Intersex individuals are protected by the California constitution's right to privacy

Overview

Children born with intersex traits are often subjected at birth to unnecessary sex-defining surgeries without their consent. This article argues that the California constitution's privacy protection for bodily autonomy extends to an intersex child's interest in making intimate decisions that will shape the course of their life. Cosmetic surgeries fail to further any compelling interest justifying the invasion of this fundamental privacy right. Consequently, intersex children who are subjected to nonconsensual sex-defining surgeries have viable constitutional privacy claims against the medical actors involved.

Analysis

Nonconsensual surgeries to "normalize" sex trait variations can cause lasting harm to intersex children.

Intersex children are born with sex characteristics including chromosome patterns, gonads, or genitals that do not fit typical binary notions of male or female bodies. Some of these children are born with visually ambiguous sex traits, including ambiguous genitalia such as large clitorises with an absent vagina, or a vagina accompanied by retained testes, or a micropenis with a vagina-like opening in the scrotum.[1]

"About one in a hundred births exhibits some anomaly in sex differentiation."[2] Intersex traits currently treated as "candidates for surgery" are estimated to appear globally in roughly 1 in 1,000 to 2,000 births.[3] This estimate suggests that 210 to 420 intersex children born in California each year might be candidates for surgery.[4] Since the 1950s, the "entrenched" and "poorly developed" medical solution has been

for doctors and parents to "choose a gender for the child and to sculpt gender-appropriate genitalia of approximately normal-looking appearance" despite the claimed benefits of these surgeries lacking the support of scientific evidence.[5]

These surgeries are rarely medically necessary.[6] Instead, medical professionals impose most procedures on intersex infants under the misguided assumption that intersex individuals will be rejected by family and society because of their differences.[7] The outcome for intersex individuals can be devastating, at times resulting in "permanent infertility/sterilization, incontinence, loss of sexual function and sensation, and experiences tantamount to rape."[8] Furthermore, some intersex people reject the gender they were surgically and socially assigned.[9] For some conditions, this rejection rate can be as high as 40%.[10]

The California constitutional privacy right protects intersex rights.

California voters intended the state's constitutional privacy right to protect against both government and private intrusion.[11] By enshrining this right in the California constitution, voters decided that privacy should be protected not only by the legislature, but also by the courts.

Whether a constitutional privacy claim alone can support money damages "is an open question," but is unlikely under the framework for awarding compensation in constitutional claims.[12] This availability of equitable but not monetary relief focuses claims on continuing violators. This was demonstrated in *American Academy of Pediatrics v. Lungren*, where a California statute denied abortions to minors whose parents declined to provide consent.[13] The plaintiffs sued the officials charged with enforcing the statute, rather than suing individual parents whose denial of consent would be used as justification by the state to invade fundamental privacy rights. Similarly here, damages claims against parents who may have been misinformed or pressured into giving consent are unlikely to be viable, and privacy claims for equitable relief instead focus on the surgeons, hospitals, or insurance companies

who improperly use this consent to continue violating the privacy rights of intersex children.[14] And parental consent is no defense: healthcare providers can be held liable for violating state law even when improper treatments were requested by the minor patient's parents.[15]

Intersex people can assert their rights in court.

Standing is no bar to sex-defining surgery victims because California has no parallel to the federal "case or controversy" standing requirements.[16] Instead, "[a]t its core, standing concerns a specific party's interest in the outcome of a lawsuit."[17] Intersex adults subjected to childhood surgeries are a "real party in interest" who may challenge ongoing nonconsensual surgeries.[18]

Though they are not at risk of future violations of consent, prospective harm to intersex plaintiffs is unnecessary for injunctive relief unless it is required by the language or purpose of a claim.[19] California's constitutional privacy right is self-executing and contains no such requirement.[20] Nor do the ballot arguments to Proposition 11 impose a prospective harm requirement, instead emphasizing the importance of protecting Californians even from privacy invasions they are personally unaware of.[21]

Intersex claims should not be dismissed as moot; courts have discretion to hear these claims as "capable of repetition yet tend[ing] to evade review," since surgeries continue to be performed on children too young to understand or assert their rights.[22]

The two-year statute of limitations for California privacy claims does not begin until a minor turns eighteen, permitting intersex individuals to file suit as late as the day of their twentieth birthday.[23] Alternatively, the statute of limitations is tolled under the "discovery rule" until a plaintiff "suspects or should suspect that her injury was caused by wrongdoing."[24] Intersex people often have their surgeries hidden from

them even into adulthood.[25] Even if they experience pain, infertility, scarring, or surgeries late enough in childhood to be remembered, some individuals have no reason to believe that these interventions were purely cosmetic.[26] The two-year statute of limitations only runs for such individuals when they should reasonably suspect that their injuries were caused by medically unnecessary surgeries. And when providers conceal the existence or nature of these surgeries, tolling continues until the intersex individual uncovers the provider's misconduct.[27]

These intersex adults also have third-party standing because they have personally been injured by nonconsensual surgeries, they have a "relationship" with intersex children as part of the same marginalized community such that they can "effectively present the third party's rights," and intersex children themselves are prevented from bringing claims because surgeries are completed before they are old enough to understand and assert their legal rights.[28] Thus, intersex adults harmed by nonconsensual surgeries can assert claims both for themselves, and on behalf of intersex children at risk of suffering similar procedures.[29]

Intersex people have a protected privacy interest in deciding whether to surgically modify sex traits.

An intersex person's decision to give or withhold consent to medically unnecessary surgery is protected by California's autonomy privacy right, which extends to minors and adults alike.[30] Establishing an autonomy privacy interest invokes three threshold elements: a specific legally protected privacy interest, a "reasonable expectation of privacy" under the circumstances, and a sufficiently serious invasion of the interest to constitute an egregious breach of the social norms underlying the privacy right.[31] Any genuine, nontrivial invasion of such a protected privacy interest is a legitimate claim.[32]

Intersex children have a specific legally protected privacy interest in making medical decisions that will shape their bodies and futures.[33] *American Academy of Pediatrics v. Lungren* turned on this same principle of a minor's privacy right to choose; in that

case, an abortion.[34] Intersex medical decisions implicate the same "fundamental interest in the preservation of [one's] personal health, [one's] interest in retaining personal control over the integrity of [one's] own body, and [one's] interest in deciding for [one' self] whether to parent a child," while shaping "one's social role and personal destiny."[35] Lesser privacy rights are not violated when parents make routine medical decisions on behalf of their minor children.[36] But a minor's fundamental privacy rights cannot be waived. Just as for minors seeking an abortion, intersex children have a protected interest in accepting or refusing surgical interventions that will profoundly shape their body, identity, and future, regardless of their parents' preferences.

Because young intersex children are incompetent to consent to medical care, parents may exercise even fundamental autonomy rights on their behalf, but with limitations that still preclude non-medically necessary surgeries. In *Conservatorship of Wendland*, the California Supreme Court recognized that withdrawing life support could violate an incompetent patient's right to life, but that unwanted life support could infringe on his privacy.[37] Because life support is reversible, it was a lesser invasion of the patient's fundamental rights than the permanent solution of death.[38] California's privacy right required the lesser, temporary solution unless conservators could prove through clear and convincing evidence that the patient would have wished for life support to be discontinued.[39]

Conversely, in *Conservatorship of Valerie N.*, the court was instead faced with two permanent alternatives.[40] A developmentally disabled woman was at high risk of pregnancy unless she was sterilized, and she lacked capacity to consent to either choice.[41] Because a nonconsensual pregnancy could cause a greater privacy invasion, the court found that sterilization was constitutionally permissible, if there was clear and convincing evidence that less invasive medical interventions were unavailable, and that the individual permanently lacked competency to consent.[42] Applied here, those factors favor the temporary solution of barring the surgery: withholding cosmetic treatment is reversible, intersex children are not permanently

incompetent, and can consent to surgery when they are older.[43] In this context the temporary solution that preserves autonomy must be favored over the permanent violation of nonconsensual surgery.

This will not bar parents from making more routine medical decisions for their children — parents can still authorize medically necessary procedures without their child's consent, when not doing so would have worse implications for a child's fundamental rights to life and to medical treatment. Most medical decisions made by parents on behalf of their minor children, from dentist appointments to appendectomies, do not implicate fundamental rights by reshaping one's body, "social role and personal destiny." Even decisions involving such rights are permissible if the minor lacks capacity to accept treatment, and other fundamental rights would be violated by withholding care. Non-medically necessary intersex surgeries fall within the category of medical decisions that parents may not make on behalf of their children without implicating the minor's privacy rights. Like the decision whether to procreate, choosing whether to undergo sex-defining surgery is a fundamental autonomy interest.

Intersex people have an "objectively reasonable" expectation of privacy from surgeries that result in sterilization "[a] significant portion of the time," thus violating the "widely accepted community norms" of reproductive autonomy and prohibitions on forced sterilizations and conversion therapy.[44] Californians approved Proposition 1 in 2022, amending the state constitution to protect "an individual's reproductive freedom in their most intimate decisions."[45] This amendment is broadly intended to further privacy rights, including rather than limited to the right to abortions and contraceptives.[46] Since fundamental rights to make decisions affecting one's body, social role, and future have been embraced both by the courts and the electorate, intersex people's expectation that their reproductive and bodily autonomy will be respected is objectively reasonable.

Californians have also rejected past eugenic practices of forced sterilization, and the state now pays reparations to former victims.[47] Sterilizing a minor is now prohibited even with parental consent.[48] Yet some intersex children are sterilized in the belief

that their reproductive system is improper for their assigned gender, such as children who are assigned female and have testes removed.[49] Intersex children have an objectively reasonable expectation that they will not be sterilized without medical necessity.

Intersex surgical interventions are performed to assign a predetermined gender, often with the intention of guiding the child towards a heterosexual orientation.[50] For example, intersex children with micropenises were historically presumed to be predisposed to homosexuality, and were thus given vaginoplasties to encourage a heterosexual female identity.[51] Yet the US population broadly rejects "conversion therapy" attempts to change a child's gender or sexual orientation through psychological intervention.[52] Prominent health associations denounce conversion therapy as pseudoscientific, and California law prohibits its practice on minors.[53] Given this widespread condemnation of conversion therapy, intersex children have an objectively reasonable expectation that they will not be subject to even more severe interventions to achieve the same ends.[54]

Just because a challenged practice is widespread does not mean that there is no expectation of privacy; an inquiry this narrow would improperly undermine California's constitutional privacy right.[55] Instead, a wider lens must be applied, in which even longstanding practices violate an objectively reasonable expectation of privacy, if they clash with broader community norms.[56] Therefore, intersex medical customs, which the general public is unaware of, and which authorize procedures that are frequently hidden even from patients themselves, cannot establish a community norm undermining an intersex child's expectation of autonomy privacy.[57] Medical professionals are not empowered to place limits on a constitutional right.[58] Because these little-known medical customs violate broader community norms supporting reproductive autonomy and rejecting eugenics and conversion therapy, they infringe on an intersex child's objectively reasonable expectation of privacy.

Intersex children suffer a serious invasion of privacy that egregiously breaches community norms when their bodies are permanently altered without consent.[59] Nonconsensual intersex surgeries "are invasive, painful and irreversible, and therefore may amount to torture."[60] Intersex children may suffer "repeated surgeries throughout childhood, limited or absent sexual response, painful and scarred genitals, a sense of shame stemming from repeated and unexplained medical examinations of their genitals, infertility, difficulty forming relationships, and depression."[61] And while intersex people may reject the gender they were assigned, surgery is irreversible.[62]

The threshold elements for a privacy claim merely screen out claims that are insignificant, and they are satisfied here by a "genuine, nontrivial invasion of a protected privacy interest."[63] Nonconsensual surgeries reshaping one's body and future are certainly more than "de minimis," so that intersex children have a viable prima facie autonomy privacy claim.

Nonconsensual intersex surgeries by private actors fail the compelling interest test for fundamental autonomy privacy claims.

Nonconsensual and medically unnecessary intersex surgeries do not meet the high bar set by California's constitution. Though infringements of informational and non-fundamental autonomy violations are weighed against the defendant's legitimate and important competing interests, this balancing test is inappropriate for intersex claims.[64] Because a fundamental autonomy privacy right is violated, intersex surgeries are subject to the compelling interest test, akin to strict scrutiny.[65]

Medical providers may claim that nonconsensual surgeries protect the minor's wellbeing by shielding them from social stigma, or voice concerns about the child-parent relationship, fearing that parents would reject children with intersex traits.[66] The *Lungren* court recognized that these interests could be compelling.[67] Even so, the challenged statute failed the compelling interest test because it actually undermined these interests by imposing unwanted and potentially dangerous

pregnancies on the minor, and encouraged conflict between the child and parents.[68] Similarly, some intersex people also experience resentment, anger, and distrust toward their parents after learning of their nonconsensual surgical interventions.[69] And unnecessary intersex surgeries can cause lifelong physical and emotional harm to a minor, with no evidence of any benefits.[70] Because these surgeries undermine compelling interests rather than furthering them, they impermissibly infringe on an intersex child's fundamental autonomy privacy rights.

Actions violating a fundamental autonomy privacy right must also be narrowly tailored.[71] When infants and young children are subjected to invasive and medically unnecessary surgeries to (in theory) protect them from future stigma regarding their intersex condition, "the scalpel has been asked to do the work of the soccer coach, the primary school teacher, and the social worker."[72] Similarly, surgery is an improperly invasive method of addressing parental anxieties about their child's intersex status; instead "the solution is to change how we parent."[73] Providers thus have "feasible and effective alternatives" for protecting patient wellbeing and the child-parent relationship by publicly addressing stigma surrounding intersex medical conditions and better educating and supporting parents.

Conclusion

Intersex individuals who are subjected to medically unnecessary surgeries without their consent have viable claims against private actors under the California constitution's protection for fundamental autonomy privacy rights. These surgeries do not further a compelling interest, instead undermining patient wellbeing and the child-parent relationship. These surgical interventions also fail the narrow tailoring requirement, and providers must instead employ the "feasible and effective alternatives" of waiting until patients are old enough to consent to surgery, while educating parents and the public and working to reduce stigma towards intersex people. Intersex individuals have a right to make core decisions about their own bodies and identities, and this right should be protected.

1. Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants* (2006) 21 Berkeley J.

   Gender L. & Just. 59, 63–64. ↑

2. Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism* (1998) 4:2 GLQ 189. ↑

3. Tamar-Mattis at 63 n.28, citing Phornphutkul et al., *Gender Self-Reassignment in an XY Adolescent Female Born With Ambiguous Genitalia* (2000) 106 Pediatrics 135. For that statistic the authors cited Blackless et al., *How sexually dimorphic are we? Review and synthesis* (2000) Am. J. Hum. Biol. 12:151–166. The Blackless paper, after an extensive survey of global medical literature, concluded that the number of intersex candidates for surgery was conservatively around .08%, but likely higher, while also noting that another paper had placed the number at .05%. ↑

4. Johnson, *California's Plunging Birth Rates* (Jan. 26, 2023) Public Policy Institute of California (stating that the number of births in the state in 2021 was approximately 420,000). ↑

5. Beh & Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?* (2000) 7 Mich. J. Gender & L. 1, 3, 22; U.N. off. of the High Comr. for Human Rights, *Human Rights Violations Against Intersex People: A Background Note* (2019) at 19 (claims of improved standards of care lack foundation). ↑

6. Beh & Diamond at 44; Tamar-Mattis at 65 n.44. ↑

7. *Id*. at 67–68; Hegarty and Smith, *Public understanding of intersex: an update on recent findings* (2022) 35 Int. J. Impot. Res. 6. ↑

8. United Nations at 13–14. ↑

9. Hermer, *Paradigms Revised: Intersex Children, Bioethics & The Law* (2002) 11 Annals Health L. 195, 212–13; Karkazis, Fixing Sex: Intersex, Medical

Authority, and Lived Experience (2008) at 225–26; Tamar-Mattis at 66, 74–75. ↑

10. Human Rights Watch, *I Want to Be Like Nature Made Me* (July 25, 2017). ↑

11. Carrillo et al., *California Constitutional Law: Privacy* (2022) 59 San Diego L. Rev. 119, 120–21. ↑

12. *Hernandez v. Hillsides* (2009) 47 Cal.4th 272, 286 (citing *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 313 n.3); *see also* Carrillo at 176 n.272. ↑

13. *Am. Acad. Of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 313. ↑

14. Tamar-Mattis at 87–88; United Nations at 18. ↑

15. *See Pickup v. Brown* (2014) 740 F.3d 1208, 1235–36 (parental consent does not permit mental health providers to violate California law prohibiting conversion therapy); *see also* Tamar-Mattis, *Sterilization and Minors with Intersex Conditions in California Law* (2012) 3 Cal. L. Rev. 133 (hereafter "*Minors with Intersex Conditions*"). ↑

16. *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247–48. ↑

17. *Id.* ↑

18. Cal. Code Civ. Proc. §367; Chase at 194–95; Beh & Diamond at 2, 21, 55, 61–62. ↑

19. *Thurston v. Midvale Corp.* (2019) 39 Cal.App.5th 634, 651–52. ↑

20. *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 18; Cal. Const. art. I, §1.1. ↑

21. *White v. Davis* (1975) (1975) 13 Cal.3d 757, 775 (the Proposition 11 ballot arguments "represent[], in essence, the only 'legislative history.'"); Proposed Amendments to Constitution: Propositions and Proposed Laws Together with Arguments, General Election, Tuesday, November 7, 1972, at pp. 26–28. ↑

22. *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 524 n.1 (the patient holding the California constitutional privacy right at issue died, but others were likely to suffer the same privacy invasion without ability to personally assert their rights). ↑

23. *Shalabi v. City of Fontana* (2021) 11 Cal.5th 842, 847, 856; *Hart v. TWC Prod. & Tech. LLC* (N.D.Cal. 2021) 526 F.Supp.3d 592, 599. ↑

24. *Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931–32 (also noting that the discovery rule applies to privacy claims). ↑

25. *See* Tamar-Mattis at 64–66. ↑

26. *Id*. at 70, 84; *see also* Chase at 193–94. ↑

27. *See Bernson*, 7 Cal.4th at 934; Chase at 193–94. ↑

28. *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1297. ↑

29. Whether organizations can obtain third party standing to assert California constitutional privacy claims is unclear. *See 420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1347–48; *but see People v. Wiener* (1994) 29 Cal.App.4th 1300, 1305–06 (permitting a business to assert the privacy rights of its customers). ↑

30. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 334. The right to privacy applies to "every man, woman, and child in this state." By contrast, the state high court has never held that nonviable fetuses have consitutional rights, distinguishing such fetuses from "a born child." *See People v. Belous* (1969) 71 Cal.2d 954, 967–68. A California appellate court held that the view that a "fetus [is] a human being" and that "abortion [is] murder" is essentially a religious belief that cannot be endorsed by the state. *See Feminist Woman's Health Ctr. v. Philibosian* (1984) 157 Cal.App.3d 1076, 1088. ↑

31. *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 36–40; *Loder v. City*

of Glendale (1997) 14 Cal.4th 846. ↑

32. *Loder*, 14 Cal.4th at 893. ↑

33. *Lungren*, 16 Cal.4th at 332–333; *Belous,* 71 Cal.2d 954 at 963–64; *see also Wendland*, 26 Cal.4th at 531, quoting *Union P. R. Co. v. Botsford* (1891) 141 U.S. 250, 251 ("[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person . . . ."). ↑

34. *Lungren*, 16 Cal.4th at 334–35. ↑

35. *Id*. at 333. ↑

36. *Id*. at 336. ↑

37. *Wendland*, 26 Cal.4th at 546. ↑

38. *Id*. at 547–48. ↑

39. *Id*. ↑

40. *See Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 150. ↑

41. *Id*. at 160–64. ↑

42. *Id*. at 165–67. ↑

43. Tamar-Mattis at 75–77. ↑

44. *Hill*, 7 Cal.4th at 36–37; *Minors with Intersex Conditions* at 128–29, 132–33; Tamar-Mattis at 71–72. ↑

45. Cal. Const. art. I, §1.1; *see also* Ballotpedia, *California Proposition 1, Right to Reproductive Freedom Amendment* (2022). ↑

46. Cal. Const. art. I, §1.1. ↑

47. *People v. Barrett* (2012) 54 Cal.4th 1081, 1122–27, Liu, J., concurring and

dissenting (describing California's endorsement, and later rejection, of eugenics ideology); McCormick, *Survivors of California's forced sterilizations: 'It's like my life wasn't worth anything'* The Guardian (Jul 19, 2021). ↑

48. *Lungren*, 16 Cal.4th at 394 (Mosk, J., dissenting). ↑

49. *Minors with Intersex Conditions* at 132–33. ↑

50. Holmes, *Rethinking the Meaning and Management of Intersexuality* (2002) vol. 5:2 Sexualities 159, 162–65. ↑

51. *Id*. at 163–64. ↑

52. Mallory et al., *Conversion Therapy and LGBTQ Youth* (2019) Williams Institute. ↑

53. *Id*.; Bus. & Prof. Code §§865–865.2. ↑

54. *See* Holmes at 162–65. ↑

55. *Lungren*, 16 Cal.4th at 338–39. ↑

56. *Id*. ↑

57. Tamar-Mattis at 64–65. ↑

58. *Lungren*, 16 Cal.4th at 338–39 (if statutory provisions could establish norms under the second threshold element, this would impermissibly permit legislators to undermine the constitutional privacy right). ↑

59. *Hill*, 7 Cal.4th at 37. ↑

60. United Nations at 13–14. ↑

61. *Exception to the Rule* at 61. ↑

62. Hermer, *Paradigms Revised: Intersex Children, Bioethics & The Law* (2002) 11 Annals Health L. 195, 212–13; Karkazis at 225–26; Tamar-Mattis at 66,

74–75. ↑

63. *Loder,*14 Cal.4th at 893–96. ↑

64. *Hill*, 7 Cal.4th at 37–38. ↑

65. *Id*. ↑

66. Tamar-Mattis at 89–90; Beh & Diamond at 44–46. ↑

67. *Lungren*,16 Cal.4th at 355–56, 359. ↑

68. *Id*. ↑

69. *Id*.; Karkazis at 7, 50. ↑

70. United Nations at 13–14. ↑

71. *Id*. Although this is not required of private entities where there is a "decreased expectation of privacy," narrow tailoring is required for "clear invasions of central, autonomy-based privacy rights . . . or . . . the invasive conduct of government agencies rather than private, voluntary organizations." "Or" signals that even private entities must narrowly tailor invasions of a fundamental autonomy privacy right). ↑

72. Hegarty & Smith at 5. ↑

73. Holmes at 177. ↑