

VI.

## **The two laws and the three sexes: ambiguous bodies in canon law and Roman law (12<sup>th</sup> to 16<sup>th</sup> centuries)**

Von

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This article traces the history of medieval canon (and Roman) law on ‘hermaphrodites’ as a third sex, bodily different from both men and women. Contrary to what has been claimed, there is no evidence for hermaphrodites being persecuted in the Middle Ages, and the learned laws did certainly not provide any basis for such persecution. The legal status of hermaphrodites was discussed regularly, and canon lawyers were clearly aware of contemporary theology and natural philosophy. In the sixteenth century, while legal dogma remained essentially unchanged, court records show a marked change in legal practice compared to the later Middle Ages. Perhaps due to developments in contemporary medicine, hermaphrodite anatomy, gender change and sexual deviance were increasingly conflated. A more gender-symmetrical definition of crimes against nature seems to have led to (female) hermaphrodites and tribades being confused in this time. This also shows the complex relations between different pre-modern discourses on hermaphrodites which cannot be made fit any linear narrative.

Der Aufsatz verfolgt die Geschichte des kanonischen (und des römischen) Rechts hinsichtlich der ‘Hermaphroditen’ als einem dritten Geschlecht, das körperlich von Männern wie Frauen unterschieden wurde. Anders als oft behauptet, gibt es keinerlei Hinweise auf eine gerichtliche Verfolgung von Hermaphroditen, und die gelehrten Rechte boten dafür auch keinerlei Grundlage. Kanonisten erörterten regelmäßig die rechtliche Stellung von Hermaphroditen, oft mit Bezug auf zeitgenössische theologische und naturphilosophische Diskussionen. Im sechzehnten Jahrhundert veränderte sich zwar nicht die Lehre, wohl aber die gerichtliche Praxis, wie eine Reihe Fälle zeigen. Möglicherweise im Zusammenhang mit zeitgenössischen Entwicklungen der Medizin wurden hermaphroditische Anatomie, Geschlechtswechsel und sexuelle Devianz zunehmend miteinander assoziiert. Gleichzeitig trug auch eine stärker geschlechtssymmetrische Definition der Vergehen wider die Natur dazu bei, dass (weibliche) Hermaphroditen und Tribaden miteinander in Verbindung gebracht wurden. Dies zeigt auch, wie komplex die Beziehungen zwischen den sehr unterschiedlichen vormodernen Diskursen rund um Hermaphroditismus waren, die sich nicht in eine lineare Grobzerählung fügen lassen.

### I. Intersexuality in law, medicine and legal history

The idea that legal gender had to be binary because biological sex was binary was part and parcel of Western legal culture throughout the twentieth century. Perhaps the most visible expression of this was, and still is, the assign-

ment of either male or female legal gender to intersexual persons. Recently, however, several countries have begun to revise these regulations. Australia in 2011 introduced a third gender marker 'X' for 'indeterminate' alongside the traditional male/female categories in passports. In 2012, the EU commission published a report that specifically mentions binary sex (or gender) classification in civil status documents in its section on 'Discrimination against intersex people'<sup>1)</sup>. Most recently, Germany in summer 2013 adopted new rules for birth certificates; for the first time since the late nineteenth century, 'undetermined sex' can be registered. At the same time, medical guidelines for the treatment of intersexual infants are in the course of being revised in many countries<sup>2)</sup>. As in the legal sphere, assumptions about sex and gender that had been unchallenged for decades have been called into question<sup>3)</sup>. Standards of medical treatment of intersexual persons based on these assumptions are today severely criticized. Both in medicine and in law, intersexuality has become a human right issue<sup>4)</sup>.

Evidently, the recent growth of scholarship on the history of intersexuality is linked to the discussions surrounding these developments<sup>5)</sup>. A growing number of studies is tracing the history of what Laqueur called the 'two-sex-

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1) Silvian Agius/Christa Tobler, *Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression*, Luxembourg 2012, 83. See also *ibid.* (n. 212) for passport options in India, New Zealand, Malaysia, Nepal and South Africa.

2) See, for example, Ieuan A. Hughes *et al.*, *Consensus statement on management of intersex disorders*, in: *Journal of Pediatric Urology* 2 (2006), 148–62.

3) For the biology of intersex, see Heinz-Jürgen Voß, *Making Sex Revisited: Dekonstruktion des Geschlechts aus biologisch-medizinischer Perspektive*, Bielefeld 2010; Anne Fausto-Sterling, *Sex/Gender: biology in a social world*, New York 2012.

4) Alice Domurat Dreger, *Intersex and human rights: the long view*, in: *Ethics and intersex*, ed. Sharon E. Sytsma, Dordrecht 2006, 72–86; Angela Kolbe, *Intersexualität, Zweigeschlechtlichkeit und Verfassungsrecht: Eine interdisziplinäre Untersuchung*, Wiesbaden 2010.

5) Thomas Walter Laqueur, *Making sex: body and gender from the Greeks to Freud*, Cambridge/Mass. 1990; Alice Domurat Dreger, *Hermaphrodites and the medical invention of sex*, Cambridge/Mass. 1998; Valerio Marchetti, *L'invenzione della bisessualità: discussioni fra teologi, medici e giuristi del XVII secolo sull'ambiguità dei corpi e delle anime*, Milan 2001; Kathleen Perry Long, *Hermaphrodites in Renaissance Europe*, Aldershot 2006; Maximilian Christian Schochow, *Die Ordnung der Hermaphroditen-Geschlechter: Eine Genealogie des Geschlechtsbegriffs*, Berlin 2009; Voß, *Making* (above, n. 3); Patrick Graille, *Le troisième sexe: être hermaphrodite aux XVII<sup>ème</sup> et XVIII<sup>ème</sup> siècles*, Paris 2011; Patricia Simons, *The sex of men in premodern Europe: a cultural history*, Cam-

model' and how the modern category of sex was 'invented'<sup>6</sup>). While it is generally accepted, and indeed firmly asserted, that the histories of law and medicine are intertwined, much more attention has been paid to the development of medicine compared to legal history. The present article is an attempt to remedy this imbalance by sketching the legal history of intersexuality in pre-modern Europe. How did medieval and early modern laws treat 'hermaphrodites'<sup>7</sup>? The evidence mainly comes from later medieval canon law, but medieval Roman law and the development in the sixteenth and seventeenth centuries will also be taken into account. Given the state of research, the results are inevitably provisional; many of the 'deficiencies in the existing scholarship' lamented by Nederman and True in 1996 still persist<sup>8</sup>).

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bridge 2011, ch. 2; François Soyer, *Ambiguous gender in early modern Spain and Portugal: inquisitors, doctors and the transgression of gender norms*, Leiden 2012.

<sup>6</sup>) Since Laqueur, the rhetoric of 'invention' is commonplace in the history of intersex. See, for example, Laqueur, *Making sex* (above, n. 5), 149 ('Sometime in the eighteenth century, sex as we know it was invented'). For important criticism of Laqueur, see Lorraine Daston/Katharine Park, *The hermaphrodite and the orders of nature: sexual ambiguity in early modern France*, in: *GLQ: A Journal of Lesbian and Gay Studies* 1 (1995), 419–38, Joan Cadden, *Meanings of sex difference in the Middle Ages: medicine, science, and culture*, Cambridge 1993; Voß, *Making* (above, n. 3).

<sup>7</sup>) Medieval and early modern authors, whether writing in Latin or the vernaculars, almost always used the terminology of 'hermaphroditism' or, less frequently, 'androgyny' and a small number of other terms. While in many cases the persons thus referred to might have been what we today would call 'intersexual', there is no way to corroborate this, and in some cases they clearly were not. For these reasons, I will use the vocabulary of 'hermaphroditism' when referring to what medieval and early modern writers would have called so.

<sup>8</sup>) For the legal history of intersex, see in particular Andreas Wacke, *Vom Hermaphroditen zum Transsexuellen: Zur Stellung von Zwittern in der Rechtsgeschichte*, in: *Festschrift für Kurt Rebmann zum 65. Geburtstag*, ed. Heinz Eyrich, Munich 1989, 861–903; Cary J. Nederman/Jacqui True, *The third sex: the idea of the hermaphrodite in twelfth-century Europe*, in: *Journal of the history of sexuality* 6 (1996), 497–517, 502 (quote), 511–5 (legal history); Marchetti, *Invenzione* (above, n. 5); Ida Raming, *The priestly office of women: God's gift to a renewed Church*, Lanham, Md. 2004, esp. at 89–92, 112–5, 162–64; Maaïke van der Lugt, *Sex difference in medieval theology and canon law: a tribute to Joan Cadden*, in: *Medieval feminist forum* 46 (2010), 101–21, at 110–2; Kolbe, *Intersexualität* (above, n. 4), at 73–86; Julius Kirshner/Osvaldo Cavallar, *Da pudenda a prudentia: il consilium di Baldo degli Ubaldi sul caso di Giovanni Malaspina*, in: *Diritto e processo* 6 (2010), 97–112. On the legal status of 'monsters' (though not hermaphrodites in particular) see also John Block Friedman, *The monstrous races in medieval art and thought*, Cambridge/Mass. 1981, at 179–83.

## II. Hermaphrodites in pre-modern Europe: persecuted and/or tolerated?

Two apparently contradictory claims concerning the medieval legal history of hermaphrodites dominate historiography. First, it is claimed that hermaphrodites were persecuted up to the sixteenth or seventeenth centuries, often facing the death penalty. Secondly, medieval and early modern laws are said to have been tolerant towards hermaphrodites in the sense that they allowed intersexual persons to choose their gender, making the Middle Ages almost a ‘terrestrial paradise’ for hermaphrodites<sup>9</sup>). It is not easy to see how these two claims could be reconciled; however, as I will argue in the following, both claims are problematic, and the first one in particular is mistaken.

Let us therefore first discuss the idea that hermaphrodites were persecuted in the Middle Ages. This occasionally had been asserted in nineteenth-century literature, but the modern discussion only starts with Michel Foucault<sup>10</sup>). He was not a historian, and certainly not a medievalist; however, the same claim was made by historians like John Boswell and Philippe Ariès, who asserted in very general terms that hermaphrodites were persecuted in medieval times<sup>11</sup>). More recently, the claim has been repeated in several studies on the history of intersexuality. As most of these studies focus on early modern history, the focus here is mainly on the *end* of this persecution which Foucault had linked to the ceasing perception of hermaphrodites as monsters. Comparing two legal cases from 1601 and 1765, respectively, he argued that by the latter date the concept of hermaphrodites as monsters was disappearing from medical discourse, and (though much more slowly) from penal law, too<sup>12</sup>). A

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<sup>9</sup>) See Kirshner/Cavallar, *Pudenda* (above, n. 8), 103 on Foucault’s ‘presentazione del medioevo come una sorta di paradiso terrestre graziato dalla libertà di scelta degli ermafroditi’. This is mainly true for Michel Foucault, Introduction, in: Herculine Barbin, being the recently discovered memoirs of a nineteenth-century French hermaphrodite: a scandal at the convent, ed. *idem*, New York 1980, vii–xvii.

<sup>10</sup>) Michel Foucault, *The history of sexuality*, vol. 1: an introduction, New York 1978, esp. 39; Michel Foucault, *Abnormal: lectures at the Collège de France 1974–1975*, London 2003, 67–72; Foucault, Introduction (above, n. 9), vii–viii.

<sup>11</sup>) John Boswell, *Christianity, social tolerance, and homosexuality: gay people in Western Europe from the beginning of the Christian era to the fourteenth century*, Chicago/Ill. 1980, esp. at 68, n. 30, 185, 375; Philippe Ariès, *Thoughts on the history of homosexuality*, in: Philippe Ariès/André Béjin, *Western sexuality: practice and precept in past and present times*, Oxford 1985, 62–75, 66: ‘The anomaly condemned was one of sexual ambiguity, effeminate man, the woman with male organs, the hermaphrodite.’

<sup>12</sup>) Foucault, *Abnormal* (above, n. 10), 72: ‘The Grandjean case, despite being

number of recent works, partly working with the same materials as Foucault, have challenged his chronology, and argued that both the ‘naturalization’ of hermaphrodites and the end of their persecution were to be dated earlier. Working mainly with literary French sources, Kathleen Perry Long suggested that at least in some milieux, hermaphrodites were tolerated already in the second half of the sixteenth century<sup>13</sup>). According to Maximilian Schochow, hermaphrodites were persecuted well into the seventeenth century, but the fundamental (intellectual) change occurred already before 1600. In particular, he pointed out that the change was visible already with Ambroise Paré (d. 1590) and Michel de Montaigne (d. 1592); hermaphrodites were less and less seen as portentous, and they no longer were deported or executed<sup>14</sup>). Patrick Graille too assumed that the medicalization of hermaphrodites put an end to their persecution in the seventeenth century, and like Schochow he stressed that Paré effectively articulated such views already in the 1570s<sup>15</sup>).

So while the date persecution ended is under some debate<sup>16</sup>), the idea that hermaphrodites were persecuted in the Middle Ages (and beyond) is widely accepted<sup>17</sup>). But what crime were medieval hermaphrodites accused of? Sur-

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almost completely isomorphic with the 1601 case, nevertheless marks a very important development. First of all, it is important because of the fact that the hermaphrodite is no longer defined in medical discourse as a mixture of two sexes [...]. Thus, monstrosity as the mix of sexes, as transgression of everything that separates one sex from another, disappears.’ As for the legal development, Foucault assumed that it was much slower (ibid., 74): ‘I think it [monstrosity] still remained essentially and fundamentally criminal until late in the eighteenth century.’

<sup>13</sup>) Long, *Hermaphrodites* (above, n. 5), 192. In particular, she claimed ‘tolerance conferred by greater scientific understanding’ as the reason why ‘superstitious horror at that which does not conform to rigid roles of sex’ in general and persecution of hermaphrodites in particular came to an end at this time.

<sup>14</sup>) Schochow, *Ordnung* (above, n. 5), 89: ‘Die Leiber aus Parés und Montaignes Erzählungen werden zwar als Hermaphroditen angerufen, doch keine Verbannung auf eine Insel droht ihnen, keine Ausstoßung in die Einöde soll ihr Leben besiegeln und auch das Aufhängen am Galgen mit anschließender Verbrennung auf dem Scheiterhaufen bleibt ihnen erspart.’

<sup>15</sup>) Graille, *Troisième sexe* (above, n. 5), 100.

<sup>16</sup>) Marchetti, *Invenzione* (above, n. 5), 11 argued for the second half of the seventeenth century for a ‘depenalizzazione radicale delle pratiche bisessuali’.

<sup>17</sup>) Wacke, *Vom Hermaphroditen* (above, n. 8), 887; Long, *Hermaphrodites* (above, n. 5), 192; Schochow, *Ordnung* (above, n. 5), 182; Voß, *Making* (above, n. 3), 190. Graille, *Troisième sexe* (above, n. 5), 99–101 is more cautious, suggesting continuity where Foucault had stressed change. Indeed, Foucault himself occasionally shows signs of being aware that his claims on the Middle Ages in particular were not based on much evidence: Foucault, *Abnormal* (above, n. 10), 67. It may also

prisingly perhaps, only rarely any crime (or pretext) is mentioned for which hermaphrodites were – allegedly – exiled, drowned or burnt at the stake in the Middle Ages. As far as this is the case, two different explanations have been brought forward. Foucault asserted that hermaphrodites were persecuted because their anatomy ‘confounded the law that distinguished the sexes and prescribed their union’<sup>18</sup>). Boswell, in contrast, assumed that the persecution of hermaphrodites was due to a ‘confusion’ of hermaphrodites and sodomites in antiquity and the late Middle Ages<sup>19</sup>).

Foucault in effect claimed that hermaphrodites were persecuted because they were seen as monsters and because ‘monstrosity’ in pre-modern law was criminal. Such an explanation clearly must be dismissed. Foucault’s assumptions have been challenged for English legal history<sup>20</sup>), but they are equally mistaken for continental Europe. First, hermaphrodites were not, in any legal sense, ‘monsters’; and secondly, even if they had, this would not have meant that they were persecuted. As Paolo Zacchia (d. 1659) summarized Roman and canon law on hermaphrodites: ‘neither are they monsters, nor do the laws treat them as monsters’<sup>21</sup>). Zacchia (who mainly relied on medieval authorities) was right: according to both laws, the human status of hermaphrodites was beyond doubt. In medieval canon law, this is most clearly articulated

be that he had changed his mind by the time he edited the *Hercule Barbin* autobiography; in his Introduction (above, n. 9), Foucault stressed free choice of gender and also that most [*sic*] legal persecutions of hermaphrodites were due to ‘changes of option, not the anatomical mixture of the sexes’. However, he remained convinced ‘that there is evidence of a number of executions’ of hermaphrodites in the Middle Ages (*ibid.*, vii).

<sup>18</sup>) Foucault, *History of sexuality* (above, n. 10), 39: ‘For a long time hermaphrodites were criminals, or crime’s offspring, since their anatomical disposition, their very being, confounded the law that distinguished the sexes and prescribed their union.’ See also Foucault, *Abnormal* (above, n. 10), 72.

<sup>19</sup>) Boswell, *Christianity* (above, n. 11), esp. at 68, n. 30, 185, 375. As for the High Middle Ages, he famously claimed the ‘triumph of Ganymede’ and widespread tolerance towards homosexuality.

<sup>20</sup>) Andrew N. Sharpe, *Foucault’s monsters and the challenge of law*, New York 2009, ch. 4.

<sup>21</sup>) Paolo Zacchia, *Quaestiones medico-legales* [...], Avignon 1657, 494: *Monstra non sunt, nec pro monstris a Legibus habentur*. (The first edition, not available to me, appeared between 1621 and 1650, the first complete edition in 1654.) Following Foucault’s lead, Zacchia was given prominence by Laqueur, *Making sex* (above, n. 5) and, even more so, Marchetti, *Invenzione* (above, n. 5). See also Osvaldo Cavallar/Julius Kirshner, *Lo sguardo medico-legale di Paolo Zacchia sugli ermafroditi*, in: Paolo Zacchia: *alle origini della medicina legale, 1584–1659*, ed. Alessandro Pastore/Giovanni Rossi, Milan 2008, 100–37.

by the right, and indeed the duty, to baptise hermaphrodites; all humans, but humans only, could receive baptism<sup>22</sup>). In medieval Roman law, the human status of hermaphrodites was likewise uncontroversial; if proof were needed, the law of persons could be quoted as the most obvious example<sup>23</sup>). Crucially, even if the medieval laws had treated hermaphrodites as ‘monsters’, this would not have affected their status as humans; as Baldus de Ubaldis (d. 1400) put it, ‘a monstrous human nonetheless is human’<sup>24</sup>).

The second idea – the ‘confusion’ of sodomites and hermaphrodites – merits closer attention. As will be discussed later on, hermaphrodites in the sixteenth century were indeed occasionally accused of sodomy. In addition, one finds some indirect links between hermaphroditism and sodomy. Namely, a number of pre-modern bestiaries associated animals that were believed to change their sex – like the hare and the hyena – with effeminate men and/or sodomites<sup>25</sup>). Some patristic and medieval theologians did the same<sup>26</sup>). Furthermore, medieval and early modern polemics against courtiers also used ‘hermaphrodite’ in a pejorative sense<sup>27</sup>). As far as these polemics also allude to male homosexuality, they do indeed link hermaphroditism and sodomy.

However, these links are not necessarily proof that intersex persons were ‘confused’ with sodomites more generally in the Middle Ages. While there is some evidence for a polemic and/or sexualized use of the terminology of hermaphroditism, the same cannot be said for the persecution of hermaphrodites in the Middle Ages. In fact, while the claim that hermaphrodites were persecuted is frequently repeated in the scholarly literature, only two cases have been quoted to substantiate this claim, and both are mistaken.

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<sup>22</sup>) See, for example, Maaïke van der Lugt, L’humanité des monstres et leur accès aux sacrements dans la pensée médiévale, in: *Monstre et imaginaire social: approches historiques*, ed. Anna Caiozzo/Anne-Emmanuelle Demartini, Grâne 2008, 135–61 (quoted here according to the extended version available online: <http://halshs.archives-ouvertes.fr/halshs-00175587/fr/>; last accessed 28 September 2013).

<sup>23</sup>) See below.

<sup>24</sup>) Baldus de Ubaldis, *Commentaria omnia*, 8 vols., Venice 1599, here at vol. 3, fol. 58va (on Dig. 28,2,12): *monstruosus homo est tamen homo, quia essentia hominis est ab anima et spiritu*. See also Friedman, *Monstrous races* (above, n. 8), 179–83.

<sup>25</sup>) Boswell, *Christianity* (above, n. 11), 137–43, 306–7.

<sup>26</sup>) See Boswell, *Christianity* (above, n. 11), 140–2 on Clement of Alexandria (d. 215) and n. 78 below on Peter of Poitiers.

<sup>27</sup>) Valentin Groebner, Körpergeschichte politisch, Montaigne und die Ordnungen der Natur in den französischen Religionskriegen 1572–1592, in: *Historische Zeitschrift* 269 (1999), 281–304.

The first, and relatively famous one, is the imprisonment of a certain Laurence from Esclimont (in northern France) who apparently was sentenced because of her sexual relations with another woman called Jehanne around 1400. We know about her from a pardon letter issued in 1405, which was printed for the first time by Pierre Carpentier (d. 1767) and later added to Du Cange's *Glossarium*<sup>28</sup>). This document is extremely interesting for at least two reasons; first, it is one of very few documents directly attesting that female homosexuality was persecuted in the Middle Ages<sup>29</sup>), and secondly, it is highly suggestive that in the eighteenth century this document was thought to have to do with hermaphrodites<sup>30</sup>). Yet for the medieval history of hermaphroditism, the letter has no relevance at all. While Carpentier indeed thought that Jeanne was an hermaphrodite, the document itself does not even suggest that either Jeanne or, for that matter, Laurence were androgynous, hermaphrodite or anything the like<sup>31</sup>).

The only other primary source evidence quoted as an example of an hermaphrodite being persecuted and indeed burnt at the stake in the Middle Ages are the *Mémoires* of Jacques du Clercq (d. 1469), a chronicler at the court of Philip the Good of Burgundy<sup>32</sup>). It is, in my opinion, showing quite the op-

<sup>28</sup>) The text was first printed by Pierre Carpentier, *Glossarium novum ad scriptores medii aevi* [...], 4 vols., Paris 1766, here at vol. 2, cols. 744–5. The first edition of Du Cange's *Glossarium* to contain Carpentier's materials (including the pardon letter) was that by Johann C. Adelung, *Glossarium manuale ad scriptores mediae et infimae latinitatis ex magnis glossariis Caroli Du Fresne, domini Du Cange et Carpentarii in compendium redactum* [...], 6 vols., Halle 1772–84, here at vol. 4 (1776), 51.

<sup>29</sup>) On the persecution of female homosexuality in general, see Louis Crompton, *The myth of lesbian impunity: capital laws from 1270 to 1791*, in: *Journal of Homosexuality* 6 (1980/81), 11–25. On Laurence and Jeanne in particular, see Cadden, *Sex difference* (above, n. 6), 224, Daston/Park, *Hermaphrodite* (above, n. 6), 424 and, most recently, Helmut Puff, *Towards a philology of the premodern lesbian*, in: *The lesbian premodern: a historical and literary dialogue*, ed. Noreen Giffney *et al.*, New York 2011, 145–57, 148.

<sup>30</sup>) For the link between female homosexuality and hermaphroditism in early modern Europe, see Emma Donoghue, *Imagined more than women: lesbians as hermaphrodites, 1671–1766*, in: *Women's History Review* 2 (1993), 199–216, esp. at 200, and Katharine Park, *The rediscovery of the clitoris: French medicine and the tribade, 1570–1620*, in: *The body in parts: fantasies of corporeality in early modern Europe*, ed. David Hillman/Carla Mazziio, New York 1997, 171–93.

<sup>31</sup>) Against Daston/Park, *Hermaphrodite* (above, n. 6), 424 and Puff, *Philology* (above, n. 29), 148 who both claim that Jeanne was called hermaphrodite in the pardon letter.

<sup>32</sup>) The claim was made by Bernd-Ulrich Hergemöller, *Sodom und Gomorrha: Zur Alltagswirklichkeit und Verfolgung Homosexueller im Mittelalter*, Hamburg



posite of what it has been claimed for. The episode is set in du Clercq's native town Lille in the year 1458<sup>33</sup>):

The seventeenth day of the afore-mentioned month of March, a man was burnt in the city of Lille; this man said of himself to be man and woman, and to have both sexes, but this was not the case. Rather, he was a man, although he dressed in women's clothes. He dressed like this to sleep with young men, with whom he committed the sin of sodomy.

The report is very clear that the man was burnt at the stake – but it is equally clear that he was not burnt because he was an hermaphrodite, or because he claimed to be one. Rather, Jacques du Clercq calls him a man, explicitly rejecting the claim that he had ‘both sexes’. The crimes he evidently was sentenced for were cross-dressing and sodomy. The claim to ‘have both sexes’ seems to have been a defence of last resort. Similar claims are known from other sodomy trials<sup>34</sup>). If anything, this is an argument that sodomites and hermaphrodites were *not* confused, and in particular that hermaphrodites were not persecuted; otherwise it would have made no sense to call oneself hermaphrodite when faced with the accusation of sodomy.

Apart from these two cases, evidence that hermaphrodites were even associated with deviant sexuality in the Middle Ages is very scarce<sup>35</sup>). Crucially, before ca. 1500 no hermaphrodite is known to have been persecuted because s/he was thought to have committed sodomy, let alone for having an hermaphrodite body. Given that intersexual persons in many societies were, and

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2000, 55: ‘Der französische Chronist Jacques du Clercq überliefert die Tragödie eines Mannes, der am 17. März 1459 in Lille auf dem Scheiterhaufen starb, weil [*sic!*] er von sich selbst behauptete, er sei sowohl Mann als auch Frau und besitze beide Geschlechter.’

<sup>33</sup>) Jacques du Clercq, *Mémoires de 1448 à 1467*, in: *Choix de chroniques et mémoires sur l'histoire de France V*, ed. Jean Alexandre C. Buchon, Paris 1838, 1–308, here at 139: ‘*Le dix-septiesme jour dudict mois de mars, feut ards, en la ville de Lille, ung homme, lequel se disoit estre homme et femme et avoir les deux sexes, mais il n'en estoit riens; et estoit homme, combien qu'il feust habillé en habit de femme. Ainsy s'habilloit pout coucher avec des josnes hommes, avecq lesquels il commectoit le péché de sodomie.*’

<sup>34</sup>) Both Elena/Eleno de Céspedes and Marie/Marin le Marcis (see below) claimed to be ‘hermaphrodite’ as part of her defence. See Soyer, *Ambiguous gender* (above, n. 5), 96–124 for a sodomy trial around 1700 where the (rather doubtful) evidence of the accused having ambiguous genitalia worked in his favour.

<sup>35</sup>) See Christof Rolker, *Der Hermaphrodit und seine Frau: Körper, Sexualität und Geschlecht im Spätmittelalter*, in: *Historische Zeitschrift* 297 (2013), 593–620, for discussion.

still are, subject to suspicion, fear and physical violence, it may be plausible to assume that this also was the case in medieval Western Europe. However, the more specific claim that hermaphrodites were tried for some capital crime and sentenced to death in the Middle Ages is not supported by any evidence. Indeed, there are good reasons to believe that there are no medieval sources relating the persecution of hermaphrodites for the simple reason that no such persecution took place. To support this position, let us turn to the medieval legal history on hermaphrodites.

### III. Medieval canon law and Roman law on hermaphrodites

To begin with, there were no medieval statutory laws on hermaphrodites. Neither synodal decrees nor papal letters specifically dealt with hermaphrodites, or if so, these texts were not received into any major canon law collection. Secular legislation on hermaphrodites is equally inexistent for the Middle Ages. This, however, does not mean that there was no legal doctrine – or, for that matter, no legal practice. Ecclesiastical courts dealt with ‘hermaphrodite’ individuals, and as I will argue, they did so in a way that was consistent with legal doctrine.

#### 1. Classical Roman law:

The starting point of all medieval and early modern debates on the legal status of hermaphrodites were the few references to hermaphrodites found in the Digest (also known as Pandects), the most complex part of the *Corpus Iuris Civilis* compiled in the sixth century<sup>36</sup>). Brief as these texts may be, they make it clear that the human status of hermaphrodites was beyond doubt<sup>37</sup>). This had not always been the case in Roman history. Livy reports on several hermaphrodite children who in the past (especially at the time of the Second Punic War) were seen as portents, and in several instances describes how they were ritually killed<sup>38</sup>). Pliny too reports that hermaphrodites in the past, though not in his own times, were seen as prodigies, and at one occasion relates that in 171 BCE a ‘boy who turned into a girl’ was deported to an un-

<sup>36</sup>) *Corpus iuris civilis*, ed. Theodor Mommsen/Paul Krüger, 2 vols., Berlin 1872.

<sup>37</sup>) See Eltjo J. H. Schrage, Capable of containing a reasonable soul, in: *Collatio iuris Romani: études dédiées à Hans Ankum à l’occasion de son 65<sup>e</sup> anniversaire*, ed. Robert Feenstra, 2 vols., Amsterdam 1995, vol. 2, 469–88, here at 473, 486, stressing the continuity of ancient, medieval and early modern Roman law.

<sup>38</sup>) Livy in 14 volumes, Cambridge/Mass. 1951–62, esp. in books xxvii–xxxiii. Livy also was the main source for Julius Obsequens (see below note 40), not to mention the numerous sixteenth-century collections of this kind.

inhabited island<sup>39</sup>). There is also some evidence for a revival of the believe in prodigies in the fourth century, notably the *Liber de prodigiis* of Julius Obsequens<sup>40</sup>). In these writings, newborn hermaphrodite children are indeed said to have been killed because their birth was seen as a portentous – at least in a more or less distant past. Classical Roman law retained monstrosity as a legal category; according to the Digest, monstrous and prodigious births ‘in a shape different from human form’ were not counted as offspring<sup>41</sup>). While it is not entirely clear which bodies were counted as ‘monstrous’, hermaphrodites in classical Roman law clearly were *not* counted as monsters or prodigies<sup>42</sup>). Indeed, *hermaphroditi* were a legal category among several others – men, women, castrates, eunuchs<sup>43</sup>). They were understood as a ‘third sex’ (bodily different from both men and women) but for all legal purpose assigned either male or female gender according to the ‘prevailing’ or ‘predominant’ sex. ‘Predominantly male’ hermaphrodites thus enjoyed a number of rights which women, ‘predominantly female’ hermaphrodites, but also certain ‘imperfect men’ did not enjoy<sup>44</sup>). Unlike women, ‘predominantly male’ hermaphrodites could witness testaments, the jurist Paulus held<sup>45</sup>). According to Ulpian, ‘predominantly male’ hermaphrodites (but not castrates) could institute posthumous heirs<sup>46</sup>). As the *De statu hominis* title of the Digest made clear, the

<sup>39</sup>) Pliny the Elder, *Natural history in ten Volumes*, vol. 2: Libri III–VII: with an English translation by Harris Rackham, Cambridge/Mass. 1961, here at VII,iii,34 (ed. Rackham, 528): *Gignuntur et utriusque sexus quos Hermaphroditos vocamus, olim androgynos vocatos et in prodigiis habitos, nunc vero in deliciis*. For the second story, see VII, iv, 36 (ed. Rackham, 530).

<sup>40</sup>) The most important edition is: Iulii Obsequentis Prodigiorum liber ab urbe condita usque ad Augustum Caesarem [...], ed. Conrad Lycosthenes, Basel 1552.

<sup>41</sup>) Dig. 1,5,14: *Non sunt liberi, qui contra formam humani generis converso more procreantur: veluti si mulier monstrosum aliquid aut prodigiosum enixa sit. Partus autem, qui membrorum humanorum officia ampliavit, aliquatenus videtur effectus et ideo inter liberos connumerabitur*.

<sup>42</sup>) Schrage, Capable (above, n. 37), 473; Nederman/True, *Third sex* (above, n. 8), 512.

<sup>43</sup>) Yan Thomas, *The division of the sexes in Roman law*, in: *From ancient goddesses to Christian saints* (= *A history of women in the West 1*), ed. Pauline Schmitt-Pantel, Cambridge/Mass. 1992, 83–138, here at 84–5.

<sup>44</sup>) On the latter, see Jane F. Gardner, *Sexing a Roman: imperfect men in Roman law*, in: *When men were men: masculinity, power and identity in classical Antiquity*, ed. Lin Foxhall/John Salmon, London 1998, 136–52.

<sup>45</sup>) Dig. 22,5,15,1 (= *Pauli Sententiae* iii, 4A, 15): *Hermaphroditus an ad testamentum adhiberi possit, qualitas sexus incalescentis ostendit*.

<sup>46</sup>) Dig. 28,2,6,2: *Hermaphroditus plane, si in eo virilia praevallebunt, postumum heredem instituere poterit*.

distinction according to the ‘prevailing sex’ was to be applied generally, and not only in the specific cases just quoted<sup>47</sup>).

## 2. Later medieval canon law on hermaphrodites:

In the early Middle Ages, these texts were hardly known. One of them happened to be included in the *Lex Romana Visigothorum* (also known as *Breviary of Alaric*)<sup>48</sup>). On the whole, however, the Roman law on hermaphrodites seems not to have played any significant role before the ‘rediscovery’ of the *Digest*, and early medieval canon law does not contain any references to hermaphrodites. It was only with Gratian’s *Decretum*, compiled around 1140, that Western canon law engaged anew with this question<sup>49</sup>). Did the interest in hermaphrodites foster interest in the relevant parts of the *Digest*, or was it only with the rediscovery of the *Digest* that lawyers felt the need to discuss hermaphrodites? In the case of canon law, the latter seems to be the case. The reason to think so is that the treatment of hermaphrodites in Gratian’s *Decretum* is both short and unsystematic. The one and only proof text on hermaphrodites is found perhaps in an unexpected context – the law of wills. Here, Gratian among several other Roman law provisions also quotes two lines lifted from the *Digest*: hermaphrodites may witness testaments if and only if they were predominantly male<sup>50</sup>). We are not told what that means, and whether it was thought to have any relevance in ecclesiastical practice. Certainly Gratian did not feel compelled to discuss hermaphrodites systematically; he did not quote any other Roman law on hermaphrodites, and did not otherwise address hermaphrodites in contexts where the distinction of the sexes was at least of equal importance, namely ordination and marriage<sup>51</sup>).

In any case, the short *Digest* quotation in Gratian’s *Decretum* for a long time provided the most convenient starting point of any canon law discussion of hermaphrodites. Being included in this all-important collection of ecclesiastical law, they at least received some attention, even if genuine interest in hermaphrodites was low. Indeed, the decretists writing from the middle of the century to the 1170s treated hermaphrodites only very briefly and hardly

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<sup>47</sup>) Dig. 1,5,10: *Quaeritur: hermaphroditum cui comparamus? et magis puto eius sexus aestimandum, qui in eo praevallet.*

<sup>48</sup>) Max Conrat (Cohn), *Der westgothische Paulus: Eine rechtshistorische Untersuchung*, Amsterdam 1907, 20, n. 47. This part of the *Lex Romana Visigothorum* draws on the *Sententiae* (see above, n. 45).

<sup>49</sup>) *Decretum magistri Gratiani*, ed. Emil Ludwig Friedberg, Leipzig 1879.

<sup>50</sup>) C.4 qq.2/3 c.3 § 22, quoting Dig. 22,5,15 (above, n. 45).

<sup>51</sup>) See in particular C.27 q.2 c.1 (on marriage as *viri mulierisque coniunctio*); D.36 c.1 and D.49 c.1 (on deformity).

went beyond what was found in Gratian<sup>52</sup>). Some, like the *magister* Rolandus, Stephen of Tournai and Simon of Bisignano, did not mention hermaphrodites at all; others were content to repeat Gratian more or less verbatim<sup>53</sup>). Paucapalea in his *Summa of Gratian's Decretum* (ca. 1150) added an etymology and wrote that some hermaphrodites have a male breast on the right side and a female one on the left side<sup>54</sup>). The *Summa Parisiensis*, compiled around 1160, in a similar way added that in hot regions 'many' hermaphrodites were born and that the term 'hermaphrodite' was derived from the names of Hermes and Aphrodite<sup>55</sup>). Both Paucapalea and the *Summa Parisiensis* ultimately depend on Greek and Roman authorities, which in the Middle Ages were probably best known via Ovid, Pliny, St Augustine and St Isidore<sup>56</sup>).

These references show that the decretists were able and willing to display their classical learning; they do not suggest that the legal status of hermaphrodites was subject to much debate. Only slowly, the canonists ventured beyond what was already found in Gratian. The earliest witness of this may be an anonymous marriage tract beginning *Videndum est quid sit matrimonium* which touches upon the marriage of hermaphrodites<sup>57</sup>). According to Wei-

<sup>52</sup>) Nederman/True, Third sex (above, n. 8), 511–5.

<sup>53</sup>) See e.g. Rufin and the *Summa Colonensis* on C.4 qq.2/3 c.2: Rufinus, *Die Summa decretorum*, ed. Heinrich Singer, Paderborn 1902, 275 and *Summa 'Elegantius in iure diuino' seu Coloniensis*, ed. Gérard Fransen/Stephan Kuttner, 4 vols., Vatican City 1969–86, vol. 2, 148, respectively.

<sup>54</sup>) *Die Summa des Paucapalea über das Decretum Gratiani*, ed. Johann Friedrich von Schulte, Giessen 1890, 62 (on C.4 qq.2/3 c.2 v. hermaphroditus): *Ermafroditus, i. e. ille, qui promiscui sexus est. Ermafroditi autem nuncupati eo, quod eis uterque sexus appareat. "Erma" quippe apud Graecos "masculus", "afrodi" "femina" nuncupatur. Alii dextram mamillam virilem, sinistram muliebrem habentes vicissim coeundo et gignunt et pariunt*. This is largely taken from St Isidore, see Isidori Hispalensis episcopi etymologiarum sive originum libri XX, ed. Wallace M. Lindsay, 2 vols., Oxford 1911, here at xi,3,11.

<sup>55</sup>) The *Summa Parisiensis* on the *Decretum Gratiani*, ed. Terence P. McLaughlin, Toronto 1952, 126 (on C.4 qq.2/3, c.2 v. hermaphroditus): *In terra enim calida plures nascuntur utriusque generis qui, si magis adjungant viris, tamquam viri dabunt testimonium. Hermes "interpres", i.e. Mercurius, frodis "spuma", i.e. Venus. Inde hermaphroditus qui ex his natus utriusque formam gerit*.

<sup>56</sup>) See in particular Pliny, *Natural history* VII,ii,16 and VII,iii,35 to VII,iv,37, ed. Rackham (above, n. 39) at 516, 528, 530, respectively, on androgynous individuals and people. Like other ancient, medieval and modern authors, Pliny claims that hermaphrodites are found in particular in Africa.

<sup>57</sup>) Johann Friedrich von Schulte, *Zur Geschichte der Literatur über das Dekret Gratian*, Erster Beitrag, in: *Sitzungsberichte der Österreichischen Akademie der Wissenschaften in Wien, Philosophisch-Historische Klasse* 63 (1870), 299–352,

gand, the tract was written in the 1150s or around 1160, probably in Bologna<sup>58</sup>); a later date is not excluded. Starting with the definition of marriage as a union of man and woman, *Videndum est* explicitly rejects the idea of same-sex marriage and in this context also brings up the marriage of hermaphrodites. Without any discussion, *Videndum est* asserts that they can marry according to the ‘prevailing sex’; a beard ‘and the like’ are quoted as signs of the male sex<sup>59</sup>). Brief as it may be, the tract for the first time gives some hint how twelfth-century canonists understood the practicalities of the ‘prevailing sex’.

Towards the end of the century, references to hermaphrodites become more frequent in legal writings produced on both sides of the Alps. The Summa of Master Honorius, compiled at the end of the twelfth century (probably in Paris), at least briefly mentions that the ‘prevailing sex’ of hermaphrodites was important both in criminal law and the law of testaments<sup>60</sup>). As in the case of *Videndum est*, this indicates that Gratian’s proof text was understood

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304–5; Rudolf Weigand, Kanonistische Ehe traktate aus dem 12. Jahrhundert, in: Proceedings of the third international congress of medieval canon law, Strasbourg, 3–6 September 1968, ed. Stephan Kuttner, Vatican City 1971, 59–79, here at 69–71.

<sup>58</sup>) Weigand, Kanonistische Ehe traktate (above, n. 57), 71.

<sup>59</sup>) Munich, Bayerische Staatsbibliothek, Clm 16984, here at fol. 29r: *Videndum est, quid sit matrimonium et a quo institutum, et ubi et quando sint necessaria ad matrimonium contrahendum, quae dirimant contractum, quid sit sacramentum, quae res sit sacramenti. Matrimonium est coniunctio viri et mulieris individuum vitae consuetudinem retinens [= C.27 q.1 c.1]. Viri et mulieris recte dicitur, quia non est matrimonium viri ad virum, nec mulieris cum muliere. Unde merito quaeritur, utrum hermaphroditus cum viro vel cum muliere contrahere possit? De hoc ergo sicut scelerum auctoritates legum testantur dicendum, quod si sexus etatis incalescentis exegerit et sicut indicaverit contrahere potest cum muliere ut si magis accedit ad sexum virilem quam muliebrem, ut habeat virilitatis inditiam, barbam et huiusmodi, cum muliere contrahere posse intelligatur. Si vero praevalent in eo muliebris imbecillitatis inditiam, ut barba careat et huiusmodi, cum viro contrahere posse intelligatur. Parts of this passage are quoted by von Schulte, Geschichte (above, n. 57), 304; Weigand, Kanonistische Ehe traktate (above, n. 57), 69, n. 60, respectively. The manuscripts used by Schulte (Berlin, Staatsbibliothek, Savigny 14) and Weigand (Bamberg, Staatsbibliothek, Msc. Patr. 18 and the Munich copy) have several small variants.*

<sup>60</sup>) Magistri Honorii summa “De iure canonico tractaturus”, ed. Rudolf Weigand et al., 3 vols., Vatican City 2004–10, here at vol. 2, 101 (on C.4 qq.2/3 c.3 § 22 v. hermofroditus): *Putat si virilis sexus in eo prevalet. Hec autem distinctio consideranda in criminibus et testamentis, ubi mulier non admittitur nisi in testamentis parentum, ut C. familie herciscunde l. ult. [= Cod. 3,36,26], non autem in civilibus, ut in contra xv. Q. iii l. De crimine [= C.15 q.3 c.1]. Honorius seems to identify the *persona mixta* in Cod. 3,36,26 with an hermaphrodite. On hermaphrodites as a metaphor in Roman law, see Ernst Hartwig Kantorowicz, The king’s two bodies: a study in mediaeval political theology, Princeton/N.J. 1997, 10–1.*

to apply more generally than the presentation in the *Decretum* would suggest, and also shows canonists were very much aware of the relevant Roman law. Around the same time, Robert Courçon (d. 1219) seems to have been the first canonist north of the Alps to apply the idea of the ‘prevailing sex’ to the law of marriage<sup>61</sup>). Hermaphrodites, he wrote, are to be treated according to the prevailing sex and can marry accordingly as men or as women; if they cannot have intercourse at all, they can marry neither as men nor as women. What about the fourth possibility, namely that ‘perfect’ hermaphrodites may be able to perform both active and passive roles in intercourse? Robert did not treat this case because he assumed that it was impossible to occur. Interestingly, he refers to physicians or natural philosophers (*phisici*) when asserting that there were no ‘perfect hermaphrodites’<sup>62</sup>).

a) *Huguccio*:

Unsurprisingly perhaps, the fullest account comes from Huguccio, who also provides some practical hints on how to decide on the ‘prevailing sex’. His extensive *Summa decretorum*, completed probably around 1190, soon became extremely influential<sup>63</sup>). The following passage can therefore be assumed to have been widely known and to have enjoyed considerable authority well into modern times<sup>64</sup>). In his comment on Gratian’s *Causa 4*, Huguccio wrote<sup>65</sup>):

<sup>61</sup>) John Wesley Baldwin, *The language of sex: five voices from Northern France around 1200*, Chicago 1994, 44–5.

<sup>62</sup>) Paris, Bibliothèque nationale, cod. lat. 14524, fol. 144va as quoted by Baldwin, *Language of sex* (above, n. 61), 44, n. 6: *Solutio ut tradunt phisici non potest contingere quod duo sexus in ermafrodito equaliter vigeant. Immo oportet quod semper unus obtineat privilegium et si secundum sexum illum possit reddere debitum secundum illum poterit contrahere quia ut dicit lex humana semper sexus incalcentis etatis preiudicat in talibus. Si autem secundum neutrum sexum possit talis reddere debitum, persona est illegitima ad contrahendum.*

<sup>63</sup>) On Huguccio, sometimes dubbed ‘the greatest decretist’, see most recently Kenneth Pennington/Wolfgang P. Müller, *The decretists: the Italian school*, in: *The history of medieval canon law in the classical period: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann/Kenneth Pennington, Washington/D.C. 2008, 121–73, here at 142–60.

<sup>64</sup>) Marchetti, *Invenzione* (above, n. 5), 119 attributed the doctrine quoted below to Juan de Torquemada (d. 1468); however, de Torquemada’s comment on Gratian as quoted by Marchetti is repeating Huguccio verbatim. For other examples of the influence of Huguccio’s *Summa* on C.4 and C.27, see Franz Gillmann, *Weibliche Kleriker nach dem Urteil der Frühcholastik*, in: *Archiv für katholisches Kirchenrecht* 93 (1913), 239–53, esp. at 249, 251, 252; Raming, *Priestly office* (above, n. 8), 89–92, 112–5, 162–4.

<sup>65</sup>) Huguccio on C.4 qq.2/3 c.3 §22 v. ordinari, quoted here from Munich, Bayerische Staatsbibliothek, Clm 10247, fol. 127va: *Set an magis in hunc sexum quam in*

Whether this or that sex prevails, is decided by bodily inspection and habits. If someone has a beard and always wants to perform male tasks (and not female ones) and always wants to converse with man (and not women), this is a sign that the male sex prevails in him, and that he hence can be witness where woman is not admitted, that is, in testaments and last wills, and can be ordained. But if someone lacks a beard and always wants to be with women and perform female tasks, this is evidence that the female sex prevails, and thus she is not admitted as witness where women are not admitted, i.e. in testaments, and cannot be ordained, because woman does not receive holy orders. In addition, in this distinction the inspection of the genitals is very useful. What if both sexes are found to be equally strong in all aspects? I believe that s/he be treated as if the female sex prevailed, because the male sex does not prevail.

For Huguccio, it is clear that the same theory of the ‘prevailing sex’ can be applied in different areas of the law. So which sex can be established as ‘prevailing’? Like the tract *Videndum est*, Huguccio places particular emphasis on the presence or absence of a beard, which is mentioned first. However, he also takes into account individual behaviour and gives special weight to the inspection of the genitals (*inspectio genitalium*). Anatomy seems to be slightly more important than behaviour, but Huguccio did not discuss the case of contradictory evidence.

Given that Huguccio is more complete than any earlier (and many later) canonists, it may be worth mentioning which criteria are *not* discussed. First

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*illum per aspectum corporis vel conversatione. Si quidem habet barbam et semper vult exercere virilia et non feminea et semper vult conversare cum feminis [recte: viris] et non cum feminis, signum est, quod virilis sexus in eo prevalet et tunc potest testis esse, ubi mulier non admittitur, scilicet in testamento et in ultimis voluntatibus, tunc etiam ordinari potest. Si vero caret barba et semper vult esse cum feminis et exercere opera feminea, inditium est, quod femineus sexus in eo prevalet et tunc non admittitur ad testimonium, ubi femina non admittitur, scilicet in testamento, set nec tunc ordinari potest, quia femina ordinem non recipit. Praeterea ad talem discretionem multa valet inspectio genitalium. Quid si illi duo sexus equales per omnia in eo inveniuntur? Credo quod debeat iudicari de eo tamquam femineus sexus in eo prevalet, quia verum est virilem sexum in eo [add. supra lineam: non] prevalere.* The scribe of the Munich manuscript seems to have been somewhat confused by Huguccio’s argument; my translation follows the corrected text, for which I have taken into account the quotations from other manuscripts by Gillmann, *Weibliche Kleriker* (above, n. 64), 247, n. 1; John Hilary Martin, *The ordination of women and the theologians in the Middle Ages*, in: *Escritos del Vedat* 16 (1986), 115–77, here at 135, n. 47; Ida Raming, *Priesteramt der Frau – Geschenk Gottes für eine erneuerte Kirche*, Münster 2002, 105, n. 159 (the Latin text is absent from the English translation of Raming’s book [above, note 8]); Yves Mause, *Veritatis adiutor: la procédure du témoignage dans le droit savant et la pratique française (XII<sup>e</sup>–XIV<sup>e</sup> siècles)*, Milan 2006, 470, n. 271; van der Lugt, *Humanité des monstres* (above, n. 22), 20, n. 83.



of all, sexual desire is apparently irrelevant to determine the legal gender of an hermaphrodite, unless it is counted among the male and female ‘tasks’. This depends on how one understand terms like *opera feminea* and *opera muliebra*. While they commonly meant ‘labour normally done by women’ – anything from childrearing to brewing beer, depending on time and place – they occasionally were used to describe the performance of a passive role in intercourse<sup>66</sup>). This was in all probability not what Huguccio meant<sup>67</sup>), but some of his readers may well have understood him to this effect. Indeed, this could explain why at least the scribe of the Munich manuscript was uncertain whether the male gender was to be inferred from the preference of male company – or rather from that of female company<sup>68</sup>); evidently, this depended on whether one understood ‘company’ as referring to homosocial or indeed to heterosexual activities.

Huguccio was also the first canonist to mention the possibility that hermaphrodites may be ordained priest. Contrary to what one could think, Huguccio did not argue that the ordination of hermaphrodites was allowed; rather, he claimed that it was ‘possible’ for predominantly male hermaphrodites while it was impossible for other hermaphrodites (and women). This is not so much a claim on the legality, but rather the validity of these ordinations. Indeed, Huguccio was the first canon lawyer to explicitly claim that the ordination of women was not only forbidden but invalid; according to him, the ordination of a woman, if done *contra legem*, did not have any legal effects on that woman<sup>69</sup>). In addition to the passage just quoted, this can be shown from his comment on *Causa 27*<sup>70</sup>):

<sup>66</sup>) For legal uses, see Henrici de Segusio, *Cardinalis Hostiensis, Summa aurea*, Venice 1574, col. 612 (as quoted below, note 83); *Institution du droit romain et du droit françois, divisée en IV livres*, Paris 1686, 630 (*office de femme*). For non-legal sources, see Boswell, *Christianity* (above, n. 11), 185 (*muliebra opera*), 217, n. 32 (*officium uxoris*).

<sup>67</sup>) See Raming, *Priestly office* (above, n. 8), 91, n. 159 on Huguccio’s use of *virilia opera* and *virilia officia* in different contexts.

<sup>68</sup>) See the passage quoted above (above, n. 65). The scribe confused men and women in the beginning (writing *feminis* instead of *viris*), and first forgot the decisive *non* at the very end of the same passage, though corrected the second mistake by squeezing in the *non* between the lines.

<sup>69</sup>) See Gillmann, *Weibliche Kleriker* (above, n. 64), 246; Raming, *Priestly office* (above, n. 8), 89–92, 112–5, 162–4.

<sup>70</sup>) Huguccio on C.27 q.1 c.23 v. ordinari, quoted here from Munich, Bayerische Staatsbibliothek, Clm 10247, fol. 229ra: *Quid si est ermafroditus? Distinguitur circa ordinem recipiendum sicut circa testimonium faciendum in testamento, ut IIII q. III. Item ermafroditus. Si ergo magis calet in feminam quam in virum, non recipit ordinem,*

What if the [candidate for ordination] is an hermaphrodite? The same distinction should be made concerning the reception of orders as for witnessing a testament (C.4 q.2/3 c.23 § 22). If therefore the person tends [*calet*] to the feminine more than to the male, s/he does not receive orders. If the reverse, s/he is able to receive, but ought not be ordained on account of deformity and monstrosity (see D.36 c.1 and D.49 c.2). What if a person equally tends to both [sexes]? This person does not receive orders.

The distinction is essentially the same as in the discussion of Causa 4, but there are some minor differences. Namely, the account is slightly more medical here: Huguccio's use of *calere* ('to be or to feel hot') that can hardly be translated into modern English evidently refers to pre-modern medical theories of men being 'hotter' than women and is perhaps best rendered as 'to have a certain humoral complexion'. There also seems to be a minor difference concerning doubtful cases and 'perfect' hermaphrodites. Commenting on Causa 4, Huguccio had only talked about treating those *found* equally male and female as if they were predominantly female; commenting on Causa 27, he more clearly seems to make a statement about bodies which *are* equally male and female. Unlike Robert Courçon, then, Huguccio did not deny the existence of 'perfect' hermaphrodites, and at least in the context of ordinations he seems to treat 'perfect hermaphrodites' as truly different (and bodily distinct?) from both 'predominantly male' and 'predominantly female' hermaphrodites.

*b) Peter the Chanter:*

In addition to the extant canon law works, valuable evidence on the debates on hermaphrodites in the late twelfth century comes from the theological works of Peter the Chanter (d. 1197). Peter, while himself not a canon lawyer, both in his *Verbum abbreviatum* and in his *Summa de sacramentis* briefly referred to the canon law on hermaphrodites<sup>71</sup>). In the *Verbum abbreviatum*, he wrote that the Church allowed androgynous persons to use either the male or the female genital organ. However, if this organ should fail later, they cannot use the other one but have to remain perpetually chaste 'to avoid even the ap-

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*si econtra, recipere potest, set non deberet ordinari propter deformitatem et menstruositatem [sic], arg. D. XXXVI. Illiteratos et D. XLVIII. c. ult. Quid si equaliter calet in utrumque? Non recipit ordinem.* I have used, but moderately revised the translation of Raming, Priestly office (above, n. 8), 91, n. 159. Note that Gratian in D.36 c.1 and D.49 c.2 indeed treats deformity but not 'monstrosity'.

<sup>71</sup>) Peter's account in the *Verbum* gained some prominence thanks to the translation in Boswell, *Christianity* (above, n. 11), 375–8. The only scholar to have taken into account the *Summa* too seems to be van der Lugt, *Sex difference* (above, n. 8), 111, n. 33.

pearance of the sodomitic vice<sup>72</sup>). This may be the earliest known reference to the question whether one person can marry (consecutively) as a man and as a woman. Peter seems to say that the Church, and perhaps church law, forbade this. The legal basis of this claim is not clear; contemporary canon law, as far as we know, was not decided on this question. Interestingly, Peter's account in the Summa is slightly different. Peter here suggests that the marriage first as a man and then as a woman was not impossible. Assuming that hermaphrodites could marry according to the prevailing sex, Peter raised two questions. What if an hermaphrodite already married as a man later turned out to be more female – was this marriage still valid? And what if his wife died, and s/he remarried as a woman? Was this (second) marriage really a marriage? Peter's answer is moderately obscure<sup>73</sup>): 'This depends on the counsel of the decretals.' Compared to the Verbum abbreviatum, the case is slightly different and the answer less certain, possibly even dissimilar. In his Summa, Peter seems to imply that a marriage first as a man and then as a woman was possible under certain circumstances, depending on the 'counsel of the decretals'. This rather elusive answer may express genuine uncertainty, and also could indicate that Peter was aware of different opinions on this matter. As mentioned above, at the time Peter compiled his works in the 1180s and 1190s – the exact dating of his works remains difficult<sup>74</sup>) – canon lawyers were apparently debating the marriage of hermaphrodites with some vigour. Yet as is evident from the texts quoted above, the question of consecutive marriage of hermaphrodites was far from clear in the later twelfth century.

In addition, Peter the Chanter was not a canonist; if anything, he is known for his severe criticism of lawyers and his extreme views of the instability

<sup>72</sup>) Petri Cantoris Parisiensis Verbum abbreviatum, ed. Monique Boutry, 3 vols., Turnhout 2004–12, here at vol. 2, 638: *Unde ecclesia homini androgyno, id est habenti instrumentum utriusque sexus, aptum scilicet ad agendum et patiendum, instrumento, quo magis calescit, quove magis est infirmus, permittit uti. [...] Si autem in illo instrumento defecerit, nunquam concederetur ei usus reliqui instrumenti, sed perpetuo continebit, propter vestigia alternitatis vitii sodomitici, quod adeo detestatur.* (The *adeo* in my opinion may well be understood to mean *a Deo*.)

<sup>73</sup>) Petrus Cantor, Summa de sacramentis et animae consiliis, ed. Jean-Albert Dugauquier, 3 in 5 vols., Louvain 1954–67, here at vol. 3/ii, 259: *Rursus, si deederet uxor eius et postea nuberet illa quam prius duxit, pateretur ecclesia tale matrimonium aut esset in rei veritate matrimonium? Istud pendet de consilio decretorum.*

<sup>74</sup>) The Summa was probably compiled in the 1190s. As for the Verbum abbreviatum, the crucial question of the direction of dependence of the different versions is still not solved beyond reasonable doubt. See John Wesley Baldwin, Review article: an edition of the long version of Peter the Chanter's Verbum abbreviatum, in: Journal of Ecclesiastical History 57 (2006), 78–85.

of ecclesiastical law<sup>75</sup>). He is also known for his sometimes unusual views, and for his obsession with sodomy<sup>76</sup>). This may explain some of the more idiosyncratic aspects of his account. Above all, the context in which Peter comes to mention hermaphrodites in his *Verbum abbreviatum* is very unusual from a canon law point of view. The discussion of hermaphrodites in the *Verbum abbreviatum* is found in a long chapter *De vitio sodomitico*<sup>77</sup>). This in itself is highly unusual; while medieval theologians sometimes seem to have associated hermaphroditism and sodomy<sup>78</sup>), medieval canon lawyers did not link anatomy and deviant sexuality this way. All this suggests that one should be very careful and not accept Peter's *Verbum abbreviatum* as representing 'the' canon law on hermaphrodites. If anything, his approach to the re-marriage of hermaphrodites shows how very much canon law in this area was in the flux in the late twelfth century.

c) *The Glossa Palatina and the Glossa ordinaria*:

Some, but not all of these discussions that took place around 1200 were received into the major collections of glosses and thus 'mainstream' canon law. Occasionally, these works compiled in the first half of the thirteenth century reveal arguments not found in earlier works. For example, the *Glossa Palatina* reports that Laurentius Hispanus (d. 1248) asserted that predominantly male hermaphrodites ought not to be ordained *propter scandalum*<sup>79</sup>). Further research into these glosses and their formal sources might well reveal more findings of this kind. What is clear, however, is that the glosses repeated and disseminated the legal doctrine discussed so far. This is above all true for the

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<sup>75</sup>) John Wesley Baldwin, *Critics of the legal profession*, in: *Proceedings of the second international congress of medieval canon law*: Boston College, 12–16 August 1963, ed. Stephan Kuttner/John Joseph Ryan, Vatican City 1965, 249–59; John Wesley Baldwin, *Masters, princes and merchants: the social views of Peter the Chanter and his circle*, 2 vols., Princeton/N.J. 1970, 332–7.

<sup>76</sup>) In addition to Baldwin, *Masters* (above, n. 75), see Boswell, *Christianity* (above, n. 11), 277; Maaïke van der Lugt, *Pourquoi Dieu a-t-Il créé la femme? Difference sexuelle et théologie médiévale*, in: *Ève et Pandora: la création de la femme*, ed. Jean-Claude Schmitt, Paris 2001, 89–113, 98.

<sup>77</sup>) *Verbum abbreviatum*, ed. Boutry (above, n. 72), vol. 2, 637–41.

<sup>78</sup>) The theologian Peter of Poitiers (d. 1215) condemned masturbation as 'sodomitic sin' and metaphorically called the sinner committing it 'almost like an hermaphrodite' because he was both active and passive: *Petri Pictavensis Summa de confessione*, ed. Jean Longère, Turnhout 1980, 18–9. See also Baldwin, *Language of sex* (above, n. 61), 44, n. 6 on Peter the Chanter.

<sup>79</sup>) Vatican City, *Biblioteca Apostolica Vaticana*, Vat. Reg. lat. 977, fol. 220v as quoted by van der Lugt, *Humanité des monstres* (above, n. 22), 20, n. 84: *hermafroditum autem dico non promovendum propter populi scandalum*.

so-called Ordinary Gloss to Gratian's *Decretum* compiled by Johannes Teutonicus (and revised by Bartholomew of Brescia in the early 1240s<sup>80</sup>). The Gloss gathered a relatively large set of questions on hermaphrodites – mainly whether and under which circumstances they could marry or be ordained. Strictly following the organisation of Gratian's *Decretum*, hermaphrodites are discussed in the context of *Causa 4* but not, for example, in the context of the definition of marriage as the union of man and woman<sup>81</sup>). According to the Ordinary Gloss, both ordination and marriage are possible under certain circumstances, but on the whole the answers are quite short: time and again, the 'prevailing sex' is quoted, without further discussion of doubtful cases or how this 'prevailing sex' could be established. Indeed, rather than addressing such questions, the Gloss states that 'monstrous questions can be asked on monsters'<sup>82</sup>). This rather grumpy remark – not exactly encouraging further discussion – is a rare example that hermaphrodites were referred to as 'monsters' in a canon law context. Nonetheless, the Gloss faithfully retained the legal doctrine developed up to the time of Huguccio, and certainly did not call into question the human nature of hermaphrodites.

d) *Hostiensis*:

The next significant development in canon law on hermaphrodites took place in mid-thirteenth century, when Henry of Segusio (d. 1271), better known as Hostiensis, wrote his comment on the *Liber Extra*. Commenting on deformity as an impediment to ordination, he raised the question of the 'perfect hermaphrodite', that is, a person with fully functional male and female genitalia, apparently because he had encountered such a case<sup>83</sup>):

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<sup>80</sup>) I have used the *editio Romana*: *Decretum Gratiani emendatum et notationibus illustratum una cum glossis* [...], Rome 1582. See below (n. 82) for other editions.

<sup>81</sup>) *Decretum Gratiani* (above, n. 80), col. 1099 (on C.27 q.2 c.1) briefly rejects same-sex marriage (*in pari sexu non potest esse matrimonium*), but does not consider the marriage of double-sexed persons or otherwise engage with ambiguous bodies.

<sup>82</sup>) *Decretum Gratiani* (above, n. 80), col. 1022 (on C.4 qq.2/3 c.2 v. hermaphroditus): *De monstro possunt fieri monstruosae questiones*. In the *editio Romana*, this gloss is attributed to Huguccio, but in the early printed editions of the Gloss I have consulted (Venice 1474 and 1500, fols. 142va and 131rb, respectively), the siglum is 'b', and the Lyon 1559 edition does not attribute it to any author: *Decretum D. Gratiani* [...] una cum glossis et thematibus [...], Lyon 1559, 520.

<sup>83</sup>) Hostiensis, *Summa aurea* (above, n. 66), col. 612: *Quid si utriusque membri officio uti potest, secundum quid de facto fuit in villa mea, scilicet Secusiae? Respondeo: eligat cui se dicat, secundum quid episcopus Tauriensis diocesanus noster de ipso fecit et iuret quod de caetero alio non utetur, quia nec fungi debet duplici officio, maxime tam diverso*.

What is s/he is able to use both members in intercourse, as it indeed happened in my home-town Susa? I reply: s/he may say which sex s/he chooses, as our diocesan bishop, the bishop of Turin [demanded in this case]; and s/he may swear furthermore not to use the other one, as one ought not use double sexual organs, especially not different ones.

This short comment is the only reference to hermaphrodites in the rather lengthy *Summa aurea* (in the 1574 edition, it covers almost one thousand pages); apparently, Hostiensis was not particularly interested in hermaphrodites, and did not mention them in the context of baptism, marriage or female ordination. However, he was the first canonist to address the question of ‘perfect’ hermaphrodites, and the author of the *regula iuris* that that hermaphrodites have to swear an oath, so frequently quoted in later medieval and early modern canon (and secular) law. The swearing of an oath, from a practical point of view, was much more attractive than the measures discussed by earlier canonists. As is clear from many later cases, bodily inspections were rather unreliable and could easily lead to different results; and apart from problems of evidence, medieval and early modern canon lawyers were ready to accept that the ‘prevailing sex’ could in fact change over time. If the main concern was to make the three sexes fit the two genders, an oath was more useful than bodily inspection.

*e) Dissemination (13<sup>th</sup> and 14<sup>th</sup> centuries):*

By and large, canon law had developed a fairly consistent dogma on the legal status of hermaphrodites by around 1200. From the early thirteenth century, these views were widely disseminated by standard works of reference which were used both in academic teaching and in practice. For the former, the Ordinary Gloss was of paramount importance; as detailed above, it was faithful to the dogma of the ‘prevailing sex’ but otherwise did not encourage further discussion. As for the latter, several thirteenth-century manuals for parish priests and confessors at least in passing referred to hermaphrodites. Robert of Flamborough, for example, around 1210 compiled a manual specifically addressing the ‘simple priest’ and with an eye to everyday practice. Yet he thought the question of the ‘prevailing sex’ of hermaphrodites important enough to include it in his account of ordination<sup>84</sup>). Likewise, both Johannes of Freiburg (d. 1314) in his gloss on the *Summa de penitentia* of Raymund of Peñafort, and Astesanus de Ast (d. ca. 1330) repeated Huguccio on the ordination of hermaphrodites<sup>85</sup>). One of the reasons that Huguccio’s positions

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<sup>84</sup>) Robert of Flamborough, *Liber poenitentialis*, ed. J.J. Francis Firth, Toronto 1971, 101.

<sup>85</sup>) See Johannes’ gloss on Raymund’s *Summa*, book 3, c.26 v. *mentiuntur*: *Summa*

rather than more recent authorities were quoted (often verbatim) even in late medieval canon law is that many works of references were compiled in the early thirteenth century and thus before Hostiensis<sup>86</sup>). This did certainly not impede the success of Hostiensis' teaching on hermaphrodites. Even if his comment was short, no other canonist was so frequently quoted by name from the later Middle Ages to modern times when it came to the legal status of hermaphrodites. Indeed, it is difficult to overestimate the influence of his short comment. Baldus de Ubaldis, Simone Majoli, Pierre Rebuffi, Tomás Sánchez – to quote only some influential scholars from the fourteenth to the seventeenth centuries – all quote Hostiensis as a key authority when dealing with hermaphrodites<sup>87</sup>). In fact, the case reported by Hostiensis was quoted as precedent in a prolonged marriage case that was decided upon by the Rota in 1888<sup>88</sup>).

*f) Summary and analysis:*

Hermaphrodites had entered canon law in a slightly random way, and only around 1200 the canonists engaged more systematically with the question of the legal status of double-sexed persons. While the legal dogma of the 'prevailing sex' was repeated time and again, special attention must be given to the context in which hermaphrodites were discussed – or not: the absence of any comments on the baptism of hermaphrodites is best explained by the fact that their human status was beyond doubt. Baptism in any case was extremely 'sex-neutral'; both men and women could baptize, and for the validity of the sacrament it was not even necessary to know the sex of the baptisee<sup>89</sup>). The context of testaments, and the prominence of hermaphrodites as witnesses, in contrast, can easily be explained by the peculiarity of Gratian's *Decretum*

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Sancti Raymundi de Peniafort [...] cum glossis Joannis de Friburgo, Avignon 1715, 456. For Asteanus de Ast, see *Summa Astensis* [...] de casibus [...] Lyon [1519], pars 1, liber 1, tit. 35 and pars 2, liber 6, tit. 2, respectively.

<sup>86</sup>) On the impact of Huguccio's comments on C.27, see Gillmann, *Weibliche Kleriker* (above, n. 64), 249–51.

<sup>87</sup>) Baldus de Ubaldis, *Consiliorum volumina quinque*, 5 vols., Venice 1580, vol. 3, fol. 67vb; Simonis Maioli [...] *De irregularitatibus et aliis canonicis impedimentis* [...] libri quinque, Rome 1585; Pierre Rebuffi, *In titulo Digestorum* [...] commentaria amplissima [...], Lyon 1586, 20; Tomás Sánchez, *De sancto matrimonii sacramento disputationes*, 3 vols., Avignon 1689, vol. 2, 381.

<sup>88</sup>) Francesco Santi, *Praelectiones juris canonici, quas juxta ordinem decretalium Gregorii IX. tradebat in scholis pontificii seminarii romani*, ed. Martin Leitner, 5 vols., Regensburg 1886–98, here at vol. 4, 277–8.

<sup>89</sup>) See, among many others, Hostiensis, *Summa aurea* (above, n. 66), here at col. 1196.

which happened to quote the most authoritative text in this context, but was otherwise silent on hermaphrodites. Thus, many decretists and decretalists asserted that predominantly male hermaphrodites could witness testaments; evidently, though, this was not the main concern of the canonists. Interestingly, it was not marriage, either: Gratian was silent on this issue, and even Huguccio, in his comment on *Causa 27* (dealing with marriage!) skipped the question. Likewise, Hostiensis inserted the report on the hermaphrodite from his native town Susa in the context of ordination, not marriage. Why was this? It was in all probability not so much the number of hermaphrodite priests that made canonists discuss this possibility; rather, the case of the ordination of predominantly male hermaphrodites provided an argument why women could not be ordained. If the ordination of predominantly female hermaphrodites was impossible, ‘much more so’ female ordination, as Antoninus of Florence (d. 1459) put it<sup>90</sup>). Theologians for a long time had not discussed the issue of female ordination, and may even have deliberately left it to canon lawyers<sup>91</sup>). Even after ca. 1240, theologians and canon lawyers did not quote many reasons why female ordinations were invalid, and disagreed on some of them<sup>92</sup>). The argument derived from the discussion of hermaphrodites and holy orders may therefore have been welcome by those scholars who wanted to provide arguments against the ordination of women.

These debates, taking place in Bologna and Paris around 1200, are still imperfectly understood. In addition to the interaction of theology and canon law, natural philosophy and Roman law must have played a role in these debates. This is particular true for the question of ‘perfect hermaphrodites’ on which canon law had long been silent, and which Robert Courçon denied to exist, explicitly referring to *phisici*. Indeed, many natural philosophers and medical

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<sup>90</sup>) Antoninus Florentinus, *Summa theologica*, 4 vols., Nuremberg 1477/78, here at pars 3, tit.28, cap.6, par.5: *et multo magis femina ordinis non est susceptiva*.

<sup>91</sup>) Martin, *Ordination* (above, n. 65), 125: ‘The failure of the theologians to discuss the ordination of women well into the thirteenth century is puzzling. Perhaps they excused themselves for the same reason that Peter of Poitiers gave when he discussed Holy Orders in his *Sentences*. [...] He could safely omit orders, he tells us, because treatment of that sacrament was taken up “by the canonists”.’

<sup>92</sup>) For example, the argument that women were not to be ordained because woman was not created in the image of God (an argument based on Ambrosiaster as found in C.33 q.5 c.13: *mulier non est facta ad Dei imaginem*) was not accepted by most medieval theologians. See Alastair J. Minnis, *De impedimento sexus: women’s bodies and medieval impediments to female ordination*, in: *Medieval theology and the natural body*, ed. Peter Biller/Alastair J. Minnis, Woodbridge 1997, 109–39, esp. at 116; Raming, *Priestly office* (above, n. 8), esp. at 30–5, 91–3, 134–42.



authorities were sceptical about the existence of humans that were male and female to the same degree<sup>93</sup>). It may also be that these natural philosophers – or Roman law? – were the source for the terminology of ‘monstrosity’ that entered canon law around 1200. Given the fundamental misunderstandings that frequently surround the pre-modern legal history of intersexuality, any hint to perceptions of hermaphrodites as ‘monsters’ deserves special attention. As quoted above, both Huguccio and the Ordinary Gloss to Gratian’s *Decretum* use ‘monstrosity’ in context of hermaphrodites<sup>94</sup>). At the same time, it is clear that this use of the vocabulary of ‘monstrosity’ did not mean that they were denied human status; indeed, both Huguccio and the Ordinary Gloss assert that they could be ordained priest. Apparently, the decretists used ‘monstrosity’ in the sense of ‘deformity’, referring to a bodily impediment that made ordination illegal (but not invalid) unless dispensation was granted. It is important to remember that there were many uses of ‘monstrosity’ in the Middle Ages. Famously, Aristotle had held that any child that did not resemble his or her parents was a ‘monster’ in some sense<sup>95</sup>). Closer to the concern of the present article, Huguccio in his popular *Magnae derivationes* used ‘monster’ in a very wide sense too; according to him, the term *monstrum* was derived from *mastruca* (‘hairy garments’), as anyone wearing such clothing was ‘monstrous’<sup>96</sup>). ‘Barbarian’ habits rather than unusual bodies were at issue here.

Another point that deserves attention is the question of ‘free choice’ of gender. The idea that medieval canon law granted hermaphrodites such a choice certainly needs qualification. Before Hostiensis, ‘choice’ was not even mentioned as a criterion to determine legal gender, and Hostiensis only mentioned it in an extreme case – the ‘perfect’ hermaphrodite which in the Middle Ages was not always believed to exist. Baldus reported Hostiensis’ solution as an opinion followed by ‘some moderns’, indicating that there may have been some opposition to it<sup>97</sup>). It was probably legal practice, not so much academic

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<sup>93</sup>) Most notably, Aristotle in *De generatione animalium* iv,4,772b denied the existence of ‘perfect’ hermaphrodites: Aristotle, *Generation of Animals: with an English translation* by A. L. Peck, London 1943, 439. Avicenna was very sceptical, too; see *Avicennae Arabum medicorum principis canon medicinae* [...], Venice 1608, here at 901.

<sup>94</sup>) See above, notes 70 and 82. Contrary to what Huguccio seems to suggest, Gratian does not deal with ‘monstrosity’ in D.36 or D.48 – or anywhere else, for that matter, as the concept of ‘monstrosity’ was only introduced in canon law by the decretists.

<sup>95</sup>) Aristotle, *De generatione animalium* iv, 2, 767b, tr. Peck (above, n. 93), 401: ‘anyone who does not take after his parents is really in a way a monstrosity’.

<sup>96</sup>) Friedman, *Monstrous races* (above, n. 8), 32.

<sup>97</sup>) Baldus de Ubaldis, *Consilia* (above, n. 87), vol. 3, fol. 67vb.

canon law, than in effect gave persons with ambiguous genital anatomy a certain degree of choice, as will be discussed later on.

Finally, it is also noteworthy that sexual desire is not even mentioned in the context of the ‘prevailing sex’. Canon lawyers had no problem to ‘test’ male impotence empirically<sup>98</sup>), but did not refer to similar practices when discussing the question how to determine the legal gender of hermaphrodites. In fact, sexual desire is completely absent from the canon law debates on hermaphrodites. Vice versa, the abundant canon law on deviant sexuality does not contain any references to hermaphrodites. Here, scholastic canon law and theology can be seen to differ significantly, as the example of Peter the Chanter’s writing has demonstrated.

### 3. Medieval Roman law (12<sup>th</sup> to 14<sup>th</sup> centuries):

It almost goes without saying that canon law and Roman law cannot be separated. As already indicated, canonists relied on the Digest for their key authority on hermaphrodites. In addition, many of the ‘canonists’ quoted above had studied Roman law, and some even had taught it. Yet it has also become clear that different scholarly traditions shaped discussions to a large extent. A detailed study of the Roman law of hermaphrodites in the Middle Ages would thus be very welcome<sup>99</sup>). For the time being, it must suffice to study some of the most influential works of references used in the later Middle Ages (and in many cases, well into the modern period).

Fundamentally, Roman law agreed with canon law, and the theory of the ‘prevailing sex’ was well known in the Roman law faculties of medieval and early modern Europe. It is mainly due to the structure of the Digest that romanists were slightly more systematic than the canonists when it came to the legal status of hermaphrodites. After all, while medieval canon law did not treat the law persons systematically, the relevant title in the first book of the Digest (*De statu hominis*) provided romanists a convenient starting point for fundamental questions such as the distinction of the two genders – and the three sexes.

The distinction of sex and gender thus had a systematic place in Roman law, and any medieval student of Roman law would learn about hermaphrodites

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<sup>98</sup>) James A. Brundage, *Law, sex and Christian society in medieval Europe*, Chicago 1987, esp. at 280–2 and 457–8; Danielle Jacquart/Claude Thomasset, *Sexuality and medicine in the Middle Ages*, Cambridge 1988, esp. at 17; Jacqueline Murray, *On the origins and role of ‘wise women’ in causes for annulment on the grounds of male impotence*, in: *Journal of Medieval History* 16 (1990), 235–49.

<sup>99</sup>) Julius Kirshner (private communication) is preparing a study on the medieval Roman law tradition.

and their legal status from the first pages of his Digest copy. In fact, he was perhaps more likely to learn it from the first pages of the relevant *summae* and glossed law-books. The first, and for a long time the most influential comment on all parts of the Corpus Iuris Civilis was that of the Roman lawyer Azo. Teaching in Bologna, he completed his great work around the year 1200, at about the same time the canonists discussed hermaphrodites with new vigour. In all three of his great Summae, Azo quoted the Digest on hermaphrodites, and in the Summa Pandectarum very straightforwardly claimed that all humans are ‘male, female or hermaphrodite’<sup>100</sup>).

A generation later, around 1230, Azo’s pupil Accursius completed his magisterial gloss on the Corpus Iuris Civilis which is generally known as the Ordinary Gloss. Like Azo, Accursius faithfully followed the distinction already found in the Digest; while his gloss adds little new, it certainly helped to further establish the theory of the ‘prevailing sex’ of hermaphrodites<sup>101</sup>). Compared to contemporary canon law, Roman law more extensively engaged with the question of monstrosity, and the Ordinary Gloss on the Digest is a case in point. However, as the romanists agreed with the canonists that hermaphrodites were not ‘monstrous’, it comes to no surprise that the relevant gloss does not mention hermaphrodites<sup>102</sup>). Rather than in the context of ‘monstrosity’, the romanists (like the canonists) discussed hermaphrodites in their role as witnesses<sup>103</sup>). To quote only one example, the famous Tractatus de testibus et eorum reprobatione attributed to the otherwise obscure Jacobus Aegidius of Viterbo and added to by Angelus de Ubaldis (d. 1407) listed hermaphrodites among those to be excluded as witnesses – depending, of course, on the prevailing sex<sup>104</sup>).

While the exact transmission remains to be studied, it is clear that Roman law contributed to spread this doctrine. It was taught in all medieval uni-

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<sup>100</sup>) See Azonis iurisconsultissimi in ius civilem Summa [...], Lyon 1564, here at fols. 169va, 280rb–280va and 305ra, respectively, for the quotations from the Digest 1,5,9, and fol. 281rb for the quote: *Fit et alia divisio hominum, quia alii sunt masculi, et alii foemine, alii hermaphroditi.*

<sup>101</sup>) Corpus iuris civilis Iustiniane cum commentariis Accursii [...], 6 in 7 vols., Lyon 1627, here at vol. 1, col. 49.

<sup>102</sup>) See Accursius’ gloss on Dig. 50,16,135 (and also Azo’s gloss on Cod. 6,29,2) as quoted and discussed by Schrage, Capable (above, n. 37), 478.

<sup>103</sup>) See Susanne Lepsius, Von Zweifeln zur Überzeugung: Der Zeugenbeweis im gelehrten Recht ausgehend von der Abhandlung des Bartolus von Sassoferrato, Frankfurt 2003, 54; Mausen, Veritatis adiutor (above, n. 65), 469–70.

<sup>104</sup>) Tractatus de testibus probandis vel reprobandis, ed. Giovanni Battista Ziletti, Venice 1574, 95: *Reprobantur hermaphroditi vel non compelluntur, sed qualitas sexus consideratur.*

versity, and received well beyond the class-room. Even the *artes notariae*, written for the day-to-day business of notaries, faithfully repeat the distinction between male, female and hermaphrodite, indicating that it was thought to matter in practice. The *Summa artis notariae* of Rolandus Passagerii (d. ca. 1300) is perhaps the most widely used of these works<sup>105</sup>. If anything, Rolandus gave the distinction of the three sexes an even more prominent place than the Digest had done. Rolandus's *Summa* presented the distinction between men, women and hermaphrodites as the first (of six) markers of legal status<sup>106</sup>. The Digest, in contrast, had called the distinction between free and unfree the *summa divisio*, and accordingly treated it first<sup>107</sup>. In practice, Rolandus held, only two legal genders mattered, but nonetheless he devoted considerable space to the third sex<sup>108</sup>. Rolandus' *Summa artis notariae* was read very widely, and directly informed a vernacular Roman law manual that enjoyed some popularity in Poland, Austria and Hungary<sup>109</sup>. In England, both Bracton and Fleta followed the distinction found in the Digest in a very similar way<sup>110</sup>. In short, the concept of the 'prevailing sex' was part and parcel of the *ius commune* on both sides of the Channel.

It would therefore be unnecessary to quote further proof of this. However, Baldus de Ubaldis (d. 1400) deserves special attention because of his influence

<sup>105</sup> *Summa artis notariae* Do. Rolandini Rodulphini [...], Lyon 1559.

<sup>106</sup> Rolando, *Summa* (above, n. 105), 803: *De personis et personarum divisionibus. Ex personis sex divisiones fiunt. Prima divisio est talis: Omnes homines aut sunt masculi, aut foeminae, aut Hermaphroditi.*

<sup>107</sup> Dig. 1,5,3: *Summa itaque de iure personarum divisio haec est, quod omnes homines aut liberi sunt aut servi.*

<sup>108</sup> Rolando, *Summa* (above, n. 105), 803–4: *Hermaphroditi sunt illi, qui habent utrunque [sic] sexum, scilicet masculinum et foemininum. Et in istis talibus datur regula: Quia aut magis incalescunt in foeminino sexu, et tunc censentur foeminae, aut magis incalescunt in masculino, et tunc censentur masculi. Et sic ita divisio trimembris potest reduci ad bimembrem, quia si magis incalescunt in masculino sexu, sunt in primo membro, si magis incalescunt in foeminino sunt in secundo.*

<sup>109</sup> Die *Summa legum brevis levis et utilis* des sogenannten Doctor Raymundus von Wiener-Neustadt, ed. Alexander Gál, 2 vols., Weimar 1926, here at vol. 1, 157; also quoted by Kolbe, *Intersexualität* (above, n. 4), 77.

<sup>110</sup> Bracton, *De legibus et consuetudinibus Angliae* [...], ed. George E. Woodbine, 4 vols., Cambridge/Mass. 1968–77, vol. 2, 32: *Hermaphroditus comparatur masculo tantum vel feminae tantum secundum praevalentiam sexus incalescentis.* Fleta 1,5,3, here quoted from Fleta, *Seu commentarius juris anglicani* [...], London 1685, 2: *Est etiam quaedam divisio hominum, quod alii masculi, alii foeminae, et alii hermaphroditae [sic]; hermaphrodita enim tam masculo quam foeminae comparatur; secundum praevalentiam sexus incalescentis.* See Sharpe, *Foucault's monsters* (above, n. 20), ch. 4 for English common law on 'monsters' and hermaphrodites.

in the history of both laws, and also because of the very different contexts in which he addressed the legal status of hermaphrodites. He repeatedly dealt with hermaphrodites in his comments on Roman law and the *libri feudorum*<sup>111</sup>), and touched upon the issue in his canon law works too, if only in passing<sup>112</sup>). Most interestingly, however, he wrote a legal opinion on a contested succession involving the hermaphrodite Giovanni Malaspina. This *consilium* has been studied by Kirshner and Cavallar recently. Perhaps the most striking aspect of this opinion is that Baldus quotes, but in the end rejects an Aristotelian definition of ‘sex’; according to feudal law, he held, a common sense approach to sex and gender was to be followed, and hence behaviour and indeed choice (not only the ability to beget or to give birth) were decisive<sup>113</sup>). Strongly relying on Huguccio, Baldus clearly helped to give individual choice a prominent position in the determination of legal gender of hermaphrodites.

#### 4. Hermaphrodites before the ecclesiastical courts:

##### a) Three cases from the courts (14th century):

While the learned laws from ca. 1200 onwards largely agreed on the legal status of hermaphrodites, it would be dangerous to study the legal history of intersex from these sources alone. Therefore, let us now turn to the small number of known late-medieval trials involving hermaphrodites. Three such cases are known from the fourteenth century. Chronologically the first is the story of a woman from a village near Bern, the capital of modern Switzerland, who turned into a man. As the Colmar chronicles relate<sup>114</sup>):

<sup>111</sup>) Kirshner/Cavallar, Pudenda (above, n. 8).

<sup>112</sup>) In his discussion of X 1,6,6, Baldus briefly mentions, but rejects to discuss, the election of an hermaphrodite pope: Baldus de Ubaldis, In decretalium volumen commentaria, Venice 1595, fol. 59va. Commenting on X 2,1,3 he briefly cross-references to his own comment on Dig. 1,5,9 (ibid., fol. 152va). Vice versa, in his comment on Cod. 4,13, he briefly alludes to hermaphroditism as an impediment to ordination: Baldus de Ubaldis, Commentaria omnia (above, n. 24), vol. 6, fol. 29ra.

<sup>113</sup>) Kirshner/Cavallar, Pudenda (above, n. 8), 110–1.

<sup>114</sup>) The Colmar chronicles, edited by Philipp Jaffé in *Annales Basilienses et Colmarienses maiores*, Hanover 1861, 193–232, here quoted from Stuttgart, Württembergische Landesbibliothek, Cod. hist. 4°, 145, fol. 135r: *Mulier in virum mutata. 1300. Prope Bernam in villa . mulier x annis viro cohabitavit; quia cognosci a viro non potuit, iudicio spirituali a viro separatur; Romam proficiens, Bononiae a chirurgo cunnus eius scinditur, egreditur virga virilis cum testiculis; domum reversa uxorem ducit, opera rustica facit, cum uxorem congeditur legitime [sic] et sufficienter.* The passage was first discussed by Miri Rubin, *The person in the form. Medieval challenges to bodily ‘order’*, in: *Framing medieval bodies*, ed. Sarah Kay/Miri Rubin, Manchester 1994, 100–22, at 101–7.

A woman turned into a man. [AD] 1300. In a village near Bern, a woman lived together with her husband for ten years. As she could not be [carnally] known, the ecclesiastical court separates her from her husband. On her way to Rome, a surgeon at Bologna cut open her vulva, and a penis together with testicles appeared. Back home, he took a wife, did rural work, and had legitimate and sufficient intercourse with his wife.

This clearly is a spectacular story. The sex change is spectacular enough; that it was brought about by surgery, even more so<sup>115</sup>). Yet perhaps the most striking aspect of the story is neither the sex change nor the surgery; most strikingly, the ‘woman turned into a man’ also returned to the village where s/he had been married as a woman, and *there* lived as a man. In this village, everyone must have been aware of the sex change, including the former husband and friends, family and neighbours of the couple. Interestingly, while the chronicle contains no comment, the story ends with a kind of checklist that may represent what was expected of a woman-turned-man: to get married, to do hard work, and to have proper relations with his wife. This does not sound like excessively high standards, and apparently, it was possible to fulfil these criteria of being a man.

The second known case was discovered by McVaugh in his study on medical practitioners in late-medieval Aragon<sup>116</sup>). In Tarragona, he relates, a certain Guillem Castelló of Castelló d’Empúires sought to have his marriage annulled in 1331. According to Guillem, his wife Berengaria could not render the marital debt because of her genital anatomy. She was inspected by an experienced surgeon who declared under oath that Berengaria indeed had only a very narrow opening in her vulva, and also that she had a penis and testicles. The latter finding was very much a by-result – it was not what Guillem had based his claims on, nor what the courts would take into account when deciding about the validity of the marriage. While McVaugh does not further relate how the trial ended, it is reasonable to assume that the marriage was indeed declared null (as in the case of the *mulier prope Bernam*), not because of the presence of male genitals, but because of the impossibility to fulfil the marital debt as a woman<sup>117</sup>).

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<sup>115</sup>) Both the condition and the surgery are dealt with in standard medical textbooks, including at least one fourteenth-century surgeon with links to Bologna, namely Guy de Chauliac (d. 1368): *Chirurgia magna Guidonis de Gauliaco olim celeberrimi medici*, ed. Laurent Joubert, Lyon 1585, 355.

<sup>116</sup>) Michael Rogers McVaugh, *Medicine before the Plague: practitioners and their patients in the Crown of Aragon, 1285–1345*, Cambridge 1993, 206.

<sup>117</sup>) On *impotentia coeundi*, see Brundage, *Law, sex and society* (above, n. 98), esp. at 290–2, 376–8, 457–8.

Finally, the ecclesiastical courts at Konstanz in 1388 were faced with the case of a married hermaphrodite from Rottweil in the Black Forest. According to a local chronicler, who may even have witnessed the events, the following had happened<sup>118</sup>):

At Rottweil, a daughter was born to one of the citizens, named Hell, and she was named Katharina in baptism. When she grew up, she put on men's clothes, declared herself to be a man, and called herself Hans. Next, this Hans took a wife, a beautiful young woman; both were around the age of twenty. And Hans grew breasts just as his wife. Then the citizens of Rottweil sent this married couple to the ecclesiastical court at Konstanz, to enquire whether this was a proper marriage. So Hans was looked at; he had a penis and a vulva. Thus, the couple was sent home again together.

If the citizens of Rottweil were shocked or horrified by what happened, the chronicler fails to relate any signs of this. According to the chronicle at least, the only reaction was fairly late and quite orderly from a legal point of view: they turned to the relevant court for a legal opinion. The court followed those procedures recommended by Huguccio<sup>119</sup>): Hans was inspected, that is, his genitals were looked at by the court and/or some expert witnesses. The result was that he had a penis and thus could be expected to have 'sufficient intercourse with his wife' (to use the formula of the Colmar chronicles), and thus the marriage was valid. That Hans also had a vulva and, for that matter, breasts, that did not bother the court. The 'couple was sent home again together' – and that was it.

b) Summary and analysis:

Three cases are, by all standards, a small sample. Nonetheless, they are valuable evidence if we want to understand the later medieval canon law on hermaphrodites. The accounts quoted above strongly suggest that the ecclesiastical courts, when faced with married hermaphrodites, acted in accordance with the law as found in the canonical collections and the relevant scholarly

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<sup>118</sup>) Konstanz, Stadtarchiv AI 1, fol. 127va: '*Anno Domini 1388 in die sancti Martini do kam ain wunderliche sach gen Costentz uff den kor und koment dar mit erber lüt von dem rat ze Rotwil. Item es ward ze Rotwil ain tochter geboren von ainem burger, hiess der Hell, und ward in dem toff gehaissen Katharina; und do sy wüchs, do lait sy mannes klaiden an und sprach, sy wär ain man, und nampt sich selber Hans; und der selb Hans nam dar nach ain wip, das was ain schön tochter, und warent baid uff ain alter uff 20 jar; und Hansen wüchsent sin brüst als och sinem wip. Dar nach schiktent die burger von Rotwil die selben zway elichen menschen gen Costentz uff gaislich gericht, das man erfür, ob es ein e mocht gesin. So ward Hans beschowet; der hätt ainen zagel und ain fud. Also wurdent sy wider haim gewist zesamen.*' On this case, see Rolker, Hermaphrodit (above, n. 35).

<sup>119</sup>) Huguccio, Summa (as quoted above, n. 65).

comments. While the stories of double genitalia and sex-change must have caused considerable rumour, and ecclesiastical judges could probably not turn to any precedent in living memory, the courts were able to deal with these cases without visible difficulties.

Anatomy did matter in these cases, both judges and academic canonists agreed. For this reason, surgeons played a role, either in surgically changing the sex of an hermaphrodite, or as expert witnesses. Such expert witnesses were not unusual in the Middle Ages; already Hostiensis referred to medical experts in ecclesiastical trials, and in the fourteenth century, Guy de Chauliac asserted that it was standard to consult physicians to inspect genitals in impotence trials<sup>120</sup>).

The narrative sources do not provide much evidence how bodily sex was determined, apart from the perhaps obvious prominence of genital anatomy<sup>121</sup>). Facial hair, for example, is not mentioned in any of the accounts quoted above. Instead, physical strength was highlighted in one account, reflecting the realities of an agrarian economy. ‘Sex’ was not necessarily binary, and not only found in the genitals.

Most importantly, double genitalia were not scandalized by the courts. In all three cases quoted above, the existence of double genitalia was well known to the court – without being described as ‘monstrous’ or otherwise problematic. It was not because of her penis that Berengaria’s marriage was probably declared null; both the *mulier prope Bernam*, the nameless woman-turned-man in the village near Bern, and Hans in Rottweil could marry as

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<sup>120</sup>) Hostiensis, *Summa aurea* (above, n. 66), col. 1375 mentioned medical experts in marriage cases; quoting himself a certain ‘*mulier experta*’, he also mentions that others would leave questions of genital anatomy to (male) experts: *Dicunt aliqui talia reliquenda esse iudicio expertarum.* – As for Guy de Chauliac, see his *Chirurgia magna*, ed. Joubert (above, n. 115), 354: *Verum quia magistratus consuevit committere examen medicis, idcirco ponitur hic modus examinandi, qui talis est: Medicus (habita licentia a magistratu) examinet primo complexionem et compositionem membrorum generationi dictarum; deinde habeat matronam talibus assuetam, et praecipiat ut iaceant simul per aliquot dies, ipsa matrona praesente.* For a translation, see Jacquart/Thomasset, *Sexuality* (above, n. 98), 172. Also quoted (from an edition with a slightly different text) by McVaugh, *Medicine* (above, n. 116), 207, who provides ample evidence for the important role of medical experts in Aragon before the Plague.

<sup>121</sup>) Laqueur, *Making sex* (above, n. 5) is often understood to have claimed that anatomy did not matter in the context of what he called the one-sex-model. Concerning hermaphrodites, his main point in my opinion is the contrast between the sixteenth and seventeenth centuries on the one hand and the nineteenth century on the other hand. Taking genital anatomy into account is not the same as what Laqueur called ‘ontological sex’.



men despite the female anatomy they still possessed. Thus, while being male required the possession of male genitalia, having additional female genitalia (or breasts) was not in itself a problem. Lacking *any* genitalia was a different thing<sup>122</sup>), but double genitalia were apparently not a major concern as long as it seemed plausible that a person could fulfil the marital debt.

As in the case of the learned laws, one can ask whether there was ‘free choice’ of gender for hermaphrodites. Interestingly, the choice of gender under oath, which is so often quoted in the secondary literature, is not mentioned in the primary sources quoted above. Given the small number of cases, the significance of this finding should not be overestimated. Whether or not such an oath was common, it may be plausible to argue that the marriage itself was a functional equivalent. After all, the lawyers were mainly concerned with the possibility of hermaphrodites using both sets of genitals consecutively or, even worse, at the same time. Both the courts and society at large may also have been more worried than it is apparent from the sources about the uncertain gender of people with ambiguous bodies. The oath, as suggested by Hostiensis, was meant to address these ‘problems’. Marriage effectively did the same; in marriage, gender and legitimate sexual activity were clearly defined. A person married to a woman was a man; marriage ‘fixed’ gender at least as effectively as an oath would have done.

At the same time, this is one of the reasons why I hesitate to interpret the possibility to marry as a sign of ‘tolerance’ and ‘free choice of gender’. Marriage certainly was attractive for many couples, and access to it was a crucial part of living a normal life. Yet people with ambiguous genitalia not only had the possibility to marry – they may also have been under pressure to marry once their gender was under discussion. Society may have expected them to marry simply to fix their gender. In a similar way, the ‘choice’ of gender was perhaps less free than it would appear, for example, from the Konstanz chronicle. Again, ‘choosing’ the male gender may well have been attractive, but the choice was perhaps not as free as it has been claimed. Significantly, pre-modern accounts of sex changes almost invariably are stories about women turned men, and the three cases quoted above fit this pattern very well. Hermaphrodites living as men but, for whatever reasons, ‘choosing’ the female gender may have been in a much more uncomfortable position. ‘Tolerance’ may well have been restricted to those ‘choices’ that fit gender arrangements

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<sup>122</sup>) On this question, see Frederik Pedersen, *Privates on parade: impotence cases as evidence for medieval gender*, in: *Law and private life in the Middle Ages*, ed. Peer Andersen *et al.*, Copenhagen 2011, 88–104.

in society at large. Likewise, repeated changes of gender were in all probability not tolerated.

Canon law in theory and practice did reckon with hermaphrodites as a ‘third sex’, bodily distinct from ‘normal’ men and women. My overall impression is that law and society were not overly concerned with unusual genital anatomy, and did not scandalize changes of sex or gender. This in practice seems to have given hermaphrodites considerable individual freedom, including a limited choice of gender. Whether they had previously lived as men or women, hermaphrodites were able to choose the male gender and to marry accordingly; other choices, or repeated sex changes, were probably less acceptable and may well have been sanctioned. The criteria these ‘predominantly male’ hermaphrodites had to fulfil were not excessively high; the ability to do physical labour and being plausibly able to fulfil the marital debt were apparently most important. Fertility was not an issue, and having female anatomy did not preclude the successful fulfilment of gender expectations.

#### IV. The sixteenth century

##### 1. Continuity of doctrine ...:

If we turn from the medieval to the early modern period, the history of canon (and Roman) law on hermaphrodites at first gives the impression of an overwhelming continuity, if not stasis. While it is not possible to review early modern canon law at the same level of detail as the decretists and decretalists, there can be no doubt about the continued importance and authority of the same proof texts. Indeed, these texts continued to be known from the very same works, and read in the same context, as they had been in the Middle Ages. In the fifteenth and early sixteenth centuries, almost all works quoted above were still in use and widely distributed. Most of them were available in print by ca. 1520, and later sixteenth and seventeenth century editions of these works further improved them by cross-references to other medieval authorities. Quotations of Hostiensis and Baldus in particular are found in almost any legal discussion of hermaphrodites in the early modern period, and indeed well into the nineteenth century.

Recent studies in later medieval and early modern procedural law show that these lawyers treated hermaphrodites very much the same way Hugucio and Hostiensis had done<sup>123</sup>). The same is true in other areas of the law. Sixteenth-century canon lawyers dealing with the ordination of hermaph-

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<sup>123</sup>) Lepsius, *Zeugbeweis* (above, n. 103), 54; Mause, *Veritatis adiutor* (above, n. 65), esp. at 469.

rodites, for example, faithfully followed the medieval authorities on the issue. Disagreement was mild at best. The canonist Domenico Giacobazzi (d. 1527), for example, challenged the authority of Baldus on the possibility to elect an hermaphrodite pope<sup>124</sup>). Simone Majoli (d. 1597) argued that the ordination of hermaphrodites was to be dealt with locally, and that the diocesan bishop was to grant dispensation; Francisco Suárez (d. 1617) in contrast held that hermaphrodites always needed papal dispensation to be ordained priest<sup>125</sup>). However, concerning the basic distinction between men, women, and hermaphrodites, and the assignment of male or female legal gender according to the ‘prevailing sex’ they all agreed. There can be little doubt that the idea of the ‘prevailing sex’ was still in force in early modern Europe.

2. ... but very real change: hermaphrodites in the courts (16<sup>th</sup> century):

And yet, something had changed fundamentally between the fourteenth and the sixteenth centuries. The change is first visible, and may well have originated in, legal practice. Rather than quoting more normative texts or scholarly comment, let us therefore study the known sixteenth-century cases (including a *cause célèbre* of 1601) in chronological order. What sex and gender was attributed to these persons, and why were they sentenced?

a) *Elisabeth alias Johannes (Worms, ca. 1530)*:

In 1527, a certain Elisabeth came to the episcopal court at Worms, claimed to be a man, and asked to have her name changed. After the court had heard witnesses and also consulted physicians, s/he was re-named Johannes, as the charter issued on this occasion relates<sup>126</sup>). So far, the story is similar to those from the fourteenth century quoted above. The only obvious difference is that s/he thought it necessary to ask for permission for the

<sup>124</sup>) D. Jacobatius, *De concilio tractatus*, Rome 1538, 150.

<sup>125</sup>) Majoli, *De irregularitatibus* (above, n. 87), 61; Francisci Suarez [...] *opera omnia* [...], ed. Michel André *et al.*, 28 in 30 vols., Paris 1856–78, vol. 20bis, 556.

<sup>126</sup>) The charter was edited by Baur, *Umtaufung eines Zwitters*, in: *Anzeiger für Kunde der deutsche Vorzeit* N.F. 22 (1875), col. 119 relates that that s/he ‘*clagenn d anzeigt, wie er durch schuldt der Natuer beyderley geschlechts gestalt uff die ertrich bracht und also durch irsall im erstlichen thauff mit einem frawenlichen Namen gethaufft Elisabet genent worden sey unnd aber folgennd zu seinem verstendigen alter und jaren komen, nit ein fraw, sondern ein man sein vernoimen, auch mit kleydern, arbeit, thun und lassen sich manlicher werk volkomlich sonder einig verhinderung gebrauchte, sey demnach sein underthenig bit inen mit einem andernn dan gethaufften weyblichen namen genennt zu werden.*’

name-change. However, the story of Elisabeth/Johannes took a very different turn, as we learn from a note written in a slightly later hand on the back of the same charter. According to this note, s/he was later (no date is provided) burnt after it turned out that s/he was indeed a woman<sup>127</sup>). Elisabeth thus was sentenced to death for having lived as a man; it is not clear whether she was charged with cross-dressing or sodomy, but given that she was burnt, it seems plausible that she was sentenced for either (or both). As s/he was inspected and declared male by physicians but later found to be female, it appears that his/her anatomy was ambiguous and s/he indeed was an hermaphrodite in this sense.

*b) The Zurich hermaphrodite (1544):*

In 1544, a woman called Christa Ursel was drowned in Zurich. Born hermaphrodite, his/her birth in 1519 was made widely known by a broad-sheet of Balthasar Spross (d. 1521), printed by the famous Christoph Froschauer (d. 1564)<sup>128</sup>). The broadsheet describes his/her birth as a prodigy and a punishment for the sins of the community (not the parents)<sup>129</sup>). Similar broadsheets were frequently printed in the course of the sixteenth and seventeenth centuries<sup>130</sup>). This particular broadsheet was particularly influential as it was taken up by medical works as well as collections of prodigies which gained considerable popularity in the sixteenth century<sup>131</sup>). In the context of the present paper, the question is why Christa Ursel was sentenced to death. This, however, is unclear. A contemporary collector of broadsheets only reports

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<sup>127</sup>) Baur, *Umtaufung* (above, n. 126), col. 119: ‘*Dieser Hans Elss ist hernacher verbrannt worden, dan befunden Er keyn Man, sondern eyn weyb gewesen.*’

<sup>128</sup>) On this broadsheet, see Sven Limbeck, ‘*Ein seltsam wunder vnd monstrum, welches beide mannlichen vnd weiblichen geschlecht an sich hett?*’: Teratologie, Sodomie und Allegorese in der Medienkultur der frühen Neuzeit, in: ‘*Die sünde, der sich der tiuvel schamet in der helle?*’: Homosexualität in der Kultur des Mittelalters und der frühen Neuzeit, ed. Lev Mordechai Thoma/Sven Limbeck, Stuttgart 2009, 199–247, 211–3; Schochow, *Ordnung* (above, n. 5), 74–90.

<sup>129</sup>) For facsimile and transcription, see *Die Sammlung der Zentralbibliothek Zürich: Kommentierte Ausgabe, T. 1 Die Wickiana I (1500–1569)*, ed. Wolfgang Harms/Michael Schilling, Tübingen 1997, 12–3. Significantly, Spross quotes Livy (see above, n. 38).

<sup>130</sup>) See Katharine Park/Lorraine Daston, *Unnatural conceptions: the study of monsters in sixteenth- and seventeenth-century France and England*, in: *Past and Present* 92 (1981), 20–54; Irene Ewinkel, *De monstribus: Deutung und Funktion von Wundergeburten auf Flugblättern im Deutschland des 16. Jahrhunderts*, Tübingen 1995; Alan W. Bates, *Emblematic monsters: unnatural conceptions and deformed births in early modern Europe*, Amsterdam 2005.

<sup>131</sup>) Schochow, *Ordnung* (above, n. 5), 82–3.

that she was sentenced to death and drowned after having committed an (unnamed) crime<sup>132</sup>).

c) *Dos mugeres Ermaphroditas (Burgos and Seville, ca. 1550–1570)*:

In 1573, Antonio de Torquemada published his *Jardin de flores curiosas*, a popular book on ‘curiosities of nature’. He included several stories of sex changes lifted from Pliny and other Roman authors, but also two stories about hermaphrodites set in contemporary Burgos and Sevilla, respectively. According to the *Jardin*, the Burgos hermaphrodite had chosen to live as a woman but was found to have ‘secretly used the male nature’ and to have some committed grave, but unspecified crimes was burnt on these charges<sup>133</sup>). Grammatically at least, it is clear that she, not he, was burnt (*quemada*); significantly perhaps, de Torquemada in the whole passage on hermaphrodites from antiquity to his own times speaks of *ermaphroditas* – not *ermaphroditos*, as one could have expected. In the light of similar, near-contemporary cases, it is safe to assume that the *ermaphroditas* were charged with ‘sodomy with [...] women while pretending to be a man’<sup>134</sup>).

d) *Elena/Eleno de Céspedes (Toledo, 1587/88)*:

In 1588, after a prolonged and complicated trial, the now famous Elena/Eleno de Céspedes was sentenced by the Inquisition in Toledo<sup>135</sup>). Elena/

<sup>132</sup>) Johann Jakob Wick (1522–1588), who collected broadsheets and owned the only extant copy of this broadsheet, details that she was ‘*im 44 iar umb einer missethat willen ertrenckt*’: Wickiania I, ed. Harms/Schilling (above, n. 129), 12–3.

<sup>133</sup>) Antonio de Torquemada, *Jardin de flores curiosas*, ed. Giovanni Allegra, Madrid 1982, 116: ‘[...] ella escogió la [natura] de mujer, y después se averiguó usar secretamente de la de hombre y hacer grandes maleficios debajo de esta cautela, y fue quemada por ello.’ The Sevilla hermaphrodite is said to have been burnt for ‘the same’ charges.

<sup>134</sup>) This was the case with Elena/Eleno de Céspedes, see Richard L. Kagan/Abigail Dyer, *Elena/Eleno de Céspedes in: Inquisitorial inquiries: brief lives of secret Jews and other heretics*, ed. *idem*, Baltimore 2004, 36–59, here at 46.

<sup>135</sup>) Large portions of the extensive trial documents have been edited, translated and commented by Marie-Catherine Barbazza, *Un caso de subversión social: el proceso de Elena de Céspedes*, in: *Criticon* 16 (1984), 17–40; Israel Burshatin, *Written on the body: slave or hermaphrodite in sixteenth-century Spain*, in: *Queer Iberia, sexualities, cultures, and crossings from the Middle Ages to the Renaissance*, ed. Josiah Blackmore/Gregory S. Hutcheson, Durham/N.C. 1999, 420–56. An English translation of the documents is provided by Kagan/Dyer, *Elena/o* (above, n. 134), 36–59. From the rich secondary literature, see most recently Simons, *Sex of men* (above, n. 5), ch. 2. For a wider context, see Soyer, *Ambiguous gender* (above, n. 5). Emilio Maganto Pavón, *El proceso inquisitorial contra Elena/o de Céspedes (1587–1588): biografía de una cirujana transexual del siglo XVI*, Madrid 2007 was not available to me.

Eleno may or may not have been an hermaphrodite in the contemporary sense of the word; neither contemporaries nor, for that matter, modern scholars have come to a real consensus concerning his or her sex. Born as a slave girl in Valencia, she was freed by her master. At young age she had been married to a man, who later abandoned her and the child they had. For a long time, s/he lived alternatively as a woman and as a man. Under the name of Eleno, he practiced various male trades, and even became a surgeon. In 1586, Eleno married a young woman called Maria del Caño. As Eleno related later, the lack of a beard raised some suspicion at this occasion, and there were rumours that s/he was ‘both male and female’<sup>136</sup>). In the course of the trial, s/he admitted to have slept with one man (her husband) and several women (including his wife) but insisted that s/he had always done so in a ‘natural way’. In this context, s/he claimed to be an hermaphrodite. S/he bolstered this claim by referring to a number of authorities asserting the existence of hermaphrodites (Cicero, Pliny, St Augustine), and argued that s/he was not guilty of any crimes as s/he had acted as a woman when the female sex had prevailed, but married as a man when the male sex had prevailed. Whether s/he indeed had double genitalia is far from clear – repeated bodily inspection led to contradictory results, and in a late stage of the process s/he claimed to have ‘lost’ her penis.

Whatever his or her anatomy looked like, different people saw very different things, and together with the (changing) defence narrative, this certainly makes Elena/Eleno ambiguous. In the end, most charges were dropped, but s/he sentenced for having abused the sacrament of marriage, sodomy and for sorcery. Given the gravity of these crimes, the sentence was relatively mild; rather than being burnt, s/he was sentenced to whipping, ordered to wear women’s clothes and to practise her (rather male) trade as a surgeon in a local hospital. While the court was not explicit on his/her sex, it clearly assigned the female gender and sentenced Elena as a woman; it was the second marriage, not the first one, that the court deemed ‘abuse of the sacrament’ and sodomitic.

*e) Antide Collas (Dole, 1599):*

In 1599 Antide Collas, the wife of Claude Richardot, was sentenced to death and burnt at the stake in Dole in the French Jura. The region was at this time the centre of an extremely bloody persecution of sorcery, witchcraft and heresy<sup>137</sup>). According to Foucault, Antide Collas was one of the last her-

<sup>136</sup>) Kagan/Dyer, Elena/o (above, n. 134), 43 and 44, respectively.

<sup>137</sup>) Between 1537 and 1683 an unusually high ratio of 60% of the witch trials in

maphrodites to be burnt for being hermaphrodite and this reason alone<sup>138</sup>). Yet as the records of the trial (unknown to Foucault) show, Antide Collas was sentenced for sorcery. Her genital anatomy – hermaphrodite or not – was not even mentioned. Duong-Iseler, who recently edited these documents, has therefore concluded that the trial should not be quoted as evidence for a shift from the medieval persecution of ‘monstrous’ hermaphrodite anatomy towards modern persecution on grounds of deviant behaviour<sup>139</sup>). While the court records consistently describe Antide Collas as female, it is not clear whether anyone involved in the trial regarded her as ‘hermaphrodite’<sup>140</sup>). Her first name (more common as a male name), and a near-contemporary account representing her as having a somehow unusual (genital?) anatomy, seem to have led nineteenth-century scholars to think so<sup>141</sup>). Even if this was also true for her contemporaries, anatomy played no crucial role in the process itself.

f) *Marie/Marin le Marcis (Rouen, 1601)*:

Finally, let us consider a case that was famous already in the seventeenth century, and following Foucault has often been quoted in modern scholarship as well: the case against Marie alias Marin le Marcis<sup>142</sup>). Brought up as a girl, s/he in 1601 declared herself to male, put on male clothes, a male name and married a widow called Jeanne le Leuvre. The couple was brought

the Jura ended with a death sentence: Robert Muchembled, *La sorcière au village (XV<sup>e</sup>–XVIII<sup>e</sup> siècle)*, Paris 1979, 123.

<sup>138</sup>) Foucault, *Abnormal* (above, n. 10), 67: ‘[Antide Collas was] convicted as an hermaphrodite apparently without anything else being involved other than the fact of being an hermaphrodite. [...] It seems that this is one of the last cases in which an hermaphrodite was burnt for being an hermaphrodite.’

<sup>139</sup>) Sophie Duong-Iseler, *Lumières sur le prétendu “hermaphrodite” Antide Collas (ou Colas) de Michel Foucault*, in: *Dix-septième siècle* 256 (2012), 545–56, 550.

<sup>140</sup>) As is evident from the French original of the *Les anormaux* (Paris 1999), Foucault referred to Antide as male. The court records, in contrast, refer to Antide as a married woman and consistently use the female form (elle, ladite). Also, the accusation that Antide slept with the devil, who appeared in the guise of a black man, strongly implies that the courts thought her to be female.

<sup>141</sup>) Duong-Iseler, *Lumières* (above, n. 139), 547–8 quotes both the report (by Henry Bouget) on Antide as a sorceress having “un trou au dessous du nombril, outre le naturel”, and the nineteenth-century works on which Foucault relied when describing Antide as ‘hermaphrodite’.

<sup>142</sup>) See, among many other studies, Stephen Jay Greenblatt, *Shakespearean negotiations: the circulation of social energy in Renaissance England*, Berkeley/Cal. 1988, 73–93; Daston/Park, *Hermaphrodite* (above, n. 6); Foucault, *Abnormal* (above, n. 10), 68–71; Long, *Hermaphrodites* (above, n. 5), 80–95; Schochow, *Ordnung* (above, n. 5), 91–100.

to court and charged with a number of crimes. After Marie/Marin had been inspected by a number of physicians and surgeons, the court declared him/her to be female and sentenced her to death for cross-dressing, contempt of the sacrament of marriage and sodomy<sup>143</sup>). However, one of the expert witnesses, Jacques Duval, disagreed; he appealed against the judgement, and after Duval convinced the court that Marie/Marin was in fact an hermaphrodite (or “*gunaner*”, as Duval preferred to call him) and not a woman, the original sentenced was lifted. The case became very widely known a decade later as Duval quoted it in his controversy with Jean Riolan over the possibility of sex changes and the existence of ‘true’ hermaphrodites. The case is justly famous for revealing different (medical) definitions of ‘sex’, but in the context of the present article, only the legal side is of interest. It may be worth noting that Duval challenged the idea that sexual relations between women could be persecuted as sodomy<sup>144</sup>). Crucially, the claim that Marie/Marin was an hermaphrodite was not an accusation but, once more, a defence – and this time, clearly a successful one.

### 3. Summary and analysis:

What do these sixteenth-century cases have in common? Like the hermaphrodites in the fourteenth century, these hermaphrodites almost all were raised as girls but as adults preferred to live as men. Unlike the medieval hermaphrodites quoted above, this sex change alone could lead to persecution in the sixteenth century. The charges, however, were very diverse and sometimes unclear. As the richly documented cases of Elena/Eleno de Céspedes and Marie/Marin le Marcis show, this is not a problem of transmission; where the relevant documents are extant, it is transparent that the courts were often uncertain what to do. Charges changed in the course of time, sentences were passed and revoked, and repeated bodily inspections led to different results. Yet however confused the single cases might have been, and however varied (and sometimes unclear) the charges were, they in several cases clearly involved sodomy, and more often than not a very real danger of being sentenced to death. Secondly, whether or not the accused were ‘really’ hermaphrodites, it is in my opinion significant that they all were sentenced as women. These

<sup>143</sup>) The sentence is quoted by Jacques Duval, *Des Hermaphrodits, accouchemens des femmes, et traitement qui est requis pour les relever en santé [...]*, Rouen 1612, at 397.

<sup>144</sup>) Duval, *Hermaphrodits* (above, n. 143), 397: ‘*Nottez l’erreur, car s’il à commit Sodomie, il faut qu’il ait eu un membre virile.*’ For the opposite position, see e.g. Jean Papon, *Recueil d’arrests notables des cours souveraines de France*, Paris 1610, here at 1257 (on *bougrerie*).



two aspects are very clearly linked. Being hermaphrodite was not persecuted, but legally being recognised as a woman, and acting as a man (in sexual intercourse, or simply by dressing male) was. Having an hermaphrodite anatomy in fact continued to be a defence against the charges of sodomy and cross-dressing, just as in the Lille case quoted above<sup>145</sup>). Unlike the male sodomite burnt in Lille, Elena/Eleno de Céspedes and Marie/Marin le Marcis convinced the courts to be hermaphrodites, and for this reason escaped the death penalty.

### V. Continuity and change

So how can we explain the dramatic changes and, at the same time, the striking continuities in the legal treatment of persons with ambiguous bodies between ca. 1400 and the sixteenth century? As has become clear, this question cannot be answered by studying the history of legal dogma alone. Three aspects in my opinion are particularly important. The first concerns gender expectations and access to marriage. Canonists and civilians from the twelfth to the sixteenth centuries all agreed that in principle predominantly male hermaphrodites could live, and marry, as men. In this sense, the law had not changed. If, therefore, it became more difficult for persons with ambiguous genitalia to live and to marry as men in the course of the sixteenth century, this may indicate that gender roles and the concept of marriage more generally had changed. As argued above, the gender expectations for women turned men were relatively low in medieval times, and access to marriage was not as strictly controlled as it was in sixteenth-century Europe. Famously, secret marriages in pre-Tridentine canon law were forbidden but perfectly valid. In the sixteenth century, in contrast, access to marriage became more and more restricted, and it has been argued that between ca. 1450 and ca. 1650 masculinity was dramatically transformed, giving rise to ‘anxious masculinities’ that fostered aggression towards anything that seemed to challenge the new model of being male<sup>146</sup>). Growing emphasis on fertility may also have contributed to this development. While all this did not specifically exclude hermaphrodites from marriage, it seems plausible that they were more vulnerable than others to suffer the consequences of these developments.

In addition, there clearly was a new emphasis on the persecution of crimes against nature around 1500. Several countries (and many cities) passed new statutory laws against sodomy. Crucially, this went hand in hand with a new,

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<sup>145</sup>) See above, note 34.

<sup>146</sup>) See Mark Breitenberg, *Anxious masculinity in early modern England*, Cambridge 1996; Raewyn Connell, *Masculinities*, Cambridge 2010, 186–91.

and more gender-symmetrical definition of these crimes against nature. The new statutory laws now clearly punished both male and female homosexual acts. In the Middle Ages, in contrast, female sodomy was rarely mentioned in the penal laws, and one of the very few exceptions to this rule is the famously confused *Livre de justice et de Plet* from thirteenth-century Orléans<sup>147</sup>). Around 1500, in contrast, sodomy became more and more defined gender-symmetrically. Between ca. 1530 and 1560 in particular, sodomy laws in continental Europe were revised, and increasingly thought to apply to female homosexual acts too. England is exceptional in this context; while the 1533 Buggery Act fits the general pattern of increased concern about ‘crimes against nature’, it was understood not to extend to female homosexual acts. Yet in continental Europe, the laws against sodomy were increasingly extended to cover female homosexual acts<sup>148</sup>). In the same year 1533 the Buggery Act was passed in England, two women were persecuted in Bordeaux for ‘*bougrerie*’. They were acquitted for insufficient evidence, but legal commentators like Jean Papon (d. 1590) in no uncertain terms held that sexual acts between two women did indeed constitute buggery and were punishable by death<sup>149</sup>). In the Holy Roman Empire, the *Constitutio Criminalis Carolina* – following the *Bambergensis* of 1507 in this respect – treated male homosexual acts, female homosexual acts, and (male or female) bestiality together as crimes against nature and made all three punishable at the stake. In Spain, the *Siete Partidas* mentioned only male homosexual acts, but the 1555 gloss argued that women were included too. There can be little doubt that this new concern about female homosexual practices in practice also meant that hermaphrodites were in a more dangerous position than before. If both male and female homosexual acts were punishable by death, any sex change was dangerous<sup>150</sup>); the claim to

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<sup>147</sup>) *Livre de justice et de Plet*. Publié pour la première fois d’après le manuscrit unique de la Bibliothèque Nationale par Rapetti [...], Paris 1850, here at 279–80: § 22: *Cil qui sont sodomite prové doivent perdre les c..... Et se il le fet segonde foiz, il doit perdre membre. Et se il le fet la tierce foiz, il doit estre ars.* § 23: *Feme qui le fet doit à chascune fois perdre membre; et la tierce, doit estre arsse.* I assume that the lacuna is not found in the original text, but simply due to the bowdlerizing editorial practice, suppressing *coilles* (testicles). This, however, does not resolve the real problem of making sense of the provisions in § 23. As Crompton, *Myth* (above, n. 29), 13 put it: ‘Rarely has a law aimed primarily at male offenders been more grotesquely adapted to women.’

<sup>148</sup>) For the following examples, see Crompton, *Myth* (above, n. 29), 17–8.

<sup>149</sup>) Papon, *Recueil* (above, n. 144), 1257.

<sup>150</sup>) For a late example that sex-change was associated with sodomy, see *Institution du droit romain* (above, n. 66), 628–9.

be a ‘true’ hermaphrodite remained as the only defence narrative, and claiming this was a difficult and risky strategy.

Finally, it has often been asserted that it was above all the changing medical knowledge and the changing role of medical expertise in law (Foucault’s ‘juridico-biological domain’) that played a decisive role<sup>151</sup>). Medical knowledge and practice indeed changed, but perhaps less dramatically than it sometimes has been thought. In particular, the courts’ reliance on medical experts was nothing new in the sixteenth century, although it may have become more frequent (if only because there were more physicians and surgeons). The existence of ‘true’ hermaphrodites was under some doubt in the sixteenth century, but this is also true for the Middle Ages; the real change here only occurred in the eighteenth century. What was more important was the increasingly sexualized perception of hermaphrodites after ca. 1500, and especially so in the second half of the sixteenth century. Broadsheets of portentous births played a role here, not because hermaphrodite births were especially prominent in the ‘Golden Age of prodigies’ (what they were not), but because broadsheet ballads and woodcuts increasingly sexualized the figure of the hermaphrodite<sup>152</sup>). Both popular and learned accounts of hermaphrodites became increasingly voyeuristic, and sometimes pornographic in nature, in the sixteenth and seventeenth centuries<sup>153</sup>). This is even more true for literary accounts, often modelled on classical Roman authors (above all Martial)<sup>154</sup>). Yet the most important area for this increasingly sexualized perception of ambiguous bodies indeed was medicine. As Daston and Park have stressed, medieval medical literature had ‘characteristically avoided moral judgments’, but after ca. 1550 interest in hermaphroditism not only grew but increasingly ‘associated it to a far greater extent with the sexually, theologically, and morally charged issues of sodomy, transvestism, and sexual transformation’<sup>155</sup>). As argued above, (male) sodomy and hermaphroditism were not confused in the Middle Ages, or less so than it has been claimed. More generally, sodomy was normally not explained as a bodily condition in the Middle Ages<sup>156</sup>). Female homo-

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<sup>151</sup>) Foucault, *Abnormal* (above, n. 10), esp. at 56.

<sup>152</sup>) See Park/Daston, *Unnatural conceptions* (above, n. 130), esp. at 26. For the quote, see Jean Céard, *La Nature et les prodiges: l’insolite au XVI<sup>e</sup> siècle*, Paris 1996, pt. 3 (‘L’âge d’or des prodiges’).

<sup>153</sup>) Daston/Park, *Hermaphrodite* (above, n. 6), 424.

<sup>154</sup>) Donoghue, *Lesbians* (above, n. 30), 201.

<sup>155</sup>) Daston/Park, *Hermaphrodite* (above, n. 6), 421.

<sup>156</sup>) For important exceptions, see Cadden, *Sex difference* (above, n. 6), 214–5; Sven Limbeck, *Phlegmatiker, Kinäden und Sodomiten: Bemerkungen zur Homo-*

sexual desire, in contrast, increasingly was explained anatomically after ca. 1550<sup>157</sup>). In other words, while there is little evidence that (male) sodomites and hermaphrodites were confused in the Middle Ages, there was a close link between (female) hermaphrodites and tribades in Early Modern Europe<sup>158</sup>). This in turn did certainly contribute to the suspicion of (female) hermaphrodites as tribades.

## VI. Conclusions

In the early twenty-first century, Western law is in the course of revising assumptions about sex and gender that for a long time had been taken for granted. Currently, the relation between law and medicine are being revised; confusion, uncertainty and considerable inconsistency are the visible marks how complicated this process is<sup>159</sup>). Similar confusion certainly existed in pre-modern law too, and some of this has become visible in the present article. This in itself should be a warning against the idea that the readiness of pre-modern law to deal with hermaphrodites as a ‘third sex’ was the expression of a uniform ‘one sex’-model or, for that matter, any other ‘model’. This leads me to my final remark. First of all, while there are indeed great changes over time, one has to resist the temptation to make these developments fit linear narratives. One such narrative is that of growing ‘tolerance’ towards hermaphrodites, of which the alleged persecution of hermaphrodites in the Middle Ages was an important part. Only if the Middle Ages were as superstitious and cruel as this narrative suggested, the sixteenth-century treatment of hermaphrodites could be described as ‘tolerant’ and the early modern medical models could appear as scientific progress. However, while I do believe that the medieval persecution of hermaphrodites is indeed a myth, it is not my intention to replace the narrative of growing tolerance by one of growing persecution. Rather, the failure of this teleological narrative should warn against any lin-

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sexualität im medizinisch-naturkundlichen Fachschrifttum des Mittelalters, in: *Forum Homosexualität und Literatur* 21 (1994), 21–44, esp. at 25–39.

<sup>157</sup>) See Puff, *Philology* (above, n. 29), 148, Park, *Rediscovery* (above, n. 30); Valerie Traub, *The renaissance of lesbianism in early modern England*, Cambridge 2002 for the sixteenth century. For the later development, see Donoghue, *Lesbians* (above, n. 30), and the example of Pierre Carpentier quoted above (n. 28).

<sup>158</sup>) Donoghue, *Lesbians* (above, n. 30), 200: ‘[...] it was rare to find either mentioned without reference to the other’.

<sup>159</sup>) See the recent sentence of a German court as quoted by Elisabeth Holzleithner, *Durchquerungen. Repräsentationen von Geschlecht im Rechtsdiskurs*, in: *Im Zeichen des Geschlechts, Repräsentationen, Konstruktionen, Interventionen*, ed. Céline Camus *et al.*, Königstein im Taunus 2008, 202–218, at 213–4.

ear plots, including what Daston and Park have rightly criticised as a ‘plot of linear, inexorable naturalization’<sup>160</sup>). The value of this narrative is all the more doubtful as ‘naturalization’ of hermaphrodites has been claimed for almost all periods in history from antiquity to the twentieth century<sup>161</sup>). The lists could easily be added to; an obvious case would be Isidore of Seville’s (re-)definition of portents as ‘natural’ occurrences<sup>162</sup>). In addition, it is far from clear why any such ‘naturalization’ should confer ‘greater tolerance’<sup>163</sup>). In the case of deviant female sexuality, rather the opposite seems to be true; conflating unusual genital anatomy, hermaphroditism and (deviant) sexual desire, early modern medical explanations of tribadism certainly did contribute not only to the growing persecution of female homosexuality, but also to hermaphrodites being increasingly suspected of sexual deviance.

Rather than making the evidence fit any linear plot, more attention has to be paid to the sometimes staggering continuity of doctrine and, at the same time, the plurality of pre-modern knowledge about hermaphrodites. Canon lawyers, romanists, natural philosophers, surgeons and theologians – to name only some disciplines discussing hermaphrodites – clearly did not always agree, even where they shared the same authoritative texts. There are more continuities than the emphasis on various ‘turning points’ and ‘inventions’ suggests, and much more differences between distinct fields of knowledge than implied in the parlance of ‘one sex’- or ‘two sex’-models<sup>164</sup>). Hermaphrodites were used as figures of thought marking borderlines in many different intellectual traditions; but which borders were at issue depended largely on context.

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<sup>160</sup>) Lorraine Daston/Katharine Park, *Wonders and the order of nature*, 1150–1750, New York 1998, here at 11. See also *idem*, *Hermaphrodite* (above, n. 6), 426–7.

<sup>161</sup>) In addition to the studies quoted above (n. 5), see George Androutos, *Hermaphroditism in Greek and Roman antiquity*, in: *Hormones* 5 (2006), 214–7, 216 (Diodorus Siculus, first century BCE); Francisco Vázquez García/Richard Cleminson, *Subjectivities in transition: gender and sexual identities in cases of ‘sex-change’ and ‘hermaphroditism’ in Spain, c. 1500–1800*, in: *History of Science* 48 (2010), 1–38, esp. at 10 (eighteenth century).

<sup>162</sup>) *Etymologies*, ed. Lindsay (above, n. 54), here at xi,3,1–2: *Portenta esse Varro ait quae contra naturam nata videntur: sed non sunt contra naturam, quia divina voluntate fiunt, cum voluntas Creatoris cuiusque conditae rei natura sit. Unde et ipsi gentiles Deum modo Naturam, modo Deum appellant. Portentum ergo fit non contra naturam, sed contra quam est nota natura.*

<sup>163</sup>) This was claimed, for example, by Long, *Hermaphrodites* (as quoted above, n. 13).

<sup>164</sup>) Here I agree in particular with Voß, *Making* (above, n. 3), esp. at 321–2.