

# From Object to Subject: Intersex Activism and the Rise and Fall of the Gender Binary in Germany

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In several states, the universal gender binary has been challenged by the introduction of an official third sex. This article explains that paradigm shift in Germany by analyzing the successful introduction of a third sex category in 2018. Historical legacies of gender variance in the pre-modern and modern states are compared with the contemporary (re-)introduction of a third sex. I show that intersex activists and their transnational advocacy at the United Nations reframed the discourse from *medical correction* to *legal protection*. This study offers critical insights into the changing dynamics and meanings of gender, state power, and social movements.

## Introduction

States around the world divide their citizens into two groups: men and women. This ubiquitous distinction is viewed as natural and is largely undisputed. However, over the past decades, doubts regarding a clear gender dichotomy have been growing in a variety of countries. Australia, India, Nepal, Germany, and others have recently introduced a third gender. This article investigates the emergence of such a third category and explores why Germany, a historically conservative welfare state based on a traditional family model, has become the first of the countries in Europe to introduce a third sex category. What legal and political discourses facilitate the emergence of a third sex? What can we learn from the sudden appearance of sex variance, not just as a cultural expression but as a new norm incorporated into law? And what does this reveal about current directions for gender politics, human rights, and state power?

My claim is that at this historic moment a more inclusive human rights discourse is affecting previously unquestioned paradigms and practices that

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began to cement the sex binary in Germany in the late nineteenth century. This discursive shift allows for challenges to the medical correction paradigm as well as the state-enforced sex binary. Social movements utilize human rights norms to target international institutions and pressure nation-states “from above.” In the case of intersex issues, German advocacy networks have initiated a boomerang pattern to challenge state power through the use of international institutions. Cooperation between two weak actors—small domestic social movements of intersex activists and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) committee at the United Nations (UN)—pushed Germany toward considering a legal redefinition of biological sex. A reinterpretation of norms filtered through the national and international political opportunity structure and discursive frames empowered marginal local actors. As a result, concerns over the protection of bodily integrity, individual rights, and sex variance have come to the fore.

What do we mean when we speak of the gender binary? The textbook distinction between sex and gender has been that sex focuses on the biologically inscribed distinction between men and women, while gender describes the socially constructed and variable ideas and practices of gendered behavior across time and place (see e.g. Saraswati, Shaw, and Rellihan 2018). Constructivist approaches maintain that gender is a product of social and cultural processes, that is, that social processes and not sexual dimorphism allow us to postulate a two-gender/sex distinction between men and women. This socially constructed binary is inscribed culturally, politically, and economically into all areas of life and informs patterns of socialization. While some nonconforming gender performance has become socially acceptable, much of our day-to-day expectations and social organization are still firmly bound to a biologically rooted sex binary. But the introduction of a third gender/sex category shows that the distinction between sex and gender will be increasingly difficult to maintain. In Germany, this situation is further complicated by language: while the separate terms “gender” and “sex” in English connote social and biological focus, respectively, this distinction is difficult to maintain in German because the same word (*Geschlecht*) is used for both. A close reading of legal and political texts is necessary to deduce the intended meaning in any given German usage.

Dichotomous mapping processes become obvious when analyzing the medical and political treatment of intersex persons. This article deals with social processes of medical and political categorization of intersex bodies that take place within a two-sex system. I will present the substance and disintegration of gender binaries by analyzing the meaning, identity, and consequence of intersexuality based on a historic precursor and a current case study of intersex mobilization in Germany. In doing so, I draw on a variety of primary and secondary sources, and interviews I conducted with activists and politicians. The past and present societal processes of negotiating the categorization of people with atypical sexual characteristics are presented. I *argue* that we are

standing at another historic turning point regarding the issue of sex variance: the first turning point occurred when the legal third sex was *abolished* with the rise of the modern German nation-state in the 1870s, and the second turning point is its current *return* in the early twenty-first century.

Analyzing the abolition and reintroduction of a third sex through the status of intersex people complicates our current understanding of the gender binary as unchanging and medically obvious. Despite the hegemonic character of the sex binary, its exclusive legal use and ubiquity may soon become a thing of the past. This process began with feminist and lesbian–gay–bisexual–transgender (LGBT) movements and has recently taken a decisive step forward with the social mobilization of intersex activists, whose arguments rely more on authoritative biological markers and genetics than queer or cultural theory. The demands for the protection of their physical integrity in a human rights frame have been heard by CEDAW and are leading to public criticism of the medicalization of intersex people and the de-normalization of the enforced gender binary. The most visible outcome of this activism has been the introduction of a third sex category in Germany in December 2018, which has been termed “diverse.” It may signal the start of a larger international trend that could trigger a diffusion process in Europe.

The article proceeds in two sections: Part I provides definitions and data on intersex conditions, a theoretical scaffolding of legal, medical, and political discourses on a third sex employing a Foucauldian backdrop, and a historical case. Part II offers a recent case study of transnational social mobilization of Germany’s intersex movement at the UN and an analysis of domestic policy reform. I demonstrate that this marginal movement was able to shift the previous discourse on the ambiguous sex of intersex people from one of *medical correction* toward one of *legal protection*. It is my contention that behind the current resurfacing of a legal third sex lies a deeper discursive shift from a private medicalized frame toward a public and international human rights frame.

## Part I. The Third Sex: Historic Discourses, Scientific Debates, and Current Data

Generations of scientists have worked on defining *biological sex*. They have viewed different indicators as crucial in assigning female or male sex. Over centuries, medical theories have viewed these distinctive indicators as primary for the identification of the correct sex: gonads (nineteenth century), hormones (nineteenth and twentieth centuries), genes (twentieth century), external sexual characteristics (early modern times and the 1950s for intersex), and biochemical messengers that activate genes (twentieth/twenty-first centuries) (Gregor 2015; for the historic evolution of this debate, see Klöppel 2010). Traditional assumptions on the two-sex system include the following:

- There are two and only two sexes.
- A person's sex always remains the same; it is unalterable.
- Genitals are the essential signs of a sex.
- Exceptions to the gender binary are not to be taken seriously.
- Everyone must belong either to the male or the female category.
- The female/male dichotomy is a natural distinction.
- The gender binary is based on normal sexuality, i.e. heterosexuality

(for examples, see [Hark and Villa 2015](#), 36; [Preves 2003](#), 17).

Historically, intersex (or intergender or inter\*) people have not had any influence on the taxonomy of their own bodies. This is particularly problematic because Western medicine in the 1950s developed the practice of eliminating hermaphroditic characteristics marked as “ambiguous” through surgical procedures. Since then, these “corrections” of intersex newborns and children have been carried out routinely in many industrialized countries. The practice of so-called surgical disambiguation, developed at Johns Hopkins University in Baltimore, is based on the notion that any gender ambiguity can and must be avoided by means of genital and hormonal adaptation of the child's intersex body to gender binarism (see pp. 12–13 below). This clinical practice marked the beginning of the nonconsensual medical normalization of intersex bodies. Like all bodies, intersex bodies are subjected to the doctrine of sexual difference. However, they are also simultaneously interpreted as a *pathological* deviation. The modern clinical paradigm is a strategy of adapting the intersex body to a socially constructed norm of “natural-looking” heteronormative sexual characteristics.

How is it that a naturally occurring phenomenon, namely the fact that some babies are born with ambiguous sexual organs, is viewed as abnormal and, much more, that this requires medical modification? On what discourses have the practice of preventive “disambiguation” in genital surgery been based and how have intersex people reacted in political terms to this medicalized discourse? What international discourses and institutions have intersex activists utilized against this prevailing medical paradigm? This article describes how the emergence of heteronormative sex binarism has affected intersex people and how, in response, intersex activists have actively, creatively, and critically deconstructed this idea, leading to the introduction of a third sex category in Germany.

A number of authors have critically remarked that a third sex is in itself not a solution to many of the problems intersex people face; I agree with that argument ([Carpenter 2018](#); [Davis 2015](#); [Fausto-Sterling 2000](#)). Carpenter has summarized the conundrum succinctly: “Medicine constructs intersex bodies as either female or male, while law and society construct intersex as neither female or male” ([Carpenter 2018](#), 493). There is no agreement among intersex groups on the desirability of legal gender variance. In the German case, intersex advocates at the UN did support a less stringent sex binarism. Crucially,

with the help of allies they identified gender-relevant treaties to *politicize* their cause and strategically used political and discursive opportunities within multilevel governance to address key human rights concerns. Here, intersex claims established specific links to the international human rights discourses on physical self-determination, which function as a powerful counter-discourse to the medical paradigm of normalization and correction. The activists' counter-discourse problematized widely pathologizing perspectives, exclusions, eradication, and "treatment" practices, relying instead on the legal protection of intersex bodies (von Wahl 2017). It is this normative counter-discourse that makes it possible to represent intersex concerns as a question of human rights. Because physical inviolability is understood to be at the core of human rights protections, it has deeply affected German politics by striking at the heart of historical sensitivities. Using such arguments, recent transnational mobilization of intersex groups at the UN paved the way for the surprising re-emergence of an official third gender in Germany. The following section presents definitions, background data, and a literature review of theories on historic discourses and medicalization of intersex people, including an analysis of the first historic turning point, that is, the rise of the modern nation-state and the disappearance of the third sex from Prussian law.

### **Subject to Change: Definitions and Data on Intersexuality**

Newborns and children who cannot be unequivocally assigned a gender are classified as "intersex." In the past, terms such as "hermaphrodite" were used, but currently "intersexual," "intersex," "intergender," and "inter\*" are all commonly used in German and will be used here interchangeably. In predominantly medical discourses, the term DSD (disorder of sex development or difference of sex development) is more prevalent. It is important to underscore that both intersex and DSD are imprecise and much-debated terms (Davis 2015). They do *not* denote either a sexual orientation or a specific symptom, but instead indicate a broad range of what are understood to be medical syndromes. Intersexuality can be expressed through numerous possible combinations of hormones, gonads, chromosomes, external sexual characteristics, or different sexual and/or mental gender identities: people with a body that appears externally female but has XY chromosomes (in the case of androgen insensitivity syndrome), people with XXY chromosomes (Klinefelter syndrome), only one X chromosome (Turner syndrome), etc. Even elevated testosterone levels in women are sometimes viewed by the medical profession or professional sports as a disorder. Many people with an intersex variation are not aware of it, even as adults. Of all cases, only the classic congenital adrenal hyperplasia (overproduction of androgen and a lack of cortisol) represents a life-threatening emergency that must be treated immediately.

How many intersex people exist in a given population? This is an open question since, first of all, there is no agreement on the definition of inter\*, and second, not all intersex newborns are identified as such. In 2013, the figure mentioned in reports in the German Bundestag was that roughly 150–340 infants with not clearly identifiable sex characteristics were born annually. American researchers claim that between 1.7 and 2 percent of all children in the United States are considered intersex, and roughly 0.1–0.2 percent undergo genital operations (Blackless et al. 2000). According to activists there are conceivably between 80,000 and 120,000 people living in Germany who are classified as intersex (Veith et al. 2008). In 2015, Caren Marks, Parliamentary State Secretary at the German Federal Ministry for Family Affairs, Senior Citizens, Women, and Youth (BFSFJ), compared the figure with the natural occurrence of red hair in Germany (BFSFJ 2015, 6). However, it is largely irrelevant whether the figure is closer to 1/2000 or 1–2 percent of the population; what matters is that this group exists in clinical terms, but legally, culturally, and politically has no clear place in a limited two-gender system.

### Theoretical Considerations: Can the Intersex Person Speak?

What has political theory to say on the subject of intersexuality and its representation? What discursive space exists for intersex claims and advocates to emerge as political actors? And how can grappling with the specific phenomenon of intersexuality and the emergence of the third gender category contribute to our broader understanding of gender? I argue that the re-emergence of a third gender was made possible by transnational social activism asserting a powerful human rights discourse at the historic moment when the exclusive power of the modern nation-state diminished with the concomitant rise of multilevel governance and globalization.

Since the mid-twentieth century, the literature on gender has been addressing social aspects, that is, that which is inherently constructed regarding the gender dichotomy. As early as 1949, Simone de Beauvoir stated, that “one is not born, but rather becomes, woman” (de Beauvoir 1949/2011, 283). Based on this idea, that gender is a temporally, spatially, and *socially* variable category, a powerful strand of feminism has—against all resistance—presumed to deconstruct the naturalized opposition of men and women, criticized their hierarchization, and drafted various counter-visions of a gender-equitable society. Other schools in feminism have, however, strong roots in the idea of a biologically anchored understanding of gender that cannot be reduced to culture. Pregnancy and birth are indicators for a profound difference between men and women. Reflecting the underlying gender binary inherent in difference feminism, sex designations that are ambiguous, fluid, or difficult to categorize, such as intersex, are not a focus. Other theorists, such as Thomas Laqueur, have extensively discussed the scientific compulsion for binary

thinking and its effects on gender (Laqueur 1990). Laqueur has described the rise of the gender binary and the end of more fluid gender variance—but not its unexpected return.

The American term “gender” emerged in the social sciences in the late 1980s, inspiring the global use of social gender as a category of analysis (Scott 1986). Although gender was understood as a socially learned and reproduced system that is culturally specific, biological sex was viewed as based on material realities. This changed with Judith Butler’s *Gender Trouble*, which argued that not only social gender but also biological sex and sexuality were culturally shaped and constructed (Butler 1990). Butler coined the concepts of the “heterosexual matrix” and “doing gender” as performative. Her understanding of gender propagated the rejection of a collective understanding of women as a fixed group with the same identities and interests. In *Undoing Gender*, Butler (2004) goes into detail on intersexuality. She critiques that up to now intersexuality marks that which is culturally inconceivable and illegible, because it exists beyond the paradigmatic binary of gender, and therefore beyond the human (Butler 2004). If being human is defined through the gender binary, then the impact for intersex people is either a designation as female/male, social exclusion, or even ostracism. Coming from this specific positionality, the question then becomes: is there any institutional and political room for intersex people to make their voices and concerns heard, and if not, where and how can such a space be created?

Antke Engel argues that within the “tolerance pluralism” of Western societies, intersex people can be in a position to demand “subject status” (Engel 2002, 54). According to Butler, however, such political resistance can only take place within the heterosexual matrix and from the exterior regions of that boundary. This means that intersex mobilization is the result of the “disruptive return of the excluded from within the very logic of the heterosexual symbolic” (Butler 1993, 12). Accordingly, intersex people can attempt to have an influence only from and within the boundaries of the all-important heterosexual matrix. Indeed, the entire story of intersex mobilization and the return of a third gender category can only be conceived as a story within a frame in which the gender binary and heterosexuality are the dominant discourses. Thus, the recent political developments leading to the re-emergence of the third gender in Germany represent an important example of the “disruptive return of the excluded.”

Foucault has shown in many works that discourses do not represent reality, but in fact create it (see Foucault 1975/2003, 1990). This article presents such a discourse at work. The discursive body is the interface between knowledge, power, and language, where patterns of thought and ideas of what is natural and human are created. Social groups that assert their definition of the normal body determine the framework of social interpretations and thus also the boundaries of what is considered “not normal.” Since the Enlightenment, this definitional power has existed primarily in the domain of medicine, within

which the intersex body is named, measured, defined, and categorized. According to Foucault, due to scientific advances, technical feasibility, and the state's desire to regulate its population, the field of medicine, as a core science, acquired increasing authority during the eighteenth and nineteenth centuries. Medicine expanded diagnoses and treatment methods so that intersex *people* became *patients* (Foucault 1990). In the mid-twentieth-century discourse on the gender binary, the modern medical field created an internal logic regarding the necessity to treat intersex children. This included an intrinsic obligation to surgically intervene and bring intersex children “back” into the gender dichotomy, that is, to make them intelligible and socially acceptable.

However, like all discursive fields, medicine itself has not been consistent. Over the last 150 years, there have been historical ruptures, scientific contradictions, and new discoveries, such as hormones and genes, leading to various new interpretations of what intersexuality is and how to deal with it. More recently, political counter-discourses permit a critique of these medical discourses. For over two decades, intersex self-help groups and political activists have criticized invasive medical experimentation and their lack of a voice in their own treatment. This article is part of the literature studying social movements that have opposed routine “corrections” of bodies that are not clearly identifiable as one gender or the other (Davis 2015; Dreger 1998b; Karkazis 2008; von Wahl 2017, 2018; Zehnder 2010). However, resistance and reform are extremely difficult in a discourse aimed at exclusion or assimilation. Only with the support of a powerful counter-discourse can claimants begin to challenge the authority of medicine to define and regulate bodies in a binary logic. This project illustrates how sex variance has been represented through time, revealing how political actors beyond the margins of the gender binary were recently able to make their voices heard.

### The Historical Disappearance of an Ambiguous Gender in Germany

In Europe, the gender binary is rooted in far-reaching and deep-seated norms as a legal, religious, and social category. Ulrike Klöppel, however, has shown in a granular historic study that over centuries, the understanding of intersexuality changed dramatically in relation to social, epistemological, and political processes (Klöppel 2010, 231). The definition, symbolic meaning, and substance of the two-sex system often varied greatly. In this section, I demonstrate how the political and legal representation of intersex people changed with the rise of the modern nation-state and the two-sex system. I sketch out how this exclusive legal duality emerged and was connected to the political rise of the German nation-state. The fusion of the national project with medical aspirations in a system of heteronormative gender binary paved the way for the modern practice of surgical intervention.

Despite the positive connotations of hermaphrodites in Greek antiquity, research has overwhelmingly shown that intersexuality has generally had a



negative social connotation (Foucault 1975/2003; Klöppel 2010; Reis 2009). In medieval Europe, the killing of intersex people was common as visible physical deviations from the norm were interpreted as the result of mortal sins: “from the Middle Ages to the sixteenth century, and until at least the start of the seventeenth century, hermaphrodites were considered monsters and were executed, burnt at the stake and their ashes thrown to the winds” (Foucault 1975/2003, 67). At the beginning of the Enlightenment, people were uncertain whether a hermaphrodite was a sinister deviation from the common rules or simply “nature’s play” (Burghart 1763, 24, cited in Klöppel 2010, 218, my translation). Medicine offered several new and useful frameworks for resolving this tension and for determining the “correct” gender. This included addressing questions of marriageability as well as the important matter of inheritance rights, which were reserved for men. The medical profession and sciences opened up powerful ways of understanding ambiguous gender that were different from the moral frameworks of sin and punishment (see Klöppel 2010, 232–3).

The Enlightenment reinforced the notion that the world should be examined empirically. In the second half of the eighteenth century, the medical profession gave greater consideration to the classification of actual cases. At the same time (around 1860–1870) anesthesia was developed and medical interest shifted from the intersex person to studying the body (Mak 2012). The emergent medical paradigm on intersexuality focused on rejecting the occurrence of “genuine” hermaphrodites and assumed that even people with externally ambiguous genitals could nevertheless be classified as either male or female (see Klöppel 2010, 163ff). The model of a strict gender dichotomy was declared a law of nature. However, actual scientific knowledge and options were limited, so doctors took individual “inclinations” toward a certain gender into consideration.

Importantly, my research shows a third gender previously already existed as a legal category in Germany. Indeed, an exclusive gender binary did not even make its way into national law until the late nineteenth century, with the rise of the modern nation-state and the founding of the German Empire in 1871. Previous to that era, the General Prussian Code (ALR) of 1794 denoted the existence of a legal third gender in the so-called “hermaphrodite articles.” These third gender laws were introduced under Enlightenment reforms in Prussia. They existed for a century and consisted of the following legal paragraphs:

- §19: When hermaphrodites are born, the parents shall decide which sex they should be raised as.
- §20: Such a person, after completing his eighteenth year, can choose which sex he wants to belong to.
- §21: His future rights are determined based on this decision.

§22: If the rights of a third party are dependent on the sex of an ostensible hermaphrodite, then the former can petition for an examination by authorized experts.

§23: The findings of the experts shall be decisive, even against the choice of the hermaphrodite and his parents.

Through the “hermaphrodite articles,” a third sex was explicitly part of Prussian law. Children officially considered hermaphrodites retained that designation until their eighteenth birthday, at which time this legal state ended and the person was required to choose a sex. Thus, while an additional third gender category existed it was also understood to be a *temporary and transitional stage* that terminated at adulthood. Significantly, the Prussian legal code also reflects the emerging modern power of the medical expert: according to §23, doctors could overrule an intersex individual’s own self-perception. Scholars of European history are likely to be surprised to learn of the early existence of categories and laws taking genital ambiguity into account, as well as the relative autonomy made available to intersex people.

The existence and voice of intersex people would, however, soon be extinguished: the newly founded German nation-state in 1871 led to the abolition of largely independent monarchies and their specific subnational civil status laws. New biopolitical goals were pursued and a uniform German Civil Status Law was introduced in 1875, which differed from the earlier, more fluid Prussian model. The new national law marked the beginning of strict medical duality as regards sex reflected in the census. The census consisted of a centralized registry and categorization of all German nationals through the entry of data on date of birth, gender, marital status, parents’ names, date of death, etc. Older legal forms of gender variance, which had been laid down in the Prussian “hermaphrodite articles,” were superseded. In contrast, the new legal code of the German Empire and the German Civil Code (BGB) of 1900 no longer allowed any exceptions or variations but recognized only two sexes: male and female.

As has been demonstrated by Foucault, in the nineteenth century, the scientization and differentiation of medicine advanced rapidly. With it grew medicine’s social power and supremacy as the ultimate decision-making authority in matters of gender classification. The nineteenth century was also described in scientific literature as the “Age of Gonads,” that is, the era in which the medical profession declared the existence of gonads to be the correct and only method by which to determine sex (Dreger 1998a, 1999). If ovaries could be identified, the person was a woman, and testicles identified the male sex. With this focus on the body, power shifted from the intersex subject to the medical expert.

In the late nineteenth and early twentieth centuries, however, proposals were repeatedly made to also classify sex variants in the form of additions,

scales, typologies, etc. These proposals never again became part of the legal system, but instead were academic theses and provocations. Intensive scientific discussion took place among psychologists, the first generation of sexual scientists, and early activists of the homosexual movement regarding a so-called third sex (Hirschfeld 1904/2017; Ulrichs 1865). This third sex was described in different ways: either as *between* female and male, or as *both at the same time*, or as something *neutral*. The medical concepts of “sex intergrades” and “sexual transitions” also emerged in the late nineteenth century, but these were not precise precursors to intersexuality. Instead they were either descriptions of sexual orientations or behavioral forms of trans- and homosexuals, which were also called the “third sex” (Whisnant 2016, 28). These variances and pathologies were constructed through the nascent sexual sciences, while they vanished from the legal realm. In general, scientific categories and concepts were in a state of flux or even contradictory, but these debates now took place within the state-empowered framework of the two-sex system. The term “intersexuality” was coined in 1915 by the German biologist and geneticist Richard Goldschmidt (Goldschmidt 1915). It resembles Hirschfeld’s idea of sex-intergrades. The term “intersexuality” was commonly used in the field of pediatrics until 2005 (and then replaced by the term DSD).

### Medical Categorization and Intervention on the Intersex Body

In the twentieth century, physicians began empirically researching the physical-material adaptation of human bodies to the gender binary. Early techniques of medical intervention in adults were initially carried out on so-called transvestites. The first operation took place in 1922, a second one in 1931 on Dora Richter, and several operations in the 1930s on the Dane Lili Elbe (previously Einar Magnus Andreas Wegener) (Stryker 2008, 39). Lili Elbe’s life story became widely known through the film *The Danish Girl* (2016). The first of four operations was conducted under the supervision of one of the progressive leaders of the modern sexual movement, Magnus Hirschfeld, under the aegis of a tolerant conception of humanity. These early operations are significant for two reasons. First, they depict the power of a heteronormative discourse that stipulated that physical and psychological expressions should necessarily be identical, that is, the identity of a man should exist inside a male body. Therefore, gay men and lesbians were categorized as “sexual inverts,” that is, physically male or female externally, but internally the opposite (von Krafft-Ebing 1886). Second, if this dictum was not satisfied there were only few specialists at the time who were willing to adapt the adult body (but not a child’s) to the “correct” psychological social identity through surgery (see Klöppel 2010, 281–2).

A paradigm shift in clinical research and treatment that was of great importance for the case of intersex claims and activism today originated in the

1950s in the United States. It opened the door to “adjusting” intersex bodies to the two-sex system through surgery and hormone treatment. This approach gained currency with the new argument that a social sex existed independently of the biological sex and therefore any child could learn “appropriate” gendered behavior. With reference to the difference between social gender and biological sex, a distinction later associated with feminist theory, a positive appraisal developed around surgical interventions for intersex newborns and children. This radical shift toward routine surgical interventions was based on several assumptions drawing upon the research of psychologist John Money. It was Money who coined the modern concepts of *gender roles* and *gender identity*. In his hundreds of publications, he underscored and popularized the *distinction between biology and culture*. Modern genetics, embryology, endocrinology, psychology, and anthropology provided a gold mine for many medical professionals, also among those who believed that this distinction could be utilized for the treatment and socialization of intersex newborns and children. While nineteenth- and early twentieth-century medicine viewed the gonads, that is, the testicles and ovaries, as the decisive factor in determining gender, doctors at Johns Hopkins University claimed that due to the relevance of the *gender role*, the *externally visible* gender should be the determinant in assigning the gender of an intersex child (Karkazis 2008). The visible genitalia had to be in agreement with the *social* gender, they asserted, because children would otherwise suffer under ambiguity and stigma, whether in the family, at school, or later in romantic relationships. Thus, an intersex body came to be understood as a birth defect to be “corrected” early through genital operations. For the first time, the medical field saw itself as capable of preventively relieving the presumed stigma of intersexuality right after birth. In other words, intersex children were supposed to be fitted through medical interventions into the dominant system of two genders *prior to* the emergence of any possible discrimination. Everything else would then be regulated by the appropriate *gender role*, which children would grow into and automatically adopt.

The physical transformation was supposed to be accomplished through a process of “disambiguation,” which was to be carried out shortly after birth, since it was believed that social gender could be assigned almost randomly within the first two years of life (the so-called time window theory) (Veith et al. 2010, 15). Early interventions were therefore viewed as the best response to gender ambiguity. Since the 1950s, then, the biological sex of intersex people was increasingly not only socially created and culturally brought to life as in previous centuries, but also changed materially through consequential medical interventions. The new medical paradigm spread from the United States to many countries through a diffusion process that included medical associations and conferences worldwide. The practice of surgically creating an intersex child’s “normal” physical appearance within the logic of the two-sex system is the epitome of Foucault’s idea of normalization and demonstrates the combined disciplining powers of medicine, science, and the state.

The continued dominant impact of the disambiguation doctrine in Germany is reflected in the following official figures: although only about 5 percent of newborns require surgery for noncosmetic reasons, in 2011, 87 percent of all intersex children (up to twelve years of age) continued to undergo operations and forced gender assignment (see [Deutscher Ethikrat 2012](#)). As a result of sterilizations and castrations, many intersex youths and adults are dependent on hormonal treatments throughout their lives. Contrary to current medical claims, such intersex adults are often disabled, struggle to hold a job, and suffer from high rates of social isolation, trauma, depression, and thoughts of suicide ([Veith, et al. 2008](#)).

## Part II: Pushing Back: Women's and Human Rights as Frames for Intersex Claims

Why and how is the third sex re-emerging as a legal option in Germany? The second part of this article describes how social movement activists have reframed the debate through the use of transnational mobilization, multilevel governance, and the human rights discourse. The mechanisms used and arguments made by activists point to a weakening of state power in upholding the gender binary due to the spread of feminism and globalization. Application of the discourse on international human rights to the situation of intersex people utilizes multilevel governance and actor-centered mechanisms such as the “boomerang pattern” ([Keck and Sikkink 1998](#)). The boomerang pattern is described as the strategy of weak actors, such as social movements and NGOs, to use multilevel governance in international relations to exert external and top-down pressure on national governments. Obviously, it is challenging for marginal political actors to successfully institute such pressure and a number of preconditions must be fulfilled. It is significant that this can only work if the social actors find a way to effectively change the dominant framing of an issue ([Kriesi 1996](#); [Snow and Benford 1988](#)).

Where are we now? Over the last thirty years, the initial patient generation of the Johns Hopkins approach has reached adulthood. With the spread of the Internet in the 1990s, political and self-help groups for intersex people and family members have been founded, connecting isolated individuals and building a community. This heterogeneous community has created organizations by and for people and patients with various types of intersexuality. Some see their cause as a private and purely medical matter. Others are politically engaged and criticize the medicalization of their situation, publishing newsletters, writing blogs, organizing local, national, and transnational meetings and protests, and informing each other of political, legal, and medical developments. Although these groups represent a wide range of demands and different identities, their shared primary goal is to end the routine surgery of intersex children. For example, the German organization *Intersexuelle*

Menschen eV (Intersex People) and the Swiss organization *Zwischengeschlecht* (In-between Gender) are focused on gaining access to self-determined, autonomous medical care as well as achieving legal and social recognition. While Organization Intersex International (OII) in Germany is ambivalent about a third sex, *Dritte Option* (Third Option) has actively and pointedly supported recent legal challenges to the gender binary and the addition of a third category. Although the primary concern of these groups has been the protection of intersex bodies from invasive medical treatments, many activists also think that the gender binary heightened pressure to choose the sex of the child after birth and may represent a burden for some inter\* people.

In order to be heard politically, such small organizations must be able to amplify their message and enter the political opportunity structure to convincingly challenge the dominant discursive frame. Here activists argue against the view that intersex bodies are per se “sick” and in need of corrective medical treatment. This means challenging the medical field’s exclusive power in defining what constitutes health, normalcy, and biological sex. Even under the best circumstances, attempts to change a dominant interpretive frame by stigmatized outsiders and lay people would be a David versus Goliath story. Such a struggle can only be effective if institutional and discursive support can be mobilized. My research shows that intersex advocacy groups have successfully communicated their claims through a sophisticated multilevel strategy by inventing bridging frames and building alliances with more powerful allies.

### Throwing the Boomerang

Globally, Germany is well integrated in the international treaty network and is a signatory to various human rights conventions such as CEDAW, CAT, CRC, ICCPR, and ICESCR. This article focuses on CEDAW to illustrate how transnational intersex movements began to utilize existing international legal frames and institutions. The United Nations CEDAW is a human rights treaty that entered into force in 1981; there are presently 189 signatory countries. CEDAW opens up a number of political opportunities to social movements interested in women’s and human rights, because the countries that have ratified CEDAW are obligated to issue reports at regular intervals and present the situation of women in their countries. At the same time, and independent of government, civil society organizations can also submit reports. This dual process helps the UN gain a more objective view of the situation of women in the signatory countries, since the national reports often paint a rosy picture of official accomplishments. But even here the hurdles for intersex people have been immense for at least two reasons: first, it is organizationally and financially difficult for all small social movements, NGOs, and organizations at international institutions. Second, CEDAW is a treaty that itself reflects the gender binary. As its name states, it focuses on the discrimination

of *women* and would therefore not seem to be a point of access for *intersex* people. However, in recent decades, CEDAW has morphed into a more inclusive treaty that has become dedicated to international questions about *gender and not just women*. And since no other international treaty deals as extensively with any kind of gender questions, CEDAW was viewed as the intersex movement's best shot at being heard. Nevertheless, even that broader interpretation of CEDAW's charge as dealing with questions of gender was defined by the sex binary. As can be expected, the position of intersex activists was complex: they found themselves located outside the existing institutional paradigms, on the one hand, and assimilated under the male/female distinction, on the other. It is counterintuitive that they used both positions to their advantage.

Beyond the shift from women to a more analytical and symmetrical perspective on gender, discourses on women's rights have also been linked since the 1990s to a larger, powerful human rights discourse (Bunch 1990; Joachim 2007). This connection of issues began with the now familiar slogan of the influential women's conference in 1995 in Beijing, which postulated that "Women's Rights Are Human Rights." The statement challenged the separation and relegation of so-called women's issues into separate, often less important legal categories. The Beijing motto underscored the sentiment that human rights include women's concerns and that women and their concerns are part of the more neutral and all-encompassing category "human." It is this critical linkage to human rights that was to open doors for intersex people. Since Beijing, various international human rights treaties that are less obviously connected to gender concerns have increasingly referenced global women's and gender issues.

Of key significance for the success of demands that lie outside acknowledged legal and political discourses is the construction of effective psychological bridges, frames, and counter-discourses. These frames have to logically link and embed the interests of intersex people into other supportive discourses. In this case, inter\* activists have creatively reinterpreted sex and gender in such a way as to apply them to intersex concerns. At the same time, their concerns were refracted through CEDAW's specific lens and shifted toward questions of *gender discrimination* (and not violence or torture, which is another perspective put forward by the movement).

I have traced the introduction of a third gender category, and specifically the efforts to reform section 22, subsection 3 of the German Civil Status Law, back to the 2008 Parallel Report (formerly known as Shadow Reports or Alternative Reports) submitted to CEDAW by the small intersex organizations *Intersexuelle Menschen eV* and the Hamburg group *XY Women*. Leaders of these groups gained access to the UN hearings through cooperation with more powerful allies, specifically Germany's largest women's organization, *Deutscher Frauenrat*, which regularly reports to CEDAW. Previous to 2008 they had held extended discussions with *Deutscher Frauenrat*, trying to

convince them that intersex concerns should be included in the German report. My interviews with Lucie Veith, the head of the Intersexuelle Menschen group, as well as others from the German delegation show that this process of inclusion was slow, complex, and incomplete. While Deutsche Frauenrat as an umbrella organization for a broad spectrum of women's groups was sympathetic to many demands being brought forward, it was hesitant to include those that did not come from "women." As a result, Deutscher Frauenrat did not incorporate the concerns of trans- and intersex people into its own report; instead, these groups submitted separate accounts. One advantage of this separation was that the claims could be reported at length and were not tucked away in a short paragraph within a larger report. It is noteworthy that trans- and intersex activists also submitted reports separate from each other, which reflects not just their different concerns but also how ambiguous and sometimes contested the relationship between trans- and inter\* groups was (and continues to be) in Germany.

On July 2, 2008, Intersexuelle Menschen, as part of the German delegation, submitted its own parallel report to the United Nations women's committee (CEDAW) (Veith et al. 2008). To get a foot in the door, they stated in the first sentence of the report that it was "devoted to revealing the denied human rights of intersexual persons" and claimed creatively that CEDAW "embraces the protection against discrimination of all persons who physically and clearly do not belong to a male gender" (Veith et al. 2008, 5). The comprehensive report was compiled such that all articles of the CEDAW convention were reviewed with an eye to their applicability to intersex concerns. Core demands included: an end to all non-life-sustaining medical interventions without informed consent, the establishment of standards of care, a reform of curricula in schools and healthcare training, reparations for victims, the inclusion of the term "intersexuality" in current law, and the option to omit a designated gender from official documents of newborns (see also Veith in an interview with Krennerich [2009]). Because concerns for bodily inviolability and medical care trump legal reforms for gender variance, sections of CEDAW dealing with women's health were discussed in detail. Through their close reading, Intersexuelle Menschen was able to precisely point out to how the substantial physical distress stemming from surgical and hormonal treatments could also be framed as a gendered health concern and a human rights issue. The discussion of women's rights and health allowed intersex activists to model their own health concerns as comparable to those of women and suggest how they could legally be integrated.

The content of the report and its arguments can be only briefly outlined here. It presented first the basic principles of CEDAW as laid down in articles 1–5, including the right to equality and the prohibition of discrimination, as well as the duties of signatory countries. Intersexuelle Menschen demanded that precisely these principles and rights be applied with respect to their specific *atypical sex*, thus constructing a bridge from women's concerns



understood more narrowly to a broader and more inclusive gender perspective (see [Veith et al. 2008](#), 9). As stated above, a central section of CEDAW pertains to the right of women to healthcare (Article 12). The subject of health offers especially fruitful links and framing relevant to the rights of intersex people. While not mentioned in the UN convention, in the view of *Intersexuelle Menschen*, the following current medical practices regarding intersex children should be prohibited: unnecessary (i.e., not life-sustaining) genital operations, medical experiments, genital amputations, sterilization, and castration. Also, improved diagnostics and treatment were called for, as well as access to healthcare and hormonal therapy (if necessary) for intersex people (see *ibid.*, 11–16).

Another area of concern that *Intersexuelle Menschen* responded to in depth was CEDAW's Article 16, which pertains to the rights to marriage and family life. These rights are deeply embedded in the heteronormative discourse of the gender binary and the biopolitical aspirations of the nation-state. This raised important questions about the kinds of partnership and/or marriage that are available to intersex people. Can an intersex person marry a man or a woman or neither? Are intersex people prohibited from either marrying or entering a civil union? Although the German Bundestag passed a law that introduced marriage equality for gays and lesbians as of October 2017, this did not consider the question of marriage for intersex people. After the passage of gay marriage, Heribert Prantl argued that it actually marginalizes intersex people even further, since it is not clear what rights inter\* adults would have under the Act to Allow Persons of the Same Sex to Marry if they were registered as neither female nor male individuals ([Prantl 2017](#)).

Furthermore, *Intersexuelle Menschen*'s critique at the UN underscored the exclusion of intersex people from such fundamental principles as the right to physical integrity and inviolability (right to freedom and protection from torture, arbitrary arrest, execution, psychological and physical abuse, etc.), which since the passage of the Magna Carta have been viewed in international and national law as hallowed values to be protected. Demands to implement the international treaty in Germany are also a call for the inclusion of inter\* people within already existing anti-discrimination laws and constitutional guarantees. Following in the vein of legal protection and the human rights discourse, intersex can then be understood as one sex among others, that is, as a variant requiring equal treatment. The demands for inclusion and the protection of human rights for intersex people left a deep impression during the hearings at the UN. A short time later, in the official evaluation, CEDAW criticized Germany and instructed representatives to meet with organizations representing trans- and intersex people to start a dialogue.

## The Boomerang Hits Home

It is a success for such marginal organizations that a commission of the UN listened and publicly criticized Germany. Why was the strategy of the activists effective? I argue that the answer is twofold and has to do with institutional and agentic explanations: the activists identified and utilized the existing political opportunity structures for civil society organizations in order to present their interests for urgently needed reform. By formulating intersectional linkages between intersex interests and women's movements' interests they created a coalition that was able to take advantage of an institutional window of opportunity and connect with an established rights discourse. However, this does not mean that their attempt was in any way a self-evident since intersex people were not covered by CEDAW. This fact did not keep Intersexuelle Menschen from lobbying to broaden the definition and applying it to themselves. In sum, the group combined a multi-pronged advocacy strategy with paradigm-shifting content.

This enterprising endeavor worked because women's rights are understood as a type of gender category. In practical terms, (i) "women" (as a sex) has become "gender" in the context of some international treaties and (ii) women's rights have morphed into human rights (and vice versa). Sex and gender are no longer limited to a small and separate field of law applying only to women. Because sex and gender have become legally integrated, the advocacy group was able to build cognitive bridging frames and embed their view into existing international law, since *intersex people have a sex and are human*.

Importantly, the UN accepted the social movement's framing of intersexuality as a *political* problem and with it Germany was called upon to consider the *human rights* of intersex people. This international criticism by the UN triggered the last sequence of a boomerang effect, accountability politics, which can only be briefly sketched out here: a short time later, the German government asked the Ethics Commission of the German Bundestag to take up and investigate the issue raised. This set off the reform of section 22 of the Civil Status Law in 2013. Since then, political discussion and legal changes have come in quick succession, leading to a subsequent dramatic shift in domestic policies. The findings and arguments in the report of the Ethics Commission were initially picked up by opposition parties on the far left of the political spectrum and spread from there toward the center and right. In the 1990s, the post-communist Party of Democratic Socialism had already been sympathetic to intersex groups. Its reincarnation, The Left Party, continued that support. In the 2000s, the Greens also began to support the introduction and expansion of rights for intersex people. Then the argument and support rippled through to the center-left Social Democrats and the liberal Free Democrats (FDP). Soon even the Christian Democrats on the center-right, which was then in a coalition government with the FDP, began to sympathize with the demands. In a short time, all parties supported the human

rights argument for physical inviolability. However, initially the government did not add a third gender category, only a “blank option,” meaning that an intersex newborn could be registered as *neither male nor female*. As a result new legal questions arose. Three years later, a court case regarding the availability and appropriate naming of this third category made its way from the local level to the regional and national levels. In 2016, Vanja, an intersex person, with the support of a new activist group Dritte Option, wanted to substitute the blank sex designation in the census file with a more positive term, such as “inter” or “diverse.” The case was rejected by several lower courts and made its way to Germany’s Federal Constitutional Court. On November 8, 2017, Germany woke up to a stunning court ruling: parliament had to either introduce a third gender or abolish gender designations in Civil Status Law in one year’s time. The court’s argument, received positively by the media as “historic,” “pioneering” even “revolutionary,” rested on the constitutional nondiscrimination clause on the grounds of *sex*.

A year later, on December 13, 2018, parliamentarians agreed in committee to introduce a newly named third sex called “diverse.” Unlike its Prussian predecessor, this designation does not end at age eighteen. Notably, the category “diverse” is the first of its kind among European countries. At the same time, the application of the third gender law is also restrictive in that in most cases it still requires a medical certificate to change a person’s sex and name. This means that although a third *legal* option exists, *medical* authority still has the final say about who can choose this option and when. Importantly, the third gender option is not officially open to the much larger group of trans or gender-fluid individuals who would like to voluntarily choose a third gender.

## Conclusion: Gender Variance at a Turning Point

I have argued that social mobilization transformed the status of intersex people from medical object to political subject. In addition, I have demonstrated that the history of a third sex category in Germany has had a longer history than previously known. Such a category existed in Prussia since 1794 and was only *abolished* with the rise of the modern German nation-state in the 1870s. It has now *returned* at the beginning of the twenty-first century, in 2018. Since the late nineteenth century, medical authorities held sole defining power in categorizing the sexes, promoting the ever more powerful discourse of a strict sex binary and its normalization. Over a century later, criticism by intersex activists began to counter both the medical paradigm and the lack of state protection, focusing especially on halting routine surgeries on children. Intersex activists and allies reframed the discourse from one of *medical correction* toward one of the *legal protection* of intersex bodies. Well-established women’s and human rights discourses and treaties provided adaptable content and frames that activists were able to mine for forms of inclusion and intelligibility. Their testimony led to critique from the UN and triggered a domestic

investigation in Germany. In 2013, this investigation resulted in support for an open sex designation for intersex newborns from all political parties. In 2018, an official third sex was introduced.

The power of the medical discourse has, however, not been eradicated: despite the introduction of the third sex category, inter\* individuals still must have medical authorization to change their name and gender. The most significant objective of intersex activists—the banning of nonessential medical interventions on intersex children—has not yet been achieved. Medical interventions, such as surgeries, on intersex children remain legal and widespread in Germany (Klöppel 2016). In the final analysis, the power of intersex activism in the face of *medical authority* remains limited. However, the power of the *nation-state* over gendered categories has clearly been reduced through global governance and transnational activism. Intersex advocacy groups have gained a voice and created a new legal space through the third gender category. They have successfully crafted a broadly supported public discourse in the interests of intersex people. The introduction of the third sex, packaged in a discourse of liberal human rights, has led to a significant rupture in the modern European gender binary. The current discursive shift points toward further debate, broader reforms, and more accessible pathways for all manner of sex variant individuals.

It is significant that third gender categories have already begun to emerge internationally. Their diffusion in Europe will be facilitated by transnational social learning among social movements, experts, and EU member states. Indeed, the introduction of intersex as a political category is already undergoing a European diffusion process: the EU Agency for Fundamental Rights in Vienna published a study in 2015 discussing the human rights of intersex people (<http://fra.europa.eu/en/publication/2015/fundamental-rights-situation-in-intersex-people>), recommending that member states avoid “sex-normalizing” medical treatments on intersex people. The usually critical inter\* organization OII Germany calls the document a “true turning point.” The EU Agency for Fundamental Rights has also begun to use the abbreviation “LGBTI,” adding intersex as a category to antidiscrimination policies. The Council of Europe and courts in Austria and the Netherlands are debating the introduction of a third sex, while Malta has already outlawed surgery on intersex newborns.

In the near future, not just gender but also sex designations could become more of a personal choice, specifically if trans and gender-fluid individuals are able to opt in. This would further undermine claims by the medical establishment in support of the necessity of forced “normalization.” The emergence of new, postmodern, gender-relevant subjects and identities is likely to trigger similar changes in other countries as social movements connect transnationally and continue to challenge ingrained state and medical prerogatives. Such a diffusion of a third gender category could foster new and emerging identities, interests, and institutions.

## Note

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