Producing Sex: A Semiotic Genealogy of Trans and Non-Binary Exclusion in UK Law

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Abstract

Legal interpretation operates through rhetorical claims to discovery whereby courts purport to ascertain the meaning of language via the neutral application of interpretative rules developed and refined throughout legal education. This article demonstrates that such claims constitute Barthesian myth, a second-order semiotic operation in which contingent, historically produced meaning is presented as natural, self-evident, and innocent of its own construction (Barthes 1972: 129-130; Boer 2011: 218). This article will show that judicial interpretation, rather than discovering meaning, produces it, whilst simultaneously erasing the productive mechanisms through which interpretation operates.

Deploying semiotics through the work of Roland Barthes (1972), Charles Sanders Peirce (Hartstone, Weiss & Burks (eds) 1931-1958), and Eco (1976), Foucauldian genealogy (Foucault 1978), Butlerian performativity theory (Butler 1990), and Elena Gambino's (2020) account of recursive power, this article traces the discursive production of sex across UK jurisprudence from *Corbett v Corbett* (1971) through *R (Castellucci) v Gender Recognition Panel* (2025) KB 577 and *For Women Scotland v Scottish Ministers* (2025). This genealogy illuminates discontinuity rather than continuity: the signifier "sex" emerges through contradictory epistemic regimes, each asserting access to a stable, pre-legal truth. Notably, the deliberate linguistic conflation of sex and gender in the Gender Recognition Act 2004, designed by its drafters purely and simply to confound future debates, exemplifies the productive rather than declaratory character of legal language and *For Women Scotland*'s declaration of plain biological meaning accomplishes what Charles Stivale (2002: 465) terms "revolutionary ex-nomination", naturalizing contingent interpretation whilst occluding over two decades of divergent juridical practice.

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Castellucci demonstrates what is at stake: non-binary subjects rendered legally impossible through law's iterative performance of binary categories, compelled to present what Mairead Losty and John O'Connor (2018) term a "false self" based on biological sex whilst concealing their experienced identity. This semiotic critique exposes judicial interpretation's concealment of productive power, revealing how claims to discovery constitute violence against lives unintelligible within law's binary framework.

Keywords: semiotics; legal interpretation; trans law; non-binary; Barthes; Foucault; Butler; UK equality law; gender recognition.

[A] INTRODUCTION

This article investigates how United Kingdom (UK) judicial and statutory interpretation discursively produces "sex" as a binary biological category rather than passively discovering a pre-social reality. The central research question asks how legal speech acts and interpretive mechanisms in UK law performatively construct binary sex, and what semiotic and material consequences this construction holds for non-binary subjects. The article argues that, when courts claim to retrieve a plain biological meaning of sex, they execute a Barthesian mythologization that conceals a normative political choice behind the mask of nature. Throughout an authoritative, institutional speech act, judicial interpretation performatively materializes the binary while producing non-binary individuals as legally impossible and statutorily unprotected.

This article contributes to queer legal theory and socio-legal scholarship by synthesizing three distinct critical traditions into a unified analytical framework. While previous scholars have examined medical gatekeeping in early trans jurisprudence or the limitations of gender recognition legislation (Sandland 2005; Sharpe 2007; 2009; Gonzalez-Salzberg 2014), this study extends that literature by uniting Roland Barthes' semiotic myth-critique, Michel Foucault and Elena Gambino's theories of recursive power, and Judith Butler and Lila Braunschweig's accounts of performativity and the tyranny of legibility. Applying this theoretical triad allows the article to offer an up-to-date critical assessment of recent landmark rulings, bridging the gap between abstract legal theory and the lived material realities of non-binary subjects.

Semiotics provides an essential methodological lens for analysing queer and trans jurisprudence because judicial interpretation operates

fundamentally as a system of signs (Barthes 1972; Kevelson 1988; Stachowiak 2022). Legal adjudication does not merely read plain words from statutory texts; it assigns specific meanings to signifiers such as "sex", "man", and "woman". A semiotic approach unmasks how judicial discourse robs language of its historical contingency, transforming social choices into self-evident biological facts through what Barthes terms ex-nomination (1972). By analysing court judgments as semiotic operations, this article exposes how claims to scientific neutrality and ordinary meaning function as ideological mechanisms that insulate normative exclusions from public critique.

To trace the evolution of this semiotic regime, four key jurisprudential moments in UK law have been selected for analysis. First, *Corbett v Corbett* (1971) represents the founding medical-biological determinism that established chromosomes, gonads, and genitalia as the exclusive markers of legal sex. Second, the Gender Recognition Act 2004 GRA demonstrates a human rights compromise wherein section 9(1) strategically conflated sex and gender to enable binary legal transition. Third, *R (Castellucci) v Gender Recognition Panel* (2025) marks the explicit judicial foreclosure of non-binary status, holding that non-binary recognition falls outside judicial competence. Fourth, *For Women Scotland Ltd v Scottish Ministers* (2025) exemplifies the complete mythologization of sex, with the Supreme Court inserting "biological" into statutory definitions of "woman". Together, these four cases span fifty-five years of jurisprudence, providing a comprehensive genealogical map of how legal sex has been constructed, contested, and foreclosed.

This article is structured in four parts. Part [B] establishes the theoretical triad, articulating how Barthesian myth-critique, Foucauldian genealogy and recursive power, and Butlerian performativity intersect. Part [C] executes a semiotic genealogy across the four jurisprudential moments demonstrating how judicial interpretation shifts between competing epistemic regimes. Part [D] analyses the three axes of judicial violence inflicted on non-binary subjects, detailing the compelled performance of a "False Self", the two-stage statutory foreclosure, and the medicalization paradox (Losty & O'Connor 2018; Murawsky 2023; Braunschweig 2024). Finally, the concluding section synthesizes the article's findings and proposes Barthes' concept of the "Neutral" of a conceptual horizon for reimagining legal intelligibility beyond binary closure.

[B] THEORETICAL FRAMEWORK: MYTH, GENEALOGY, PERFORMATIVITY, AND RECURSIVE POWER

Barthesian myth and legal interpretation

Barthes developed his account of myth in *Mythologies* (1957) through close reading of the cultural phenomena of 1950s France: wrestling matches, detergent advertisements, the face of Garbo. Myth, for Barthes, is a second-order semiotic system. At the first order of signification, a sign is formed from a signifier (sound-image) and a signified (concept). At the second order, this first-order sign becomes the signifier of a new sign, and it is here that myth operates. Myth appropriates an existing sign and empties it of its history, filling it instead with a "natural" meaning that appears self-evident and eternal rather than historically contingent.

Roland Boer (2011: 213, 216) offers a technically rigorous account of this operation. Barthes, he notes, designates myth as metalanguage, "a second language in which one speaks about the first": myth is a secondary semiological chain, inherently parasitic, that builds its own system by appropriating the meaning-full[1] sign of the first system, emptying it out, and refilling it with new ideological content. The process is one of distortion: myth "hides nothing; its function is to distort, not to make disappear" (Boer 2011: 216, citing Barthes). Crucially, myth is characterized by inherent instability, moving back and forth between the sign on which it feeds and its mythic form, functioning, as Boer (2011: 218) observes, like an alibi, always pretending to be somewhere else so that, if one confronts the myth, it points to its denotative fact, and if one confronts the fact, it retreats behind the myth. This instability is precisely what renders myth resistant to exposure: the "pretence to naturalness and innocence is a cover for having stolen language" (Boer 2011: 229).

Charles Stivale (2002: 464-465) identifies the specifically political operation at the heart of Barthes' analysis through his recovery of the concept of "revolutionary ex-nomination". Myth achieves what Barthes terms "ex-nomination" (Barthes 1972), the operation by which the bourgeoisie, as the ruling class, hides its name to appear as "Nature" itself: through this process, historically contingent choices are rendered invisible and innocent, and the specific interests of those who exercise

[1] "Meaning-full" in this sense rather than "meaningful" because it is full of meaning referring to other signs and signifiers in the chain of linguistic meaning rather than meaningful in the sense of being important.

interpretive power become the universal standard. When ex-nomination proceeds by the resolution of a contested political moment, Stivale notes, myth accepts to wear a mask, to hide its name, and to distort itself into Nature (Stivale 2002: 465, citing Barthes). This concept is directly applicable to judicial claims to "plain meaning". Specifically, this article contends that courts present the historically produced meaning of "sex", assembled through specific decisions by institutional actors across distinct historical moments, as though it were self-evidently available within the text. Interpretation is thus staged as the mere retrieval of pre-existing meaning via legal method, concealing its true character as an active process of creation and production. This analysis is supported by Patrick Ffrench's reading of Barthes which draws attention to the political stakes of myth-critique: if Barthes' early structuralism is driven by the impetus to disengage everyday life from itself, to reveal the ideological upholstery that supports the what-goes-without-saying (Ffrench 2004: 293), then the project of legal semiotics is to perform the same defamiliarization upon legal discourse, to reveal judicial interpretation as a site of active meaning-production rather than passive reception.

To develop this further in the realm of judicial interpretation, Jan Broekman and Larry Backer, situating this within the tradition of legal semiotics, observe that lawyers operate as meaning-makers even as they present themselves as meaning-finders: "lawyers sensitive to the semiotic foundations of their work come to see and understand what they are told to do differently" (Broekman & Backer 2013: 26). Arguably, it is not just lawyers who operate as meaning-makers but also members of the judiciary in their interpretation of the law in question. This is reinforced by Kevelson's Peircean account of law as a system of signs, where meaning emerges through interpretive processes involving symbols, language, and social relations rather than through fixed definitions, which is in the same tradition, thus building a picture of a process of legal interpretation which is not science as taught in law school but rather an act of meaning-making and construction of society (Kevelson 1988; Broekman & Backer 2013). While neither tradition discussed here can accommodate the claim that "sex" possesses a timeless, pre-interpretive meaning awaiting discovery in statutory text, this is precisely the premise adopted by the Supreme Court in *For Women Scotland* when declaring that the term has a plain, biological meaning. To understand this further we must consider how the semiotic mechanics of "sex" as legal signifier repay examination. In Charles Sanders Peirce's triadic model, a sign consists of a representamen (the sign-vehicle), an object (what the sign stands for), and an interpretant (the meaning produced in the mind of the sign-user) (Peirce 1931-1935). The

crucial point is that the relationship between representamen and object is never fixed; it is mediated through the interpretant and is therefore culturally, historically, and institutionally contingent (Peirce 1931-1935; Eco 1976). Legal institutions constitute specific interpretive communities that stabilize meaning in particular ways, but this stabilization is an achievement rather than a given (Kevelson 1988; Broekman & Backer 2013). When courts pronounce on the "plain meaning" of "sex", they claim to be reporting the relationship between signifier and referent; what they are in fact doing is producing an interpretant within a particular regime of truth (Foucault 1980; Ffrench 2004).

In addition to this, Eco's concept of the "model reader" offers a complementary lens (Eco 1979). Every text presupposes a competent reader who will activate its meanings appropriately (Eco 1976; 1979). When courts invoke "ordinary meaning", they invoke an idealized competent reader, but this idealization is itself a construct (Eco 1979; Broekman & Backer 2013): it assumes a particular culturally located, politically positioned interpreter, and treats that assumption as natural (Barthes 1972; Ffrench 2004). The "ordinary meaning" of "sex" accessed by the ordinary reader is not universal; it is the meaning produced within a particular semiotic community at a particular moment, reading through particular ideological assumptions about what bodies are and what they mean.

Foucauldian genealogy, legal discourse, and recursive power

Michel Foucault's genealogical method offers a tool for tracing the historical conditions under which legal meanings emerge, compete, and are displaced (Foucault 1972; 1977). Where traditional legal history narrates development as progressive clarification, genealogy attends to discontinuity (Foucault 1980). It reveals that what presents itself as natural and continuous is in fact the contingent outcome of specific struggles between competing epistemic regimes, each making claims to truth (Foucault 1980; Ffrench 2004) and when we trace the case law on trans rights through recent history these competing epistemic regimes become evident; at different points in time courts could have taken different interpretative "pathways" which would have resulted in a completely different prevailing episteme of sex and gender. To develop Foucault specifically in legal discourse, Anne Wagner's analysis is directly relevant here (Wagner 2025), as she demonstrates, legal discourse functions as a regime of knowledge and power in which "law is a field in which knowledge is created, classified, and deployed through power-

laden mechanisms" (Wagner 2025: 14). Every legal utterance (every interpretation of a statute, every judicial holding) belongs to a regime of truth that determines what is sayable, by whom, and under what institutional constraints (Foucault 1980; Wagner 2025). This framework is crucial because it reveals how specific narratives achieve legal primacy through institutional gatekeeping. In litigation, such as *For Women Scotland*, the court's regime of truth determined not only what constituted valid evidence, but who possessed the authority to speak: while narrow biological and medicalized accounts were granted the status of natural expertise, trans and non-binary voices were systematically excluded from the evidentiary record (Phillips & Ors 2025). By controlling the boundary between authorized expert testimony and disqualified lived experience, legal discourse secures its plain meaning not by discovering objective facts, but by enforcing a procedural and epistemic closure (Foucault 1980; Ffrench 2004).

Legal discourse is not a neutral medium for conveying pre-existing facts; it is a productive formation that constitutes the very realities it purports to describe and Foucault's concept of *pouvoir/savoir*, power/knowledge, is central to this (Foucault 1980; Ffrench 2004). This concept designates the intertwining of discursive formation and institutional practice: knowledge does not exist outside power relations, and power is exercised through the production and management of knowledge (Foucault 1977; 1980). Applied to the legal production of sex, this means that juridical pronouncements on the meaning of "sex" are not merely epistemological (purporting to report what sex *is*) but are fundamentally ontological (constructing what sex is *made to be* through legal inscription) and political (authorizing certain understandings while foreclosing others) (Foucault 1980; Wagner 2025). This tripartite production operates distinctly across the jurisprudence traced in this article. First, in *Corbett v Corbett* the court performed an ontological fixing of sex through medical determinism, enshrining a chromosomal-gonadal-genital test at birth as a natural truth to insulate heteronormative marriage (Sharpe 2007). Second, while the GRA (following on from *Goodwin v United Kingdom* 2002) appeared to shift toward a human rights model, it maintained a medicalized gate, re-inscribing sex as a certificated, binary property (Sandland 2005). Third, in *Castellucci* the court exercised political foreclosure by declaring non-binary legal recognition beyond judicial competence, rendering non-binary subjects impossible (Murawsky 2023). Finally, in *For Women Scotland* the Supreme Court accomplished a full mythologization by declaring that "woman" carried a plain, biological meaning; an assertion that masks an active, normative choice behind

the guise of passive discovery (Phillips & Ors 2025). Across each moment in the genealogy of legal sex the court or legislature does not discover an antecedent biological reality; it actively deploys power to constitute the very legal categories it purports merely to discover and describe (Foucault 1980; Ffrench 2004).

To understand the precise structural mechanisms through which this judicial production operates across the case law, Elena Gambino's (2020: 221-222) theory of recursive power is particularly helpful. Hierarchies, she argues, do not merely repress pre-existing groups but "produce and police the very marginal subjects they require as their own premises", co-constituting the normative and institutional practices they presume by simultaneously generating "fit" subjects and those who are "not fit", whose exclusion retroactively legitimizes and secures the normative social order (Gambino 2020: 221-222). This is what Gambino (2020: 222) terms a "relation of ruling": power must generate marginal subjects whose subsequent exclusion or discipline then serves to legitimize the exercise of power itself. Applied to the legal production of sex, this theory reveals the non-binary subject not as a pre-existing identity that the law happens to overlook but as a figure actively produced by law's binary framework, whose "legal impossibility" performs the essential structural function of naturalizing and legitimizing the very binary that creates it (Sandland 2005; Gambino 2020; Murawsky 2023). Applied to the law discussed in this article, Gambino's framework reveals that the legal binary has never simply "found" non-binary subjects to exclude; rather it has recursively generated them as necessary marginal figures to legitimize its own binary authority. So, in *Corbett* the court recursively produced the trans subject as an "unfit" or "monstrous" outlier whose legal invalidation was structurally required to elevate and retroactively legitimize the white, reproductive nuclear family as the sole "fit" legal subject (Sharpe 2007; Gambino 2020). The GRA created a "normative trans subject", one who commits to a permanent, binary crossing "until death" (Sandland 2005; Sharpe 2007). In doing so, the GRA recursively remaindered the non-binary subject as the "unrecognisable beyond" (Sandland 2005: 48), demonstrating how an ostensibly emancipatory stature reinscribes marginality by demanding binary conventionality (Gambino 2020: 226). In *Castellucci* the state operates as "Supreme Speaker", using "coercive legibility" to declare non-binary status "legally impossible" (Gambino 2020; Murawsky 2023). By framing non-binary recognition as a source of "moral difficulty" beyond judicial competence, the court actively produced the non-binary subject as an impossible figure whose exclusion retroactively "proved" that the legal system is binary by constitutional necessity (Gambino 2020: 222)

and in *For Women Scotland* the Supreme Court's judgment relied on generating trans and non-binary identities as structural impossibilities, using their exclusion to retroactively legitimize biological determinism as natural law (Ffrench 2004; Phillips & Ors 2025).

If Gambino identifies the political necessity driving this recursive production of marginality, Luca Siliquini-Cinelli exposes the specific epistemic-ontological machinery through which law executes it. Law's "epistemic-ontological connotations" (Siliquini-Cinelli 2025: 22) argues, operate through "regulatory frameworks of legal intelligibility" that perform the intellectual labour of "replacing life with knowledge". Through this process, the complex, lived reality of human sex and gender is compressed into the rigid legal binary of man and woman (Siliquini-Cinelli 2025; Osella 2022). Law does not passively reflect the world; it actively makes a world and, in making it, it forecloses all others (Siliquini-Cinelli 2025).

Butlerian performativity and the binary

Butler's account of gender performativity, developed in *Gender Trouble* (1990) and *Bodies that Matter* (1993), offers a third dimension of analysis. For Butler, neither sex nor gender is the expression of a pre-social biological substrate; rather, both are performatively constituted through the citational repetition of norms. Gender is not what one *is* but what one *does*, and what one does is constrained by the iterative force of normative citation: the constant reiteration of existing categories gives those categories their appearance of ontological solidity.

The implications for legal discourse are profound. When courts pronounce on the meaning of "sex", they do not merely describe an antecedent biological reality; they perform that reality into legal existence through an authoritative, institutional speech act (Butler 1993; Raj 2023). Far from being a passive observation of pre-existing facts, each judicial pronouncement constitutes an iterative performance that relies on the compulsory citation of binary norms to materialize legal subjects (Butler 1990; Gonzalez-Salzberg 2014). This performative production operates through three distinct citational mechanisms across UK jurisprudence: first through judicial decisions that equate "sex" with biological sex. In decisions spanning from *Corbett v Corbett* to *For Women Scotland*, courts cite medicalized and anatomical markers as self-evident truths (Sharpe 2007; Phillips & Ors 2025). By repeatedly linking "sex" to chromosomes, gonads, or birth-assigned genitalia, judicial discourse naturalizes a contingent selection of physical traits, retroactively framing an interpretative choice as the passive retrieval of nature (Butler 1993;

Sharpe 2007). Second, through statutory interpretations which exclude certificated sex: In decisions such as *For Women Scotland* the Supreme Court performatively occluded section 9(1) of the GRA[2] by declaring a plain, biological meaning of sex. This refusal to treat certified sex as operative for the Equality Act 2010 is a citational operation that actively erases two decades of human rights development, enforcing biological determinism over legal status under the guise of statutory clarity (Phillips & Ors 2025). The third citational mechanism is through judicial refusal to recognize non-binary status. In *Castellucci* the court's determination that non-binary legal recognition falls beyond judicial competence acts as a citational foreclosure (Murawsky 2023; Tissandier-Nasom 2024). By repeating the assertion that the legal system is fundamentally binary the court does not discover an immutable constitutional limit; rather it performs the non-binary subject as legally impossible and unintelligible, enforcing binary closure through institutional repetition (Sandland 2005; Osella 2022).

Through these cumulative citational acts, the judiciary repeatedly enacts the gender binary, producing the appearance of an immutable, pre-legal ontology while erasing the very institutional machinery through which that fixity is constructed (Butler 1993).

This judicial performativity discussed above does not operate in a vacuum; its lived and material consequences are illuminated by Stef Murawsky's (2023) sociological account of non-binary accountability to transnormativity. Transnormativity, Murawsky demonstrates, is a "prescriptive ideology that legitimizes or invalidates transgender people's gender identities based on their adherence to the binaristic medical model of trans identity" (2023: 1). Functioning as an accountability structure, it produces normative expectations regarding "authentic" gender identity and generates pronounced ontological uncertainty in those whose identities resist master narratives (Butler 1993; Murawsky 2023). Non-binary people are therefore forced onto a precarious tightrope between sociocultural invisibility on one side and unintelligibility on the other (Murawsky 2023: 3). The medicalization paradox identified by Murawsky (2023: 5-6) is particularly significant here: accessing gender-affirming care to alleviate social dysphoria often produces binary misgendering, rendering non-binary identity *less* rather than *more* culturally intelligible, since binary-oriented medical interventions pull the body towards binary gendered legibility rather than the non-binary presentations subjects see (Butler 1993; Sandland 2005; Murawsky 2023).

[2] Which legislated that gender becomes for all purposes the acquired gender.

While Murawsky documents the structural and medical paradoxes of binary legibility, Mairead Losty and John O'Connor's (2018) psychoanalytic study provides clinical evidence of the subjective toll wrought by this institutional compulsion. Their research identifies a central theme of "being seen and unseen", a tension between the "True Self", the non-binary identity as internally experienced, and a world that mirrors only the "False Self", the biological sex assigned at birth, compelling individuals to present binary conformity while concealing their experienced identity (Losty & O'Connor 2018: 40-41). Crucially, this compelled concealment is not merely psychological or social; it is directly enforced by a legal framework that renders non-binary identity legally impossible and demands binary legibility as the price of legal recognition (Sandland 2005; Losty & O'Connor 2018; Murawsky 2023). Courts pronouncing on plain meaning actively weaponize this compulsion, treating the performatively enforced "False Self" as biological fact while banishing the experienced self to legal unintelligibility (Butler 1993; Raj 2023).

Braunschweig's (2024) feminist reading of Barthes illuminates the convergence of the Barthesian semiotic and the Butlerian performative perspectives. Drawing on Butler's (2004) analysis of David Reimer, who was subjected to medical intervention to resolve what clinicians construed as a "gender emergency", Braunschweig (2024: 183) identifies "the tyranny of legibility of sexual difference, the obligation to choose, no matter what side". This tyranny is institutional and social before it is legal; but it is through law that it is most definitively inscribed (Butler 1993; Braunschweig 2024). Barthes' (2005) later concept of the Neutral, the deliberate suspension of the binary paradigm and the refusal of the compulsion to take sides, offers an illuminating contrast to law's operation. Where the Neutral suspends the classificatory gesture that imposes rigid typologies upon subjects, law forcibly intensifies it, stripping language of nuance and naturalizing contingent social choices into statutory mandates (Barthes 1972; 2005; Braunschweig 2024).

Together these three theoretical traditions, the Barthesian semiotic myth-critique, Foucauldian genealogy and Butlerian performativity, provide a unified critical framework for deconstructing legal claims to plain meaning. Barthes (1972) exposes how legal discourse robs language of its historical contingency, turning constructed definitions into self-evident Nature. Foucault (1980) and Gambino (2020) reveal how legal regimes of truth recursively produce the non-binary figure as impossible in order to legitimize their own binary authority. Finally, Butler (1993), Murawsky (2023), and Braunschweig (2024) demonstrate how judicial

speech acts enforce a "tyranny of legibility", performatively materializing binary sex through iterative citation.

Part [C] of this article shifts from pure theory to empirical legal analysis. It traces how UK courts have interpreted "sex" across four key historical moments from the medical determinism of *Corbett*, through the certificated regime of the GRA 2004, to the judicial foreclosures in *Castellucci* and *For Women Scotland*, demonstrating that what purports to be the neutral, scientific retrieval of legal meaning is, in truth, an active and political act of semiotic creation.

[C] THE SEMIOTIC GENEALOGY OF "SEX" IN UK LAW

Deploying the theory above, the way in which the law through judicial interpretation of legislation or precedent does not "discover" the meaning of that which it is being asked to determine but rather is engaged in an active process of creating the meaning and then presenting that contingent determination as a natural discovery through the application of legal method, this section applies the theory discussed above to the four key points of analysis in question.

Corbett v Corbett (1971): medical determinism and the founding myth

The origin point for the legal construction of sex in modern English law is *Corbett v Corbett* (1971), decided by Ormrod J. Arthur Corbett sought a declaration of nullity of his marriage to April Ashley on the basis that the marriage was void because Ashley was male. Ormrod J, who possessed qualifications as a medical doctor and judge, held that the marriage was void on the basis that both parties were male at birth and at the time of the marriage despite Ashley having socially and medically transitioned to female.

Corbett held that sex, for the purpose of the English law of matrimony, was fixed at birth and to be decided by chromosomes, gonads and genital factors (Sharpe 2002; 2007). Psychological identity, social presentation and post-operative anatomical changes were explicitly excluded (Whittle & Simkiss 2019). Ormrod, J therefore laid down the legal test for sex determination in the UK albeit that the case was heard in a relatively low-level court, concerned a narrow point of English law and therefore, arguably, should not have become precedent across all of the jurisdictions of the UK. For the relevance of this article, the court in *Corbett* presented

this test of legal sex as the passive retrieval of medical fact. In semiotic terms, however, this operation was profoundly productive (Barthes 1972, Eco 1976). Ormrod J transformed biological factors into authoritative legal signs, executing what Barthes (1972) terms the secrecy of qualification (Stivale 2002). By selecting three congruent biological markers while discarding other, arguably also, relevant ones such as psychological identity and social reality, the court produced a specific version of "sex" while hiding its own constructive labour behind the authority of clinical science (Foucault 1980; Sharpe 2007).

In Foucauldian terms this case established the first epistemic regime of modern UK trans jurisprudence: a regime of medical-biological determinism where the body becomes a reality fabricated by a specific technology of power (Foucault 1977: 194). As Siliquini-Cinelli (2025: 22) observes, law operates through regulatory frameworks of legal intelligibility that replace lived experience with institutional knowledge. In *Corbett*, Ormrod J declared that over a very large area of law (most areas of law in fact) sex is an irrelevant factor, yet where sex mattered, for example specifically in matrimonial law, it required immutable biological grounding (Sharpe 2007; 2009).

Critical legal scholars have exposed the normative anxieties driving this biological fixation. Alex Sharpe (2002; 2007) demonstrates that Ormrod J's test was infused with homophobic panic, designed to protect the institution of marriage from same-sex unions. By evaluating Ashley's post-operative body as an artificial cavity and scrutinizing her capacity for vaginal penetration, the court revealed an aesthetic and phallocentric concern to preserve heterosexual naturalness (Sharpe 2007). The court used a biological grid to enforce what Butler (1990) terms the heterosexual matrix, ensuring that legal personhood remained bound to reproductive heteronormativity (Croce 2018).

What *Corbett* foreclosed is as significant as what it constructed. By fixing legal sex at birth, the judgment rendered trans transition and non-binary existence legally impossible (Sandland 2005; Whittle 2006). Ashley's experienced identity and social recognition as a woman were dismissed as legally irrelevant. In Peircian terms, the interpretant was institutionally frozen: the signifier of birth-sex dictated the referant, prohibiting subsequent physical or social inscription from altering judicial status (Peirce 1931-1935; Kevelson 1988). For over three decades *Corbett* functioned as an unassailable legal truth, demonstrating how judicial claims to neutral discovery successfully conceal the ideological upholstery supporting normative exclusion (Ffrench 2004; Whittle & Simkiss 2019).

The Gender Recognition Act 2004: human rights discourse, strategic compromise, and partial deconstruction

The medical determinism of *Corbett* was disrupted by the European Court of Human Rights in *Goodwin v United Kingdom* (2002). The Strasbourg Court held that the UK's refusal to recognize a trans woman's legal sex breached Articles 8 and 12 of the European Convention on Human Rights, forcing the UK legislature to enact the GRA 2004 (Sharpe 2009; Whittle & Simkiss 2019).

The GRA represented a major semiotic rupture (Sandland 2005). Under section 9(1), a trans person obtaining a Gender Recognition Certificate (GRC) achieved full legal recognition in their acquired gender. Where *Corbett* insisted sex was immutable and fixed at birth, the GRA established a statutory mechanism through which legal sex could be altered (Whittle 2006; Leng 2023). The epistemic regime shifted from strict medical determinism toward a human rights model, allowing personal gender identity to override birth assignment (Gonzalez-Salzberg 2014).

Critical legal analysis must account for the deliberate semiotic construction of the GRA. Stephen Whittle, an insider stakeholder who spent three years drafting the Act word by word, reveals that section 9(1) was an exercise in strategic political crisis management (Whittle 2006; Whittle & Simkiss 2019). Section 9(1) provides that, upon receiving a certificate, a person's gender becomes for all purposes the acquired gender, so that if the acquired gender is the male gender, the person's sex becomes that of a man, and if it is the female gender, the person's sex becomes that of a woman.

Whittle (2006: 268) confirms that the decision to conflate "sex" and "gender" within section 9(1) was implemented purely and simply to confound future debates (Whittle & Turner 2007). During drafting, Whitehall civil servants held that sex was a matter for scientists, whereas gender was viewed as social and subjective (Whittle & Simkiss 2019). To bypass pedantic debates regarding genital reconstruction, which were pushed by faith groups arguing that only a vagina made a woman, the state selected gender presentation as the defining moment (Whittle 2006).

Section 9(1) performed a performative speech act: it did not find a scientific truth, but instead made gender into sex in law (Whittle & Turner 2007: 8.7; Butler 1993). This strategic conflation served as a political concession to the evangelical Christian lobby (Whittle 2006). By legally changing a person's sex to match their gender, the state maintained

the outward appearance of heteronormative marriage without formally sanctioning same-sex unions (Sharpe 2007; Sandland 2005).

Despite its progressive features, such as dispensing with mandatory surgical requirements, scholars have exposed the deep conservative structures embedded within the GRA (Sandland 2005; Sharpe 2007). Sharpe (2007; 2009) demonstrates that a biological understanding of sex persisted as an obsessive subtext within the Act. To protect marriage from homosexual incursion, the GRA originally required married trans applicants to annul their marriages before receiving a full GRC (Cowan 2005; Sharpe 2007). Furthermore, section 12 maintained that legal gender recognition did not affect status as a biological mother or father, while amendments to matrimonial law made non-disclosure of gender history prior to marriage a ground for annulment (Sharpe 2007; Leng 2023). As Sharpe (2007: 80) argues, law's concern over non-disclosure re-inscribed the truth of the biological past as the ultimate legal reality.

Moreover, the GRA maintained a psychiatric gate, requiring applicants to secure a formal diagnosis of gender dysphoria from medical specialists (Sharpe 2009). This preserved a mental illness model of trans embodiment, demanding that individuals narrate themselves through clinical distress to achieve state recognition (Butler 2004; Davy 2011; Gonzalez-Salzberg 2014).

Ralph Sandland (2005: 50) highlights how the GRA enforced strict binary closure. By requiring applicants to demonstrate that they had lived in their acquired gender for two years and intended to remain in that gender until death, the state divided the trans community, rewarding binary lifers who committed to lifelong conventionality (Sharpe 2007). Using Gambino's (2020) theory of recursive power, the GRA produced a normative trans subject while remaindering non-binary existence as the unrecognizable beyond (Sandland 2005: 48) through the foreclosing of non-binary identity recognition and the clear wording that any resulting recognition under the Act was only to be as the sex opposite to that registered at birth; the normative trans subject being the person who fit the narrow "wrong body" trope and who sought to medically and socially transition for the remainder of their life and who had been "certified" as trans by the medical profession.[3] In that sense, the state's inclusion of binary trans individuals was achieved by defining non-binary identities as unthinkable, securing the binary gender order under a modernized human rights guise (Sandland 2005; Hines & Santos 2018; Gambino 2020).

[3] Through the requirement for evidence of diagnosis provided by medical professionals as part of the process of applying for a GRC.

R (Castellucci) v Gender Recognition Panel (2025): binary closure and legal impossibility

The limits of the GRA's human rights framework were tested in *Castellucci* (2025). The claimant, having obtained legal recognition as non-binary in California, moved to the UK and applied to the Gender Recognition Panel for a non-binary GRC. The Panel refused, issuing a certificate recording the claimant's gender as female. The Court of Appeal dismissed the claimant's judicial review, holding that the GRA 2004 rested on an immutable legislative assumption of a binary gender system (Murawsky 2023). The court declared that recognizing non-binary status was a legislative step rather than a judicial one (*Castellucci* 2025: paragraph 42).

Castellucci demonstrates the precise mechanism of legal production through foreclosure (Butler 1993; Gambino 2020). The court did not engage with whether non-binary gender exists in social reality. Instead, it treated non-binary status as legally unutterable within UK statutes (Siliquini-Cinelli 2025; Osella 2022). By repeating the assertion that the legal framework is fundamentally binary, the court executed a Butlerian citational act, performatively materializing binary closure while presenting its holding as a passive constitutional constraint (Butler 1993; Raj 2023).

In Gambino's (2020: 222) framework, recursive institutions produce and police the very marginal subjects they require as their own premises. In *Castellucci*, the court operated as the state's Supreme Speaker, deploying coercive legibility to refuse to name a reality outside its permitted code (Gambino 2020; Osella 2022). The court justified its restraint by enumerating the difficult moral questions non-binary recognition would raise regarding marriage, single-sex spaces, prisons, and parental roles (*Castellucci* 2025: paragraph 45).

As Murawsky (2023) and Elias Tissandier-Nasom (2024) argue, enumerating these administrative difficulties constructed the non-binary subject as an inherent source of social disorder rather than a bearer of fundamental rights. The court invented the non-binary figure as a site of legal impossibility whose exclusion retroactively legitimized the state's authority to define what constitutes a person and a sex (Gambino 2020: 226; Sandland 2005).

The court supported its holding by pointing to a lack of international consensus, noting that only a minority of Council of Europe states recognize non-binary identities (*Castellucci* 2025: paragraph 38; Tissandier-Nasom 2024). Deployed as a reason for restraint, this comparative survey functions as Barthesian mythologization (Barthes 1972; Stivale 2002). The court

presented the contingent state of international legislation as evidence that the binary is natural and self-evident, rather than acknowledging an ongoing political struggle over human rights recognition (Quinan & Bresser 2020; Osella 2022).

Furthermore, this reasoning occluded clinical and demographic facts, such as data from youth gender services showing a significant rise in non-binary identification (Twist & de Graff 2019). As Tissandier-Nasom (2024: 108) observes, one cannot protect what one does not recognize as existing. By refusing legal nameability, *Castellucci* enforced administrative violence, trapping non-binary individuals in a state of social death where they are recognized only through a performatively enforced False Self (Losty & O'Connor 2018; Murawsky 2023).

For Women Scotland v Scottish Ministers (2025): mythologization accomplished

If *Castellucci* closed the door on non-binary recognition, *For Women Scotland* (2025) accomplished a systematic mythologization of "sex" itself. The Supreme Court considered whether "woman" in section 212(1) of the Equality Act 2010, defined as a female of any age, included trans women holding a GRC for the purposes of public-sector gender balance targets. The Supreme Court held that "woman" in the Equality Act refers exclusively to biological females, ruling that the certificated sex interpretation produced statutory incoherence (*For Women Scotland*: paragraph 14; Leng 2023).

The decisive semiotic move occurred when the Court asserted that although the word "biological" does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman (*For Women Scotland*: paragraph 16). This sentence exemplifies Barthesian mythologization (Barthes 1972; Stivale 2002). The word "biological" is absent from the statutory text. Nevertheless, the Court inserted the biological referent as its self-evident correlate, presenting this textual addition as the passive discovery of plain language (Stachowiak 2022). The Court transformed a contingent biological symptom into an absolute legal signifier, executing a revolutionary ex-nomination that hid a normative political choice under the mask of objective nature (Barthes 1972; Stivale 2002; Siliquini-Cinelli 2025).

A core operation of Barthesian myth is the loss of the historical quality of things (Barthes 1972: 142). The Supreme Court achieved narrative closure by smoothing over twenty years of divergent legal, administrative, and

institutional practice (Whittle & Simkiss 2019). Prior to this ruling, official Equality and Human Rights Commission guidance, government policies, and judicial decisions had treated certificated sex under section 9(1) GRA as operative for Equality Act protections (Murray & Hunter Blackburn 2019; Sharpe 2020; Leng 2023). By declaring the biological meaning plain and unambiguous, the Supreme Court retrospectively erased this complex history (Barthes 1972; Ffrench 2004). Divergent practice was not critically reconciled; it was abolished. The Court presented its decision as the retrieval of an eternal truth that had existed since 2010, purifying the legal signifier of its historical instability (Barthes 1972; Stivale 2002).

The Supreme Court's assertion of a plain biological meaning has drawn intense critique from biomedical, decolonial, and legal scholars (Phillips & Ors 2025; Sharpe 2020). J Craig Phillips and colleagues (2025: 228) call narrow judicial definitions of sex absurd, demonstrating that defining sex solely through binary gametes or anatomical markers ignores the complex biological variability inherent in human development. Crucially, Phillips and colleagues (2025: 228) argue that binary conceptualizations of sex are rooted in colonial and puritanical understandings designed to retain power within cis-heteronormative male societal structures (Graaff 2025). By elevating a rigid biological binary to an immutable statutory command, the Supreme Court did not engage with neutral science; rather, it codified a colonial, essentialist ideology that excludes biological variation and social gender expression (Osella 2022; Phillips & Ors 2025).

The interplay between *Castellucci* and *For Women Scotland* creates a devastating two-stage foreclosure for non-binary subjects (Murawsky 2023). *Castellucci* closed the GRC recognition route by holding that non-binary gender falls outside the statutory frame, while *For Women Scotland* restricted the Equality Act exclusively to biological males and females, stripping non-binary people of protection as a distinct group (Sharpe 2020; Leng 2023).

Non-binary individuals are doubly erased: legally unnameable under the GRA and protected only to the extent that they misgender themselves within their birth-assigned biological sex (Schudson & Morgenroth 2022; Murawsky 2023). This double foreclosure exemplifies what Braunschweig (2024: 183) calls the tyranny of legibility, namely the compulsory obligation to choose a binary side as the prerequisite for legal existence. Where Barthes' (2005) concept of the Neutral seeks to suspend the classificatory gesture that forces subjects into rigid binaries, UK equality law forcibly intensifies it. By claiming to discover a plain biological meaning, the Supreme Court concealed its own productive

power, insulating a normative political choice from public critique while executing semiotic violence against those who exist beyond the binary grid (Barthes 1972; Butler 1993).

[D] THE VIOLENCE OF THE BINARY: NON-BINARY SUBJECTS AND LEGAL INTELLIGIBILITY

The jurisprudence traced across UK case law carries specific, tangible consequences that fall most heavily on those who exist outside the binary performed into legal being, including non-binary, agender, and genderfluid individuals. While *Castellucci* provides the most direct illustration, the problem is structural rather than case-specific. Gambino's (2020: 221-222) theory of recursive power provides the framework for understanding why binary legal closure is productive rather than a mere failure of accommodation. Hierarchies generate normative and deviant subjects to create specific surfaces of intervention for institutional management; co-constituting the normative and institutional practices by producing "fit" subjects and those who are "not fit", whose exclusion secures the normative social order (Gambino 2020). In the context of the legal production of sex, non-binary subjects are generated as the necessary outside that legitimizes the binary framework's claim to exhaustive authority. The court in *Castellucci* did not simply decline to assist non-binary people; it invented them as a source of "difficult moral questions" requiring legislative action, performing the recursive move identified by Gambino wherein the marginal subject's exclusion justifies the legal system's continued operation (Gambino 2020; Murawsky 2023).

Losty and O'Connor's (2018: 40-41) psychoanalytic research provides the clinical dimension of this analysis, identifying a central tension between being seen and unseen. Non-binary individuals experience visibility as gendered beings through the biological sex attributed to them by others, alongside invisibility as their experienced non-binary selves. Individuals feel compelled to present a False Self legible within the binary grid, while concealing their experienced True Self. In *For Women Scotland* the Supreme Court's declaration of a plain biological meaning converts this clinical compulsion into a statutory command. To claim anti-discrimination protections under the Equality Act 2010, non-binary individuals are legally compelled to present their birth-assigned biological sex (Leng 2023). This forced presentation is an act of institutional violence in Butler's (1993) sense, representing the deliberate refusal of

legal structures to recognize a form of life as intelligible, real, or mattering (Butler 1993; Losty & O'Connor 2018; Braunschweig 2024).

Murawsky's (2023: 3-5) sociological research identifies the specific mechanisms through which binary legal frameworks and medicalized gatekeeping generate pronounced ontological uncertainty. Master narratives for understanding gender dysphoria, such as the wrong body trope and linear binary transition models, were designed for binary experiences and systematically misrepresent non-binary lives (Sharpe 2007; Murawsky 2023). Non-binary individuals report introspective doubt regarding the authenticity of their identity, a condition generated by the systemic failure of available diagnostic frameworks to accommodate non-binary experience. As Murawsky (2023: 4) notes, there is no definition for dysphoria that fits everyone; this definitional inadequacy reflects a diagnostic framework built for binary transitions rather than a neutral gap in clinical knowledge.

The medicalization paradox identified by Murawsky (2023: 5-6) is particularly significant for understanding the specific character of the violence inflicted by binary legal frameworks. For non-binary people who seek gender-affirming care to address social dysphoria, binary-oriented medical interventions may produce a different form of binary misrecognition. Interventions designed to address the dysphoria associated with being perceived as one binary sex masculinize or feminize the body to the point where the person is then misgendered as the opposite binary sex, substituting one form of binary misrecognition for another (Murawsky 2023). The law's demand for binary legibility, sustained by the GRA and reinforced by *For Women Scotland*, establishes an active system of coercive misrecognition in which available paths to legal and social recognition lead into the binary and away from non-binary identity (Sandland 2005; Leng 2023).

The interplay between *Castellucci* and *For Women Scotland* is particularly significant in this respect. *Castellucci* closed the non-binary recognition route through the GRA, while *For Women Scotland* further secured the binary by holding that the Equality Act 2010's protections operate exclusively through biological sex. Together, these decisions create a two-stage statutory foreclosure. Non-binary subjects cannot obtain recognition through the GRA, and their distinctiveness as a group is not protected by the Equality Act 2010, which recognizes only males and females. Non-binary subjects are doubly excluded, being legally positioned as not men, not women, and not legally nameable (Murawsky 2023). This double exclusion exemplifies what Braunschweig (2024:

183) terms the tyranny of legibility of sexual difference, enforcing the compulsory obligation to choose a binary side as the condition of legal existence. Where Barthes' (2005) concept of the Neutral seeks to suspend the classificatory gesture that forces subjects into rigid typologies, UK equality law forcibly intensifies it, concealing judicial power behind the mask of plain biological meaning while executing semiotic violence against those who exist beyond the binary grid (Barthes 1972; Butler 1993).

The genealogical perspective reveals that this construction is not inevitable. Rather, it is the contingent product of a specific configuration of legal intelligibility in which the binary is naturalized and everything outside it constitutes disorder (Foucault 1977; 1980; Siliquini-Cinelli 2025). The history traced across UK jurisprudence in this article demonstrates that this configuration has shifted across distinct historical moments, moving from the medical determinism of *Corbett* to the human rights framework of the GRA, and now to the biological determinism of *For Women Scotland* (Sandland 2005; Sharpe 2007; Phillips & Ors 2025). Each transition was presented by the judiciary as the passive discovery of what sex "really" means. In truth, each judgment represented an active renegotiation of power, determining which bodies and identities would be made legally intelligible within law's regulatory frame and which would be cast out into legal impossibility.

[E] CONCLUSION: INTERPRETATION AS PRODUCTION, PRODUCTION AS VIOLENCE

This article has argued that the judicial claim to discover the meaning of "sex", whether in Corbett's chromosomal test, the GRA's certificated framework, or *For Women Scotland*'s declaration of plain biological meaning, constitutes Barthesian myth. Each discovery is, in semiotic terms, a production: the construction of an interpretant within a particular regime of truth, presented as the neutral retrieval of a pre-existing referent. The productive character of interpretation is concealed precisely in the moment of its exercise.

The genealogy traced here reveals not continuity but discontinuity: three successive epistemic regimes, medical determinism, human rights discourse, and biological determinism, each claiming access to a stable truth that the others had failed to grasp. What each actually produced was a different version of "sex", legally different, with different inclusions and exclusions, different bodies made intelligible and different bodies rendered impossible. Crucially, as the analysis of the GRA's drafting history reveals, this production has at times been conscious and

deliberate: the architects of the Act crafted its language "purely and simply to confound future debates", performing what Boer (2011: 216) identifies as the characteristic operation of myth, building a secondary semiological system upon the first without acknowledging the construction. The recent trajectory has been towards biological determinism, but this trajectory is not the discovery of a pre-political truth; it is the outcome of a contested political struggle, enacted through the language of legal interpretation, its colonial and puritanical heritage concealed beneath the rhetoric of plain meaning (Phillips & Ors 2025: 328).

Gambino's (2020: 221) theory of recursive power extends the critique: legal pronouncements on sex are not merely descriptions of a biological given but citational acts that generate the marginal subjects, the legally impossible non-binary persons, whose very exclusion retroactively legitimizes the binary framework's claim to be exhaustive and natural. Each holding that reinforces the man/woman dyad is a contribution to the iterative performance through which that dyad acquires its appearance of ontological solidity. The courts are not neutral reporters of biological fact; they are active participants in the semiotic production of sex, and their participation carries the coercive force of legal compulsion.

The costs of this production are borne by those whose lives are unintelligible within its framework. Non-binary subjects, rendered legally impossible by *Castellucci* and doubly excluded by *For Women Scotland,* are the most immediate casualties. As Losty and O'Connor (2018) and Murawsky (2023) demonstrate, the violence is not only formal: it is experienced as the compulsion to present a False Self, the impossibility of being seen as one is, the systematic failure of available narratives to accommodate one's experience, and the ongoing ontological uncertainty generated by a world that recognizes only two genders and generates those who fall outside them as sources of difficulty rather than bearers of rights. The construction of non-binary subjects as a source of "difficult moral questions" in *Castellucci* is not a passive observation but a performative act: it names the non-binary subject as problem rather than person, and in so doing participates in the recursive production of marginality that Gambino identifies (Reisberg 2017: 708).

What does a semiotic critique demand? At minimum, it demands honesty about interpretation as production. Courts do not discover the meaning of "sex"; they choose, within institutional constraints, with reference to interpretive conventions, and against the backdrop of existing power relations, among competing possible meanings. Acknowledging this would not destroy legal certainty; it would locate legal certainty

where it actually resides, in the institutional authority of courts to resolve interpretive disputes, rather than in the fictional pre-existence of correct answers. Stivale (2002: 465) notes that myth loses its hold the moment its hidden construction becomes visible; the project of legal semiotics, in the tradition of Barthes and Ffrench, is to make that construction visible, to defamiliarize the what-goes-without-saying of judicial discourse, to reveal, as Ffrench (2004: 293) describes it, the ideological upholstery that supports the claim to discover what is, in fact, produced.

The semiotic project in law is, in this sense, continuous with the political project of trans and non-binary rights advocacy: it demands that law stop claiming to discover a binary that it has itself constructed, and start accounting for the violence that construction performs.

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