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DOUBTFUL SEX IN CIVIL LAW: NINETEENTH AND EARLY TWENTIETH CENTURY PROPOSALS FOR RULING HERMAPHRODITISM

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INTRODUCTION

In her pioneering article on the history of hermaphroditism, Julia Epstein mentioned a remarkable discovery: according to her, the nineteenth-century French professor of anatomy Charles Debierre was the first in history to seriously consider a third category of sex in civil law. Debierre proposed to add “doubtful sex” to the categories of male and female in birth certificates. His proposal would be followed up more than a hundred years later, Epstein claimed, when the feminist biologist Ann Fausto Sterling suggested the introduction of multiple genders.¹

During the late 1840s, however, there had already been suggestions in France to change Article 57 of the *Code Civil* and to introduce the *sexe douteux* (doubtful sex) category for registration at birth. A proposal was made as early as 1846 by the surgeon Joseph-Napoléon Loir and revised in an 1854 lecture before the *Académie des Sciences Morales et Politiques*.² Loir critiqued the insufficient way in which French law had regulated “the differentiation and verification of sex within the realm of the civil state.”³ He argued that modern medicine should use its knowledge of embryology to shed light on cases of contested sex, and that the legislator had a duty to avoid the “sad results of errors.” Loir further pleaded, in the interest of morality and the security of families, that in certain exceptional cases

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** German and French translated by Antje M. Herlyn, B.A., Dartmouth, 2000. Dutch translated by Sebastian Barreveld, Ph.D. candidate, Stanford University Department of History.

¹ JULIA EPSTEIN, *ALTERED CONDITIONS. DISEASE, MEDICINE, AND STORYTELLING* 118-119 (New York and London: Routledge 1995).

² JOSEPH-NAPOLÉON LOIR, *DES SEXES EN MATIÈRE D'ÉTAT-CIVIL, COMMENT PREVENIR LES ERREURS RESULTANT DE LEURS ANOMALIES, MÉMOIRE LU A L'ACADÉMIE DES SCIENCES MORALES ET POLITIQUES LE 16 SEPTEMBRE 1854* 1 (Paris: Cotillon 1854).

³ *Id.* (la distinction et la constatation du sexe en matière de l'état civil).

newborns be classified as doubtful sex on their birth certificates.⁴ Many authors, both from France and Germany, followed Loir's suggestion in the late nineteenth and early twentieth century, though not always by explicitly referring to his proposal.⁵

Thus, contrary to Epstein's bold claim, Debierre was not the first who "seriously proposed an addition to our gender classifications."⁶ Nor did Debierre really presage Fausto Sterling's radical proposal for more than two genders. This article will show that the proposals for an introduction of a *sexe douteux* (doubtful sex) in France had little in common with the critique of and alternative to the binary sex system that Fausto Sterling had in mind. These proposals were aimed at better controlling unruly sexes, not to make space for alternative ones. Only the later German proposals show a more interesting perspective in their attempt to support hermaphrodites. However, their proposals also ultimately lead to more medical control of hermaphrodites. This article considers the actual arguments presented in the early proposals of Loir and in the subsequent French and German texts to illustrate how these led to a more medicalized control of sexuality and gender.

THE MORAL DANGERS OF A DECEITFUL SEX

In a clearly structured argument, Loir first explained the medical conditions of hermaphroditisms as known at the time and gave several examples of cases in which sex had been erroneously established at birth. He claimed that not only did the persons themselves become victims of such errors, but society at large—and morality in particular—could also be harmed. According to Loir, under contemporary French law, wrong determination of sex led to the following results:

1. Wrongful education and an unfortunate position bestowed on children, victims of this type of error;
2. Anti-natural marriages, recognized as such only after they were finalized;

⁴ *Id.* at 28.

⁵ See, e.g., P. Garnier, *Du pseudo-hermaphroditisme comme empêchement médico-légal a la déclaration du sexe dans l'acte de naissance*, 14 ANNALES D'HYGIENE PUBLIQUE ET DE MEDECINE LEGALE 285 (3e série, tome XIV, 1885); Albert Leblond, *Du pseudo-hermaphroditisme comme empêchement médico-légal a la déclaration du sexe dans l'acte de naissance (1)*, 14 ANNALES D'HYGIENE PUBLIQUE ET DE MEDECINE LEGALE 285 (3e série, tome XIV, 1885); Charles Debierre, *L'Hermaphrodite devant le code civil. L'hermaphroditisme, sa nature, son origine, ses conséquences sociales*, 1 ARCHIVES DE L'ANTHROPOLOGIE CRIMINELLE 305 (1886) in France; Theodor Landau, *Über Hermaphroditen. Nebst einigen Bemerkungen über die Erkenntnis und die rechtliche Stellung dieser Individuen*, 15 BERLINER KLINISCHE WOCHENSCHRIFT 339, 342 (1903) [hereinafter *Über Hermaphroditen*]; Magnus Hirschfeld *Drei Fälle von irrtümlicher Geschlechtsbestimmung*, 51 MEDIZINISCHE REFORM, WOCHENSCHRIFT FÜR SOZIALE MEDIZIN XIV 614 (1906); EUGEN WILHELM, *DIE RECHTLICHE STELLUNG DER (KÖRPERLICHEN) ZWITTER DE LEGE LATA UND DE LEGE FERENDA* (Halle 1909) in Germany. In 1916, Franz Ludwig von Neugebauer mentioned two other authors pleading for a category of doubtful sex as well: Leblaud and Arturo Guzzoni degli Ancaroni. FRANZ LUDWIG VON NEUGEBAUER, *HERMAPHRODITISMUS UND PSEUDOHERMAPHRODITISMUS* (Wien: Braumüller 1916) [hereinafter *HERMAPHRODITISMUS UND PSEUDOHERMAPHRODITISMUS*].

⁶ EPSTEIN, *supra* note 1, at 118-119.

3. Threats against the morality and well-being of the young girl or young man whose marriage, only recently formalized, is abruptly nullified or followed by a separation.⁷

Loir thought a reform of the law necessary since errors of sex affected the interest of both the individual in question and society. He proposed three additions to the existing regulation. First, a physician should be present at all births to establish the sex of a newborn child. Second, doubtful sex should be indicated on birth certificates. Finally, all persons of doubtful sex should be physically examined before marriage.

The objective of these measures was to “thwart the guilty conduct, full of deceit and bad faith, of this exceptional class of individuals who do not think twice about knowingly duping others and their families.”⁸ This phrase betrays Loir’s aggression and fears regarding people with an erroneous sex determination.

Thirty years later, P. Garnier and Charles Debierre were much more explicit in naming the dangers of doubtful sexes while they plead for a category *sexe douteux*. At birth, Garnier explained, it was very easy to make a mistake when establishing sex, for:

The external genitalia of the two sexes are generally inflamed, red, oedematous One must look very carefully in order to recognize the true sex. Inexperienced novice parents, an ignorant nanny, a prudish mid-wife, or a myopic physician are in charge of this care role, and only one small vice to conform on their part can give rise to the error.⁹

A split scrotum or a hypertrophic clitoris often led to a wrong determination. Such errors could have severe consequences:

The most grave social disorders result from these mistakes. If one or the other of these sexually misidentified individuals enters into a religious order or teaching profession, morality will be severely compromised. If a man-woman is admitted into seminary, what will happen to the young levites in contact with this individual, or in any other congregation or monastery? This is much more dangerous in the case of a woman-man . . . soon enough this also threatens to be the fire in the convent that consumes all the nuns! It will even be worse in grade schools, in boarding houses, in

⁷ LOIR, *supra* note 2, at 16 (1. *De la fausse education et de la malheureuse position donnée aux enfants victimes de ce genre d'erreurs*; 2. *Des mariages anti-naturels, reconnus seulement après qu'ils ont été conclus*; 3. *De l'atteinte portée à la moralité et au bien-être de la jeune fille ou du jeune homme, dont le mariage, à peine contracté, est frappé de nullité ou suivi du'n séparation.*).

⁸ *Id.* at 28 (*la conduite coupable, pleine de dissimulation et de mauvaise foi de cette classe exceptionnelle d'individus, qui ne se font aucun scrupule de tromper sciemment et les personnes et les familles*).

⁹ Garnier, *supra* note 5, at 287-288 (*[L]es parties externes de la génération chez les deux sexes sont généralement irritées, rouges, oedématisées . . . [I]l faut y regarder de très près avec attention pour reconnaître le vrai sexe. Que des parents novices, inexpérimentés, une matrone ignorante, une sage-femme prude ou un médecin myope soient chargés de ce soin, et le moindre vice de conformation peut donner lieu à l'erreur.*).

secondary schools. What will this mean for the military barracks if today's preliminary recruitment exam could not assure against such a mistake?¹⁰

Garnier claimed that if the birth certificate suspended the assignment of sex, indicating *sexe indéterminé ou douteux*, "this monstrous marriage between two men could not be scandalously sanctioned by the law."¹¹ By demanding a medical examination every time a birth certificate was required, this indication would prevent "so many men from passing as women and so many women from passing as men at the expense of morality, justice and truth."¹² This would preclude:

Quite some indictments of unnatural relations, offences against public decency and morals, in which these sexually misidentified individuals are often entangled; being neither man nor woman and dressed in contradiction of their true sex, they indifferently offer themselves to or pursue both sexes Husbands and wives would no longer run the risk of being tricked regarding the true sex of their partner¹³

Debierre described the moral dangers resulting from the French civil code in almost exactly the same terms—without mentioning Garnier.¹⁴ He discussed the difficulties with establishing sex at the time of birth. There is also little originality in his proposal to prescribe a medical examination of sex at birth, and in cases of doubt, assign *sexe douteux* or *nécessité d'un examen ultérieur*; these proposals were identical to Loir's second and first arguments, respectively.¹⁵ The new aspect of Debierre's proposal prescribed to newborns of doubtful sex was a future medical examination between ages 15 and 18, to be performed by a forensic-medical commission. After such an examination, the person's sex would be established and inscribed in the register of births.

Thus Loir, Garnier and Debierre generated an interest to know more about the frequent but hidden presence of misleading sexes among society. Warnings of the moral threat of deceitful sexes which only medicine would be able to reveal, ensured that modern medicine would be needed to monitor sex from birth. Only in

¹⁰ *Id.* at 289 (*Les plus graves désordres sociaux résultent de ces méprises. Que l'un ou l'autre de ces individus mal sexués entre dans les ordres religieux ou enseignants, et la morale sera gravement compromise. Si c'est un homme-femme admis au séminaire, que deviendront les jeunes lévites à son contact comme dans toute autre congrégation ou monastère? Ce sera bien plus dangereux si c'est une femme-homme . . . voilà aussitôt le feu au couvent consumant toutes les nonnes! Ce sera pis encore dans l'école, dans les pensionnats, les lycées. Que serait-ce à la caserne si l'examen préalable du recrutement n'assurait aujourd'hui contre une semblable méprise?*).

¹¹ *Id.* at 292 (*ce mariage monstrueux de deux hommes n'eût pu être consacré scandaleusement par la loi*).

¹² *Id.* at 292 (*tant d'hommes de passer pour femmes et tant de femmes pour hommes, au mépris de la morale, de la justice et de la vérité*).

¹³ *Id.* at 293 (*Bien des inculpations de rapports contre nature, d'outrage aux mœurs et à la morale publique, encourues fréquemment par ces individus mal sexué, ni hommes ni femmes, vêtus contrairement à leur vrai sexe et qui se livrent ou s'attaquent indifféremment à tous les deux Maris et épouses ne courraient plus le risque d'être trompés sur le vrai sexe de leur conjoint*).

¹⁴ Debierre, *supra* note 5, at 335-336.

¹⁵ *Id.* at 337-338.

this way the dangerous moral pitfalls of deceitful outer appearance at birth and later in life could be avoided.

The Dutch gynecologist, A. Geijl, ridiculed those who felt moral outrage towards hermaphrodites. In 1902, he wrote a long serial article defending an operation on a "girl with testicles" in order to prepare her for marriage. On that occasion, he disagreed with Debierre's arguments, calling him unnecessarily hard on *misdeelde natuurgenooten* (deprived fellows of nature). After having quoted Debierre on the serious problems that were at stake, Geijl giped:

The ability to fertilize heavily haunted his French brain and influenced him, as later will become apparent. And then to think that all of this could have been avoided, that one could have precluded "these unnatural relations, these outrages on public morality, these monstrous unions, indeed damages to the family and the source of so many troubles" if only the legislator had done his duty and assigned blame to the mistakes [erroneous sex determination] at the time of birth. Because that would have been the final remedy against all of these troubles I make note here, that Debierre . . . exaggerated the benefits for the community tied to his modified law, while the negative repercussions for those who would be effected by them, he significantly underrated. I also dare to ask if one serves the public morality, when the preparation and execution of a special law awakes the attention of the general public disadvantageously to these poor, deformed ones, and waking the crazy emotions that now so quietly with good intentions lay at rest?¹⁶

Geijl, however, was a very rare example of a contemporary doctor who was not carried away with sweeping statements about public morality in peril.

HUMANITARIAN CALLS FOR BETTER REGULATIONS

In Germany, similar proposals to change civil law appeared only after 1900. This is not surprising since it was only in 1900 that the provisions for hermaphrodites in both Bavarian and Prussian law disappeared. Up to that year, Bavarian law simply stated that experts had to define someone's sex in case of doubt; if they could not find a predominant sex it was up to the person him or

¹⁶ A. Geijl, *Over operatief ingrijpen bij pseudohermaphroditismus masculinus of femininus externus*, 9 MEDISCH WEEKBLAD VAN NOORD-EN ZUID-NEDERLAND 281, 327 (1904) (*Die aptitude à la fécondation spookt hem hevig door het Fransche brein en speelt hem parten, zooals later blijken zal. En dan te denken, dat dit alles had kunnen voorkomen worden, dat men had kunnen verhinderen «ces rapports contre nature, ces outrages à la morale publique, ces unions monstrueuses, si dommageables pour la famille et la source de tant de maux» als de wetgever zijn plicht gedaan had en de schuldigen aan al die misstanden bij de geboorte had laten signaleeren. Want dat zou de afdoende remedie geweest zijn tegen al deze rampen . . . Ik stip hierbij aan, dat Debierre . . . de voordeelen voor de gemeenschap, aan zijn veranderde wetgeving verbonden overschat, terwijl hij de nadeelen voor hen, die er de dupe van zullen worden, belangrijk onderschat. Ook durf ik te vragen, of men de publieke moraal dient, wanneer men door de uitvaardiging en uitvoering, eener specieele wet de aandacht van het groote publiek ten nadeele dezer arme misvormden gaande maakt en de kwade hartstochten die nu zoo rustig bij de menigte liggen te sluimeren, wakker roept?*).

herself to decide.¹⁷ Prussian law provided a more elaborate system.¹⁸ In case of doubt, first the parents and, upon reaching adulthood, the hermaphrodite him or herself would choose a sex. In cases where there was an interested third party, an expert would be called upon to consult and the outcome of the consultation would be binding.

When the new German civil law was passed in 1900, any reference to hermaphrodites in legal text had disappeared. Legitimizing this change in comparison to the earlier Prussian law, the legislator claimed that modern medicine no longer acknowledged people with either a neutral or a double sex. This argument is consistent with what Alice Domurat Dreger has labeled “The Age of Gonads,” referring to the late nineteenth and early twentieth century in which, according to her, the medical definition of someone’s sex was solely based on the gonads. This definition left no room whatsoever to the existence of neutral or double sexes.¹⁹ However, several doctors involved with hermaphrodites criticized the change in legislation on the basis of this gonadal theory. Theodor Landau argued that in practice this gap in the law meant that “the assessment is at the physician’s own discretion” and pleaded for the reintroduction of Prussian law,²⁰ Magnus Hirschfeld proposed an alternative.²¹ Additionally, in 1909 judicial expert

¹⁷ The *bayerische Landesrecht* (Bavarian Law) ordered that hermaphrodites should be assigned the sex: “welcher nach Rat und Meinung der Verständigen vordringt, falls sich aber die Gleichheit hierin bezeigt, sollen sie selbst eines erwählen und von dem Erwählten sub poena falsi nicht abweichen.” *Bayerische Landesrecht, Teil I, 3, 2, n.2* (that prevails according to the advice and arguments of experts, but if the sex characteristics are represented equally, the individual himself should choose one sex and should never deviate from this choice.).

¹⁸ *Das preußische Landrecht* (Prussian Law) section 1, part 1:

§ 19. *Wenn Zwitter geboren werden, so bestimmen die Eltern, zu welchem Geschlecht sie erzogen werden sollen* (If children are born hermaphroditic, the parents decide which sex they shall be raised as);

§ 20. *Jedoch steht einem solchen Menschen nach zurückgelegtem 18. Jahre die Wahl frei, zu welchem Geschlecht er sich halten will* (However, at the age of eighteen such a person is free to choose to which sex he wants to belong);

§ 21. *Nach dieser Wahl werden seine Rechte künftig bestimmt* (This choice determines his future rights);

§ 22. *Sind aber die Rechte eines Dritten von dem Geschlecht eines vermeintlichen Zwitters abhängig, so kann ersterer auf eine Untersuchung durch Sachverständige antragen* (However, if the rights of a third party are dependent on the sex of a putative hermaphrodite, that party may petition to have this person examined by experts);

§ 23. *Der Befund der Sachverständige entscheidet auch gegen die Wahl des Zwitters und seiner Eltern* (The findings of the experts supersede the choice of the hermaphrodite and his parents).

Id.

¹⁹ ALICE DOMURAT DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* 139-166 (Harvard University Press 1998).

²⁰ *Id.* at 342 (*dem freien Ermessen des Arztes die Beurtheilung derartiger Fälle ermessen ist*).

²¹ Franz Ludwig von Neugebauer started to criticise the law in the supplement of his major work, with an answer to a question asked by a Dr. König. FRANZ LUDWIG VON NEUGEBAUER, *HERMAPHRODITISMUS BEIM MENSCHEN* 706 (Leipzig: Werner Klinkhardt 1908) [hereinafter *HERMAPHRODITISMUS BEIM MENSCHEN*]. Theodor Landau, *Mann oder Weib*, 7 *ZENTRALLBLATT FÜR GYNÄKOLOGIE* 203, 204 (1904) [hereinafter *Mann oder Weib*]; Hirschfeld, *supra* note 5, at 617.

Eugen Wilhelm, wrote an elaborate analytic essay on the position of hermaphrodites under the new German law and made an extensive proposal to amend the law.²²

After describing a case in which he could not establish the sex of a patient, Landau discussed the problems of the new German civil law. He first explained why it was difficult for even a medical expert to define sex in cases of doubtful sex when no signs of menstruation or ejaculation of sperm (a clear sign of working gonads) were available. Diagnostic operations to establish the character of the gonadal tissue, as Franz Ludwig von Neugebauer had promoted, were dangerous and not always determinative. Secondary sex characteristics were not a good indication, Landau argued, for these varied considerably even among "normal" people. Inclinations for certain work, smoking, coquetry, and neatness were among traits that were not good indicia of sex either because they were not necessarily inborn but rather a result of education and habits. Finally, Landau rejected the direction of sexual drive as a determining factor since there was also a lot of variety among people other than hermaphrodites.²³

Having thus explained the complexity of sex assignment by a medical expert, Landau started his critical questioning of the new civil law in Germany:

Because sex determination is not purely a scientific or scholarly matter, but rather a legal and social matter . . . and has a far-reaching meaning for the personal experience of the individual, one cannot understand that German civil law does not once mention the term "Zwitter" (hermaphrodite), or even give guidelines for this category of individuals.²⁴

In the guide to the new law by Erichson, Landau found that *Zwitter* were still mentioned, though:

If necessary, a physician's findings decide the predominant sex of a hermaphrodite. Because this concerns evidence of sex exceeding the interest of any party, and not the authentication of the parents' choice, the will of the latter or the hermaphrodite in question cannot be normative; rather, the objective facts decide.²⁵

But what, Landau wondered, was a predominant sex? He had already explained that medical experts had difficulty deciding this on the basis of the gonads. Did the commentator want doctors to determine the predominant sex based on the outer

²² WILHELM, *supra* note 5.

²³ See *Über Hermaphroditen*, *supra* note 5, at 340-341.

²⁴ *Id.* at 341 (*Da die Frage nach der Bestimmung des Geschlechts keine rein wissenschaftliche oder akademische ist, sondern bezüglich rechtlicher und sozialer Fragen . . . und für das persönliche Empfinden des Individuums von weittragender Bedeutung ist, versteht man nicht, dass das Deutsche Bürgerliche Gesetzbuch nicht einmal den Ausdruck Zwitter erwähnt, geschweige denn bestimmte Vorschriften für diese Kategorie von Leuten giebt.*).

²⁵ *Id.* (*Bei Zwittern entscheidet das nöthigenfalls durch ärztlichen Befund festzustellende vorwiegende Geschlecht . . . Da es . . . um einen gegen jedermann wirkenden Beweis über das Geschlecht handelt, und nicht um die Beurkundung der Wahl der Eltern, so kann hierbei nicht der Wille der letzteren bezw. des Zitters selbst maassgebend sein; sondern nur der objective Thatbestand entscheiden.*).

shape of the genitals and the secondary sex characteristics? Landau argued that secondary sex characteristics were not yet visible in children, and that it had precisely been the ambiguous appearance of the genitals that had raised doubts about the child's sex. He concluded that medical experts would often be unable to establish a predominant sex. While such a judgment would be based only on arbitrary, personal moments he did not see why an expert would be better equipped to choose a sex than the parents or the hermaphrodite involved. He therefore advised the medical expert:

That in cases of hermaphroditism where he cannot make a clear decision using our medical resources, he should, according to the spirit of the Prussian Law, allow the affected individual to decide his sex once he has reached puberty. In this way these unfortunate individuals could escape conflict with their own psyche and also eventual conflict with the country's customs and penal code in a humane way.²⁶

The tone of the argument against sex determination for hermaphrodites at that time in Germany was completely different from that in France some decades earlier. Hirschfeld, for example, ended an article written about three cases of hermaphroditism with a passionate call for a more clear and less prejudiced judgment of hermaphrodites. They may have abnormal genitalia, he wrote, but "overall, they are still physically, mentally and above all ethically and socially complete human beings, and it is therefore necessary that the secretive contempt, horror and mockery, with which they have most often been treated will be replaced by a scholarly standard and humane perspective."²⁷

In this "humanitarian-scientific" context, Hirschfeld proposed to announce the sex of a newborn baby as undecided or doubtful in such cases, and suggested that a midwife should be obliged to call in a doctor when the sex seemed unclear.²⁸ He actually gave an example in which he as a medical expert had reported on the doubtful sex of a baby and concluded: "Under these circumstances and from a

²⁶ *Id.* at 342-343 (*[D]ass er in denjenigen Fällen von Hermaphroditismus in denen mit unseren Hilfsmitteln eine Entscheidung nicht zugänglich ist, im Sinne des Preusschen allg. Landrechts die Wahl des Geschlechts dem betreffenden Individuum nach Eintritt der Pubertät überlässt, damit in humaner Weise diese unglücklichen Leute vor Conflicten mit der eigenen Psyche und eventuell mit den Sitten- und Strafgesetzen verschont bleiben.*)

²⁷ Hirschfeld, *supra* note 5, at 617 (emphasis in original) (*so sind sie doch im übrigen körperlich, geistig und vor allem ethisch und sozial durchaus vollwertige Menschen, und es ist deshalb nötig daß an die Stelle der Geringschätzung des geheimen Grauens und Spottes, mit denen man ihnen bisher meist begegnete eine wissenschaftliche gerechte und menschenwürdige Auffassung tritt*).

²⁸ "Bestehen bei einem Neugeborenen nach Hinzuziehung eines Arztes, auf die in solchen Fällen hinzuweisen die Hebammen verpflichtet sein müssten, Zweifel über die Geschlechtszugehörigkeit, so erscheint es wissenschaftlich allein gerechtfertigt, das Kind beim Standesamte als unbestimmten oder zweifelhaften Geschlechts anzumelde." Hirschfeld, *supra* note 5, at 617 (In the case that a midwife is unsure of the sex of a newborn, she is required to call a physician to examine the child, and if doubt remains, it is scientifically accepted that the child be recorded at the civil registry office as indeterminate or doubtful sex.).

scientific viewpoint, it is advisable that the child be registered as indeterminate or doubtful sex.”²⁹

There is more evidence that in Germany at that time newborn children were sometimes assigned as doubtful sex on their birth certificates. In the guide to civil law cited by Landau, there was a provision for cases in which the expert could not decide: “Should the child be so malformed that the sex cannot be determined by medical examination, a comment must be recorded in the birth registry.”³⁰ Landau even found a model form (*Musterformular*) to register such a child. He described a child in Eberswalde that on January 19, 1901 had been registered as “*Zwitter*” and did not get a first name until a medical expert had decided on its sex. The child died quickly afterwards, however, and Landau speculated that if the child had stayed alive the expert may have waited until the child had turned at least twenty before he would have been able to definitively establish a sex.³¹

The jurist Eugen Wilhelm cleverly noted that although there were no legal provisions regarding hermaphrodites, the demand to declare the child’s sex did not preclude calling it *zwitterhaft* (hermaphrodite), undecided or doubtful. He quoted another edition of the same guide Landau cited with model forms for the registration of a hermaphrodite. Wilhelm, like Landau, criticized the form because it did not leave open the possibility that an expert would be unable to establish the sex.³² In 1908, he did research at the county clerks’ offices of Charlottenburg and Berlin to ask about registrations hermaphrodite births, and came across another example in which a child had been registered according to the abovementioned form. The child also died soon afterwards and Wilhelm was unable to supplement the information obtained from the Eberswalde case.

At the end of his article, Wilhelm proposed an amendment to the German civil law in order to better regulate the legal status of hermaphrodites. According to Wilhelm, this was badly needed because the current regulation caused judicial difficulties, severe abuses, and damages to hermaphrodites and third parties. His proposal suggested:

1. that children with a considerable malformation of the genitals would be announced hermaphrodite (*zwitterhaft*) on their birth certificate and given a sex neutral name;
2. that the midwife or doctor who was present at birth would be responsible for this and verified by a second physician;
3. the parents of the child would decide on the sex in which the child would be raised;

²⁹ Hirschfeld, *supra* note 5, at 617 (*Es ist unter diesen Umständen vom wissenschaftlichen Standpunkt aus geraten, das Kind als unbestimmten oder zweifelhaften Geschlechts einzutragen.*).

³⁰ See *Über Hermaphroditen*, *supra* note 5 (*Sollte das Kind so missgebildet sein dass das Geschlecht nicht durch ärztliche Untersuchung bestimmt werden kann so müsste ein dahin lautender Vermerk im Geburtsregister gemacht werden.*).

³¹ *Über Hermaphroditen*, *supra* note 5, at 342.

³² WILHELM, *supra* note 5, at 23.

4. after having reached adulthood, the hermaphrodite in question should decide within two years to which sex he or she would want to belong; and
5. a physician had to perform an examination in order to verify whether the personal choice of the hermaphrodite was reasonable.³³

³³ The complete proposal is:

§ 1. *Diejenigen Kinder, welche mit erheblichen Mißbildungen der Geschlechtsteile geboren werden, sind bei dem Standesamt als „zwitterhaft“ anzumelden. Der Vorname soll möglichst ein für beide Geschlechter passender sein, kann aber auch ein männlicher oder weiblicher sein* (Children born with genital malformations must be recorded as “zwitterhaft” at the civil registry office. The first name should be sex neutral if possible, but can also be masculine or feminine.).

§ 2. *Zur Anmeldung derartiger Kinder sind insbesondere der Arzt oder die Hebamme verpflichtet, welche der Geburt beigewohnt oder nachträglich das Kind untersucht haben* (The physician or midwife who examined the child before or after the birth is required to report these types of children.).

§ 3. *Die gleiche Verpflichtung trifft die Hebamme oder den Arzt, welche solche angeborene Mißbildung der Geschlechtsteile bei einem noch nicht 21 Jahre alten Menschen feststellen* (The same is required of midwives or physicians who diagnose a congenital sex malformation in an individual less than 21 years old.).

§ 4. *Dem Kreisarzt sind die Anmeldungen unter §§ 1, 2 und 3 mitzuteilen. Er hat das Kind zu untersuchen und falls er die Mißbildung nicht für erheblich genug erachtet, die Entscheidung des Ministeriums herbeizuführen. Anderenfalls zeigt er dem Standesbeamten an, dass keine Bedenken gegen die Eintragung bestehen, worauf das Geschlecht im Geburtsregister als zwitterhaft zu bezeichnen ist. Die Entscheidung des Ministeriums erfolgt nur nach Anhörung eines Spezialarztes* (The district medical officer must also participate in the notifications listed under §§ 1, 2 and 3. He is required to examine the child and if the malformation is found to be not substantial enough, he must relinquish the decision to the Ministry. Otherwise he will notify the civil registry office that he has no objections regarding the record, whereupon the sex is documented as hermaphroditic in the birth record. The Ministry’s decision follows a hearing with a medical expert.).

§ 5. *Ist der gesetzliche Vertreter des Zwitters mit der Anmeldung als „zwitterhaft“ seitens des Arztes oder der Hebamme nicht einverstanden, so steht ihm gegen diese Anmeldung das Beschwerderecht an das Ministerium zu, welches nach Erhebung eines Gutachtens seitens eines Spezialarztes, nach Anhörung des anmeldenden Arztes oder der Hebamme sowie des Kreisarztes entscheidet. Die Beschwerde ist bei dem Standesbeamten einzulegen, der erst nach der Entscheidung des Ministeriums die Eintragung vorzunehmen hat* (If the hermaphrodite’s legal guardian disagrees with the physician’s or midwife’s diagnosis of “zwitterhaft,” the guardian may file a complaint with the Ministry, who, after having asked for a report from a specialized doctor and a hearing with the physician, midwife or district medical officer, will decide. The complaint is noted by the civil registry office and the record is chronicled only after the Ministry’s final decision is made.).

§ 6. *Nach erfolgter Großjährigkeit des Zwitters hat dieser oder im Falle seiner Geschäftsunfähigkeit sein gesetzlicher Vertreter innerhalb zwei Jahren sich zu entscheiden, ob er als männlichen oder weiblichen Geschlechts im Geburtsregister eingetragen werden soll, und einen entsprechenden Antrag auf Berichtigung bei dem Standesbeamten zu stellen. Die Frist zur Entscheidung und Anmeldung kann auf Antrag des zur Anmeldung Verpflichteten durch die vorgesetzte Behörde des Standesbeamten bis zum 25. Lebensjahr verlängert werden* (Upon reaching adulthood the hermaphrodite or legal guardian (in the case of a hermaphrodite deemed incompetent by the law) has two years to decide if the sex should be recorded as male or female in the birth registry and must file this request at the civil registry office. The required time period for reaching a decision and filing it with the civil registry office can be extended until the 25th birthday.).

§ 7. Der Anmeldung der getroffenen Wahl ist ein Zeugnis eines Spezialarztes beizufügen, daß die getroffene Wahl nicht ungerechtfertigt erscheint. Der Arzt soll das Zeugnis nur ausnahmsweise und nur dann verweigern, wenn die getroffene Wahl eine offenbar unsachgemäße ist. Der Umstand, daß der Zwitter die dem gewählten Geschlecht nicht entsprechenden Geschlechtsdrüsen besitzt, bildet allein keinen Grund zur Verweigerung des Zeugnisses (The filing of the decision must be verified by a specialist physician in order to prevent an unwarranted choice. The physician should only refute the hermaphrodite's decision if it is deemed inappropriate. The fact that the hermaphrodite's chosen sex does not reflect his gonads is an inadequate reason to deny his decision.).

§ 8. Macht der zur Anmeldung Verpflichtete glaubhaft, daß er nicht in der Lage ist, das in § 7 erwähnte Zeugnis vorzulegen, so steht dem Ministerium die Prüfung zu, ob die getroffene Wahl nicht ungerechtfertigt erscheint. Die Entscheidung erfolgt nur auf Grund des Gutachtens eines Spezialarztes und des Kreisarztes (If the specialist believes that he is unable to make a decision as described in § 7, the Ministry must investigate if the individual's choice is inappropriate. The final decision takes place only after deliberations by a specialist physician and district medical officer).

§ 9. Ähnlich wie nach § 8 wird verfahren, wenn der Verpflichtete überhaupt es versäumt, in der gesetzlichen Frist die Wahl zu treffen und die Anmeldung zu machen. Der Entscheidung des Ministeriums muß jedoch eine zweimalige Aufforderung des Landesbeamten an den Verpflichteten unter ausdrücklicher Androhung der Entscheidung seitens des Ministeriums vorangehen (Similar guidelines as stated in § 8 will apply if the individual fails to make a decision and file it in the required time period. The Ministry's decision must however be preceded by at least two summons from the civil registry office that emphasize to the individual the gravity of the Ministry's involvement and choice.).

§ 10. In den Fällen der Entscheidung seitens des Ministeriums kann der Zwitter zur körperlichen Untersuchung seitens der vom Ministerium dazu bestimmten Ärzte gezwungen werden (In the case where the Ministry executes the decision, the hermaphrodite can be forced to undergo a physical examination by a specialist physician appointed by the Ministry.).

§ 11. Die Berichtigung der Bezeichnung „zwitterhaft“ im Geburtsregister in „männlich“ oder „weiblich“ erfolgt auf Grund der Anmeldung des Verpflichteten, falls er zugleich das in § 7 genannte ärztliche Zeugnis vorlegt, oder auf Grund der Entscheidung des Ministeriums. Zugleich ist nötigenfalls der Vorname zu berichtigen (The amendment of the identifier “zwitterhaft” in the birth registry to “male” or “female” follows the required notification by the individual, if he at the same time submits the physician's verification as mentioned in § 7, or it follows the Ministry's decision.).

§ 12. Eine spätere Änderung des Geschlechts ist nur auf Antrag des Betroffenen oder seines gesetzlichen Vertreters zulässig und nur dann, wenn durch übereinstimmendes Gutachten dreier Ärzte, darunter des Kreisarztes und mindestens eines Spezialarztes, bezeugt wird, daß die früher getroffene Wahl ungerechtfertigt erscheint und die Annahme des anderen Geschlechts sachgemäß ist. Das Gutachten hat genau die für die Änderung sprechenden Gründe anzugeben. Über den Antrag entscheidet das Ministerium. Falls der Antrag für begründet erklärt wird, erfolgt die Berichtigung des Ständeregisters auf Grund der Entscheidung des Ministeriums (A future alteration of this documented sex can only be proposed by the individual or his or her legal guardian, and only when the overwhelming opinion of three physicians, including the district medical officer and at least one specialty physician, demonstrates that the former choice was unwarranted, can the new sex be approved. The opinion is based on the aforementioned reasoning. The ministry decides on the initial proposal. If the proposal is deemed reasonable, the civil registry office will be notified regarding the amendment, as decreed by the Ministry.).

§ 13. Bis zum 21. Lebensjahr des Zwitters bestimmt sein gesetzlicher Vertreter, ob er als Knabe oder Mädchen erzogen werden soll (Up until the age of 21, the hermaphrodite's guardian decides if he should be raised as a boy or girl.).

§ 14. Mit der Eintragung des bestimmten Geschlechts (männlich oder weiblich) hat die eingetragene Person alle die dem eingetragenen Geschlecht entsprechenden Rechte und Pflichten (Once the particular sex (male or female) is documented, this individual possesses all of the rights and duties pertaining to the recorded sex.).

Wilhelm took some remarkable stands throughout his proposal. Most importantly, several times he explicitly pleaded to include pseudo-hermaphrodites with known gonadal sex in the category of hermaphrodites. In other words, he explicitly rejected the dominant gonadal definition of sex as a criterion for sex determination and proposed to offer these pseudo-hermaphrodites the choice of their sex as well as those whose gonads were hermaphrodite, neutral or undecided. For as he argued:

Many of these individuals have more in common with the opposite sex of their gonadal sex, possess a sexual consciousness of the other sex, and feel comfortable in this opposite sex, so that a simple assignment of this hermaphrodite as a man or a woman based on gonadal sex in many cases does not do justice to the situation.³⁴

Thus, newborns with malformed genitalia, even when testicles or ovaries could be medically determined, should be registered as hermaphrodite. This was necessary to make it possible for them to choose the sex of their liking as an adult, which, Wilhelm argued, was not necessarily their gonadal sex.³⁵

Wilhelm advocated that the choice of the adult hermaphrodite had to be controlled by a physician; he intended this check to be mainly a guarantee against possible fraud. He was sharply opposed to establishing sex by only considering the gonads:

At the time of the verification, the physician should not have solely examined the hermaphrodite's sexual organs, but rather should have also considered the sexual features, secondary and tertiary, the direction of the sexual drive, tendencies, and habits of the hermaphrodite, as well as everything that would play a role in his future, such as relationships with others, etc. . . . The physician could have only then refuted the hermaphrodite's choice if this individual very blatantly would have chosen an ill-fitting and for him, foreign sex . . .³⁶

§ 15. *Die Ehemündigkeit des Zwitter tritt mit dem Zeitpunkt ein, in dem ein bestimmtes Geschlecht in das Geburtsregister eingetragen worden ist* (The hermaphrodite's age of consent coincides with the moment when the specific sex is recorded in the birth registry.).

WILHELM, *supra* note 5, at 66-68.

³⁴ WILHELM, *supra* note 5, at 59 (*[V]iele der letzteren haben mehr Ähnlichkeit mit dem ihren Geschlechtsdrüsen entgegengesetzten Geschlecht, besitzen oft auch das Geschlechtsbewußtsein des anderen Geschlechts und fühlen sich in diesem entgegengesetzten Geschlecht wohl, so daß eine einfache Zuzählung dieser Zwitter je nach ihren Geschlechtsdrüsen zu den Männern oder Weibern in vielen Fällen der Sachlage nicht gerecht wird.*).

³⁵ *Id.* at 61.

³⁶ *Id.* at 62 (*Der Arzt hätte bei der Ausstellung seines Zeugnisses nicht bloß die Geschlechtsteile des Zwitter, sondern alle sonstigen Geschlechtsmerkmale, sekundäre und tertiäre, Richtung des Geschlechtstriebes, Neigungen, Gewohnheiten des Zwitter, auch „alles das, was in der Zukunft für den Zwitter eine Rolle spielen, die Beziehungen zu den Mitmenschen“ usw. . . . [I]n Betracht zu ziehen. Nur dann hätte der Arzt der Wahl des Zwitter zu widersprechen, wenn der Zwitter das ganz offenbar für ihn nicht geeignete und seinem Wesen fremde Geschlecht wählen würde. . . .*).

On the paragraph proposing that parents should decide the sex in which the hermaphrodite child would be raised, Wilhelm contributed no further comment; he did not see much of a problem there. More than a decade later Neugebauer seems to have been the first to raise the problems concerning this issue—though referring not to Wilhelm, but to Garnier and Debierre, amongst others. Although Neugebauer considered the idea to introduce a third category of undecided sex reasonable, he foresaw many problems:

How should the parents raise such a child? . . . How should the parents dress such a child? Should the unconfirmed sex express itself in clothing, and how will such a particular condition, where everyone is informed of this malformation of the genitalia, reflect itself on the mental state of this affected individual?³⁷

Neugebauer thus seems to have been the first to have contemplated issues arising from the introduction of the doubtful sex category for the child involved.

The examples of Wilhelm and Neugebauer show that each considered it the physician's responsibility to be concerned about the hermaphrodite's social and inner life, his or her position in the world, relation to others, feelings and inclinations, happiness or unhappiness. In their discussion of the introduction of the doubtful sex category, Wilhelm and Neugebauer encouraged the medical profession to consider these topics as their specialty, which may be the very beginning of a medical expertise in what in the fifties of the twentieth century would be called "gender identity."

CONCLUSION: MONITORING DOUBTFUL SEX

While both discourses promote medical science as a key to the solution of the moral and legal problems associated with hermaphroditism, late 19th century French and early 20th century German pleas to introduce a doubtful sex category in civil law differ markedly in their argumentation. The French texts show an enormous anxiety about sexes that can turn out contrary to their original designation, that can be purposefully misrepresented, thus disturbing marriages, families and even the nation. The German texts are much more concerned with the sad fate of the hermaphrodites in question. Where the French texts thus appeal to the state as a protector of the moral public order, the German texts call for a state that protects its citizens against damage and abuse. Yet, both of them try to convince the state that medical science is indispensable for good management of the sexes.

³⁷ HERMAPHRODITISMUS BEIM MENSCHEN, *supra* note 21, at 574; HERMAPHRODITISMUS UND PSEUDOHERMAPHRODITISMUS, *supra* note 5, at 293-293 (*Wie sollen die Eltern so ein Kind Erziehen? . . . Wie sollen die Eltern ein solches Kind kleiden? Soll das unbestimmte Geschlecht in der Kleidung einen Ausdruck finden und wie wird eine solche Ausnahmstellung, wobei die Mißbildung der Genitalorgane jedermann kundgegeben wird, auf den Seelenzustand des betreffenden Individuums rückwirken?*).

If we look more closely at the practical consequences of both the French and German proposals, it immediately becomes clear that both would entail a considerable increase of medical interference in the lives of people with a doubtful sex. Those individuals would be medically and administratively monitored from birth onwards. Wilhelm kept the category purposefully large, by including genital malformations that did not raise doubt in strict medical sense. Obviously he did so with the best intentions for the persons in question, due to his desire to guarantee them the right to choose their own sex. However, this does not alter the fact that by doing so all these individuals would become the object of medical and administrative surveillance. If, for example, all cases of hypospadias (a congenital malplacement of the urethral meatus on the penis) would be registered as doubtful sexes, an enormous number of people would enter that category that otherwise probably would hardly have been noticed.³⁸ The only contemporary gynecologist who foresaw such consequences was Geijl. On Debierre's proposal to register doubtful sexes as such at birth, Geijl reproached Debierre for being carried away by prejudices and urged him to take an example from legislators:

Who having been educated by the experience, that all the tales of old about the danger of the hermaphrodite for the community and the public morality are at the very minimum grossly exaggerated, have understood, that it would be needless torment of poor, sickly people to place them outside the normal law. Neither the government, nor the sexual mores, require special guidelines to protect themselves sufficiently against these mostly completely innocent people.³⁹

In both the French and the German proposals, physicians would become involved with decisions over either a possible future marriage or sex assignment. Whereas the French texts opted for an almost complete medical dominance over such decisions—with a gonadal definition of sex as the only criterion—Wilhelm and the other German authors prioritized the hermaphrodite's own choice. However, Wilhelm did not simply leave the choice to the hermaphrodite; instead he carefully worked out a system in which the physician would include the hermaphrodite's sexual drive, proclivities, habits, and perspectives on future relations to other people within his medical expert account. In other words, the choice of the hermaphrodite would become part of the expertise of the physician.

Therefore, the important difference between Wilhelm's proposal and the earlier Prussian and Bavarian regulations of hermaphroditisms is the position of the

³⁸ Late nineteenth-century French research showed that about 5 % of all conscripts declared unfit were cases of hypospadias. These were cases of malformed genitalia in which sex had never been doubted at all. Wilhelm's proposal would have included most of these cases.

³⁹ Geijl, *supra* note 16, at 328 (*[D]ie, wijs geworden door de ervaring, dat al die verhalen van vroeger en heden over de gevaarlijkheid van den hermaphrodiet voor de gemeenschap en de publieke moraal minst genomen schromelijk overdreven zijn, begrepen heeft, dat het onnoodige kwelling van arme, ongelukkige menschen zou zijn, om hen buiten de gewone wet te stellen. Noch de maatschappij, noch de zedelijkheid, behoeft uitzonderingsmaatregelen, om zich tegen deze meestal volkomen onschadelijke lieden naar eisch te kunnen beschermen.*).

hermaphrodite's subjective experiences and drives. The earlier regulations allowed to a certain extent for the direct choice by hermaphrodites; in Wilhem's proposal, however, the hermaphrodite's choice is either approved or refuted by medical expertise which has to take into account the hermaphrodite's emotions, habits and desires. Thereby the latter have become the *object of medical inquiry*.

None of the proposals discussed in this section have ever been actually introduced in civil law. On the level of the local administration sometimes a doubtful sex was registered—as the three cases in Germany indicate. After 1900, medicine's control over the sex assignment of hermaphrodites rapidly increased, however, not so much through legal measures but because of medicine's growing capacity to both diagnose and operate on doubtful sex. Since the second half of the twentieth century, an entirely medical protocol decides the sex of a newborn intersexed child.⁴⁰ Thus, a question that was so fervently discussed as a *legal* issue in the nineteenth century—in which the medical community tried to get a major voice—has become an exclusively *medical* terrain. A terrain in which any legal involvement or control is remarkably absent.

⁴⁰ For a further analysis of what this development meant for the process of assigning a hermaphrodites' sex see Geertje Mak, *So we must go behind even what the microscope can reveal: The Hermaphrodite's "Self" in Medical Discourse at the Beginning of the Twentieth Century*, 11 GLQ 65(2005)1. See also Alison Redick's forthcoming monograph, *American History XY: The Medical Treatment of Intersex, 1916-1955* (2004) (unpublished Ph.D. thesis, New York University) (on file with the University of Pittsburg Health Sciences Library). For discussion of the increasing application of surgery on hermaphrodites from the end of the nineteenth century, but with a different analysis, see Chritina Matta, *Ambiguous Bodies and Deviant Sexualities. Hermaphrodites, Homosexuality, and Surgery in the United States, 1850-1904*, 48 PERSPECTIVES IN BIOLOGY AND MEDICINE 74 (2005).

