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ORIGINAL ARTICLE

The Medico-Legalization of Sex in the Nineteenth-Century United States

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Abstract

The rising field of medical jurisprudence in common law from late eighteenth century has led to a rearrangement of authority and epistemic power between lay and expert witnesses, in favor of the latter. Although the law had long relied on testimony from members of the community to establish the legal fact of a person's sex, the legal procedure of fact-making started to rely instead on the opinions of doctors, surgeons, and medical practitioners. This article closely reads medical jurisprudence books, U.S. case law, and U.S. newspapers from the nineteenth century to describe this expansion of medical experts' authority to establish the legal fact of sex in vague cases. The article describes the spread of medico-legal technics of sex classification in three arenas of U.S. law: the law of marriage and divorce, cross-dressing, and defamation. The practice of legal sex classification was thus absorbed into medical expertise, and the meaning of sex in the law transformed from a socio-physical construct to a medical one. The mid-nineteenth-century decline of medical jurisprudence subsequently pushed the practice of sex classification outside the realm of law and into the jurisdiction of the medical profession, thus leaving sex classification mainly to doctors.

Among the many projects of modernization and enlightenment, the elimination of any belief in myths, "wonders of nature," and "monsters" was paramount.[1] The concept of hermaphroditism was at the heart of these efforts, which started in the late eighteenth century.[2] Borrowed from the myth about the half-male, half-female Hermaphroditus, the term implied a mixture of the sexes in the

[1] Lorraine J. Daston and Katharine Park, *Wonders and the Order of Nature, 1150–1750* (New York: Zone Books, 2001); Oren Solomon Harman, *Evolutions: Fifteen Myths that Explain Our World* (New York: Farrar, Straus and Giroux, 2018).

[2] Michel Foucault, *Ethics: Subjectivity and Truth* (New York: The New Press, 1998); Alex Sharpe, *Foucault's Monsters and the Challenge of Law* (London: Routledge, 2009).

same person: "he that is both man and woman"; "one born with two sexes, being male and female in the same person"; "a person of both sexes, or who has the parts of generation both of male and female." It was frequently used to describe people with indeterminant sex,[3] and its fall from favor paralleled a change in how sex was understood.

As Anne Fausto-Sterling describes, throughout early history, many societies saw hermaphrodites as socially disruptive and even fraudulent. With the rise of biological science as an organizing discipline in the nineteenth century, hermaphroditism was treated more as a pathology than as a sign of god's wrath. Modern biologists were fascinated with hermaphroditism and believed that understanding it could unlock knowledge about the process of embryonic sex differentiation.[4] Accordingly, throughout most of the twentieth century, medical jargon used the term to catalog different types of unusual sex development, which the medical profession attempted to erase and normalize through "corrective" surgical and hormonal treatments. Then, in the 1990s, patients began vocally resisting both the medical management of people with indeterminant sex and the medical jargon surrounding them. The term "hermaphrodite" is now often considered derogatory, so both the medical community and activists have abandoned it in favor of alternative terms, such as intersex or people with disorders (or differences) of sex development (DSD).[5] In this article, then, I will use the term "hermaphrodite" in historical contexts and will use alternative terms otherwise.

In early modern times, people with indeterminant sex posed a challenge to jurists who were tasked with deciding how to apply laws and rules that depended on a person's sex status. The central common law authority on this matter was Lord Coke's explanation in *Institutes of the Laws of England* (1628), which stated that "An hermaphrodite may purchase according to that sexe which prevaileth."[6] As a result, when courts had to classify people with indeterminate sex as either male or female for the purpose of solving a legal dispute or criminal accusation, they did so by applying

[3] *Encyclopedia Britannica Online*, s.v. "Hermaphroditus," accessed December 26, 2021, https://www.britannica.com/topic/Hermaphroditus; Thomas Elyot, *The Dictionary of syr Thomas Eliot Knight* (London: Thomas Bertheleti, 1538); Ephraim Chambers, *Cyclopaedia* (London: James and John Knapton, 1728); Thomas Jefferys, *A New and Complete Dictionary of Arts and Sciences All the Branches of Useful Knowledge* (London: W. Owen, 1754), 1611.

[4] Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York, NY: Basic Books, 2000), 32–38. A revised edition of the book has recently been issued. See Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York, NY: Basic Books, 2020).

[5] "Is a person who is intersex a hermaphrodite?," Intersex Society of North America (ISNA), accessed January 8, 2022, https://isna.org/faq/hermaphrodite/. Notably, intersex and DSD are also controversial and politically loaded terms. See, Elizabeth Reis, *Bodies in Doubt: An American History of Intersex* (Baltimore: Johns Hopkins University Press, 2021), 170–77.

[6] Henry De Bracton, *On the Laws and Customs of England*, trans. Samuel E. Throne (Cambridge, MA: Harvard University Press, 1968), 29–41; Edward Coke, *The First Part of the Institutes of the Laws of England; or, A Commentary upon Littleton* (London: J. & W. T. Clarke, 1853).

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then-commonsensical understandings of those sexes.[7] In this model, judicial fact finders (i.e., justices or juries) would see the evidence and listen to the testimonies of witnesses, such as acquaintances, employers, family members, and sometimes the individuals in question. Such testimonies and evidence could, and often did, point to differing conclusions.[8] Eventually, judicial fact finders determined the sex of the person based on their own personal gauge of femininity and masculinity.

Throughout the nineteenth century, however, persistent efforts by philosophers and scientists to eliminate so-called myths transformed the understanding of hermaphrodites from an established legal category into an anachronistic fable. Asserting the nonexistence of hermaphrodites and advocating for medical classification to their "true sex" became a token of progress in learned circles, including those within the legal profession.[9] A major pathway by which the early modern understanding of hermaphroditism and sex spread into law was the field of medical jurisprudence, which was meant to educate experts regarding how to testify on matters of medical or scientific fact in judicial arenas.

By conducting a close reading of British and American medical jurisprudence books from the late-eighteenth to late-nineteenth centuries, this article outlines several principles common to chapters dealing with "doubtful sex." Such books forcefully asserted the nonexistence of hermaphrodites and armed medical experts with new theories and classification schemes to help classify hermaphrodites according to their "true sex." Importantly, these chapters elevated the opinions of doctors and surgeons above those of all others. As a result, the knowledge production mechanisms offered in medical jurisprudence books, I argue, gradually transformed legal sex from a commonsense determination into a medical or scientific fact.

Specifically, this article examines how the implementation of the new epistemology of sex and hermaphroditism affected the legal adjudication of hermaphrodites in the nineteenth-century United States through reading U.S. case law and newspaper reports from that time. My focus on the effect of medical jurisprudence over the legal adjudication of people with indeterminant sex tells a largely unexplored story in the literature of U.S. intersex history. The article focuses on three major sites of such adjudication: marriage and divorce; gender crossing; and slander and defamation. With most cases taking place in the second half of the nineteenth century, a time of major transformation that challenged the political hegemony of white men, the adjudication of hermaphrodites also reflected a medico-legal adjudication of the boundaries of gender, race, family, and respectability.

[7] Maayan Sudai, "Sex Ambiguity in Early Modern Common Law (1629–1787)," *Law & Social Inquiry* 47, no. 2 (2021): 478–513.

[8] Particularly telling is the example of Thomas/Thomasine Hall from Virginia (1629). See, Kathleen Brown, "'Changed...Into the Fashion of Man': The Politics of Sexual Difference in a Seventeenth-Century Anglo-American Settlement," *Journal of the History of Sexuality* 6 (1995): 171.

[9] Sudai, "Sex Ambiguity," 494. This sentiment is represented in James Parsons, *A Mechanical and Critical Enquiry into the Nature of Hermaphrodites* (London: J. Walthoe, 1741), vi–x.

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Ultimately, this article shows that the field of medical jurisprudence served as a meeting point where law and medicine together reproduced sex and gender as modern medical facts. Scholars such as Elizabeth Reis, Anne Fausto-Sterling, and others have shown that doctors and surgeons took the lead in the classification process in colonial America and the United States. Indeed, before the nineteenth century, doctors served as occasional validators of hermaphrodites and as helpful figures in settling a person's sex, but they were not the leading or sole authorities.[10] Gradually, however, as this article demonstrates, the indoctrination of expert testimony into the developing adversarial system and the emerging field of medical jurisprudence pushed the legal meaning of sex closer to the epistemic category of scientific or medical fact.

Recent decades have brought a change in direction, as many sex/gender/sexual minorities challenge expert-based medical classification in a range of administrative and legal arenas. In response, dominant segments of the medical profession are now withdrawing from the legal and administrative process of sex classification.[11] Likewise, some states and legislators around the world are transforming to a self-determination mechanism by handing the authority over such classification to individuals.[12] This article provides critical historical context for these developments by tracing a primary channel through which the epistemic authority of legal classification was handed over to doctors (via evidentiary procedures and doctrines) in the first place. It sheds light on a largely unexamined aspect of the medico-legal relationship: the power to change meaning and shift the boundaries of professional jurisdiction. Finally, it underscores the role of law as a vehicle for medicalization and epistemic change—and, conversely, the role that the law can have in helping to both de-medicalize the practice of classification and diversify the set of epistemic authorities that can be consulted.

The Emergence of Doubtful Sex Guidelines (1780–1850)

The development of modern evidence law from the mid-eighteenth century onward[13] drove experts to testify in common law courts as partisan witnesses. Two important eighteenth-century changes fostered this development: the first was the Industrial Revolution, which generated a strong need for mechanical and scientific knowledge in court cases addressing technical issues.[14] The

[10] See Sudai, "Sex Ambiguity," 485–89.

[11] "Report 10 of The Board of Trustees," American Medical Association, 12–15, accessed November 24, 2021, https://www.ama-assn.org/system/files/2021-05/j21-handbook-addendum-ref-cmte-d.pdf.

[12] Ido Katri, "Sex Reclassification for Trans and Gender Nonconforming People: From the Medicalized Body to the Privatized Self," *Oxford Research Encyclopedia of Politics* (2019), accessed December 25, 2021, https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1229.

[13] Modern evidence law doctrine was organized into formal treaties in the mid-eighteenth century. See, e.g., Geoffrey Gilbert, *The Law of Evidence* (London: Catherine Linot, 1754); Henry Bathurst, *The Theory of Evidence* (Dublin: Sarah Cotter, 1761); Francis Buller, *Introduction to the Law Relative to Trials at Nisi Prius* (London: W. Strahan and M. Woodfall, 1785).

[14] Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge, MA: Harvard University Press, 2004), 53.

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second was the development of the adversarial system, which turned judicial fact finders (e.g., jury and judges) into neutral and passive figures and moved the investigative role to the parties themselves and to their lawyers.[15] By the end of the eighteenth century, lawyers (and not judges) took over the mission of evidence production by examining witnesses and developing cross-examination techniques.[16] The adversarial system contributed to an increased reliance on testimonial knowledge, and it allowed parties to call witnesses—and experts—of their own.[17]

In this system, another important principle regulating the content of such witness testimonies was the opinion doctrine. This doctrine required witnesses to provide *only* their knowledge of the facts of the matter and to refrain from sharing conclusions or inferences based on those facts.[18] Such emphasis on the distinction between fact and opinion also created a distinction between the labor of lay witnesses and that of experts: at least in theory, lay testimonies were constrained to matters of fact, whereas experts were privileged to give their opinions based on their general knowledge, even when they had no direct experience of the specific facts of the case.[19]

The resulting need for reliable expert opinions engendered the field of *medical jurisprudence*, which deals with the application of medicine to law. For early writers in this field, the challenge was to guide expert witnesses in providing competent opinions while remaining loyal to the ideals of scientific civility and methodology.[20] Although such medico-legal science had already been an established field in continental Europe, it arrived in England and the United States almost two centuries later.[21] During the first half of the nineteenth century, U.S. physicians were enthusiastic about the field's potential for nation building and professional development, but by the end of the century, the field declined and almost disappeared from medical schools.[22] In the heyday of the field, however, U.S. physicians wrote and translated medical jurisprudence books, which included guidelines for giving testimony on a variety of common subjects.[23] The first of these books was written in 1823 by physician Theodric Romeyn

[15] Stephan Landsman, "A Brief Survey of the Development of the Adversary System," *Ohio State Law Journal* 44 (1983): 713.

[16] Golan, *Laws of Men*, 34–36.

[17] Landsman, "A Brief Survey," 728.

[18] Tal Golan, "Revisiting the History of Scientific Expert Testimony," *Brooklyn Law Review* 73 (2008): 884–85.

[19] Golan "Revisiting the History," 884–85.

[20] Samuel Farr, *Elements of Medical Jurisprudence: or, A Succinct and Compendious Description of Such Tokens in the Human Body as Are Requisite to Determine the Judgment of a Coroner, and of Courts of Law, in Cases of Divorce, Rape, Murder* (London: J. Callow, 1788).

[21] Catherine Crawford, "Legalizing Medicine: Early Modern Legal Systems and the Growth of Medico-legal Knowledge," *Legal Medicine in History* (Cambridge, UK: Cambridge University Press, 1994), 89–116.

[22] James C. Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America* (Oxford: Oxford University Press, 1993), xiv–xv.

[23] Mohr, *Doctors and the Law*, 5; See, e.g., Francis Wharton, *Wharton and Stille's Medical Jurisprudence* (Philadelphia: Kay & Brother, 1873); Amos Dean, *Principles of Medical Jurisprudence: Designed for the Professions of Law and Medicine* (New York: Banks & Brothers, 1866).

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Beck and was (also) called *Elements of Medical Jurisprudence*.[24] It was published in twelve consecutive editions[25] and, according to James Mohr, became the most popular handbook for lawyers and judges on forensic issues cited in American courts.[26]

The field of medical jurisprudence produced a hybrid type of expert: physicians who were both healers in their medical capacity and fact finders in their judicial capacity. Such experts began to provide opinions on matters that were deemed related to medical knowledge and that were recurring subjects of investigation in judicial settings, such as "the danger of wounds," "child murder," "poisoning," "procured abortion," and "concealed pregnancy"[27]—and, of course, sex classification. Given that the sex of a person had significant legal implications in terms of property, inheritance, political rights, criminal responsibility, and so forth, the issue of sex classification in ambiguous cases was frequently included in the field's curricula and texts.

The developing science of sex classification was part of a larger project of scientific classification in nineteenth-century Europe and United States. As religious belief declined and social instability prevailed, reformists and conservatives alike turned to social theories about human differences as the foundation for social and political action.[28] Within the nineteenth-century scientific project of differentiation, sex and race were two prominent themes—race was at the heart of political struggles of abolitionist movements pushing for emancipation, and sex was at the heart of women's movements claiming rights and equal political status.[29] In this context, differences between races and sexes were used to justify or rebut social hierarchies. The elimination of "hermaphrodites" as a concept, and their classification to their "true sex," was therefore not just an act of fact finding but also one of social construction of boundaries between groups and categories.

To provide sex-classification guidelines for experts testifying in courts or in other legal and political settings, medical jurisprudence books included chapters titled "Doubtful Sex." Medical experts developed their theories, exchanged notes on case studies, and settled their expertise in these guidelines, which included repeating principles that expressed the new theory of human sex, as we will see in the next section.

Principles of "Doubtful Sex" Classification in Medical Jurisprudence Guidelines

Early modern theories of sex that developed in mid-eighteenth-century philosophical and medical circles shaped the medico-legal treatment of hermaphroditism in the nineteenth century. These theories focused on creating

[24] Theodric Romeyn Beck, *Elements of Medical Jurisprudence* (London: John Anderson, 1823).

[25] Beck, *Elements of Medical Jurisprudence*. Editions were published between 1823 and 1863.

[26] Mohr, *Doctors and the Law*, 26.

[27] Mohr, *Doctors and the Law*, 74.

[28] Cynthia Eagle Russett, *Sexual Science: The Victorian Construction of Womanhood* (Cambridge, MA: Harvard University Press, 1989), 6.

[29] Russett, *Sexual Science*, 7.

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a definite classification mechanism between maleness and femaleness that could help sort out ambiguous cases. Sex classification guidelines translated these theories into presumably clear principles and practical instructions for medical experts, who were often called upon to give their opinions on sex classifications. These "doubtful sex guidelines" offered principles that experts could use to classify cases of indeterminate sex. The following sections identify the hallmarks of these texts and their classification schemes.

Denial of hermaphroditism

From the very beginning, medical jurisprudence books prioritized eliminating the concept of hermaphrodism, in the "ancient" or "strict" sense of the term. Doubtful sex guidelines consistently portrayed the concept as a myth that belonged to ancient history. Farr's British *Elements of Medical Jurisprudence* (1788), for example, opened with the mid-eighteenth-century sentiment that hermaphrodites did not exist: "A perfect hermaphrodite or a being partaking of the distinguishing marks of both sexes, with a power of enjoyment from each, is not believed by anyone ever to have existed."[30] U.S. medical jurisprudence books repeated this assertion: the mid-nineteenth-century *Cyclopaedia of Practical Medicine*, printed in Philadelphia, claims that "in modern times it is admitted that no such phenomenon ever existed."[31] Similarly, Beck explains that "the ancients have several fables on the idea of the union of the qualities of the males and females in the same individual,"[32] and so on. Such a statement of denial was a cornerstone of every medical jurisprudence book reference to hermaphrodites.

Sex classification theories and mechanisms

After denying the existence of hermaphroditism in the ancient sense, authors moved on to suggest possible classification systems based on reported case studies and dominant theories of sex classification from the fields of anatomy and teratology.[33] In the first American medical jurisprudence book (published in 1823),[34] Beck presented the theory of analogous organs, as presented by Dr. Ackermann from Edinburgh in 1807.[35] According to the theory, male and female reproductive organs corresponded to each other and were therefore

[30] Farr, *Elements of Medical Jurisprudence*, 13.

[31] John Forbes et al., *The Cyclopaedia of Practical Medicine: Comprising Treatises on the Nature and Treatment of Diseases, Materia Medica and Therapeutics, Medical Jurisprudence, etc.* (Philadelphia: Lea and Blanchard, 1845), 153.

[32] Theodric Romeyn Beck and John B. Beck, *Elements of Medical Jurisprudence* (Philadelphia: Little, 1850), 127.

[33] According to Dreger and Fausto-Sterling, most influential were the writings of biologist Isidore Geoffroy Saint-Hilaire and Dr. James Young Simpson. See, Fausto-Sterling, *Sexing the Body*, 36–39; Alice Domurat Dreger, *Hermaphrodites and the Medical Invention of Sex* (Cambridge, MA: Harvard University Press, 2009), 33.

[34] Theodric Romeyn Beck, *Elements of Medical Jurisprudence* (Albany: Webster and Skinner, 1823).

[35] Beck, *Elements of Medical Jurisprudence*, 65.

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analogous: "the penis to the clitoris, the scrotum to the labia, the testes to the ovaria, and the prostate to the uterus; and it farther appears, that of these analogous organs, no two were ever found together in the same individual."[36] The theory's starting point was firmly grounded in the idea of genital homologies, part of the one-sex model presented in Thomas Laquer's book *Making Sex: Body and Gender from the Greeks to Freud*, according to which female bodies were "underdeveloped male bodies."[37] However, Beck applied the analogous organs theory to say that there cannot be people with double sets of generative organs and thus aimed to eliminate the ancient idea of hermaphrodites and solve all cases of so-called hermaphrodites presented thus far with strong certainty.[38]

Building on the theory of analogous organs and on other theories that seemed to offer clarity on sex, most guidelines suggested that ambiguous sex should be classified into three main categories: males with abnormalities, females with abnormalities.[39] Those who could not be sorted into these categories were placed under the umbrella of so-called hermaphroditism—but only temporarily, as they would soon thereafter be classified more precisely.

Continuing the mid-eighteenth-century sentiment that aimed to rebut the existence of "perfect" hermaphrodites, early-nineteenth-century medical jurisprudence treatises distinguished between "perfect" and "imperfect" hermaphrodites, suggesting that the category of "perfect" was likely false.[40] According to Beck, even the most difficult cases should eventually be classified as either male or female after proper examination.[41] Later in the century, building on the works of French natural historian Isidore Geoffroy Saint-Hilaire from the

[36] Beck, *Elements of Medical Jurisprudence*, 64 (quoting a report on the work of Jacob Ackermann, "Infantis Androgyni Historia et Ichnographia," *Edinburgh Medical and Surgical Journal* 3 [1807]: 206). Notably, the authors of the report refer to Ackermann's theory of generation with ridicule and humor rather than as a novel and instructive theory. See Ackermann, "Infantis Androgyni Historia," 210–11. The homologous doctrine for sex differentiation was promoted by several biologists and anatomists in the late eighteenth to early nineteenth centuries. See, Ross Brooks, "One «Both» Sex«es»: Observations, Suppositions, and Airy Speculations on Fetal Sex Anatomy in British Scientific Literature, 1794–1871," *Journal of the History of Medicine and Allied Sciences* 70 (2015): 34.

[37] Brooks, "One «Both» Sex«es»," 37–44. Laquer's thesis about the hegemony of the one-sex model has been continuously resisted by scholars. A powerful critique has recently been made by Katherine Park, who offers a full narrative of the theory from Galen to early-modern European surgeons and demonstrates that the one-sex model was not dominant in premodern times but rather prospered in specific circles and contexts. See Katharine Park, "The Myth of the 'One-Sex' Body," *Isis* 114 (2023): 150.

[38] For example, using some of Ackermann's language, he mentions that it is "no doubt correct" that a part deemed a uterus is actually a malformed prostate, inferring that "the proof rises almost to certainty" that the case should be classified to the male sex. See Beck, *Elements of Medical Jurisprudence*, 65.

[39] Beck, *Elements of Medical Jurisprudence*, 65–67.

[40] Thomas Cooper, *Tracts on Medical Jurisprudence: Including Farr's Elements of Medical Jurisprudence, Dease's Remarks on Medical Jurisprudence, Male's Epitome of Juridical or Forensic Medicine, and Haslam's Treatise on Insanity: With a Preface, Notes, and a Digest of the Law Relating to Insanity and Nuisance* (Philadelphia: James Webster, 1819), 12–13.

[41] Beck, *Elements of Medical Jurisprudence*, 61.

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early 1830s and Scottish obstetrician James Young Simpson from 1839,[42] doubtful sex guidelines kept fragmenting the category of hermaphrodites into subcategories and distinctions, always aiming to whittle down the group of "true" hermaphrodites in favor of classifications such as spurious/lateral/transverse hermaphrodites.[43] Thus, the dominant paradigm (i.e., the one that medical practitioners invoked and that these guidelines expressed) was that medical practitioners could classify even rare cases of "true" hermaphrodites through proficient examination and available theories (Figure 1).[44]

Method of classification: "genitals plus"

Medical jurisprudence textbooks recommended classifying people based on their "organs of generation," usually along with another secondary sex characteristic. Farr's 1788 *Elements*, for example, called attention to the structure of the scrotum, penis, clitoris, and breasts, and to the growth of a beard.[45] Likewise, in 1823, Beck advised those giving their opinions in "contested cases" to attend to "relevant" circumstances: specifically, femininity was indicated by the size of the clitoris, the opening of the vagina, and the absence of testicles, but also by "the smoothness and softness" of the body, the absence of a beard, existence of menstrual discharge, and more.[46] Masculinity was indicated by the fissure in the perineum, size of the penis, and presence of testes, but also by "the desires excited by the presence of a women," the "greater breadth of shoulders than of the pelvis and hips," and more.[47] Beck also noted that newborn children could be difficult to classify and might require a "close and accurate" examination.[48]

Physicians were expected to examine their subjects carefully before reaching any conclusions.[49] Still, despite the focus on sexual and reproductive organs, physicians used other factors in their decisions when physical examination was not conclusive. According to Elizabeth Reis, doctors focused first on visible markers such as the penis, clitoris, vagina, and menstruation, but they turned to social indicators to validate their determination.[50] That is, although sex organs were the most important factor for physicians, they were not always sufficient to determine a person's sex.[51]

[42] Encyclopedia Britannica, s.v. "Sir James Young Simpson, 1st Baronet, Scottish physician," accessed July 28, 2021, https://www.britannica.com/biography/Sir-James-Young-Simpson-1st-Baronet. The work was published in 1839 and reprinted in James Young Simpson, *The Obstetric Memoirs and Contributions of James Y. Simpson* (Philadelphia, Lippincott, 1855), 203.

[43] Fausto-Sterling, *Sexing the Body*, 37–39.

[44] Dreger, *Hermaphrodites*, 109; Medical Professors of Worthington College, "Hermaphrodites," *Western Medical Reformer* 42, no. 4 (1882): 193.

[45] Farr, *Elements of Medical Jurisprudence*, 21.

[46] Beck, *Elements of Medical Jurisprudence*, 71.

[47] Beck, *Elements of Medical Jurisprudence*, 71.

[48] Beck, *Elements of Medical Jurisprudence*, 72.

[49] Forbes et al., *The Cyclopaedia of Practical Medicine*, 159.

[50] Reis, *Bodies in Doubt*, 54.

[51] The case of 23-year-old Levi Suydam tells of the inconclusiveness of physical examinations and the reliance on social signs and gender stereotypes in some cases of sex classification. See,

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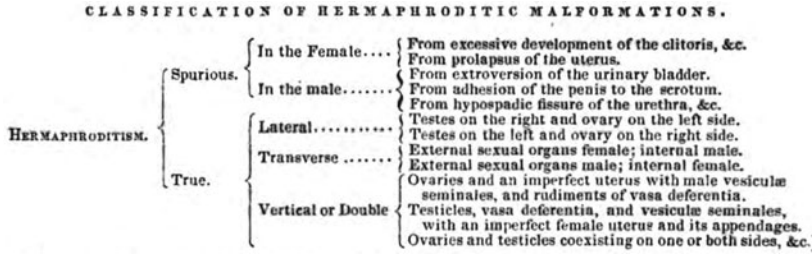

Figure 1. Classification of hermaphroditic malformations. *The Cyclopaedia of practical medicine: comprising treatises on the nature and treatment of diseases, materia medica and therapeutics, medical jurisprudence, and so on* (John Forbes, Alexander Tweedie, John Conolly, eds., Philadelphia: Lea and Blanchard, 1845), 154. *Credit:* Public domain, Google digitized; courtesy of HathiTrust, https://hdl.handle.net/2027/njp.32101023642810?urlappend=%3Bseq=150%3Bownerid=27021597768332964-156.

Medical jurisprudence books, then, treated social characteristics such as sexual desires, general appearance, and impressions as medical evidence—but only insofar as they supported conclusions arrived at using anatomical evidence. In cases where the two contradicted each other, social cues were easily dispensable.[52]

The making of sex into a medical fact

One significant consequence of treating physicians and surgeons as the most competent and proficient collectors and evaluators of evidence related to sex was that these texts (and, thus, medical jurisprudence in general) crowded out both lay opinion and self-knowledge. As lawyer and professor of medical jurisprudence Amos Dean noted, "It is the more incumbent on the medical practitioner to note every minute fact, with regard to births of doubtful sex, particularly when you reflect on the misrepresentations which ignorant or interested persons may make on such a subject."[53] Both the impressions of non-expert others and the self-testimonies of supposed hermaphrodites were highly suspect and seen as distorting.[54] Experts assumed that they themselves were objective and that non-experts were likely not.

James Wm. Barry, "Case of Doubtful Sex," *The Medical Examiner and Record of Medical Science*, 3 (1847): 308. This case was often cited in medical jurisprudence books and texts as justification for conducting a thorough examination and as a reminder of the consequences of medical mistakes. See, e.g., Arthur C. Nelson, "Medical Jurisprudence," *Nelson's American Lancet* 2 (1851): 121; Francis Wharton and Moreton Stillé, *A Treatise on Medical Jurisprudence* (Philadelphia: Kay & Brothe, 1860), 392; Alfred Swaine Taylor, *A Manual of Medical Jurisprudence* (London: J. & A. Churchill, 1874), 625.

[52] Marshall Davis Ewell, *A Manual of Medical Jurisprudence for the Use of Students at Law and of Medicine* (Boston: Little, Brown, and Company, 1887), 177. As demonstrated by Alice Dreger, toward the last quarter of the nineteenth century, gonads became the most important indicators of sex in Europe; Dreger, *Hermaphrodites*, 139.

[53] Amos Dean, "Medical Jurisprudence, On the Laws Relating to the Birth of Children, Tenancy by The Curtesy, As Affected by The Cesarian Operation, And by Monsters, & C.-Order of Births," *The Legal Observer* (1830–1831): 346.

[54] Forbes et al., *The Cyclopaedia of Practical Medicine*, 159.

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This corrosion of non-medical authority resulted in the transformation of sex from a social fact into a black-and-white medical fact. Indeed, medical jurisprudence books elevated medical *opinions* nearly to the status of facts, and medical jurors saw such "medical evidence" as the channel to truth.[55] In the context of sex classification, then, medical opinions were not valued in terms of probability or predominance but rather were evaluated as either accurate or false.[56] By 1850, doubtful sex guidelines portrayed sex classification as a straightforward task for medical examiners, though only in adult cases: "after that period [puberty], *no erroneous conclusions* can be formed by properly qualified examiners."[57] Thus, except in the case of children, the field treated medical sex classification not as just "an opinion" but rather as a strong approximation of truth.[58]

Following this paradigm, in which every hermaphrodite could be classified to one of exactly two sexes, the meaning of "sex" also shifted. Sex-classification guidelines and medical accounts now seemed to consider sex to be an objective truth that existed in the world, as demonstrated by their growing use of the expressions "real" or "true" sex.[59] This language was used in the *Cyclopaedia of Practical Medicine*, which detailed the "Means of ascertaining the *real sex* of a supposed hermaphrodite"[60]; in Wharton's treatise of medical jurisprudence, which defined its practical question as "how far it is possible to discriminate the *true sex* of a living person"[61]; and in a manual stating that "with proper care and attention it is always easy [...] to discover the *true sex* in the different varieties of false hermaphroditism."[62] This language surrounding sex—specifically, describing it as either true or false—strengthened professional authority over such classification and suppressed the knowledge that non-experts held about sex.

Legal implications of hermaphroditism

Lastly, authors on the subject of hermaphrodites in medical jurisprudence texts discussed the most pressing legal issues concerning doubtful sex, including, most notably, the capacity to inherit. Guidelines mentioned the old English rule saying that a hermaphrodite may inherit according to "the sex which prevails,"[63] and they stressed the importance of recording the details of birth, including the sex, condition, and shape of the first born, in order to answer such questions.[64] Another issue was sterility and impotence, which could affect judicial decisions regarding marriage and divorce.[65]

[55] Theodric Romeyn Beck, "Annual Address" (Annual address delivered before the Medical Society of the State of New-York, February 6, 1828).

[56] See, e.g., Beck, *Elements of Medical Jurisprudence*, 71. [my emphasis, M.S.]

[57] Nelson, "Medical Jurisprudence," 121. [my emphasis, M.S.]

[58] Francis Wharton, *Treatise on Medical Jurisprudence* (Philadelphia: Kay & Brother, 1855), 311.

[59] Dreger, *Hermaphrodites*, 29; Reis, *Bodies in Doubt*, 29.

[60] See, e.g., Forbes et al., *The Cyclopaedia of Practical Medicine*, 159. [my emphasis, M.S.]

[61] Wharton, *Treatise on Medical Jurisprudence*, 312. [my emphasis, M.S.]

[62] Ewell, *A Manual of Medical Jurisprudence*, 172. [my emphasis, M.S.]

[63] Beck, *Elements of Medical Jurisprudence*, 72; Beck and Beck, *Elements of Medical Jurisprudence*, 145; Taylor, *A Manual of Medical Jurisprudence*, 626.

[64] Taylor, *A Manual of Medical Jurisprudence*, 573.

[65] Farr, *Elements of Medical Jurisprudence*, 14.

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The issue of hermaphroditism arose in other circumstances as well. The next section will discuss its adjudication in several prominent areas in order to examine the extent to which sex classification guidelines were accepted and implemented in practice.

Judicial Reception of the Principles Underlying Doubtful Sex Guidelines

Nineteenth-century adjudication of hermaphroditism increasingly depended on medical opinions in legal contexts, and on the principles underlying doubtful sex guidelines. In addition to marriage and divorce, two legal areas stood out in nineteenth-century American case law and newspapers as fruitful sites of medico-legal classification of hermaphrodites: gender crossing and defamation. In each of these three arenas, the traditional legal model of sex classification ("the sex which prevails") was supplanted by the new expert opinion-based medical model of sex classification.

Marriage and divorce: the hermaphrodite sword

According to traditional English divorce law, which respected canon law, ecclesiastical courts could issue two kinds of decree to those who wished to divorce: (1) divorce from bed and board (*a mensa et thoro*) and (2) divorce from the bonds of marriage, or an absolute dissolution (*a vinculo matrimonii*) with permission to remarry. The latter was permitted in limited circumstances, such as when the marriage was found to be invalid because of age, fraud, mental incompetence, or sexual impotence.[66] In the English colonies before the American Revolution, such absolute divorce was available only based on "fault grounds"—mostly adultery, desertion, or bigamy, but also impotence.[67] After the Revolution, state legislators begun passing divorce laws that defined the circumstances or causes for divorce.[68] Southern states were slower than others to adopt such laws, however by the mid-nineteenth century, most of them allowed divorce on the grounds of impotence.[69]

In the context of divorce, hermaphroditism was sometimes conflated with impotence. Medical dictionaries of the time related impotence to sterility, and the former was defined as an "incapacity of sexual intercourse, and inability of procreation" resulting from various causes, including malformations of the generative organs.[70] Because hermaphroditism was considered to reveal

[66] Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850–1895* (Princeton, NJ: Princeton University Press, 1989), 36.

[67] Hendrik Hartog, "Marital Exits and Marital Expectations in Nineteenth Century America," *The Georgetown Law Journal* 80, no. 1 (1991): 114–15; Paul R. Amato and Shelley Irving, "Historical Trends in Divorce in the United States," in *Handbook of Divorce and Relationship Dissolution*, eds. Mark A. Fine and John H. Harvey (Mahwah, NJ: Lawrence Erlbaum, 2006), 43.

[68] Amato and Irving, *Historical Trends*, 45; Hartog, "Marital Exits," 114–15.

[69] Amato and Irving, *Historical Trends*, 45; Robert L. Griswold, "Law, Sex, Cruelty, and Divorce in Victorian America, 1840–1900," *American Quarterly* 38 (1986): 723. Kempf v. Kempf, 34 Mo. 211, 1863 WL 2986 (1863).

[70] James Copland and Charles A. Lee, *A Dictionary of Practical Medicine: Comprising General Pathology, the Nature and Treatment of Diseases ...With Numerous Prescriptions...a Classification of Diseases...a Copious*

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a physical incapacity to consummate a marriage—that is, impotence—accusations of it offered an otherwise elusive path to absolute divorce. As a result, husbands and wives seeking grounds for divorce in England,[71] Colonial America,[72] and Continental Europe[73] commonly accused their partners of hermaphroditism. It was also used as a defense claim by husbands who deserted their wives: if hermaphrodites could not enter the binding contract of marriage, as argued in case law,[74] then husbands' financial commitments to their wives were likewise void if those wives were found to be hermaphrodites.

Judicial inspections of impotence to determine the validity of marriages date back to premodern times. In English church courts, "honest women" physically examined husbands for their virility, and a jury of matrons examined wives to determine whether a marriage had been consummated.[75] Starting in early modern times, however, the legal context considered impotence to be a medical problem that doctors or midwives diagnosed by inspecting the genitals of the person in question.[76] By the nineteenth century, the court often referred accusations of impotence to court-appointed physicians, who were expected to help determine whether they were true. Medical evidence offered by such experts was essential if these divorce cases were to succeed: in 1879, a New Jersey court denied a husband's claim that his wife was a hermaphrodite because, as the wife claimed, there was no evidence of "physical defects" beyond her husband's statement.[77] In one often-cited 1878 case, *Peipho v. Peipho*, a husband claimed that his wife was a hermaphrodite because "when sexually excited no male could have sexual intercourse with her."[78] Both the Circuit court and the Court of Appeals denied his bill, however, holding that the husband had failed to show that the claimed malformation constituted impotency.[79] A different husband, who was accused of desertation, presented as a defense certificates from physicians in Poland and Germany stating that his wife was a hermaphrodite.[80]

Although doctors and physicians had been involved in determining impotency in such cases even before the doctrinal acceptance of expert testimony in common law, divorce cases from the nineteenth century demonstrate that medical opinions were solicited by both sides, and that such opinions were

Bibliography, With References; and an Appendix of Approved Formulae... 369–371 (1860), accessed November 17, 2022, https://catalog.hathitrust.org/Record/002071417.

[71] See, e.g., "Wednesday and Thursday's Posts," *The Leeds Intelligencer*, June 25, 1771.

[72] Reis, *Bodies in Doubt*, 10.

[73] Geertje Mak, *Doubting Sex: Inscriptions, Bodies and Selves in Nineteenth-Century Hermaphrodite Case Histories* (New York: Manchester University Press, 2013), 34.

[74] State v. Barefoot, 31 S.C.L (2 Rich.) 209, 227 (Ct. App. 1845).

[75] Angus McLaren, *Impotence: A Cultural History* (Chicago: University of Chicago Press, 2007), 25–37; Jacqueline Murray, "On the Origins and Role of 'Wise Women' in Causes for Annulment on the Grounds of Male Impotence," *Journal of Medieval History* 16 (1990): 235. See, New Plymouth Colony et al., *Records of the Colony of New Plymouth, in New England: Court orders 1633–1691* (Massachusetts: W. White, 1856), 191; this case is also discussed by Reis, *Bodies in Doubt*, 11–12.

[76] McLaren, *Impotence*, 73–78.

[77] Van Arsdalen v. Van Arsdalen, 30 N.J Eq. 359, 362–363 (N.J. Ch. 1879).

[78] Peipho v. Peipho, 88 Ill. 438, 439 (1878).

[79] Peipho v. Peipho, 438, 439.

[80] "A Peculiar Case," *The Anaconda Standard*, December 25, 1891.

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incorporated into divorce jurisprudence. In the 1879 case *Merrill v. Merrill*, a husband was able to secure a divorce by alleging that his wife was impotent. His supporting evidence was mostly circumstantial: she had refused to have sex with him for 10 years without explaining why, she had admitted to a friend that she "could not have connection with any man," and she "refused to submit to an examination as to her physical capacity" by "competent physicians" brought by the husband.[81] When the case was reported in the *Albany Law Journal* two years later, the author stated that, although such inferential evidence makes a "rather strong case" to prove a wife's incapacity, she could rebut it by submitting to physical examination "disclosing no incurable physiological obstacle."[82] Thus, although medical examination was not systematically formalized in divorce cases, it began to emerge as an essential tool to fulfill the burden of proof of impotence by either side.

Doctors focused not only on whether a patient could perform their matrimonial duties,[83] as in the aforementioned cases, but also on the *validity* of such marriages.[84] After all, if after examination the patient was found to belong to the other sex, then their marriage was not lawful. In the 1899 work of Franciszek Neugebauer, published in the *N.Y. Medical Journal*, the author reported collecting fifty cases of divorce granted on grounds of "an error in the sex of one of the contracting parties." In forty-six out of the fifty, "a man had married a man." Although such a "mistake" in sex seems implausible, "the confirmation of the genitals of some of these hermaphrodites was such as to deceive medical men."[85]

Despite the ambiguity of boundary cases, nineteenth-century theories of sex led physicians to describe classifications of individuals with indeterminate sex in absolute terms, such as "right," "correct," and "true," or "wrong," "error," and "mistake." For example, Dr. Webber reported serving as a medical expert for a case in which a husband asked to annul his marriage because a different doctor had determined that his wife, Ms. Wayne, was a hermaphrodite. Webber opened his report by complaining that such superficial examinations fail to assign patients to their "true position."[86] Webber himself, along with two other doctors, examined Ms. Wayne and concluded that she was, in fact, a woman. He and his colleague Dr. Fletcher hypothesized that the earlier physician had confused a tumor with a testicle, did not have "any doubts" that she could procreate, and were willing to say so "in open court." And the case was indeed discussed in court: after the physician for the husband's case "swore positively that [the] woman was a hermaphrodite and that she must of

[81] Merill v. Merill, 126 Mass. 228 (1879).

[82] 21 ALB. L.J. 224 (1880).

[83] Gregory, "Tumor of Sciatic Nerve—Fracture of Infra-Maxillary in a Child Two Years Old—Removal of the Ramus of the Jaw—Case of Hermaphrodism—Ligature of the Carotid Artery—Two Successful Cases of Ovariotomy," *Saint Louis Medical and Surgical Journal* 38 (1880): 545.

[84] L. H. Luce and W. H. Luce, "Three Cases of Hypospadias in which the Sex was Undeterminable Until Puberty," *The American Naturalist* 24 (1890): 1017.

[85] Franz Von Neugebauer, "Ill-assorted Marriages of Hermaphrodite," *New York Medical Journal* 144 (1899): 598–99.

[86] N. W. Webber, "A Case of Hermaphrodism," *The Detroit Clinic* 1 (1882): 141.

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necessity be sterile," Webber and Fletcher "swore to the directly opposite, giving a very decided opinion that this growth was a fatty tumor and that by a slight operation it could be removed." The junior council for the husband requested that a jury of doctors be appointed to decide which of the opinions should prevail, but the case was ultimately dismissed. When Webber finally removed the aforementioned tumor, he happily reported that it was not testicle but rather a small lobe of fat, "clear and unmistakable,"[87] and added that the wife gave birth a year and a half later.

The jurisprudence of divorce for people with unusual genitalia demonstrates that although physician's examination was common even before the indoctrination of expert opinions, its role changed in the nineteenth century: whereas they had once been hired by the court as objective experts, they were now hired by the sides, and their opinions were essential for proving impotency or sterility. Physicians were thus immersed in questions about the validity of marriages and were called upon to render opinions with a higher degree of certainty than was often possible. Although the status of medical jurisprudence as a field of practice and expertise shifted throughout the nineteenth century in the United States, doctors continued to serve as arbiters of hermaphroditism on other intimate legal occasions, as the next sections will show.

Gender crossing: the hermaphrodite defense

Rules to safeguard the performative norms of race, gender, and social rank existed in the colonial period.[88] However, starting in the mid-nineteenth century, there was an uptick in laws defending gender boundaries, some of which explicitly aimed to prevent people from presenting themselves as a different sex/gender.[89] At the time, mass-circulation press reported not just a few but many cases of cross-dressing and "gender fraud" in various contexts.[90] Likely as a reaction to that, as well as to urbanization and first-wave feminism, laws and ordinances criminalizing cross-dressing started to spread in U.S. cities and states.[91]

Cross-dressing did not overlap with hermaphroditism, but as with impotency, the two were sometimes conflated. As Jen Manion points out, the concept of hermaphroditism was used to explain many forms of gender nonconformity.[92] Accounts of cross-dressing from that time in the United

[87] Webber, "A Case of Hermaphrodism," 141.

[88] Susan Stryker, *Transgender History: The Roots of Today's Revolution* (Berkeley: Seal Press, 2017), 45–46. For guarding against cross-dressing, see, Bennett Capers, "Cross Dressing and the Criminal," *Yale Journal of Law & the Humanities* 20 (2008): 7–8. For guarding race boundaries, see, Reis, *Bodies in Doubt*, 36–40.

[89] Kate Redburn, "Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86," *Law and History Review* 40, no. 4 (2023): 681.

[90] Peter Boag, *Re-dressing America's Frontier Past* (Berkeley: University of California Press, 2011), 24.

[91] William N. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, MA: Harvard University Press, 1999), 27–28.

[92] Jen Manion, *Female Husbands: A Trans History* (New York, NY: Cambridge University Press, 2020), 128.

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States were heterogeneous in both context and motives (i.e., those engaging in the practice might today identify in different ways, such as trans or butch).[93] Scholars suggest that both cross-dressing laws and newspaper reports bolstered medical authority to investigate the origins of sex, gender, and sexuality transgressions.[94]

In most cases reported here, physicians conducted medical examinations when law officers, magistrates, or law enforcement officials asked them to determine a person's "real" sex. Such an examination might occur when, for example, a person who was prosecuted or arrested for violating these laws raised a hermaphrodite defense in order to be released from prison and prosecution; indeed, the popular view was that hermaphrodites could dodge punishment for cross-dressing. Reports demonstrate that these medical examinations relied on the popular signs—mostly the shape of genital organs and presence of secondary sexual characteristics—that medical jurisprudence books outlined.

As in petitions for divorce, medical determinations in cases of alleged cross-dressing were conveyed with much certainty and with the spirit of eliminating doubt.[95] Sex was portrayed as a fact, known only through examination by a physician, and the determination was clear and final: the person was either a "perfect male" or a "perfect female." For example, on April 15, 1840, the New York Police Office arrested a person who aroused the suspicion of the watchman overseeing voting. An initial inspection revealed the person to be either a hermaphrodite or a woman disguised as a man in order to be able to vote. The magistrate sent the person for further examination, and the officer reported from "ocular demonstration" that she was a "perfect woman"; as a result, she was sent to prison.[96]

The individuals who claimed to be hermaphrodites usually hoped to be vindicated and to avoid punishment, but their hopes were for naught, as examinations consistently yielded a binary result: male or female. A report from the New York police (1836) tells of a person "calling herself James Walker" who was arrested wearing male attire. The person then confessed to being a woman named Jane Walker and was "examined by a surgeon," who affirmed the confession.[97] The magistrate later discovered that Jane was a "female husband" who had deceived her wife into marriage. Walker was sent for a second examination and in that context confessed that they both had sailed to the United States, gone to Canada, purchased land, and worked in a cotton factory. Apparently, Walker "wished to persuade this magistrate that she was an hermaphrodite, but surgical examination proved her statement to be *false*. She is a *perfect female*."[98] Walker was again arrested.

[93] Emily Skidmore, *True Sex: The Lives of Trans Men at the Turn of the Twentieth Century* (New York: New York University Press, 2017), 6–11.

[94] Boag, *Re-dressing America's Frontier Past*, 41; Manion, *Female Husbands*, 164.

[95] For the demand in certainty in expert opinions, see, Stephan Landsman, "One Hundred Years of Rectitude: Medical Witnesses at the Old Bailey 1717–1817," *Law & History Review* 16 (1998): 482–87.

[96] See e.g., "Police Office," *Morning Herald*, April 16, 1840.

[97] A note on terminology: except for when I quote directly from historical texts, I tried to use either neutral pronouns (the person/prisoner/name) or inclusive ones (s/he, they, their, etc.).

[98] "New York Police," *Mississippian*, August 13, 1836.

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According to Peter Boag, however, females who dressed as males were associated with values of frontiersmen, and they were forgiven for transgressions that were perceived to be rational and even necessary if they were to make it on their own.[99] According to Jen Manion, until the mid-nineteenth century, "Female Husbands" were understood to be courageous women claiming manhood.[100] Indeed, the reports about both Walker and the person who was understood to have disguised herself as male in order to vote rationalized the transgressions as necessary in order to enjoy male privileges. Still, ascribing positive attributes to female cross-dressers seems to have depended on race. According to Clare Sears, during late-nineteenth era in which Chinese females were restricted from entering the United States, female immigrants who dressed as male were not valorized—they were deported.

Likewise, within the campaigns to block Chinese immigration, Chinese men were depicted as hyperfeminine and therefore as a "direct threat to white labor, public health and family life."[101] Boag argues that men trying to pass as women "ran diametrically counter to what frontier and the American West symbolized,"[102] and that as a result, male effeminacy was described far more harshly than female masculinity. According to Boag, newspaper reports frequently highlighted the race of non-white cross-dressers. Doing so further sexualized, feminized, and excluded non-white effeminate men from the "real" West.[103]

This association of femininity with non-whiteness was also popular in nineteenth-century American racial science. Melissa Stein's book *Measuring Manhood: Race and the Science of Masculinity* describes the scientific impetus for finding biological differences between the races in order to naturalize the hegemony of white men in a time of political flux.[104] In the post-antebellum period, when Black men were on the verge of enfranchisement, racial scientists marked what they perceived to be the biological characteristics of white men—particularly, beards—as necessary in order to become full citizens. Beards were a marker not just of manhood but of whiteness as well. Accordingly, Black men with scant beards were marked as feminine and unfit for citizenship.[105]

Reports about male-to-female cross-dressing in those suspected of hermaphroditism likewise highlighted the non-white race of the transgressor. In 1876, for example, "a negro" named Francis Thomas from Memphis was

[99] Boag, *Re-dressing America's Frontier Past*, 16–17.

[100] Manion, *Female Husbands*, 2–3.

[101] Clare Sears, *Arresting Dress: Cross-Dressing, Law, and Fascination in Nineteenth-Century San Francisco* (Durham: Duke University Press, 2015), 122–24.

[102] Boag, *Re-dressing America's Frontier Past*, 16.

[103] Ibid., 114–15.

[104] Melissa N. Stein, *Measuring Manhood: Race and the Science of Masculinity, 1830–1934* (Minneapolis, MN: University of Minnesota Press, 2015).

[105] Stein, *Measuring Manhood*, 15. See also Londa L. Schiebinger's discussion about the emergence of a scientific discussion about beards as differentiating between sexes and races in the eighteenth century: Londa L. Schiebinger, *Nature's Body: Gender in the Making of Modern Science* (New Brunswick, NJ: Rutgers University Press, 2004), 120–24.

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arrested for wearing female clothes. Many believed that Francis was a hermaphrodite, but Dr. Nuttall, who was called to perform an examination, "had informed the police that he would *establish the fact* that Thomas was a man and not a woman."[106] Apparently, Thomas had worked in several houses as a female worker (i.e., as a cook, house woman, domestic servant, etc.) and, according to the reports, had been arrested in the past for "lewdness and immorality" and corrupting others "both white and black." Again, the report mentioned how "the question of sex could only be determined by examination." At first, Francis refused such examination, but after being threatened with examination by force, Francis submitted. The physician "found 'Francis Thomas' to be a fully developed man, and in no respect a woman; in fact, Thomas is not even a hermaphrodite, as he claimed to be." The physicians reported that "the organs" were completely male, that he had a "heavy beard," and that he was a "strong and well-developed negro man."[107] Interestingly, although Francis was Black, their beard was mentioned as proof of manhood and virility according to the medical schema to categorize hermaphrodites to their "true sex." Still, Francis's political standing as a deserving man was diminished by descriptions of their "immoral" sexuality (a term scientists used to indicate the degeneracy of non-white groups).[108]

As Reis described, the mention of race in cases of hermaphroditism likely echoed social and medical anxieties from the blurring boundaries of sex, race, and class.[109]A similar case occurred in Memphis two years later, when another "negro man" was arrested for having lived in the city as a woman for a number of years. When the police approached to arrest the person, "he claimed to be a hermaphrodite." The medical examination, however, resulted in "the discovery" that the person was "a perfectly developed male." According to the report, "after the *truth* was ascertained," the person confessed to the deception and said that he had dressed as a woman in order to become employed.[110] In a different case, "a mulatto" who was known as a hermaphrodite was suspected of marrying a white man and acting as his wife. The person was arrested and examined by a physician, who declared the person "a natural man." Following this determination, both were sent to jail on charges of sodomy.[111]

Although race was sometimes mentioned in cross-dressing cases that involved white or female transgressors, Boag proposes that highlighting the racial background of effeminate defendants helped preserve ideals of American frontiers as masculine and white.[112] As Stein shows, race theorists in the second half of the nineteenth century interlinked blackness with servitude and femininity to diminish the capacity of Black men to become equal citizens.[113]

[106] "Francis Thomas," *Memphis Daily Appeal*, July 12, 1876.
[107] "Francis Thomas."
[108] Stein, *Measuring Manhood*, 23.
[109] Reis, *Bodies in Doubt*, 32, 66.
[110] "A Negro Man Passes for Years for a Woman," *The Wheeling Daily Intelligencer*, February 21, 1878.
[111] "A White Man Duly Married to a Negro Man," *The Russellville Democrat*, July 26, 1888.
[112] Boag, *Re-dressing America's frontier past*, 115.
[113] Stein, *Measuring Manhood*, 89–93.

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Still, both white and non-white people who cross dressed sought refuge from the law with medical doctors. As in cases of divorce, where each side hired their own experts, both state officials and individuals seeking validation of their condition approached doctors for support. An 1886 report from Saint Paul tells of a "colored person" who came to the mayor's office and asked for a certificate to wear either male or female clothes, saying that "he was as much man as woman."[114] The mayor called a physician, who revealed that the person "was not a hermaphrodite, but was absolutely without sex": a "perfect woman" from the waist up, and an "imperfect man" from the waist down.[115] Others, known as hermaphrodites, turned to medical authorities directly to ask for a certificate stating that their sex cohered with their attire or asking to change their name.[116]

As James Mohr shows, the stature of medical opinions in nineteenth-century United States fluctuated, and so did their inclusion in judicial processes of sex determination. The early-nineteenth-century enthusiasm from the potentials of the field was somewhat diminished by the concern from over-concentration of power in the hands of experts and a populist anti-intellectual spirit rising in the Jacksonian period.[117] According to Mohr, given the legal unclarity regarding who was eligible to be considered a medical expert in a court of law, many courts erred on the side inclusion and heard opinions by people with a plausible claim to an expert status.[118] Indeed, the authority of medical examinations and the perception of sex classification as a scientific endeavor were not total. Reports in newspapers and medical journals revealed that, in some cases, doctors were either not involved in classifications[119] or were called upon only to conduct autopsies.[120] In such cases, investigators applied the older traditions of sex classification—using common knowledge or female expertise to examine the body, relying on the model of dominancy instead of "real" sex, and accepting the idea that hermaphrodites could be both male and female. Dr. Flint reported one telling case in *Boston Medical and Surgical Journal* (1840)[121]: the report tells of a person "represented as being a hermaphrodite" who was sent by the magistrate to the Erie County Almshouse (a poorhouse) after being arrested "on the charge of being a female disguised in men's clothing." Upon arriving to the poorhouse, when the person was asked to exhibit their sexual organs, they were shy and reluctant. The

[114] "A Freak of Nature: The Mayor's Attention Called to a Curious Malformation," *The St. Paul Daily Globe*, July 27, 1886.

[115] "A Freak of Nature."

[116] Austin Flint, "Hermaphroditism," *The Boston Medical and Surgical Journal* 23 (1840): 146.

[117] Mohr, *Doctors and the Law*, 86–87.

[118] Mohr, *Doctors and the Law*, 99–100.

[119] "Union Hall," *Morning Herald* (London), July 11, 1844; "A Most Strange Chapter Explained," *Shasta Courier*, 1868.

[120] Flint, "Hermaphroditism," 145.

[121] Flint, "Hermaphroditism," 145; Neill, "Case of Hermaphroditism," *Transactions of the College of Physicians* 113 (1850); E. F. Cummings, "A Case of Congenital Malformation of the Genital Organs," *The New England Journal of Medicine* 108 (1883): 195; Harlow Brooks, "A Case of Asexualism," *Medical Record* 56 (1899): 221.

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officer, who did not think he was authorized to enforce a physical examination, summoned an old woman inmate of the house. The woman shared "her opinion that the female organs predominated," and the person was accordingly assigned to the female ward. The prisoner testified that s/he had been raised as a girl and had been working in female services. After a few weeks, however, when the prisoner died of pneumonia, the commonsensical determination model that looks for dominancy was supplanted by a binary model of medical certainty. Dr. Flint and another doctor went to examine the body and declared that "We found male organs entire and well developed, and no semblance whatever of those of the female."

Although such traditional determinations still existed in some judicial arenas, overall the cases described here illustrate both the growing reliance on medical expertise in judicial environments and the cultural recognition of the authority of medical certificates in this context. Doctors gradually became essential validators of hermaphroditism (or lack thereof) in the cross-dressing context. They were approached by legal officers or by transgressors. Their opinions guarded racial and gendered hierarchies as they implemented the new theory of sex with certainty and declared transgressors to be "perfect" men or women, based mostly on their genitals, body shape, and hair.

Slander and defamation: calling someone a hermaphrodite

One final area of law that rebutted the existence of hermaphrodites was the law of defamation. Under the U.S. doctrine of defamation, "slander" was a verbal tort, addressing things that people said about others, whereas "libel" addressed written communications. Libel was actionable *per se* (i.e., one did not have to prove actual damages), but in order for slander to be actionable, a plaintiff had to show "special damages" and prove that their reputation had been harmed.[122] In France, the act of falsely calling someone a hermaphrodite was considered a serious slur that exacted heavy penalties.[123] The U.S. approach was less clear, as nineteenth-century U.S. case law had not settled the question of whether calling someone a hermaphrodite was actionable.

According to traditional English law, the answer was no, as demonstrated in one of the earliest cases addressing this issue: *Wetherhead v. Armitage*. The plaintiff was a dancing mistress who taught young women to dance, and the defendant was reported to have said that "she is as much a man as I am … she is a hermaphrodite" and to have accused the mistress of impregnating someone else.[124] Without being specific, the plaintiff claimed that she had

[122] Alice Krzanich, "Virtue and Vindication: An Historical Analysis of Sexual Slander and a Woman's Good Name," *Auckland University Law Review* 17 (2011): 34.

[123] Lorraine J. Daston and Katherine Park, "Hermaphrodites in Renaissance France," *Critical Matrix: The Princeton Journal of Women, Gender, and Culture* 1 (1985): 6.

[124] Creswell Levinz and England and Wales. Court of King's Bench, *The Reports of Sr. Creswell Levinz, Knt. Late One of the Judges in the Court of Common-Pleas at Westminster; in French and English. Containing cases heard and determin'd in the Court of King's Bench, during the time that Sir Robert Foster, Sir Robert Hyde, and Sir John Kelyng were chief justices there; as also of certain cases in other courts at Westminster, during that time* (1762), 233.

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lost students as a result of this statement. The court of King's Bench held that "hermaphrodite is not actionable, nor is it any scandal to her profession; for young women are taught to dance more frequently by men than women."[125] This holding was cited in various nineteen-century U.S. legal treatises on defamation law,[126] which continued to affirm that calling someone a hermaphrodite was not an actionable offense.

The few medical jurisprudence books that addressed this case reformulated the holding to affirm the emerging paradigm about the nonexistence of hermaphrodites. When English barrister and prolific legal writer Joseph Chitty[127] described it in his *Practical Treatise on Medical Jurisprudence* (1836), he reframed the original explanation and added a new one of his own. According to Chitty, calling a dance mistress a hermaphrodite was not actionable "first, because such union of the sexes *cannot exist in fact*, and every one must be supposed to know it"[128]; "and secondly, because the party would be a just as good and perhaps even safer dancing master than would a person in whom only *one perfect sex* had been discoverable."[129] Chitty's explanation was cited in numerous editions of Alfred Swaine Taylor's *Principles and Practice of Medical Jurisprudence*, a standard professional book in England,[130] which was also issued and circulated in the United States.[131]

Even as the law on this issue seemed clear and stable, a U.S. decision in 1846 departed from the English ruling and re-ignited the debate. In *Malone v. Stewart*, the court decided that calling a young woman a hermaphrodite was actionable *per se*, without needing to prove special damages, because "a more gross or indelicate slander could not well have been uttered against a female—especially a young girl—or one more calculated to wound her feelings and do her mischief. It unsexes her...converts her into a monster, whose very existence is

[125] Levinz, 233.

[126] Defamation, 9 ALB. L.J. 118 (1874); Thomas Starkie, *A Treatise on the Law of Slander Scandalum Magnatum and False Rumors* (London: Clarke and Sons, 1826), 121; Franklin Fiske Heard, *A Treatise on the Law of Libel and Slander* (Lowell, MA: F.A. Hildreth, 1860), 48; William Blake Odgers, *The Law of Libel and Slander: The Evidence, Procedure, and Practice, Both in Civil and Criminal Cases, and Precedents of Pleadings, With a Chapter on the Newspaper Libel and Registration Act* (London: Stevens and Sons, 1881), 673.

[127] Joseph Chitty the Elder (1775–1841), barrister and legal writer, *Oxford Dictionary of National Biography*, accessed August 17, 2021, http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-5336.

[128] Joseph Chitty, *A Practical Treatise on Medical Jurisprudence Microform* (Philadelphia: Carey, Lea & Blanchard, 1836), 377.

[129] Chitty, *A Practical Treatise*, 377. This was cited by other medical jurisprudence books, particularly by Alfred Swaine Taylor, e.g., see Alfred Swaine Taylor, *A Manual of Medical Jurisprudence* (London: J. Churchill, 1844), 621; Alfred Swaine Taylor, *Medical Jurisprudence* (Philadelphia: Lea & Blanchard, 1861), 497; Alfred Swaine Taylor, *A Manual of Medical Jurisprudence* (London: J. & A. Churchill, 1879), 636.

[130] Oxford Dictionary of National Biography, s.v. "Taylor, Alfred Swaine (1806–1880), Medical Jurist and Toxicologist," accessed August 17, 2021, https://www-oxforddnb-com.ezp-prod1.hul.harvard.edu/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-27017?rskey=G5JyJj&result=1.

[131] Mohr, *Doctors and the Law*, 37.

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shocking to nature…excludes her from social intercourse and all hopes of marriage."[132]

Although this decision might seem to have indirectly revived the idea that hermaphrodites exist as monstrous creatures of nature, however, I suggest that it did the opposite, for multiple reasons. First, the truth of the accusation was not even examined. Unlike in Renaissance France, where a statement's trustworthiness would be examined through the appointment of a medical commission,[133] in this context, the accusation was considered certainly false—perhaps because the defendant did not claim to speak the truth, so no evidence about Malone's genitals, sexual inclination, existence of a beard, and so on, had to be produced on the matter. Regardless, in line with Chitty's rationalization about the unfeasibility of hermaphroditism, the possibility of Malone actually *being* a hermaphrodite or of unclear sex seems to be completely missing from the decision and from judicial consciousness.

Second, the decision was likely part of a process to liberalize sexual slander jurisprudence in several common law jurisdictions. According to common law principles, sexual slanders against women were not actionable *per se* because the resulting damages were usually intangible and not easily monetized. However, according to Alice Krzanich, throughout the nineteenth century, both legislative and judicial reforms removed the requirement for special damages for sexual slanders against women in order to allow them to protect their reputation and ability to marry.[134] Judicial justifications for this liberalization varied, but in *Malone*, the justices simply asserted that men and women should be similarly treated under the same common law principles. Thus, if a slander that injured a man financially was actionable, then a slander that "inflicts the deepest wound upon her feelings, break up her hopes, and excludes her from society" should be actionable, too.[135] As feminist criticisms of defamation law noted, despite the liberalization efforts to provide women with options for redress, such reforms actually reinforced traditional sexual norms for women as belonging to the domestic sphere, measured by their virtuous reputation and sexual purity.[136]

Unlike the medico-legal proof mechanism used in Renaissance France, slander and defamation jurisprudence in nineteenth-century United States reflected a medico-legal confidence in the inexistence of hermaphrodites. Although doctors were not directly involved in the falsification of such statements, medical jurisprudence authors used slander jurisprudence as an

[132] Malone v. Stewart from 1846 (reported in George W. McCook et al., Ohio Reports, Official Series Reports of cases in the Supreme Court of Ohio 321 [1853]).

[133] Daston and Park, "Hermaphrodites in Renaissance France," 6.

[134] Krzanich, "Virtue and Vindication," 33–37.

[135] Krzanich, "Virtue and Vindication," 321

[136] Penelope Pether, "Sex, Lies and Defamation: The Bush Lawyer of Wessex," *Law and Literature* 6 (1994): 182; Diane L. Borden, "Reputational Assault: A Critical and Historical Analysis of Gender and the Law of Defamation," *Journalism & Mass Communication Quarterly* 75 (1998): 98–111; L. R. Pruitt, "'On the Chastity of Women All Property in the World Depends': Injury From Sexual Slander in the Nineteenth Century," *Indiana Law Journal* 78 (2003): 965–1018; Krzanich, "Virtue and Vindication," 33–34.

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opportunity to make the point of inexistence into a legal axiom. The next and final section of this article will attempt to explain why, from the mid-nineteenth century, sex classification of people with unclear sex transformed from a joint medico-legal practice into a largely medical and surgical endeavor.

The Decline of Medical Jurisprudence and the Rise of Medical Authority over People with Indeterminant Sex (1850–1900)

As doctors' involvement in sex classification increased, the medical discourse about hermaphrodites surged from the 1850s onward (see Figure 2). Medical journals slowly became a primary arena in which learned discussion about sex classification occurred. As a result, the field of medical jurisprudence failed to sustain the practice of sex classification as a joint medico-legal endeavor; instead, it provided a stopover, a pathway by which jurisdiction over sex classification moved from law to medicine.

Physicians had a clear interest in assuming the role of sex classifiers. In addition to satisfying their curiosity and building professional prestige,[137] doctors who published case studies of hermaphrodites in medical journals echoed a desire expressed by authors in the field of medical jurisprudence: to bring truth to justice, and to redeem people thought to be hermaphrodites from cruel legal treatment. As American medical jurisprudence spread to the fields of insanity, poisoning, sexuality, and procreation, medical experts were inspired by the ethos of saving defendants from wrongful convictions and helping them obtain just trials.[138] James Mohr suggests that nineteenth-century U.S. medical jurists believed that "enlightened science should triumph over both ancient legal precedents and entrenched folk perceptions."[139] Accordingly, physicians attending people with unclear sex were strongly motivated to assign them to the "correct" sex, even when that sex was contested by the people in question, because they believed that doing so was their public duty and that it provided a way for their patients to achieve moral legitimacy and become lawful citizens.[140]

Another reason for the proliferation of medical discourse on hermaphrodites was likely the erosion of experts' credibility as well as the crisis of the field of medical jurisprudence in the second half of the nineteenth century. The adversarial revolution that relocated experts from the position of court advisers to that of partisan witnesses led to public showdowns, in which experts contradicted each other in both civil and criminal court.[141] Moreover, the lack of governmental support to ensure experts' financial compensation and official status, compounded by the experts' own fear of embarrassing themselves publicly, led to a decline in motivation to serve as

[137] Dreger, *Hermaphrodites*, 60.

[138] See, e.g., Cooper, *Tracks on Medical Jurisprudence*, 83–84.

[139] Mohr, *Doctors and the Law*, 71.

[140] See, e.g., Palmer, "Two Hermaphrodite Sisters," *American Journal of Obstetrics & Diseases of Women & Children* 13 (1880): 174; Charles W. Allen, "Report of a Case of Psycho-Sexual Hermaphroditism," *Medical Records* 51 (1897): 653.

[141] Golan, *Laws of Men*, 54.

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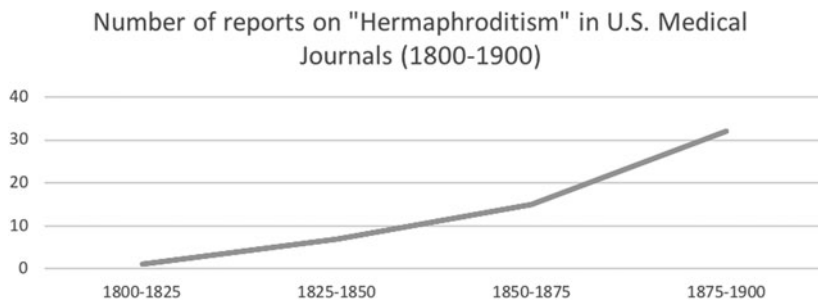

Figure 2. Number of reports on "hermaphroditism" in U.S. medical journals (1800–1900). I found 57 original cases published in U.S. medical journals relating to treatment of "hermaphrodites" or instances of "doubtful sex," broken down as follows: from 1800 to 1825, 1 case; from 1825 to 1850, 7 cases; from 1850 to 1875, 15 cases; and from 1875 to 1900, 32 cases.

witnesses.[142] As Golan describes it, the medico-legal relationship had moved from "late eighteen-century optimism" to "mid-nineteenth-century disenchantment and mistrust."[143]

The erosion of the status of experts, however, did not likewise erode the belief in science or in the natural facts it sought to prove. Jennifer Mnookin argues that despite the public's visible mistrust in experts, science itself was idealized and was believed to provide critical and reliable evidence for resolving legal disputes.[144] As a result, despite the fact that experts were tainted with bias and even corruption, the true-sex paradigm was not compromised; indeed, it continued to prosper in medical and legal thought.

Given that this paradigm persisted, it was important that there be experts who could determine a person's true sex, even as interest in serving as legal experts declined. That combination of ongoing need and decrease in interest may be part of why epistemic authority to classify sex moved from medical jurisprudence to medical science; however, it's not clear why that change appears to have gone smoothly. Why did the legal profession not resist this transition? Why did it simply handover to medical experts its authority to classify people with unclear sex?

There are several possible explanations. First, the challenges posed by so-called hermaphrodites were mostly theoretical and not practical. Amos Dean, a lawyer and professor of medical jurisprudence, observed in 1831 that because the U.S. legal system developed to address practical issues rather than conceptual or non-acute matters, a court would address the issue of ambiguous sex only insofar as clarity was needed for practical reasons: "If a case of monstrous birth should be brought before the courts, the courts will

[142] Mohr, *Doctors and the Law*, 102–5; Stanford E. Chaillé, *Origin and Progress of Medical Jurisprudence* (Philadelphia: Collins, 1876), 413–15.

[143] Golan, *Laws of Men*, 54.

[144] See Jennifer L. Mnookin, "Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence Symposium: Expertise in the Courtroom: Scientists and Wizards—Panel One: Judges, Evidence and Expertise," *Villanova Law Review* 52 (2007): 766.

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seek for all the medical information that can be obtained, and will legislate for the particular occasion."[145] On this theory, it can be argued that the issue of sex classification became less acute in the nineteenth and twentieth centuries because women began to receive more rights, such as suffrage and the capacity to inherit.

But this shift alone cannot explain the decline of legal focus on hermaphrodites in later periods, particularly because so many spheres of law (such as family and employment) remained—and often still remain—sex segregated. In fact, loosening sex-based restrictions in different fields of law could have caused the reverse effect. Several historians have suggested that the mid-nineteenth century's gradual shift toward sex equality was the driving motivation behind the social conservative insistence on a sex-binary system, set by clear biological differences that doctors sought to establish.[146] Therefore, it is possible that medical authority on hermaphrodites was actually *legitimized* by sex-equality ideologies and that the "true-sex" idea was consequently further entrenched in legal thought.

Reflecting this entrenchment of the sex-binary system, one medical reaction to non-conforming bodies from the mid-nineteenth century was to surgically adjust them to match one sex or the other. At that time, surgery was becoming an option offered to address both palliative *and* sex-affirming/corrective aims.[147] It is possible that the emerging surgical construction of sex created a "solution" to sex ambiguity that prevented such cases from ever arriving in court at all. Given that surgical "fixes" likely contributed to the disappearance of hermaphrodites from courts of law at this time, hermaphroditism may simply have become too rare a case to warrant attention.

The increase in surgical fixes likely also contributed to a reduction in meaningful conflict between expert and commonsense notions of sex and hermaphroditism—and, thus, less investment in maintaining epistemic authority in this area. In areas of greater controversy, such authority was guarded carefully: for example, medical determinations of insanity stirred strong public criticism,[148] and legal doctrines were developed to restrain expert testimonies from spreading into matters of fact and to reaffirm the role of juries—not doctors—as judicial fact finders.[149] Similarly, nineteenth-century scientific determinations of race were rejected and put back in the hands of juries when those determinations strongly contradicted commonsense views of whiteness.[150] However,

[145] Dean, "Medical Jurisprudence," 324.

[146] Fausto-Sterling, *Sexing the Body*, 40; Reis, *Bodies in Doubt*, 62–66.

[147] Reis, *Bodies in Doubt*; Maayan Sudai, "'A Woman and Now a Man': The Legitimation of Sex-Assignment Surgery in the United States (1849–1886)," *Social Studies of Science* 52, no. 1 (2022): 79–105.

[148] Golan, *Laws of Men*, 96–98; Mohr, *Doctors and the Law*, 102–3.

[149] R. D. Slayton, "Evidence—Expert Testimony—The Ultimate-Issue Rule," *Chicago-Kent Law Review* 40, no. 2 (1963): 147; "Expert Testimony as an 'Invasion of The Province of The Jury'," *Iowa Law Review* 26 (1941): 819–40.

[150] Ian Haney-López, *White by Law: The Legal Construction of Race* (New York : New York University Press, 2006); Ariela J. Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 108 (1998): 109.

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there was no such guarding of authority around the task of sex determination, and it is possible that this trend contributed to the almost complete transition of sex classification into the medical and scientific circles.

Today, scientific authority on sex classification is undergoing legal and public scrutiny yet again. The contemporary intersex rights movement challenges several aspects of the early modern theory of sex. First and foremost, it challenges the authority of medical/scientific actors to *know* who/what they are and their authority to surgically intervene and "correct" intersex conditions by fitting their bodies to a particular sex/gender without direct consent.[151] Second, the movement presents a deep and powerful challenge to the rigid binary model introduced in the early modern theories of sex. Movement politics confront two important tenets built into that model: first, that people with mixed sex organs do not exist, and second, that an intermediate condition between the sexes is pathological. Their approach that non-health-threatening intersex conditions are benign biological variations and should be left "as is," is in direct conflict with the rigid binary model, which sought to eliminate the ambiguity spectrum between the poles of "perfect" maleness and femaleness.

Thus, almost two centuries after the triumph of the mid-nineteenth-century campaign to eliminate the existence of hermaphrodites, it seems that the early modern model of sex is reaching its limits. Over the past decade, the sex and gender binary has become a subject of fierce public controversy in American life, and it has led to high-profile legal disputes in courts and administrative arenas. As sex and gender minority movements are constantly challenging the binary characterization of human sex and its legal applications, conservative movements insist on preserving the rigid binary model of human sex, which relies heavily on early modern consolidations of the true sex ideal, as described in this article.

The medical profession is slow to react to such pressure, but it gradually does so. Although medicine is still very much utilized to carry out the binary sex model for mostly cultural reasons, the "true sex" concept is no longer a medical standard nor a method for conceptualizing human sex. As contemporary struggles of sex and gender movements work to reduce the legitimacy of medical/surgical sex classifications and strengthen individual choice and autonomy in the process, medical practice is propelled to take a constructive role in the lives of sex and gender minorities and to help them thrive.[152]

In contrast to the desertion of people with indeterminate sex by the legal profession in late nineteenth century, today's legal profession is returning to the stage to shape a post-medical model of sex classification, currently in

[151] Maayan Sudai, "Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization," *Harvard Journal of Law & Gender* 41 (2018): 1; "Intersex Care at Lurie Children's and Our Sex Development Clinic," accessed September 26, 2021, https://www.luriechildrens.org/en/blog/intersex-care-at-lurie-childrens-and-our-sex-development-clinic/; Shefali Luthra, "Boston Children's Hospital will no longer perform two types of intersex surgery on children," The 19th, accessed October 21, 2020, https://19thnews.org/2020/10/boston-childrens-hospital-will-no-longer-perform-two-types-of-intersex-surgery-on-children/.

[152] Katri, "Sex Reclassification"; Paisley Currah, *Sex Is As Sex Does: Governing Transgender Identity* (New York: New York University Press, 2022), 44–45.

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the making, which moves away from the medical and scientific totalism and toward cultivating a new hybrid medico-legal relationship.

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