In May 2013, the first intersex medical malpractice lawsuit was filed in the United States. “M.C.,” the child named in the suit, was surgically assigned as a female at birth but M.C. later identified as a boy. His adoptive parents sued the state of South Carolina and the hospital that performed surgery on him as a baby.

At present, when an infant is diagnosed with “ambiguous genitalia,” most surgeons perform cosmetic surgery to normalize the appearance of the child’s genitals. Our cultural logic dictates that there must be only two sexes. This, in turn, has meant that performing medically unnecessary surgeries on infants is preferable to tolerating bodies that do not conform to perceived notions of sex.

Transgender and intersex activists have responded to the naturalization of two sexes by turning increasingly to canonical Jewish texts. Rabbinic literature treats at length a variety of sexed bodies, including the categories of male eunuchs, female eunuchs, and different types of androgynes. In order to subvert the invisibility of queer bodies in the face of their “correction,” activists, scholars, and rabbis have connected with a system that allows for the possibility of bodies in-between.

By focusing on one short excerpt from the hundreds of texts that treat eunuchs and androgynes within rabbinic literature, I foreground the profound questions raised by both contemporary activists and the sages of old. When do the rabbis try to disambiguate these categories, and how do they choose to disambiguate? To what end do they assign sex? Finally, what happens to normative gender when the rabbis (or contemporary doctors) disambiguate queer bodies?

The text I present contains the most programmatic tradition about the androginos, and has been written about by both activists and scholars. The compound term androginos comes directly from the Greek, formed by
Sleeping Hermaphrodite (two views), Gian Lorenzo Bernini. Musee du Louvre, Paris, France.
combining the word for man (ἀνήρ, ἀνδρός) and woman (γυνῆ). The rabbis understand the androginos as a dually sexed being, with two sets of genitalia. This key text takes the form of a list:

In the case of the androginos: there are ways that the [androginos] is equivalent to men, there are ways that the [androginos] is equivalent to women, there are ways that the [androginos] is equivalent to both men and women, and there are ways in which the [androginos] is not equivalent to men or women. (tBikurim 2:3)

The list that follows is organized into categories of laws that govern women, men, and both, with a ruling of how the androginos functions legally as each. One scholar, Sarra Lev, has argued that the androginos tends to be saddled with the most stringent legal position in each category.

The strategy of the list manages the androginos through a kind of disambiguation. Those who are considered to be androginos are dissected into constituent parts: they are liable for the laws of both menstruation and seminal emissions, for example. But the rabbis do not privilege one bodily characteristic in order to argue that androginos fits wholly into male or female categories. Rather, the various bodily qualities of the androginos are used to slot him/her into the established categories of law. Thus atomization of the various attributes of the androginos works in the service of including them in rabbinic legal frameworks.

After a lengthy attempt to incorporate the androginos into Jewish law, the final line rejects the strategy of the list:

Rabbi Yose disagrees: The androginos is sui generis and the sages could not decide about [the androginos] whether he is a man or she is a woman. (tBikurim 2:7)

The opinion of Rabbi Yose stands in tension with the approach that precedes it: if the sages cannot adjudicate the status of the androginos, then the androginos cannot have a role in Jewish law. Rabbi Yose’s opinion assumes that for the androginos to participate in the law, a single sex must be chosen. Therefore, the very fact that the androginos is not disambiguated, and a sex is not chosen, renders him/her both unique and unintelligible in law. As scholar Charlotte Fonrobert has argued, this rhetorical move excludes the androginos, and also produces gender as integral to rabbinic law. The androginos is the exception that proves the rule: in this moment, binary gender becomes even more important than a legal system that is comprehensive and can include everyone.

Regardless of Rabbi Yose’s statement at the end of the list, any exclusion of the androginos from Jewish law must necessarily be partial. After all, the simplest way to exclude the androginos would be to ignore the topic en-
tirely. The androginos is not a biblical concept, so there is no formal reason for its inclusion in rabbinic debates. Even this tradition about Rabbi Yose’s attempt to exclude the androginos becomes canonized within the traditional corpus, cementing the presence of the androginos in a variety of legal debates on topics as diverse as circumcision and levirate marriage.

If the lawsuit in South Carolina is successful, we may yet see the cessation of surgeries on intersex infants in our lifetimes. And yet, while this remains a crucial activist goal, the cessation of surgery only ceases the practice of “correcting” bodies. By itself, eliminating surgery does not get rid of the overarching logic that makes surgery a legible choice. As long as we reinforce the belief that there are only two sexes, we will continue to damage gender variant people. The rabbinic system of sex, while certainly not utopic, contextualizes and historicizes our contemporary taxonomies of sex and gender.

Scholarship on eunuchs and androgynes has the potential to unlock a different set of concerns. These categories are embedded in cultures that predate modern medicine and the constitution of sexuality as a basis of identity. Within rabbinic texts, therefore, we encounter the possibility of “thinking sex” outside of both sexual identity and Western medicine. In the androginos we have an example of taxonomy before the advent of 19th-century sexological and taxonomical thinking. In the correspondences and divergences between rabbinic attempts to theorize gender and contemporary Western strategies, we can begin to frame new questions and new modes of research.