

# There Exist Boys, Girls, and Scalpels: Scientific Sanction and the Punishment of Intersex

Written 16 December 2009, as a final paper for PLSC 24901: Punishment and Social Theory, Professor Bernard Harcourt, at the University of Chicago Law School.

In modern American culture, society relies on a stable notion of a sexual binary. Intersexed bodies present a challenge to this binary by presenting genitalia and hormonal levels that do not correspond strictly to either male or female categories. In order to preserve the sexual binary, authorities punish the intersexual through measures aimed at rendering intersexuality invisible and imposing the binary on their bodies, through surgery and hormonal treatment. Whereas intersexed persons were punished through public stigma and humiliation before the Enlightenment, society has shifted its punishment practices from the prison to the less public, more "humane" setting of the operating room since the rise of modern science and medicine. This change in site and punisher does not present much of a shift in humaneness or outlook of what is done to the intersexed, but rather masks the same repressive and punitive principle beneath the cloak of scientific sanction. This grim reality leads one to wonder if there exists a way to arrive at a social framework that can recognize intersexed persons as full members of society that do not need to be punished. One possible solution is to adopt the principle of "dirty hands" as defined by Bernard Harcourt and extend it to the social aspects of the biological sciences, acknowledging the social implications of each course of action and choosing one that accommodates the framework to fit the individual, instead of the individual to fit the framework.

## The Importance of the Sexual Binary and the Right to Punish

In *On Crimes and Punishments*, Enlightenment philosopher and politician Cesare Beccaria claims that "it is vain to hope that any lasting advantage will accrue from public morality if it be not founded on ineradicable human sentiments."<sup>1</sup> Here, Beccaria acknowledges that laws stem from or at least require overwhelming consent and support from the general population. From this acknowledgement, one can assume that any laws outlining a sexual binary require the widespread support from most people who make up society. If these laws did not have basis in widespread and shared sensibilities, Beccaria proposes that they would be met "with a resistance that will overcome it in the end."<sup>2</sup> In their studies of gender, other theorists and researchers also notice a seemingly inherent desire and need for a gender system structured along a male-female binary. In her study of the interactions between intersexed infants and their parents, Suzanne Kessler notes that "... a clear gender assignment and correctly formed genitals will determine the kind of interactions parents will have with the child... parents 'need to go home and do their job as child rearers with it very clear whether it's a boy or a girl,'" noting that gender ambiguity can lead to negative reactions to the child on behalf of the parents.<sup>3</sup> Clearly, there is a strong need for the parents to see their child placed into a category in this sexual binary. Certain theorists attribute the very high importance of a sexual binary to the desire of broader society to enforce and maintain heterosexuality and heterosexual relationships. In *Gender Trouble*, philosopher Judith Butler claims that "there is no reason to divide up human bodies into male and female sexes except that such a division suits the economic needs of heterosexuality and lends a naturalistic gloss to the institution of heterosexuality," which she calls a "system of compulsory sexual reproduction"<sup>4</sup> The categories of male and female, therefore, do not merely represent a difference in appearance, but also imply a difference and distribution of roles. This reliance of society, or desire to rely on heterosexual roles and relations, contributes to what Beccaria calls "ineradicable human sentiments" and their influence in granting legitimacy to the sexual binary, and the right for a group or individual to set out to enforce it.

Another important aspect of in Beccaria's work includes the necessity that all laws and regulations be applied evenly and without failure, and to be made clear to all. "Violation by even one man begins to legitimate anarchy,"<sup>5</sup> says Beccaria, and accordingly, violations are often met with much anxiety. In a history of intersexed persons in the United States and the early American colonies, Elizabeth Reis points out that the idea of two sexes existing in one body upset many conceptions of gender and sex, pointing out that "the ideal established and authorized by the biblical Adam and Eve was rigid, and choosing only one for each individual (despite ambiguity and contradictory markers) was mandatory."<sup>6</sup> Violations of the sexual binary were not allowed by any means, for they could upset the scripturally and socially-ordained sense of normalcy, with unpredictable ramifications for the state of the sexual binary. Alleged hermaphrodites were seen as threats not only to gender, but also to sexuality, as "they were often thought to be women with long clitorises, capable and interested in sexual penetration"<sup>7</sup> In the face of such danger, it becomes important for there to be rigid enforcement of the sexual binary.

However, in order to enforce this binary, it needs to be made clear to all members of the community, particularly to those who present the most challenges to it, including intersexed persons. Beccaria claims that "it is the greatest of evils if the laws be written in a language which is not understood by the people and which makes them dependent upon a few individuals because they cannot judge for themselves what will become of their freedom or their life and limbs."<sup>8</sup> Beccaria's mention of what may become of the people's limbs is eerily close to the implications that it has for the intersexed person, as the sexual binary is made perfectly clear to them upon diagnosis, through surgery on their bodies. Kessler describes the actions of the

leading physicians on intersex, saying that “in the face of apparently incontrovertible evidence... physicians hold an incorrigible belief and insistence upon female and male as the only ‘natural’ options.”<sup>9</sup> The law of the binary is clearly to the intersexual, rather strongly through corrective surgery, as according to physicians who operate on intersexed people, “the essential factor should be the possibility of creating functional and visually acceptable outer sex organs,” and any operation is acceptable as long as it helps define the acceptable binary to the intersexed person and all who are to see this person’s genitals.<sup>10</sup> The “clarity” provided by surgery serves to help justify the authority of gender enforcers in the medical and scientific communities, as they work in a cycle of defining gender, operating to preserve this definition, and then using the carefully managed conformity to the binary to prove that there are essentially two sexes.

### The Challenge Presented to the Sexual Binary by Intersex

As the Committee on Genetics states, “the birth of a child with ambiguous genitalia constitutes a social emergency.”<sup>11</sup> The presence of intersexed persons presents a huge challenge to the idea of a stable sexual binary, and can be seen as subversive of the authority and the structure of society that adheres to the categories of men and women. Intersexed bodies threaten the precarious authority of the doctors and their right to punish difference, since either the bodies or the souls housed in the bodies can often be uncooperative with medical assignment. One physician interviewed in Kessler’s study reveals that “If you make a statement that later has to be disclaimed or discredited, you’ve weakened your credibility”<sup>12</sup> The entire notion that the world will not always continuously produce Jacks and Jills, but that sometimes it will produce Jordans, presents a difficult challenge to a society deeply entrenched in the idea of there being only male and female gender categories. This is, perhaps, why the Committee on Genetics advises parents to not name the child or register the birth until a sex can be assigned to the child.<sup>13</sup> It is here where intersexuality crosses over into the definition of a crime as set by Beccaria, as it fitssomewhere within the degrees of damage to society in which the individual becomes a threat to “society or its representative.”<sup>14</sup> The intersexual, through sheer existence, when left unmodified, breaks the laws of society by refusing to conform to the definition reality that has been ordained by the pursuit of heterosexual economics. Merely being an intersexual is an action “contrary to what each citizen, in the view of the public good, is obliged by law to do or not to do.”<sup>15</sup> As Claudia Moscovici points out in *Gender and Citizenship: The Dialectics of Subject-Citizenship in Nineteenth Century French Literature and Culture*, that gender codes are related to the “practices of citizenship. They draw distinctions between legitimate citizen-subjects (those who conform to moral and sexual codes) and those who [like the intersexed], belong to the many classes of ‘deviant’ subjects that undermine the civic order.”<sup>16</sup> Therefore, in a society that demands a sexual binary, the intersexual, through merely existing, enters into a relationship of transgression and punishment with society, and this gives society the right to punish its differences. Whether or not the intersexual is being intentionally subversive to the sexual binary does not matter, as in Beccaria’s perspective, “the one true measure of criminality is the damage done to the nation.”<sup>17</sup> As long as the intersexual exists in society, and threatens the binary, the intersexual is still a subject of the law, or “the terms under which independent and isolated men come together in society,”<sup>18</sup> and thus society is given the right to punish the intersexual.

### Invisibility, and Prevention as Punishment

In an ideal society, claims Beccaria, “It is better to prevent crimes than to punish them.”<sup>18</sup> Indeed, medical and scientific authorities have worked to prevent the crime of intersex as long as they have had the authority to do so. Kessler notes that the prevailing attitude among physicians is that “Gender and children are malleable; psychology and medicine are the tools used to transform them. This theory is so strongly enforced that it has taken on the character of gospel.”<sup>19</sup> Here one sees the relationship between enforcement and maintaining law and authority, and how the license to prevent comes from knowledge created precisely through practices of prevention. Kessler reports that these practices have led to the blinding of gender researchers to “a number of unexamined and deeply conservative assumptions,” such as the belief that gender and genitals are naturally dimorphic, that intersex genitals can and should be modified, and that “physicians and psychologists have legitimate authority to determine the relationship between gender and genitals”<sup>20</sup> Elizabeth Reis also notes the discursive power of prevention, saying that “eliminating hermaphroditism as a human phenomenon, however, validated medical and laypeople in their insistence on the rigor of two discrete, mutually exclusive sexual categories...”<sup>21</sup> Another significant function of medical intervention on the intersexed person is that it not only eliminates intersex from the consciousness of society, but it also often makes intersexed persons unconscious of their own condition. In a study of intersexed persons, Sharon Preves discovered that “participants demonstrated an adherence to binary understandings of gender as well as to the biological construction of gender and sexuality, perhaps as a result of being exposed to a repetitive emphasis on the importance of the standard female- and male-looking bodies,” and that 95 percent of them had been operated on.<sup>22</sup> Thus, one finds that through the self-legitimizing practices of doctors and psychologists, intersex and the possibility for non-binary gender is made practically invisible to broader society, the scientific community, and intersexed persons themselves, and that the gender binary is draped over every body regardless of whether it is a suitable, accurate fit.

However, although Beccaria draws a clear line between prevention and punishment, the management of intersex cases presents the possibility that there may not be much separating prevention and punishment, as the prevention of the crime of mere intersex existence immediately imposes invisibility and non-personhood upon intersexed individuals. Philosopher

Frantz Fanon, when writing about black identity, writes in *Black Skin, White Masks* that “man is a human only to the extent to which he tries to impose himself on another man in order to be recognized by him.”<sup>23</sup> Fanon draws upon Hegelian notions of subjectivity and declares that existence itself is predicated upon acknowledgement from others, and that without it, the black man will always be confined to a “zone of nonbeing,” from which no progress can be made.<sup>24</sup> Because the existence of intersexed persons is not acknowledged broadly in society and science, in the name of prevention, intersexed persons are left precisely in the situation that Fanon outlines, unable to impose themselves, unable to present an alternative narrative to the gender binary, as the binary has been carved into their bodies to obscure any sign of nonconformity. Intersexed people, in most cases in which they have been operated upon, do not have the knowledge or visibility necessary to confront the binary firsthand, just as how “there is no open conflict between White and Black” in France, in Fanon’s opinion, and that only the master, or those in control have the power to present or withhold recognition.<sup>25</sup> Judith Butler recognizes the relationship of this invisibility to the humanity of the intersexed person, noting that “those bodily figures who do not fit into either gender fall outside the human, indeed, constitute the domain of the dehumanized and the abject against which the human itself is constituted.”<sup>26</sup> Thus, the invisibility required by prevention of the “crime” of being openly outside of male-female categories is in itself a form of punishment, which strips any power to assert oneself, and thus be human from the intersexed person.

### Transitions in Punishment

Before the Enlightenment, the punishment of the intersexual was public and focused on externally identifying them as deviant characters, in order to prevent them from challenging the sexual mores of the time. In *The History of Sexuality, Vol. 1: An Introduction*, philosopher Michel Foucault discusses the juridical nature of these punishments, saying that “for a long time hermaphrodites were criminals or crime’s offspring, since their anatomical disposition, their very being, confounded the law that distinguished the sexes and prescribed their union.”<sup>27</sup> Leaders responded to challenges of the mandatory heterosexuality present in American colonial society by publicly separating the intersexed person from men and women, and even humans, so that they could never engage in sexual behavior outside of the gender binary. Reis points out that “early Americans placed hermaphrodites in the broad category of monstrous births, a catchall designation that included all kinds of birth anomalies... sent by God as signals and warnings.”<sup>28</sup>

By attributing mythical characteristics to intersexuals, American colonial society was able to live among public intersexuals, as modern surgery and hormonal techniques had not yet arrived to present any corrections to their bodies, while still keeping them within the framework of punishment. Public records display the interaction between intersexuals and the law in colonial America, and in the cases of Nathaniel Clarke and Thomas/Thomasine Hall, authorities carried out the process of punishment publicly and focused on the visibility of the intersexual, subjecting both of these people to thorough bodily inspection by witnesses in order to decide how their punishment would be meted.<sup>29</sup> In the case of Thomas/Thomasine Hall, s/he is subjected to the violence of inspection and the mandatory scorn of the public eye, as “they threw the said Hall on his back, and then this examiner felt the said Hall and pulled out his members whereby it appeared that hee was the Perfect man.<sup>30</sup> Hall is subjected to further, and permanently visible punishment, being required by the court to “wear a paradoxical costume consisting of ‘man’s apparel, only his head to be attired in a Coyfe and Crosscloth with an Apron before him.’”<sup>30</sup> Thus, not having the tools to make intersexed bodies indistinguishable from male and female bodies, and thus invisible, American colonial society found it best to punish through visibility, presenting the intersexual as a public pariah, a violation of nature that must be visible in order to be avoided.

However, during the dawn of the Enlightenment, cultural sensibilities changed significantly, from favoring public punishment of transgressors to preferring less-visible and institutionalized punishment. Medical authors such as James Parsons began to criticize the brutality and openness of the punishment of intersexuals, lamenting that “Innocent children have been punished, and even put to Death, for having been reputed Hermaphrodites,” blaming these deaths on “Ignorance of the Fabric of the Body,” encouraging society to gain more knowledge about the intersexual from a medical and scientific perspective.<sup>32</sup> Enlightenment philosophers such as Beccaria no longer saw public punishment as the most effective way to address crimes in society. Instead, Beccaria claimed that criminals will not “depart from the universal principle of anarchy which we see in the physical as well as in the moral realm unless they are given motives which impress themselves directly on the senses...”<sup>33</sup> Notably including anarchy of the physical realm as a crime, Beccaria advocates for the movement of punishment from public violation of the body to the enforcement of moral laws through impression and repetition, so that the transgressor internalizes the intended effects of the law.

However, one must not confuse this change of venue and method in punishment as a general easing or absence of punishment. Nietzsche claims in *On the Genealogy of Morality*, that “something that has somehow or other come into being, is again and again interpreted according to new views, monopolized in a new way, transformed and rearranged for a new use by a power superior to it.”<sup>34</sup> Michel Foucault outlines the reinterpretation of punishment in terms of the rise of prison systems and incarceration in *Discipline and Punish: The Birth of the Prison*, referring to it as “the emergence... the baptism as it were, of a new type of supervision – both knowledge and power – over individuals who resisted disciplinary normalization,” marked by the appearance of “professionals of discipline, normality, and subjection.”<sup>35</sup> This does not present a reduction in punishment, but rather a shift towards total punishment through the control of knowledge and

### Danya Lagos

About  
Following  
Search  
Archive  
← Home

Posted on Sunday 1  
January 2010 at 3:  
Cargo Theme by  
Jarred Bishop.  
Inspired by Cargo

power, fulfilling Beccaria's vision of constant impression of discipline on the punished through the senses. This type of control is self-sufficient, operating through "an apparatus which, through the execution of the sentence with which it is entrusted, seems to have the right in part at least, to assume its principle."<sup>36</sup> It is not more humane, just better designed for the intentions of society, as Foucault remarks, "We preferred the blows, but the cell suits us better."<sup>37</sup> The cell suits the designs society began to place upon their objects of punishment, requiring the internalization of control of the entire body and psyche, instead of merely inflicting visibility and scorn upon the body. Just as Foucault describes a prison apparatus of control that emerged to replace the public execution or flogging, a new apparatus soon emerged for the treatment of intersexuals, employing a team of professionals ranging from psychologists, counselors, and other mental health professionals to "minimize" "conflicts between their psychosexual orientation and their genital appearance and function."<sup>38</sup> This "minimizing" presents the new trend that emerged during the Enlightenment in terms of treating the intersexed, replacing the public punishment and humiliation, but remaining, nevertheless, a punitive apparatus designed to impress the gender binary upon the intersexed individual.

Foucault comments on the remarkable ability of the prison to compartmentalize - to separate individuals and form categories, and to manipulate the interactions between these categories. "Discipline sometimes requires enclosure, the specification of a place heterogeneous to all others and closed in upon itself. It is the protected place of disciplinary monotony,"<sup>39</sup> says Foucault, and he explains that it is based on the principle of creating distribution and partitioning, and the need to "break up collective dispositions."<sup>40</sup> This compartmentalization bears a resemblance to the organization of the gender binary, and the effects of surgery on the intersexed person. The aim is, indeed, to "break up collective dispositions," which are present in the intersexual through the ambiguity of sexual identity. Judith Butler comments on Foucault's analysis of prison reform, saying that "the criminal subject who gets emancipated may be even more deeply shackled than the humanist originally thought. To be sexed, for Foucault, is to be subjected to a set of social regulations..."<sup>41</sup> In *Undoing Gender*, Butler even extends the similarities between gender categorization and the prison system by saying that "gender requires and institutes its own distinctive regulatory and disciplinary regime."<sup>42</sup> It can be concluded that the enforcement sexual binary moved from the visible and strictly appearance-based punishment of the pre-Enlightenment era, to one that is nonetheless punitive in nature, through the impression of confined gender categories and a process of self-legitimation through an extensive disciplinary apparatus. As Foucault says, the transition has merely been a "technical mutation."<sup>43</sup>

### Science and Punishment of Intersex

As the site of punishment for the intersexual was moved to the realms of the operating room and scientific discourse, "objective" and "natural" sexual categories were idealized in order to grant legitimacy to those who were now entrusted with the task of punishing the intersexual, and preserving the sexual binary. Notions of the ideal in terms of the body have existed since the advent of modern medicine, and in eighteenth-century physician Nicolas Andry's work *Orthopædia*, in particular, the entire body is categorized, and ideal dimensions, proportions, and angles are meticulously outlined. "The head... is placed upon the spine as on an axis, with respect to the first vertebrae ought, for the gracefulness of the body, to be carried straight so that it neither inclines to the one shoulder, nor to the other, forwards, nor backwards."<sup>44</sup> Due to improvements in correctional techniques and tools the scientific and medical of the Enlightenment came to see the body as malleable, and at times, in need of adjustment in order to meet an ideal trait. Foucault acknowledges that the Enlightenment, through a "materialist reduction of the soul and a general theory of dressage" joined the notions of manipulation and analysis upon the body into docility, and "a body is docile that may be subjected, used, transformed, and improved."<sup>45</sup> Current medical and scientific studies of intersexed persons read as if they were nearly copied out of a missing chapter of *Orthopædia*, prescribing "correct" lengths for penile tissue and depths for vaginal cavities in terms of centimeters.<sup>46,47</sup> If the body that someone is born with does not live up to the ideals prescribed by medical authorities, it is modified to do so, in the name of an authoritative, scientific, and "correct" standard. Scientific authority frames itself as a pathway that is necessary for all who are intersexed, recommending itself as a solution, pointing to its record of producing men and women as evidence that one cannot live outside of this category, as "psycho-emotional reactions and also the parents' behavioural routines become real obstacles in the correct choice of sex" if gender-assignment modifications are not made immediately upon the discovery of the situation.<sup>48</sup> In *The History of Sexuality, Vol. 1*, Foucault describes the advent of the "medico-sexual regime," in which science sought to trace deviant sexual categories and categorize them, "installing 'devices of surveillance' wherever they may appear."<sup>49</sup> Science steps into its role as the maker of the laws and the enforcer, and through enforcement, reaffirms these laws.

It is through the exploration of similarities between the prison -military complex and surgery where the social mission and nature of science is revealed, and the political and societal implications are made clear. The physician Andry himself hints at socio-political overtones in medical notions of correctness, recommending methods similar to "what a modern writer advises for subduing certain violent passions," advising that "one that would to subdue any wrong passion ought to incline to the other extreme, that he may be able to keep within those bounds, in which he designs to confine himself."<sup>50</sup> Referring to Andry's work, Foucault claims that "the classical age discovered the body as object and target of power... The great book of Man-the-Machine was written simultaneously on two registers: the anatomico-metaphysical register... [and] the technico-political register."<sup>51</sup> Foucault describes the military discipline that

emerged from this era, and how specific exercises were used to define and delineate role and rank, making who stands where, in both senses, clear to all.<sup>52</sup> This discipline, originating in the field of medical science, is used to control and to differentiate in the broader social sphere. It is also used for political ends, as Foucault describes the well-disciplined armies of Frederick II as “small-scale models of power.”<sup>53</sup> One can see the operated bodies of the intersexed – regimeted into male or female, modified to fit Andry-like dimensions of the “correct” genital system as small-scale models of power, held by the medical and scientific authorities in the interest of promoting a sexual binary, and one can detect a distinct social agenda in the scientific and medical research on intersex.

### In Search of a Livable Identity

It has thus far been demonstrated that the existence of intersexed bodies present a challenge to current notions of a sexual binary, and that they are currently made invisible and binaried by a medical and scientific punitive apparatus that exercises its social agenda through surgery, hormone treatment, and the adoption of male or female gender roles. However, once one studies the lives of intersexed persons, it becomes evident that this system takes its toll on their mental and physical health. Researchers in a Polish study on intersexed persons reported that intersexed persons who are operated to become males suffer from “very apparent hypogonadal features with a large degree of autism, physical weakness, and a large percentage of infertility,” which puts them in “a position of losers in the challenges of a male world,” recommending that intersexed persons usually be changed into females.<sup>53</sup> Perhaps the most famous intersex person, Herculine/Abel Barbin, committed suicide after being forced to adopt a male identity by the law, due to the definition of a penis and a male.<sup>54</sup> Clearly, what benefits the appearance of a coherent sexual binary for broader society comes at a high price to many intersexed individuals. Thus, an alternative to the current trend of punishing those who do not naturally conform to the sexual binary, and perhaps an alternative to the binary itself is worth seeking out.

Initially, it may seem logical and tempting to wish for a third, or fourth, or many genders, through which to include people with intersexed bodies, or to acknowledge intersex as an intermediate category, and work to integrate this category into society. The rabbis of the Talmud, a source of Jewish law written in antiquity, seem to have approached intersex and other gender categories in this manner, coining terms such as *timtum* and *androgynos* and mentioning these categories over 200 times in the Talmud, prescribing responsibilities and accommodations to Jewish law for these individuals.<sup>55</sup> However, one runs the risk that these categories may in turn also serve to punish certain individuals who also may fit perfectly to these categories, or that they are nonetheless part of a compulsory heterosexual system that serves to punish nonconformists, regardless of the novelty of accommodating gender categories. In *After Identity: Rethinking Race, Sex, and Gender*, Georgia Warnke critiques the notion that alternative gender categories like *hijras* in the Indian subcontinent and *berdaches* in American Indian cultures are examples of ideal accommodation for intersexed persons in society, asking “if membership in the classes or clubs of men and women is oppressive, why will adding new clubs help?”<sup>56</sup> Warnke does not see a possibility for gender identities without codes, and the punishments that may follow if these codes are broken. As a solution, Judith Butler proposes that the bodies of both intersexed and non-intersexed persons “be liberated, neither to its ‘natural’ past, nor to its original pleasures, but to an open future of cultural possibilities.”<sup>57</sup> Because the notion of gender itself constitutes a system of regulation and punishment, the solution should be to add more categories, and possibly set up more systems from which the medical and scientific community to enforce conformity.

One step that may contribute to a change in the direction of punishment that takes less of a toll on intersexed individuals is for the mechanisms behind the construction and enforcement of sex to be exposed as inherently regulatory, and for the punitive features to be made visible. In “Invisible Punishment: An Instrument of Social Exclusion,” Jeremy Travis writes about the invisibility of certain exclusionary practices that punish those in the penitentiary system beyond what is made clear, and proposes that making “the universe of these punishments visible” and raising “searching questions about why we have chosen these responses to the wrongdoing of our fellow citizens” is advantageous.<sup>58</sup> This is not presently done very publicly in terms of both the punishment of gender-deviants and other forms of criminality. It should be made clear to general society that, as Nietzsche says, “there is no ‘being’ behind the doing, effecting, becoming;” that the “doer” is simply fabricated into the doing,” that our entire science... still stands under the seduction of language...”<sup>59</sup> From this, once the pretense to essence is taken out of the sexual binary, one can recognize it as a regulatory system, step back and evaluate it from a more informed perspective, and evaluate whether one consents to this system.

Just as Travis proposes that “a state enact a legislation allowing convicted offenders to return to sentencing court to argue that a collateral sanction not apply to him,”<sup>60</sup> perhaps intersexed persons should be allowed to arrive to an age and consciousness where they can objectively see the constructed gender binary, and decide whether they choose to participate in this system of punishment and regulation through surgery at adulthood, instead of operating on infants who do not have a say in the matter, and are at the mercy of nervous, desperate parents in the delivery room. As Fanon said, “man is not only the potential for self-consciousness or negation... Man is a ‘yes’ resonating from cosmic harmonies.”<sup>61</sup> This will require intersexed persons themselves, and perhaps the parents of intersexed infants, to take action and “[assert] a right or entitlement to a livable life when no such prior authorization exists, when no clearly enabling convention is in its place,” as Judith Butler says.<sup>62</sup> Perhaps this will come through a widespread resistance to operations and treatment of intersex infants, but this will require a fundamental

change in the way people in society understand gender and the nature and role of science. However, as Judith Butler says in *Gender Trouble*, "if subversion is possible, it will be a subversion from within the terms of the law, through possibilities that emerge when the law turns against itself and spawns unexpected permutations of itself."<sup>63</sup> It is a matter of choosing which through which laws subversion, and ideally, a livable life for intersexed persons will emerge.

### Conclusion: The Dirty Hands Approach

If a study into the relationship of science to the punishment of gender and/or sexual deviance reveals only one truth, it is that every framework of knowledge and power predetermines and often services a course of action. Whether it was through the practices of humiliation and public punishment practiced before the Enlightenment, or through the enforcement of invisibility and the impression of the sexual binary upon the bodies of the intersexed in the Enlightenment and beyond, all of these actions are determined by frameworks of knowledge and power, shaped by views on the nature of the right to punish, and what one does when one punishes. As Judith Butler says, "it is necessary to take into account the full complexity and subtlety of the law, and to cure ourselves of the illusion of a true body beyond the law" with an agenda and course of action.<sup>64</sup> It is here where the principle of "dirty hands" as outlined by Professor Bernard Harcourt in *Language of the Gun: Youth, Crime, and Public Policy* becomes pertinent and applicable. Harcourt urges that "we expose the hidden assumptions about human behavior that underlie our social science methods and that we openly evaluate these assumptions by assessing the price we pay when we decide to believe any one of them."<sup>65</sup> Thus, an evaluation of the current punishment system of the sexual binary and its relationship to intersexed people, and certainly any attempts to understand solutions or new approaches must be conducted in a way that is conscious of the effects that frameworks have on the individual, the apparatuses of power and punishment that each decision or belief supports. Harcourt urges that "we need to evaluate theories of action in light of their ramifications for the individual and for society and then choose between them based on stated values. We need, in other words, to get our hands dirty. The decision is an ethical one."<sup>66</sup> Thus, if one cannot "govern innocently" or scientifically, one cannot punish innocently either. Each assumption one makes about the way one should govern sexual identity, or whether it should be governed at all, must be looked at with the potential ramifications in terms of punishment and implied courses of action in mind, and one must be careful to make sure that traditionally invisible individuals such as intersexed persons are included in the considerations of the cost.

1. Cesare Beccaria, *On Crimes and Punishments and Other Writings*. (Cambridge: Cambridge University Press, 2003), 10.
2. *Ibid.*, 183.
3. Suzanne Kessler, "The Medical Construction of Gender: Case Management of Intersexed Infants," *Signs* 16, no. 1 (1990): 9.
4. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*. (New York: Routledge, 1990), 150, 153.
5. Beccaria, *On Crimes and Punishments*, 12.
6. Elizabeth Reis. *Bodies in Doubt: An American History of Intersex*. (Baltimore: Johns Hopkins University Press, 2009). 2.
7. *Ibid.*, 14-15.
8. Beccaria, *On Crimes and Punishments*, 17.
9. Kessler, *The Medical Construction of Gender*, 4.
10. M. Fryczkowski, A. Paradyz, and Z. Krauze-Balwinska. "Late Results of Operative Treatment of Intersexuality in Children with Advanced Hypospadias and Simultaneous Cryptorchidism." *International Urology and Nephrology* 28, no. 2 (1996): 241-45.
11. Committee on Genetics. "Evaluation of the Newborn With Developmental External Genitalia." *Pediatrics* 106, no.1 (2000): 138.
12. Kessler, "The Medical Construction of Gender," 8.
13. Committee on Genetics, "Evaluation of the Newborn", 138.
14. Beccaria, *On Crimes and Punishments*, 24.
15. *Ibid.*, 25.
16. Claudia Moscovici, *Gender and Citizenship: The Dialectics of Subject-Citizenship in Nineteenth Century French Literature and Culture*. (Lanham, MD: Rowman and Littlefield Publishers Inc., 2000), 94.
17. Beccaria, *On Crimes and Punishments*, 9.
18. *Ibid.*, 103.
19. Kessler, "The Medical Construction of Gender," 8.

20. Suzanne Kessler, *Lessons from the Intersexed*. (New Brunswick: Rutgers University Press, 1998), 7.
21. Reis, *Bodies in Doubt*, 12
22. Sharon Preves, *Intersex and Identity: The Contested Self* (New Brunswick: Rutgers University Press, 2003), 145.
23. Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 2008), 191.
24. *Ibid.*, xii.
25. *Ibid.*, 191.
26. Butler, *Gender Trouble*, 151.
27. Michel Foucault. *The History of Sexuality, Vol. 1: An Introduction*. (New York: Vintage Books, 1995), 38.
28. Reis, *Bodies in Doubt*, 3.
29. *Ibid.*, 9-11.
30. *Ibid.*, 11.
31. *Ibid.*, 13.
- Lagos 21
32. *Ibid.*, 8.
33. Beccaria, *On Crimes and Punishments*, 9.
34. Friedrich Nietzsche, *On the Genealogy of Morality*. (Indianapolis: Hackett Publishing Company, Inc., 1998), 51.
35. Michel Foucault, *Discipline and Punish: The Birth of the Prison*. (New York: Vintage Books, 1990), 293.
36. *Ibid.*, 244.
37. *Ibid.*, 293.
38. Committee on Genetics, "Evaluation of the Newborn," 141.
39. Foucault, *Discipline and Punish*, 142.
40. *Ibid.*, 143.
41. Butler, *Gender Trouble*, 130.
42. Judith Butler, *Undoing Gender*. (New York: Routledge, 2004), 41.
43. Foucault, *Discipline and Punish*, 257.
44. Nicolas Andry. *Orthopædia: Or the Art of Correcting and Preventing Deformities in Children*, (London: Buchanan's Head, 1743), 92.
45. Foucault, *Discipline and Punish*, 136.
46. Kessler, "The Medical Construction of Gender," 3.
47. Committee on Genetics, "Evaluation of the Newborn," 139.
48. Fryczkowski, "Late Results of Operative Treatment," 244.
49. Foucault, *The History of Sexuality, Vol. 1*, 42.
50. Andry, *Orthopædia*, 93.
51. Foucault, *Discipline and Punish*, 136.
52. *Ibid.*, 159.
53. Fryczkowski, "Late Results of Operative Treatment," 244.
54. Nathaniel Wing. *Between Genders: Narrating Difference in Early French Modernism*. (Dover: University of Delaware Press, 2004), 103.
55. Rabbi Eliot Rose Kukla and Reuben Zellman. "Created by the Hand of Heaven: Making Space for Intersex Jews – Commentary on Parshiyot Tazria-Metzora." *TransTorah* (2007): 2.
56. Georgia Warnke. *After Identity: Rethinking Race, Sex, and Gender*. (Cambridge: Cambridge University Press, 2007), 162.

57. Butler, *Gender Trouble*, 127.
58. Jeremy Travis, "Invisible Punishment: An Instrument of Social Exclusion." In *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind, 15-36. (New York: The New Press, 2002), 36.
59. Nietzsche, *On the Genealogy of Morality*, 25.
60. Travis, *Invisible Punishment*, 36.
61. Fanon, *Black Skin, White Masks*, xii.
62. Quoted in Warnke, *After Identity*, 167.
63. Butler, *Gender Trouble*, 127.
64. *Ibid.*, 127.
65. Bernard E. Harcourt. *Language of the Gun: Youth, Crime, and Public Policy*. (Chicago: University of Chicago Press, 2006), x.
66. *Ibid.*, 170.

### Bibliography

- Beccaria, Cesare. *On Crimes and Punishments and Other Writings*. Cambridge: Cambridge University Press, 2003.
- Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge, 1990.
- Butler, Judith. "Sexual Inversions." In *Foucault and the Critique of Institutions*, ed. John Caputo and Mark Yount, 81-98. University Park, PA: Pennsylvania State University Press, 1993.
- Butler, Judith. *Undoing Gender*. New York: Routledge, 2004.
- Fanon, Frantz. *Black Skin, White Masks*. New York: Grove Press, 2008.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books, 1990.
- Foucault, Michel. *The History of Sexuality, Vol. 1: An Introduction*. New York: Vintage Books, 1995.
- Fryczkowski, M., A. Paradysz, and Z. Krauze-Balwinska. "Late Results of Operative Treatment of Intersexuality in Children with Advanced Hypospadias and Simultaneous Cryptorchidism." *International Urology and Nephrology* 28, no.2 (1996): 241-45.
- Harcourt, Bernard. *Language of the Gun: Youth, Crime, and Public Policy*. Chicago: University of Chicago Press, 2006.
- Kessler, Suzanne. *Lessons from the Intersexed*. New Brunswick: Rutgers University Press, 1998.
- Kessler, Suzanne. "The Medical Construction of Gender: Case Management of Intersexed Infants." *Signs* 16, no.1 (1990): 3-26.
- Kukla, Rabbi Eliot Rose, and Reuben Zellman. "Created by the Hand of Heaven: Making Space for Intersex Jews – Commentary on Parshiyot Tazria-Metzora." *TransTorah* (2007): 2. Print.
- Moscovici, Claudia. *Gender and Citizenship: The Dialectics of Subject-Citizenship in Nineteenth-Century French Literature and Culture*. Lanham, MD: Rowman & Littlefield Publishers Inc., 2000.
- Nietzsche, Friedrich. *On The Genealogy of Morality*. Indianapolis: Hackett Publishing Company, Inc., 1998.
- Preves, Sharon E. *Intersex and Identity: The Contested Self*. New Brunswick: Rutgers University Press, 2003.
- Reis, Elizabeth. *Bodies in Doubt: An American History of Intersex*. Baltimore: Johns Hopkins University Press, 2009.
- Travis, Jeremy. "Invisible Punishment: An Instrument of Social Exclusion." In *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind, 15-36. New York: The New Press, 2002.
- Warnke, Georgia. *After Identity: Rethinking Race, Sex, and Gender*. Cambridge: Cambridge University Press, 2007.
- Wing, Nathaniel. *Between Genders: Narrating Difference in Early French Modernism*. Dover: University of Delaware Press, 2004.

Posted 2 years ago & Filed under [intersex](#), [gender](#), [punishment](#), [science](#), [university of chicago](#), [coursework](#), [essays](#), [history](#), [Notes](#)

**Notes:**