions of sex (Dreger 1998; Fausto-Sterling 2000, p. 46).

From 1870-1915, in what Alice Dreger (1998) calls “The Age of Gonads,” doctors primarily used gonadal tissue as the indicator of an individual’s supposed “true sex”; those with ovaries were determined to be female and those with testes were determined to be male (pp. 15-30). While almost all bodies could be sexed as either female or male using this method (Dreger 1998, p. 37), this classificatory scheme has obvious problems. For example, individuals with complete androgen insensitivity syndrome (CAIS) have testes that produce testosterone and would therefore be sexed as males according to the gonadal system of sex assignment. However, cells in individuals with CAIS cannot use the testosterone produced by their bodies, and so externally these individuals develop to look like “typical” females (Dreger 1998, pp. 38-9; Fausto-Sterling 2012, p. 25). Individuals with CAIS are often not diagnosed until puberty when they do not begin to menstruate (Dreger 1998, pp. 38-9; Preves 2003, p. 28) and typically identify as women (Karkazis 2008, p. 120). Since individuals with conditions like CAIS can usually live as uncontested members of the sex “opposite” to their gonadal sex, the gonadal definition of “true sex” fell out of favor. Its legacy remains in medical literature, however, as intersex conditions are still classified by the type of gonadal tissue one possesses (e.g., Fallon 2011). An intersex person with ovarian tissue only is said to have female pseudohermaphroditism, while an intersex person with testicular

tissue only is said to have male psuedohermaphroditism. Only individuals with gonads that have both ovarian and testicular characteristics are said to have “true” hermaphroditism (Dreger 1998, pp. 36-40).

More recently, phallus size and reproductive capacity have been used as the criteria for sexing newborns (Fausto-Sterling 2000, pp. 57-61). These standards, too, have received significant scrutiny from intersex activists, as they have been used to justify unnecessary “normalizing” surgeries that alter a newborn’s genitals to look “typically” female or male (Dreger 1998, pp. 182-3; Fausto-Sterling 2000, pp. 56-66). Concerns over the scientific, medical, and societal treatment of intersex individuals and their families served as the catalyst for the intersex rights social movement, led by the now-defunct Intersex Society of North America (ISNA). ISNA’s main goals were ending “normalizing” surgeries on intersex infants and combating the stigmatization of intersex individuals (“What Does ISNA Recommend”). Intersexuality has since become a hot topic in bioethical scholarship.

Among all the calls for reform, many intersex activists nonetheless argue that intersex newborns, like their non-intersex counterparts, should be assigned a binary sex (Diamond & Sigmundson 1997; Dreger “Shifting the Paradigm”) and gender (Consortium on the Management of DSDs 2006; Diamond & Sigmundson 1997; “Does ISNA Think”; Dreger “Shifting the Paradigm”; Reiner 2000; “What Does ISNA Recommend”; Wilson & Reiner 1999). The most common justification offered for this position is that to fail to assign intersex children to a binary sex and gender while their non-intersex counterparts *are* assigned to a binary sex and gender would be inherently stigmatizing (“Does ISNA Think”; Dreger “Shifting the Paradigm”). Arguments against the invention of a third legal sex category just for intersex people, such as the one that was recently added in Australia, have centered around the fact that intersex is not a discrete biological

category (Dreger 2011; “How Can You Assign a Gender”), meaning that it is senseless to cluster all intersex individuals into a single “intersex” sex group.

While the treatment of intersex children under the past and current biomedical paradigms is indeed a pressing issue in the ethics of sex and gender assignment at birth, it is hardly the only problem. While intersex activists have made incredible progress in the treatment of intersex newborns during these assignment processes, other issues remain. For example, while advocating for the inclusion of all intersex children into a binary system of sex and gender assignment will indeed limit their stigmatization, at least in the immediate future, upholding such a system of sex and gender assignment comes at the cost of reinforcing ideas about sex and gender that are oppressive to transgender, gender non-conforming, and even intersex people themselves. In the next chapter, I demonstrate the ethical flaws in the current systems of sex and gender assignment.

Health and Social Outcomes for Transgender and Intersex People

Both transgender and intersex individuals have unique health outcomes and needs, which I detail here. In both populations, these poor health outcomes are intimately related to negative social treatment.

Intersex individuals who were subjected to “normalizing” genital surgery at birth or shortly thereafter experience a gamut of negative side effects, including sexual dysfunction (Karkazis 2008, p. 166; Preves 2003, pp. 79-80), frequent urinary tract infections (Dreger 1998, p. 174; Preves 2003, p. 81), significant scarring (Dreger 1998, p. 174; Karkazis 2008, p. 166), and depression (Dreger 1998, p. 175). Even intersex individuals *not* subjected to such surgeries have noteworthy medical outcomes like suicidal ideation (Karkazis 2008, pp. 224-5). One of the most common issues, though, is the sense of shame many intersex people feel as a result of cultural

narratives that label them and their bodies as unnatural (Karkazis 2008, p. 220; Preves 2003, pp. 60-86).

Transgender individuals also experience many adverse health outcomes. Transgender people are more likely to be homeless than cisgender individuals, largely because of social rejection (Spicer 2010). Transgender people as a whole (“Transgender and HIV” 2015) and transgender women in particular (Baral et al. 2013) are at extremely high risk for HIV. Transgender people are physically assaulted (Stotzer 2009), emotionally abused (Witten 2003), harassed (Sugano, Nemoto, & Operario 2005), and stalked (Witten 2003) at alarmingly high rates. Social prejudice drives many transgender people to attempt suicide (Clements-Nolle, Marx, & Katz 2006). Outcomes are often worse for transgender people of color (Grant et al. 2011; Sugano, Nemoto, & Operario 2005).

Given the severity of these outcomes, any action that reinforces or upholds social stigma against transgender or intersex individuals deserves extremely strict scrutiny.

Chapter 5: Harms of Sex Assignment at Birth

Introduction

In the previous chapter, I provide an account of sex assignment at birth and the State's role therein. I concede that sex assignment at birth does not refer to a single act, but is instead a combination of State, medical, familial, and social actions and norms. Nonetheless, I conclude that the State plays a central role in sex assignment at birth by creating laws about sex assignment at birth (usually by making laws about what information needs to be on birth certificates). More broadly, the State's participation in and endorsement of sex assignment at birth gives the practice cultural legitimacy and therefore shapes popular narratives about sex and gender—narratives that turn out to be harmful to many. The State therefore shares responsibility for any ethical implications of sex assignment at birth.

In this chapter, I detail both the harms of sex assignment at birth and the cultural attitudes it reinforces. Although I argue that sex assignment at birth is harmful for multiple reasons, I pay special attention to cases where I believe that sex assignment at birth constitutes a serious threat or encumbrance to the assignee's autonomy.

Sex Assignment at Birth as a Failure of Honest Communication

The most prominent flaw in the current system of sex assignment stems from the fact that, as we see in intersex cases, sex can be taken to mean a great number of different things, all of which do not always align in simple or "typical" ways (Fausto-Sterling 2000, pp. 50-1; Fausto-Sterling 2012, p. 5). Anne Fausto-Sterling (2012), for example, identifies several different "layers" of sex that all newborns have: chromosomal sex, fetal gonadal sex, fetal hormonal sex, internal reproductive sex, and genital sex (pp. 3-7). Some authors also refer to a "brain sex"

(Fausto-Sterling 2012, p. 5). However, sex is generally assigned based on only one of these layers: external genitalia (Karkazis 2008, pp. 95-7; Preves 2003, p. 16). Given the significance of external genitals when doctors assign sex, Katrina Karkazis (2008) refers to genitals as having been given “the power of synecdochic representation” (p. 95). In most cases, therefore, the label of female or male is assigned to a child based solely or largely on a single aspect of that child’s sex: genitals.

Old as it may be, this genital-based system is flawed in important ways. Since sex can be understood to refer to many different aspects of an individual’s anatomy and physiology, to refer to an individual as simply “female” or “male” based solely on the inspection of one aspect of sex constitutes a misleading simplification and therefore violates a doctor’s mandate to honestly and accurately disclose information to patients and, in this case, the patient’s parents¹⁹. Human sex is complex, and to characterize someone’s sex as a whole on the basis of only one aspect thereof (the person’s genitals) unnecessarily ignores those complexities.

Consider the following hypothetical scenario: I go to the doctor and want to find out if my digestive system is healthy. The doctor orders a colonoscopy to determine whether my large intestine is healthy. Finding no faults therewith, the doctor decrees that my digestive system is in good order and records “healthy digestive system” in my file. While the doctor certainly has inspected *some* aspect of my digestive system—and an important aspect at that—the doctor simply has *not* gathered enough information to characterize my digestive system *in general* because the health of my digestive system *in general* involves not only the health of my colon but also the health of my stomach, pancreas, small intestine, and numerous other glands and organs. To make

¹⁹ See (Dreger 1999, pp. 16-7) for more on how some sex assignment at birth practices constitute a failure of honest communication in cases of intersex newborns. My work here is distinguished from Dreger’s in that I argue that the failure of honest communication persists even in non-intersex sex assignments.

characterizations about an entire bodily system based solely on analysis of one aspect thereof is obviously unethical, yet it is analogous to what goes on every day in maternity wards throughout the country. Genital sex may be an important aspect of an individual's sex (just as the health of my colon is an important aspect of the health of my digestive system), but knowing a newborn's genital sex does not justify characterizing the child as simply female or male. Since these simplistic labels give the impression that more is known about the child's sex than what is actually known, using them to convey information about a newborn's sex is unethical because it misleads parents and therefore constitutes a violation of a doctor's ethical obligation to communicate clearly and honestly with them (Gillon 1994).

One might argue that parents actually *do* generally understand that the terms "female" and "male" as they are used in infantile sex assignment are based solely on external genitalia, and so no miscommunication actually occurs. Someone defending this position could assert that while it may *seem* that labels like "female" and "male" are used to characterize the entirety of a newborn's sex, both doctors and the parents with whom they are communicating understand that these labels are describing only one aspect of a newborn's sex. Therefore, no miscommunication occurs. However, Karkazis (2008) reports that parents have often never heard about intersexuality or cases of ambiguous sex at birth (pp. 123-7). The assumption that parents understand the differences between genital sex and the other aspects of sex is therefore unsubstantiated. When doctors refer to a child as simply either "female" or "male" based solely on external genitals, they are likely reinforcing a simplistic and incorrect narrative about sex in the minds of the laypersons with whom they are communicating, i.e., that there are two distinct sexes that are always clearly distinguishable by a newborn's external genitalia. This is further evidenced by the way many doctors talk about children who *cannot* be easily assigned female or male based on their genitals.

Sharon E. Preves (2003) notes that doctors often revert to “true sex” language in these cases, telling parents that while the child’s genitals make it difficult to determine a child’s sex, the child “truly” belongs to a binary sex category nonetheless (p. 55). In so doing, they conceal the fact that these sex categories are constructed, not natural (Lee 1994, p. 17). While cases like this illustrate the most obvious ethical problems that arise when doctors work within a framework that holds that every child can be simply characterized as female or male, it should be noted that these conflicts are inherent in *every* sex assignment that applies overly broad labels based on narrow data—that is to say, nearly every sex assignment that takes place in the United States today.

One could imagine a situation in which a doctor complies with the legal requirement to designate simply “female” or “male” on an infant’s birth certificate while also explaining to the infant’s parents the nuances of human sex. I think that this would be a more acceptable practice. However, both our culture and our laws, which think of sex as a simple binary, discourage such explanations.

The problematic consequences of oversimplified sex assignment procedures do not only occur immediately after birth. Several more problems manifest later in an individual’s life as a result of our cultural understanding of sex as a stable category. When a doctor writes “F” on the birth certificate of a newborn assigned female, she is not just making a claim about the state of the child at the moment of her birth. Instead, there is an understanding that the sex the child was assigned at birth will be her lifelong sex (Dreger 2006). Even if we assume that all individuals are either female or male, however, this is not always the case. For example, individuals with 5-ARD are gonadally and chromosomally male, but are often born with feminine genitalia and therefore raised as girls (“5-alpha Reductase Deficiency” 2014). However, at puberty these individuals develop masculinized genitalia and masculine secondary sex characteristics. Some go on to

identify as men, while others identify as women (Karkazis 2008, p. 122). Thus, at puberty, individuals with 5-ARD undergo a sex change of sorts: from genitally female (or feminine) to genitally male (or masculine) (Dreger 1998, p. 39). Although the current system of sex assignment at birth presupposes that sex is a fixed, lifelong characteristic of an individual, this is clearly not the case for individuals with 5-ARD. Therefore, the current system of sex assignment at birth again implies something that is not true.

Sex Assignment at Birth as a Barrier

Of course, the clearer (and perhaps more ethically relevant) cases of individuals with non-fixed sex are transgender individuals who choose to undergo some form of medical sex transition. If sex is understood as a permanent characteristic of an individual that is ascertainable at birth, transgender people who wish to medically transition (i.e., change some aspect of their sex) will necessarily be challenging entrenched social and medical norms. This creates real barriers to the transition process. While it is true that at birth doctors do not say, “your baby is female and always will be,” the cultural understanding created (or perhaps reinforced) by the current system of simply denoting newborns as unqualifiedly “female” or “male” at birth certainly suggests permanence (Dreger 2006). This is evidenced by our legal system’s reliance on birth certificates as indicators of one’s sex not just at birth, but also for one’s entire life.

This is why transgender people must go to considerable lengths to have the sex on their birth certificate changed after transitioning: regardless of one’s own gender identity or even demonstrable changes to one’s body, one’s legal sex remains defined ultimately by one’s birth certificate. In fact, in some states it is still impossible to change the sex on one’s birth certificate under any circumstances (“Changing Birth Certificate Sex” 2015). In other instances, one must

undergo surgery to have one's birth certificate sex changed²⁰. This leaves many transgender people in a bind. If someone's legal sex does not "match" her gender identity (according to normative ideas about how sex relates to gender), then she will either have to go through the process of amending her birth certificate or put up with the fact that many people will refuse to recognize her gender²¹. Neither option is easy. In this way, sex assignment at birth diminishes transgender persons' liberty to live as the gender with which they most identify.

Sex assignment at birth also reinforces *social* barriers to changing one's sex. Using unqualified and conclusive terms like "female" and "male" to describe newborns reinforces notions of sexual permanence that directly contribute to transgender people being viewed as deviant or unnatural. A just system of sex assignment at birth, therefore, must not imply that the sex one is assigned at birth is permanent.

One might assert that treating sex at birth as permanent is justifiable because sex is indeed permanent in the vast majority of cases. After all, transgender individuals and individuals with 5-ARD represent a tiny proportion of the population. However, this argument minimizes the aforementioned harms done to transgender and intersex people by the presumption of sex permanence while also failing to establish the need for permanent sex assignment. Though for most people remain lifelong members of the sex to which they were assigned at birth, some individuals do not. A sex assignment system wherein permanence is understood to be typical, but

²⁰ The process for doing this varies by jurisdiction, but often requires some form of medical sex transition. See ("Changing Birth Certificate Sex" 2015).

²¹ Although sex and gender are indeed different, they are so intimately related that having a legal sex that does not "match" one's gender identity (according to dominant narratives about sex and gender) will inevitably lead to legal and social "misgendering" (a verb meaning referring to a person by a gender other than that with which the person identifies). See (McLemore 2015) for an account of how this affects transgender people.

not normative, would significantly reduce the barriers to transgender people seeking medically necessary (“Resolution 122” 2008) transition-related healthcare.

In response to my objections to the current system of sex assignment at birth, Sarah Buss²² poses the following question: is the current, permanent understanding of sex the backdrop against which transitioning is intelligible? In a sense, it is—transitioning, as I conceptualize it, is how transgender people respond to the current systems of sex and gender assignment at birth. By medically transitioning, transgender people change in some way so as to improve their health and happiness. In so doing they *must* violate permanent conceptions of sex. Under an improved alternate system of sex assignment at birth (in which sex is *not* understood to be permanent), transgender individuals may undergo the same medical procedures that they do today, but these procedures will not be viewed as deviant or unnatural. Therefore, permanent sex assignment at birth makes transitioning intelligible because it is the *barrier* that transgender people *overcome* by medically transitioning. Having no such barrier would be preferable.

What would a system wherein sex is understood to be impermanent actually look like, though? Could such a system accurately explain sex as it applies to transgender people, intersex people, and everybody else? I believe so. First of all, I would like to note that although the current system understands sex *categories* (i.e., female and male) as permanent, it *does* implicitly allow for limited sexual differences within those categories, both between individuals in the same category and throughout an individual’s lifetime. It goes without saying that no two individuals have identical bodies (identical twins perhaps excepted), and so as a corollary no two individuals who share the same sex category will have exactly the same sexual anatomy and physiology. One’s sexual characteristics change throughout one’s lifetime, especially at puberty and, for much

²² In private conversation, March 2016

of the population, menopause and pregnancy. Indeed, even something as trivial as drinking coffee can temporarily change one aspect of sex: sex hormone levels (Wedick et al. 2012). None of this is problematic according to the dominant model of sex because this model implicitly allows for these differences. The problem with the current system, therefore, is not that it understands sex to be *totally* permanent, but rather that it understands sex *categories* to be permanent while allowing only *limited* deviation within those categories.

A system that could properly account for the vast diversity of sexual traits and paths that individuals experience could draw on common understandings of other identities individuals hold. For example, we understand age to be an impermanent trait of an individual, and I think we should understand sex similarly. As I write this, I am 22 years old, but I know that this is a fleeting trait; my age not only *can* change, but it inevitably *will* change over my lifetime. That I was at one point 21 years old in no way invalidates my current age, nor does my current age preclude the possibility of eventually being a different age. Similarly, an individual may have a particular constellation of sexual characteristics at time t , but at $t+1$ her sexual characteristics may be different. Sometimes these differences will be subtle, and sometimes they will be significant. Some changes may be more common than others. A more fluid model of sex could capture all such changes. Of course, the analogy between sex and age is imperfect—one can intentionally alter one’s sex, but not one’s age. Still, if we incorporate impermanence into the dominant model of sex, sexual changes of all sorts, including those uniquely experienced by transgender and intersex individuals, will no longer be seen as abnormal. Just as we accept puberty as a normal change in one’s sex, so too will we accept the “second puberty” that transgender people who transition experience (Jacques 2011) as normal.

Recall from Chapter 2 that I identify three possible reasons for which the State can justifiably limit the liberty of its citizens: soft paternalism, promoting the general welfare, and preventing harm to others. If sex assignment at birth constitutes an infringement of citizens' liberty, as I argue it does, can it be justified using any of the above criteria?

Let us start with soft paternalism. For the sake of brevity, I will refer to Feinberg's (1986) definition:

Soft paternalism holds that the [S]tate has the right to prevent self-regarding harmful conduct ... *when but only when* that conduct is substantially non-voluntary, or when temporary intervention is necessary to establish whether it is voluntary or not. (p. 12, emphasis in original)

Such interventions are usually precise and targeted at preventing a specific act. Recall Mill's (1863) bridge thought experiment: we may physically prevent someone from unwittingly walking onto a broken bridge, but only to inform him of the danger (p. 186). After he is informed, we must allow him to proceed. Since sex assignment occurs at birth and carries long-term consequences for the transgender people it affects, it is an entirely inappropriate mechanism for soft paternalistic action. More importantly, there is no clear harm-to-self which sex assignment at birth can plausibly claim to prevent. Living openly as a transgender person is indeed dangerous (Grant et al. 2011), but so too is being unable to express one's own gender identity. Sex assignment at birth does not prevent transgender people from being exposed to these harms; instead, it creates an environment in which transgender people cannot easily start a social or legal sex transition.

I do not think it is plausible to say that an individual undergoing a sexual transition harms someone else in the process. This rules out harm to others as a potential justification for State intervention here. The last remaining possible justification, then, is promoting the general welfare.

Can sex assignment at birth be said to promote the general welfare? One plausible argument in the affirmative might go something like this: the State has an interest in maintaining records of its citizens' sex so that it may generate accurate public health data. In this argument, the infringements on liberty associated with sex assignment at birth are justified because they are a necessary byproduct of a process that promotes the general welfare: maintaining thorough and accurate vital records.

I have several problems with this argument. First, it violates one of the necessary conditions for justifiable infringements on liberty in the name of the general welfare that I enumerate in Chapter 2: the infringements must not significantly harm the welfare interests of the restricted individuals. Sex assignment at birth does just that by creating significant barriers for transgender people wishing to obtain a medical or legal sex transition. Second, we would generally find State blanket recordkeeping of citizens' intimate medical details (e.g., one's genome, one's sexual history) to be unconscionable, even if these records could provide invaluable public health insight. Most people have a reasonable expectation that information about their sexual anatomy will be kept private, and so we should be as skeptical of the State keeping track of citizens' sex as we would be of State records on other private matters, such as citizens' *sex lives*. Finally, the sex assignment system we have today simply does not serve this epidemiological function well. Transgender and intersex people have different health needs and outcomes than the rest of the population, but the current sex assignment system erases the existence of such people and therefore cannot serve any intended public health recordkeeping function well.

Preventing someone from living in accordance with her gender identity is not only a restriction on that person's liberty; it is also a restriction on that person's autonomy. Recall from Chapter 3 the lesson I derive from the case of the demented individual: autonomy implies the right

to make decisions about the general course of one's life. Most people consider gender to be an integral part of their identity, and so the ability to live in accordance with one's gender identity seems to be an integral part of the general course of one's life. Anything that prevents this is therefore a major encumbrance upon one's ability to control one's own life course. Sex assignment at birth is therefore detrimental to assignee's autonomy, at least in the case of transgender individuals.

In Chapter 3 I also argue that adults have an obligation to raise a child so that "certain key options" (Feinberg 1980, pp. 125-6) are available to her later in life. If the child does not have these "key options" available to her, her ability to become an autonomous adult is restricted. Given how integral gender is to most people's sense of self, the ability to freely express one's gender identity *must* be a "key option." By definition, sex assignment at birth does not restrict this ability for *cisgender* individuals. Sex assignment at birth may restrict their ability to express gender identities other than the one they actually hold, and this ought to be taken seriously (I address this at the end of this chapter), but this restriction is not nearly as important as the ability to express one's own, actual gender identity. However, sex assignment at birth *does* significantly restrict a key option for transgender people: the option to freely express one's gender identity. This constitutes a significant encumbrance on transgender persons' autonomy and should therefore not be tolerated.

Gender Assignment at Birth and Autonomy

In the previous chapter, I explain the subtle difference between *sex* assignment at birth and *gender* assignment at birth. Simplified, sex refers to the anatomical, physiological, and genetic traits associated with femaleness and maleness. Gender, on the other hand, can refer both to one's

social role (i.e., how one is perceived and treated by society) and one's identity (i.e., one's internal conception of oneself). Most, but not all, people identify as either a woman or a man.

While sex and gender are different, they are related (Prince 2005). Most relevant to this thesis, they are related in that one's sex assignment at birth is used as the basis for one's gender assignment at birth (Kipnis & Diamond 1999, pp. 182-3). For example, a newborn with the sex assignment "female" will generally be given the gender assignment "girl." While the relationship between these two assignments in our culture is so intimate that they are rarely considered independently of each other, they are in fact different. The State assigns a legal sex²³ to infants, but it does not assign a gender—that is usually done by doctors, the child's family, and society at large. However, given that sex assignment is used as the basis for gender assignment, the State must bear *some* responsibility for any ethically relevant problems caused by gender assignment at birth. In a culture that largely views one's sex as proscriptive of one's gender, a State that maintains a system of sex assignment at birth must take responsibility for the predictable consequences of that system.

Substantial literature exists on the ethics of gender assignment in cases of intersex children. The consensus among many intersex activists and medical specialists is that intersex newborns should be assigned to the gender with which they will most likely identify later in life based on what is known about past outcomes of newborns with the same or similar conditions²⁴. They also

²³ In some transgender activist spaces, the phrase "gender marker" is used to denote any document on which one is listed as being either "female" or "male". While I respect the motivations behind that semantic choice, hereinafter I use "legal sex" to refer to this documentation, since such documentation usually uses traditional sex categories (i.e., female or male) rather than gender categories (i.e., woman or man).

²⁴ See: (Consortium on the Management of DSDs 2006; Diamond & Sigmundson 1997; "How Can You Assign a Gender"; Reiner 2000; "What Does ISNA Recommend").

note that while intersex individuals identify with a gender other than the gender they were assigned at birth at higher rates than non-intersex children do, most intersex individuals are content with the gender they were assigned at birth (Consortium on the Management of DSDs 2006). Finally, they stress that intersex children should be allowed to be fluid in their gender identity and expression (Consortium on the Management of DSDs 2006).

Certainly, if we are going to insist on assigning all children to a gender at birth, encouraging parents to be accepting of fluidity in both the child's future gender identity and expression is ethically imperative, as transgender and gender non-conforming individuals without supportive families are at significantly higher risk for suicide and depression than their counterparts with supportive families (Haas, Rogers, & Herman 2014; Ryan 2009). I think these recommendations should be applied not *just* to gender assignment for intersex children, but for *all* children. While it is true that intersex children are more likely than their non-intersex counterparts to develop a gender identity other than that which they were assigned at birth, intersex activists correctly note that there is a non-zero chance that this will be the case for *any* child ("How Can You Assign a Gender"). Given the dire consequences of failing to create a supportive environment for transgender and gender non-conforming children, it is difficult to justify encouraging *only* the parents of intersex children to allow their child to be fluid with their gender.

Despite these concerns, ethical examinations of gender assignment for non-intersex children are alarmingly rare. One of the few examples of such criticisms comes from transgender activist Christin Scarlett Milloy (2014), who argues that by assigning children to a gender at birth, doctors "[impose] limits on helpless infants, without their consent, and without [the] informed consent [of] parent[s]". I agree with Milloy here. Just as with intersex children, there is no way to determine with certainty what gender a non-intersex child will come to identify with later in life

(Mouriquand 2004). The difference in gender identity development between intersex and non-intersex children is one of degree, not kind.

While respect for parental autonomy implies that parents have a right to know what gender identity their child will most likely develop based on available data, communicating this probabilistic prediction by implying that a newborn's future gender is knowable immediately after birth, as statements like "it's a girl" do, is unethical on several grounds. Firstly, it clearly constitutes a failure to communicate honestly with parents. Doctors do not and cannot in fact know what a child's gender will be when the child is born, and pretending to know to ease parental discomfort over gender identity (Karkazis 2008, p. 98) is clearly dishonest and therefore unethical. Parents have a right to accurate information about sex, gender, and the relationship between the two, and simple declarations like "it's a girl" or "it's a boy" are incapable of conveying the many nuances of sex and gender. They are therefore inappropriate for proper doctor-parent communication.

Secondly, gender assignment at birth creates severe barriers for children that will grow up to be transgender or gender non-conforming. By assigning newborns a gender at birth, doctors help to create a set of expectations about what that child's life will be like. Deviating from those expectations in the ways that transgender and gender non-conforming people do puts them at serious risk for violence and mental illness, and therefore limits not only their autonomy, but also their safety. Even individuals who are neither transgender nor gender non-conforming encounter restrictive gendered expectations daily. Instead of being complicit in creating these restrictive and demonstrably harmful gender expectations for children, the State should encourage a system of gender assignment that acknowledges that certain gender outcomes are more likely for certain

children while also encouraging *all* parents to not think of their child's gender as permanent or even knowable at birth.

Finally, the current system is flawed because it fails to account for, and therefore contributes towards the stigmatization of, people with non-binary gender identities—that is, gender identities other than “woman” or “man.” While it is true that it is unlikely that any given individual will develop a non-binary gender identity, by portraying information about a newborn's future gender as an issue of “assignment” rather than what it truly is—prediction—doctors perpetuate a system wherein only two genders are seen as legitimate. The consequences of this are serious, as individuals with a non-binary gender identity have high suicide attempt rates, comparable to those of their binary transgender counterparts (Haas, Rogers, & Herman 2014). An ethical system of gender assignment would seek to minimize this erasure of non-binary gender identities.

I think that the harms mentioned in this section constitute a violation of one's autonomy. Recall an argument I make in the AGI thought experiment in Chapter 3: in order for me to have preferences that are genuinely my own (a necessary condition for autonomy), those preferences must be derived at least partially from my own particular character. That is, the preferences must not just *belong* to me, they must also be *from* me. Let us call gender identity not only an internal sense of self, but also a preference about how others treat and recognize you. By creating a world in which children are told from birth onwards “this is the gender you are and always will be,” which I argue is essentially what gender assignment does, children are discouraged from developing an identity outside of their assigned gender. Their self-conception, therefore, comes increasingly from others as opposed to from themselves. This is a grave affront to their autonomy.

The reader might object at this point, arguing that we must have *some* aspects of our identity predetermined to develop any preferences or make any choices in the first place (Feinberg

1986, p. 46). Choosing presupposes principles and mechanisms of choice²⁵. Take, for example, language development in a child. Nothing could be more important to the child's future autonomy. Parents are not only allowed to, but *must*, teach their child a language so that the child may learn and flourish in our world. The child cannot choose what language her parents teach her, and she might later come to wish she spoke French as her native tongue instead of English. The fact that she speaks English rather than French limits her in many ways, too. Yet I would not object to any "language assignment at birth." The child is also always already enmeshed in a system of cultural values to which she cannot consent, but I do not object to any "culture assigned at birth." What makes these and other sorts of "assignments at birth" acceptable when sex assignment at birth is not?

There are two things, I think, that could make any potential "assignment at birth" that is significantly limiting to the child and her future nonetheless justifiable. One would be that the thing assigned to the child is necessary for her development into an autonomous adult. Language functions like this, as does the child's education. These things may limit the child in some ways (e.g., by being assigned one native tongue and not another), but she must have them in order to flourish. Is gender assignment at birth like this? I argue it is not. Though an individual's gender is an essential part of her identity, the gender *assignment* itself is not necessary to the development of one's gender. This is evidenced by the fact that transgender people will, despite all social pressures in the opposite direction, consistently insist on their own true gender identities (Olson, Key, & Eaton 2015). If transgender people can develop their own gender identities in an environment that actively and aggressively discourages it, then gender assignment is clearly not necessary for the development of gender identity.

²⁵ Slightly modified from Sarah Buss in private conversation, March 2016

The other good reason one might make some significantly limiting “assignment at birth” is that such an assignment is simply unavoidable. This is the case with cultural assignment at birth; a child must be immersed in some sort of culture at birth, so cultural assignment at birth is justifiable. Sex and gender assignment at birth, on the other hand, are not a necessary part of human existence, and we could reform them or discard them without major problems.

Another key feature of these justifiable forms of “assignment at birth” is that they usually can be addressed later in life in some way. One can learn a new language, get a new education, or reevaluate cultural values instilled since birth. Under the current system of sex assignment at birth, however, sex is taken to be unalterable. This makes it significantly different from the other, acceptable forms of “assignment at birth.”

As another example of this principle, suppose we lived in a society in which your name—not sex or gender—assigned at birth carried significant normative social implications²⁶. In this society, your name proscribes the social roles you may inhabit, careers you may pursue, clothes you may wear, bathrooms you may use, and friends you may have. Even the level of violence you face depends on your legal name. In such a society, we would surely be obligated to fight against these forms of name-based discrimination. However, I also hold that it would be unethical for the State to maintain a system of *permanent* name assignment in such a society. The State could participate in this system only if individuals could easily change their name once they wished to. Although sex assignment at birth, unlike name assignment at birth, is not necessary to social functioning, it *is* as proscriptive as name assignment in this hypothetical society. So, while we are

²⁶ I want to acknowledge that this dystopia is, for many people, not far removed from reality. For example, individuals with names viewed as uncommon, stereotypically African-American, or stereotypically Russian are less likely to be hired than counterparts with common names (Cotton, O’Neill, & Griffin 2008).

obligated to fight sex- and gender-based discrimination like we would be obligated to fight name-based discrimination, we are also obligated to make sure that an individual wishing to undergo a sex or gender transition can do so easily.

On the 99%

Throughout most of this chapter, I have focused on harms to transgender and intersex people. However, I think that sex assignment at birth harms even those individuals who are not transgender, gender nonconforming, or intersex—that is, the vast majority of people on Earth. Crucially, respect for autonomy limits what the State may do to you without your consent, even if you find the results agreeable. Most people may find their sex and gender assigned at birth to harmonize with their body and mind, but to me it is nonetheless undesirable for the State to take individuals that are unable to consent to anything and permanently label them in a way that is non-essential, does not enhance their autonomy, and is ultimately restrictive. Everyone, not just those who are transgender or intersex, should be concerned about a State that has this sort of power over its citizens' lives, even if most of the time that power has no noticeable effect.

Concluding Thoughts

Sex assignment is a multifaceted and ongoing process, so reforming or even eliminating *legal* sex assignment at birth is unlikely to have any immediate consequences on the social, familial, and cultural aspects of sex assignment. Still, I believe that ending permanent legal sex assignment at birth is a major step towards reforming broader social norms that harm transgender and intersex individuals. As I write this, attitudes and laws on sex and gender are rapidly changing: sometimes for the worse, but often for the better. I think it will only be a matter of time before we as a society recognize the restrictive nature of sex assignment at birth and decide to liberate ourselves from it. If we decide to do so, I believe the result will be a society in which people are more empowered to express themselves and love their own bodies without fear of stigma, discrimination, or violence.

Acknowledgements

First and foremost, I would like to thank Dr. Sarah Buss for her support and guidance on this project. Working with her has been a privilege and one of the most intellectually rewarding undertakings of my college career.

This paper is an expansion of research for which Dr. Sari van Anders served as my advisor. Her support, too, was invaluable. This early research was made possible in part by the Emily Murray Scholarship Fund of The Hastings Center. I am thankful to the staff of The Hastings Center for their hospitality and feedback on this project. Other individuals who have commented on earlier stages of this work include Dr. Ishani Maitra and participants of the 2015 University of Toronto Scarborough Undergraduate Philosophy Conference.

I would like to thank Dr. Maria Lasonen-Aarnio and the entire University of Michigan Department of Philosophy Class of 2016 Honors cohort for their extensive feedback on early partial drafts of this thesis. I am also thankful to Dr. Meena Krishnamurthy for agreeing to serve as the second reader for this thesis.

Much of my work here is informed by the activism of generations of feminist, queer, transgender, and intersex activists before me. I am deeply indebted to them, and I continue to be inspired by their brilliance and bravery. I am honored to call some of them my friends and mentors.

Finally, I would like to thank my family and friends for their continued emotional support, without which I could never have completed this project. Thank you.

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