Chapter Four
Beyond Conflation: Lessons From the Past and for the Future

INTRODUCTION

The deconstruction of the conflation in modern and legal culture presented above shows that conflationary precepts and practices are not isolated phenomena. In fact, Chapters One and Two show how the conflation is integral to Euro-American active/passive conceptions and applications of "sex," "gender," and "sexual orientation." Chapter Three of this Project added a comparative perspective, emphasizing key (dis)similarities between the Euro-American and Native American systems. Chapter Three thus highlighted two major themes: the conflation's artificiality and the post-conflationary, non-conflationary opportunities suggested by the Native American example. This Chapter extracts and elaborates the lessons from the first three Chapters in order to enable us to better spot, understand, and resist the conflation's power over our lives and thinking.

For the legal system specifically, the insights offered by the lessons drawn from the first three Chapters are a prerequisite to understanding the ways in which sex, gender, and sexual orientation actually inter-relate in the sex/gender controversies brought to tribunals for just and principled resolution. Such an understanding is itself a prerequisite to the development and application of coherent and workable legal concepts and rules: if the interrelationships among sex, gender, and sexual orientation are miscomprehended or disregarded, then legal doctrines founded on these concepts and their interrelationships will be ignorant, incoherent, and impracticable. Because this description fits the doctrinal status quo, these lessons are indispensable to reforming the law, and to cohering law with reality.

But the lessons catalogued below from modern culture, legal culture, and native culture(s) must be viewed as only a beginning. The record presented above is virgin, and too rich and nuanced to be exhausted here. Therefore, the following critical synthesis of lessons from these various domains is offered to facilitate even more searching assessments of the conflationary status quo and the traditionalist active/passive sex/gender themes and biases that it encapsulates and empowers.

Toward this end, Part I of this Chapter presents a discussion of the points to be drawn from the conflation's clinical, intellectual, and social history in modern Euro-American culture. Part II then considers some of the costs and consequences resulting from the conflation's power over legal culture specifically. Part III concludes with a critical consideration of the
essentialist (and utilitarian) claims advanced to support the conflationary Euro-American sex/gender status quo in light of the Native American example. Part IV closes this Chapter of the Project with three final lessons that span these three phenomenological domains. Taken together, these final lessons show that the conflation is not natural, inherent, or inescapable, and they bring into sharp relief how the social and sexual components of gender, coupled with the fundamentality of sex and the derivative illusionism of sexual orientation, are central to the sex/gender arrangements that subordinate women and sexual minorities alike.

I

Lessons From Modern Culture

Modern culture, as we saw in Chapter One, is permeated with conflationary influences. As such, the conflation’s role in modern culture provides a rich source of critical insights and reformatory lessons. We therefore begin with the cultural lessons.

A. The Conflation as Process

As both the intellectual and social history of the conflation suggest, this phenomenon is deeply entrenched and widely accepted in Euro-American culture, both as a formal construct as well as a normative standard that governs (mis)perceptions of sex, gender and sexual orientation in myriad and powerful ways. Chapter One thus shows that the conflation was and is a key and influential fixture of the Euro-American sex/gender system. Though deeply and widely ingrained, however, the conflation is not a fixed or static phenomenon.

Instead, the conflation is fluid and sometimes unruly because all segments of society (including the law) influence its application and perpetuation. For example, throughout the history of the conflation various sex/gender theories advanced by different camps have gained prominence, but no viewpoint achieved complete and continuing predominance. Accordingly, the conflation has been beyond the absolute or unilateral control of any one person, group, institution or viewpoint. Instead, various forces tug(ged) and pull(ed) at it, using conflationary notions and imageries under the active/passive paradigm to serve particular interests or purposes. The conflation, in short, envelops and absorbs the theories or endeavors of any given age or setting even as it is put to use by various actors or forces in numerous venues or contexts.

Thus, each of us, sometimes unwittingly, participates in the continual replication of conflationary practices. Formal clinical theorists such as sex-

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892. The rivalry of Third Sex adherents and homoerotic proponents are a prime example of colliding viewpoints, but neither attained complete preeminence over the other. See supra Chapter One, Part I.C.1.
members of mainstream social institutions such as the cinema and government, and individual leaders and members of sexual minorities all play(ed) a role in the continual reiteration of conflationary notions and imageries. The threshold lesson from modern culture, therefore, is that this conflation is an intellectual and attitudinal phenomenon continuously flowing around and through all fields of human experience. It is both an overarching and underlying process that remains always in place and in flux.

Yet the conflation is not a neutral, random, or haphazard process. Though not absolutely controllable, the conflation was (and is) vulnerable to manipulation, especially by legal and social leaders. Consequently, the conflation’s net effects are fairly predictable: the tug and pull of dominant sex/gender forces ensures that conflationary pressures generally work against persons, expressions, sentiments, and ideas that do not conform to traditionalist sex/gender conventions originating in active/passive dictates.

This first lesson therefore cautions that the conflation is a pervasive phenomenon, encompassing multiple dimensions and enveloping numerous actors. It is a process in perpetual motion. Yet, despite its fluidity, complexity and volatility, the conflation as process has shown itself to be an enduring, omnipresent, and central fixture of the Euro-American sex/gender system. As Chapters One and Two jointly show, its historic power remains intact today as the means through which every individual’s personal, social, and sexual identity is processed and policed to produce sex/gender homogeneity and order in compliance with active/passive themes and traditions.

B. Gender & Socio-Sexual Identity

Though the conflation is fluid, the objective of conscious and unconscious conflationary forces remains relatively constant: the conflation merges social and sexual gender indicia into an integrated ideal of personhood that this Project denominates “socio-sexual identity” because it

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893. See supra Chapter One, Part I.B.
894. See supra notes 260-74 and accompanying text.
895. See supra notes 275-97 and accompanying text.
896. As noted above, conflationary understandings have been codified in clinical theories, internalized by sexual minorities, and accepted by social institutions and popular culture. See supra Chapter One.
897. The conflation’s manipulability perhaps is best demonstrated in judicial opinions. See supra Chapter Two.
898. See infra notes 931-52 and accompanying text.
899. The term “socio-sexual” is used here to signify the idealized merger of social and sexual gender attributes in the formation of every person’s identity. As elaborated below, this merger facilitates the application and enforcement of conflationary strictures both socially and sexually. Thus, socio-sexual identity represents both an ideal regarding the alignment of sex, gender, and sexual orientation as well as a demand for conformity to that ideal. See infra notes 901-07 and accompanying text.
comprises and regulates both “public” (social) and “private” (sexual) aspects of an individual’s being and life. This ideal, as shown above, tracks the sex/gender biases and symbolisms of the active/passive paradigm, a primary organizing principle for Western society since ancient times. Thus, the next lesson to be drawn from the cultural record is the conflation’s definitive role in the formation of socio-sexual identity.

As recounted earlier, the active/passive paradigm historically has embraced both sexual and social sex-based gender roles that corresponded to the fundamental active/passive symbolisms of the culture. Thus, the man/male was idealized as the autonomous and active agent both socially and sexually while the woman/female was made inert or passive, again both socially and sexually. Consequently, the roles and positions thought appropriate or “natural” (hence “normal” and “moral”) for men and women in bed become metaphors for the permitted roles of “males” and “females” in society at large and vice versa: males stayed “on top” in the boardroom and bedroom, and females were always beneath them. Thus, male dominance in each realm—social/public and sexual/private—under the active/passive paradigm helped ensure male dominance in the other realm.

The active/passive paradigm also informed the clinical theories that intellectualized, rationalized, and codified the conflation around the turn of the century. Accordingly, behaviors historically deemed to be cross-gender under the active/passive paradigm in either social or sexual settings came together formally in conflationary clinical theories. Cross-gender social behavior officially was blended with cross-gender sexual behavior into generalized socio-sexual violations of traditional sex-derived gender proprieties under the combined operation of Legs One and Two.

Under this normative and clinical scheme, the assignment of gender based on sex brought with it a host of rules regulating “social personal-

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900. See supra Chapter One, Part I.A.

901. In other words, the active/passive paradigm converted the combinations of the three traits—active/passive, superior/inferior, dominant/submissive—into social roles or identities as well as sexual roles or identities. Of course, being “on top” and being active are not necessarily equivalent, either socially or sexually, though culturally they have been made so. Consequently, the very notion of active and passive roles as mutually-exclusive socio-sexual categories must be recognized as a cultural construct as well. See generally supra Chapter One, Part III.

902. Inversion theory was concerned with sexual orientation primarily as an element of gender; thus inversion theory diagnosed a disorder when the performance of erotic acts entailed departures from appropriate sex-determined gender roles. See supra notes 122-48 and accompanying text. Of course, these roles came packaged in the two basic forms provided by historically paradigmatic standards: active and passive, corresponding to male and female. See supra Chapter One, Part I.A. Indeed, inversion theory incorporated and codified the prevailing precepts of the active/passive paradigm, and fixation theory later retained this incorporation. See supra notes 210-29 and accompanying text. However, the gender logic of active/passive norms affected male same-sex couples and female same-sex couples quite differently. See infra notes 923-30 and accompanying text. Even more insidiously, socio-sexual identity also allowed the conflation to be used as a generalized regulatory apparatus whenever an individual appeared anomalous in sex/gender terms, either socially or sexually. See infra Part I.H.
ity”—everything from grooming to clothing, from hobbies to careers.\textsuperscript{903} Deviation from those rules was, and to some extent still is, deemed an official symptom of perversion, of disease. In this way, the conflation regulates gender deviations in the figurative and literal boardroom. And because sexual orientation and gender are linked under Leg Two of the conflation, this regulation extends to gender “deviations” in the bedroom as well. Thus, the conflation also reaches “sexual personality”—the individual’s persona in private settings that otherwise might remain unregulated. In this way, the conflation enables dominant cultural (and legal) forces to (mis)use concepts of gender to monitor and control both the social/public and sexual/private spheres of human life and personality.\textsuperscript{904}

Gender, then, is the main ingredient in the manufacture and management of socio-sexual identity, and the conflation is the mold that shapes the person into the “correct” gender.\textsuperscript{905} And because the deductive, intransitive Euro-American conception of gender assigns this characteristic rigidly on the basis of the official sex assignment, this molding of the person emphasizes conformity to sex-determined social and sexual expectations set by active/passive dictates. It was this conflationary molding of the person through gender that sexology couched in scientific terms as it catalogued and compiled its clinical gender profile for each sex, and as it codified the conflation as a whole. Both under the conflation and under the proto-conflationary active/passive paradigm, gender is and was the stuff of social and sexual personality.

As recounted earlier, turn-of-the-century clinical theorists exploited gender’s centrality to socio-sexual identity by building on the active/passive paradigm to create a formal(ized) version of the conflation. Their theories reinforced the regulation of traditionalist sex/gender configurations and categories of socio-sexual identity and expression among all\textsuperscript{906} members of

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  \item \textsuperscript{903} See supra notes 122-29 and accompanying text.
  \item \textsuperscript{904} As discussed below, the conflation thus amounts ultimately to a regulatory apparatus. See infra Part I.H. Moreover, the conflation as regulatory apparatus serves distinct ideological ends as well. See infra notes 931-52 and accompanying text.
  \item \textsuperscript{905} See infra Part IV.A.
  \item \textsuperscript{906} Though androsexist and heterosexist ideology affects women and sexual minorities most dramatically, heterosexual men are affected as well, as evidenced by the litigation of conflationary cases. See supra Chapter Two; see also Warren Farrell, Women’s Liberation as Men’s Liberation: Twenty-one Examples, in The Forty-Nine Percent Majority, supra note 247, at 278 (enumerating various ways in which Feminism liberates men); Joseph H. Pleck, Men’s Power with Women, Other Men, and Society: A Men’s Movement Analysis, in The American Man, supra note 266, at 417, 427 (arguing that “[p]atriarchy is a dual system, a system in which men oppress women, and in which men oppress themselves and each other”); Bruce Ryder, Straight Talk: Male Heterosexual Privilege, 16 Queer’s LJ. 287 (1991) (setting forth a similar analysis from a Canadian perspective); Cooper Thompson, On Being Heterosexual in a Homophobic World, in Homophobia: How We All Pay the Price, supra note 23, at 235 (describing “some of the ways homophobia has hurt [him] as a heterosexual and how [he] believe[s] that ending homophobia is in [his] own interest as a heterosexual”).
  \item Indeed, the fear of too much or too little femininity or masculinity preoccupies those associated with feminist issues. As Leigh Megan Leonard noted: “As long as lesbians occupy a status which is even lower than that of heterosexual women, it is advantageous for feminists to distance themselves
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society with putative scientific precision. Since then, the conflation's mediation of deductive, intransitive gender to manufacture, manage, and, if nec-

from lesbian existence to avoid additional stigmatization." Leonard, supra note 23, at 41. This reality engenders divisions among women's groups and gives adversaries greater opportunity to obstruct gender equality, as when some opponents of the National Organization of Women seek to undermine its effectiveness by dismissing the group as a "bunch of lesbians." See, e.g., id. at 41; see also Donald G. Mathews & Jane Sherron De Hart, Sex, Gender and the Politics of Era: A State and the Nation 3-27, 152-80 (1990) (discussing the tensions between heterosexual and homosexual components of both the suffragette movement and the 1970s Women's Liberation movement). Thus, in a social, legal, and political environment that acquiesces to, even celebrates, the subdivision of sexual minorities, the conflation of sex-based gender with sexual orientation makes sexual orientation brandings a club with which to beat down all sex/gender non-conformists. Again, this result is made altogether too clear by the case law. See supra Chapter Two.

Those associated with the "Men's Movement" also grapple with conflationary fallout. See, e.g., Joseph H. Pleck, The Theory of Male Sex-Role Identity: Its Rise and Fall, 1936 to the Present, in The Making of Masculinities: The New Men's Studies, supra note 247, at 21 (noting that the problems modern males face "include effeminacy and homosexuality . . . as well as hypermasculinity"). Generally, the Men's Movement was formed as a response to the challenges that Feminism and lesbian/gay rights have posed to traditionalist conceptions of men. See Carrigan et al., supra note 247, at 83-89. See generally Franklin, supra note 48 (reviewing cultural constructions of masculinity in the United States); The Making of Masculinities: The New Men's Studies, supra note 247 (presenting a collection of essays relating to this movement); Meanings For Manhood: Constructions of Masculinity In Victorian America (Mark C. Carnes & Clyde Griffen eds., 1990) (presenting a collection of essays on maleness); Kimmel, supra note 173, at 674 (recapping the "four basic rules of [traditional] masculinity" which come from the first four Chapter headings in The Forty-Nine Percent Majority, supra note 247—"No Sissy Stuff," "Be a Big Wheel," "Be a Sturdy Oak," and "Give 'em Hell"—and reviewing the changed and changing social landscape). The topic of the flux of masculinity has spread to popular culture as well. See, e.g., Nancy R. Gibbs, Bringing Up Father, Time, June 28, 1993, at 53 (cover story captioned as "Fatherhood: [T]he guilt, the joy, the fear, and the fun that come with a changing role").

Most recently, the Men's Movement has spawned a move toward men's studies programs as well. See Scott Heller, Disconcerted by the 'Iron John' Movement, Many Scholars Call It Simplistic, Chron. or Higher Ed., Feb. 3, 1993, at A8. The controversy surrounding both the Men's Movement and men's studies programs also has spurred numerous books. Recent books on the subject of masculinity in light of the Men's Movement include Ed Cohen, Talk on the Wilde Side: Toward a Genealogy of a Discourse on Male Sexualities (1993); Men's Friendships (Peter M. Nardi ed., 1992); Michael A. Messner, Power At Play: Sports and the Problem of Masculinity (1992); Peter Middleton, The Inward Gaze: Masculinity and Subjectivity in Modern Culture (1992); Kevin White, The First Sexual Revolution: The Emergence of Male Heterosexuality in Modern America (1993). Ironically, the main model who for the past twenty years has played the iconic "Marlboro Man"—America's model of masculinity—is openly gay and lives in the predominantly gay and lesbian Castro District in San Francisco. See generally Scott Heller, Scholars Debunk the Marlboro Man: Examining Stereotypes of Masculinity, Chron. or Higher Ed., Feb. 3, 1993, at A6.

For women and men of all sexualities, it seems that too much or too little of the "wrong" gender may be as problematic as too much or too little of the "right" gender. Given this landscape, Dr. George Weinberg effectively counsels that a "healthy" perspective on sex-determined gender and homosexuality (or, by implication, heterosexuality) requires rejection of the conflation. Unfortunately, though predictably, "[m]any homosexuals have, when they discovered their orientation, begun acting in ways they believed consistent and necessary for their identity as homosexuals. For instance, they adopted highly defined masculine or feminine roles and elaborated upon them" thus accepting "a capitulation to a stereotype" that as this Project shows, is based on the conflation of sex, gender, and sexual orientation. Dr. George Weinberg, Society and the Healthy Homosexual 71 (1991). This point, yet again, corroborates how codified and internalized conflationary notions create self-fulfilling associations regarding sex, gender, and sexual orientation. See, e.g., supra Chapter One, Part II.B.A. See generally infra note 915.
assy, forcibly impose socio-sexual identity has extended to every sex/
gender type or category,\textsuperscript{907} and thus touches \textit{everyone} subject to the Euro-
American system.

\textbf{C. The Conflation's Ubiquity & Universality}

The conflation's multi-faceted nature and its expansive scope suggests
the third lesson from modern culture: the conflation, and the intellectual
and normative constructs essential to and processed by it, is ubiquitous,
pervasive, and universal. In fact, the accounts presented above suggest that
sex, gender, and sexual orientation \textit{never} have been constructed independ-
ently of each other in our society.\textsuperscript{908} As a result, the conflation's sex/
gender constructs pervade human life through various combinations of
common concepts and cross-associations regarding gender typicality/inntran-
sitivity and atypicality/transitivity. Thus, even though the social and legal
histories recounted above depict the construction and destruction of the
effeminate male as a primary concern of conflationary outlooks,\textsuperscript{909} the
"sissy" is not the sole sex/gender character to whom the conflation applies.
Indeed, as pointed out in the preceding lessons, the conflation of sex, gen-
der, and sexual orientation is the overarching and underlying process by
which \textit{all} individuals classify and reclassify each other and themselves as
socio-sexual types.

As we saw earlier, the conflationary process tags the "sissy" (but heter-
osexual) man as such because he is socially gender-atypical (or transitive)
under Leg One: his appearance, speech, mannerisms, attire, hobby, career
or other social personality attributes do not conform to dominant expecta-
tions associated with his anatomical sex.\textsuperscript{910} In a society that makes the
conflation of sex and gender an absolute requirement socially, the "sissy"
inevitably represents disorder and consequently suffers opprobrium (even if
he is heterosexual).\textsuperscript{911} But, the conflation goes beyond this point: it adds
sexual orientation to the sex and gender equation that creates the "sissy"\textsuperscript{912}

\textsuperscript{907} See infra Part I.E.4.
\textsuperscript{908} Inversion sexologists and Third Sex activists conflated the three. See supra notes 108-64 and
accompanying text. Post-World War II clinicians, theorists, and activists ultimately slid into the same
patterns of conflation. These other theorists included the homoerotic faction among early sexual
minorities as well as the mainstream fixation theorists who devised the dominant post-inversion clinical
frameworks after World War II. See supra notes 167-83 and 210-29 and accompanying text. However,
the rise of social constructionism as a new theoretical perspective has shifted the focus of the discourse
somewhat because constructionism is not concerned with theories that strive to explain the causes of
sexual orientation but rather with observations about the ways in which pre-existing theories have
(mis)constructed such explanations. See supra note 315 and authorities cited therein on social
constructionism.
\textsuperscript{909} See supra Chapter Two, Part II.
\textsuperscript{910} See supra note 909 and accompanying text.
\textsuperscript{911} For examples of such (legally condoned) opprobrium see supra Chapter Two, Part II.
\textsuperscript{912} See supra Chapter Two, Part II.B.
through the clinical and cultural cross-association of social gender atypicality with sexual gender atypicality.

This cross-association, as we saw in Chapter One (and Chapter Two), triggers and is made generally plausible by the conflationary construction of sexual orientation as the sexual component of sex-determined gender jointly under Leg One and Leg Two. In this way, societal fear and suppression of sexual gender atypicality substitutes for, and justifies, societal fear and suppression of social gender atypicality; Leg Two is activated and deployed to bolster and enforce the conflationary sex/gender mandate of Leg One. Thus, cultural "softness" in the manner, disposition, or physique of a ("sissy") heterosexual male sparks questions, and often conclusions, about (minority) sexual orientation because conflationary traditionalism holds that "sissies" and "queers" are fungible under the joint operation of Leg One and Leg Two. In this manner, the conflation constructs, deduces, and imputes a "sissy's" sexual orientation based on a perception of social non-conformity regarding his sex and gender, and vice versa. This social and sexual interplay of sex, gender, and sexual orientation also generates other socio-sexual types or categories among members of the sexual majority, but with varying configurations of the conflation's legs and endpoints.

The "sissy's" diametric opposite, the (heterosexual) "macho" man, similarly embodies the conflationary process, but does so by emphasizing his gender typicality socially and, by cross-association, sexually as well. Ironically, this exaggeration of male-identified gender symbolisms, both socially and sexually, is reminiscent of the homoerotic approach to "queerness," or same-sex sexual orientation. However, the mainstream connotations of social gender conformity routinely interpret "machismo" as establishing cross-sex sexual orientation credentials. Under the confla-
members were required to pass while being subjected to sexual assaults and harassment. This type of sexual ritual symbolizes and affirms the sex-based gender attributes of the males, including their hyper-active/dominate sense of masculinity and their cross-sex sexual orientation. For various accounts of the Tailhook scandal, see Stephanie Grace, *Navy Secretary Asks New Probe of Tailhook Case*, L.A. TIMES, June 19, 1992, at A14 (reporting that suspicions of cover-ups and collisions in the Navy’s internal investigation had “eroded seriously” the credibility of its findings, thus nudgeing the then-Navy Secretary into follow-up inquiries) (quoting Navy Secretary H. Lawrence Garrett, III); ‘Handful of Junior Officers’ Blamed for Tailhook Scandal, L.A. TIMES, July 23, 1992, at A20 (quoting the Navy’s new acting Secretary, Sean O’Keefe, as saying that only a few low-level service members were involved in the Tailhook incident, and that too many people had been tarred with a brush they really don’t deserve’); H.G. Reza & Sonni Efron, *Photos Show Pilots Stripping Girl*, 17, L.A. TIMES, July 29, 1992, at B1 (revealing the existence of photographs depicting “an intoxicated 17-year-old girl being manhandled and undressed by dozens of rowdy naval aviators at the 1991 Tailhook convention,” a previously undisclosed incident that took place “on the same night [that] more than two dozen women said they were assaulted in the same hotel hallway”); Gregory Vistica, *Sex, Alcohol Binge Tacitly OK’d by Top Navy Brass, Probe Finds*, S.D. UNION-Trib., May 1, 1992, at A1 (reporting that, even though the Navy’s investigation concluded that the Tailhook annual meeting was “a tax-supported sex-and-alcohol binge where women were molested and abused with the tacit approval of top Navy brass, . . . no disciplinary action” against officers was being contemplated).


However, the results were anti-climactic, with only a handful of perpetrators being charged with misconduct. *See* Richard A. Serrano, *Only 3 in Tailhook Case Facing Assault Charges*, L.A. TIMES, Aug. 17, 1993, at A1. *See generally Dep’t of Defense, Office of Inspector General, The Tailhook Report: The Official Inquiry Into the Events of Tailhook ‘91* (1993) (containing the “official” version of the events that transpired at the convention).

In addition to the various investigations, the scandal also has prompted legal actions. *See* *Four Women File Suit Over Tailhook Scandal*, L.A. TIMES, Sept. 9, 1992, at B1. However, the courts have held that the United States was not liable because the assailants were not acting in the line of duty and because the United States did not owe a duty of care to the service members attending the convention. Hallett v. United States, 63 U.S.L.W. 2573 (D. Nev. Feb. 21, 1995).

The Tailhook scandal was quickly followed by the disclosure of other similar incidents. *See, e.g.*, H.G. Reza, *Five Officers at Miramar Are Relieved of Command*, L.A. TIMES, July 25, 1992, at A1 (reporting on the scandal involving the use of illegal contributions to buy beer at the performance of a sexually offensive skit known as the “Tomcat Follies”); H.G. Reza, *Navy Disciplines Pilot for Incident in Japan*, L.A. TIMES, Aug. 30, 1992, at A6 (reporting that “[a] drunk Top Gun pilot dressed only in boxer shorts broke into an admiral’s residence and chased the admiral’s wife throughout the house until he was subdued by armed security guards”).

However, perhaps the most grisly incident resulted in the beating murder of a gay sailor, which left his corpse so disfigured that he could be recognized only by tattoos on his arms. *See* H.G. Reza, *Homosexual Sailor Beaten to Death, Navy Confirms*, L.A. TIMES, Jan. 9, 1993, at A1 (reporting that “[c]onfronted with charges of a cover-up, Navy officials have confirmed that a sailor about to be discharged because he was homosexual was beaten to death more than two months ago by a shipmate”); Sam Jameson, *Trial Set in Gay Seaman’s Death*, L.A. TIMES, Feb. 4, 1993, at A14 (reporting that, based on the testimony of other sailors who witnessed the event, the accused, Terry Helvey, was set to be court-martialed on charges of murder); Sam Jameson, *Judge Bars “Emotional Appeals” in Navy Slaying Trial*, L.A. TIMES, May 22, 1993, at A10 (describing the condition of the victim when found: “An autopsy showed that [his] skull was crushed, all but two of his ribs were broken, and his genitals were lacerated”).

Eventually, the killer received a life sentence. Sam Jameson, *Sailor Gets Life Term in Killing of Gay*, L.A. TIMES, May 27, 1993, at A1. Immediately afterwards, the Navy revealed that two sailors had
tionary scheme, after all, "manly" men rarely are suspected of being "queers"—indeed, the number of athletes and other "all-American boys" who took and take refuge behind exaggerated sex/gender role compliance socially to disguise same-sex sexual orientation will never be known, though we know that they did so, and still do so. Thus, "macho" projections of sexual orientation in the form of social or sexual swagger, prowess, and conquest help to define and confirm the "macho man's" conformity

stalked the victim before joining in the fatal beating, and that the second perpetrator "unwittingly" had been sentenced only to four months' imprisonment. Sam Jameson, 2nd Sailor Joined in Fatal Beating of Gay, L.A. Times, May 28, 1993, at A27. Earlier, however, a witness reported that he had seen "five sailors pummel [the victim] outside a public restroom before two of the attackers dragged him inside to continue the fatal assault." H.G. Reza, Witness to Murder Says He Saw Five Sailors Beat Gay Shipmate, L.A. Times, Feb. 25, 1993, at A3. Thus, during the investigation of the case the Navy had attempted to suppress information about the killing. See id. (reporting the Navy's attempt to suppress knowledge about the existence of a journal kept by the victim, the victim's reports of harassment to his immediate superiors, and the participation of several other shipmates not yet charged in the case).

At the same time, the Navy seemed to view its investigation of the killing as an opportunity to identify and expel other gays. See Gay Sailor Reports Pressure, UPI, Mar. 4, 1993, available in LEXIS, Nexis Library, UPI file (noting that the shipmate of a murdered sailor was ordered to reveal the identities of other gay shipmates or risk being charged with sodomy).

Of course, these (heterosexual) macho displays of sex/gender identity are not limited, among the military, to the Navy. See, e.g., James Bomemeier & Pat Morrison, Air Force Sex Harassment Case Spans Years, Globe, L.A. Times, June 22, 1993, at A1 (recounting the retaliation experienced by several Air Force personnel in their attempts to bring charges against their harasser); Melissa Healy, Army Lists Show 34 Sex Crimes in Gulf Conflict, L.A. Times, July 18, 1992, at A6 (reporting that army soldiers were alleged to have "committed at least 34 sex-related crimes" during the Desert Shield and Desert Storm operations in the Persian Gulf).

The extreme inconsistency between the military's asserted justifications for the exclusion of gays, lesbians, and bisexuals in the military and the record of its current heterosexual male service members has not been lost either on the armed forces or on sexual minority observers. See, e.g., A Few Bad Men, Time, Feb. 15, 1993, at 19 (noting that "even as opponents of Clinton's easing of restrictions against gay military personnel raised the specter of unrestrained homosexuals running rampant through their ranks, more tangible threats to military discipline were coming from the straight and narrow-minded already in uniform"); Melissa Healy & H.G. Reza, Tailhook Probe Finds Lurid Cases of Sexual Misconduct, L.A. Times, Feb. 6, 1993, at A1, A17 (predicting the contents of the final report on the Tailhook incident, expected to divulge a much worse scandal than previously acknowledged, and reporting that both military personnel and sexual minority activists believe "that several officers could be court-martialed under the military's sodomy statute [which] is certain to thrust the Tailhook case into the debate over President Clinton's proposal to lift a ban on gays in the military").

This irony prompted a torrent of wry or revelatory commentaries. E.g., Alisa Solomon, Boot Camping: Ban Straights, Newsday, Jan. 29, 1993, at 58 (questioning how the nation can rely on "straight troops [unable to] protect themselves from some gay guy in the showers."); Lucian K. Truscott, III, What Straight Soldiers Do, L.A. Times, Apr. 30, 1993, at B7 (recounting "sordid affairs" including adultery, whoring, pimping, and the sexual "ownership" of Asian women engaged in by U.S. service personnel in Asian countries).

916. For one notable account by a 1970s football star and his friend (but not lover), see David Kopay & Perry D. Young, The David Kopay Story: An Extraordinary Self-revelation (1977). Another is provided by Jacob's story. See supra notes 293-97 and accompanying text. Brian Pronger notes that "[s]port in contemporary Western culture . . . dramatizes myths; preeminent among them is the myth of masculinity." PRONGER, supra note 86, at 15. He begins this book on sports and sexuality with a revealing witticism attributed to Oscar Wilde: "Football is all very well as a game for rough girls, but it is hardly suitable for delicate boys." Id. at 13.
with the expected (and demanded) gender roles under the conflation's first and second legs, and in compliance with traditionalist active/passive dictates. In this way, gender and sexual orientation mutually reinforce each other's conventional alignment with sex in the conflated persona of the hyper-typical "macho" (and heterosexual) man.

Of course, the conflation also extends to the construction of the "mannish" woman and the "feminine" woman. For this reason, the "mannish" (but heterosexual) woman oftentimes is dubbed a "tomboy" while the "feminine" women may be beautified as a "fox." The "tomboy" oftentimes is assumed to be lesbian because her sex and gender diverge socially, whereas the "fox" generally is assumed to be heterosexual because her sex and gender converge socially. Such assumptions confirm that the cross-association of social and sexual gender atypicality under Legs One and Two of the conflation occurs in the case of women as well as men.

Thus, among women, these two legs of the conflation likewise work in tandem to generate (perceived) socio-sexual identity. (Non)conformance to conflationary strictures establishes socio-sexual identity for both "feminine" and "mannish" women. Consequently, conflationary (mis)alignments of sex-determined gender socially guide (mis)understandings of sexual orientation for both sexes.

In recent years, this tradition of swagger has become more problematic. See Kimmel & Levine, supra note 173 (noting that macho male sexual norms often run counter to the safe-sex programs, both among hyper-masculine gay male "clones" and non-gay men). The authors also note that

As sociologists have long understood, stigmatized gender often leads to exaggerated forms of gender-specific behavior. Thus, those whose masculinity is least secure are precisely those most likely to follow hyper-masculine behavioral codes as well as hold fast to traditional definitions of masculinity. In social science research, hyper-masculinity as a compensation for stigmatized gender identity has been used to explain the propensity for authoritarianism and racism, homophobia, anti-Semitism, juvenile crime and gang activities.

That gender deviance (transitivity) and gender conformity (intransitivity) are equally integral to the construction of cross-sex sexual orientation is demonstrated by the traditional belief that "real men" go for "real women" (and vice versa) precisely because each adopts and projects the "correct" gender auras. Indeed, the absence of inversion, or, conversely, an abundance of correct gender indicia, is the source from which cross-sex orientation often is extrapolated. Thus, traditional rationales for the superiority of cross-sex sexual orientation ironically resemble the homoeotic theory of same-sex sexual orientation: both justify sexual orientation by reference to conformance with sex-derived gender attributes. See generally supra notes 167-74 and accompanying text.

However, the "tomboy" apparently does not meet with the same degree of rejection that is heaped on the "sissy," either in society or in the law. Perhaps this difference is not cause for shock in a culture that unrelentingly valorizes masculinity and derogates femininity. This disequilibrium depicts the man who voluntarily betrays his male privilege through effeminacy as the ultimate outcast and situates the woman, who is seen as attempting to bootstrap her status through masculinity, as an aspirant to privilege who must be struck back in her place while being admired for her grit.

This difference in cultural (as opposed to strictly clinical) treatments of "sissies" and "tomboys" was initially brought to my attention by Angela Harris and Kathleen O'Reilly during a lunch discussion in 1990, and since then has been raised by colleagues and others with whom I have discussed this Project. E.g., Letter from John Noyes to Francisco Valdes (Apr. 23, 1993) (recalling "childhood impressions" that "tomboy" was not a disparaging term, but rather referred to a stage that was "acceptable only in preadolescent girls") (original on file with author). This recollection, of course,
The conflation’s ubiquity, pervasiveness, and universality therefore underscores a critical point: even though minority sexual orientation historically has been and still is a primary object of clinical, cultural, and legal intervention, the conflation necessarily applies to, and governs, cross-sex, or majority, sexual orientation as well. Both majority and minority types are categories of sexual orientation and both are conflated with sex-derived gender under the first and second legs of the conflation. Same-sex sexual orientation appears more prominently in the conflation’s history simply because it is the orientation clinically, culturally, and legally stigmatized by its cross-association with social gender atypicality/transitivity; it thereby is the one socially and intellectually subjected to conspicuous inspection in the conflationary construction of sex(ual) (ab)normalities. This emphasis on sexual minorities cannot obscure the fact, however, that the conflation also mediates majority orientation and molds members of the sexual majority in the same way as it molds members of sexual minorities.

D. Constructing Sex(ual) (Ab)Normalities

Though the conflation applies with equal force to all socio-sexual identities and thus to the sex/gender constructions that shape all humans, conflationary norms also serve to divide us into two basic groups—“normal” and “abnormal.” In fact, because conflationary beliefs and attitudes track ideals rooted in the active/passive paradigm, this division follows the dictates of that paradigm in the medical, social, and legal construction of sex(ual) (ab)normalities. The next lesson to be drawn from modern culture therefore is that conflationary sexual orientation label(ings) are anchored to the biases that shape the broader sex and gender framework of the active/passive paradigm. As elaborated below, sexology’s conflationary logic, stemming as it does from active/passive sex/gender imageries to conceptualize and explain (minority) sexual orientation, illustrates this lesson well.

implies that “tomboyishness” can and does become a basis for disparagement if it is not outgrown in accordance with dominant expectations. See also Lisa A. Serbin & Carol H. Sprafkin, A Developmental Approach: Sexuality from Infancy Through Adolescence, in THEORIES OF HUMAN SEXUALITY, supra note 109, at 163, 177 (“Girls who exhibit cross-sex-typed behavior receive far less censure than boys, possibly because of the higher status the male sex role has in our culture...”) (citation omitted). The case law, which sometimes shows mercy to “tomboys”—as in Hopkins v. Price Waterhouse, 618 F. Supp. 1109 (D.D.C. 1985), aff’d in part, rev’d in part, 825 F.2d 458 (D.C. Cir. 1987), aff’d in part, rev’d in part, remanded, 490 U.S. 228 (1989)—but never to “sissies”—as in Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975), aff’d, 569 F.2d 325 (5th Cir. 1978)—certainly bears out this distinction. See supra notes 571-621 and accompanying text.

920. Of course, bisexual orientation is subject to this same phenomenon. This intermediate category, the most recent to arise as a generally recognized sexual orientation, brings into question the sex/gender polarities of the other two categories and thus potentially could undermine conflationary constructs that hinge on such polarities. See generally supra note 26 and authorities cited therein on bisexuality.


922. See supra Chapter One, Part I.A. See also infra Part IV.A.
1. Male Couples & Selective Labeling

Among male same-sex couples, sexology’s logic mandated that only the man who assumed sexual roles constructed as “passive” need be labeled an “invert,” and thus be tagged with a minority sexual orientation. After all, the man adhering to the male-identified “active” role simply had substituted one sex object for another while still fulfilling his approved gender role sexually: he indulged a behavioral quirk that, though seriously frowned upon, did not necessarily result in a change in his gender/sexual orientation status. The active man thus often retained his heterosexual label(ing) while his partner received the homosexual label(ing).

Accordingly, a man’s foray into same-sex activity could and can be privileged under the active/passive paradigm: real men mount “inverts,” who simply serve as penetrable surrogates for women. In this context, sexual contact was service, with the invert a feminized, substitute provider. This arrangement of course was emblematic of hetero-patriarchy: the “man” “on top,” in sexual command. Thus, among and between men, the logic of inversion theory created selective (sexual orientation) label(ing)s differentiated by polarized (sex and gender) roles and stances within sexual or affectional couplings.

2. Female Couples & Indiscriminate Labeling

Among female same-sex couplings, however, the logic of inversion theory imperiled both participants: active/passive sex/gender dichotomies labeled the active participant an “invert” because she had usurped the male role of sexual aggressor, yet the participant perceived as quiescent also was.

923. For a glimpse at the dynamics of selective labeling, see supra notes 189-96 and accompanying text.

924. The cultural vestiges of selective diagnoses survive. See Pronger, supra note 86, at 136-41 (discussing the “meaning of fucking”); Donald Symons, The Evolution of Human Sexuality 253-85 (1979) (discussing “Copulation as a Female Service”); Tripp, supra note 110, at 125 (outlining “Systems of Denial” which include “The Gender-Role Umbrella” in which assumption of male postures absolves that participant of homosexuality); Joel D. Hencken, Conceptualizations of Homosexual Behavior Which Preclude Homosexual Self-Labeling, in Gay Personality and Sexual Labelling, supra note 150, at 53 (listing the rationalizations employed to deny homosexual identity in spite of homosexual conduct, including “I just ‘get done.’ ”).

925. Earlier, this discussion noted that the correlation between being active and being “on top” is itself a cultural construction. See supra notes 874-77 and accompanying text. Now, the discussion shows the specifically androsexist bent of this construction. See Franklin, supra note 48, at 163 (1984) (noting that “[a] common theme of male sexuality in America . . . [is] male dominance”) (emphasis omitted). See generally Mackinnon, Feminism Unmodified, supra note 22 (arguing in a series of works that sexuality is characterized by the sense and symbolism of male domination and control).

A more recent phenomenon is the rise of dominatrixes, women sought out by men because they specialize in the “domination” of men during sexual play. Typically, the dominatrix will enact scenes in which the male submits to her sexual degradation of him. See generally Mistress Jacqueline, Whips and Kisses: Parting the Leather Curtain (1991) (recounting the experience of one dominatrix). One must remember, however, that the men are actually still in control of such interactions, submitting only to that which they are willing to submit, and which they often have pre-arranged. Thus, figuratively, if not literally, men remain “on top.”
designated an “invert” for “giving” herself sexually to another female. Thus, both women were tagged with minority sexual orientation label(ing)s because one woman misappropriated male sex/gender privilege while the latter diverted her sexual availability away from men. In other words, the “butch” or active woman took the wrong sex/gender role sexually while the “femme” or passive woman submitted to the wrong sex sexually.

In this way, inversion’s sense of logic rendered both women in a same-sex coupling problematical because it deemed both to be gender-atypical/transitive. Both could be diagnosed clinically and condemned culturally because together they obviated, or excluded, men. This stigma of course also encapsulated and perpetuated hetero-patriarchy: only men could command women’s sexuality while women could only succumb, and then only to men. Thus, among and between women, the logic of inversion theory

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926. Dr. George Weinberg, a noted psychotherapist who originated the term “homophobia,” identified the divergent ramifications of inversion precepts on male and female couples: “Curiously, the larger culture has decided that in men homosexuality connotes weakened sexuality, whereas in women it is a sign of enhanced sexuality.” WeINBERG, supra note 906, at 71. Of course, unlike inversion, the homoerotic construction of male same-sex sexuality did not connote weakened sexuality; on the contrary, homoeroticism emphasized enhancement of male gender attributes, including sexuality. See supra note 170 and accompanying text.

The vernacular language of sexuality reflects the traditionalist gender arrangements as well: relevant terminology depicts how males “do” and how females “get done.” See, e.g., Robert Baker, Conceptions of Sex—“Pricks” and “Chicks”: A Plea for “Persons,” in PHILOSOPHY AND SEX 249 (Robert Baker & Frederick Elliston eds., 2d ed. 1984). Reviewing the various words and phrases available in the English language to denote coitus, the author recounts how the terminology generally goes: Dick “screwed,” “laid,” “fucked,” “had,” “did it to,” “banged,” “humped,” and “balled” Jane, while Jane was “screwed by,” “laid by,” “fucked by,” and “had by” Dick. Id. at 261; see also Robin West, supra note 22, at 13 (discussing how “radical feminists[ ] [posit that] the important difference between men and women is that women get fucked and men fuck: ‘women,’ definitionally, are ‘those from whom sex is taken’”) (first internal quotation marks omitted); MACKINNON, FEMINISM UNMODIFIED, supra note 22, at 92 (1987) (arguing that male (hetero)sexuality is inseparable from domination and violence because, even accepting that not all men “want to fuck us, they just want to hurt us, dominate us, and control us, and that is fucking us”).

927. For further discussion of the butch-femme framework, see supra notes 281-84 and accompanying text; see also FADEMAN, SURPASSING THE LOVE OF MEN, supra note 86, at 239-53 (discussing the impact of inversion on women generally); RUTH SIMPSON, FROM THE CLOSEST TO THE COURTS: THE LESBIAN TRANSITION 78-106 (1976) (discussing lesbianism and psychiatry); Naomi Weisstein, Psychology Constructs the Female, in WOMAN IN SIXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS, supra note 90, at 207 (criticizing the essentializing of womanhood through psychology and traditional constructs).

928. Thus, inversion’s underlying and intrinsic androsexism made the theory affect male-male couplings quite differently from female-female couplings. This differential impact flowed from the historical circumstance that “sexuality is a construct of [heterosexual and heterosexist] male power” which encapsulates and projects androcentric gender inequality. See Catharine A. MacKinnon, A Feminist/Political Approach: “Pleasure Under Patriarchy,” in THEORIES OF HUMAN SEXUALITY, supra note 109, at 65, 67-68.

Of course, the generic construction of women as the passive sexual chattel of men required that women be “on call” sexually only for “their” men. See Carole J. Sheffield, Sexual Terrorism: The Social Control of Women, in SEXUAL INVERSION, supra note 212, at 171, 173 (discussing the “good woman/bad woman dichotomy”). Perhaps the most bizarre outgrowth of male concern over his control of her sexuality was the chastity belt. See generally Dr. ERIC JOHN DINGWALL, THE GIRDEL OF
created indiscriminate (sexual orientation) label(ing)s based on the violation of (sex and gender) boundaries under the active/passive paradigm.

As this brief dissection of the conflation's differential impact on male and female couples indicates, the construction of sex(ual) (ab)normalities is a highly nuanced phenomenon that is not necessarily most concerned with same-sex activity per se.\textsuperscript{929} Instead, the construction of sex(ual) (ab)normalities specifically incorporates and manifests a particularized disdain of gender atypicality or transitivity; this differential illustrates how sex and gender active/passive alignments are the paramount issues under the conflation. Additionally, however, this male/female differential in the construction of sex(ual) (ab)normalities also incorporates and manifests a generalized and underlying disdain of women and femaleness.

The selective labeling of men and the indiscriminate labeling of women indicates an underlying disdain of femininity and of the (de)feminized because, among the two couples, it leaves unscathed only the "manly" man. The second man, feminimized by his sexual gender atypicality, and the two women, defeminized by their respective sexual gender atypicalities, are the problematized sex/gender types.\textsuperscript{930} This differential obviously tracks the preferences and prejudices of hetero-patriarchy. This differential impact thus underscores how conflationary concepts and customs under the active/passive paradigm are propelled by, and in turn propel, both androsexist and heterosexist imperatives. This dissection of the conflation's differential impact on male and female same-sex couplings consequently points to the next lesson from modern culture: how the conflation represents sex/gender ideology and how it erects multiple sex/gender hierarchies.

\textbf{E. The Conflation as Ideology & Pecking Order}

The conflation's differential impact on male and female couples, indeed these cultural lessons taken as a whole, indicates that the conflation operates primarily as a means to particular ends. These ends include the

\textsuperscript{929} Consequently, conflationary arrangements implicate status/conduct issues as well. \textit{See infra} Part IV.B.

\textsuperscript{930} \textit{See infra} Part I.E.4.
promotion of androsexist and heterosexist tenets and imperatives, and they culminate in the preservation of hetero-patriarchy as the dominant ideology governing sex/gender relations. These ends are outlined briefly below.

1. From Androsexism to Heterosexism

The lessons from modern culture presented thus far demonstrate that conflationary sex/gender notions and customs based on the active/passive paradigm are inimical to both women and sexual minorities. Over time and under the conflation, these notions and customs have coalesced in a set and system of beliefs that shape and govern the dispensation of sex/gender privileges and punishments. In this Project, this system is denominated as “hetero-patriarchy” to denote its fusion of androsexism and heterosexism, its twin disdain of women and of sexual minorities.931 The next lesson consequently is that the conflation amounts to sex/gender ideology, an ideology that serves to justify and maintain established Euro-American hierarchies based on the social and sexual interplay of sex, gender, and sexual orientation.

However, a remaining question is how and why it came to be so: how and why antipathy for women and antipathy for sexual minorities became fused in this particular way. Although a full account is beyond the scope of this Project,932 a brief sketch should help illuminate the historical and contemporary continuities of androsexism and heterosexism as the double helix of hetero-patriarchy. This account begins with, and is rooted in, the cultural antecedents of Euro-American societies in antiquity.

At its genesis, the active/passive paradigm was conceived deliberately as androsexist because it categorically assigned inferiority to women and femaleness as it institutionalized Greco-Roman sex/gender arrangements.933 The modern Euro-American sex/gender system in turn has retained this bias as a defining feature.934 Androsexism therefore is the baseline, both historically and conceptually, of the present-day Euro-American sex/gender system. This arrangement was not, however, necessarily inimical to persons, groups, attributes, or ideas associated with same-sex relations. Indeed, androsexism did not entail heterosexism in Western culture(s) for quite some time.935 It therefore remains to be understood how an androsexist construction was transmuted into a heterosexist device as well.

The active/passive paradigm and its conflationary tendencies became inimical to sexual minorities over time because they posited male/female...

931. See generally supra Chapter One, Part I.A.
932. For a more detailed account of how heterosexism flourished with the rise of Christianity, see FRANCISCO VALDES, QUEERS, SISSES, DYKES & TOMBOYS: HOW LAW AND CULTURE (Mis)CONSTRUCT AND (Mis)USE SEX, GENDER & SEXUAL ORIENTATION (forthcoming 1997). See also Valdes, supra note 9.
933. See supra notes 89-107 and accompanying text.
934. See generally supra Chapters One and Two.
935. The evolution is detailed in Valdes, supra note 9.
social and sexual norms in which the male was positioned as the only active agent. As crystallized and codified by sexology at the turn of the century, sexual orientation was subsumed within the overall social/sexual gender composite precisely because it came to represent the manifestation of gender during or within sexual and affectional activity. In theory and in practice, sexual orientation slowly but surely came to signify the sexual component of gender. In this way, the suppression of sexual or erotic attributes and behaviors deemed to contravene social gender delineations under the active/passive dichotomy gradually became a significant byproduct of the androsexist imperatives underpinning this basic framework.

Accordingly, male same-sex intimacy ultimately became loathsome when viewed as placing a male sexually in female roles or postures: the feminization of males was intolerable to the patriarchal order, but male same-sex sexuality per se was not necessarily problematic. Instead, male same-sex sexuality was made proscribable primarily when the active/passive divide was deemed crossed. Female same-sex intimacy, however, was made generally intolerable because it raised fundamental fears of and suspicions about women's sexual and therefore social autonomy. Thus male same-sex activity was sometimes tolerable, but female same-sex activity was never acceptable.

In this manner, heterosexism arose centuries after androsexism had been institutionalized because conflationary practices and customs eventually caused same-sex activity, per se, to be associated with potential or actual erosions of culturally prevalent active/passive sex/gender hierarchies. In contrast, traditionalist sex/gender hierarchies were reassuringly evidenced by, and more easily enforced in, cross-sex liaisons. This twin disdain, for women or "femaleness" generally and for sexual practices which threatened social (and sexual) gender boundaries specifically, eventually produced the double helix of sex/gender ideology in which androsexism and heterosexism are coiled together to produce and reinforce conflationary tenets and imperatives. Chapter One (and Chapter Two) of

936. See supra notes 89-107 and accompanying text.
937. The choice of the term "byproduct" is calculated, as it specifies a result other than the intended goal or objective of the action or behavior that initially produced it. See WEBSTER'S NINTH COLLEGIATE DICTIONARY 192 (1987) (defining the term as "a secondary and sometimes unexpected or unintended result"). In this instance, the primary goal or objective of the socio-sexual arrangement is androsexism and the byproduct is heterosexism. See Valdes, supra note 9.
938. See supra notes 923-25 and accompanying text. This practice dates back to antiquity as well. See Valdes, supra note 9.
939. See supra notes 926-28 and accompanying text. This practice also dates back to antiquity. See Valdes, supra note 9.
940. See supra notes 923-28 and accompanying text.
941. Professor Hunter has similarly noted that the prohibition against same-sex marriage is driven, at least in part, by the institutionalization of societal sex-based gender hierarchies within the traditional cross-sex marriage. See Hunter, supra note 23, at 11-12.
this Project demonstrates that androsexism and heterosexism still retain cultural and legal power. This combination of active/passive socio-sexual biases therefore still preserves the dual and correlated superiorities of male and heterosexual constructions both socially and sexually.942

This (d)evolution shows that androsexism and heterosexism are related remnants of the Euro-American active/passive paradigm. Placed in this perspective, the interrelationship between androsexism and heterosexism in both law and society reveals that the two strains of sexism must be seen as integral to the conflation, and to each other.943 More specifically, and significantly for the law, this intertwining of androsexism and heterosexism means that the two species of bigotry combine and converge both cognitively and culturally under and through the combined impact of Leg One and Leg Two of the conflation.

In other words, gender discrimination and sexual orientation discrimination operate in tandem culturally and legally because both have been and are integral to the conflation that undergirds the sex/gender system; these two types or strains of conflationary discrimination work in tandem because Leg One and Leg Two work in tandem. Because sexual orientation is seen as the sexual component of gender, sexual orientation discrimination is in fact almost always gender discrimination.944 Simply phrased, this (d)evolution explains why “sex” and “gender” discrimination cannot be eliminated so long as “sexual orientation” discrimination remains legal.945 The two species of discrimination in fact are one because they share common tenets and animate common imperatives regarding the conflation of sex, gender, and sexual orientation.

2. Conflationary Tenets & Imperatives

Understanding the conflation as a means whose ends include the sustenance of the hetero-patriarchy leads to the next lesson from modern culture: identifying the androsexist and heterosexist tenets and imperatives that underlie conflationary sex/gender bigotries. These tenets and imperatives

942. In a deductive system of gender—one that adheres sex to gender intransitively—a relationship that is heterosexual is at once heterogender. In such a system, women must be passive in order to complement or facilitate the active role of the male gender. However, in an inductive system of gender—one that does not intransitively adhere sex to gender—a relationship may be homosexual as well as heterogender. Consequently, the passivity that may still be associated with the female gender may be assumed by members of either sex, but without stigma. For further discussion of the inductive/deductive distinction, see infra notes 998-1000 and accompanying text. For a more detailed discussion of the topic, see Valdes, supra note 9.

943. Inversion's selective sexual orientation label(ing)s of the participants in a male coupling based on active/passive gender stances illustrates the point: the label(ing)s use androsexist sex-based gender conceptions to arrive at heterosexist sexual orientation conclusions. See supra notes 923-25 and accompanying text.


945. See supra Chapter Two, Part V.C. See generally infra Chapter Five.
may be organized around four basic themes, all of which reflect and track the rigid, binary social and sexual structure of the active/passive paradigm.

a. The Bifurcation of Personhood

The conflation's first imperative is bifurcation—the sex/gender split of personhood into man/woman and male/female. This bifurcation sets the stage for dominant judgments of correctness or incorrectness regarding each individual's sex/gender profile. As processed through the conflation, bifurcation thus appears at the threshold: two sexes and their corresponding, fixed social and sexual gender roles are the only acceptable forms or categories of socio-sexual identity. This first imperative thus follows from and continues the fundamentality of sex and the intransitivity of deductive or sex-determined gender.

b. The Polarization of Sex/Gender Ideals

The second, related imperative is polarization—the dichotomized conception of male/female constructions and associations as opposite and opposing. This polarization posits sex/gender categories as being mutually exclusive, if not outright antagonistic to each other. Polarization thereby renders the bifurcated sex/gender roles incapable of combination or convergence, either as an ideal or as a person, either socially (in public) or sexually (in private). This second imperative thereby motivates, exemplifies, and empowers the clinical, cultural, and legal cross-problematization of social and sexual gender atypicality.

c. The Penalization of Gender Atypicality/Transitivity

The third conflationary imperative of hetero-patriarchy is penalization—the proscription of all people and phenomena that blur, or might blur, the social and sexual distinctions that separate the bifurcated and polarized parts of personhood. Penalization, and the corresponding rewards for conformity, therefore coerces compliance with dominant standards of socio-sexual gender correctness by suppressing social and sexual gender individuality, atypicality, and transitivity. This imperative, like the preceding one, therefore caters to and continues the cross-problematization and cross-subordination of cross-gender(ed) persons or phenomena.

946. See supra notes 89-107 and accompanying text.
947. See supra notes 899-904 and accompanying text.
948. See supra notes 901-04 and accompanying text.
949. See supra notes 118-29 and accompanying text. This imperative is seen in the use of sin, disease, and crime, as defined by religious institutions, medicine, and the law, to damn, cure, and punish those who deviate from conventional sex/gender polarities. See also Valdes, supra note 9.
d. The Devaluation of the (De)Feminized

The fourth imperative is devaluation—the disparagement of human qualities perceived as “female” or “feminine.” This devaluation occurs either with the assignment of sex (female identity) or through the manifestation or imputation of minority sexual orientation (homosexual identity). Women are feminized and devalued because of sex while gay males are feminized and devalued because of sexual orientation.\(^950\) Lesbians are (de)feminized and devalued on both counts.\(^951\) Bisexuals and the trans/bi-gendered further complicate—and uniquely jeopardize—the simplistic tidiness of active/passive images, so these types or categories likewise are devalued.\(^952\) Thus, as more fully discussed below, (de)feminization and devaluation affect women because of their sex and regardless of their sexual orientation, gay males despite our sex and because of our sexual orientation, and lesbians because of both their sex and their sexual orientation. Bisexuals and the trans/bi-gendered upset the control and order(ing) of (de)feminization, and therefore they are devalued on this basis as well. This final imperative therefore encapsulates and enforces the fusion of andro-centric and hetero-centric priorities and prejudices in the form of hetero-patriarchy.

As these tenets and imperatives show, current conflationary arrangements stem from ancient sex/gender traditions under the active/passive paradigm. These tenets and imperatives have since served to stratify society along sex/gender lines. Today, these tenets and imperatives continue to buttress the conflationary categories and hierarchies favored by hetero-patriarchal ideology.

3. The Making of Conflationary Hierarchies

In society (and in law), conflationary precepts and practices are structured and deployed under Leg One and Leg Two to devalue persons or phenomena associated with women and/or with sexual minorities.\(^953\) The conflationary status quo therefore stratifies males, females, and “inverts” (or other sex/gender types), and thereby distributes power, privilege, and punishment according to traditionalist active/passive, sex/gender rankings. The conflation perpetuates the biased hierarchies that create(d) and define(d) it.

The story behind Simone de Beauvoir’s choice of titles for her groundbreaking work on the condition of women illustrates the point. Originally,

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950. The feminization and devaluation of women and gay men is discussed further below. See infra notes 958-63 and accompanying text.
951. The (de)feminization and devaluation of lesbian identity is discussed further below. See infra notes 964-68 and accompanying text.
952. The othering and devaluation of bisexual and trans/bi-gendered identity is discussed further below. See infra notes 969-72 and accompanying text.
953. See, e.g., supra notes 931-45 and accompanying text.
de Beauvoir thought of titling her book as *The Other Sex*, but she eventually switched to the final title of *The Second Sex*, explaining that “since pansies are called the third sex . . . that must mean that women come in second.”

Heterosexual women are second because they are not inverted—not diseased—just inferior by “nature.” Inverts, by cultural and clinical consensus, rank last precisely because they have been considered diseased. Of course, heterosexual men “naturally” rank first and reap the fruits of that primacy; the remaining sex/gender species—heterosexual women and various sexual minorities—must settle for the leftovers. Under this scheme, women are deemed deficient and sexual minorities are deemed defective; lesbians are deemed both, and thus doubly disdained—lesbians are deemed double and nothing. Bisexuals and the trans/bi-gendered similarly are degraded.

In sum, the conflation supports several particularized and overlapping sex/gender pecking orders: male over female and trans/bi-gendered; masculine over feminine or trans/bi-gendered; heterosexual over homosexual or bisexual. In this manner, the conflation’s three endpoints and legs create sex/gender types ranked in accordance with hetero-patriarchal tenets and imperatives. As outlined next, the (de)feminization and (de)valuation of these sex/gender types serve to delineate and order these cross-correlated hetero-patriarchal categories and hierarchies.

4. The (De)Feminization & (De)Valuation of Sex/Gender Types

As we have seen, hetero-patriarchy devalues the female and the feminine, both socially and sexually. The next lesson from modern culture therefore is that categorical (de)feminization is at the heart of conflationary pressures and concerns that (de)value the various sex/gender types. Once feminized, either through sex at birth, or through social or sexual gender (a)typicality, an individual becomes categorized as an Other—someone exiled to the margins. Though each specific type of categorical sex/gender otherness is effected through the reactions of clinically, culturally, and legally dominant forces to particular permutations of sex, gender, and sexual orientation, the hetero-male-masculine ideal that sits atop the traditional active/passive pecking order stays constant.


955. For further discussion of “nature” (and “normality” and “morality”) in this context, see infra Part III.B.

956. See Littleton, *Double and Nothing*, supra note 584.
a. The Non-Gay Male Ideal

As long as men follow socially and sexually the sex/gender rules applied to them beginning at birth under all three legs of the conflation, they occupy the apex of all hetero-patriarchal hierarchies. More particularly, the conflationary male ideal emphasizes masculinity for men both socially and sexually under the joint operation of the conflation's first and second leg. This ideal therefore emphasizes "active" displays of sex, gender, and sexual orientation socially and sexually, and (primarily) within cross-sex contexts or liaisons. This traditionalist privileging of men and masculinity, both socially and sexually, constructs the non-gay, masculine male as the only socio-sexual identity category that is not problematized, othered, and devalued under the hetero-patriarchal strata of the conflation.

This masculinist sex/gender ideal, therefore, is the standard against which the rest of society is measured, othered, and devalued. The "sissy" non-gay male is consequently feminized due to his social gender atypicality under the conflation's first leg. Under the active/passive themes and traditions that underlie Leg One of the conflation, the heterosexual "sissy" represents an erosion of male hegemony over "active" attributes and activities socially, and therefore signifies (a possible) erosion of male hegemony over sex/gender primacy and privilege on the whole. Like the non-gay "sissy," each of the remaining categories—non-lesbian women, gay men, lesbians, bisexuals, and the trans/bi-gendered—in their own way(s) represent potential threats to or erosions of this hegemony by violating one or another of the conflation's legs. Therefore all of these remaining sex/gender types also entail some form or quantum of (de)feminization and devaluation.

b. The Feminization of Non-Lesbian Women & Gay Men

For women generally, categorical feminization and devaluation occur automatically and inexorably via sex (and gender) under the conflation's first leg. Assigned officially at birth, this designation fixes for life the social and sexual femaleness of women via the intransitivity of deductive gender, and hence the otherness and devaluation of all humans born with vaginas. Thus fixed, the female socio-sexual identity of women casts them as inferior and passive beings destined to be controlled and subordinated throughout life, both socially and sexually, by those with traditionalist socio-sexual male identity. In this way, the feminization of women via sex (and gender) under the conflation's first leg helps to preserve male sex/gender privilege and hegemony.

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957. See supra notes 51, 915.
958. As noted above, under the deductive/intransitive gender model that prevails in Euro-American law and society, the sex designation attaches gender as well, so that women become automatically, permanently, and irredeemably feminized at birth. See supra notes 118-21 and accompanying text.
959. See supra note 98 and authorities cited therein on traditionalist male control of both of women and sexuality.
However, non-lesbian women who violate the conflation’s first leg with social manifestations of gender atypicality are further devalued for undermining this hegemony in additional ways. Non-lesbian “tomboy” women socially, if not sexually, (mis)appropriate masculinity, thereby disturbing their conventional feminization and devaluation under Leg One: by violating the conflation of sex and gender the “tomboy” non-lesbian woman disquiets the guarded superiority of the male ideal. For this reason, her masculinity is neither appreciated nor accepted. On the contrary, as Anne Hopkins’ experience illustrates, the “tomboy’s” social gender atypicality—her conformance to male-centric ideals—excites cultural (and sometimes legal) reactions that penalize her incursion into the highly guarded social territory reserved exclusively for masculine men under the active/passive paradigm.960

For gay men, on the other hand, feminization and devaluation occur via sexual gender atypicality—despite the privileges of sex (and social gender) under the conflation’s use of active/passive specifications as a whole.961 Thus, through his “queerness,” the gay male sex/gender type is feminized and stratified: as with the (heterosexual) “sissy,” the “queer” creates and personifies a category of man other than, and below, the hetero-patriarchal, masculine ideal because he violates the conflation of sex-determined gender with sexual orientation, thus disrupting Leg Two with his sexual gender atypicality. In this sense, gay men, like other devalued sex/gender types, undermine the intransitivity of deductive gender by upsetting the active/passive arrangements of sex and gender.

Moreover, the sexual gender atypicality of this socio-sexual identity is debased because it is deemed a surrender of the traditionalist active/passive birthright of male superiority routinely bestowed on men at birth. In other words, gay male socio-sexual identity is treated as a betrayal and corruption of the hetero-patriarchal pecking order962 because it threatens to erode or

960. See supra Chapter Two, Part III.A.

961. “In the dynamics of hegemony in contemporary Western masculinity, the relation between heterosexual and homosexual men is central, carrying a heavy symbolic freight. To many people, homosexuality is a negation of masculinity.” R.W. Connell, A Very Straight Gay: Masculinity, Homosexual Experience, and the Dynamics of Gender, 57 AM. SOC. REV. 735 (1992) Thus, the feminization of (gay) males through sexual orientation may be acquired—or imposed—despite sex.

962. This concept of sex/gender identity “corruption” is reminiscent of the racial corruption ideology underlying anti-miscegenation statutes. Those statutes created classes of race determined by quanta of blood in which the purity of white blood (and thus the racial classification) could be despoiled by a droplet of “other” blood. See Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967). The other blood was powerful indeed: a minute trace of otherness was sufficient to trigger a downward re-classification of the person so tainted. See generally Gotanda, supra note 77 (discussing constructions and meanings of “race” in constitutional jurisprudence); Ian F. Haney López, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (deconstructing legal and cultural cross-constructions of “race”).

As with the hierarchical nature of racial categories and their regulation through the notion of corruption, the feminization and corruption of gay males through sexual orientation categorization helps to police the hierarchical nature of sex/gender typology. See Connell, supra note 961, at 736.
fracture the socio-sexual solidarity and mastery of the sex/gender ruling class. By feminizing and devaluing gay male identity, the system tries to defuse and disempower the subversive capacity of these otherwise privileged men.

c. The (De)Feminization of Lesbians

Lesbian identity is feminized and defeminized at once, thus making this socio-sexual identity a “double and nothing” sex/gender category jointly under Legs One and Two. For lesbians, as with women generally, feminization occurs at birth via the official sex (and gender) assignment relating to Leg One. Yet, minority sexual orientation serves to defeminize the lesbian under Leg Two: this sex/gender category is defined under the conflation’s second leg as sexually gender-atypical, thus conflicting with the intransitivity of deductive gender and diluting (or polluting) the femininity imputed to the woman at birth under the conflation’s active/passive assignment of sex and gender.

As with the (heterosexual) “tomboy,” the “dyke” is deemed to misappropriate masculinity, but in a sexual (rather than social) way. The dyke is a sex/gender other under Leg Two because her atypical sexual orientation directly violates that leg; she is also a sex/gender other under Leg One because her sexual gender atypicality is cross-associated with social gender atypicality. Thus, under the joint operation of Leg One and Leg Two, this socio-sexual identity represents a doubled otherness that threatens male and masculinist privilege and hegemony. Thus, the dyke is devalued and subordinated by and within the hetero-patriarchal arrangement of active/passive domains socially and sexually.

As these comments indicate, the conflationary bind of lesbian identity is relatively complex: though feminized from birth onward via sex (and gender) under Leg One, women with a gender-atypical sexual identity are defeminized under Leg Two. Minority sexual orientation seemingly negates sex (and gender). Yet, as with “tomboys,” this simultaneous feminization and defeminization of lesbian identity does not include acceptance of the gender-atypical woman into male domains because maleness is highly guarded territory under the active/passive paradigm. Women, by cultural definition and ideological fiat, cannot authentically assume the active sexual (or social) postures and powers identified as male.

Thus, like the tomboy, the dyke is not appreciated or accepted into male domains. And, because lesbian identity tends to exclude male partici-
pation in, and hence control of, the sexual (and social) lives of women, the lesbian sex/gender type is cast as especially opaque and suspect. Thus, lesbian identity is doubly categorized and problematized, effectively creating what ardent traditionalist hetero-patriarchists might regard as the fourth sex—luckless enough to be born women, impetuous enough to be sexually gender-atypical, and subversive enough not to desire or need men.

d. The Male/Female Bisexual Conundrum

Bisexuality, the intermediate sexual orientation category that challenges the bi-polar hetero-homo sexual dichotomy among both men and women, creates a sex/gender type that cuts across various conflationary lines. This intermediate identity necessarily complicates and confuses the hetero-patriarchal pecking order precisely because it spans and straddles several of the system's many sex/gender divides; bisexual women and men literally and figuratively embody a continuing challenge to the strict sex/gender active/passive dichotomies of hetero-patriarchal categories and rankings because their in-between position defies the dominant binary view of sexuality.

Perhaps most notably, male and female bisexuality negates sexually the intransitivity of deductive gender under Leg Two; bisexual identity belies sexually the mutual exclusivity of sex-based gender assignments. In this way, bisexual men and women specifically blur and disturb the neat active/passive sexual divides that stratify conflationary categories and that delineate the sex/gender hegemony of the heterosexual male and his masculinity. And, of course, it is this conceptual interference with the process of, and control over, categorical active/passive (de)feminization that makes this

967. Lesbian identity is marked by the understanding that the women involved are woman-identified; thus, depictions of female same-sex intimacies that titillate non-gay male eroticisms are not "lesbian" as such.

968. Consequently, lesbian identity is made virtually invisible. See, e.g., Ruthann Robson, Incendiary Categories: Lesbians/Violence/Law, 2 Tex. J. of Women & L. 1, 2 (1993) (discussing how violence among lesbians gets lost in the discourse, and is sometimes explained away as "merely an instance of lesbians appropriating male values").

969. See supra note 920. At one time, bisexual identity provided a cover for same-sex sexual orientation—it allowed persons with same-sex desires and contacts to distance themselves from gay or lesbian identity by staking out this middle ground. Today, bisexual identity has gone from being a convenient apology for same-sex sexuality to being an affirmative sex/gender category whose male and female members oftentimes (though not always) ally themselves openly with sexual minorities in general. For a personal account of the evolution of bisexual identity vis-a-vis hetero/homo polarities see generally Colker, supra note 26.

970. For example, bisexual identity complicates the selective label(ing) that privileges the "active" participant in male same-sex activity because it permits a new label(ing) that is neither "homo" nor "hetero." Thus, instead of retaining his "heterosexual" status, the "active" participant can now be labeled with bisexual identity, which crumbles the either/or hetero/homo dichotomy. Yet, bisexuality may trigger the same kinds of concerns or fears as homosexuality because, by definition, it does involve same-sex sexuality. Thus, for instance, the military ban against homosexuality and homosexuals applies to bisexuality and bisexuals. See, e.g., Schowengerdt v. United States, 944 F.2d 483, 489-90 (9th Cir. 1991) (upholding the discharge of a naval reservist for "being bisexual").
sex/gender type a threat to hetero-patriarchal tenets and imperatives, such as bifurcation and polarization.

In other words, bisexual men and women refuse to recognize binary sexuality under Leg Two and therefore refuse to obey sexually (and perhaps socially) the conflation of sex, gender, and sexual orientation specifically under Leg Two (and perhaps under Leg One). In this way, bisexuality resists sexually the combined operation of Leg One and Leg Two. Consequently, male and female bisexual identity is lumped in and devalued along with the other sex/gender Others. However, it bears emphasis that male and female bisexual identity is specifically and independently disfavored because it creates a specific and unique conundrum.

Bisexual identity is not easily or readily painted as merely an “inversion” of correct sex/gender attributes, and bisexual persons therefore are not easily or readily categorized along mutually exclusive bi-polar sex/gender lines. Bisexual identity consequently does not lend itself to the sort of (de)feminization based on bi-polar sex/gender/sexual orientation lines that represents and protects the socio-sexual privileging of masculinity only for men under active/passive sex/gender arrangements. Bisexuals—like the trans/bi-gendered—uniquely threaten the guarded primacy of exclusive male masculinity under the conflation, and therefore are specifically disparaged and devalued on the sex/gender (de)merits of this socio-sexual identity.

e. (De)Feminization & the Trans/Bi-gendered

Finally, the hetero-patriarchal pecking order also orders and devalues persons identified as trans/bi-gendered—persons viewed as transsexuals, transvestites, and/or cross-dressers. As we saw in the cases in Chapter Two,\textsuperscript{971} this sex/gender type is cavalierly lumped in with homosexuals because, like other sex(ual) (ab)normalities (or aberrations), trans/bi-gendered persons embody possibilities that hetero-patriarchal tenets and imperatives deny and suppress.\textsuperscript{972} The trans/bi-gendered community nonetheless uniquely exposes the limitations of hetero-patriarchal ideology by daring to exist openly despite the dictates of bifurcation, polarization, penalization and devaluation of the (de)feminized.\textsuperscript{973} Indeed, like bisexual identity under Leg Two, trans/bi-gendered identity represents a unique defiance of and complex challenge to hetero-patriarchal beliefs and goals under Leg One that, in some respects, may be more subversive of conflationary arrangements than lesbian and gay male identity.

The social sex/gender transgressions of the trans/bi-gendered include taking physical and visible command over the process of (de)feminization; indeed, it is this trait that oftentimes is most noticed about the trans/bi-

\textsuperscript{971} See, e.g., \textit{supra} notes 449-54 and 509-40 and accompanying text.
\textsuperscript{972} See \textit{supra} Chapter Two, Part IV.B.
\textsuperscript{973} See \textit{supra} Part I.E.2.
gendered. Whether they identify as male-to-female or female-to-male transsexuals, transvestites, or cross-dressers, the trans/bi-gendered resist and rebuke categorical (de)feminization by asserting control over the non-conflationary adornment and representation of their bodies and beings. This relatively public and tangible stance makes the sex/gender non-conformance of the trans/bi-gendered much more palpable and concrete than oftentimes is the case with lesbians, gay men, or bisexuals. Trans/bi-gendered identity consequently excites a particularized sense of disorientation and terror within traditionalist hetero-patriarchal quarters that may be more immediate, visceral, and acute than the disturbances caused by the other sex/gender types. The pronounced physicality that marks this self-reclamation of (de)feminization thus marks this sex/gender type as an Other.

Thus, like bisexual identity, trans/bi-gendered identity negates the intransitivity of deductive gender and its guard over masculinity only for men (and, correspondingly, femininity only for women). In fact, within the socio-sexual context of the conflation, trans/bi-gendered identity operates socially much like bisexual identity operates sexually: the trans/bi-gendered upset conflationary sex/gender dichotomies and categorizations socially under Leg One while the bisexual upsets conflationary dichotomies and categorizations sexually under Leg Two. This sex/gender type socially discombobulates conflationary premises and hierarchies because it does not represent just the “other” and mutually exclusive sex/gender end of a bipolar world view under Leg One. Instead, the trans/bi-gendered mix sex and gender (and perhaps sexual orientation) in individualized ways that conflationary arrangements simply are unable or unwilling to comprehend. In effect, the trans/bi-gendered refuse, in highly pronounced ways, to obey the conflation of sex, gender, and sexual orientation socially under Leg One (and sometimes sexually under Leg Two).

The historical durability and contemporary familiarity of the various sex/gender types and rankings catalogued above is a measure of the entrenchment and continuing power of conflationary active/passive arrangements. This continuity also brings into sharp relief the fact that the conflation does more than reflect and mediate the traditionalist sex/gender ideology and ordering of socio-sexual identities. The conflation also distills and produces them.

5. The Conflation as Product & Crucible of Ideology

As the lessons presented thus far indicate, the conflation in modern culture is more than a process for and a product of traditionalist active/passive sex/gender ideology. The conflation also produces and reproduces hetero-patriarchy. Historically and currently, the conflation not only accommodates traditional and traditionalist sex/gender arrangements, it also projects them from a distant past into the present. As long as sex, gender,
and sexual orientation remain clinically and culturally conflated in this way, the conflation itself will reify and reinforce the very androsexist and heterosexist forces which spawned it. The conflation, in short, is sustained by hetero-patriarchal tenets and imperatives even as it sustains them because the conflation is hetero-patriarchal. The conflation thereby serves as the crucible that joins the sex/gender past and present, and, if not dismantled, the future as well.

F. The Conflation as Regulatory Apparatus

The preceding points and lessons show that the conflation in modern culture is an all-encompassing yet manipulable process, a focused and determined ideological force serving as a means to various particularized ends, and a product and (re)producer of its ideological imperatives. However, the conflationary record from modern culture suggests that the conflation, ultimately, must be viewed, in addition to all else, as a regulatory apparatus. Though this apparatus probably reached its zenith of formal power during inversion’s reign at the turn of the century, it remains fully intact and operational today.

As Chapter One of this Project explained, inversion theory codified the pre-existing climate of sex/gender intimidation that historically held sway through hetero-patriarchal active/passive conventions and conceptions. In effect, sexology’s clinical theories, which formalized the conflation, backed up the cultural status quo with the new threat of medical sanctions that branded the individual as sick—a scientifically official sex/gender pariah. Since then, that threat has been kept viable by the succession of theories that followed inversion, culminating in today’s “gender identity disorder” category. The conflation, operating through a combination of vehicles such as clinical theories and abiding societal attitudes, thus targets sex/gender recalcitrants with social stigma and even state-sanctioned destruction.

974. See Valdes, supra note 9.
975. Vivid examples are provided in the writings of inversion theorists. See supra notes 122-47 and accompanying text; infra note 977.
976. See supra notes 230-37 and accompanying text.
977. For instance, as enshrined in inversion and fixation theories, conflationary conventions stymied the aspirations, joys, and opportunities of “strong” women by confining them to the socially constraining gender profiles that society cast as passive: women were to stay quiet, ignorant, and impoverished behind the closed doors of their husbands’ (or fathers’) house, while inverters were to stay alone, unloved, and isolated in the “closet” that society built for them. Moreover, castration was proposed as a possible “solution” to all kinds of (male) sexual perversion. See Katz, Almanac, supra note 86, at 241-43, 455. However, even less extreme instances of branding and penalization could ostracize individuals and destroy their lives.

The example of Frederik Hammerich illustrates both the stigmatization and destruction of persons through the conflationary process. The son of a prominent judge in Denmark, Hammerich was privileged to escape to the United States after exposure as a homosexual in 1893. His correspondence with selected relatives reveals a life of loneliness and despondency spent in search of a community where he could settle. His wanderings eventually took him to California, where he committed suicide in
Accordingly, the final lesson to be drawn from the conflation’s history in modern culture is that it is more than a phenomenon friendly and subservient to hetero-patriarchal sex/gender beliefs and goals: it is an apparatus that is used proactively and affirmatively by culturally (and legally) dominant forces to regulate the formation and maintenance of socio-sexual identities in line with highly regimented preferences. As a regulatory apparatus, the conflation is deployed, forcibly if necessary, to ensure that sex/gender boundaries and hierarchies are obeyed. In other words, the conflation is a tool used to keep us all in our officially ordained sex/gender places, and to keep the hetero-patriarchal status quo intact. Unfortunately, as Chapter Two demonstrates, the law lends force and sharpness to this tool. We therefore next turn to the lessons to be derived from legal culture’s role in this conflationary status quo.

II

LESSONS FROM LEGAL CULTURE

As we saw in Chapter Two, legal culture recycles the conflation and, as in society at large, conflationary pressures leave an unsatisfactory legacy in the law because they inflict harm on multiple levels. First, the conflation harms individuals whose meritorious claims go unremedied. Consequently, the conflation weakens the legal system, which derives much of its legitimacy from ostensibly impartial applications of ostensibly neutral principles. In this manner, legal culture betrays both systemic values regarding informed and reasoned judgment as well as substantive ideals regarding sex and gender equality. Thus, the conflation harms legal culture itself. Ultimately, the conflation also harms society as a whole because conflationary legitimization of sex/gender biases undermines the effectiveness, fairness, and cogency of existing anti-discrimination laws, laws which represent principles professedly fundamental to this society. In doing so, the conflation’s record in legal culture serves to license and exacerbate traditionalist and invidious sex/gender bigotries that create cultural acrimony and polarize society. Accordingly, the lessons from legal culture outlined below first

1919 at the age of 51. His obituary concluded that “this unsettled life had become too difficult for the aging man,” and the final sentence noted that he was “unmarried.” See Katz, Almanac, supra note 86, at 235-39.

Even today, the threat of exposure and branding can terrorize otherwise sophisticated and privileged persons into secret double lives. The life of David Louis Schwartz, who until his death in 1992 headed the real estate department of New York City’s mega-firm Cravath, Swaine & Moore, is an apt example. Though married, Schwartz apparently engaged in a double life sexually, and was found dead on November 9, 1992 in a rent-by-the-hour motel room in the Bronx. In an interview two months after Schwartz’s death, another successful gay Manhattan lawyer said that he “maintains his own status within his community’s legal elite by keeping his sexual preference hidden [because] . . . [t]o do otherwise could mean the loss of his wife and family, maybe his business and perhaps his life.” See Rita Henley Jensen, The Private Life and Public Death of David Schwartz, NAT’L L.J., Jan. 25, 1993, at 1, 1.
consider the toll taken by the conflation on individuals, then on the legal system itself, and finally on society as a whole.

A.  

**Individual Harm & Injustice**

The cases reviewed in Chapter Two reveal a record of lives disrupted unjustly.\(^79\) In each of the Title VII cases except *Hopkins*, naked sex and gender discrimination deprived individuals of employment opportunities, of all that flows from gainful employment, and of a remedy for those wrongs.\(^80\) Even in *Hopkins*, the plaintiff’s life was terribly disrupted by the combined operation of modern and legal culture: despite the eventual vindication of her claim, Hopkins spent years in taxing and disruptive litigation.\(^81\) The Title VII cases as a whole thereby show how the conflation’s influence on legal culture inflicts and aggravates harm on individuals who turn to the law for redress of unlawful wrongs. In the constitutional law cases, the conflation likewise deprived the claimants of religious, equal protection, and due process interests professedly guaranteed by the Bill of Rights.\(^82\) The conflation thus causes the legal system to compound the sex/gender wrongs of society in various cultural and doctrinal settings. The accumulation of these individualized harms, in turn, inflicts harm on the law itself, as a (failed) system of principle and justice.

B.  

**Substantive (In)Coherence & Systemic (I)Legitimacy**

Conflationary tendencies and actions in legal culture undermine the law substantively, pragmatically, and systemically because the conflation effectively permits courts to substitute stereotypical conflationary suppositions for informed and reasoned legal analysis.\(^83\) As noted in Chapter Two, the conflationary status quo in legal culture can be traced specifically to the sexual orientation loophole that the courts opened when they contrived and indulged these conflationary suppositions in their analyses of the sex/gender issues,\(^84\) and which they exercise by shifting claims from Leg One to Leg Two in order to take advantage of the formal legality that protects sexual orientation biases. The unprincipled, unwarranted, and indefensible adjudicative and doctrinal results thereby produced should motivate us to reconsider and reconstruct the way in which we understand and apply existing rules prohibiting sex and gender biases. This reconstructive effort is taken up in the following Chapter of this Project. For the moment, however, this discussion focuses only on the institutional costs entailed by judicial indulgences of conflationary suppositions. In other
words, the lessons outlined here are limited to pointing out the three-pronged effects of the conflationary status quo on the legal system itself, while the reconstruction of legal doctrine is addressed later in Chapter Five of the Project.

Substantively, conflationary analyses produce rulings that vary wildly from case to case and from court to court. The inconsistencies add up to doctrinal chaos, thus removing any semblance of overall coherence and rationality from the resulting opinions and judgments that incrementally bring into existence bodies of law. Pragmatically, these analyses and rulings make existing anti-discrimination laws underinclusive and keep the law from fulfilling its formal duty of prohibiting and punishing sex/gender bigotries. This cumulative underinclusiveness as a practical matter makes it legal to engage in various sorts of discriminatory actions. Systemically, these failures and inconsistencies undermine the effectiveness and legitimacy of a system that grounds its efficacy in informed and principled operation. These failures, over time, can result in the legal system being viewed as a mere caricature of its formal self-image, thus bringing the law into disrepute. These three institutional concerns therefore counsel reform for the law’s own sake, if nothing else.

The cases reviewed earlier once again illustrate this three-pronged problem. The unseemly and transparent lurching of analyses and rulings from case to case shows the courts reacting to the claims before them without much deliberation, raising the specter of a visceral judicial distaste for the plaintiffs themselves. This apparent indulgence in “personal predilection” produced virtually knee-jerk rejections of meritorious claims that clearly involved biases against social gender atypicality that enforce Leg One’s traditionalist, active/passive sex/gender stereotyping. Thus, as a substantive matter, these rulings unjustifiably constricted the existing, formal mandate against sex and gender discrimination and sowed doctrinal chaos in the process.

By limiting the substance of the law, these analyses and rulings also deformed it because they rendered the law devoid of informed or principled reasoning and virtually bereft of practical relevance to the anti-discrimination project. These rulings, in other words, operate virtually to incapacitate the formal mandate of Title VII and equal protection jurisprudence against sex and gender discrimination in conflationary contexts. And, not only does conflationary analysis harm the law in the practical sense of making legal doctrine unduly underinclusive, it belies the legal institutions’ claim to respect and legitimacy based on impartial applications of neutral princi-

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985. See supra notes 332-37 and accompanying text.
986. See supra Chapter Two, Parts II-III.
988. See supra Chapter Two, Part IV.C-D.
Indeed, the only consistency to be found among the variated conflationary approaches of the cases is in their uniformity of unjustifiable results, which repeatedly and conspicuously tilted toward hetero-patriarchal tenets and imperatives. This uniformity of result in turn, and inevitably, points to the sort of results-oriented adjudication that is said to be antithetical to the legal system’s self-professed values. Thus, the conflation’s toll on legal culture ultimately turns the law’s response to sex and gender discrimination into a failure substantively, pragmatically, and systemically.

C. Societal Division & Dysfunction

As mentioned above, conflationary analyses tend to generate rulings that run counter to the fundamental principles of liberty and equality that are the hallmarks of this nation’s self-identity. The conflation, as applied by the courts, thus fans the sex, gender, and sexual orientation divisiveness that has plagued American society for so long, and that has burst to the forefront of the nation’s political discourse in recent times. This divisiveness tends to polarize communities and to pit Americans against each other in an ugly standoff over the rights and roles of women and sexual minorities in the nation’s social, economic, and political mainstreams.

989. See supra notes 332-39 and accompanying text.

990. See supra Part I.E.2.

991. The values and ideals enshrined in this nation’s sacred texts exalt freedom, liberty, justice, and equal opportunity. See, e.g., The Declaration of Independence para. 1 (U.S. 1776) (declaring that “men” are “created equal” and that “Life, Liberty, and the pursuit of Happiness” constitute inalienable birth rights); U.S. Const. amends. V and IX (establishing “life, liberty, or property” and “equal protection of the laws” as constitutional rights protected from federal and state infringements). The portico of the United States Supreme Court building in Washington, D.C., similarly proclaims “Equal Justice Under Law.”

992. This divisiveness broke out as a declared “cultural war” during the 1992 Presidential campaign season. See, Paul Galloway, Divided We Stand: Today’s ‘Cultural War’ Goes Deeper than Political Slogans, Time, Oct. 28, 1992, at D1 (discussing the invocation of cultural warfare by Patrick J. Buchanan and others).

993. See Paul Gray, Whose America?, Time, July 8, 1991, at 12, 17 (discussing the debate over educational curriculum diversity and the “enduring volatility of the American experiment” which it represents); Robert Hughes, The Fraying of America, Time, Feb. 3, 1992, at 44, 44 (lamenting the breakdown of “mutual respect” which is necessary to accomplish the “collective act of the imagination” that is American society).
Conflationary analyses and rulings, in short, license sex/gender bigotries that contribute to societal factionalism and dysfunction.

Judicial coddling of employer discrimination in the cases reviewed above again illustrates the problem. In those cases, conflationary analyses and rulings approved acts of sex and gender discrimination under the guise of approving sexual orientation discrimination. In this way, conflationary analyses opened a loophole for acts of sex and gender discrimination that properly are subject to condemnation under the formal mandate of Title VII and the equal protection clause of the Fourteenth Amendment. These judicial pronouncements consequently contribute to the sex/gender disharmony and distrust that afflict this society.

Moreover, by repeatedly reaffirming the specific legality and respectability of discrimination that ostensibly or actually is based on sexual orientation, courts and (by implication) lawmakers contribute to the oppression of perceived and actual sexual minorities. In this sense, courts signal to bigots that homophobia, or any bigotry that under the conflation plausibly may be depicted as such, may still be practiced with impunity. Thus, each time that a tribunal rejected a meritorious sex/gender claim with the pronouncement that the law does not protect sexual minorities, it expressly ratified sex/gender bigotries that derogate three distinct, though culturally cross-correlated, sex/gender phenomena: femaleness generally, male social gender atypicality specifically, and minority sexual orientation generally. Over time, these derogations work to subordinate both women and sexual minorities because they target sex/gender identities and phenomena most closely associated with these two groups. Legal culture’s recycling of the conflation therefore not only hurts the individuals that turn to its tribunals for justice—not only undermines the law as a coherent system of justice—but also harms society generally by exacerbating, rather than ameliorating, historic and persistent sources of division, subordination, and oppression.

As this brief tabulation of lessons from legal culture indicates, the conflation’s influence over the legal system causes and compounds harm on multiple levels, and these harms flow from the courts’ strategic or ignorant (mis)treatments of conflationary bigotries. These harms will continue so long as the legal system refuses to recognize that, under the joint cultural operation of Leg One and Leg Two, discrimination “based” on sex and gender is conflated with discrimination “based” on sexual orientation precisely because these three constructs are conflated in society. In short, the law cannot fulfill its mandate to fight sex and gender discrimination if it

994. See supra Chapter Two, Parts II-III.
995. See, e.g., supra note 336 and accompanying text.
996. See supra Chapter Two, Part V.
continues to embrace and recycle the conflation culturally while denying it legally. 997

III
LESSONS FROM INDIGENOUS CULTURE(s)

The third set of insights or lessons is offered by the Native American sex/gender system discussed in Chapter Three. This system, built upon an altogether different and non-conflationary sex/gender paradigm, provides a concrete counterpoint to the Euro-American system. A comparative look at the two systems permits expansion of this discussion beyond the confines of acculturation, and, particularly from a Euro-American perspective, beyond the conflation's omnipresent and limiting legacy.

A. A Comparative Look at (Non)Conflationary Legacies

As noted in Chapter Three, the historical record shows an intricate mix of similarities and differences between Euro-American and Native American sex/gender arrangements. The bottom line, however, is that only the Euro-American system is corrupted by the conflation because only the Euro-American system deduces gender intransitively from sex and because only the Euro-American system constructs sexual orientation as the sexual component of sex-determined gender. An immediate and important result of this threshold distinction is the divergence in systemic preferences for heterosexual versus heterogender couplings. Due to these key differences and others, the end results under each system are markedly dissimilar even though the two systems share some remarkable similarities.

The historical record also indicates that neither system can be regarded as “natural” and inevitable. Rather, this record shows that both systems represent societal choices, even though both make earnest essentialist claims. Thus, each system must be assessed on its merits, or in light of its respective codes and actions; to be thorough, a comparative and critical assessment of the two must examine how and to what extent each system fulfills self-professed values and goals regarding sex/gender relations. The discussion presented below consequently traces the (dis)similarities of the two systems to assess their respective and comparative records of experience and results, and to consider the integrity of each system under self-professed values and ideals.

1. The Deductive/Inductive Gender Distinction

The threshold difference between the two systems is in their respective conceptions of gender. Under the Euro-American system, gender exists as a set of cultural abstractions imposed on the individual based exclusively on

997. See supra Chapter Two, Part IV.C.
her or his sex.\textsuperscript{998} This approach thus \textit{deduces} gender from a person’s sex, and makes this deduction permanent. Consequently, a Euro-American’s social and sexual gender profile originates and is imposed externally at birth, before the individual has gathered any sense of sex/gender self-awareness. It is strictly and rigidly a product of society’s matching a person’s external genitalia with cultural gender abstractions.

The alternative—the inductive model—is unfamiliar. However, as Chapter Three describes, the inductive gender model was common among Native American cultures.\textsuperscript{999} In the inductive model, gender also exists as a set of cultural abstractions, but it is not imposed as a fixed or permanent set on individuals based solely on sex and regardless of individual personality. Rather, the inductive approach literally \textit{induces} a person’s gender from the personality attributes manifested incrementally by the individual as he or she gains a sense of self, regardless of sex, focusing particularly on the individual’s exhibition over time of occupational ability or orientation. Thus, in the inductive model, gender originates internally, and unfolds as part of the individual’s growing self-awareness. Then, as an individual’s sense of self gradually consolidates, society confirms the gender fit by matching her or his manifested personality to the existing social abstractions and by accepting the individual’s occupational propensities. Indeed, society celebrates this maturation and attainment of gender identity with ceremonial rites that publicly recognize and collectively ratify the individual’s realization of that gender.

As this summary indicates, the threshold distinction between the two systems is that the deductive model presupposes that sex conclusively settles gender, whereas the inductive model uses sex only as an indicator of gender, rebuttable by personality. A critical consequence of this distinction is that the deductive model conceives gender as an intransitive trait whereas the inductive model conceives gender as a transitive trait. Thus, gender atypicality is almost oxymoronic under the inductive model but is highly problematic under the deductive model. Consequently, only the deductive gender model entails a fear of and retaliation against persons or phenomena that seem to disjoin sex and gender in violation of Leg One.

By not basing gender on sex intransitively, the inductive gender model made itself relatively unconcerned with symmetries of sex and gender.\textsuperscript{1000} The native model thereby better accommodated gender individuality: inductive arrangements conceived of gender as a spectrum or continuum of possibilities, and flexibly allowed individuals to settle at the point that best

\textsuperscript{998.} See supra notes 118-30 and accompanying text.

\textsuperscript{999.} See supra notes 736-66 and accompanying text.

\textsuperscript{1000.} Androsexism and heterosexism are not particularly significant in societies that employ the inductive/transitive model of gender because neither women nor sexual minorities pose sex/gender anomalies perceived as destabilizing of a dominant social and sexual hierarchy. See supra Chapter Three, Part II.
comported to her or his own felt talents and personality. By allowing individuals to customize various mixes of gender indicia, the inductive/transitive model promoted gender variety and diversity. Accordingly, inductive arrangements are more likely to accommodate diverse manifestations of human personality, both socially or sexually. Thus, the inductive/transitive gender model better promotes the development of each person's manifest abilities and talents into productive skills regardless of social (or sexual) prescriptions and proscriptions regarding human personality.

Each system did exhibit particular biases and preferences, however. These lessons therefore must focus on a comparative assessment of their respective precepts and practices. Thus, the discussion now turns to a key distinction between the two systems—the Euro-American system's preference for heterosexual (and hetero-patriarchal) couplings and the contrasting Native American system's preference for heterogender (though not necessarily heterosexual) couplings—before continuing with a comparison of other (dis)continuities between the two.

2. **Heterogender v. Heterosexual Ideals**

An immediate, and profoundly important, result of the deductive/inductive gender distinction is the difference between the Native American interest in heterogender couplings and the Euro-American insistence on heterosexual couplings.1001 This difference and its implications have remained generally obscured because a deconstruction of the conflation is a prerequisite to recognizing the difference between the two types of preference. This difference is important, however, because it leads to dramatically contrasting understandings of, and approaches to, sexual or affectional relations.

Because inductive arrangements did not conflate sex and gender, Native American culture recognized three genders while also recognizing two sexes. Therefore, some couplings could be cross-sex while others could be same-sex, yet both could be cross-gender and hence be deemed socially and economically viable. For instance, as previously noted, a person of the male sex and of the berdache gender could freely mate with a person of the male sex and of the male gender.1002 On the other hand, a person of the male sex as well as of the male gender was relatively unlikely to mate with another also of the male sex and of the male gender.1003 Native bias was focused on a couple's gender alignments, not on its sex alignments.

To the Euro-American focused on sex, these two couplings appear identical because both are homosexual. But to the Native American interested in gender, the two are quite different because only the latter represents

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1002. See supra notes 846-49 and accompanying text.
1003. See supra note 849 and accompanying text.
a homogender coupling. In fact, both perspectives are accurate: the two couples described indeed are identical on the basis of sex but nonetheless are dissimilar on the basis of gender. The Euro-American system generally devalues both, while the Native American system generally discouraged only the second couple.

The heterogender ideal therefore permits greater, though not total, freedom regarding sexual or affectional unions. This greater freedom, of course, reflects broader native norms regarding sex, gender, and sexuality that favored autonomy over anatomy. Still, the heterogender ideal entails a devaluation of homogender couplings. This bias in favor of heterogender couplings, though based on practical or economic considerations, interjects a definite sense of bias into the system. This difference in turn therefore highlights a similarity: both systems have their particular and definite biases. These biases and their consequences are considered in relation to each other and to self-professed systemic values below. First, however, the remaining sex/gender (dis)continuities must be noted, along with a comparative critical assessment of each system’s essentialist claims.

3. Comparative Sex/Gender (Dis)Continuities

As Chapter Three illustrates, the two systems also exhibited other similarities or continuities. Both systems, for example, used external genitalia to assign sex at birth. Both systems also relied on the fundamentality of sex to organize the social order. In addition, both systems conceptualized the ingredients of gender in male and female terms, and both systems used occupation and appearance to effectuate and symbolize gender. Thus, several elemental features of the two systems may be viewed as common to both.

Yet, the two systems have been driven by very different sex/gender tenets and imperatives: in the Euro-American setting the imperative is hetero-patriarchal hegemony, while in the Native American context the imperative was sex/gender power parity. This combination of elemental similarity and ideological divergence thus shows that identical or similar “raw” elements may be employed toward the accomplishment of radically different ends. This combination in turn suggests that both systems are but social constructions, albeit on the grandest of scales. Accordingly, this combination calls for some suspicion of essentialist claims made on behalf of either system or its imperatives.

1004. See supra Chapter Three, Part I.A.5.
1005. See supra Chapter Three, Part I.A. and Part II.
1006. See supra Chapters One and Two; see also supra Part I.E.
1007. See supra Chapter Three, Part I.A-B.
4. Comparative Essentialist Claims

Interestingly, the self-imputation of essentialist foundations is another feature common to both systems. Both systems represent(ed) themselves as reflective of and responsive to “natural” conditions and needs. To some extent, perhaps they both were. Nonetheless, both systems also encapsulate and represent calculated societal choices.

Euro-American hetero-patriarchal tenets and imperatives, as noted earlier and elaborated below, assert essentialist claims based on invocations of nature (and normality and morality). Of course, Euro-American essentialist claims are facilitated by the deductive/intransitive gender model, which conflates personality with biology. Indeed, conflationary arrangements generally bolster the characterization of the overall Euro-American sex/gender status quo as “natural.” In other words, the conflation of a pure social construction (gender) to a bio-physical construct (sex, or external genitalia) helps to essentialize the entire system built on this scheme because it cloaks the construct with biology. The conflation, and specifically the deductive gender model under Leg One, thereby aids justifications for the status quo that appeal to “nature” (and, hence, “normality” and “morality”).

The Native American sex/gender parity imperative likewise rested on essentialist beliefs regarding the balance of natural dualities. This native essentialism, for instance, specifically valorized berdaches precisely for their perceived ability to unify Nature’s own dualities. Thus, both sex/gender systems, as well as their underlying imperatives, were regarded as natural in origin and purpose by their respective cultures.

Yet, only the Euro-American system deemed it necessary or desirable to adhere gender to sex, which limited the number of cognizable genders to two, thus creating a binary view of gender that rendered masculinity and femininity as mutually exclusive active/passive domains. Consequently, only the Euro-American system viewed gender as a trait requiring dichotomized uniformity rather than permitting individuated diversity. Only the Euro-American system policed gender socially and punished gender atypicality socially. In short, only the Euro-American system conflated sex and gender under Leg One, making both intransitive.

Additionally, only the Euro-American system made sexuality central to its construction of gender; only the Euro-American system conceived of sexual orientation as the erotic or affectional component of the overall gender composite under Leg Two of the conflation. More specifically, only the Euro-American system cross-associated social gender atypicality with minority sexual orientation, or with same-sex desire and activity, under the

1008. See, e.g., supra Chapter One, Part III.
1009. See supra notes 302-06 and accompanying text; infra Part III, B.
1010. See supra notes 793-803 and accompanying text.
1011. See supra Chapter One, Part I.A.
joint operation of Leg One and Leg Two. This cross-association ensured
that the Euro-American problematization and pathologization of gender
atypicality would extend both to social and sexual gender atypicalities.\textsuperscript{1012}
Thus, only the Euro-American system militated against same-sex sexuality,
and especially against the adoption of gender-atypical stances within same-
sex couplings. In short, only the Euro-American system conflated gender
and sexual orientation.

Still, it must be noted that berdachism entailed a palpable correlation
between same-sex sexuality and gender-crossing/mixing behaviors.\textsuperscript{1013}
This correlation may be seen as resembling Euro-American conflationary
cross-associations between minority sexual orientation and social gender
atypicality. Indeed, this association is what transfixed and horrified Euro-
American (mis)perceptions of berdaches. Berdachism, however, centered
on the creation of a distinctive and respected gender, which attached to
individuals independent of sexuality or sexual orientation. Berdachism thus
demonstrates that gender atypicality and minority sexualities may exist in
tandem, but that such a correlation need not entail denigration and stigmati-
zation of either.

This sketch of the intricate (dis)continuities between the Native Ameri-
can and Euro-American systems demonstrates that even the sex/gender
universals common to the two sex/gender systems are constructed. In other
words, neither system may be deemed to embody a fixed, natural, or abso-
lute sex/gender framework because the two systems serve wildly divergent
imperatives and yield mutually exclusive results, even though they share
common elemental features. If either were an embodiment of essential
truth, the other could not and would not exist. Yet both have (co)existed for
centuries, and (to some extent) continue to (co)exist. Moreover, both have
prospered, and both have gained ascendancy on this continent, though at
different (yet overlapping) times. This realization strongly suggests that a
critical and intellectually honest comparative evaluation must recognize that
the two systems must be judged by the imperatives that they serve because
neither can rest on essentialist claims for their conclusive justification: the
underlying imperatives, themselves, must provide the ultimate justification
for the system that serves and sustains them.\textsuperscript{1014}

5. A Critical Comparison of Sex/Gender Imperatives

Given the record presented above, the sex/gender imperatives underly-
ing each system are apparent. The Euro-American imperative is adherence
to androsexism and heterosexism in its historic and present form of institu-
tionalized hetero-patriarchy.\textsuperscript{1015} As shown in the first two Chapters of this

\textsuperscript{1012} See supra Chapter One, Part I.B-C.
\textsuperscript{1013} See supra notes 773-92 and accompanying text.
\textsuperscript{1014} See infra Part III.B.
\textsuperscript{1015} See supra Chapter One, Part I.A; see also supra Part I.E.
Project, the conflation is the centerpiece of this arrangement; it is the linchpin for the continuing regulation of sex, gender, and sexual orientation in favor of hetero-patriarchal active/passive tenets and imperatives. The Native American imperative, however, is the attainment of sex/gender autonomy and balance. The conflation, as noted in Chapter Three, simply did not exist in native societies. In its absence, the socio-sexual domains covered by the conflation were left largely unregulated so that individuals could make personal “choices” regarding gender and sexuality. This relatively high degree of sex/gender autonomy resulted in native sex/gender freedom and diversity, and in sex/gender power parity.

Thus, for Euro-Americans, the conflation’s first leg—sex and gender—undermines the potential for gender social diversity enjoyed under the Native American system. In other words, the first leg of the conflation truncates social/public personality and blocks its diversity because the conflation of sex with deductive and intransitive gender insists that individuals uniformly and permanently conform their social personality manifestations to the gender attributes that the system has assigned to their sex. The homogenizing effects unavoidably and deliberately are wide-ranging, spanning from appearance to occupation.

Furthermore, the conflation’s second leg—gender and sexual orientation—makes sexuality in large part subservient to the same ideological imperatives regarding gender that nip the individual in the bud socially. Because sexual orientation is constructed as the sexual component of gender, the conflationary scheme also implicates the sexual/private personality of the individual—her or his persona in intimate settings that otherwise might escape regulatory control. As a whole, then, the conflation of the three traits is what enables Euro-American society to control and forcibly homogenize the individual’s entire personality—socially (as a “public” person interacting with society) and sexually (as a “private” person interacting with affectional partners).

This depth and scope of control seems antithetical to this nation’s foundational values and aspirations, which expressly have praised heterogeneity, egalitarianism, and personal liberty since the United States was formed. This depth and scope of control, in fact, represents a creeping sex/gender totalitarianism—a traditionalist occupation both of public/social life and private/sexual life. This regime thus seems violative of funda-

1016. See supra Chapter Three.
1017. See supra notes 122-30 and accompanying text.
1018. See supra notes 131-47 and accompanying text.
1019. See supra Part I.B.
1020. See supra note 330 and authorities cited therein on equality and sex/gender anti-discrimination laws, principles, and issues. See generally Valdes, Diversity and Discrimination, supra note 991.
1021. See generally Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 784 (1989) (defending privacy under substantive due process principles as a bulwark against “creeping totalitarianism, an unarmed occupation of individuals’ lives”) (emphasis in original).
mental and formalized legal principles that have espoused dignity, equality, and non-discrimination since the adoption of the Fourteenth Amendment to the Constitution, and certainly since the enactment of federal civil rights legislation during the twentieth century. In other words, this comparative look at the two systems shows that Euro-American sex/gender imperatives are at odds with the primary cultural and legal principles and aspirations that purportedly define and legitimate the United States and its legal system. This organic dissonance suggests that the current conflationary system cannot withstand informed critical scrutiny.

In contrast, the Native American system affirmatively served both sex/gender liberty and equality. By not demanding pre-arranged and permanent conformity to fixed sex-based gender roles, and by encouraging individuated personality development, the native system nurtured individual liberty in the most personal or basic aspects of human life. Moreover, by not fixing social and economic power based on sex (and/or -gender) designations, the native system helped to foster a general sense of sex/gender equality, opportunity, and dignity throughout society. Thus, of the two, native arrangements in practice are more likely to help advance sex/gender egalitarianism and pluralism, whereas Euro-American arrangements are more likely to propound sex/gender stratification and subordination. Ironically, native sex/gender arrangements therefore seem more reflective of, and better able to fulfill, the professedly egalitarian beliefs and sensibilities of American society.

Additionally, in not regulating social and sexual gender roles extensively, native cultures enhanced their ability to maximize individuals’ talents by fully and efficiently incorporating both women and sexual minorities into the community’s social and economic mainstream. In this way, sex/gender liberty facilitated individual productivity as well as personal happiness. And, because no one had to demean, discourage, or punish deviations from fixed and dichotomized sex/gender sexual orientation standards, the native system freed both society and individuals from the endless and costly chore of policing sex/gender boundaries. The native system thus represents a shrewd policy choice: native arrangements not only honored and expanded individual dignity, freedom, self-actualization, and equality of opportunity, they also reduced the various human and fiscal costs incurred under the Euro-American system. Native sex/gender arrangements thereby helped promote the harmony, productivity, and efficiency of the society as a whole. The utility of native arrangements thus bests the utility of conflationary sex/gender arrangements.

In sum, this comparative outline of sex/gender imperatives underscores how the conflation serves as the vehicle through which dominant forces in

1023. See supra notes 332-38 and accompanying text.
1024. See supra notes 722-35 and accompanying text.
Euro-American settings homogenize the social and sexual shaping of each and every individual from the moment of sex designation at birth. The Native American system, on the other hand, did not impose on its people any aspect of the conflation, and thus freed both its people and itself of conflationary demands, pressures, and constraints. In this way, the native system not only better cultivated personal productivity and societal unity, it also better served Euro-American equality and utilitarian ideals.

Unfortunately, the native system was overwhelmed by the conflationary forces which emigrated to the New World from Europe over the last 500 years. Nonetheless, through its recorded sex/gender example, it can serve as a model of sex/gender freedom to help contemporary cultural and legal institutions in this country progress beyond the conflationary present. Consequently, the lessons from indigenous culture end with a final instruction: the dismissal of Euro-American sex/gender essentialism as based on self-serving constructions of nature, normality, and morality.

B. Naturality, Normality, Morality & Utility: The Euro-American Construction of Conflationary Essentialism

As Chapter One discussed, the Euro-American system posits that conflationary sex/gender traditions favoring hetero-patriarchy emanate from "nature" and thus reflect a stable, objective, and "natural" sense of normality and morality. This claim effectively argues that "nature" embodies "normality" and settles "morality" and that, consequently, "naturality" is "normality" and "morality." Correspondingly, the "unnatural" is abnormal and immoral. This sense of "naturality" in turn was and is used to justify the subordination and oppression of women and sexual minorities under and through the conflation. It also was used to justify the evisceration of Native American non-conflationary sex/gender arrangements. This essentialist claim thus motivates a powerful sense of righteousness: it positions culturally dominant forces to disclaim, and shift to "nature," responsibility for their exercises (or abuses) of power and privilege.

In legal culture specifically, this appeal to "nature" is exemplified by two Supreme Court opinions that span the last century: Bradwell v. Illinois and Bowers v. Hardwick. The Court upheld the exclusion of women from law practice in Bradwell, and the criminalization of same-sex sodomy in Bowers. The Court's analyses joined the two seemingly unre-
lated scenarios by resting the rulings in both cases on essentialized conceptions of nature, normality, and morality.

In Bradwell, for example, one Justice reasoned that “the nature of things” had allocated “the domestic sphere as that which properly belongs to the domain and functions of womanhood.” Because this arrangement was deemed “the law of the Creator,” the very “idea of a woman adopting a distinct and independent career from that of her husband” was “repugnant” to the “natural” state of affairs. Similarly, in Bowers Chief Justice Burger reasoned that the proscription of sodomy emanates from God-given Judeo-Christian mandates. The idea that sexual minorities have a human or legal right to be protected from governmental intrusions was deemed “at best, facetious.” Thus, in both instances, the Court viewed the interests and claims of women and sexual minorities as contrary to traditionalist and conflationary notions of nature. In so doing, the Court embraced prevalent notions of a pre-ordained, or essential, system of naturality, normality, and morality to uphold state actions against women and sexual minorities.

The preceding Chapters of this Project demonstrate, however, that this appeal to nature, though convenient, is illusory and unfounded. Chapter One plainly shows how the conflation was culturally constructed and clinically codified. Chapter Two embarrassingly shows the force of law used to keep this purportedly stable state of “natural” sex/gender alignments from disintegrating through popular expressions of sex/gender individuality and diversity. In particular, the Native American example in Chapter Three affirmatively shows that humans can achieve basic sex/gender equality without jeopardizing the existence or progression of humanity. Collectively, these three Chapters belie the claimed essentialism of conflationary arrangements.

Indigenous cultures additionally demonstrate the possibility of using sex and gender as reference points for social organization without turning to

1032. 83 U.S. at 141 (Bradley, J., concurring).
1033. id.
1034. 478 U.S. at 196-97 (Burger, C.J., concurring).
1035. id. at 194.
1036. These rulings, of course, were part of the broader reliance on “nature” as an arbiter of what “ought to be,” originally embraced by the ancient Greeks and since then echoed throughout Euro-American legal and social discourse. See supra notes 302-07 and accompanying text. See generally Otis R. Damslet, Note, Same-Sex Marriage, 10 N.Y.L. Sch. J. Hum. Rts. 555, 558-60 (1993) (tracing the deep historical roots of homosexual marriage and observing that “sexual contacts between individuals of the same sex are known to occur in practically every species of mammal which has been extensively studied”) (quoting Alfred Kinsey et al., Sexual Behavior in the Human Female 448 (1953)).
1037. For instance, some Euro-American researchers came to the conclusion that the Zuni had developed a more enlightened, civilized, and harmonious society than Western culture. See Roscoe, supra note 718, at x-xi (discussing the assessments of John Collier, Commissioner of Indian Affairs under Franklin Roosevelt; Elsie Clews Parsons, feminist anthropologist; Ruth Benedict, popular anthropologist; and others).
androsexist or heterosexist precepts.\textsuperscript{1038} The native experience thus shows that neither androsexism nor heterosexism are prerequisites for the development of productive individuals or for the creation, maintenance, or advancement of a functional and prosperous social order. On the contrary, the native example illustrates that neither androsexism nor heterosexism represent some essential or beneficial prerequisite to civilized life, "ordered liberty," or social harmony. As both a practical matter and a moral consideration, the Euro-American conflation simply is not elemental to individual or collective human well-being. In other words, Chapter Three conclusively confirms what Chapters One and Two vividly demonstrated: that the Euro-American system does not represent some inevitable or beneficial mandate of "nature." Hetero-patriarchy is not Nature's gift to humanity.

In addition, native societies belie any claimed utility of conflationary sex/gender arrangements. Native arrangements allowed their members more individual liberty and autonomy regarding personality and lifestyle than is typical under the Euro-American system because the Native American sex/gender system lacked the myriad of cultural pressures requiring that personality, occupation, living arrangements, and sexuality conform to rigid sex-based expectations.\textsuperscript{1039} In this way, native arrangements simultaneously maximized individual liberty and productivity as well as societal harmony and efficiency. Native cultures therefore not only refute the claimed essentialism, morality, and utility of traditionalist Euro-American sex/gender arrangements, but also provide a powerful vision and potential model for non-conflationary, post-conflationary and anti-conflationary reforms. The native sex/gender example shows that what is, and has been, is not necessarily what must or will be.

IV
Final Lessons

This final Part of this Chapter describes three lessons that spring from, but transcend, the lessons from modern culture, legal culture, and indigenous culture. The first of these emphasizes the primary roles of sex and gender in the conflationary status quo, and sexual orientation's derivative and illusionary nature within this status quo. The second notes how this status quo additionally implicates status/conduct issues vis-à-vis sexual orientation. The third lesson pauses to reflect on what can be learned about the conflation's three endpoints as a result of this Project's examination of the conflation's three legs. With these three lessons registered, the Project turns to doctrinal reconstruction in the next Chapter.

\textsuperscript{1038} See supra notes 722-35 and accompanying text.
\textsuperscript{1039} See supra Chapter Three, Part I.
A. The Fundamentality of Sex, Centrality of Gender & Illusionism of Sexual Orientation

As noted at the outset, the deconstructive focus of this Project is on the “legs” of the conflation—on the interrelationships that create conflationary linkages between and among sex, gender, and sexual orientation. Even though this treatment does not highlight any one of this trio, the first of these three final lessons focuses on points about each: the recurring fundamentality of sex, the inescapable centrality of gender, and the derivative illusionism of sexual orientation. This lesson, in turn, is central to the deconstruction of the conflation as a whole.

As the sex/gender record bared in Chapter One and Chapter Two revealed, sex is fundamental to the conflationary status quo. This construct is fundamental to the sex/gender system as a whole for two reasons. First, it is fundamental because the active/passive paradigm uses sex as the basis for societal organization and operation. Second, this construct is recurrently fundamental because sex is used to deduce and assign gender intrinsically, which in turn fixes the official parameters of social and sexual personality for the individual permanently. Thus, on a societal level as well as on an individual level, sex is fundamental to life and identity.

The recurring fundamentality of sex leads to, and is matched by, the inescapable centrality of deductive gender to the regulation of conflationary sex/gender arrangements. As shown in Chapters One and Two, gender consistently has played and continues to play the central role in the operation of the Euro-American sex/gender system: in the formulation of the active/passive paradigm, in the manufacture and management of socio-sexual identity, in the construction of sex(ual) (ab)normalities, in the ideological hierarchies that govern the Euro-American sex/gender system as a whole, and in the grossly unprincipled conflationary analyses of the courts. The lessons from modern culture in particular show that conflationary forces undertake a relentless and mass appropriation of gender itself. In short, gender is the arena in which the conflationary contest between every individual and the system over the formation and manifestation of her or his social and sexual personality and identity takes place.

Moreover, these socio-sexual struggles over gender are infused with a sense of ideology and destiny because each contest determines the individual’s worth, role, and rank in the sex/gender pecking order. Thus, the Euro-American deductive/intransitive gender model is the cornerstone of heteropatriarchy and its conflationary sex/gender hierarchies. The Euro-American (mis)conception and (mis)treatment of gender socially and sexually is inescapably central not only to the creation and management of all socio-sexual types, but to the historic and continuing subordination of both women and sexual minorities.

The lessons from modern and legal culture are supplemented by the lessons from indigenous culture(s), which also made sex fundamental to the
social order(ing) and made gender central to personal, social, and sexual identity. However, native arrangements generally did not utilize sex or gender to (de)value humans as individuals. Nonetheless, the bias in favor of heterogender couplings that marked native arrangements could result in a devaluation of humans as constituents of a couple. Thus, even though each system based itself on sex, the two elected to employ different gender models. And, though this difference regarding gender yielded very different sex/gender relations under each, both systems place(d) gender squarely at the center of the individual's relationship to her or his community. This trans-cultural record therefore points to gender as the terrain that, regardless of bias or ideology, inevitably must be contested (as in the Euro-American setting) or negotiated (as in the Native American setting) between the individual and her or his society. In both systems, gender is the salient feature in the molding of every person's socio-sexual identity.

Gender's recurring and inescapable centrality in personality formation and in human relations strongly suggests that particular ways of constructing gender inevitably will affect everyone in some way. Gender, whether deductive/intransitive or inductive/transitive, is the means through which all of us manifest and present ourselves as humans, socially and sexually: as individuals and as groups, as men and as women, as members of the sexual majority and as members of a sexual minority. Therefore, a deconstruction of the conflation in its entirety—inclusive of all its legs and endpoints—is necessary to a wholesale and iconoclastic deconstruction of gender itself, and vice versa.

The Euro-American clinical, cultural, and legal experience with the conflation specifically shows that the deconstruction of gender itself cannot be complete unless it accounts for the roles of sex and sexual orientation in the (mis)construction of gender. Gender simply cannot be unpacked alone, as if in a vacuum, because it is completely conflated with sex and with sexual orientation. And, the reverse is equally true. In fact, the Euro-American experience strongly indicates that no one of these three conflated constructs may be understood fully or addressed sensibly without accounting for the interdependencies that bind the trio normatively and intellectually. The on-going deconstruction of sex, gender, or sexual orientation therefore must be handled as one critical undertaking toward sex/gender/sexual orientation equality.1040

Without such a contextual and holistic approach, the overlapping and "utterly confused" social and legal categories founded on these traits will survive intact. This sort of continuing confusion will promote the continuation of the conflationary (and discriminatory) dynamics that flow from, and swirl around, these categories and the people placed in them. In other

1040. See supra Chapter Two, Part V.C. See infra Chapter Five.
1041. The phrase is expansively adapted from Michel Foucault's description of "sodomy" as "that utterly confused category." See Foucault, supra note 1027, at 101.
words, the conflationary status quo will ensure that sexual orientation remains integral to androsexism and that gender remains integral to heterosexism so long as this status quo endures. Understanding this conflation, and gender’s central role in it, thus paves the way for a searching, contextual, and holistic reconsideration of existing anti-discrimination law.

This sort of holistic and inclusive approach to gender (and sex) in turn bares for inspection the nature and role of sexual orientation in conflationary sex/gender dynamics. The fundamentality of sex and the centrality of gender thus lead to the last point of this lesson: the illusionism of sexual orientation as a derivative construct. As we saw in Chapter One, formal concepts of “sexual orientation” came into existence within Euro-American culture only in the past century, even though same-sex relations existed prior to the invention of this construct at the turn of the century. And, it did so to help sexology organize and enforce sex and gender imperatives.1042

As Chapter Two further illustrates, the construct of sexual orientation has come to be deployed under the conflation to vindicate sex and gender imperatives; Leg Two is deployed strategically to vindicate Leg One substantively.1043 Additionally, Chapter Three explains that sexual orientation did not exist as a formal construct in native sex/gender arrangements because sex, and especially gender, were conceived or employed in non-conflationary ways; the formal absence of sexual orientation from non-conflationary native culture(s) shows how the invention, design, and use of the construct is driven by conflationary imperatives regarding sex and gender.1044 The lessons from these three Chapters thus teach that conceptions and deployments of sexual orientation are entirely contingent on sex and gender—on how sex and gender are conceived and on the purposes sought to be achieved through the deployment of sex and gender.

In short, these lessons teach that sexual orientation is a derivative of sex and gender. The organization and existence of sexual orientation conceptually and operationally depends on a culture’s view and purpose regarding sex and gender. As seen above, in the Euro-American conflationary context, the derivative illusionism of sexual orientation flows from the fundamentality of sex and from the centrality of gender, and from the traditionalist active/passive imperatives that undergird their construction and deployment.

The derivative and illusionary nature of sexual orientation in practice is furthered by the actual operation of the conflation in modern and legal culture. As noted above, the configuration of the endpoints that form this conflation ensures that sex and gender always and necessarily will underlie the practice of sexual orientation discrimination. One or both of those two endpoints is always and necessarily connected to sexual orientation; gender

1042. See supra Chapter One, Part I-II.
1043. See supra Chapter Two, Part IV.
1044. See supra Chapter Three, Part I.A; see also supra Part III.
is connected to sexual orientation under Leg Two while sex is connected under Leg Three. However, the reverse is not so: sexual orientation is not an endpoint of Leg One, which means that sex and gender discrimination occurring along that leg of the conflation does not involve sexual orientation. Thus, sexual orientation must be protected if sex and gender are to be protected, but the reverse is not so.1045

This dynamic reveals that the current configuration of sex/gender anti-discrimination law is self-defeating; the lack of protection for discrimination occurring along Leg Two and Leg Three because they involve “sexual orientation” sets up the failure of formal protection against sex and gender discrimination occurring along Leg One. The configuration and operation of legs and endpoints within the conflation combine with the legality of sexual orientation discrimination to invite defendants and judges to shift cases over to Leg Two: as the cases reviewed in Chapter Two repeatedly show, the shift from Leg One to Leg Two (or Leg Three) effectively pulls sexual orientation into the analysis of the controversy, thereby exploiting the sexual orientation loophole in sex and gender anti-discrimination law. Thus, until legal culture acknowledges and understands how the fundamentality of sex and the centrality of gender combine to create the illusionism of sexual orientation (discrimination) under the conflation, the institutions and processes of the law will be unable to fulfill their formal mandate against sex and gender discrimination in a principled and effective manner.

B. A Note on the (Ab)Use of Behavior to Target Desire

The penultimate lesson drawn in this Chapter of the Project takes note of the way(s) in which conflationary arrangements abet the targeting of minority sexual desire in the name of regulating behavior. This discussion consequently implicates the recent and ongoing social and legal discourse over the status/conduct distinction and its application in sexual minority contexts. This social and legal discourse, brought onto the national stage by the Gays-in-the-Military controversy of 1993-1994,1046 echoes the general constitutional principle that is supposed to prevent society from using the force of law to penalize persons for “being” something or other. In other words, the status/conduct distinction generally prohibits state actions that

1045. See supra Foreword, Part I.A-D; see also supra Chapter Two, Part V.
1046. The controversy was sparked by the vow of President-elect Bill Clinton, shortly after his election victory, to reform the military’s exclusionary policies in a way that would comport with the prohibition against status penalties. See Healy, supra note 53. This national controversy is paralleled in legal discourse. See, e.g., Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1619-28 (1993) (arguing that sexual minority litigation efforts should focus on reversing Bowers v. Hardwick, and that strategic exploitation of status/conduct issues do not “sufficiently challenge” that ruling).
target a person’s bare desires, tendencies, inclinations, propensities, proclivities—or (in this instance) sexual and affectional orientation.1047

Under American jurisprudence, as articulated by the Supreme Court, the status/conduct distinction is considered a key check on governmental power over individuals’ hearts, minds and lives. The distinction supposedly carves out an inner sanctum within the person and psyche of every human being that generally allows us freely to be what we are or feel, even if this beingness, or these feelings, may sometimes be deemed “bad” under prevailing societal mores.1048 Thus, absent the actual commission of proscribed “bad” acts, harboring disfavored feelings is supposed to remain beyond the reach of state control. In the sexual orientation context, the status/conduct distinction therefore should immunize same-sex desire per se; penalties should have to be targeted at acts or practices, not at orientations or proclivities. Consequently, the persecution of same-sex desire is always couched—or obfuscated—in terms of behavior. But, in fact, the status/conduct distinction is frequently breached in the sexual minority context.

The ostensible regulation of behavior to reach bare desire is perhaps best exemplified by the anti-sexual minority policies of the United States Armed Forces.1049 Indeed, the military’s exclusionary rules and regulations hinge on a disingenuous use of “conduct” to mask its search-and-destroy focus on status: the policy expressly and explicitly mandates the disqualification or discharge of “homosexuals” found to have committed a same-sex act, but contemplates the excuse and retention of “heterosexuals” found to have committed the very same act, possibly within the very same liaison.1050 In effect, the regulation concedes that not all same-sex sexual acts justify sexual orientation label(s); only when the bad act is accompanied by the bad orientation will the military’s disciplinary machinery begin to grind. Consequently, this scheme uses desire as the dispositive factor while using conduct to disguise this targeting of desire.

This focus on status, or desire, initially was brought to the surface in legal culture, and in this specific context, during the 1980s in Watkins v. United States Army.1051 In Watkins, the Ninth Circuit pointed out that “the

1047. The status/conduct distinction was established as a constitutional law principle in Robinson v. California, 370 U.S. 660 (1962) (striking down a statute criminalizing drug addiction on the grounds that the U.S. Constitution forbids the punishment of the mere status of being addicted).

1048. See id. at 678-79 (Harlan, J., concurring) (finding a statute criminalizing narcotics addiction unconstitutional because it punishes a “bare desire to commit a criminal act”).

1049. See generally Valdes, supra note 53 (surveying and critiquing judicial treatments of the status/conduct distinction, primarily in cases involving lesbian and gay service members).

1050. Id. at 465-74 (quoting and critiquing the current regulations from a status/conduct perspective).

1051. 847 F.2d 1329, 1335 (9th Cir. 1988), withdrawn, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990); see also Valdes, supra note 53, at 406-11 (discussing the laborious history of the Watkins case from a status/conduct perspective).
regulations target homosexual orientation itself.”1052 The court therefore struck down the policy, noting that “[t]he regulations clearly mandate that homosexual acts give rise to a disqualifying presumption of homosexuality, though that presumption can be rebutted by proof of actual nonhomosexual orientation.”1053 Thus, the regulations explicitly, though indirectly, punish “illicit” status or identity rather than prohibited acts or behavior.1054 Since Watkins, this hidden focus on status has prompted similar judicial observations and rulings.1055 And, though these regulations have been modified several times over the years, they have consistently retained this status focus.1056

However, the military’s violation of the status/conduct distinction is not unique, nor even anomalous. Rather, the conflationary status quo also illustrates—and generally facilitates—the way in which culturally and legally dominant forces circumvent this doctrinal principle in practice. Specifically, conflationary clinical theories have helped to establish a climate and regime where the nature or extent of same-sex acts, rather than the actual performance of same-sex acts, is used as a proxy primarily for targeting those with the disfavored desire. Thus, clinical theories since the turn of the century have helped to legitimize the military-style absolution of same-sex behavior that is believed to result from sources other than disfavored desire.

For example, inversion theory’s usual diagnosis of only the “passive” man as an “invert” helps to highlight how same-sex activity or behavior, alone, did not automatically initiate cultural, clinical or legal interventions. The real litmus test, clinically and culturally, honed in on same-sex desire,

1052. Watkins, 847 F.2d at 1337.
1053. Id. at 1335.
1054. The regulations thus articulated a sense that the source of sexual orientation label(ing)s and discrimination may reside in something other than merely same-sex conduct or behavior. In other words, if some performers of same-sex conduct are not gay or lesbian, then the bases of gay and lesbian identity must reside elsewhere. For a detailed phenomenological analysis of the way in which sexual minority identity comes into being, see Valdes, supra note 55.
1055. See, e.g., Able v. United States, No. 94-CV-0974, 1995 U.S. Dist. LEXIS 3928 (E.D.N.Y. Mar. 30, 1995) (concluding that the “Don’t Ask, Don’t Tell” policy currently in place gives “Orwellian” treatment to status/conduct issues and holding the policy unconstitutional); Meinhold v. United States Dep’t of Defense, 34 F.3d 1469, 1479 (9th Cir. 1994) (upholding the exclusionary policy only to the extent that it “can reasonably be construed to mandate separation due to a statement of homosexuality only when that statement itself indicates more than the inchoate ‘desire’ or ‘propensity’ that inheres in status”); Steffan v. Aspin, 8 F.3d 57, 65-67 (D.C. Cir. 1993) (holding the ban on sexual minorities unconstitutional on status/conduct and equal protection grounds); Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991) (noting with disapproval that “an officer who commits a homosexual act can remain in the service if he or she is not a homosexual, but must be separated if he or she is homosexual”), cert. denied, 113 S.Ct. 655 (1992); Dahl v. Secretary of the Navy, 830 F.Supp. 1319, 1332 (E.D. Cal. 1993) (finding the policy to be grounded in prejudice rather than a legitimate government interest). These cases are discussed in more detail in Valdes, supra note 53, at 414-25.
1056. See Valdes, supra note 53, at 465-74 (analyzing the focus on status, which remains intact though somewhat submerged in the “Don’t Ask, Don’t Tell” compromise policy issued by the Clinton Administration in 1994).
not on same-sex behavior, because males who used homosexual relations simply as another sexual outlet for their “active” sex/gender appetites remained relatively safe. In other words, the actual commission of same-sex acts generally was not dispositive. Instead, the nature of the same-sex acts was deemed dispositive.

Because individuals with sustained and persistent same-sex desires were most likely to violate traditionalist gender boundaries during same-sex liaisons, they were the ones most likely to be caught, diagnosed, and penalized. Of course, these individuals were precisely the ones whom today we would characterize as gay or lesbian. As such, sexual orientation, per se, rather than same-sex conduct, emerged as the underlying aspect of sexual personality that most seriously affected the way in which inversion’s conflationary theorizing operated in practice.

Fixation theory also illustrates this hidden targeting of desire, or status. Even though fixation theorists expressly asserted an interest only in “overt homosexual behavior” as the basis for minority sexual orientation, their rationalizations made mere desire central to sexual orientation. For example, Bieber, the theory’s chief architect, wrote that he did “not diagnose patients as homosexual unless they have engaged in overt homosexual behavior.” He simply defined “homosexual behavior” as “erotic activity between two members of the same sex.” However, Bieber conceded that “[a]n isolated [same-sex] experience may not warrant the diagnosis, but repetitive homosexual behavior in adulthood, whether sporadic or continuous, designates a homosexual.” In sum, Bieber’s approach seemingly made desire alone irrelevant to the labeling process. Yet his search for

1057. This diagnostic focus on orientation per se is reflected in the clinical classification schemes devised by various sexologists. Generally, these schemes included levels of deviance that measured the depth of the inversion. See, e.g., supra notes 124-27 and accompanying text.

The classification schemes were used to distinguish between “acquired” and “congenital” inversion. “Congenital” cases, considered inborn, corresponded to people whose sexuality was exclusively or predominantly expressed with members of their sex, and thus whose orientation today generally would be understood as lesbian or gay. On the other hand, “acquired” cases corresponded to people who occasionally engaged in same-sex activity, whose orientation today could be deemed either bisexual or heterosexual. For instance, Ellis wrote that “when we put to the side occasional homosexuality in presumably normal persons, we seem justified in looking upon inversion as a congenital anomaly…. Congenital sexual inversion is thus akin to biological variation.” Ellis, supra note 110, at 168.

Interestingly, Ellis, who was regarded as comparatively progressive, was using the biological innateness of extreme inversion to argue in favor of people who today might be identified as lesbian or gay. To him, “well-marked cases of sexual inversion” simply were anomalies due to “imperfect sexual differentiation” that did not necessarily constitute a “morbid condition.” Thus, “acquired” cases represented disturbed individuals that should be treated until cured whereas “congenital” cases represented relatively harmless unfortunates who simply had been born that way. These unfortunates, as Russia’s Tamovsky explained in like vein, could not help themselves and should be left alone. See Weeks, supra note 110, at 27.

1059. Id.
1060. Id. Bieber further explained that “[t]hose who also engage in heterosexual activities are diagnosed as bisexual.”
repetitive same-sex conduct expressly drew diagnostic attention to the extent of the behavior, as opposed to the actual commission of the behavior. In this way, fixation theory also tilted the labeling focus toward those whose orientation was exclusively or primarily same-sex directed.

In other words, under fixation theory those with abiding same-sex desire were the most likely to engage in repetitive (rather than isolated) same-sex overt behavior, and these persons consequently were the most likely subjects of intervention:

In a climate of discrimination against homosexual relationships and encouragement of heterosexual relationships, the majority of subjects with both a homosexual and heterosexual component are likely to express the latter to a much greater extent and to often suppress the former completely. The majority of people adopting homosexual or bisexual behaviors for significant periods of time would therefore be those who have a predominant or exclusive homosexual interest.1061

Thus, clinically, erotic desire itself—or sexual orientation per se—was in practice key to fixation theory’s diagnosis and penalizing of those who in fact had engaged in the “bad” conduct. Consequently, under fixation theory, as under inversion theory and the military’s regulatory regime, persons with strong same-sex desires, rather than persons who simply performed same-sex acts, were most likely to become the prime suspects for diagnostic label(ing)s and interventions. In this way, conflationary theories and forces seem generally to be most concerned with targeting desire, or status, while ostensibly only regulating acts, or conduct. Conflationary theories and forces disingenuously violate the doctrinal distinction between status and conduct while legal culture, again, looks the other way.

C. Of Legs & Endpoints: The Endpoints as Endpoints

As noted at the outset, the focus of this Project is on the legs of the conflation in order to highlight the way in which the conflation’s three endpoints are cross-connected and, more specifically, in order to illustrate how the current idea that discrimination may be “based” on one or another endpoint are untenable both as a matter of fact and as a matter of law.1062

However, this shift from legs to endpoints does more than enable us to see how the three constructs intersect and interlock to operate as a set officially, clinically, culturally, and legally. This shift sheds light on the contents of sex, gender, and sexual orientation as endpoints.

This shift, in other words, allows us to see how the three endpoints have been imbued with contents both culturally and legally; this shift allows

1061. McConaghy, supra note 47, at 317. Because those with “predominant or exclusive” same-sex dispositions were those who adopted same-sex roles or behaviors “for significant periods of time,” in practice they also logically were the ones most likely to be “caught” and diagnosed.

1062. See supra Foreword, Part I.D.
us to consider how the three endpoints effectively have been constructed as endpoints. This shift thus facilitates not only a holistic and contextual critical approach to the conflation as one whole, and to its sex/gender status quo, it also facilitates a continuing examination of each endpoint as such. Consequently, this Chapter and its lessons close with a brief accounting of the endpoints' contents as such.

With respect to the base of the conflation—sex—we see above that external genitalia is the predominant, if not exclusive constituent of this construct. More specifically, we see that sex as a cultural (and legal) concept is reducible to the official observation and inscription of genital anatomy at birth with one temporal, though not substantive, modification: sometimes a subsequent genital change will be recognized as effecting a corresponding change in sex, but sometimes not—sometimes the birth genitals are deemed to govern sex permanently, intransitively. Though only the first view is traditionalist both substantively and temporally, under both views sex is external genitalia—this is how the construct was and is regarded and treated traditionally, clinically, culturally, and legally.

With respect to gender, this shift discloses that this construct comprises both social and sexual dimensions. Leg One connects sex and the social dimension of gender while Leg Two connects the sexual dimension of sex-determined gender to sexual orientation; under the conflation, gender is articulated both socially and sexually, and this articulation must intransitively reflect the sex assignment. Therefore, under Leg One and Leg Two, respectively, we see these two dimensions combine and interplay: we see that both social and sexual gender typicality are regarded and treated as essential to the integrity of the construct. Consequently, under the conflation, we see a cross-correlation between social gender atypicality and sexual gender atypicality (and vice versa), and their joint problematization traditionally, clinically, culturally, and legally. The contents and contours of gender as a conflationary endpoint thus comprise two dimensions or components—social and sexual—that together position gender as the construct that connects Leg One to Leg Two.

Finally, with respect to sexual orientation, this shift from legs to endpoints indicates that traditionally, clinically, culturally, and legally this endpoint encompasses three factors: anatomy, desire, and behavior. As indicated above, Leg Two of the conflation views and treats sexual orientation as the sexual dimensions of gender, thus encompassing both erotic feeling and its expression. Furthermore, Leg Three of the conflation points to the (non)coincidence of genital anatomy as the distinguishing determinant between hetero-sexual, homo-sexual, and bi-sexual erotic domains: same-sex desire or activity is equated with "homosexual(ity)" and cross-sex

1063. See, e.g., supra Chapter Two, Part I.A.  
1064. See supra Chapter One, Part I.B.1-4; see also supra Part I.B.  
1065. See supra Foreword, Part I.B. and II.C; see also supra Part IV.B.
desire or activity is equated with "heterosexual(ity)" while a mix or combination of the two is equated with "bisexual(ity)." Under the conflation we thus see how sexual orientation represents a blending of anatomy, desire, and behavior in myriad mixtures that, collectively, construct this attribute of personhood.

CONCLUSION

The lessons gleaned here from modern culture, legal culture, and indigenous culture(s) depict the conflation as an omnipresent and artificial phenomenon that dominates and skews Euro-American (mis)perceptions of sex, gender, and sexual orientation. Generally, the conflation's social, intellectual, and doctrinal history in Euro-American law and society shows that it serves to perpetrate and perpetuate androsexism and heterosexism. In legal culture specifically, these lessons demonstrate how the conflation confuses legal reasoning, distorts anti-discrimination doctrine, and betrays systemic and substantive ideals. These lessons thus disclose the conflation's destabilizing force in law and society, and reveal the deductive/intransitive gender model as the linchpin of Euro-American hetero-patriarchy. These lessons—the unmasking of the conflation's surreptitious and seductive power—consequently should help prompt us to search for more sensible and honest sex/gender arrangements.

In addition, the comparative example of Native American culture(s) highlights that the conflation is neither essential nor beneficial in any sense of these words: it is neither necessary for personal contentment nor conducive to societal harmony; it does not advance human development and it does not contribute to economic efficiency. On the contrary, these lessons show the conflation is simply a (very powerful) social construction—a contrivance that disrupts lives, restricts liberty, and promotes inequality. As such, the conflation is incompatible and irreconcilable with the values historically and currently idealized by this nation. In fact, the example set by native societies underscores the needlessly destructive and sinister influence exerted by the conflation on our lives, and should help to motivate new (re)visions of sex/gender order, both in law and in society. The next Chapter of this Project therefore endeavors a reconstruction of existing anti-discrimination law regarding sex and gender as one step toward making coherent legal doctrine and social reality.

1066. See supra Foreword, Part I.C. and II.C. See also generally Colker, supra note 26.