

Hard Cases

An Untold Legal History of Nonbinaries

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Abstract

Building on the recent decision of the Italian Constitutional Court on the case of a nonbinary individual, this article offers a general overview of the legal status of nonbinaries, providing critical insights into its historical evolution and the current comparative scenario.

I. Introduction

At first glance, Lili's life seemed quite simple. A healthy child assigned female at birth, growing up in one of Italy's wealthiest regions and raised in a fully supportive household without rigid gender expectations.¹ Yet, beneath the surface, a profound journey of self-discovery was unfolding. As puberty brought physical changes, Lili felt an increasing discomfort with her developing feminine traits, which led to psychological distress and social withdrawal.

The turning point came during high school, when Lili discovered the concept of transgender identities online. This revelation sparked a gradual recognition of their nonbinary identity, although fear of misunderstanding initially kept them silent. Eventually, Lili found the courage to come out to their parents, starting with their mother and later their father, expressing a desire to be recognized as *nonbinary*.²

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¹ Italian law requires a birth certificate to identify 'the sex of the child' as either male or female within strict time limits from the day of birth. See Art 29, paras 2 and 30 of decreto del Presidente della Repubblica 3 November 2000 no 396. A late declaration, if any, must indicate the 'reasons for the delay' and, in this case, the civil status officer must inform the public prosecutor's office for commencing the sex reassignment action (Art 31). The name of the newborn must correspond to their sex (Art 35).

² In this article, we use the term 'nonbinary' in a nounal form instead of a mere adjective. When we talk about nonbinary people, we refer to people who perceive their 'felt internal and individual experience of gender' as 'neutral', 'third', or 'gender diverse' compared to the gender binary male/female. See the Introduction to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (2017), referring to gender identity as 'each person's deeply felt internal and individual experience of gender'. In contemporary terms, nonbinary people form 'a distinct social group, existing within the broader transgender and LGBTQ communities and endowed with its own assortment of vulnerabilities and privileges': E. Young, *They/Them/Their. A Guide to Nonbinary and Genderqueer Identities* (London and Philadelphia: Jessica Kingsley Publisher, 2020). Their world is extremely diverse, and not all people who do not identify as male or female believe that they belong to a nonbinary gender. See J.A. Clarke, 'They, Them, and Theirs' 132 *Harvard Law Review*, 894-991, 905-910 (2019); E. Young (*supra*), 17. Nonbinary people are not *asexual*, as this adjective refers to sexual

University life marked a new chapter. Embracing the name Isamberto, which unites the German ancient words ‘iron’ (*isan*) and ‘bright’ (*beraht*), the student openly identified as nonbinary, receiving acceptance from both peers and faculty. The existence of an ‘alias career’ regulation facilitated this supportive environment, providing access to the psychological care necessary to safeguard their right to education.³ A psychological evaluation confirmed Isamberto’s stable nonbinary identity with a masculine (*trans-masculine*) inclination and a strong desire for gender-affirming surgery and legal recognition as a third gender.⁴

At 24, Isamberto decided to undergo a mastectomy and petitioned the local court for the necessary authorization and subsequent name change, a routine legal procedure in Italy.⁵ Their petition argued, *inter alia*, that the relevant legal provision was unconstitutional because it did not permit changing the gender marker to a third gender.⁶ The court referred the matter to the Italian Constitutional Court to clarify whether the Italian Constitution permits or even mandates the recognition of a gender beyond male and female.⁷ The Constitutional Court responded positively, stating that the recognition of every person’s dignity under Art 2, the principle of equal protection under Art 3, and the ‘fundamental right’ to health under Art 32 of the Italian Constitution require acknowledging nonbinary identities.⁸ Yet, for the

orientation and not to gender identity. On the other hand, if we define *trans** people as those whose gender identity differs from that typically associated with the sex assigned at birth, then many of the nonbinary people are also *trans**. However, not all nonbinary people identify as *trans** and, in turn, many *trans** people identify as men or women. Finally, nonbinary people do not necessarily identify with *intersex* people. Intersexuality refers to sexual characteristics that remain distinct from gender identity. Again, some, but not all, intersex people identify as nonbinary.

³ The so-called ‘alias career’ (*carriere alias*) regulations allow educational institutions, mainly high schools and universities, to change the gender marker and name in the student’s records upon request. See F. Rescigno, ‘*Nomina sunt consequentia rerum*: la carriera alias’ *Rivista critica del diritto privato*, 293-322 (2024); A. Pioggia, ‘La carriera alias: identità accademica e genere’ *Giornale di diritto amministrativo*, 156-169 (2024); M.V. Izzi, ‘Ai margini di politica e ideologia: quale spazio per un discorso giuridico in materia di carriera alias? Brevi considerazioni in merito’ *GenIUS - Rivista di studi giuridici su identità di genere e orientamento sessuale*, 118-135 (2023), connecting these regulations with a constitutionally protected right to education. For a critical analysis of these regulations in the US context see Z. Nicolazzo, *Trans* in College: Transgender Students’ Strategies for Navigating Campus Life and the Institutional Politics of Inclusion* (Sterling: Stylus Publishing, 2017), 146 (arguing for ‘partnerships and coalitions’ between trans students, faculty and staff “[r]ather than waiting for upper-level administrators to recognize and affirm the lives of *trans** college students”).

⁴ See Tribunale di Bolzano 12 January 2024, *L.N. v Procura della Repubblica di Bolzano*, para 1.1. For the sake of narrative, the original names L. and I. have been replaced with imaginary full names.

⁵ See legge 14 April 1982 no 164 (*Norme in materia di rettificazione di attribuzione di sesso*, ‘Norms Concerning the Rectification of Sex-Assignment’), Arts 1 and 3.

⁶ See Tribunale di Bolzano, n 4 above, para 1.3.

⁷ *ibid* para 4.

⁸ Corte costituzionale 23 July 2024 no 143, para 5.4: ‘The individual’s perception of belonging neither to the female nor to the male sex—from which arises the need to be recognized in “another” identity—generates a situation of significant discomfort with respect to the personalistic principle to which the constitutional system recognizes centrality (Article 2 of the Constitution). To the extent that it may induce unequal treatment or compromise the psycho-physical well-being of the

court, this acknowledgment cannot be made by the judiciary alone but necessitates the Parliament's imprimatur.⁹ It's a legislative action that is unlikely to occur shortly, as it shows Italian courts' 'very little dynamism' regarding socially demanded legal reforms.¹⁰

Isamberto is the first nonbinary person to bring a constitutional claim before Italian Courts. Until then, the condition of nonbinaries had been confined to the world of mental health professionals, particularly under the influence of the revised fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association (*DSM-5-TR*), which includes in the notion of 'gender dysphoria' all identities belonging to 'some alternative gender different from one's assigned gender'.¹¹ Only recently have Italian law scholars begun to address the claims of nonbinary individuals, primarily following the aforementioned Constitutional Court's ruling.¹² Apart from these sources, there is currently no trace of nonbinary subjectivities in the Italian legal system in general, and it is unlikely that there will be any soon.

In fact, a myth haunts the legal discourses surrounding nonbinaries: the notion that they are a new phenomenon, a cultural novelty introduced by Generation Z. This belief casts those who exist beyond the gender binary as a modern invention, implying they did not exist before.¹³ When this myth reaches the courtroom, it causes courts to defer responsibility to lawmakers. By treating nonbinaries as newcomers to legal consciousness, in other words, the judiciary absolves itself of protecting their rights because it fails to see them as a potentially 'suspect class'.¹⁴

person, this condition may also raise an issue of respect for social dignity and health protection, in the light of Articles 3 and 32 of the Constitution'.

⁹ *ibid* para 5.5: 'The possible introduction of a third type of civil status would have a general impact, which necessarily postulates a systemic legislative intervention, in the various sectors of the legal system and for the numerous institutions currently regulated with a binary logic'.

¹⁰ M.F. Moscati, *Pasolini's Italian Premonitions: Same-Sex Unions and the Law in Comparative Perspective* (London: Wildy, Simmonds & Hill Publishing, 2014), 124 (who also argues that '(i)n the case of Italy, (...) it seems that several courts have set aside legal reasoning in favour of a *vintage interpretation and folkloristic use of law* in order to protect the judiciary from political critique').

¹¹ See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Text Revision, American Psychiatric Association Publishing, 5th ed, 2022), 513 (the 5th edition of 2013, at 451, mentioned, perhaps more clearly, 'a category other than male and female'). On the notion of gender dysphoria see also S. Faye, *The Transgender Issue. An Argument for Justice* (Dublin: Penguin Random House, 2022), 65-67.

¹² See respectively B. Pezzini, 'Il binarismo di genere come problema di biodiritto' *BioLaw Journal/Rivista di biodiritto*, 59-65 (2023) and the collective volume by N. Posteraro and B. Liberali eds, *Sul non binarismo di genere e sull'autorizzazione giudiziale a effettuare gli interventi chirurgici di affermazione di genere: la sentenza della Corte Costituzionale n. 143 del 2024* (Napoli: Editoriale Scientifica, 2025). Outside Italy, see C. Richards et al, 'Nonbinary or Genderqueer Genders' 28 *International Review of Psychiatry*, 95-102 (2016).

¹³ This 'myth of newness' is the same as the one concerning trans children: see J. Gill-Peterson, *Histories of the Transgender Child* (Minneapolis/London: University of Minnesota Press, 2018), 2-3.

¹⁴ In the US anti-discrimination framework, for example, a 'history of discrimination' is a condition for judicial intervention in defense of suspect classes. Along this line, since the early 1990s, there is a consensus within the US judiciary that gays and lesbians, as an 'insular and discreet

However, history tells a story rich with gender diversity that was long repressed and is now demanding acknowledgment. This article encourages us to confront this historical neglect to recognize that nonbinary genders are not a recent invention. What is new is the growing effort for the law to recognize them, along with the idea that no gender exists outside the binary.

II. How to Do the History of Nonbinaries

A history of nonbinary identities must begin with a simple yet inconvenient truth:

‘Since ancient times and throughout the world, there have always been people, and sometimes established cultural categories for those people, outside the strict binary of man and woman’.¹⁵

In many societies, nonbinaries were often assigned specific cultural roles or categorized within distinct social groups. While the notion of a unified nonbinary identity, capable of mobilizing for civil and political rights, is a relatively recent development that has emerged alongside global networks of activism, the presence of nonbinaries is anything but new. Nonbinaries have been culturally codified, socially acknowledged, and even legally defined long before the emergence of contemporary movements seeking societal acceptance and equal rights.¹⁶

However, to tell the history of nonbinaries is to challenge the very frameworks through which history has been written for a long time. In fact, theirs is not a story of linear progress but one of silences, ruptures, and resistance as well as shifts in understanding of the sex binary. It’s a story that demands to unsettle the illusion that ‘sex’ and ‘gender’ are fixed, timeless, or self-evident throughout centuries and cultures, and acknowledge that they are relative categories that profoundly differ depending on place and time.¹⁷

minority’ in need of judicial protection, are a suspect class under the Equal Protection Clause of the Fourteenth Amendment. See *U.S. High Tech Gays v Defense Industry Security Clearance Officer* (1990), 9th Cir. 895 F.2d 563, 573; M. Strauss, ‘Re-Evaluating Suspect Classifications’ 35 *Seattle University Law Review*, 135-174, 151 (2011), arguing that ‘a history of discrimination can determine whether a bias exists in the legislature (...) and whether it necessitates judicial scrutiny’; E. Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (Chicago: Chicago University Press, 1999), 66.

¹⁵ E. Young, *They/Them/Their. A Guide to Nonbinary and Genderqueer Identities* (London and Philadelphia: Jessica Kingsley Publishers, 2020), 63.

¹⁶ On the mobilization of ‘intersex’ people see J. Gleeson, *Hermaphrodite Logic. A History of Intersex Liberation* (London: Verzo Books, 2025), 17.

¹⁷ See, for example, S. Cordoba, *Nonbinary Gender Identities. The Language of Becoming* (Abingdon & New York: Routledge, 2023), 8 (observing that ‘[m]easuring the degree of masculinity and femininity that a person has is context-dependent: it is different across time and place.’); S. Stryker, *Transgender History. The Roots of Today’s Revolution* (New York: Seal Press 2017), 45 (relativizing gender-nonconforming people throughout US history).

In this regard, Michel Foucault's *History of Sexuality* offers us a helpful starting point. Foucault's genealogical approach – as opposed to traditional methods which tell history as a progressive, linear story punctuated by cause-and-effect relationships, continuity, and development toward a more enlightened present – invites us to trace how categories like 'sex' and 'gender' have been constructed, regulated, and enforced not as biological truths, but as products of discourse and power. For Foucault, power does not merely repress; it produces realities, shaping what counts as truth and who counts as intelligible.¹⁸

Within this logic, when we interrogate history regarding the legal status of nonbinaries, we scrutinize the cultural narratives surrounding the social recognition of people *as men or women* and deconstruct the precise dynamics of power – the '*order of gender*' – that assert masculine domination, patriarchal privilege, and compulsory heterosexuality.¹⁹

Following this thread, nonbinary genders have been systematically written out of official histories, marginalized by medical classifications, erased by religious orthodoxy, and constrained by law codes. But erasure is not absence. As David Halperin reminds us, while we cannot impose modern identity labels on the past, we can uncover how desire, embodiment, and social roles once flourished outside binary scripts. Specifically, Halperin intends, on the one hand, to

'encourage us to inquire into the construction of sexual identities before the emergence (of gender identities) and to do this *without* recurring necessarily to modern notions of "sexuality" or (gender identity)'.²⁰

On the other hand, he suggests not to forget that past identities cannot be seen in isolation but as 'something that can offer a new leverage against the contemporary problems'.²¹

¹⁸ See M. Foucault, *Histoire de la sexualité I. La volonté de savoir* (Paris: Editions Gallimard, 1976), transl. *History of Sexuality. An Introduction*, I (Toronto and London: Random House, 1978). Foucault turned the historian into an archaeologist of discourse and a cartographer of power relations. His work emphasized that the repression of unconventional sexualities in the modern period was functional to the development of capitalism, which enforces 'a general and intensive work imperative' (ibid 5). Compared to the past, this marked 'the first time that a society had affirmed, in a constant way, that its future and its fortune were tied not only to the number and uprightness of its citizens, to their marriage rules and family organization, but to the manner in which each individual made use of his sex' (ibid 26). L. McWhorter, 'Sodomites, Witches, and Indians: Another Look at Foucault's 47 *History of Sexuality, Volume One* Philosophy and Social Criticism, 907-920, 911 (2021), concluding that Foucault's 'genealogy does not seek to be *the* truth; it seeks only to be plausible enough to force us to question the heretofore unquestioned, which in this case is the idea that sexuality is a universal and natural feature of human life that harbors our truth. Foucault accomplished that (...)'.
¹⁹ On the *order of gender* as 'what reminds each and every one of their obligations based on their sex' see I. Jablonka, *A History of Masculinity from Patriarchy to Gender Justice* (London: Penguin Random House, 2022), 6.

²⁰ D. Halperin, *How to Do the History of Homosexuality* (Chicago: University of Chicago Press, 2002), 43.

²¹ *ibid* 23.

From a broader perspective, writing a history of nonbinaries implies loosening our grip on the Western canon and deliberately stepping into other ways of knowing.²² It requires us to decenter Europe, not just geographically, but epistemologically, and to listen to the stories that colonial oppression sought to silence. Here, the work of *decolonial thought* is to unsettle the universalizing gaze that made the Western sex binary seem inevitable and to illuminate the plurality of gender systems that have existed across time and culture.²³

In many indigenous and non-Western traditions, gender has never been strictly binary. From the two-spirit people of Turtle Island to the *hijras* of South Asia, from the *fa'afafine* of Samoa to the *bissu* of Sulawesi, we find rich and complex understandings of identities that defy Western taxonomies.²⁴ Colonialism actively tried to erase these traditions, enforcing rigid binaries through law, medicine, and religion. As María Lugones reminded us in coining the expression 'coloniality of gender', those indigenous peoples whose gender was determined according to the colonizer's standard were attributed human characteristics, whereas the genderless were subject to genocide.²⁵ To recover nonbinary histories, then, is also to confront the violence of the multiple 'gendericides' that have occurred throughout history.²⁶

Nonbinary histories often unfold in what Foucault once described as acts of 'counter-conduct' – those subtle rituals, relations, and ways of living that quietly rebel against heteronormative order.²⁷ If we trace the violence embedded in legal codes against nonbinary lives, we find it rooted in one of humanity's deepest anxieties: the obsession with preserving the procreative line. This drive to secure lineage has long underpinned political projects, from consolidating dynastic powers

²² See H. Chiang, 'Liberating Sex, Knowing Desire: *Scientia Sexualis* and Epistemic Turning Points in the History of Sexuality' 23 *History of the Human Sciences*, 42-69, 54 (2010), arguing that 'Foucault's understanding of power and knowledge, and their relation to discourse in the historical analysis of sexuality, is as useful when applied to non-western contexts as it is to the western context'.

²³ As has been pointed out, 'decolonial thinkers interested in a shift towards a knowing that sits in bodies and territories and their local histories have considered border thinking and border subjectivities as decolonial ways of knowing, sensing and relating to the world'. R. Icaza, 'Social Struggle and the Coloniality of Gender', in *Routledge Handbook of Postcolonial Politics* (London: Routledge, 2018), 58-71, 65.

²⁴ These understandings 'together represent a quarter of the world's population'. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N. Doc. A/73/152 (12 July 2018), para 3.

²⁵ M. Lugones, 'The Coloniality of Gender', in W. Mignolo and A. Escobar eds, *Globalization and the Decolonial Option* (London: Routledge, 2010), 367-390, 383 (arguing that 'the imposition of [the colonial] gender system was as constitutive of the coloniality of power as the coloniality of power was constitutive of it. The logic of the relation between them is of mutual constitution.'). This notion has also been addressed in M. Lugones, *Pilgrimages = Peregrinajes: Theorizing Coalitions Against Multiple Oppressions* (Lanham: Rowman & Littlefield, 2003), 151-166.

²⁶ On this notion see A. Jones, 'Gendercide and Genocide' 2 *Journal of Genocide Research*, 185-211 (2000). See also, relatedly, S. Federici, *Une guerre mondiale contre les femmes de la chasse aux sorcières au féminicide* (Paris: La Fabrique Editions, 2021).

²⁷ See M. Foucault, *Security, Territory, Population. Lectures at the Collège de France, 1977-78* (New York: Palgrave Macmillan, 2007), 201 (defining 'counter-conduct' as 'struggle against the processes implemented for conducting others').

to justifying military conquest and domination, which by necessity required the erasure of sexually ambiguous or gender nonconforming bodies. Their striving for survival and, more recently, their fight for recognition is not just a testament to existing gender diversity but a form of resistance that reclaims space where erasure once ruled.

III. Marvels and Monsters in Pre-Modern Worlds

1. Queer Cosmogonic Mythologies

Early civilizations imagined the origins of humanity as fundamentally genderless, suggesting that the first humans existed outside a rigid sex binary. This perception is evident across disparate *cosmogonic mythologies*, where the primal state of humanity is described as either lacking a defined sex or possessing multiple sex characteristics simultaneously.

Ancient Egyptian texts, for example, mention three genders – male (*ta*), female (*hmt*), and *sekhet*, the latter often linked to eunuchs or individuals who don't fit into traditional categories. Sumerian and Akkadian traditions describe figures created without sexual organs who later assume social roles. The Indian concept of '*tritiya-prakrti*' ('third nature') also appears in ancient Sanskrit literature, where beings outside the male/female binary serve unique religious or social purposes. The acknowledgement of different genders beyond male and female is evident in the assignment of sacred roles, which is based not only on genital ambiguity but also on social standing, sexual practices, reproductive ability, and other factors.

In the Western world, the most familiar cosmogonic myth is contained in Plato's *Symposium*, where Aristophanes discusses the original nature of humanity:

'For our original nature was by no means the same as it is now. In the first place, there were three kinds of human beings, not merely the two sexes, male and female, as at present: there was a third kind as well, which had equal shares of the other two, and whose name survives though, the thing itself has vanished. For "man-woman" (*hermaphrodite*) was then a unity in form no less than name, composed of both sexes and sharing equally in male and female; whereas now it has come to be merely a name of reproach.'²⁸

In this story, the primeval androgyny possesses a monstrous shape: they are a round, double-bodied shape, featuring four arms, four legs, two faces, and two sets of sexual organs, allowing them to race and roll about cartwheel-like on their many limbs. This unity, however, made the nonbinary creature too strong not to trigger the gods' envy and mistrust. As he cut the being into halves, Apollo aided by turning their heads and necks to face the wound, so each would constantly be

²⁸ *Plato in Twelve Volumes*, translated by H.N. Fowler (Cambridge: Harvard University Press, 1925), paras 189d-190a.

reminded of their separation. Apollo also carefully drew together their skin, tying it at the navel in the process of healing and reshaping human bodies. From then on, each half persistently yearned for reunion with its missing counterpart, a longing Plato famously interprets as the deepest root of love and desire – or ‘compulsory heterosexuality’.²⁹

The myth of the primeval androgyny was further popularized by Ovid’s *Metamorphoses*, where Hermaphroditus, the dazzling son of Hermes and Aphrodite – the gods of male and female sexuality – is described as beautiful as ‘white lilies in translucent glass.’³⁰ On a summer day, the boy slipped into a pristine pool fed by the waters of the Naiad nymph Salmacis to bathe. The nymph fell fiercely in love with him and, despite his repeated rejection, wrapped herself around him in the water, clinging ‘as the ivy oft-times embraces great trunks of trees.’³¹ When the nymph’s fervent prayers to the gods were granted, their bodies fused, becoming one single creature embodying both male and female traits so that ‘(t)hey seemed neither, and yet both’, adopting a single appearance (*facies una*) yet maintaining a dual form (*forma duplex*).³²

Hermaphroditus’s vanishing act inside Salmacis’s lustful embrace mirrors Plato’s origin myth, but with a twist: here, instead of splitting, there is a fusion and a loss of difference. Ovid begins his epic not with harmony, but with chaos – a primordial state where the world consisted of a single appearance and witnessed no differentiations (*vultus unum*).³³ This time, it’s not only the divine but also ‘God and bounteous Nature’ (*deus et melior litem natura*) who intervene, dissolving chaos by disentangling the elements and placing ‘each in its proper place’.³⁴

Interestingly, as Princeton classics professor Peter Kelly observes, the Hermaphrodite’s tale is a mythic rewind:

‘the cosmos takes shape (...) through a process of separation, expansion, and the development of distinction. In the case of Hermaphroditus, however, this essential sequence is reversed as the many become the one, through the consolidation of the separate bodies of Hermaphroditus and Salmacis and through the loss of gender opposition’.³⁵

In this sense, the fleshy union of Hermaphroditus and Salmacis is less a reason

²⁹ See M. Delcourt, *Hermaphrodite: Myths and Rites of the Bisexual Figure in Classical Antiquity* (London: Studio Books, 1961), 73-74.

³⁰ Ovid, *Metamorphoses*, IV, 285-388, 355, translated by F.J. Miller (Cambridge: Harvard University Press, 1916), 199-205.

³¹ *ibid* 365.

³² *ibid* 378-379 (*‘nec femina dici / nec puer ut possit, nec utrumque et utrumque videntur’*).

³³ See Ovid, n 30 above, I, 7-9 and 18-20.

³⁴ *ibid* 21.

³⁵ P. Kelly, ‘Intersex and Intertext: Ovid’s Hermaphroditus and the Early Universe’, in A. Surtees and J. Dyer eds, *Exploring Gender Diversity in the Ancient World* (Edinburgh: Edinburgh University Press, 2020), 95-105, 98.

for celebration than a sign of the destabilizing return to chaos, a world where gender boundaries have vanished and the comfort of difference has disappeared.³⁶ Additionally, the story itself is a cumulation of unconventional, if not unlikely, situations: an extremely seductive prepubescent body narcissistically exposed; a female, otherwise powerless being, exercising coercion over an unconsenting child; and both socially marginalized figures subjected to the insatiable scrutiny of the male gaze in Ovid's era.³⁷

2. Greco-Roman Legal Traditions

Down to earth, the Greco-Roman world knew no concept of gender as we understand it today. According to Berkeley's history professor Thomas W. Laqueur, ancient Western cultures predominantly viewed male and female bodies not as fundamentally different, but *as variations of a single sex*.³⁸

Laqueur built his one-sex model on the works of the Greco-Roman physician Galen (129-216 CE), who believed that the female body was an inverted and less perfect version of the male body, with reproductive organs viewed as homologous structures that differed only in position and degree of development.³⁹ Rather than a binary opposition between sexes, this perspective emphasized a hierarchy that affirmed male supremacy.⁴⁰ In Laqueur's one-sex/flesh model, gender preceded sex and:

'(t)o be a man or a woman was to hold a social rank, a place in society, to assume a cultural role, not to be organically one or the other of two incommensurable sexes'.⁴¹

In this one-sex world, gender nonconforming bodies were not seen as a third category but as intermediate forms illustrating gradations between male and female. At the same time, far from being wholly accepted or celebrated as such, bodies that challenged male and female typical morphologies were considered a sign of divine retribution – *monsters and marvels at the same time (téras)* – for not

³⁶ *ibid* 104.

³⁷ See S. Carter, *Ovidian Myth and Sexual Deviance in Early Modern English Literature* (New York: Palgrave Macmillan, 2010), 130-131.

³⁸ See T. Laqueur, *Making Sex. Body and Gender from the Greeks to Freud* (Cambridge, Harvard University Press, 1990).

³⁹ See Galen, *De Usu Partium (On the Usefulness of the Parts of the Body)*, II, 632 ('since everything in the male is the opposite [of what it is in the female] the male member has been elongated to be most suitable for coitus and the excretion of semen'). As T. Laqueur, n 38 above, 35, noted, for Galen 'the vagina was an internal penis [and] the womb was a female scrotum'.

⁴⁰ Galen (...) postulated that women have small genital testicles capable of making inferior seed incapable of regeneration. Men, due to their warmer body temperatures, carried the strong perfect seed'. P. Abrams, 'The Tradition of Reproduction' 37 *Arizona Law Review*, 453-500, 473 (1995).

⁴¹ T. Laqueur, n 38 above, 8.

resembling their parents.⁴² For Aristotle:

‘Some take after none of their kindred, although they take after some human being at any rate; others do not take after a human being at all in their appearance, but have gone so far that they resemble a monstrosity, and, for the matter of that, anyone who does not take after his parents is really in a way a *monstrosity* (τέρας), since in these cases Nature has in a way strayed from the generic type. The first beginning of this deviation is when a female is formed instead of a male ...’⁴³

In early Roman culture, newborns with ambiguous genitalia, referred to as ‘hermaphrodites,’ would be secluded in a wooden crate and cast into the sea to appease restless gods.⁴⁴ Indeed, it was Romulus, Rome’s very founder, who permitted parents to kill their children if they were ‘mutilated or monstrous (τέρας) from their birth’.⁴⁵ Romulus’ specific concern was to prepare Rome for military expansion, which required ensuring the city’s full reproductive capacity. Evidently, letting bodies with ambiguous reproductive organs live puts this objective at risk.

As Rome entered its imperial age and got past life-threatening military conflicts, the grim infanticidal custom eventually faded from history, leading to the explicit recognition of hermaphrodites as subjects of civil rights who could appoint their heirs and act as witnesses in civil and criminal trials. In relation to these two specific rights, a succinct Latin principle would resonate through late Roman and medieval notarial practice, according to which ‘(a)ll men are either male, female, or hermaphrodites’.⁴⁶ However, in cultural contexts where being a man or a woman made a huge difference in terms of fundamental civil rights, the hermaphrodites’ status continued to be defined based on their *dominant sex* – either male or female – which they revealed ‘during arousal’ (*incalescentis*).⁴⁷

⁴² R. Braidotti, ‘Mothers, Monsters, and Machines’, in Id ed, *Nomadic Subjects* (New York: Columbia University Press, 1994), 59-79, 62. For an explanation of this term see L. Brisson, *Sexual Ambivalence: Androgyny and Hermaphroditism in Graeco-Roman Antiquity* (Berkeley: University of California Press, 2002), 14.

⁴³ Aristotle, *Generation of Animals*, IV, 2, 767b (emphasis added), translated by A.L. Peck (Cambridge, Harvard University Press, 1943), 401.

⁴⁴ See Livy, *History of Rome*, XXXIX, 22, 5 (‘a report came from Umbria of the discovery of a child there, nine years old, who was a hermaphrodite. Horrified at such a portent the aurspices gave orders for it to be removed from Roman soil as speedily as possible and put to death’). See also R. Evêque, ‘The Legal Treatment of Hermaphroditism in Ancient Rome. From Persecution to Integration’, in E. Stradella ed, *Gender-Based Approaches to the Law and Juris Diction in Europe* (Pisa: Pisa University Press, 2020), 111-158, 134-136.

⁴⁵ Dionysius of Halicarnassus, *Roman Antiquities*, II, XV, 2, translated by E. Spelman, I (London: Booksellers of London and Westminster, 1758), 251.

⁴⁶ Rolandinus De Passageriis, *Summa Artis Notariae* (1559), 803 (‘*Omnes homines aut sunt masculi, aut foeminae, aut Hermaphrodit*’).

⁴⁷ See, among others, Ulpian, *Digest*, XXII, 15, 5, 1 (‘*Hermaphroditus an ad testamentum adhiberi possit, qualitas sexus incalescentis ostendit.*’); Justinian’s *Digest*, I, 1.5.10 (‘*Quaeritur: hermaphroditum cui comparamus? et magis puto eius sexus aestimandum, qui in eo praeualel*’);

In other words, the legal status of any possible third gender was systematically reduced to the binary, indicating that legal principles were more influenced by the pressing need to resolve specific legal dilemmas regarding lineage and the functioning of the justice system than by progressive inclusion. Instead of challenging established gender roles, sex variations were folded into social hierarchies, with legal status assigned according to how closely one's traits matched the ideal of male or female.

3. The Medieval World

On the route between Bristol and Birmingham in the United Kingdom, Hereford Cathedral houses a treasure of medieval cartography: the *Mappa Mundi*. This circular vellum unfolds in the dim light to depict the world as it was seen in the thirteenth century.⁴⁸ The map, a spiritual chronicle with Jerusalem at its glowing heart and Paradise perched at the eastern frontier, shows, at its borders, the legendary 'monstrous races', a legacy of Saint Augustine. Writing ten centuries earlier, in the influential *The City of God*, Saint Augustine listed the hermaphrodites – 'persons of sex so doubtful, that it remains uncertain from which sex they take their name' – among the 'monstrous races' that descended from Noah's disgraced son Ham.⁴⁹

Along with the one-footed, one-eyed, and earless beings, the *Mappa Mundi* depicts a striking figure of a hermaphrodite, drawn as a nude human with a vertically bisected body, displaying both double genitalia and a pair of breasts. Unusually, the face and hair remain intact rather than split, and the figure notably wears a turban and even sports a beard – an odd mix of gendered and exotic markers. Below the image, a Latin inscription reads '*Gens uterque sexus innaturales multimodis modis*' ('a people having both sexes; they are unnatural in many ways').

This depiction captures medieval fascination with the strange, the 'other', and the margins – Albert Magnus's 'monster in nature'⁵⁰ –, framing gender nonconforming bodies within mythic and moral contexts rather than as part of the human species.⁵¹ As has been observed:

'(g)iven the heavily Christian orientation of the Hereford Map, (...) these figures constitute a deliberate conflation of living and imaginary groups, in which ideas about Monstrous Races, barbarians, Jews, and Muslims intersect'.⁵²

XXII, 5.15.1 (*Hermaphroditus an ad testamentum adhiberi possit, qualitas sexus incalescentis ostendit*).

⁴⁸ L. DeVun, *The Shape of Sex. Nonbinary Gender from Genesis to Renaissance* (New York: Columbia University Press, 2021), 40-69.

⁴⁹ Saint Augustine, *The City of God*, XVI, 8.

⁵⁰ Albert the Great, *Questions Concerning Aristotle's On Animals*, translated by I.M. Resnick and K.F. Kitchell Jr, in *The Fathers of the Church. Mediaeval Continuation*, IX (Washington: Catholic University of America Press, 2008), 445-446.

⁵¹ See N. Reed Kline, *Maps of Medieval Thought. The Hereford Paradigm* (Suffolk: The Boydell Press, 2001), 151.

⁵² D. Higgins Strickland, *Saracens, Demons & Jews: Making Monsters in Medieval Art*

Far beyond the realms of anatomy or theology, the figure of the hermaphrodite became a linchpin in medieval Europe's vast geopolitical imagination, especially when it came to navigating anxieties about unknown regions of Africa and the Muslim world. Christian doctrine seized upon ambiguous bodies, elevating them to signal not just a personal peculiarity but a civilizational difference and disorder.⁵³

In the theological discourse of the time, the biblical phrase 'male and female He created them' (Genesis 1, 27) hardened into a legal weapon that justifies the stigmatization, exclusion, and at times even the criminal prosecution (notably for sodomy) of those whose bodies or behaviors defied binary gender norms.⁵⁴ And all this, although a queer reading of Genesis 1, 27 has always been at the core of medieval discussions about gender.⁵⁵

In this climate, ambiguity itself was outlawed, relegating anything outside the strictest binary to realms of suspicion or punishment, so that law and theology could work in tandem to fortify patriarchy. For Thomas Aquinas, for example, maleness alone was the image of God, and femaleness could only ever take a subordinate seat. Genesis, in his reading, became a proof text against the possibility of both sexes coexisting in one body: 'the image of God is found in man, and not in woman', he insisted. 'Man is not of woman, but woman of man; and man was not created for woman, but woman for man'.⁵⁶

In contrast with the Western world, the Islamic legal tradition approached individuals with sex variations (*khuntha*) with more pragmatic sensibility. Instead of treating *khuntha* as a threat to the social order, the Muslim culture avoided the harsh moralizing that shaped the Western response, offering instead accommodation and recognition.⁵⁷ In the Muslim world,

'(t)here was no insinuation that intersex individuals were the product of divine wrath, and associations of the *khuntha* with physical, moral, or other forms of corruption were anything but prevalent in the early modern Arab-Islamic world. There is also little evidence that *khunthas* were ostracized, persecuted, or imprisoned'.⁵⁸

It is within this solution-oriented approach that the muslim philosopher Ibn Sina, aka Avicenna (980-1037), proposed a surgical intervention over nonconforming

(Princeton: Princeton University Press, 2003), 187.

⁵³ See L. DeVun, n 48 above, 42-45.

⁵⁴ See P. Cantor, *Glossae super Genesim: Prologus et Capitula 1-3*, translated by A. Sylwan (Göteborg: Acta Universitatis Gothoburgensis, 1992), 40-41.

⁵⁵ For a queer reading of this sentence, see P. Trible, *God and the Rhetoric of Sexuality* (Philadelphia: Fortress Press, 1973), 80; *contra*, see R.S. Kawashima, 'A Revisionist Reading Revisited: On the creation of Adam and Then Eve' 56 *Vetus Testamentum*, 46-57, 48 (2006).

⁵⁶ E. Hill ed, *Thomas Aquinas Summa Theologiae*, XIII (Cambridge: Cambridge University Press, 2006), 58-59 (Part I, Question 93, Art 9).

⁵⁷ See L. DeVun, n 48 above, 110-112.

⁵⁸ S. Scalenghe, *Disability in the Ottoman Arab World 1500-1800* (Cambridge: Cambridge University Press, 2014), 161-162.

bodies to ensure sexual pleasure and preserve the reproductive capacity.⁵⁹ Avicenna's influence was so significant that around the thirteenth century, a group of active surgeons operating in France and Italy systematically performed surgical treatments on bodies with intersex variations, allegedly to restore their 'natural form' or predominant sex.⁶⁰ Surgeries aimed at dispelling anxieties surrounding possible same-sex relationships and concerns with women's presumably uncontrolled sexual desire. This was the case with *tentigo*, the 'tension' through which an overly large clitoris could achieve a penis-like erection and somehow penetrate a vagina, which received an enhanced interest by this pre-modern generation of surgeons.⁶¹

Perhaps the most popular symbol of the legal repression of ambiguous bodies in the late Middle Ages was Joan of Arc's trial and execution. During her 1431 heresy trial, court records show that Joan was repeatedly questioned about her military attire – men's clothing, short hair, and armor – which the court regarded as direct violations of Biblical and canon law injunctions.⁶² Joan defended her attire on spiritual grounds, arguing that she wore a man's dress for a divine mission.⁶³ Notably, her persistent refusal to 'pass' as male while remaining publicly identified as a woman positioned her outside the available gender norms of the time. On at least two occasions, she was examined to determine her sex and successfully passed both the femininity and virginity tests.⁶⁴ As has been observed:

"That the sex determination needed to be made at all indicates that Joan's cross-dressing and cross-behavior were perceived to complicate her sexuality and move it beyond the normative. Joan rejects feminine roles while continuing to identify herself as a woman".⁶⁵

Joan's trial records highlight that while her transgressive clothing was officially at issue, the court also regarded this transgression as the outward sign of more profound ambiguities - religious, sexual, and ontological - that threatened the established social order. Joan's 'monstrous dress in which she perseverated' (*difformitate habitus in quo perseverabat*), as the court called it,⁶⁶ became the

⁵⁹ See Avicenna, *Liber canonis de medicina* (Venice: Iuntae, 1582–84), book III, fen 20, treatise 1, chapter 43. See also I. Falk Gesinik, 'Intersex Bodies in Premodern Islamic Discourse' 14 *Journal of Middle East Women's Studies*, 152-173, 161-162 (2018).

⁶⁰ See L. DeVun, n 48 above, 115-116.

⁶¹ *ibid* 149-151.

⁶² See Deuteronomy, 22, 5. See D. Grigat and G. Carrier, 'Gender Transgression as Heresy: The Trial of Joan of Arc' 13 *Past Imperfect*, 188-207, 201 (2008).

⁶³ S. Crane, 'Clothing and Gender Definition: Joan of Arc' 26 *Journal of Medieval and Early Modern Studies*, 297-320 (1996).

⁶⁴ See H. Cowans, 'A Woman Dressed as a Man Dressed as a Woman: The Nonbinary Gender of Joan of Arc', Thesis with the Ohio State University, available at <https://tinyurl.com/mr4ctrx5> (last visited 31 January 2026), 25.

⁶⁵ *ibid* 310.

⁶⁶ *Procès de condamnation et de réhabilitation de Jeanne d'Arc, dite La Pucelle* (Paris: Imprimerie de Crapelet, 1841), 43.

emblem not just of individual disobedience but of a broader anxiety about unstable boundaries between male and female, sacred and profane, order and disorder. She herself affirmed that she would ‘rather die than leave off (her) men’s dress, save by God’s command’,⁶⁷ explicitly situating her conduct within a religious vocation rather than a simple desire to deceive or escape violence.

Indeed, Joan’s death sentence resulted not so much from her cross-dressing as a male but from the ambiguity and symbolic ‘contamination’ her actions produced, ‘draw(ing) on femininity and masculinity to present a habitus that matches neither’.⁶⁸ Joan’s defiance was unique: she wore men’s clothes, yet never claimed to be a man. Her insistence that this crossing and refusal to ‘pass’ was divinely commanded connects her to a tradition of nonbinary sanctity; figures like Joan of Arc are often seen as approaching the image of the angel, beings depicted in medieval theology as transcending human sexual difference.⁶⁹ ‘There is neither Jew nor Gentile, neither slave nor free, *nor is there male and female*, for you are all one in Christ Jesus’, so wrote Saint Paul.⁷⁰

Such ‘closeness to Christ’ is imagined in medieval culture through the erasure of gender boundaries, with aspects of masculinity and femininity merging into complex figures that invite queer readings of Christian theology. The class of the *eunuchs*, so popular in the Byzantine culture, synthesizes these complex tropes. They established a distinct class of slaves and performed essential functions in the imperial court, such as serving as guardians of the imperial thalamus (*cubicularii*, *koubikoularioi*) and often as chamberlains. The most famous of them, Narses (478-573), led one of the bloodiest military campaigns in medieval history to reconquer Italy under Justinian. In general, the Byzantines believed that castration made eunuchs not only physically distinct from men and women because of their absent beard, height, and voice, but also predisposed to be slaves and generally inapt to play male gender roles.⁷¹

In religious terms, the eunuchs were celebrated as a model of chastity and renunciation of sexual desire proper to the angels.⁷² For this reason, the inclusion of martyrs and holy eunuchs in early Christian hagiography appears anything but out of place. However, it is often criticized by the Fathers of the Church themselves, in line with the stereotype that eunuchs were predisposed to a loss of self-control. In one of his homilies, Saint Basil of Caesarea, known as the Great (330-379), urges

⁶⁷ *ibid* 281.

⁶⁸ S. Crane, n 63 above, 312.

⁶⁹ See C. Maillet, *Les genres fluides de Jeanne d’Arc aux saintes trans* (Paris: Arké, 2020), 32-33.

⁷⁰ Galatians 3, 27-28; see also 2 Corinthians 5-17 (‘Therefore, if anyone is in Christ, the new creation has come: The old has gone, the new is here!’).

⁷¹ D. Gonzales-Salzberg and M. Perisanidi, ‘Belonging Beyond the Binary: From Byzantine Eunuchs and Indian Hijras to Gender-Fluid and Nonbinary Identities’ 48 *Journal of Law & Society*, 669-689, 673 (2021).

⁷² See Matthew 19, 12. See also S. Tougher, *The Eunuch in Byzantine History and Society* (London and New York: Routledge, 2008), 78.

the faithful to ‘imitate the eunuch (who) embraced the faith and did not delay in receiving the seal of the spirit’.⁷³ At the same time, he describes

‘the race of eunuchs (as) without honor and completely abandoned (as) not female, not male, crazy for women, envious, rewarded with evil, capricious, unable to share, indifferent, insatiable, always dissatisfied with lunch, predisposed to anger, crazy for gold, cruel, effeminate and slaves to the belly’⁷⁴

- sexual ambiguity calling for ambiguous judgments.

IV. Medicalization and Erasure: The Modern Era

As Europe launched its colonial ventures across the globe, the ancient times terror-and-wonder approach to gender nonconformity gave way to a relentless drive to enshrine the male-female binary in law. Progressively, people whose bodies or identities defied this binary stopped being considered a third alternative but became medical cases, ushered into new regimes of classification and intervention. The era witnessed the rise of what Foucault termed ‘exclusionary inclusion’, where nonconforming bodies were accepted subject to normalization through medical control and surgery, bringing them in line by bodily manipulation.⁷⁵

The earliest manifestation of this epistemological shift is the dispute between the physician Jacques Duval (1555-1615) and the anatomist Jean Riolan (1577/80-1657) on the case of Marie/Marin Lemarcis (or Le Marcis). A French self-identified man, Lemarcis had been assigned female at birth and was later prosecuted for sodomy after having married another woman, Jeanne Le Febvre. The court of Rouen sentenced Lemarcis to death by burning, but she successfully demanded to be hanged and strangled before being burned, and her ashes to be dispersed. Acting as a witness for the court, Duval examined Lemarcis and testified that s/he showed signs of masculine anatomy and therefore was not a woman but a hermaphrodite with male dominant sex. For Duval, the case reflected the nature’s prominent diversity. For Foucault, Duval’s expert opinion represents ‘the very first rudiments of a clinical approach to sexuality’.⁷⁶ Indeed, though the court forbade Lemarcis from having sexual relations altogether, s/he had her life spared thanks to Duval.⁷⁷

Criticizing this conclusion and accusing Duval of incompetence, Riolan, on

⁷³ Basil the Great, ‘Sermon 13’ *Sanctum Baptismum*, 225 (1843).

⁷⁴ *Lettera CXV*, in Y. Courtonne, *Saint Basile. Lettres*, 2 (Paris: Les Belles Lettres, 1957), 19-20.

⁷⁵ See M. Foucault, *Discipline and Punish: The Birth of Prison*, translated by A. Sheridan (New York: Vintage Books, 1995), 184.

⁷⁶ See M. Foucault, *Abnormal: Lectures at the Collège de France, 1974-1975*, translated by G. Burchell (New York: Picador, 2004), 68-69.

⁷⁷ See J. Vons, ‘Une expertise médicale qui sauva une vie: Jacques Duval (1555–1615) et le gynanthrope de Rouen’ 47 *Histoire des sciences médicales*, 87-93 (2013).

the other hand, argued that Lemarcis was nothing but a deformed woman, a ‘perversion of the order of natural causes, the health of people, and the authority of the king’.⁷⁸ Riolan’s theory proved more influential in the long run. In response to Duval’s humanizing approach, Riolan claimed that there exist no ‘true’ hermaphrodites but only women with genital deformities. Riolan’s prescriptive model comprised three commandments: *enquire, identify, and excise*.⁷⁹

We need to know the nature that dominates in them, give them the clothing of their sex, and, if we have the means, excise what does not belong to them.⁸⁰

In this emerging clinical landscape, the perspectives and autonomy of the individuals affected were largely erased. Most were poor, marginalized, and unable to participate meaningfully in medical debates, leaving their experiences unrecorded and their agency unrecognized. Moreover, Riolan’s obsession with differentiating the ‘true’ sex was emblematic of a broader misogynist and racist project, as seen in his simultaneous efforts to explain the origins of Blackness in Africans by recourse to anatomical and physiological explanations.⁸¹ Tainted and biased, Riolan’s ideas marked the beginning of a medicalisation of sex variations that still endures today. From that point forward, tales of hermaphrodites vanished from the pages of monstrous lore and reappeared under the surgeon’s lamp, reborn within the clinical chronicles of medicine.⁸²

Along this line, the entry ‘Hermaphrodite’ of Diderot and D’Alembert’s *Encyclopédie* declared that hermaphrodites were ‘nothing more than a chimera’, storytellers spun from ignorance and fit for children’s fables, not serious science.⁸³ Only those rare cases so anatomically perplexing that even the sharpest eye might pardon confusion, such as hypospadias, vaginal atresia, and anorchia or bilateral cryptorchidism, merited the label ‘true’ hermaphroditism. In an age of conservative backlash and mounting nationalism, the discourse surrounding possible ‘third gender’ was dominated not only by concerns for deception and fraud but also by

⁷⁸ L. Daston and K. Park, *Wonders and the Order of Nature, 1150–1750* (Cambridge: MIT Press, 1998), 203.

⁷⁹ See L. Leibacher-Ouvrard, ‘Imaginaire anatomique, débordements tribadiques et excisions. Le Discours sur les hermaphrodites (1614) de Jean Riolan fils’, in Marianne Closson ed, *L’Hermaphrodite de la Renaissance aux Lumières* (Paris: Classiques Garnier, 2013), 111-124, 113-114.

⁸⁰ J. Riolan, *Discours sur les hermaphrodites. Où il est démontré contre l’opinion commune, qu’il n’y a point de vrais hermaphrodites* (Paris: Pierre Ramier, 1614), 5 (‘il faut savoir la nature qui domine en eux, pour leur donner l’habit de leur sexe, et s’il y a moyen, retrancher ce qui ne leur appartient’).

⁸¹ See C.S. Collins, C.B. Newman and A. Jun, *Global White Supremacy. Anti-Blackness and the University as Colonizer* (New Brunswick: Rutgers University Press, 2023), 41.

⁸² See M. Foucault, *Abnormal* n 76 above, 71. As another example of hermaphrodite erasure, see J. Parson, *A Mechanical and Critical Enquiry into the Nature of Hermaphrodites* (London: Walthoe, 1741), 144-145.

⁸³ Louis de Jaucourt, ‘Hermaphrodite’, in *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers*, VIII (Paris, 1765), 165-167, transl. ‘Hermaphrodite’ in *The Encyclopedia of Diderot & d’Alembert*, Collaborative Translation Project, translated by N.J. Andrews (Ann Arbor: Michigan Publishing, 2003). See also P.F. Monet, in D.J. García López ed, *Sobre el derecho de los hermaphroditos* (Madrid: Melusina, 2015), 305.

anxieties about sexual promiscuity, same-sex relationships, and missing procreative opportunities.⁸⁴

The legal counterpart to this process of medicalization involved assigning ‘experts’, authorized by law, the absolute authority to determine a person’s ‘true sex’. This was exemplified in Arts 19 to 23 of the Prussian Civil Code of 1794, which stated that hermaphrodites could be registered as male or female at birth based on their parents’ decision. However, upon reaching adulthood, they were required to choose a definitive legal sex, with all rights and obligations hinging on this choice. If the interests of third parties were affected, medical experts would intervene, and their decisions were final and unappealable, reflecting the increasing influence of medicine over legal issues concerning sex and gender.⁸⁵

This example reflects a more general tendency among European nations, which, during the eighteenth century, encouraged by the pressure of Enlightenment ideals for greater bureaucratic oversight, began to standardize the practice of recording the sex of newborns at birth according to a strict binary framework. Parallely, the emerging medical discourse pathologized gender nonconforming bodies as a manifestation of arrested or premature deviations from a pretended ‘normal’ developmental pathway toward the binary male or female.⁸⁶ By the 1870s, thanks to Charles Darwin’s popularization of the arrested development theory, the medical gaze had eventually determined that ‘true hermaphrodites’ (*Hermaphroditismus verus* or *Androgynie*), defined by the presence of both ovarian and testicular tissue, occupied such a narrow category that it could be easily reduced to either male or female.⁸⁷

It’s in this context that the idea of a ‘third sex’ re-emerges in the work of Karl Heinrich Ulrichs (1825-1895), a German jurist who, long before the word ‘homosexuality’ was widely known, imagined in individuals attracted by people of their own sex a new species in the spectrum of sex and desire. Ulrichs called them *Urnings*, or ‘Uranians’: people who, he argued, combined a female soul with a male body (*anima muliebris virili corpore inclusa*). Inspired by scientific observations that embryos begin with undifferentiated sexual organs, Ulrichs boldly theorized that sexual identity and desire can take separate paths, sometimes resulting in humans

⁸⁴ See E. Reis, *Bodies in Doubt: An American History of Intersex* (Baltimore: Johns Hopkins University Press, 2009), 36-40.

⁸⁵ See A. Wijffels, ‘Intersex: Some (Legal-)Historical Background’, in J.M. Scherp et al eds, *The Legal Status of Intersex Persons* (Cambridge: Cambridge University Press, 2018), 181-200, 194-196.

⁸⁶ See I.G. Saint-Hilaire, *Historie générale et particulière des anomalies de l’organisation chez l’homme et les animaux ou Traité de tératologie*, II (Brussels: Société belge de librairie, 1837), 44. See T.A.E. Klebs, *Handbuch der pathologischen Anatomie* (Berlin: A. Hirschwald, 1876), 723-748 (categorizing hermaphrodites as either ‘true’ or ‘pseudo’ (male or female); A. Domurat Dreger, *Hermaphrodites and the Medical Invention of Sex* (Cambridge: Harvard University Press, 1998), 140.

⁸⁷ See C. Darwin, *The Descent of Man, and Selection in Relation to Sex* (New York: D. Appleton & Co., 1889), 37-38 (mentioning Geoffroy Saint-Hilaire’s arrested development theory) and 161-162 (examining hermaphroditism in cirripedia or barnacles).

who are neither fully male nor fully female, but something different entirely.⁸⁸
For Ulrichs:

‘We, Urning, who form a separate sexual species, are similar to hermaphrodites. As *the third sex*, we are on the same level as the male or female sex, but we are independent of the male or female sex, fully separate from both. We are not fully men or women, but by nature different’.⁸⁹

The impact of Ulrichs’ thought was profound. Edward Carpenter (1844-1929), a pioneering English gay activist, championed Ulrichs’ third sex - which he called ‘*intermediate sex*’ - and insisted that sexual acts do not merely define such people, but deep emotional and spiritual bonds do. Carpenter painted Uranians as sensitive, complex, and brilliant, combining ‘masculine powers’ with the emotional richness of a woman’s soul. Women in this ‘third’ category, too, were described as courageous, decisive, and passionate about life outside traditional gender roles.⁹⁰

Another pioneer of the ‘third sex’ is the German intellectual and activist Magnus Hirschfeld (1868-1935).⁹¹ Hirschfeld writes:

‘To us, the term *third sex* is synonymous with that of intermediate sexual stages or sexual transitions: by it I mean all the intermediate forms which depart most strongly from the absolute sexual type, which I divide into four main groups: *hermaphrodites, androgynes, homosexuals, and transvestites*, according to which deviation affects the actual sexual organs, other bodily sexual characteristics, bad instinct and other mental gender differences’.⁹²

Under Hirschfeld’s visionary leadership, Berlin’s Institute for Sexual Sciences (*Institut für Sexualwissenschaft*) became a revolutionary hub for the scientific study of the ‘third sex’. Hirschfeld didn’t just theorize but brought Berlin’s queer community into the laboratory, documenting same-sex relationships, cross-dressers, trans, intersex, and nonbinary individuals, and social outcasts with both empathy and rigor. His groundbreaking work didn’t just catalog sexual minorities but celebrated their joy and resilience amidst social stigma. The Institute blurred the line between sentiment and science, offering everything from gender transition surgeries to fiery activism against repressive laws such as the infamous Paragraph

⁸⁸ See H.C. Kennedy, ‘The ‘Third Sex’ Theory of Karl Heinrich Ulrichs’ 6 *Journal of Homosexuality*, 103-111, 105 (1980).

⁸⁹ K.H. Ulrichs, *Vindex. Forschungen ueber das Raethsel der mannmaennlichen Liebe (Research on the enigma of male love)* (Leipzig: Spohr, 1864), 25.

⁹⁰ *ibid* 25-36.

⁹¹ On which see L. Murat, *La loi du genre. Une histoire culturelle du ‘troisième sexe’* (Paris: Fayard, 2006), 178-195; R. Dose, *Magnus Hirschfeld and the Origin of the Gay Liberation Movement* (New York: Monthly Review Press, 2014); C. Wolff, *Magnus Hirschfeld: A Portrait of a Pioneer in Sexology* (London: Quartet Books, 1986).

⁹² M. Hirschfeld, *Die Homosexualität des Mannes und des Weibes. Handbuch der gesamten Sexualwissenschaft in Einzeldarstellungen* (Berlin: Marcus, 1914), 30.

175.⁹³ In Hirschfeld's hands, the study of the 'third sex' transformed research into a movement that challenged the violence expressed by the laws of the time.

Unsurprisingly, Hirschfeld's groundbreaking work and militancy did not last long. As soon as they seized power in 1933, the Nazis first looted and then burned down Hirschfeld's Institute, including all its archives. While Hirschfeld was highly influential in his own field and highly regarded for his activism, scientific studies, and institution-building, his theories were eclipsed by those of his more famous contemporary, Sigmund Freud (1856-1935). Freud's development of psychoanalysis, broad cultural influence, and prolific output made him a global intellectual celebrity and a household name in the humanities, art, and popular culture.⁹⁴

Importantly, Freud refuses to consider homosexuals as a 'third sex' or an independent category outside the binary. Although sympathetic to Hirschfeld's cause for the repeal of Paragraph 175, in contrast with him, Freud considered homosexuality a neurosis caused by the failure to overcome the phase of attachment to the mother and the absence of the father during childhood.⁹⁵ On the other hand, there is no trace of sex variations in Freud's published case studies, which focused primarily on hysteria, neuroses, and psychosexual development among people assigned male or female at birth. Simply put, for Freud, nothing existed outside the binary.

While the discrete idea of a 'third gender' assumed subversive tones in Europe, across the globe, the tide of erasure surged far beyond the Western world. As colonial empires expanded, Western adventurers encountered unfamiliar gender-diverse peoples – *babaylan* healers in the Spanish Philippines, the *mahu* in Hawaii, and the Two Spirits traditions among the Crow nation of North America. But far from sparking curiosity, these meetings resulted in a wave of violent repression, transforming vibrant third-gender communities into targets of colonial erasure.⁹⁶

Take the Hijras of India – those who neither fit into male nor female categories, often embodying roles that blended human and spiritual realms. Colonial authorities launched a relentless assault, branding Hijras as immoral and engaging in arbitrary arrests and imprisonment based on the false conviction that they were all involved in prostitution ('professional sodomy').⁹⁷ In reality, Hijras maintained rich cultural roles, including mutual caretaking and street performance. The oppressive 1871 *Criminal Tribes Act* criminalized Hijras as a category of 'eunuchs',

⁹³ Thus, the invectives against the notorious § 175 of the German Criminal Code are dedicated to the 'third sex', like the pamphlet *Was soll das Volk vom dritten Geschlecht wissen?: eine Aufklärungsschrift* ('What People Should Know About the Third Sex: An Educational Text') of 1903 and the broader *Das dritte Geschlecht* ('The Third Sex') of 1908.

⁹⁴ See L. Murat, n 91 above, 229-232.

⁹⁵ See S. Freud, *Eine Kindheitserinnerung des Leonardo da Vinci* (Leipzig and Wien: Franz Deuticke, 1910), 34-35.

⁹⁶ See D.A. Miranda, 'Extermination of the *Joyas*: Gendercide in Spanish California' 16 *GLQ A Journal of Lesbian and Gay Studies*, 253-284 (2010).

⁹⁷ See S. Nanda, *Neither Man Nor Woman. The Hijras of India* (Belmont: Wadsworth Publishing Co., 2nd ed, 1999), 13-19.

subjecting them to police registration, property confiscation, and economic disruption – an extension of colonial efforts to control and normalize gender within hetero-patriarchal frameworks.⁹⁸ Behind these repressive provisions, which reflect a hetero-patriarchal conception of gender, is the Western obsession with the continuation of the reproductive line, which frames any alternative relationships as against the social order.⁹⁹

India only recently tried to disenfranchise itself from its colonial past by declaring that Hijras effectively belong to a third gender. In *National Legal Services Authority (NALSA) v Union of India*, the India Supreme Court established that under constitutional law, individuals whose identity falls outside the male/female binary, including eunuchs and Hijras, could be registered as a ‘third gender’ as a corollary of their right to dignity and nondiscrimination.¹⁰⁰ Despite this development, Hijras are still subject to social and economic marginalization as a prolonged effect of British colonial legacy.

Today, the comparative landscape offers two main models of recognition of nonbinary individuals. The first, a *binary ascriptive* model, limits gender recognition to the binary male/female; the second model, on the other hand, affirms the individual’s self-determination in allowing them to be registered as a ‘third gender’. This *elective or voluntaristic* model currently exists in Belgium, Germany, and Iceland.¹⁰¹ In both cases, the action of a third party (a ‘gatekeeper’) or a specific social behavior, eg presenting oneself ‘publicly as belonging to the declared sex’, may be required to access the sex rectification.¹⁰² Notably, the European Court of Human Rights (ECtHR) established that medical gatekeeping is not incompatible with Art 8 of the European Convention on Human Rights (ECHR), while requiring that the appearance transformation is irreversible is incompatible with Art 8.¹⁰³

In the case *Y. v France*, the ECtHR reiterated that Art 8 of the ECHR does not require domestic governments to recognize a nonbinary gender in civil status

⁹⁸ See J. Gill-Peterson, *A Short History of Trans Misogyny* (London and New York: Verso Books, 2024), 30-36.

⁹⁹ See S. O’Sullivan, ‘The Colonial Project of Gender (and Everything Else)’ 5 *Genealogy*, 67-76, 68 (2021). See also M. Lugones, ‘Heterosexualism and the Colonial/Modern Gender System’ 22 *Hypatia*, 186-209 (2007).

¹⁰⁰ See *National Legal Services Authority (NALSA) v Union of India* (2014), 5 SCC 438.

¹⁰¹ We drew this categorization from S. Osella and R. Rubio-Marín, ‘Gender Recognition at the Crossroads: Four Models and the Compass of Comparative Law’ 21 *International Journal of Constitutional Law*, 574-602, 576-578 (2023) and S. Osella, ‘When Comparative Law Walks the Path of Anthropology: The Third Gender in Europe’ 23 *German Law Journal*, 920, 922-923 (2022).

¹⁰² See, for instance, Art 61-5 no 1 of the French Civil Code (subjecting rectification to the fact that ‘he or she publicly presents himself as belonging to the declared sex; [is] known by the sex declared by those around her family, friends or professional; [and has] obtained the change of his name so that it corresponds to the declared gender’).

¹⁰³ Compare Eur. Court H.R., *Y.Y. v Turkey* App no 14793/08, Judgment of 10 March 2015, paras 105 and 112 (on the sterility requirement to access surgery authorization) with Eur. Court H.R., *A.P., Garçon and Nicot v France* App nos 79885/12, 52471/13 and 51596/13, Judgment of 6 April 2017, paras 116-118 (on the irreversibility of the appearance transformation).

registers, and domestic lawmakers have discretion as to whether, when, and how to regulate genders outside the binary.¹⁰⁴ Significantly, the court reframed the applicant's demand for recognition of a 'negative' obligation of non-interference in light of a gap in French law as a question concerning the existence of a 'positive' obligation to recognize a new gender.¹⁰⁵ For the Court, the interests at stake, signally the principle of unavailability of the status of persons, the reliability and coherence of the civil status system and, more generally, the principle of legal certainty, are too important not to trump the individual's interest in having their identity recognized.¹⁰⁶ Also,

‘particular importance should be attached to the role of the national decision-maker – and this is all the more so when, as in the present case, it is a matter that falls within the scope of a choice of society.’¹⁰⁷

An alternative outcome was certainly possible. In Austria, for example, the Constitutional Court, ruling on the constitutional scrutiny of the *Civil Status Act* (*PStG*), interpreted Art 8 of the ECHR as allowing to register the applicant with the marker ‘inter’, ‘different’, or ‘X’.¹⁰⁸ In Belgium, the Constitutional Court declared null and void, for violation of the principle of equality, Art 3 of the law of 25 June 2017

‘as it does not provide, for people whose gender identity is not binary, the possibility of changing the sex registration in their birth certificate so that this data corresponds to their gender identity’.¹⁰⁹

The nation most respectful of the individual self-determination of the nonbinaries is Germany, which has ushered in a new era of gender rights with the *Self-Determination Act* (*Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag*), in force since 1st November 2024.¹¹⁰ After years of fierce debate in courts and parliament, the law gives individuals the power to define their own gender identity.¹¹¹ Under the new rules, anyone can declare their gender - male, female, ‘*divers*’ (‘different’), or none at all (‘no mention’) - directly at the civil

¹⁰⁴ Eur. Court H.R., *Y. v France* App. no 76888/17, Judgment of 31 January 2023.

¹⁰⁵ *ibid* paras 68-70.

¹⁰⁶ *ibid* paras 77-78.

¹⁰⁷ *ibid* para 90.

¹⁰⁸ See Constitutional Court (*Verfassungsgerichtshof Österreich, VfGH*) (Austria), 15 June 2018, no G77/2018-19.

¹⁰⁹ See Constitutional Court (Belgium), 19 June 2019, no 99/2019. Art 3 of *Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets* in *Moniteur Belge*, 10 July 2017, 71465, inserted into the *Civil Code* as Art 62-*bis*, which provides for the right of ‘those who are convinced that the sex mentioned on their birth certificate does not correspond to their intimately lived gender identity’ to request the change of sex designation.

¹¹⁰ *Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag* in *Bundesgesetzblatt I*, 21 June 2024, no 206.

¹¹¹ See Federal Constitutional Court (*BVerfG*) (Germany), 10 October 2017, 1 BvR 2019/16.

registry, either orally or in writing. The process is straightforward: a person simply affirms that the chosen or removed entry best reflects their gender identity and that they understand the significance of the change, and a name change follows automatically, and further changes can be made after a one-year interval. This four-gender system was deemed necessary because the ‘no mention’ marker, which has existed for long time, ‘gives the impression that the official recognition of another gender identity is excluded and that entry into sex has not yet been clarified, that a solution has not been found or even that it has been forgotten’.¹¹² For a nonbinary, the non-mention is simply inaccurate.

V. Conclusion

This article has traced the rich and complex legal journey of nonbinary people and revealed how what is often dismissed as a ‘modern invention’ is in fact deeply rooted in historical, global and communal practices. From longstanding cosmogonic mythologies on the gender diversity of the primeval human to the more recent development of formal legal frameworks, we have seen how nonbinary individuals have inhabited leadership roles, formed resilient communities, and quietly resisted exclusion.

Legal recognition remains uneven and contested: while some jurisdictions have moved decisively toward recognising markers beyond male and female, others continue to rely entirely on binary categories. Importantly, the struggle is not just about the addition of a third marker, but about shifting the underlying logic of how law defines identity, moving from imposed categories toward self-determination. Ultimately, the legal history of nonbinaries reminds us that law can be both a site of marginalisation and transformation and that Isamberto is not alone in their fight but brings with them in the courtroom hundreds of years of history.

¹¹² *ibid* para 43. See also para 54 (‘the positive entry of a third gender could provide more clarity given that - unlike a sex voice that is left permanently blank - it does not convey the erroneous impression that the voice has been left blank inadvertently’).