Chapter Two: Legal Culture: Recycling the Conflation

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38172V

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Chapter Two
Legal Culture:
Recycling the Conflation

INTRODUCTION

Turning to legal culture, the obvious threshold question is whether the conflation operates in the law in the same way(s) that it operates in modern culture. As this Chapter shows, with some interesting variations, it does. The legal record, on the whole, corroborates the record from modern culture.

This Chapter, then, may be viewed as documenting the intersection of cultural and legal conflationary precepts and practices in contemporary America. At bottom, the record presented below can be seen at once as the conflation’s operation specifically within legal culture, and also as a continuation of the record from modern culture, because each of the cases critiqued below represents the adjudication of conflationary actions taken by persons in, or institutions of, modern culture.

Yet the question of more direct concern to and about legal culture, given the conflation’s record in modern culture, is whether acts of discrimination arising from modern culture and brought to the courts for relief are, or can be, legally thought of as being “based”\(^\text{327}\) on sex, or on gender, or on sexual orientation in isolation from each other. Keeping in mind the conflation’s record in modern culture, the expectations for the record adduced below should be relatively clear. And, indeed, the conflationary record from legal culture presented in this Chapter confirms that acts or strains of sex/gender discrimination tend to occur within one (or more) of the conflation’s three legs, rather than at any single endpoint.\(^\text{328}\) The conflationary facts and controversies deconstructed in this Chapter additionally disclose specific aspects of the way(s) in which the conflation’s legs and endpoints operate in legal culture (and therefore modern culture, too).

The discriminatory facts challenged and condoned in the cases discussed below were reactions to various expressions of social/public personality that were deemed disruptive of conflationary linkages between sex and gender under Leg One of the conflation; these cases were triggered by cultural reactions to the claimants’ perceived disruption of the sex and gender conflation. These cultural reactions included conflationary associations of social/public gender atypicality with minority sexual orientation. Thus, the official, clinical, and cultural association of social and sexual gender atypicality prevalent in modern culture under Leg Two of the conflation also is

\(^{327}\) See supra notes 37, 38 and 43.

\(^{328}\) See supra Foreword, Part I.A-C. See generally supra Chapter One.
seen at play in the sex/gender controversies brought to the courts for adjudication. These (f)acts therefore confirm that, and further illustrate how, the first and second legs of the conflation work in tandem to suppress all forms of gender atypicality.

In addition to confirming that Leg One and Leg Two operate in tandem, this record shows how these two legs combine operationally. The cases presented below first show how conflationary acts or strains of discrimination are triggered by social gender atypicality—observations of and reactions to the disruption of sex and gender under Leg One through "sissiness" or "tomboyishness." The cases also show how this social gender atypicality then is associated with sexual gender atypicality, thereby triggering Leg Two, which conlates sex-determined gender with sexual orientation and which effectively constructs sexual orientation as the sexual component of gender. The association of social gender atypicality with minority sexual orientation is used to substitute sexual orientation for sex and gender in legal analyses of sex/gender discrimination. In practice, this substitution serves to justify discrimination against social gender atypicality on sexual gender atypicality grounds. This much confirms, and is relatively familiar from, Chapter's One account of modern culture. In legal culture, as in modern culture generally, Leg Two is used strategically to enforce the dictates of Leg One.

Through the strategic use of Leg Two on behalf of Leg One, the courts can and do take variable conflationary paths, depending on the factual and procedural particularities of the cases, to arrive at uniform substantive results: active/passive themes and traditions are advanced through the cross-association and problematization of social and sexual gender atypicality. On the whole, then, traditionalist sex/gender concerns and demands for social/public and sexual/private gender correctness under the combined impact of Leg One and Leg Two is as influential in legal culture as it is in modern culture. Indeed, in the cases documented below, the conflation influences events throughout the entire timespan of the controversy: it influences the parties in their pre-litigation interactions leading up to the dispute; it influences the drafting of the litigants' pleadings; and it influences the conclusions and rationales that the courts proffer in their opinions.

The troubling point is that cases driven by conflationary precepts dispense skewed (mis)treatments to the individuals being socially or sexually categorized. This conflationary (mis)treatment of sex/gender claims in turn depends on an analytical double standard regarding the conflation's cultural and doctrinal operation. Below, we witness the courts engaging this analytical double standard by acquiescing to the conflation normatively but denying it legally. In other words, we witness judicial refusal to (re)cognize the legal relevance of conflationary associations and dynamics that (f)actually

329. See supra Chapter One, Part I.A.
created the issues being litigated. This judicial double standard validates the cultural operation of the conflation by withholding or disabling the law's (re)cognition of and response to the discrimination that thereby is perpetrated.

Moreover, under this analytic double standard, gender is deployed as the key, specific variable in the manipulation and distortion of the results in sex and gender discrimination cases. Thus, when electing to protect the plaintiff, courts analytically conflate gender with sex (a formally protected attribute) under Leg One of the conflation. By contrast, when choosing to deny the plaintiff relief, courts analytically conflate gender with sexual orientation (an unprotected attribute) under Leg Two of the conflation. In some instances, the courts even manage to (mis)treat gender as unrelated either to sex or to sexual orientation! This manipulation of gender, in conjunction with the courts' double standard, produces inconsistent analyses that preclude any semblance of conceptual or doctrinal coherence.

In a general sense, however, the conflationary dynamics of the cases oftentimes follow a common scenario: the claimant, through some social act of gender atypicality, violates or disrupts Leg One of the conflation, which the defendant finds intolerable and therefore attacks through some act of discrimination. Contemporaneously, the defendant further (mis)takes this intolerable social gender atypicality for a simultaneous violation or disruption of Leg Two. In litigation, this subjective association of social gender atypicality with minority sexual orientation is trumpeted as a defense.

This creation and use of the "sexual orientation loophole" is important because it invites defendants and enables courts to shift the issues from sex and gender to sexual orientation; in other words, this loophole allows a shifting of claims from Leg One to Leg Two of the conflation regardless of the (f)actual circumstances of the case. Of course, this shift is critical because current anti-discrimination law protects, at best, only acts or strains of discrimination occurring within or along Leg One: sex and gender discrimination.

330. Current laws purport to protect "sex" and (presumably) "gender" and therefore focus on Leg One of the conflation. See, e.g., infra note 336 and authorities cited therein on the protection of "sex" and (perhaps) "gender" under Title VII. See also infra notes 1111-23 and authorities cited therein on the protection of deductive "gender" under Equal Protection jurisprudence. Of course, the conflation of sex and gender means that sex and gender in fact are intertwined under the statutory scheme of Title VII and under the constitutional scheme of equal protection doctrine. See infra Chapter Five, Part I.A-B. Because Leg One connects sex with gender, current law protecting sex and gender purports to protect against acts or strains of discrimination occurring within or along this leg of the conflation. See generally supra Foreword, Part I.A and I.I.A.

The "equality" principle embraced in these sources of law of course was heralded by the seminal political statement that eventually resulted in the formation of the United States: the Declaration of Independence proclaimed among its recitation of self-evident truths that "all men are created equal." See 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY: FROM SETTLEMENT THROUGH RECONSTRUCTION 60 (Melvin I. Urofsky ed., 1989). Since then, the balancing of rights and powers necessary to the cultivation of equality and liberty through democracy has been a notable theme in American law and society. See, e.g., JOHN H. ELY, DEMOCRACY AND DISTRESS: A THEORY OF JUDICIAL
The shift to Leg Two therefore pushes the case into unprotected sexual orientation domains.\textsuperscript{331}

The legal permissibility of sexual orientation discrimination to facilitate sex and gender discrimination is at once an expression and an exploitation of heterosexism: it deploys legal heterosexism to absolve cultural heterosexism. Significantly, the shift from Leg One to Leg Two does not (f)actually depend on sexual orientation at all; it turns neither on the pro-

\textsuperscript{331} The exclusion of sexual orientation from the sex and gender (or any other) anti-discrimination scheme is amply demonstrated by the record of rulings examined below. See infra Part II.A-D. Sexual minorities therefore remain beyond the equality and anti-discrimination principles. See supra note 330 and authorities cited therein on equality and anti-discrimination as foundational cultural and legal values. Perceived or actual members of sexual minorities therefore are inviting targets for societal acts or expression of debasement and discrimination. See, e.g., Developments in the Law—Sexual Orientation and the Law, 102 Harv. L. Rev. 1508 (1989) (surveying the many social settings in which heterosexist discrimination is openly and continually practiced even today).

Within the context of the conflation, the legality of sexual orientation prejudice means that acts or strains of discrimination occurring along or within Leg Two and Leg Three are unprotected by sex/gender anti-discrimination law. As noted at the outset of this Project, Leg Two binds gender to sexual orientation, see supra Foreword, Part I.B., while Leg Three binds sex to sexual orientation, see supra Foreword, Part I.C; see also infra Part V. Because sexual orientation is one of the endpoints in each of these legs, discrimination that takes place there, or that analytically is (re)situated there, is dissimissable and dismissed as "merely" legally permissible sexual orientation discrimination. See generally infra Part IV. This dismissal, as evidenced by the cases reviewed in this Chapter, overlooks the conflationary reality of such discrimination, which clearly and unavoidably involves sex (under Leg Three) or gender (under Leg Two). See also infra note 335. See generally infra Part V.
fessed nor actual sexual orientation of the claimant, and occurs despite it. The shift depends entirely on the willingness of a judge to permit it.

As the record below repeatedly demonstrates, this conflationary shift from social gender atypicality to minority sexual orientation, if successful, can and does secure exoneration of blatant sex and gender discrimination regardless of sexual orientation (in)correctness. Consequently, this shift, and the loophole that makes it possible, makes everyone and anyone vulnerable to sex and gender discrimination. The results thus produced tend both to mask the perpetuation of sex and gender discrimination and to weaken the substance, reach, and application of sex and gender anti-discrimination law.

But this shift from Leg One to Leg Two licenses more than heterosexism. The cases unrelentingly punish social/public gender atypicality among men while sometimes protecting social/public gender atypicality among women. In other words, routinely in cases with male plaintiffs but only sometimes in cases with female plaintiffs, the courts (re)characterize social/public gender atypicality as sexual/private gender atypicality. The net effects of this skewed result is a virtual emasculation of anti-discrimination law—a virtual de facto (re)legalization of androcentric bias. By always condemning social (and sexual) effeminacy among men but sometimes condoning social (if not sexual) masculinity among women, judicial uses of the conflation over time tend to promote traditionally male-identified social gender attributes.

Conflationary discrimination and decisions, therefore, not only exploit heterosexism to facilitate the circumvention of sex and gender equality principles, they also help affirmatively to invigorate both traditionalist androcentric and heterocentric biases in law and society: on the whole, this skew helps to legitimize and foster the elevation of masculinity over femininity as well as the elevation of heterosexuality over all other forms of sexuality. The conflation thus invigorates hetero-patriarchy within legal culture in much the same way(s) as it does throughout modern culture.

This deconstruction of the conflation’s operation in legal culture thus yields key insights. First, it exposes the trio of legal techniques that recur to effectuate these traditionalist sex/gender results: the analytical double standard, the shift from Leg One to Leg Two, and the strategic use of Leg Two to uphold Leg One substantively. This deconstruction also shows that their net results are neither neutral nor random but instead evidence a marked slant toward keeping androcentric and heterocentric values in place both legally and culturally.

Finally, this deconstruction reveals a startling consequence of the conflationary status quo in legal culture: while sex and gender discrimination are formally illegal and sexual orientation discrimination is not; it is impossible (by conflationary definition) to practice “sexual orientation” discrimination without also and simultaneously committing sex and gender
discrimination. This deconstruction therefore impels us toward concluding that it is impossible to practice the legal bias without simultaneously practicing the illegal biases—that it is impossible to practice legal heterosexism without first and foremost practicing formally illegal androsexism. This core inconsistency and its consequent instabilities could not but cause multiple forms of harm on multiple levels of human life. As this Chapter shows, they do.

The record presented below shows how judicial complicity in conflationary bigotry results in immediate damage to the individual claimants who come to the legal system for relief from actionable sex/gender wrongs; in these instances, the courts condone the discrimination and thus compound the harm to the individual already caused by the discriminatory act. Over time, however, conflationary practices in legal culture also impair the institutional integrity of the law under its self-professed values and ideals. This impairment grows along with the (re)production and accumulation of substantive and analytical inconsistencies that are at odds with established institutional and national ideals exalting informed justice tempered by principled judgment.332

As this record attests, the law’s conflationary tendencies contravene the core ideals of impartially applied “neutral principles” espoused by the most traditionalist quarters of legal and modern culture.333 For example, the sex-based disparity in the courts’ application of the conflation reflects the need for neutral applications, definitions, and derivations of principles in judicial analyses. For a critical discussion of this ideal, see Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1 (1992) (challenging the “baseline” from which modern constitutional theorists derive neutral principles). Though idealized versions of the adjudicative process portray judges as detached and impartial enforcers of neutral rules, actual experience depicts a more complex scenario, as this Chapter of the Project will demonstrate. See generally Mackenzie, Feminism Unmodified, supra note 22 (arguing that legal principles originate in sexual inequality and male domination); Richard Delgado, Norms and Normal Science: Toward a Critique of Normativity in Legal Thought, 139 U. Pa. L. Rev. 933 (1991) (exploring and criticizing the way that legal scholars use normative discourse); Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982) (examining the notion that adjudication is a form of interpretation); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987) (suggesting that critical legal scholars adopt as a normative source for legal principles the perspective of those who have actually experienced discrimination); Symposium, Critical Legal Studies, 36 Stan. L. Rev. 1 (1984) (providing varying viewpoints on the definitions, purposes, and contributions of Critical Legal Studies). Nonetheless, as the
an unprincipled consistency of outcome, which in turn suggests a results-oriented (mis)management of conflationary themes. Only one motive explains this results-orientation: a need or want—even if unconscious\textsuperscript{334}—to rebuff meritorious claims that might chip away at the active/passive divides that represent and that still enforce, both culturally and legally, sex/gender hierarchies that the nation formally has repudiated.\textsuperscript{335} The conflation thus seems to present the courts with a self-damaging temptation that even (or especially) traditionalist tribunals seem unable or unwilling to resist: to uphold traditionalist sex/gender privileges courts must—and they do—betray traditional, and ostensibly revered, values of the law and the nation regarding informed rulings based on impartial applications of fair and general legal rules. This tempting of the judiciary ultimately results in damage to the nation as a whole because the unprincipled results and rationales effectively license various strains of sex/gender hate and bias that, in turn, cause societal division and dysfunction.

Thus, the conflation's impact on legal culture and on society at large, as on the individual, is destructive. If legal culture is to fulfill its sex and gender anti-discrimination mission\textsuperscript{336} and reclaim its intellectual efficacy in

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\textsuperscript{334} Charles R. Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 Stan. L. Rev. 317 (1987) (pointing out in a race context the real and pernicious effects of "unconscious" bigotry).

\textsuperscript{335} The nation formally has repudiated sex and gender discrimination with the legislative enactment of Title VII's "sex" provision and with the judicial development of equal protection "gender" jurisprudence. See supra note 330. The nation has not (yet) formally repudiated the legality of sexual orientation discrimination because the conflationary dynamics of sexual orientation vis-à-vis sex and gender has not (yet) been comprehended, as evidenced by the cases reviewed below. See infra Part II., III., and V. See also infra Part IV.C-D; Chapter Four, Part IV.A and C; Chapter Five, Part I.A-C and Part II.A-B.

However, this Project suggests that the protection of "sexual orientation" discrimination in fact and in theory requires simply a holistic and contextual analysis of "sex" and "gender" discrimination. See infra Chapter Five, Part IIA-B. In other words, this Project concludes that both theoretically and practically no such thing as "sexual orientation discrimination" does or can exist independently of "sex discrimination" and "gender discrimination" under the conflation; because "sexual orientation discrimination" always occurs along Leg Two and/or Leg Three of the conflation, this type of prejudice always and necessarily involves sex (under Leg Three) or gender (under Leg Two). See infra Part V and, specifically, notes 686-90 and accompanying text. See generally supra Foreword, Part I.A-C and D. See also supra Foreword, Part IIA-C. Therefore, there is nothing left of "sexual orientation" discrimination once its sex and gender bases have been holistically and contextually addressed. See infra Chapter Four, Part IV.A.

Ultimately, this analysis of the conflation's operation in legal culture, in light of its operation in modern culture, shows that sexual orientation must be protected as part of sex and gender because it is conflated with sex and gender and because, therefore, sex and gender cannot be protected against discrimination unless and until sexual orientation is holistically and contextually considered a part of sex and gender discrimination. See generally infra Chapter Five.

\textsuperscript{336} Title VII establishes a non-discrimination ideal that is supposed to overcome historical sex and gender inequalities. See, e.g., City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (noting that Title VII was intended to prohibit all sex discrimination against individuals based on broad generalizations or stereotypes); see also Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1166-95 (1971)
this area, it must dispel the conflation from its imagination, its institutions, and its processes. This conflation, therefore, matters to legal culture, doctrine, and theory: transcending conflationary harms and injustices, and ending their consequent destructiveness on these multiple levels, is a prerequisite to (re)claiming the law’s systemic and substantive integrity.337

To aid this mission, Part I of this Chapter opens with a brief summary of sex, gender, and sexual orientation as legal concepts in order to establish the continuity between these constructs as legal concepts and their cultural counterparts, as reviewed above in Chapter One. Part II then undertakes a detailed deconstruction of cases involving “sissies” and “queers,” while Part III deconstructs cases involving “dykes” and “tomboys.” This deconstruction amply evidences the conflation’s active existence and destructive impact within legal culture.338 Next, Part IV examines some of the more salient points to be drawn from this deconstruction of the conflation in legal culture. Part V follows with a consideration of the “miscegenation analogy” in light of the conflation’s deconstruction to identify the intersections of these two analyses under Leg Three of the conflation. Part VI closes this Chapter by urging reformatory leadership from those both within and without legal culture who are most deliberately and maliciously targeted for subordination through the use of the conflation—women and sexual minorities. By helping to deconstruct the conflation of sex, gender, and sexual orientation in legal culture, this Chapter of the Project endeavors to take a step beyond the social/legal cross-recycling of the conflation that the discussion presented below critiques.

337. See infra Chapter Four, Part II.A.C.

338. However, this Chapter does not attempt a comprehensive doctrinal reconstruction—this effort is undertaken later, in Chapter Five of this Project.
I

SEX, GENDER, & SEXUAL ORIENTATION AS LEGAL CONCEPTS

Even though the law routinely is called upon to categorize individuals along sex, gender, and sexual orientation lines, it has failed to settle on clear definitions for these three constructs. As this Part of the Chapter illustrates, this definitional murkiness results in large part from the fact that legal culture reflects and reinforces traditional conflationary arrangements: sex determines gender, and gender is meshed tightly with (mis)perceptions of sexual orientation. The unprincipled adjudication in the cases reviewed below therefore reflects and recycles the official, clinical, and cultural history of the conflation in modern culture not only substantively but conceptually and linguistically as well.\(^339\)

A. Legal Definitions of Sex (& Gender)

Cases involving transsexuals provide the most graphic illustration of the confusion surrounding the definition and application of sex as a concept in legal culture.\(^340\) The following cases show that, in keeping with cultural custom, courts invariably define sex solely by reference to external genitalia.\(^341\) However, confusion results because some courts limit their inquiry to external genitalia at birth, while others take into account a subsequent change in the genitals.\(^342\) In other words, the official view of sex in legal culture, as in modern culture, stays uniformly trained on observable anatomy, but legal culture is called upon to rule on the consequences for sex of

\(^339\). See supra Foreword, Part I.A-C and Part II.A-C. See also infra Chapter Four, Part IV.C.

\(^340\). The transsexualism cases typically require courts to determine whether transsexuals are eligible for various rights that are defined by reference to sex, such as the right to marry. Thus, in these cases, the courts must directly confront the definition of sex. See generally L. Anita Richardson, Comment, The Challenge of Transsexuality: Legal Responses to an Assertion of Rights, 4 N. ILL. U. L. Rev. 119 (1983) (surveying and critiquing the law’s impact on the ways in which transsexuals must navigate through the issues of daily life).

\(^341\). See supra Foreword, Part I.A and Part II.A.

\(^342\). As previously noted, modern medicine considers sex to comprise between six and eight elements. See supra note 118. The complex nature of sex at times receives some recognition in legal culture. For example, Black's Law Dictionary defines sex as the "sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." BLACK'S LAW DICTIONARY 1233 (5th ed. 1979) (emphasis added). Even though these elements clearly comprise both physical and psychological features, sex still is generally determined by reference to external genitalia. See, e.g., infra notes 343-66 and accompanying text. The complex nature of sex thus places legal culture’s conceptualization of the trait in a certain degree of flux.

The complexity of sex as a multi-pronged trait has become more evident in recent years, especially since transsexualism has forced the courts to define more clearly the legal concept of sex. See note 366 and authorities cited therein. Likewise, the rise of visible and active sexual minorities has forced the courts to define sexual orientation more clearly. See generally Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 VA. L. Rev. 1721 (1993) (analyzing the equation of sodomy with homosexuality); Nan D. Hunter, Life After Hardwick, 27 HARv. C.R.-C.L. L. REV. 531 (1992) (discussing the legacy of Hardwick as it affects homosexual identity); Valdes, supra note 53 (discussing the uses and applications of "sexual orientation" in light of the status/conduct distinction). See also Cass, supra note 55, at 105; Shively et al., supra note 55, at 127; Valdes, supra note 55 (manuscript-in-progress on file with author).
a change in genital anatomy. The cases below illustrate what happens in such instances.

Anonymous v. Weiner shows how courts may and do define sex by reference to external genitalia at birth. In Weiner a male-to-female post-operative transsexual asked the court to direct the New York City Board of Health ("Board") to amend her birth certificate to reflect her female name and sex after the Board had denied the request. As part of its administrative process, the Board, citing "the serious consequences" that would result from such a decision, had "initiated an exhaustive inquiry into the subject" and referred the matter to the New York Academy of Medicine ("Academy"). The Academy recommended against changing the birth certificate because the petitioner was "chromosomally" a male even if "ostensibly" a female. The Academy further announced that the "desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud." The Board adopted the Academy's recommendation, resolving that "an individual born one sex cannot be changed" by a surgical alteration of the sex organs. The court denied the transsexual's request, holding that the Board's decision was not "arbitrary, capricious or otherwise illegal."

Weiner highlights the confusion and inconsistency surrounding sex as a legal concept. In Weiner the court clearly accepted the determination of sex that was imposed at birth, a determination exclusively based, no doubt, on external genitalia. At the same time, the court refused to accept a change in sex after the (f)actual basis for that initial determination had changed in actuality. Instead, the court substantively shifted its focus to chromosomes as the dispositive element, with the obvious and unavoidably direct result that external genitalia at birth, or official sex at birth, legally would remain in place.

The fraud rationale advanced by the Academy further illustrates the importance of the determination of sex at birth. By invoking fear of fraud, the Academy suggested that the petitioner's "true" sex already had been conclusively and unalterably determined at birth. Therefore, a subsequent sex change was deemed to constitute undesirable concealment of the "truth" regarding official sex as a legal concept.

344. Id. at 321.
345. Id. at 322.
346. Id.
347. Id.
348. Id. at 323-24.
350. See, e.g., Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980) (emphasizing, in a case involving the military, the importance of genitalia at birth); see also infra notes 681-85 and accompanying text. An English case considering the validity of a marriage in which one of the partners was a post-operative transsexual held that "the law should adopt... chromosomal, gonadal and genital..."
In this way, Weiner also illustrates the fundamentality of sex to confla-
tionary arrangements. Although the conflation mandates that a person’s sex
determines her gender, Weiner shows explicitly how the opposite is not
true; a person’s gender will not determine, nor even influence, a determina-
tion of sex. In this instance, for example, the plaintiff walked, talked and
looked like a woman (even under her clothes)—she lived as a woman—yet
the court referred to her as merely “ostensibly” female. The facts and treat-
ment of this case thus illustrate not only the primacy of external genitalia in
sex assignments, but also the legal fundamentality of that assignment in the
conflationary sex/gender scheme. In this scheme, sex determines gender
but gender does not determine sex: gender is deduced from and based on
sex, but the converse is not so. This case shows how sex is the official,
cultural, and legal base of the conflation.

By contrast, M.T. v. J.T., 351 though still focusing on external genitalia,
shows that some courts are willing to acknowledge a change in the litigant’s
genitals when determining the litigant’s sex. This case thus illustrates a
temporal, but not substantive, shift in the basis for sex determinations. In
M.T., a post-operative male-to-female transsexual filed a complaint against
her husband for support and maintenance. 352 M.T., the wife, acknowledged
that she was born a male but that “[a]s a youngster she did not participate in
sports and at an early age became very interested in boys.” 353 Eventually,
she began to live with J.T., and several years later, she completed a sex
change procedure. 354 M.T. then “had a vagina and labia which were ‘ade-
quate for sexual intercourse’ and [which] could function as any female
vagina, that is, for ‘traditional penile/vaginal intercourse.’” 355 The court’s
careful description of M.T.’s vagina, quoting from the trial testimony, is
striking in its fascination for detail:
The “artificial vagina” constructed by [the] surgery was a cavity, the
walls of which [were] lined initially by the skin of the penis, often
later taking on the characteristics of normal vaginal mucosa; the
vagina, though at a somewhat different angle, was not really differ-
ent from a natural vagina in size, capacity and “the feeling of the
walls around it.” Plaintiff had no uterus or cervix, but her vagina
had a “good cosmetic appearance” and was “the same as a normal
female vagina after a hysterectomy.” 356

352. Id. at 205.
353. Id.
354. Id.
355. Id. at 206.
356. Id.
The court began its analysis by explaining that even though the genitalia of the individual were "unquestionably significant and probably in most instances indispensable" in determining the individual's sex, "there are several criteria or standards which may be relevant." The court went on to disagree with the notion that "sex is somehow irrevocably cast at the moment of birth." Instead, the court reasoned that if the "genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." In other words, if external genitalia change, so does sex—but not before. In this instance, accordingly, the court upheld the marriage because the external genitalia in fact had changed. Although the opinion extended a thoughtful consideration of the various ways in which sex could be delineated as a legal concept, it nonetheless affirmed the bottom-line belief that external genitalia constitute the controlling determinant of sex.

Like Weiner, M.T. v. J.T. highlights the conflation of sex and gender under Leg One in legal culture, and how this leg is based on sex. In this case, gender indicia, such as a lack of interest in sports, provided a cultural gender norm to buttress the plaintiff's claim that her official birth sex had been "wrong" all along. In other words, the sports evidence was invoked to show that M.T.'s sex/gender designation as man/male at birth was "wrong" because s/he exhibited social gender characteristics that were considered more typical of the other sex. Clearly, this claim relied on the conflation of sex and gender for its resonance. But this approach effectively posited that gender determines sex which, as seen also in Weiner, is not the case. The invocation of sports evidence marshalled the imagery of Leg One but tried to apply it in an unorthodox (and unwanted) manner.

Finally, these facts illustrate how sex is an indispensable and direct determinant of sexual orientation under Leg Three of the conflation. Under conventional understandings of sexual orientation, the pre-operation relationship between M.T. and J.T. would be deemed homosexual because it involved two persons of the same sex (as determined by external genitalia). Yet after M.T.'s sex change operation, the same, on-going relationship between the same individuals would be deemed heterosexual because

357. Id. at 208.
358. Id. at 209 (discussing Corbett v. Corbett, 2 All E.R. 33 (1970)).
359. Id.
360. Id. at 211.
362. See generally Colker, supra note 26, at 127. Discussing definitional points regarding specifically bisexual orientation and identity, the author explains how "waking up one morning and saying 'I'm straight' and waking up another morning and saying 'I'm a lesbian' depend[ed] on the sex of the person on the other side of the bed." Id. The bisexual context, like the transsexual context, thus illustrates and illuminates the way in which sexual orientation is derived from, or conflated with, sex under Leg Three. See generally supra Foreword, Part I.C. See also Chapter Four, Part 1.E.4.d-e.
the operation altered the genital configuration of the coupling from same-sex to cross-sex, from homosexual to heterosexual. Thus, M.T.’s situation depicts how sex has a logical (and legal) domino effect on sexual orientation. Moreover, M.T.’s sexual orientation situation was not novel; this type of situation is known to the legal system and to society as a whole.

These transsexualism cases show that external genitalia remain the predominant substantive indicator of sex in legal culture. The cases further show that, while sex determines gender under Leg One of the conflation, the reverse does not hold true. Finally, sex determines the sexual orientation of the individual involved.

363. See, e.g., Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980) (disposing of plaintiff’s case on exhaustion grounds and recounting military findings that plaintiff was a lesbian because she married a post-operative male transsexual, who the military considered to be still a woman). Of course, this domino effect is complicated by temporal considerations: this effect will hinge on the set of genitals that a court elects to use in determining sex. In the case of a post-operative transsexual, as this discussion of Weiner and M.T. shows, courts sometimes elect to use the genitals recorded at birth and other times courts elect to use the genitals in existence after the sex change procedure. See infra notes 681-685 and accompanying text. However, once the court makes this election, sexual orientation conclusions automatically fall into place. Id.

364. See, e.g., infra notes 681-85 and accompanying text.

365. Another apt example is B. v. B., 355 N.Y.S.2d 712 (1974). In B. v. B., a wife sought annulment of her marriage to a female-to-male post-operative transsexual on the grounds that both parties were women and thus were “physically incapable” of entering into marriage. Id. at 713-14. The wife charged that the husband did “not have male sexual organs, [did] not possess a normal penis, and in fact [did] not have a Penis.” Id. at 713. She further alleged that the husband was “incapable of normal cohabitation or normal sexual intercourse” and thus was unable to perform “all the duties and relations of a husband.” Id. The husband denied the allegations, asserting that “from my earliest youth... I felt in myself that I was, in fact, a male person... I had surgery performed upon my person... so as to conform the physical manifestations of my sex with my true male identity.” Id. at 714-15. The husband therefore counter-claimed for divorce on the grounds of abandonment. Id. at 714.

The court announced in its analysis that “the marriage relationship exists with the result and for the purpose of begetting offspring.” Id. at 717. In this instance, the court concluded, the record failed to “show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage.” Id. The husband simply did not possess the “necessary apparatus” to have his legal sex deemed male. Id.

Although the court in B. v. B. seemed willing to take into account the husband’s subsequent sex change, its focus remained fixed on anatomical “apparatus.” The overall prominence of the husband’s penis in the analysis illustrates again how sex as a legal concept depends inevitably and inexorably on external genitalia. This case thus provides another example of the dispositive primacy accorded to external genitalia in legal (and cultural) determinations of sex.

366. Given that the imposition of sex entails momentous life-long ramifications, the formal designation of sex for most Americans is remarkably informal, at least relative to the significance of the decision. Generally, state statutes regulate the formal designation of sex at birth by requiring that a birth certificate record the sex of each newborn infant. Holloway, supra note 118, at 286-87 (1968). Thus, when that initial pronunciation—“It’s a girl!”—is uttered, the individual’s sex/gender fate is by and large settled for life. For discussions of the sex assignment in the context of sex changes, see Meredith Gould, Sex, Gender, and the Need for Legal Clarity: The Case of Transsexualism, 13 VAL. U. L. REV. 423, 429 (1979); Mary B. Walz, Transsexuals and the Law, 5 J. CONTEMP. L. 181, 185 (1979); David, supra note 157, at 292 (1975); Douglas K. Smith, Comment, Transsexualism, Sex Reassignment Surgery, and the Law, 56 CORNELL L. REV. 963, 967 (1971). For further readings on transsexualism, see generally Jeanine S. Haag & Tami L. Sullinger, Note, Is He or Isn’t She? Transsexualism: Legal Impediments to Integrating a Product of Medical Definition and Technology, 21 WASHBURN L.J. 342 (1982); Note, Transsexuals in Limbo: The Search for a Legal Definition of Sex, 31 MO. L. REV. 256 (1971). See also supra note 342 and authorities cited therein on “sex” and various identities based on it.
orientation of both individuals engaged in a sexual act or relationship. Sex is fundamental: it serves as the basis for conflationary arrangements.

B. The Substantive & Linguistic Interchangeability of Sex & Gender

As shown in Chapter One, the imposition of sex at birth carries with it a corresponding imposition of gender: every human is presumed to have the same gender as sex even though the two traits are conceptually and linguistically distinguishable. The same is true in legal culture, as the cases reviewed below demonstrate. Further, in legal culture, as in society at large, the substantive conflation of sex and gender is compounded because the terms “sex” and “gender” are used interchangeably. For instance, legal institutions routinely assert “that Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender” or that “when Congress used the word ‘sex’ in Title VII it was referring to a person’s gender.” This linguistic slip-and-slide seemingly makes sense because the conflation of sex and gender under Leg One of the conflation is so familiar and pervasive.

Of course, this linguistic conflation of the terms “sex” and “gender” evidences the substantive conflation of the two as concepts. At the same time, the interchangeability of the terms “sex” and “gender” creates additional layers of uncertainty that further blur conceptual distinctions. The law’s confusion over the definitions of the constructs is exacerbated because sex and gender are conflated, and thus confused, both substantively and linguistically.

As this linguistic and substantive murkiness shows, legal culture, like society at large, imposes gender on the basis of sex and confutes the two. Moreover, the cases below show that legal culture, like clinical science and modern culture, imbue gender with two active/passive and cross-associated dimensions: social/public and sexual/private. The law thus validates and invigorates traditionalist active/passive expectations that officially and culturally demand a social (and sexual) correspondence of gender to sex. In this way, legal culture reinforces Leg One of the conflation, conceptually, rhetorically, and substantively.

The current sophistication of medical knowledge regarding the elements of sex, the narrow basis and lack of procedure for sex assignments at birth, as well as the significance and conclusiveness of such assignments combine to suggest that the prevailing practice may be suspect as an “irrebutable presumption” on due process grounds. Some courts have suggested virtually as much already. See, e.g., In re Anonymous, 293 N.Y.S.2d 834, 838 (1968) (suggesting that the denial of a post-operative transsexual’s application for a name change would be a “violation of his civil rights”). However, such an analysis is beyond the scope of this Project. For further readings on the role of “irrebutable presumptions” in constitutional law, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 521-24, 751-53 (4th ed. 1991).

369. See supra Chapter One, Part I-II. See also infra Chapter Four, Part IV.C.
C. The Indeterminacy of Sexual Orientation

Sexual orientation is sometimes seen as a relatively simple and straightforward concept: legal culture, like society at large, oftentimes projects a core understanding of "sexual orientation" as simply an erotic feeling or desire that is oriented toward particular sex-defined directions, and that typically is accompanied by verbal or behavioral expressions of such feelings. In other words, it seems generally understood, both legally and culturally, that "homosexuals" are those persons whose "sexual orientation" is same-sex directed, that "heterosexuals" are those persons whose "sexual orientation" is cross-sex directed, and that "bisexuals" are those persons whose "sexual orientation" is directed at both sexes. Despite the apparent clarity of these notions and categories, the legal (and cultural) concept of sexual orientation remains indeterminate and unstable for various reasons.

To begin with, as discussed above, Euro-American culture historically conflated sexual orientation into the official sex-based gender composite that was catalogued by sexology at the turn of the century. Under this scheme, social and sexual gender typicality was and is associated clinically and normatively with heterosexuality, while social or sexual gender atypicality was and is associated with homosexuality (and bisexuality). Other definitional difficulties—such as the blurring of status and conduct and the essentialist/social constructionist debate—add to the indeterminacy of sexual orientation as a legal (and cultural) concept. The cases documented below reflect this indeterminacy, and exhibit its conflationary bents regarding sexual orientation: these cases show legal culture embracing Leg Two and Leg Three (in addition to Leg One) of the conflation wholeheartedly. Courts embrace Leg Two by finding manifestations of "sexual orientation" in social gender atypicalities ranging from earrings to shoulder-length hair (among men); they embrace Leg Three by discerning "sexual orientation" through the (non)coincidence of sex or anatomy with a coup-

370. For instance, a 1993 proposal to amend both the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of "sexual orientation" included a definition of the construct as "male or female homosexuality, heterosexuality, and bisexuality by orientation or practice." H.R. 423, 103d Cong., 1st Sess. § 2(f) (1993). Similarly, Judges Canby and Norris of the Ninth Circuit explained that, "Homosexuals are physically attracted to members of their own sex . . . [t]hat is [what] we notice about them." High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, Norris, JJ., dissenting from denial of hearing en banc). Likewise, a popular dictionary defines a homosexual as a person "characterized by a tendency to direct sexual desire toward another of the same sex." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 579 (1991). See generally supra notes 131-47 and accompanying text.

371. See supra Foreword, Part I.C-D and Part II.C.

372. See supra Chapter One, Part I.B.1-4.

373. See infra Chapter Four, Part I.B.

374. See infra Chapter Four, Part IV.B.

375. See supra notes 53-55 and 315 and authorities cited therein on the (mis)construction of sexual orientation as a legal (and cultural) concept.
ling. Along the way, these cases show how the construction of sexual orientation pulls together aspects of anatomy, desire, and behavior, and how the resulting definitional status quo is as muddled in legal culture as it is in society at large.

II

THE LEGAL (MIS)TREATMENT OF “SISSIES” & “QUEERS”

Earrings, skirts, and dresses. These social/public gender indicants appear repeatedly in the cases below. They are the emblematic connection between “sissies” and “queers” in legal culture.

Although sex and gender discrimination cases provide the main substantive arena for judicial grappling with the conflation, the following discussion shows that the conflation impacts numerous legal doctrines: conflationary influences are manifest not only in Title VII cases but also in Fourteenth Amendment and First Amendment cases. As the following critique demonstrates, judicial attempts to conceptualize coherent distinctions in these varied settings tend to degenerate into disingenuous analyses and conclusory assertions.

A. “Refusal to Hire Homosexual”

The first ruling that attempted to distinguish sex and gender discrimination from sexual orientation discrimination was issued by the Equal Employment Opportunity Commission (“EEOC”) in Refusal to Hire Homosexual Was Not Discrimination Based on “Sex.” Though the ruling is bare of factual detail, the claim apparently arose from an employer’s refusal to hire an applicant because the applicant’s rejection from the military draft

376. See infra Chapter Four, Part IV.B.
377. See supra Foreword, Part II.A-C.
378. Title VII outlaws discrimination on account of “sex.” It provides: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” 42 U.S.C. § 2000e-2(a)(1) (1988).

For a practical overview, see SUSAN M. OMILLN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION (1990). The leading casebooks are HERMA HILL KAY, SEX-BASED DISCRIMINATION (3d ed. 1988) and BARBARA ALLEN BANCOCK ET AL., SEX DISCRIMINATION AND THE LAW (1975). For accounts of the statute’s legislative history, see supra note 336 and authorities cited therein on Title VII and sex equality. See also generally infra Chapter Five, Part II.A.7.
379. See infra notes 541-70 and accompanying text.
380. Refusal to Hire Homosexual Was Not Discrimination Based on “Sex,” EEOC Dec. No. 76-67, EEOC Dec. (CCH) ¶ 6493 (Mar. 2, 1976). This case and another had been consolidated. The second case, Homosexual’s Sex Bias Claim Untimely and Uncovered, EEOC Dec. No. 76-75, EEOC Dec. (CCH) ¶ 6495 (Mar. 2, 1976), involved an employee who believed he was discharged as a result of a newspaper article that stated that he had been arrested and was awaiting trial on charges of homosexual activity. Apparently, until these decisions, the EEOC had dragged its feet in addressing sexual minority claims. See Gary R. Siniscalco, Homosexual Discrimination in Employment, 16 SANTA CLARA L. REV. 495, 503 (1976) (reporting that the EEOC rendered these decisions more than five years after first receiving cases involving charges of sexual orientation discrimination).
mentioned “homosexual tendencies.” Denying the applicant’s claim, the EEOC explained that the “ordinary meaning” of the term sex denoted a “person’s gender, an immutable characteristic with which a person is born.” By contrast, the EEOC continued, sexual orientation alluded only to “a person’s sexual proclivities or practices, not to his or her gender.”

The EEOC ruling thus posits two categories for Title VII claims. The first category specifically is about sexuality; it construes sexual orientation or “homosexual tendencies” as denoting a person’s erotic proclivities or practices. The second category, emphatically distinguished from the first, groups sex and gender together to denote a person’s non-erotic sex/gender attributes. Using this dichotomy, the EEOC placed this claimant in the first (and unprotected) category because he had purportedly manifested “homosexual tendencies” that, presumably, were erotic in nature.

Clearly, then, the EEOC dichotomy accepts the first leg of the conflation, sex and gender, while it simultaneously rejects the second leg of the conflation, sex-determined gender and sexual orientation. However, the basis of this simultaneous embrace and rejection of the conflation was unexplained, and remains unclear. To begin with, Title VII’s text refers explicitly to sex, yet the EEOC ruling, without explanation, shifted to gender. Of course, this switch in terminology illustrates both the conceptual and the linguistic conflation of these two constructs under Leg One. At the same time, the EEOC ruling emphatically asserted that sexual orientation was “in no way synonymous” with sex and gender. According to the EEOC, sexual orientation is limited to erotic sensibilities, and these are cast as completely unrelated to sex or gender. Thus, the EEOC dichotomy in a superficial and conclusory manner accepts the history of conflation that pervades Euro-American culture with respect to sex and gender but ignores and denies that very same history with respect to gender and sexual orientation. This unexplained internal inconsistency makes the EEOC dichotomy unprincipled at the threshold, as well as impracticable.

By sharply separating the two categories of discrimination, the EEOC’s structure appears, at first blush, susceptible to consistent, if simplistic and artificial analyses. In other words, the EEOC dichotomy seemingly offers a viable distinction between discrimination based on erotic grounds and discrimination based on non-erotic grounds. However, the

381. Refusal to Hire Homosexual, EEOC Dec. No. 76-67, ¶ 6493, at 4263. The nature or details of these “tendencies” were not specified, and today the records of the proceedings are unavailable for review. Requests submitted to the EEOC for permission to inspect the records of this claim were denied because the files had been destroyed “in keeping with the [EEOC’s] records destruction schedule.” Letter from Thomas J. Schlageter, EEOC Assistant Legal Counsel, to Bill Bookheim, Reference Librarian, California Western School of Law (Dec. 15, 1993) (on file with author).


383. Id. at 4263.

384. See supra notes 367-68 and accompanying text.


386. See generally supra Chapter One.
EEOC in fact sets up a double standard: this definitional distinction effectively positions legal culture to ignore the way(s) in which sexual orientation in fact is conflated with sex and gender in modern culture, and thus calls for the law to blind itself to the conflationary dynamics of sex/gender discrimination claims brought to the legal system for vindication. And, by effectively calling upon legal culture to blind itself to the conflation’s operation in modern culture, this definitional double standard leaves societal exercises of sex/gender discrimination unfettered.

Additionally, judicial practices belie the efficacy of the dichotomy in application; the joint power and influence of Leg One and Leg Two easily overwhelm and negate this definitional distinction. As in modern culture, the following cases show that courts have been unable to resist indulging the clinical and societal cross-association of social gender (a)typicality with (minority) sexual orientation under the conflation’s first and second legs, thereby underscoring the impracticality and impotence of the EEOC’s analytical scheme. In fact, the wholesale judicial disregard for the dichotomy’s definitional distinctions amounts to and operates as an analytical double standard that matches the dichotomy’s definitional double standard.

As seen in the cases that follow, the courts’ analytical double standard operates in much the same way as the EEOC’s definitional double standard because it blinds the law to the conflation’s actual role in the case; the difference between the two is that the latter is formally incorporated into the EEOC’s substantive framework while the former is simply applied by the courts without any open acknowledgement. In this way, courts simultaneously engage in three tactics specifically vis-à-vis this dichotomy, which in turn highlight its inadequacies: courts (sometimes) profess fealty to the dichotomy, they (typically) disregard its definitional distinctions in practice, and they (routinely) employ an analytical double standard that withholds legal recognition of the conflation’s operation in modern culture to rebuff meritorious claims. These problems, and a host of others related to the conflation more generally, are manifested in the seminal case and its progeny.

B. Smith v. Liberty Mutual Ins. Co.

The seminal judicial opinion, Smith v. Liberty Mutual Insurance Co., provides a classic example of the way(s) in which the conflation impacts legal culture. As the first Title VII ruling expressly on the conflationary association of sex and gender with sexual orientation, Smith continues to tower over the area of law that it originated. It thus is especially

387. See infra Part IV.G.
388. See generally infra Part IV.
389. See infra Part IV.G.
390. See generally Chapter Four, Part II.
significant that Smith shows how easily tribunals, like other segments of society, ignorantly or strategically embrace or disavow the conflation, or parts of it.

As discussed below, Smith reveals how legal culture upholds and recycles sex/gender themes and traditions to aid the perpetuation of hetero-patriarchy. More specifically, Smith shows how legal culture accepts the deductive, intransitive conception of sex-determined gender, and how it applies the conflationary association of social gender atypicality with sexual gender atypicality to police and preserve traditionalist active/passive divides both socially and sexually. Smith thus exemplifies how the conflation’s first and second legs operate in tandem within legal culture to generate skewed results and incoherent precedents.

1. The Conflation’s Shaping of the Case

The facts in Smith were simple and undisputed. Smith applied for a job as a mail clerk at a large insurance company but was denied employment because the supervisor who interviewed him found him to be socially “effeminate” and therefore “not too suited for the job.” The EEOC investigated Smith’s claim, with the investigator reporting that the “offensive” characteristics were “quite pronounced” and that Smith had social “interests . . . not normally associated with males (sewing).” In fact, EEOC documents reveal that Smith had identified four hobbies on his application for employment: “[p]laying musical instruments, singing, dancing and sewing.” Upon concluding its investigation, the EEOC issued Smith notice of his right to sue.

Smith then filed his action. The discovery proceedings quickly focused the controversy on social gender effeminacy and its conceptual and normative correlation to sexual gender effeminacy under the conflation. Responding to Smith’s interrogatories, the employer candidly stated that

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392. See supra Chapter One, Part I.A.
393. See infra Chapter Four, Part I.E.I-5.
394. See generally supra Foreword, Part I.A-D.
395. The facts, though agreed upon by both parties, are recited haphazardly in various sources. The following account pulls the facts together in order to present a clear picture of the case. This account is based primarily on the facts as recited in the Brief for the Appellant, Bennie E. Smith, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (No. 75-3230) [hereinafter Smith’s Brief] and the Brief for the Appellee, Liberty Mutual Insurance Company, Smith (No. 75-3230) [hereinafter Liberty’s Brief].
396. Liberty’s Brief at 9.
397. Liberty’s Brief at 9 n.7.
399. Liberty’s Brief at 2.
400. Smith claimed both race and sex discrimination and, interestingly, his complaint omitted any mention of effeminacy or sexual orientation. Thus, conflationary associations regarding sexual orientation were not raised in Smith with the filing of the complaint. Complaint at 3, Smith (Civil Action File No. 17499).
Smith had not been hired because the interviewing supervisor believed that he was effeminate and "thus suspected Smith of homosexuality." This response effectively crystallized the remainder of the litigation into a contest over conflationary imagery. In this way, the conflation entered the formal record of the case.

Following extended procedural maneuvers, both parties moved for summary judgment. In Smith's motion for summary judgment, he framed his claim in the following way: "The sole issue presented . . . is whether the refusal to hire an applicant based on sexual stereotypes amounts to unlawful discrimination on the basis of sex." By contrast, the employer's response simply asserted that whether "the named plaintiff may or may not be homosexual is of no moment. He was suspected of being such and that is why he wasn't hired." Conflationary associations of social and sexual gender effeminacy thus took over the framing of the issues and, ultimately, the disposition of the controversy.

This framing of the issues shows how Leg One and Leg Two work in tandem culturally because this framing shows how sex determines gender and how social gender atypicality is associated with minority sexual orientation. This framing also shows how sex serves as the basis of all conflationary arrangements in modern and legal culture: sex determines gender and thus establishes the social/public and sexual/private dimensions of personality that Smith was expected—and, to get a job, required—to manifest in accordance with active/passive themes and traditions. The courts' (mis)treatment of these issues and (f)acts next shows how these conflationary events reverberated in the law, and captured its judgment.

2. The Conflation's Grip on the District Court

The district court ruled in favor of the employer, holding that Title VII did not "forbid discrimination based upon 'affectional or sexual preference.'" The court made no attempt to reconcile the obvious disparity between the facts in the record, which by everyone's account showed social gender (effeminacy) as the basis of the discrimination, and its holding, which was mostly concerned with sexual orientation as the source of the

401. The interrogatory response was acknowledged and accepted in the appellate briefs of both parties. See Smith's Brief at 1; Liberty's Brief at 2-3.

402. Liberty's Brief at 18.

403. The race discrimination claim was denied after a bench trial. The convoluted procedural history of the case is summarized in Smith's Brief at 1-6, and in Liberty's Brief at 1-10.


405. Response of Liberty Mutual Insurance Company to the Motion for Summary Judgment at 3, Smith (Civil Action File No. 17499) (footnotes omitted).

discrimination. Instead, the court simply accepted the employer's conclusory and conflationary framing of the case.

For instance, the district court stated that “[p]laintiff argues that it is forbidden under present law for an employer to consider a job applicant’s affectional or sexual preference in hiring and that, therefore, the employer’s election not to employ plaintiff because applicant (a male) appeared to be ‘effeminate’ constituted an unlawful discrimination.”

This re-characterization is not only conceptually incoherent, it is flat wrong. Smith’s pleadings and motions clearly show him arguing that discrimination against effeminate men constituted sex discrimination because such discrimination reinforced sex/gender stereotypes. Smith specifically did not argue that such discrimination constituted sexual orientation discrimination—only the employer had expounded that view. This flawed judicial analysis, riding roughshod over the plaintiff’s explicit framing of his claim, thus permitted the conflationary cultural themes embedded in the (f)acts of the case to ordain a wrong result at the trial level: the district court effectively, and as a matter of law, embraced and condoned the cultural enforcement of Leg One by accepting the analytical shift to Leg Two.

The court’s flawed analysis forced it to embrace a disingenuous position. By accepting the defendant’s subjective equation of social gender atypicality with same-sex sexual orientation, the district court embraced Leg Two of the conflation on a normative or cultural level. Yet, the district court’s ruling simultaneously denied this cross-correlation for purposes of legal analysis. Through the disengenuity of simultaneously accepting (culturally) and denying (legally) the second leg of the conflation, the district court managed to justify cultural and legal enforcement of the first leg.

This ruling enforces Leg One via Leg Two in two steps: by accepting first the proposition that sex and gender are correlates that must conform to each other and by accepting next that social gender atypicality and homosexuality are correlates. This shift from Leg One to Leg Two allows the use of the latter leg strategically to support the former substantively. As a practical matter, the district court’s analytical double standard with respect to Leg Two permits society to discriminate against “sissies” because they might be “queers.” This double standard does not permit the law to recognize that the cultural conflation of the two identities is what drives such discrimination. Through the shift from Leg One to Leg Two and the double standard employed under the latter leg, the district court validated the conflation as a normative and official force while disabling the law’s ability to

407. Id. at 1099.

408. The appellate court noticed the district court’s confusion but apparently thought it emanated from Smith’s arguments, mentioning at one point in its opinion that, “[t]he record is replete with the [trial] court’s efforts to achieve an understandable idea of just what Smith was claiming . . . .” Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 328 (5th Cir. 1978).
counteract conflationary bigotries. The appellate court’s ruling only made matters worse.

3. Compounding the Conflation on Appeal

On appeal, Smith again framed the issue to focus on social gender atypicality and its foundation in sex. The question presented, Smith asserted in his brief, was whether “discrimination against an applicant for employment who, in the employer’s opinion, has characteristics or personality traits which are normally or traditionally associated with the sex of the opposite gender constitutes discrimination on the basis of sex.”

Urging that it did, Smith quoted the definition of “effeminate” from Webster’s dictionary and argued that such discrimination was unlawful because it gave effect to sex-determined gender stereotypes.

Defending its position, the employer continued its efforts to shift the issue to Leg Two by stressing twin points. First, it argued that “discrimination because of sexual preference or demeanor is not actionable under Title VII.” This joinder of sexual preference and (sex/gender) demeanor seemed calculated to exploit the conflationary association of sexual orientation with gender, which already had prevailed at the district level. Second, the employer maintained that it had no policy against hiring effeminate men, but that it was properly concerned “that all of its employees behave in a manner appropriate to their sex.” Thus, the employer argued, it did not discriminate at all, but rather it only screened applicants of both sexes for “a neutral fact—a sexual demeanor which is ‘in accordance with generally accepted community standards of dress and appearance.’” This position baldly claimed an interest in enforcing sex-based gender correctness along traditionalist active/passive lines as a defense to laws that on their face prohibit discrimination based on sex. The success of these two points therefore depended on judicial acceptance of conflationary premises and practices.

The employer’s first point, of course, represented an unadulterated invocation of Leg Two’s conflationary associations because it plainly asked the court to accept the conflation of social gender atypicality with minority sexual orientation. In effect, this request urged the court to follow the employer’s cultural employment of the conflation, and thereby to convert the case into a sexual orientation controversy. The alarming point is that this audacity succeeded.

409. Smith’s Brief at 16.
410. Id. The quoted definition read: “to make womanish, having the qualities generally attributed to women, as weakness, gentleness, delicacy, etc., unmanly.” Id.
411. Smith’s Brief at 16.
412. Brief for the Appellee at 23, Liberty Mutual Insurance Company, Smith (No. 75-3230).
413. Id. at 21 n.16 (emphasis added).
414. Id. at 20-21 (quoting Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc)).
The employer’s second argument effectively was that its sex and gender prejudice against effeminate men was counter-balanced by a corresponding prejudice against masculine women. According to the employer, such dual prejudice could not constitute discrimination because the prejudice applied "equally" to each sex and gender. This argument upsets Title VII principles by positing that more discrimination is a cure for, or a defense to, otherwise illegal discrimination. Though the Orwellian reasoning underlying this "equal discrimination" argument already had been rejected in miscegenation cases, it was advanced here and neither addressed nor questioned judicially.

The Fifth Circuit affirmed the district court’s ruling, but with an analysis as convoluted as the district court’s had been disingenuous. Smith’s claim, the court explained, was not that he suffered discrimination because he was a male; rather, Smith experienced discrimination because “as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive "effeminate."" Although with this statement the court seemed to acknowledge expressly that sex-based gender stereotyping motivated the defendant’s act, the court nonetheless denied relief simply by asserting in passing that sex is irrelevant to gender. By denying the relevance of sex to gender, this court disavowed analytically the conflation’s first leg. In effect, the court disjoined doctrinally this most familiar leg of the conflation: the use of sex to determine gender. This disavowal thus mirrored with respect to Leg One the same analytical double standard employed by the district court with respect to Leg Two. Through this double standard, the appellate court also was able to conclude that sex discrimination had not occurred in Smith.

The appellate court’s doctrinal disavowal of Leg One could not obscure, however, that in keeping with Euro-American norms, Smith’s gen-

415. See infra Part V.A-B.
417. Id. at 327.
418. The court held that Title VII protects only sex discrimination, and so it did not reach “the conduct complained of here.” Id.
419. As the seminal case, it bears mention that Smith also depicts how the conflation actually creates legal controversies: the employer’s interrogatory response acknowledged that the refusal to hire was motivated by the supervisor’s perception that Smith’s gender did not conform socially to his sex and that this nonconformance rendered Smith’s sexual orientation suspect as well. In other words, the conflation’s influence on the perceptions of the supervisor under Leg One and Leg Two in fact sparked the action that gave rise to this case. The conflation therefore not only influences the legal system’s reaction to controversies, it also manufactures and constructs controversies that might otherwise not have come into existence.

In addition, Smith shows that the conflation crosses over from society into the law, and also crosses back from the law into society. This cross-recycling imports the conflation from society into legal culture and then, once imported, the law’s embrace of the conflation in turn validates and perpetuates the conflationary forces in society at large. In this way, law and society serve as mutual buttresses for the conflation. These two points—the conflation’s manufacturing of legal controversies and its continual cross-recycling from modern to legal culture and back—are further demonstrated in varying ways and degrees by all of the cases that follow below.
der derived *exclusively* from his sex, and that his social/public gender atypicality was grounded factually and conceptually on sex-based gender stereotypes. By all accounts of the facts, the employer discriminated against Smith only because he was a *man* deemed insufficiently male by another man.\textsuperscript{420} Indeed, the position Smith sought had been filled (after his rejection but before this litigation) by a person who the employer, under its equal discrimination regime, no doubt would require to be effeminate—a *woman*.\textsuperscript{421} The only difference relevant to the employer's actions in this instance was the sex difference.

Thus, the discrimination here arose precisely because Smith's sex was male, yet he did not sufficiently affect the masculine gender. Moreover, a similarly situated member of the female sex suffered no discrimination for affecting an effeminate appearance or demeanor. The discrimination practiced against Smith therefore involved *both* sex and gender under the conflation's first leg.

With this approach, the appellate court, like the district court, also circumvented undisputed facts showing that the discrimination was motivated by the plaintiff's perceived disruption of the conflation's first leg. The employer in its pleadings had boasted of its policy requiring social gender correctness and gauging correctness by reference to sex. The employer on the record had acknowledged that Mr. Smith personally was denied employment because he violated this policy and its embodiment of Leg One. On the record, the employer effectively had claimed a right to police traditionalist sex/gender stereotypes. By denying legal recognition of this conceded cultural conflation, the court also condoned discrimination that was based both on *sex and* on gender because it was occurring along Leg One of the conflation. In this way, the appellate ruling upholds the conflation culturally, and empowers it legally.

Consequently, the court helped to empower sex-based active/passive categories and hierarchies that enforce traditionalist sex/gender correctness. That it did so even as legal institutions purport fidelity to a statute that textually forbids discrimination on account of sex is especially reprehensible. This ruling's (mis)treatment of the conflation's first leg thus aggravated and compounded the district court's complicity in conflationary discrimination.

\textsuperscript{420} The interviewing supervisor was Nathaniel Nash. See *Brief for the Appellee at 8-9*, Liberty Mutual Insurance Company, *Smith* (No. 75-3230).

\textsuperscript{421} *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 n.2 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978). Plaintiff "thus argue[d] that the defendant accepted an employee presumably displaying effeminate characteristics resulting in plaintiff's having been discriminated against because he was a male." *Id.*
4. The Court’s (Mis)Use of the EEOC Dichotomy

The Fifth Circuit also cited the EEOC’s ruling in *Refusal to Hire Homosexual* to support its conclusions, but its reliance on that ruling was erroneous in two crucial respects. First, the Fifth Circuit mischaracterized the EEOC’s decision. The court wrote that the EEOC had “ruled that adverse action against homosexuals is not cognizable under Title VII.” In fact, the EEOC ruling was much more limited: the EEOC decided that Title VII did not prohibit action against homosexuals (and, presumably, heterosexuals) based specifically on “sexual proclivities or practices.” This decision, however, did not condone action against homosexuals on the basis of sex or gender. Thus, according to the EEOC ruling, Title VII does not protect homosexuals as homosexuals, but Title VII on its face and as applied does protect homosexuals as women and men.

Second, the court misapplied the EEOC ruling to the facts of *Smith*. The EEOC ruling was based explicitly on a purported manifestation of “homosexual tendencies,” meaning specifically “sexual proclivities or practices.” In other words, the EEOC ruling defined a homosexual as a person with certain “sexual proclivities or practices,” which the claimant somehow was found to possess. Smith, however, had not manifested such “homosexual tendencies”; rather, Smith manifested social/public effeminacy-social/public gender atypicality—which the employer then unilaterally equated with minority sexual orientation under Leg Two of the conflation. The *Smith* case, in short, was diametrically contrary to the EEOC scenario because the record in *Smith* did not and (as discussed

423. Id.
425. The text of the statute does not exclude persons with a minority sexual orientation from its sex provision. See *supra* note 378. More generally, the courts’ treatment of sexual minority issues under Title VII has been characterized by chaos. For instance, in *Wright v. Methodist Youth Services*, 511 F. Supp. 307 (N.D. Ill. 1981), the court held that an employee suffered unlawful discrimination when he was fired for refusing same-sex advances from a supervisor. The court simply stated, “Though neither any of the parties nor this Court has been able to locate any direct precedent for such a claim, Title VII should clearly encompass it.” *Id.* at 310. Yet in *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332, at 70, 102 (6th Cir. 1992), the court held that no unlawful discrimination occurred when a Postal Service employee was forced to resign, upon the advice of his psychiatrist, after three years of being “taunted, ostracized, and physically beaten by his co-workers because of their belief that he was a homosexual.” This harassment included epithets like “fag” and taunts such as “Dillon sucks dicks,” which the employee claimed created a hostile working environment. *Id.* However, the court concluded that the “right to a work environment free from denigrating comments, verbal abuse, and other tactics of marginalization” did not extend to sexual minorities. *Id.* at 70,106. For further readings on judicial (mis)treatment of sexual minorities in this context, see Marcossen, *supra* note 24; Marie E. Peluso, *Note, Tempering Title VII’s Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 *VAND. L. REV.* 1533 (1993). Regarding sexual harassment, see generally Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 *TUL. L. REV.* 1363 (1993).
426. See *supra* notes 380-87 and accompanying text.
below) could not support any finding of disfavored "sexual proclivities or practices." Thus, the Fifth Circuit’s reliance on the EEOC ruling was factually misplaced and analytically flawed. By equating social gender atypicality, like cross-gender hobbies or mannerisms, with same-sex sexual orientation, the Smith court disregarded both the definitional and the conceptual structure of the EEOC dichotomy.

Of course, had the court properly applied the EEOC’s definitions, it would have placed Smith in the protected sex/gender category because the bias here was based on social gender atypicality, not on sexual proclivities or practices. But judicial sympathy for, or vulnerability to, the joint power of the conflation’s first and second legs caused this court to disregard the dichotomy’s analytical framework.

5. The Sexual Orientation Loophole

Ironically, Smith vehemently and persistently denied that he was gay, a denial that remained factually unchallenged on the record because the employer’s defense asserted only a subjective conflationary association between Smith’s social gender atypicality and his perceived sexual orientation. For instance, in his brief Smith asserted that he “strongly resent[ed] the insinuation and opinionated references” about his sexual orientation that the employer repeatedly advanced, and he “most stringently denie[d] that he [was] a homosexual.” Smith furthermore asserted the he was a “happily married man” and that the “accusation [of homosexuality was] strongly refuted by his marital status.” To underscore his own focus on sex and gender, Smith maintained that he was not “demanding that an employer accept [an] unconventional life style and mores,” and he emphasized that the defendant’s refusal [to hire him] was not based on a determination that plaintiff was in fact a homosexual, but rather the subjective determination that he possess[ed] personal traits that Liberty Mutual associated by stereotype with the female gender. Smith repeatedly tried to stress that his claim was not about sexual orientation and that, in any event, he was a happily-married, albeit socially gender-atypical, member of the sexual majority. Yet, as discussed above, the court reached the sexual

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427. This scenario replays itself in subsequent cases as well. See, e.g., infra notes 591-622 and accompanying text.
429. Smith’s Brief at 20 n.7.
430. Id. at 17; Plaintiff’s Brief in Support of Motion for Summary Judgment at 5.
431. Smith’s Brief at 20 n.7.
432. Smith’s Brief at 17; Plaintiff’s Brief in Support of Motion for Summary Judgment at 5.
433. Smith’s Brief at 20 n.7 (emphasis omitted).
orientation question by accepting the analytical shifting of this case to the conflation of gender and sexual orientation under Leg Two.\(^{434}\)

Thus (mis)applying the EEOC dichotomy, the court had no difficulty concluding that Title VII did not protect sexual orientation from discrimination.\(^{435}\) In this way, the appellate court mirrored the district court’s acceptance of Leg Two normatively while denying it doctrinally.\(^{436}\) The appellate court, like the district court, upheld the conflation’s operation in modern culture by withholding legal recognition of the conflation. The appellate court thus applied this analytical double standard to both legs of the conflation.

Worse yet, in so doing, the appellate court in Smith authoritatively validated a doctrinal loophole for the exoneration of sex and gender discrimination: because sexual orientation discrimination is generally permissible, an employer need only say that it based its sex/gender discrimination on a “suspicion” about sexual orientation to elude legal repercussions. In practice, as Smith indicates, this claim by the employer has the capacity to transform otherwise blatant sex and gender discrimination into judicially blessed employer action by triggering the shift from Leg One to Leg Two. This shift therefore represents a sexual orientation loophole to sex and gender anti-discrimination law that obviously invites unscrupulous defense strategies and unprincipled court rulings, an invitation that neither defense strategists nor courts have hesitated to accept.

Perhaps, then, the most dramatic lesson of Smith—and its most dangerous legacy—lies in the courts’ readiness to transform what was in reality a sex and gender discrimination claim into a sexual orientation discrimination claim. After all, a key point in this controversy—and one that recurs in subsequent cases as well—is that Smith never asserted a claim based on sexual orientation discrimination. Indeed, he repeatedly tried to focus the litigation on social gender atypicality. However, despite Smith’s efforts and despite his unequivocal self-inscription as a “happily married” heterosexual, Smith was tagged a suspected homosexual by the conflationary perceptions that sparked the controversy in the first place, and his suspected sexual orientation inexorably eclipsed all else as the case unfolded. In addition to its other lessons, Smith thus shows the distorting power of the homosexual label, a power that weakens sex/gender anti-discrimination law as it enlivens the power of conflationary notions and biases.\(^{437}\)

\(^{434}\) Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 n.1 (5th Cir. 1978). The court’s mischaracterization of the EEOC ruling in Refusal to Hire Homosexual followed, without explanation, a discussion of Smith’s effeminacy.

\(^{435}\) Smith, 569 F.2d at 327.

\(^{436}\) See supra notes 391-421 and accompanying text.

\(^{437}\) See infra Part IV.C-E.
6. The Sex-Plus Loophole

The Fifth Circuit not only weakened Title VII’s sex/gender coverage by countenancing what was plainly sex and gender discrimination, it also used this seminal Title VII case (putatively) on sexual orientation to situate male effeminacy within the obtuse doctrinal territory of permissible “sex-plus” discrimination. Generally speaking, the type of discrimination encompassed by the sex-plus doctrine “involves the classification of employees on the basis of sex plus one other ostensibly neutral characteristic.”438 The Supreme Court first recognized “sex-plus” discrimination in Phillips v. Martin Marietta Corp.439

In Phillips, the challenged employment policy deemed women with pre-school aged children ineligible for employment, although men with young children were eligible.440 The Court held that women could not be denied job opportunities because of fears of “conflicting family obligation.”441 That is, women may not be subjected to discrimination based on the presumption that they will assume traditional feminine gender roles socially, such as child caretaker. In so holding, however, the Phillips Court also acknowledged that under some circumstances sex-plus discrimination would be permissible.442

Thus, an employer’s discrimination may be valid so long as it is based not just on sex but also on a “plus” characteristic, and so long as the plus itself is not an especially sensitive attribute protected under another provision of law. For example, a plus involving an “immutable characteristic” or abridging a “fundamental right” or some other “legally protected right” does not fall within the exception.443 In this way, the sex-plus doctrine threads Title VII analyses with conventional equal protection considerations (e.g., “immutable” characteristics) in a manner that tends to narrow the statute’s remedial reach.444 The sex-plus concept thus tends to obscure the

440. Id. at 543.
441. Id. at 544. Since Phillips, courts have struck down a variety of employment restrictions that qualify as sex-plus categories. See, e.g., Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (height, weight, and sex-appeal characteristics that excluded men from customer contact positions); Sprogis v. United Air Lines, 44 F.2d 1194 (7th Cir.) (no-marriage rule for female flight attendants), cert. denied, 404 U.S. 991 (1971); cf Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (presumption that women lacked physical capability for certain jobs).
442. The Court stated that:

The Court of Appeals ... erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction ....

400 U.S. at 544.
444. For instance, in Willingham, the Fifth Circuit held that discrimination against men with long hair, but not women with long hair, was legal sex-plus discrimination. Id.; see also Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973) (holding hair length regulation for male employees valid under Title VII); Lockhart v. Louisiana-Pacific Corp., 795 F.2d 602 (Or. App. 1990) (citing to
bare fact that sex plus something else still leaves sex as the touchstone for the discrimination.445

Smith illustrates how the intersection of the sex-plus doctrine with the conflation’s first leg can weaken the protections promised by Title VII: the Smith court placed male “effeminacy”—social gender atypicality—within the zone of permissible sex-plus discrimination. Indeed, most of the court’s brief discussion of Smith’s sex discrimination claim was devoted to analogizing male effeminacy to hair length, a factor that the Fifth Circuit had validated in a previous case as a basis for sex-plus discrimination under Title VII.446 The court found that, like hair length and grooming requirements, effeminacy implicated no independently protected characteristic or right and therefore merited no protection under Title VII.447 From a conflationary perspective, the Smith court’s deployment of the sex-plus doctrine reveals how the sex-plus concept can be used as a gender proxy that effectively (re)legalizes even the most stereotypical forms of sex and gender discrimination.

In Smith the pleadings and briefs establish that the discrimination involved sex plus effeminacy. Smith, therefore, was about sex plus gender and, more specifically, it was about sex plus gender atypicality: the “plus” here was gender itself. The bizarre effect of the sex-plus approach, in this instance, was to sever gender from sex in order to (re)classify gender discrimination as a form of bias that is not based on sex, and that is therefore permissible. In this way, the legal manipulation of the conflation to shift this claim from Leg One to Leg Two via the sex-plus concept creates yet another loophole for discrimination that actually is based on both sex and gender.

Of course, this doctrinal disjunction of sex and gender in the sex-plus context is implausible—indeed, impossible—for at least two reasons. First,

445. Decrying the suggestion by the Phillips majority that a woman’s child-rearing responsibilities might conceivably constitute a bona fide occupational qualification, Justice Marshall’s concurrence in Phillips expressed a “fear” that the ruling would permit “ancient canards about the proper role of women to be a basis for discrimination” by allowing employers to reject an individual “based on stereotyped characterizations of the sexes” even though Title VII is intended to prevent reliance on such stereotypes. 400 U.S. at 545 (Marshall, J., concurring). In effect, Marshall was pointing out that the sex-plus doctrine threatened to give legal effect to the historic conflation of sex and gender, and thereby undermine Title VII. The court’s treatment of Smith (and other cases) realized Marshall’s fear of judicially perpetuated stereotyping. See infra text accompanying notes 657-59. However, some courts have resisted this temptation. See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.) (holding that being a woman was not a “bona fide occupational qualification” for the job of flight attendant), cert. denied, 404 U.S. 950 (1971); Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972) (holding that sex-based disparities within employer grooming codes constituted unlawful sex discrimination under Title VII).


447. Id. at 327.
it is descriptively false; as previously discussed, Euro-American culture historically and currently adheres gender onto sex deductively and intransitively.\footnote{See supra notes 118-19 and accompanying text.} The denial of this pervasive custom in a court opinion cannot alter or obscure that history. Second, the discrimination in the case was squarely situated in the conflation of sex and gender or, more precisely, in the victim’s disregard for the conflation of sex and gender. This act or strain of discrimination therefore is based on both constructs connecting Leg One of the conflation: Smith’s gender (a)typicality, as measured by reference to sex, was the direct and undisputed source of the discrimination against him.

This use of the sex-plus analysis to open up a second loophole to sex and gender anti-discrimination law yet again employs the cultural/legal double standard. This technique, clearly, is key to conflationary judicial analysis. Yet, judicial denial of cultural practices only serves to make the opinions intellectually dishonest, the results analytically incoherent, and the protections of anti-discrimination law substantively underinclusive.

7. The Linkage of Transsexualism & Homosexuality

Finally, and presumably for good measure, the Fifth Circuit also linked transsexuality with homosexuality by commenting, in passing, that “[t]wo district courts also have held that Title VII does not protect transsexuals.”\footnote{Smith, 569 F.2d at 327 n.1. The two district court rulings cited by the court were Powell v. Read’s, Inc., 436 F. Supp. 369 (D. Md. 1977), and Voyles v. Ralph K. Davies Medical Ctr., 403 F. Supp. 456 (N.D. Cal. 1975), aff’d, 570 F.2d 354 (9th Cir. 1978). The employer had advanced the link originally by citing Voyles in its brief. Brief for the Appellee at 18-19, Liberty Mutual Insurance Company, Smith (No. 75-3230).}
The court failed to articulate the logic of this conclusory analogy between homosexuals and transsexuals for purposes of a Title VII analysis, perhaps because the linkage of the two groups is conceptually untenable. Transsexuality generally refers to a subjective sense that one’s sex, as indicated by external genitalia, is discordant with one’s personal(ized) sense of gender. Accordingly, many transsexuals undergo sex-change operations in order to harmonize sex with gender.\footnote{See, e.g., Jérol Taitz, Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination, 13 AM. J.L. & MED. 53, 54 (1987) (explaining that the “operation is a therapeutic procedure, designed to bring anatomical sex into line with gender”); see also D. Douglas Cotton, Note, Ulane v. Eastern Airlines: Title VII and Transsexualism, 80 NW. U. L. REV. 1037, 1039 n.15 (1986) (explaining that “a transsexual is a person whose anatomical sex is different from his or her gender identity”); Green, supra note 118, at 125 (defining transsexualism as “the enduring, pervasive, compelling desire to be a person of the opposite sex”). One popular dictionary defines a “transsexual” as a “person with a psychological urge to belong to the opposite sex that may be carried to the point of undergoing surgery to modify the sex organs to mimic the opposite sex.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1255 (1991).}
Transsexualism, however, has nothing in particular to do with sexuality or eroticism. By contrast, homosexuality generally signifies a tilt of erotic interest toward members of the same
Homosexuality, in turn, has nothing in particular to do with doubts about one's sex. Thus, the forced linkage of transsexualism and homosexuality in Smith is squarely contrary to the generally recognized conceptions of each.

However, the simplistic cross-juxtaposition of these two categories in Smith does provide a vivid example of the way in which a repetitive assertion of tautological, conflationary conclusions can manufacture law. The process was begun in Voyles v. Ralph K. Davies Medical Center, a case in which the defendant fired Voyles from her job because she was about to undergo a sex-change operation. The Voyles court casually commented that neither homosexuals nor bisexuals were protected under Title VII. This commentary was wholly irrelevant to the claim at issue in that case, but it set the wheels of cross-juxtaposition in motion by injecting sexual orientation into the consideration of transsexualism under Title VII. The process was complete when Smith reciprocated by injecting transsexualism into the consideration of sexual orientation under Title VII.

The two courts' cross-assertions illustrate the confusion and just plain carelessness (or worse) that surround the legal treatment of sex, gender, and sexual orientation under the conflation. The tautological citations in these cases created a circular, self-justifying set of conflationary misapprehensions that to this day condone arbitrary discrimination against individuals categorized either as transsexual or homosexual. This tautology thus illustrates how conflationary influences can trigger and justify various acts or strains of sex/gender discrimination.

8. Smith's Conflationary Legacy

Smith, as the case of first impression in this area of law, continues to haunt litigants because the two opinions it generated are irreconcilable, even though they purport harmony. Indeed, the Smith rulings agreed only on result; the two Smith courts' selective embraces and disavowals of conflationary precepts injected serious analytical and doctrinal disequilibrium into this area of Title VII jurisprudence from the outset. Consider the possi-

451. The same dictionary defines "homosexual" as a person "characterized by a tendency to direct sexual desire toward another of the same sex." Webster's Ninth New Collegiate Dictionary 579 (1991); see also supra note 370 and authorities cited therein.

452. 403 F. Supp. 456 (N.D. Cal. 1975), aff'd, 570 F.2d 354 (9th Cir. 1978).

453. Id. at 457.

454. This recycling of conflated cross-citations continued in prominent cases such as Ulane v. Eastern Airlines, 742 F.2d 1081, 1085-86 (7th Cir. 1984) (holding that transsexuals are not protected under Title VII and relying in part on the fact that Congress had defeated attempts to amend Title VII to protect sexual orientation), cert. denied, 471 U.S. 1017 (1985). Although the Ulane court claimed to recognize distinctions among homosexuals, transvestites and transsexuals, the court nonetheless proceeded to cite the absence of protection for homosexuals and transvestites as further support for finding no protection for transsexuals. Id.; see also Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989) (holding that a gay male was not protected under Title VII and relying in part on transsexualism rulings), cert. denied, 493 U.S. 1089 (1990).
ble permutations of the two Smith opinions' combined meanings as precedent.

Under the district court's analysis, (male) effeminacy is not necessarily concerned with sex or gender but is evidence of, or tantamount to, homosexuality. Consequently, discrimination based on (male) effeminacy is deemed to constitute discrimination based on sexual orientation. The effect of this regime is that neither (male) effeminacy nor homosexuality is protected by Title VII. As noted earlier, this possible meaning of Smith follows from the district court's cultural embrace of the first and second legs of the conflation, which jointly equate sex-based social gender atypicality with same-sex sexual orientation, while denying the legal relevance of that equation.

Under the appellate court's opinion, on the other hand, (male) effeminacy concerns gender and sexual orientation, but not sex. Consequently, discrimination based on (male) effeminacy is deemed to constitute either gender or sexual orientation discrimination, but not sex discrimination. The effect of this regime is that gender (in the form of (male) effeminacy) and sexual orientation are not protected by Title VII. This meaning of Smith obtains because the appellate opinion doctrinally rejected the conflation's first leg, but accepted its second leg. In tandem, the mixed treatments of the three constructs in the two Smith opinions condoned discrimination based on (male) effeminacy (or gender) and on homosexuality (or sexual orientation).

However interpreted, the two opinions dramatically circumscribed the substantive scope of Title VII. Because sexual orientation discrimination is formally permissible, while sex and gender discrimination formally are not,⁴⁵⁵ the association of social gender atypicality with sexual orientation rather than with sex or gender created a giant loophole in anti-discrimination law. The conflationary analyses in Smith thus facilitate the labeling of various acts or strains of discrimination as "merely" based on sexual orientation, thereby shifting the case from Leg One to Leg Two and immunizing the bigotry from Title VII protection.

Ultimately, the Smith courts also accepted and ratified the fundamentality of sex within the conflationary status quo and the intransitivity of deductive gender within this scheme. In other words, the courts' approval of discrimination penalizing social gender atypicality, or transitivity, licenses cultural biases and pressures designed to ensure gender correctness on the whole. And, because correctness of deductive, intransitive gender is measured by reference to sex, judicial approval of this discrimination also

⁴⁵⁵ See supra notes 330-31 and accompanying text. Indeed, because of this difference in treatments, some litigants have attempted to characterize outright sexual orientation discrimination as sex or gender discrimination, though to no avail. For a discussion of these attempts, see, e.g., Capers, supra note 24. For a comprehensive discussion of the vulnerabilities of sexual minorities to discrimination, see generally Developments in the Law—Sexual Orientation and the Law, supra note 83.
helps to consolidate the fundamental role of sex in fixing gender. Additionally, the *Smith* courts expressly accepted and ratified the cross-association of social and sexual gender atypicality because their approval of social gender atypicality in this case was tied to cultural and legal biases against persons with perceived or actual same-sex dispositions. These two rulings thus cater and give credence to active/passive traditionalism regarding all three endpoints of the conflation.

As a set, these rulings depict the courts readily lending their power and prestige to legitimizing and vitalizing the cultural and legal power of the conflation’s active/passive imperatives. While manipulating the conflation’s first and second legs in unprincipled and inconsistent ways, the *Smith* courts took variable analytical paths toward uniform results, managing to ensure substantive outcomes that denigrate both femininity and same-sex sexuality: both *Smith* rulings pronounce and establish clear legal disapproval of cross-gender qualities by and among men, thereby devaluing femininity, and both rulings (mis)treat minority sexual orientation as an aspect of personhood that society may attack and seek to destroy at will. The *Smith* results therefore are both androcentric and heterosexist—they echo and follow the traditionalist sex/gender preferences of hetero-patriarchal categories and hierarchies. This conflationary accommodation of historic sex/gender stereotyping is jarring, and especially dangerous, in a seminal case interpreting and applying the nation’s chief statutory bulwark against sex/gender discrimination.

As this discussion shows, the effect of the conflation in *Smith* was decisive and far-reaching. The conflation warped perceptions of facts and theories during the entire process leading up to and concluding the litigation. As a result, *Smith* created two loopholes, the first based on sexual orientation and the second on the sex-plus concept. These loopholes disarmed anti-discrimination law in this case of first impression, and set the stage for further conflationary rulings. Two decades later both opinions in *Smith* remain on the books as effective law. And, worse, their potential for mischief has been realized in their progeny.

C. Strailey v. Happy Times Nursery

The conflationary legacies of the seminal rulings by the EEOC and the *Smith* courts were promptly picked up in *Strailey v. Happy Times Nursery School, Inc.*456 As with *Smith*, the facts of the case were fairly simple and undisputed. Basically, Strailey had been employed at a nursery school for

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456 608 F.2d 327 (9th Cir. 1979). On appeal to the Ninth Circuit *Strailey* was consolidated with two other cases because of the “similarity of issues involved.” *Id.* at 328. The Ninth Circuit decision with regard to these three cases is commonly referred to as *Desantis v. Pacific Tel. & Tel. Co.* When discussing the portions of the opinion that address Strailey’s claims, however, this Project will refer to the decision as *Strailey v. Happy Times Nursery School, Inc.*
two years but was discharged "because he wore a small gold ear-loop to school prior to the commencement of the school year."457

However, like Smith, the Strailey opinion did not reveal all that is necessary for a thorough understanding of the conflation's influence in the litigation. Fortunately, the pleadings and briefs filed in the case again help to cure some of these omissions; more importantly, the recollections of Strailey's attorney458 explain how the conflation entered—indeed created and molded—this case. As in Smith, the supplemented facts and explanations are instructive in two significant ways. First, they illustrate the ways in which the conflation pervades modern and legal culture, thus shaping the perceptions and guiding the actions of all participants in a controversy. Second, they show how the conflation travels back and forth between society and law, thus reinforcing the conflation's grip in both arenas.

1. The Conflation's Shaping of the Case

In this case, unlike Smith, both social gender atypicality and minority sexual orientation were (f)actually involved. Indeed, these two themes framed the issues of this case. Of course, their joint presence here did not necessitate their conflation. But, once again, the temptation to do so proved too great for the courts.

Strailey alleged in his complaint that he "was fired by Defendants in Sept. 1975 because he [was] a homosexual and failed to present a proper male image," and that this action violated Title VII.459 He further alleged that his employer "refuse[d] to employ anyone it [knew to be a] homosexual, including persons it believe[d] [did] not present a proper male (or female) image, despite their abilities to teach and to deal with children effectively."460 As such, the claim asserted that the school maintained a "policy and practice of denying equal employment opportunities to homosexual applicants and employees because of their sex and sexual orientation."461 The conjunctive syntax of these allegations hints that perhaps Strailey's lawyer conflated the constructs in his framing of the claim. However, the attorney's account of drafting the complaint suggests that the conflation entered the case, not because of the attorney's unilateral conflationary perceptions, but for more complex reasons. Indeed, this attorney considered the conflationary dynamics of this case and consciously strove to craft pleadings that would cut through these dynamics from the outset of this litigation.

457. Id. at 328.
458. Richard Gayer of San Francisco represented Donald Strailey. See id.
459. Complaint at 2, Strailey v. Happy Times Nursery Sch., Inc. (N.D. Cal.) (Civil Action No. 76-1088).
460. Id. at 3.
461. Id.
Strailey’s attorney was not sure whether the employer actually knew or even suspected his client’s homosexuality. Strailey’s attorney was not sure whether the employer actually knew or even suspected his client’s homosexuality.462 “I knew that they objected to his earring, and I inferred that they objected to his homosexuality because of that.”463 The allegations that he included in the complaint, he explained, were based on “information and belief” drawn from the timing and circumstances of Strailey’s termination.464 Strailey was “let go immediately after he wore the earring, without being called in for a reprimand—he was not given any opportunity to remove the earring and keep his job.”465 The abruptness of Strailey’s termination led the attorney to think that the earring was a pretext for the defendant’s discrimination.466 The attorney surmised that the “school was generally displeased with Mr. Strailey’s image, his general effeminacy” and that the “earing [had been] the last straw.”467 More specifically, the attorney hypothesized that the “school did not want parents to see or think that [it] employed gay teachers . . . . I thought that maybe the school feared that [the parents] would think that Mr. Strailey was gay because of his effeminate image, and then pull their children out.”468 Thus, the conflation entered the case at its very inception because the attorney concluded that a third party important to the employer’s business interests—the clientele—harbored conflationary sex/gender attitudes, and that the discriminatory act was a preemptive move responsive to those attitudes.

The attorney framed the case similarly on appeal. For instance, Strailey’s brief stressed that “probably the principal reason” for his firing was that he had, in the employer’s view, “failed to present a proper male image.”469 This reason, the brief continued, projected “stereotypical thinking” rooted in deductive gender assumptions that “impose[d] a sex-based standard upon the Plaintiff without fair consideration of his individual ability to teach children.”470 Thus, the conflation served as the filter for the plaintiff’s framing of his case both at the trial level and the appellate level.471

463. Id.
464. Id.
465. Id.
466. Id.
467. Id.
468. Id.
469. Appellant’s Opening Brief at 26, Strailey v. Happy Times Nursery Sch., Inc., 608 F.2d 327 (9th Cir. 1979) (No. 77-1204).
470. Id. at 27-28.
471. A final sidenote on the conflation’s role in creating and shaping this case: when asked if he could describe the “general effeminacy” of “Mr. Strailey’s image,” Strailey’s attorney’s immediate response was “no,” as if lost for words. Telephone interview with Richard Gayer, supra note 462. Exclaiming, “How can you describe those things . . . it’s just one of those things that are understood,” the attorney nonetheless ended by stressing that Strailey “certainly was effeminate.” Id. Then, a few minutes later, the attorney found the words to elaborate Strailey’s “general effeminacy,” saying that “it was not in the way that he spoke” and “his clothes certainly were not effeminate . . . . it was in the way that he moved or gestured.” Id. He concluded by saying that “it was nothing gross, but enough to
2. The Conflation’s Grip on the Courts: Procedure & Substance

The conflation also influenced the procedural posture and history of Strailey. Strailey initially filed his claim with the EEOC, which rejected it “because of an alleged lack of jurisdiction over claims of discrimination based on sexual orientation.” This denial of administrative recourse for social gender atypicality discrimination is reminiscent of Smith in that it shows how the sexual orientation label may overshadow, and doom, a case that plainly is meritorious because it is (f)actually based on sex (and gender). This administrative denial thus shows that even the EEOC in practice disregards the definitional distinction of gender and sexual orientation in its dichotomy.

Strailey next filed suit in district court, which in an unpublished ruling dismissed his complaint for failure to state a claim. At the same time and for the same reason, the district court also dismissed two other suits involving discrimination against homosexuals due to some manifestation of same-sex proclivities or practices. On appeal, the Ninth Circuit consolidated the three cases at the request of appellants’ counsel. The premise for the consolidation was a “similarity of issues” that, upon closer inspection, may have been illusory: though all three cases certainly involved homophobia, Strailey’s complaint also raised a second and independent claim of discrimination based on social/public gender atypicality. Nonetheless, the sexual orientation claims in all three cases, and Strailey’s addi-

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472. Strailey, 608 F.2d at 328. The EEOC’s position apparently was due to its earlier ruling in Refusal to Hire Homosexual. See supra notes 380-87 and accompanying text.

473. See supra notes 428-37 and accompanying text.

474. See supra notes 380-87 and accompanying text.

475. Strailey, 608 F.2d at 328.

476. The first case involved one plaintiff who was denied employment because the employer found out that “he was a member of the Metropolitan Community Church and concluded that he was a homosexual” and co-plaintiffs who were employed but, because they were identified as gay, were harassed until they finally quit. Opening Brief for Appellant at 3, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (No. 77-1109). The second case involved two women who were harassed and eventually fired because they “were lesbians and were having a lesbian relationship.” Opening Brief for Appellant at 2, Lundin v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (No. 77-1662).

477. Strailey, 608 F.2d at 328.

478. Id.

479. Complaint at 2, Strailey v. Happy Times Nursery Sch., Inc. (N.D. Cal.) (Civil Action No. 76-1088). Attorney Gayer evidently understood this distinction. Though he represented both Strailey and the DeSantis appellants in the consolidated appeal, only the Strailey brief contains a section on gender atypicality as a form of sex discrimination. Appellant’s Opening Brief at 26-31, Strailey v. Happy Times Nursery Sch., Inc., 608 F.2d 327 (9th Cir. 1979) (No. 77-1204). See generally Opening Brief for Appellant, DeSantis (No. 77-1109).
tional social gender atypicality claim, were lumped together, or conflated, procedurally through consolidation.480

This conflation was substantive, too. On appeal, the Ninth Circuit described Strailey’s social/public gender atypicality claim as emphasizing that “the school’s reliance on a stereotype—that a male should have a virile rather than an effeminate appearance—violate[d] Title VII.”481 Thus, the court’s own words seem to recognize that Strailey, at least in his second claim based on the earring, specifically had alleged sex and gender discrimination. That is, the social gender atypicality claim alleged that the defendant punished social effeminacy when exhibited by members of one sex but not when exhibited by members of the other sex. The Ninth Circuit, purporting to apply “traditional notions” of sex, disposed of this “earring” claim with breathtaking alacrity and did so in a way that compounded the conflation’s impact on the case: relying on the equation in Smith of social gender atypicality with same-sex sexual orientation, the Strailey court, in two back-to-back sentences, summarily declared that Title VII banned “discrimination because of gender, not because of sexual orientation” and that, consequently, “discrimination because of effeminacy, like discrimination because of homosexuality . . . or transsexualism . . . [did] not fall within the purview of Title VII.”482 These twin sentences densely pack numerous conflationary notions to effectuate this summary rebuff.

Strailey was infused with conflationary confusion, as was Smith, and its holding reinforced the conflationary legacy produced by Smith. At the outset, the Ninth Circuit, like the EEOC, referred to “gender,” thus misreading Title VII, which instead refers to “sex.”483 The outcome of the case, however, should have been the same whether Strailey’s claim was cast as sex-based or gender-based; the Euro-American deductive/intransitive gender model conflates the two.485 Moreover, Strailey alleged a clearly demarcated claim of sex and gender discrimination that was located within Leg One of the conflation: members of one sex were allowed to wear certain gender regalia during working hours while members of the other sex were not. Undeniably, this case involved sex.

Yet the case also encompassed a clear gender claim, since the earring claim explicitly evoked images of virility and effeminacy. In other words, Strailey’s “earring” claim alleged discrimination because he was deemed to

480. For instance, the Ninth Circuit’s opinion begins by noting, mistakenly, that “[m]ale and female homosexuals brought three separate . . . actions claiming that their employers or former employers discriminated against them . . . because of their homosexuality.” Strailey, 608 F.2d at 328. Yet Strailey’s additional effeminacy claim was not based on his homosexuality, but on his earring.
481. Id. at 331.
482. Id. at 331-32.
483. Id. at 329.
484. See supra note 378 and authorities cited therein on Title VII’s provisions and legislative history.
485. See supra Chapter One, Part I.A-B.
be violating the conflation of sex and gender under Leg One. This claim alleged and complained of cultural enforcement of this leg, and its social gender correctness. Indeed, because the social dimension of gender comprises the bundle of notions about appearance, behavior, and other attributes that construct "femininity" and "masculinity" and that are imputed to persons on the basis of sex, Strailey’s earring claim seemed to state the quintessential case of sex-determined gender discrimination. Thus, regardless of whether the court accepted or rejected the conceptual and linguistic distinctions between sex and gender, it should not have dismissed Strailey’s case for failure to state a claim. In doing so, this court, like the Smith courts, legitimized the conflation’s operation in modern culture. And, that it did so indicates the level of influence that conflationary traditionalism can and does exercise in legal culture.

The Strailey court, like the Smith courts, additionally employed the analytical double standard to embrace doctrinally the second leg of the conflation. Strailey also accepted social gender atypicality as an aspect of minority sexual orientation: by accepting the cultural conflation of social effeminacy (in the form of an earring) with same-sex affinities, this court’s analysis shifted the challenged discrimination doctrinally from Leg One to Leg Two. In this way, the court, as had the courts in Smith, substituted sexual orientation for sex and gender in order to exonerate discrimination. The court’s conflationary viewpoint thus blinded it to the fact that Strailey’s sexual orientation was wholly irrelevant to the disposition of the earring claim.

As a practical and legal matter, the earring claim was independent of Strailey’s actual or perceived sexual orientation because this claim did not allege that only gay men were prohibited from sporting ear jewelry. Rather, the claim pointedly charged that the employer permitted women (regardless of their sexual orientation) but not men (independent of their sexual orientation) to wear such jewelry at work. Because the discrimination was based squarely on sex and gender, Strailey’s right to redress under the earring claim did not and could not turn on his known or supposed sexual orientation. The pull of the conflation’s second leg, however, blinded the court’s vision and deprived Strailey of merited redress. Once again then, Leg Two was used tactically to bolster or buttress Leg One substantively.

486. See supra notes 118-30 and accompanying text.
487. And, in fact, other courts have recognized as much. See, e.g., Peter F. Ziegler, Comment, Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964, 46 S. CAL. L. REV. 965, 973-80 (1973) (surveying Title VII case law concerning sex-based grooming and image discrimination); see also infra notes 571-90 and accompanying text.
488. See supra Part I.B.
3. A Transsexualism Redux

Still retring Smith, the Strailey discussion of transsexualism provides additional showcasing of judicial carelessness toward sex, gender, and sexual orientation in conflationary legal analysis. The Strailey court cited Holloway v. Arthur Andersen & Co., a transsexualism case decided after Smith, to support its sexual orientation analysis. Interestingly, the court in Holloway also had cited the Smith court’s sexual orientation analysis to support its holding that transsexualism was not protected under Title VII. As with Smith and Voyles, the sequence of these rulings held transsexualism unprotected under Title VII because homosexuality was unprotected, while holding homosexuality unprotected because transsexualism was unprotected. This accumulation of circular cross-citations created a self-justifying tautology that substituted conclusory assertion for thoughtful consideration of the conflationary issues respecting sex, gender, and sexual orientation presented by the various controversies. Consequently, Strailey, like Smith, shows how the conflation operates to generate and validate various acts or strains of sex/gender discrimination that affect multiple categories of persons and identities.

4. Hetero-racial & Homo-sexual Couplings

Though his case emphasized conflationary themes, Strailey’s complaint asserted another theory that was independent of social or sexual gender atypicality to provide support for his sex discrimination claim. In this third claim, Strailey asserted that “[d]iscrimination based on sexual orientation is based upon the gender of the plaintiffs as well as that of their sexual partners, just as discrimination based on hetero-racial relationships is based upon the race of each party to such relationships.” This framing linguistically used “gender” when meaning “sex” because conceptually it sought to analogize homo-sexual couplings to hetero-racial couplings. This claim therefore characterized discrimination against same-sex couples as based on sex in the same way that discrimination against cross-race couples is based on race.

Strailey’s brief on appeal reiterated his third claim, relying on cases decided during the 1960s that had invalidated anti-miscegenation statutes. Defenders of those statutes had argued then that because the prohibition against cross-race relations applied “equally” to both races, the laws

489. 566 F.2d 659 (9th Cir. 1977).
490. Strailey, 608 F.2d at 329-32.
491. Holloway, 566 F.2d at 662 n.6.
492. See supra notes 449-54 and accompanying text.
493. Complaint at 3-4, Strailey v. Happy Times Nursery Sch., Inc. (N.D. Cal.) (Civil Action No. 76-1088) (emphasis omitted).
494. E.g., Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia’s anti-miscegenation statute as race-based discrimination); see Appellant’s Opening Brief at 15, Strailey v. Happy Times Nursery Sch., Inc., 608 F.2d 327 (9th Cir. 1979) (No. 77-1204) (citing and quoting Loving).
did not "discriminate" on the basis of race. The courts resolutely rejected that reasoning, discerning that the anti-miscegenation statutes were intended and employed as a means of preserving racial hierarchies that subordinated minority races. Thus, judicial rejection of this sophistry in the miscegenation setting was based on a recognition that the abstract equality on the face of the statutes masked and perpetuated race-based inequalities in practice.

In effect, Strailey's third claim advanced and presaged an analogy between sex and race: since Strailey's framing and assertion of this claim, this "miscegenation analogy" has received scholarly attention and development. Here, as in the subsequent scholarship, this analogy was employed to train the court(s) on the direct, unmediated inter-connection between sex and sexual orientation in order to obtain judicial recognition of sexual orientation discrimination as a sub-set of sex-based discrimination. This claim, and the analogy as later developed, thus introduce Leg Three of the conflation into the sex/gender record of legal culture.

In this vein, Strailey's brief went on to analogize this claim to EEOC decisions dealing with discrimination based on an employee's "associations" with persons of another race. Specifically, it referred to a 1971 decision in which the EEOC considered the claim of a white employee who had been discharged, in the former employee's words, "because of her friends." The EEOC in that case had concluded that the discharge was based unlawfully on the employee's "interracial dating," an association that was "clearly protected by Title VII."

Unfortunately, the Strailey court's response to this analogizing disregarded the reasoning of precedent, and was as strained and superficial as the rest of its opinion. The court asserted that Strailey's analogy had not claimed that his employer would "terminate anyone with a male (or female) friend." Rather, the court maintained, Strailey had claimed that his employer "discriminate[d] against employees who have a certain type of relationship—i.e., homosexual relationship—with certain friends." This distinction—presumably between "friends" on the one hand and "certain relationships . . . with certain friends" on the other—seems slippery, and is

495. See, e.g., Loving, 388 U.S. at 7-8.
496. Id. at 10-12; see also McLaughlin v. Florida, 379 U.S. 184 (1964) (holding that a Florida statute prohibiting unmarried interracial couples from habitually living in the same room during the nighttime violates the Equal Protection Clause of the Fourteenth Amendment).
497. Loving, 388 U.S. at 11-12.
498. See infra Part V.
499. See supra Foreword, Part I.C.
500. Appellant's Opening Brief at 16, Strailey v. Happy Times Nursery Sch., Inc., 608 F.2d 327 (9th Cir. 1979) (No. 77-1204).
502. Id.
503. Strailey, 608 F.2d at 331.
504. Id.
incongruent with the statute's anti-discrimination principles because it serves to license rather than to limit bigotry.\textsuperscript{505}

Still, even as reformulated by the court, Strailey's associational claim seems precisely analogous to cross-race intimacy. Anti-miscegenation statutes, as well as the discharge of employees who had "friends" of other races, discriminated against persons who had a certain type of relationship—i.e., a hetero-racial relationship—with certain friends. In each instance, the discrimination sought to regulate intimate interactions with sexual or affectional partners. In each instance the discrimination was calculated to subordinate minority groups. Finally, in each instance the discrimination succeeded in doing just that (and nothing else).

5. Strailey's Conflationary Legacy

As in \textit{Smith}, the court in \textit{Strailey} planted the conflation of sex, gender, and sexual orientation in Title VII jurisprudence in a way that constricts the statute's anti-discrimination reach: though sexual orientation was irrelevant to a principled analysis of the earring claim, its conflation with sex-determined gender jointly under Leg One and Leg Two once again gave safe legal harbor to the cultural operation of conflationary discrimination underlying the case.\textsuperscript{506} This condonation, as in \textit{Smith}, was effected by (re)characterizing the discrimination in the shift from Leg One to Leg Two, which strategically employs Leg Two to uphold the sex/gender substance of Leg One. \textit{Strailey} thereby reinforced the sexual orientation loophole established in \textit{Smith} through the same analytical double standard used there. Thus, \textit{Strailey}, like \textit{Smith}, depicts how the conflation provides legal cover for acts of discrimination. Also like \textit{Smith}, \textit{Strailey} remains "good" law to this day.

Therefore, as in \textit{Smith}, the court here bolstered the sex/gender biases underlying and animating the conflationary status quo. Here, as in \textit{Smith}, the court's validation of cultural pressures against any disruption of the conflation's legs reinforced the various associations that inter-link sex, gender, and sexual orientation under the active/passive paradigm. This court, like the \textit{Smith} courts, consequently upheld discriminatory practices that perpetuate active/passive themes and traditions, including the fundamentality of sex, the intransitivity of deductive or sex-determined gender, the cross-association of social and sexual gender atypicality, and the mutual problematization of social and sexual sex/gender incorrectness.\textsuperscript{507} This court, like the \textit{Smith} courts, lent its power and prestige to the conflation, and to the various acts or strains of sex/gender bigotries that it (re)produces, even as it applied a federal statute putatively employed to eradicate traditionalist sex/

\textsuperscript{505} See infra notes 1081-82 and authorities cited therein on canons of statutory construction specifically governing the interpretation of statutes designed to remedy injury.

\textsuperscript{506} See supra note 455 and accompanying text.

\textsuperscript{507} See supra Part I.A.
gender stereotyping. The Smith and Strailey legacies, in turn, have been extended and compounded by the actions of other tribunals in other areas of substantive law.

D. Blackwell v. United States Dep’t of Treasury

The litigation and adjudication of Blackwell v. United States Dep’t of the Treasury provides perhaps the most vivid demonstration of analytical gymnastics in response to conflationary (f)acts and issues. Though the court files are missing, the (f)acts recited in the various opinions generated by this action manifest how another sex and gender phenomenon—transvestism—can interplay with sexual orientation in ways that echo the role of transsexualism in Smith and Strailey. Further, because this case implicated legal conceptions of discrimination based on a “handicap,” it illustrates how the conflation’s doctrinal impact can reach beyond the strict bounds of sex/gender/sexual orientation discrimination law under Title VII.

Like Smith and Strailey, this case shows how conflationary beliefs in society trigger legal controversies, and how the conflation undermines legal recognition of sex and gender discrimination as soon as the sexual orientation label is interjected into the case. This case, like Smith and Strailey, thus attests yet again to the power of the conflation’s first and second legs both in modern and in legal culture. Adjudicated in 1986 and 1987, Blackwell specifically illustrates how the conflation remains an active agent in contemporary legal culture.

1. The Conflation’s Shaping of the Case

Blackwell had worked at the Treasury Department for almost a decade but was laid off during a “reduction in force,” which entitled him to reinstatement privileges. He was eventually notified of a re-employment opportunity and reported for an interview. In its first opinion, the district court wrote that the plaintiff “attended the interview dressed as a woman, the same type of dress he had worn during his previous eight years of employment with the Department of Treasury.” The court did not disclose what it meant by the phrase “dressed like a woman,” but it did note that the plaintiff acknowledged in his complaint that he was “a homosexual

510. A “thorough search” for the case records by the court clerk’s office was “unsuccessful.” Letter from Michael Cochis, Deputy Clerk, United States District Court for the District of Columbia, to Bill Bookheim, Reference Librarian, California Western School of Law (Dec. 8, 1993) (on file with author).
512. Id. at 289-90.
513. Id. at 290.
and transvestite." Therefore, in this case—like in Strailey and unlike in Smith—sexual orientation was (f)actually involved. Yet, as in Strailey, this involvement was not necessarily dispositive of the sex and gender issues presented by the case. As in Strailey, the court did not have to, but willingly did, conflate the claims.

As explained further below, immediately after Blackwell completed a two-stage interviewing process for this job, the position was reclassified, making him ineligible. And, in a point that later turns out to be crucial to the deconstruction of this case, the court expressly noted in this initial ruling that the complaint alleged that the Treasury Department had discriminated against Blackwell because “plaintiff [was] a transvestite whom [the defendant’s agents] regarded as being mentally ill.” This “transvestite” claim, like Strailey’s “earring” claim, explicitly and specifically asserted sex/gender discrimination independent of sexual orientation issues. The plaintiff therefore sought relief under the Rehabilitation Act of 1973, which prohibits discrimination based on a “handicap.”

Initially, the district court ruled that Blackwell’s complaint stated a claim under the Rehabilitation Act for two reasons. First, “transvestitism [sic] [was] recognized by the American Psychiatric Association as a mental disorder.” Second, Blackwell had “alleged that the position he sought was eliminated because Treasury officials regarded the fact that he [was] a transvestite as a handicap.” Consequently, the plaintiff’s transvestism was both an “actual” and a “perceived” handicap under the statute. At the conclusion of this first round, the law of the case thus established that Blackwell’s claim rested on handicap discrimination based on transvestism, or on sex and gender issues.

After a bench trial, the district court issued a second opinion, which included findings of fact and conclusions of law that diverged in key ways from the initial ruling and which thereby confused the analysis and distorted the outcome. The court began by elaborating on the sex/gender issues raised by the plaintiff’s appearance and attire during the interviewing process. This time, the court was more factually detailed: “At [the] time [of the interview, Blackwell] wore pants of a feminine style, a broad stretch belt, a shirt-blouse, and his hair was in long braids.” Based on this social

514. Id. at 289.
517. Id. Blackwell also claimed relief under the Fifth Amendment. Id.
520. Id.
gender atypicality, as in Smith, the initial interviewer "believed [Blackwell] was a homosexual."\textsuperscript{522} During the initial interview, as reported in this second opinion, Blackwell had inquired whether his "life-style" (meaning his transvestism) was objectionable, and the interviewer, thinking that Blackwell was referring to homosexuality, had said "no."\textsuperscript{523} This conflationary misunderstanding later becomes dispositive of the court's analysis but, at the time, this interviewer simply sent Blackwell to a senior supervisor, Mr. Strange,\textsuperscript{524} for the second interview, along with a favorable recommendation.\textsuperscript{525} It was just a few hours after concluding this second interview that Strange unilaterally terminated the vacancy altogether, explaining later in litigation that he had intended to recategorize the position to a higher government service employee level, which incidentally disqualified Blackwell.\textsuperscript{526} From these facts, the district court concluded that "Mr. Strange found [Blackwell's] apparent homosexual aspect undesirable."\textsuperscript{527} Of course, this "apparent homosexual aspect" of Blackwell's personality was his transvestism—his disruption of Leg One. Thus, both interviewers unilaterally and subjectively interpreted Blackwell's social gender atypicality (transvestism) as homosexuality.

These conflationary dynamics, reprising Smith's cultural sex/gender dynamics, set the stage for critical twists in the district court's treatment of the case. As the court indicated retrospectively, Blackwell seems to have intended his "life-style" query during the first interview to address potential problems he might encounter as a transvestite, not as a homosexual. However, the initial interviewer's subjective conflationary outlook led her to misapprehend Blackwell's question, and she responded as if he had asked the reverse. The second interviewer compounded this conflationary twist when he also subjectively mistook the plaintiff's social gender profile for his sexual gender profile—his sexual orientation—and on that basis rejected the application. The court's account of these twists defies paraphrasing:

In the Court's view, and the Court so finds, Mr. Strange found plaintiff's apparent homosexual aspect undesirable . . . .

There is nothing to suggest that Mr. Strange had any understanding one way or the other as to the difference between a homosexual and a transvestite or that he focused on the fact that plaintiff's dress was somewhat more feminine than that of many homosexuals. To make matters more difficult, some transvestites

\textsuperscript{522} Id.
\textsuperscript{523} Id.
\textsuperscript{524} The old adage is true: fact sometimes is stranger than fiction.
\textsuperscript{525} Blackwell, 656 F. Supp. at 714.
\textsuperscript{526} Id.
\textsuperscript{527} Id. at 715.
are homosexuals. Yet, as a matter of statutory analysis, while homosexuals are not handicapped it is clear that transvestites are, because many experience strong social rejection in the work place as a result of their mental ailment made blatantly apparent by their cross-dressing life-style.528

Thus, the court concluded that "Mr. Strange rejected plaintiff because he believed he was a homosexual . . . and not because he was a transvestite."529

The court's conclusion is of course grossly oversimplified. Strange in fact discriminated against Blackwell because of Blackwell's social gender atypicality, although he additionally (and ignorantly) transmuted that social gender atypicality into a conclusion about Blackwell's sexual orientation; in other words, Strange observed Blackwell's disruption of Leg One and perceived this disruption as a sign of same-sex sexual orientation, thus triggering Leg Two as well. In fact, as in Smith and Strailey, the associations and actions of both interviewers here took place under the joint operation of the conflation's first and the second leg, and thereby implicated all three endpoints of the conflation. Moreover, the court's conclusion belies its prior recognition, expressed explicitly in its initial ruling, that the discrimination against Blackwell was rooted in Strange's disdain for Blackwell's transvestism, or for Blackwell's social/public gender atypicality.530 Yet, as seen below, and as occurred in Smith and Strailey, the sexual orientation label(ing) that took place here via the conflation's cultural dynamics eclipsed the social gender issues legally; once again, conflationary cross-associations strategically shifted the analysis from social gender atypicality under Leg One to minority sexual orientation under Leg Two.

2. The Conflation's Grip on the District Court

From the court's perspective, these (f)acts posed an acute analytical predicament: what to do with a defendant who had discriminated against a transvestite believing that he was discriminating against a homosexual. The court's self-ordained doctrinal quandary was that under its initial ruling the statute applied to discrimination against transvestites but not homosexuals. The court responded to this difficulty by concluding that Blackwell could not prevail, even on the grounds of transvestism, because, though statutorily protected, this "handicap was not automatically apparent as is gender [in a sex discrimination case]."531 The court did not explain its reasoning, but the discussion yielded a remarkable conclusion: plaintiffs with nonobvious handicaps owed a duty to inform prospective employers of their condi-

528. Id.
529. Id.
530. See supra text accompanying notes 519-20.
tion, presumably so that courts subsequently could more easily ascertain the precise basis of a wrongdoer’s discriminatory act. Because Blackwell’s “lifestyle” query during the initial interview had omitted an explicit declaration of transvestism, he had permitted the employer to mistake it for an inquiry about homosexuality. The court found that Blackwell had breached this duty to disclose, and denied him relief.

By ruling in this way, the court failed to address the conflationary dynamics that culturally and legally were at the heart of this case and thus skirted the actual sources of discrimination presented by Blackwell’s claim. The court’s analysis overlooked the fact that Strange’s reaction was sparked by and directed at Blackwell’s social/public gender atypicality. This analysis, like the Smith and Strailey analyses, employed Leg Two strategically to uphold Leg One substantively: by shifting the analysis from sex and gender issues under Leg One to (non-existent) sexual orientation issues under Leg Two, the ruling validated sex and gender discrimination.

Like the courts in Smith and Strailey, this court acquiesced to the conflation’s cultural power but denied the relevance of this power to the legal analysis of the discrimination that it created. With this analytical double standard, the court also empowered the conflation both culturally and legally; as in Smith and Strailey, the court’s simultaneous condonation of the conflation in modern culture, coupled with its refusal to recognize it legally, led to judicial complicity in cultural coercion of traditionalist sex/gender stereotypes under the combined impact of Leg One and Leg Two of the conflation. This analytical disengenuity, as in the previous cases, led, once again, to judicial acceptance of bigoted ignorance, judicial validation of sex and gender discrimination, and erroneous denial of warranted relief in a meritorious case. The appellate court, in turn, did likewise.

3. Compounding the Conflation on Appeal

On appeal, the District of Columbia Circuit summarily affirmed the district court’s judgment. In an opinion by then-Judge Ruth Bader Ginsburg, the appellate court accepted the district court’s shift from Leg One to Leg Two, finding that “Blackwell suffered discriminatory denial of a government employment opportunity because . . . Mr. Strange[] perceived Blackwell to be a homosexual.” The appellate court then stated that “there is no precedent for holding that one’s sexual orientation or preference falls within the compass of the Rehabilitation Act.” This pronouncement illustrates how the exclusion of sexual orientation from the

532. Id. At the same time, Judge Gesell lamented Strange’s “highly reprehensible” conduct and, concluding, sighed that “[h]opefully wiser heads will correct the underlying injustice.” Id.
533. Id. The opinion characterizes the plaintiff as “preferring to refer simply to his ‘lifestyle,’ which was clearly ambiguous.” Id.
535. Id. (citation omitted).
sex/gender anti-discrimination framework makes the shift from Leg One to Leg Two legally lucrative.

Nonetheless, the appellate court vacated the opinion below in order to remove the “duty to inform” from the law books. The government’s liability should not turn on whether a bureaucrat “knows that homosexuality and transvestism are not one and the same,” the appellate court concluded.\textsuperscript{536} True; but the question was whether the plaintiff’s injury should go unremedied because the government’s bureaucratic agent had elected to enforce conflationary sex/gender correctness in this instance, and at Blackwell’s expense. This case clearly presented the courts with yet another instance of discrimination calculated to enforce the conflation’s first leg—to enforce the intransitivity of deductive, sex-based gender. In fact, as this discussion shows, Leg Two crept into this case, as it had in \textit{Smith} and \textit{Strailey}, primarily as a means of culturally and legally enforcing Leg One.

The supporting and strategic yet eclipsing role of the conflation’s second leg is most conspicuously evidenced in and by the district court’s \textit{two} opinions, which actually had made it clear that Blackwell did \textit{not} claim discrimination based on his sexual orientation at all. Indeed, the opening sentence of the district court’s final judgment specified unambiguously that the plaintiff sued under the Rehabilitation Act “alleging discrimination based on the failure of the Department of the Treasury to hire him because he is a transvestite.”\textsuperscript{537} Blackwell, like Smith and Strailey, asserted a claim based explicitly on sex and gender that, but for the cultural (and legal) interjection of conflationary sexual orientation associations and suppositions, was cognizable under the relevant statutory scheme. Nonetheless, this specificity, once again, did not prevent either of the two courts ruling in this case from contriving a sexual orientation holding to approve sex/gender bigotry. Thus, the appellate court also ratified the conflation; by affirming the district court’s validation of the Treasury Department’s discrimination after dispensing with its “duty to inform” holding, the appellate court

\textsuperscript{536} \textit{Id.} at 1184.

\textsuperscript{537} \textit{Blackwell}, 656 F. Supp. at 714. Of course, homosexuals may be, but are not necessarily, transvestites. And of course, (male) homosexuals may exhibit attributes culturally associated with femininity, and vice versa. But the very same observations apply to male and female heterosexuals. Indeed, Marjorie Garber’s groundbreaking survey of cross-dressing customs shows that such behavior is widespread among heterosexual males, and that it spans ages and cultures without any particular correlation to (either male or female) homosexuality. \textit{See Garber, supra} note 123, at 1-66.

However, because it violates the conflation of sex and gender under Leg One, cross-dressing remains generally taboo and receives no protection from the law. \textit{See}, e.g., Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987) (rejecting constitutional and civil rights claims filed by a heterosexual couple who attempted to attend their high school prom cross-dressed). Citing to \textit{Strailey}, the Harper court noted without explanation that “[n]either homosexuals, nor transvestites” are protected under the law. \textit{Id.} at 1356. The juxtaposition of homosexuality and transvestism in Harper thus reinforced the Strailey court’s juxtaposition of homosexuality and transsexualism. \textit{See supra} notes 489-92 and accompanying text.
upheld the cultural and legal power of the conflation’s active/passive sex/gender rules.

4. Blackwell’s Conflationary Legacy

The (f)acts and proceedings in this case show that Leg One and Leg Two of the conflation were as central to Blackwell as they had been to Smith and Strailey. In the first instance, the conflation of sex-determined gender with sexual orientation motivated once again the act of discrimination perpetrated against Blackwell: it was Strange’s subjective conflationary association of social gender atypicality with sexual gender atypicality under the second leg that directly prompted his denial of Blackwell’s employment application. However, social gender atypicality is culturally problematized precisely because it interferes with the intransitivity of deductive gender, which is based on sex under the conflation’s first leg.538 In other words, Blackwell, like Smith and Strailey, was targeted for discrimination for disrupting the conflation of sex and gender under Leg One, and then the courts selectively recognized and denied the conflationary association of social gender atypicality with sexual gender atypicality under Leg Two to exonerate the discrimination. Thus, as in Smith and Strailey, the conflation’s operation in modern culture sparked the controversy in Blackwell and a judicial double standard concluded it. This case, like the others, kept fully intact the traditionalist equation of “sissies” with “queers.”

Moreover, like Smith and Strailey, Blackwell illustrates the conflation’s expansive capacity to distract the courts from the claims and issues actually being presented. Most egregious in this case was the district court’s express and repeated references to Blackwell’s sex/gender claim based on transvestism in its first opinion and final judgment, coupled with its headlong rush to rule based on sexual orientation. And, while the district court noted the ignorance revealed by Strange’s sex/gender misperceptions, the court itself mirrored Strange’s conflationary suppositions in its own analysis; that is, by describing Blackwell’s attire as “somewhat more feminine than that of many homosexuals” the district court revealed its belief that “feminine attire” was the hallmark of “many” (though perhaps not all) homosexuals.539 After sparking this controversy, the conflation then framed, guided, and shaped the legal system’s response to it.

Consequently, both the district and appellate courts in Blackwell legally ratified the cultural penalization of social/public gender atypicality. In doing so, these courts recycled the clinical and cultural association of social gender atypicality with minority sexual orientation: they approved social gender discrimination under Leg One by invoking the legality of sex-

ual gender discrimination under Leg Two. These courts thereby employed the sexual orientation loophole to weaken or circumvent sex/gender anti-discrimination law.

Blackwell thus reprised Smith and Strailey. As in Smith and Strailey, the conflation’s influence in Blackwell quickly and irreversibly shifted the analysis from sex or gender issues, which generally are recognized as impermissible sources of prejudice, to the issue of sexual orientation, which generally is the last basis of sex/gender discrimination that remains lawful and respectable—both as de facto and de jure prejudice. Moreover, this shift occurred in each case in spite of the forthright sex and gender claims raised and pressed in the pleadings and briefs. In Blackwell, as in Smith and Strailey, the conflation substituted a convenient target—sexual orientation—for a problematic set of targets—sex and gender—in order to impair the potency of anti-discrimination law. Blackwell, like Smith and Strailey, helped to embed the conflation in the law and to reinforce it in society at large.

In sum, Blackwell’s facts and issues show that this controversy was triggered and framed by the joint operation of Leg One and Leg Two of the conflation: the first leg problematized Blackwell’s social gender atypicality while the second leg problematized his imputed (and actual) sexual gender atypicality. As a set, these two legs reflect and project the association of social gender atypicality with sexual gender typicality because they jointly construct and (mis)treat sexual orientation as the sexual component of sex-determined gender. Thus, the Blackwell courts’ rulings effectively ratified the operation of the conflation both culturally and legally by permitting the employer’s conflationary associations, and the sex/gender bigotries related to them, to prevail in this case. The Blackwell courts, like the Smith and Strailey courts, in this way lent judicial power and prestige to the entire constellation of active/passive precepts and prejudices against either social or sexual gender transitivity.

E. Dreibelbis v. Marks

A startling case that shows how the conflation influences other areas of law is Dreibelbis v. Marks, where the Third Circuit upheld sex-based hair-length prison regulations. Dreibelbis, incarcerated in a Pennsylvania state prison, was an ordained minister of an obscure faith that forbade the cutting of hair from any part of the body. The prison grooming regulation specified that the hair of male inmates could not “fall below the top of the collar.” By contrast, the portion of the regulation governing female

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540. This point is made unambiguously by cases reviewed above, such as Smith and Strailey. See also supra notes 330–31, 335, 455 and accompanying text.  
541. 742 F.2d 792 (3d Cir. 1984).  
542. Id. at 793. The religion was named the “Church of Prophetic Meditation.” Id.  
543. Id.
inmates allowed “any feminine hair style,” thus permitting unshorn hair for women. After Dreibalbis had been penalized several times for failing to comply with the regulation, he filed a claim challenging the regulation as an unconstitutional abridgment of his religious freedoms under the First Amendment’s free exercise clause.

The district court dismissed the case as “frivolous.” On appeal, the Third Circuit reversed, holding that a complete factual record was a prerequisite to the balancing of state and religious interests required in free exercise analyses. On remand, the defendant moved for summary judgment, and the district court accepted affidavits to adjudicate this motion. In its affidavits, the defendant recited several state interests served by the more restrictive regulation for males, including “assist[ance] in controlling homosexuality within the correctional institution.” While accepting the sincerity of the plaintiff’s religious beliefs, the district court nonetheless entered summary judgment for the defendant, holding in an unpublished ruling that the defendant’s list of reasons constituted countervailing state interests that justified regulatory impingements on the plaintiff’s religious practices.

On appeal again, the Third Circuit affirmed this second ruling without exception. Thus, both the district and appellate courts in Dreibalbis embraced the defendant’s rationales for the regulation. In so doing, the courts also embraced the first and second legs of the conflation: they first embraced the notion that sex properly determines gender attributes (such as hair length or styling) and then embraced the notion that social gender atypicality (regarding hair length) fosters homosexuality. The Dreibalbis

544. Id. The regulation also permitted the use of cosmetics by women if “in good taste” but mandated that “hair dyeing and tinting shall be done only by the institutional beautician” unless “otherwise determined” by the superintendent. Id.

545. Id. The plaintiff had been issued three misconduct reports, which resulted “in loss of privileges, segregated confinement and loss of his prison job.” Id.

546. Id.

547. Dreibalbis v. Marks, 675 F.2d 579, 581 (3d Cir. 1982).

548. Dreibalbis v. Marks, 742 F.2d 792, 793–94 (3d Cir. 1984). Because the district court’s ruling was not published, the following account of the history of the case on remand is drawn from the subsequent appellate opinion.

549. Id. at 795. The other reasons included the avoidance of “situations where altered appearances enable escapes from custody because of mistaken identity,” along with preventing the concealment of “contraband, such as weapons and controlled substances,” and a generalized fear that “inmates in the prison work programs who have long hair and beards would create a dangerous situation for themselves and their coworkers.” Id. at 794–95.

550. Id. at 793–94.

551. Id. at 796. However, Judge Gibbons dissented on two grounds. First, he asserted that the “opportunity for concealment or disguise presented by long or intricate female hair styles would seem to present the same security risks as in the case of men” yet the defendant seemed unconcerned about such risks. Id. Second, he found that the plaintiff’s uncontested affidavits documented instances of nonenforcement or selective enforcement of the regulation as applied even to males. Id. at 796–97. Consequently, the dissent concluded, the defendant’s justifications reasonably could be seen as pretextual, raising factual questions that should have precluded summary judgment. Id. at 797.
opinions thereby injected the conflation of sex, gender, and sexual orientation into First Amendment doctrine.

The *Dreibelbis* courts through these rulings accepted the intransitivity of sex-determined gender, as well as the cultural (mis)uses of sex-determined gender to prevent and penalize social/public or sexual/private 'gender atypicality. The *Dreibelbis* courts thus injected the active/passive schematics and preferences of conflationary traditionalism into First Amendment jurisprudence. The legacy of these rulings, coupled with the results and effects of the next case, further expanded the doctrinal entrenchment and reach of the conflationary sex/gender status quo.

**F. Poe v. Werner**

In *Poe v. Werner*, another inmate sought "to wear his hair at shoulder length," but was prevented from doing so by the same hair regulation at issue in *Dreibelbis*.

Poe, however, challenged the regulation on due process and equal protection grounds under the Fourteenth Amendment. The district court rejected both claims in deference to the state interests purportedly served by the sex-skewed regulation. To obtain this result, this court also accepted and indulged the combined precepts and power of the conflation's first and second legs.

**1. The Conflation & Due Process**

Beginning with the due process claim, the court first noted that the defendant had presented evidence relating the regulation to the following identifiable governmental interests: "the preservation of internal order and discipline, the maintenance of institutional security, and the rehabilitation of prisoners." Then, without explanation, the court launched into a discus-

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553. *Id.* at 1015.
554. *Id.*
555. Because the claim sought injunctive relief on constitutional grounds, this district court consisted of a three-judge panel. *Id.*
556. *Id.* at 1018, 1021. The court therefore employed the "heightened scrutiny" level of equal protection analysis generally associated with sex or gender classifications. *Id.* at 1019. At some level, judicial employment of this scrutiny indicates the court's recognition that the averred discrimination was, or may have been, actually "based" on sex (and gender), but the court ultimately concluded that conflationary sexual orientation concerns trumped this sex/gender classification.
557. The opinion does not make clear whether the plaintiff asserted a procedural or a substantive due process claim, or both, though the court seemed to be more concerned with substantive due process issues. The court began the opinion with a consideration of "[w]hether the right to select the length of one's hair" was "fundamental" or "substantial" or "basic" or "simply a 'right' " but did not decide the question, noting that it would not even decide "whether there is a constitutional right to govern one's own hair length." *See id.* at 1016-17.
558. *Id.* at 1017.
sion of homosexuality. "Long hair in a closed male institution impedes the control of homosexuality and invites the attentions and sexual attacks of homosexual predators in the institution ‘because [long-haired males] appear to the predators as very feminine individuals.’" In effect, the court found that long hair (among men) caused same-sex relations. On this basis, the court upheld the regulation under due process.

The court’s sudden announcement of the homosexuality rationale for this ruling seems wholly inexplicable except for one detail: in a footnote, the court observed that, "Plaintiff is an avowed homosexual." It seems, then, that an otherwise irrelevant detail—Poe’s “avowed” sexual orientation—retrospectively transformed the regulation from one regulating hair length to one regulating homosexual desire and activity. If this inference is correct, the court’s (re)casting of the regulation shows yet again the power of minority sexual orientation label(ing)s over the judicial imagination.

The Poe court thus accepted hair length as an aspect of sex-determined gender and then carelessly (or calculatedly) connected atypicality regarding this social aspect of gender with minority sexual orientation. By equating social deviations from sex-determined gender stereotypes with homosexuality, this court adopted both Leg One and Leg Two of the conflation, and acquiesced in their joint operation in this controversy. This ruling therefore (and again) shows judicial use of sex to determine “correct” gender, and to discern social gender correctness that corresponds to Leg One of the conflation; here, long hair among men was deemed “incorrect” because long hair among men is defined under the active/passive paradigm as a cross-gender phenomenon. Aiding the cultural conflation of sex and gender, the court upheld the discrimination occurring within Leg One.

The Poe ruling additionally (and again) shows judicial association of minority sexual orientation with social gender atypicality: the court relied on Leg Two of the conflation by connecting Poe’s “avowed” sexual orientation to generalized manifestations of social gender atypicality. In other words, the court here used the plaintiff’s sexual orientation as the springboard to social gender atypicality, rather than the reverse scenario witnessed in cases like Smith or Blackwell. This footnoted detail thus shows how social and sexual gender atypicality are cross-associated.

The court’s express rationale that social gender atypicality in the form of cross-gender hair “invites the attentions and sexual attacks of homosexual predators” in the prison apparently was suggested, and made factually plausible (though still strained), by the (f)actual coincidence that the plain-

559. Id. (footnote omitted).
560. After elaborating how the regulation furthers the asserted state interests in other respects, the court concluded with the following holding: “The court holds that the evidence presented by the defendant, particularly with respect to contraband, homosexuality and prisoner hygiene, are considerations sufficiently paramount in the administration of the prison to justify the hair regulation.” Id.
561. Id. at 1017 n.5.
tiff was a gay man. A regulation plainly anchored to and trained on sex and gender consequently was transformed into a sexual orientation regulation by the court's opportunistic postulation that permitting social gender atypicality would trigger or promote manifestations of sexual gender atypicality. This opportunism effected the shift from Leg One to Leg Two, exploiting the sexual orientation loophole in a constitutional doctrinal context. This opportunism therefore illustrates once again how Leg Two is maneuvered to uphold Leg One.

Like the courts in Smith, Strailey, Blackwell, and Dreibelbis, the Poe court relied on sexual orientation rationales to uphold a policy that regulated appearance based on sex and on traditional gender conceptions of masculinity and femininity. In this way, Poe introduced the conflation into due process jurisprudence. More specifically, Poe introduced the joint operation and impact of Leg One and Leg Two into this area of constitutional law.

2. The Conflation & Equal Protection

The court then turned to Poe's equal protection claim, and further compounded the conflation's power and influence in the adjudication of this case. Still under the conflation's influence, the court stated that because "men and women differ physically and psychologically," the governmental interests in "institutional security, maintenance of internal discipline and prevention of homosexual attacks" justified the "differential treatment [of] male and female inmates based on perceived natural and practical differences." This reasoning configured sex, gender, and sexual orientation into a unique but still conflationary arrangement.

The court specified two sex and gender differences that, combined with its sexual orientation concerns, supported the prison's disparate regulation of male and female hairstyles. First, the court concluded that the "greater aggressiveness and disposition toward violent action" of men made "homosexual attacks" a "much greater problem" among male prisoners than among female prisoners. The second difference was the "greater importance of personal appearance to women than men," which the court concluded "largely eliminate[d] any hygienic problems with respect to long hair of female inmates." Consequently, the court concluded, "there is a validating relationship between the varying behavioral patterns of the two sexes and the regulatory distinction between the sexes with respect to hair length."

The court's analysis regarding homosexual attacks posits an intricate configuration of sex, gender, and sexual orientation. In the equal protection

562. Id. at 1020.
563. Id.
564. Id.
565. Id. at 1020-21.
portion of its opinion, the court seemingly reasoned that sex and gender differences caused sexual orientation differences, which in turn justified regulations that employed sex and gender to regulate sexual orientation. In this postulation, humans of the male sex have an aggressive or “active” gender, and therefore are more likely to engage in sexual belligerence than humans of the female sex, who have a quiescent or “passive” gender. In other words, men were more likely to commit (homo)sexual attacks than women; therefore, regulating male hair length was justified because it helped to prevent such attacks. With this justification, the court’s equal protection discussion, like its due process discussion, embraced the cross-associations and joint operation of the conflation’s first and second legs.

This particular configuration of sex, gender, and sexual orientation in the equal protection portion of Poe shows yet again how legal culture legitimates and recycles the active/passive sex/gender precepts, practices, and preferences of the conflation. Sex once again was (mis)treated as the determinant of gender while gender once again was (mis)treated as intransitively fixed by this determination, thus giving effect to Leg One of the conflation. Social gender atypicality thereby was regarded problematical. Additionally, sexual orientation once again was (mis)treated as the sexual component of sex-determined gender. In this way, gender was viewed as having both social and sexual dimensions under the combined operation of Leg One and Leg Two. Accordingly, sexual/private atypicality was cross-associated with, or cross-referenced against, social/public gender atypicality, and both types of gender atypicality were problematized. Thus, the traditionalist delineations of the active/passive paradigm that clinically and culturally have been incorporated into the conflation were fully applied and enforced here as a set.\footnote{566}

But the court overlooked a critical and inevitable consequence of its conflationary postulations. In justifying the hair-length regulation based on its concerns about hygiene, the court selectively ignored its previous reliance on the conflationary association of social and sexual gender atypicality. In other words, if male homosexuals are indeed effeminate, then they, like the female prisoners, would be sufficiently concerned about their “personal appearance” so that “any hygienic problems with respect to long hair” would be “largely eliminate[d].” Moreover, like women, these gender-atypical men also would be less prone to commit homosexual (or any other type of) attacks. This conflationary analysis thus nullifies itself. Despite its internal incoherence, Poe situated the conflation of sex, gender, and sexual orientation in both due process and equal protection law.\footnote{567}

\footnote{566. See supra Chapter One, Part I.A.}
\footnote{567. As previously noted, controversy over disparate hair-length and grooming employment codes also was instrumental in the courts’ creation of the sex-plus concept. See supra notes 446-47 and accompanying text. Thus, all of these cases connecting hair length and minority sexual orientation implicate the conflation, either by conflating sex with gender (sex plus) or by conflating sex-determined}
3. Dreibelbis’ & Poe’s Conflationary Legacy

Dreibelbis and Poe individually and collectively take conflationary analyses into constitutional planes under the First Amendment and the Fourteenth Amendment. In doing so, these opinions do more than deepen or broaden the doctrinal entrenchment and influence of the conflation in legal culture. They represent a qualitative expansion of the conflation’s doctrinal entrenchment and influence in the law. These two examples of the conflation in legal culture illustrate how legal complicity in the conflationary sex/gender status quo is doctrinally and analytically varied, but how this complicity nonetheless manages to obtain uniform substantive outcomes that result in the valorization of conflationary traditionalism.568

Poe and Dreibelbis, along with Smith, Strailey, and Blackwell, today serve as binding precedent in five of twelve federal circuits, which together have jurisdiction over nearly half of all Americans.569 As a group, these cases have entrenched the conflation in the statutory and constitutional bodies of law that provide much of the substantive battlegrounds for contemporary anti-discrimination suits.570 As a set, they make it perfectly legal to

gender with sexual orientation. One particularly surreal hair length controversy was reported in Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971). In Roberts, the employer mandated hats for men working with exposed foods and hair nets for women with similar duties. Id. at 1056. However, the plaintiff’s hat did not adequately contain his hair, prompting him to request permission to wear a hair net. Id. The employer refused because the rules assigned hair nets for women only and instead terminated the employee on the grounds that the hat did not suffice for sanitary purposes. Id.

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

569. The circuits, in order of the cases discussed, are: the Fifth, the Ninth, the D.C., and the Third. Because Smith was decided by the old Fifth Circuit, it remains in effect in the new Eleventh Circuit until otherwise ruled. See, e.g., Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (holding that all decisions of the old Fifth Circuit “shall be binding as precedent in the Eleventh Circuit”). The population statistics for these circuits are based on the 1991 population estimates of the United States Bureau of the Census. Those figures place the total population of the United States at 252,177,000 and the population of the five relevant circuits at approximately 116,000,000. See U.S. Releases 1991 Population Estimates, UPI, Dec. 29, 1991, available in LEXIS, Nexis Library, Wires File.

570. It should be noted that cases based on conflationary scenarios in modern culture continue to abound, not only in the federal courts, but in state courts as well. One especially nasty saga generated the litigation in Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784 (Minn. Ct. App. 1985), aff’d, 389 N.W.2d 205 (Minn. 1986). In this case, a gym patron demonstrated to another patron how to perform an Irish jig by doing “four or five quick steps.” Id. at 787. The management, however, apparently considered this sort of dancing by or between men to be socially gender-atypical, and therefore an indicant of minority sexual orientation. After informing the patron that his action was “disruptive or wrong” a gym staff member remarked that they were “not going to put up with this gay stuff anymore.” Id. The gym subsequently refused to admit the patron unless he was “willing to discuss his problem on behavior and attitude.” Id. The gym defended its action by arguing that the patrons were “creating a homosexual atmosphere” and “characterize[d] the dance as effeminate and done in an obviously homosexual manner.” Id. at 788. The court regarded the management’s conflationary associations excessive in this instance, and concluded that “[h]omosexuals must have the same right to do a quick, impulsive dance step in a public place as other members of society.” Id.

A similar scenario was presented in Potter v. LaSalle Sports & Health Club, 368 N.W.2d 413 (Minn. Ct. App. 1985), aff’d en banc, 384 N.W.2d 873 (Minn. 1986). In this case, a gym patron at the same establishment “took a break from his weight workout and began conversing with a friend . . . [about] an injured elbow.” Id. at 415. Both conversationalists were “homosexual males” who, apparently, were sitting too close to each other or otherwise gesturing in a manner that the management
mistreat both "sissies" and "queers" at will. Thus, cumulatively and collectively, these judicial actions continue to exert an invidious precedential and practical force over American law and society.

III

THE LEGAL (MIS)TREATMENT OF "TOMBOYS" & "DYKES"

The cases outlined above all centered on effeminate men. The pending question, therefore, is whether courts act similarly in situations involving "mannish" or "macho" women. The first case discussed below suggests not. In that case the court protected a socially gender-atypical woman in her male-identified persona. But the second case discussed below demonstrates that claims brought by female plaintiffs are not immune from the conflation's distorting influences. Together, the two cases depict how the conflation is sometimes disavowed, and sometimes embraced, but, as with the preceding cases, always to the same effect: to perpetuate androsexist and heterosexist biases through the selective interpretation and application of laws against sex and gender discrimination.

A. Hopkins v. Price Waterhouse

The celebrated case of Hopkins v. Price Waterhouse suggests that, while discrimination against "sissy" males like Smith, Strailey, or Blackwell based on their social effeminacy is lawful, discrimination against "tomboy" females like Hopkins based on their social masculinity may not be. Ironically, Judge Gesell wrote the district court opinion in Hopkins as well as the district court rulings in Blackwell, but he reached diametrically opposed doctrinal conclusions in the two cases. How (and why) he did so is elaborated below.

1. Sex & Social Gender Atypicality

Ann Hopkins was denied partnership in the accounting firm of Price Waterhouse despite her acknowledged superior accomplishments in various categories of professional performance, including business development and client relations. For instance, Hopkins' complaint recites that she secured "millions of dollars worth of new business for the firm," and she had been particularly successful in developing the firm's business with the

considered socially gender-atypical and therefore, once again, an indicant of minority sexual orientation. The gym staff disrupted their talk in order to prevent them from "creating a gay atmosphere" that was "offensive to people of normal sensibilities." Id. at 415-16. The court, apparently thinking this conflationary scenario a bit over the top, concluded that "[h]omosexuals must have the same rights to engage in conversation in a public place as other members of society." Id. at 416.

federal government.\textsuperscript{573} The partners, however, characterized Hopkins as "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff."\textsuperscript{574} Thus, Price Waterhouse attributed its denial of partnership to Hopkins to reputed deficiencies in her "interpersonal skills" within the office.\textsuperscript{575}

Notably, these personality deficiencies were blatantly couched in terms of social gender atypicalities. For instance, during the partnership evaluations, one critic suggested that Hopkins needed to enroll in a "course at charm school."\textsuperscript{576} A supporter defended her as having "matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate."\textsuperscript{577} Another evaluator concluded that "Ann has a clearly different personality ... [but] many male partners are worse than Ann (language and tough personality)."\textsuperscript{578} Yet another co-worker suggested that "she may have overcompensated for being a woman."\textsuperscript{579} Her office's senior partner, charged with informing Hopkins of the evaluation results, advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."\textsuperscript{580} The evaluation's bottom line was clear: because Hopkins' social gender attributes failed to comport with her sex, the firm's partners chose to exclude her from their partnership despite her professional competence.

Noting evidence that earlier female candidates likewise had been rejected for acting like "Ma Barker" or for trying too hard to be "one of the boys," Judge Gesell easily found that "the partnership evaluation process at Price Waterhouse was affected by sexual stereotyping."\textsuperscript{581} In so ruling, Judge Gesell quoted the Supreme Court's declaration that, "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."\textsuperscript{582} In this case, unlike the

\textsuperscript{573} Complaint at 2-3, Hopkins (Civil Action No. 84-3040). These accomplishments also were recognized by the court. See Hopkins, 618 F. Supp. at 1112.
\textsuperscript{574} 618 F. Supp. at 1113 (footnote omitted). These points are also recounted by the appellate court in Hopkins v. Price Waterhouse, 825 F.2d 458, 463 (D.C. Cir. 1987), aff'd in part, rev'd in part, 490 U.S. 228 (1989).
\textsuperscript{575} 618 F. Supp. at 1113.
\textsuperscript{576} 825 F.2d at 463.
\textsuperscript{577} Id.
\textsuperscript{578} 618 F. Supp. at 1117.
\textsuperscript{579} 825 F.2d at 463.
\textsuperscript{580} 618 F. Supp. at 1117 (footnote omitted); see also 825 F.2d at 463.
\textsuperscript{581} 618 F. Supp. at 1117-20.
"sissy" cases, the court employed a stereotype analysis and interposed its authority to halt the cultural enforcement of the conflation's first leg rather than accept or effect a shift to Leg Two to absolve the discrimination.

In Hopkins, as in Smith and Strailey, the employer had acted on the basis of the conflation's first leg: gender as dictated intransitively by sex. In response, all three claimants invoked Title VII. All three claimants specifically alleged that employers had used sex to dictate social gender and to discriminate on the basis of social gender atypicality. However, only the court in Hopkins intervened, disallowing the conflationary discrimination: only the woman was protected in her social gender atypicality. Hopkins thus shows that the courts are capable of recognizing discrimination based on social gender atypicality as a species of unlawful sex/gender discrimination.

Although the definitive explanation for this difference in result may be unknowable, the net consequences of the different treatments dispensed in these "sissy" and "tomboy" cases are quite knowable: the cumulative sex/gender dynamics of Hopkins, Smith, and Strailey show that anti-discrimination law may be deployed to encourage women to become more like the official male sex/gender profile, while discouraging men from becoming like the official female sex/gender profile. "Feminized" men remain the consistent taboo, both in legal culture as well as in society at large. Over time, this slant fosters, or at least facilitates, "masculinity" among everyone in every facet of life because it fosters the masculinization of both women and men while confining femininity to women only. The law's current posture, formally and ostensibly committed to the advancement of sex/gender equality, can be seen in practice as protecting and perpetuating traditionalist sex/gender preferences for male-identified attributes in the law and throughout society. Anti-discrimination doctrine, in other words, is thus made androcentric in application.

and convincing evidence that it would have made the same partnership decision about Hopkins regardless of the sexism. Id. The Supreme Court decided that the courts should have applied the more lenient "preponderance of the evidence" standard. Id.

583. See infra notes 585-87 and accompanying text.

584. See, e.g., Christine A. Littleton, DOUBLE AND NOTHING: LESBIANS AND THE LAW, 12-20 [hereinafter Double and Nothing] (unpublished manuscript on file with author) (discussing how the application of sex/gender anti-discrimination law in this particular context gives the legal doctrine an androsexist slant); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1286-97 (1991) (critiquing the "assimilationist" approach that has guided the conception of sex "equality" in legal culture); Stephanie M. Wildman, The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence, 63 OR. L. REV. 265, 266 (1984) ("The Supreme Court sex discrimination cases have purported to be concerned with achieving equality between women and men, but in fact the precedents legitimize sex discriminatory attitudes and behavior."). See generally Christine A. Littleton, Reconstructing Sexual Equality, 75 CALIF. L. REV. 1279 (1987) (advancing a theory of "equality as acceptance" that consciously endeavors to transcend traditional androsexist biases); Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 WOMEN'S RTS. L. REP. 175, 176 (1982) (posing the existence of a sex and gender "equality crisis"
2. Social Gender Atypicality & Sexual Orientation

Despite the salience of social gender atypicalities in Hopkins, the second leg of the conflation never surfaced in this controversy. Unlike in Smith and Strailey, the employer here did not tag Hopkins a lesbian, nor did the courts divert their analyses from sex and gender to sexual orientation when faced with a claim based on social gender atypicality, a violation of Leg One. Hopkins therefore prompts some reflection on the reason(s) why this plaintiff, situated so similarly to those in Smith and Strailey, nonetheless escaped conflationary branding as a lesbian under Leg Two and conflationary shifting of the case to that unprotected domain.

One possible explanation for this difference is that our culture seems generally more tolerant of the “tomboy” than the “sissy”; for this reason, perhaps, “tomboy” imagery excites less sexual orientation paranoia. Alternatively, the difference may be due to the traditional valorization of male attributes, which would render attempts by women to act like men more culturally heroic, or at least more sympathetic. Related to the last point is the possibility of judicial sympathy for the “double bind” in which Hopkins and women like her are situated due to the valorization of masculinity: professional women (still) have to act like men to succeed on dominant and androcentric terms, but their strategic self-masculinization then is held against them. Or, perhaps this difference in labeling is just a random anomaly resulting from unquantifiable idiosyncrasies among these particular litigants and judges. Or, finally, perhaps a combination of such factors is responsible for the disparity in the law’s (mis)treatment of “sissies” and “tomboys.”

In light of the sundry possibilities, chances are that the source(s) of this difference in perception and adjudication will never be settled definitively because legal culture has failed to “cope with issues that touch the hidden nerves of . . . profoundly embedded cultural values”).

585. See infra note 919.

586. See supra note 584 and authorities cited therein on Feminist critiques of (and suggestions for) the legal construction of sex/gender equality. In turn, the traditional valorization of maleness may explain our culture’s relative tolerance of the tomboy. See generally infra note 919.

587. See Case, supra note 41 (explaining that socially masculinized women face a “double bind” that is created when women are both encouraged and constructively forced to masculinize themselves in order to succeed in male-dominated and male-defined socio-economic contexts, but then penalized for doing so).

588. See, e.g., Robert P. Smith, Jr., Explaining Judicial Lawgivers, 11 Fla. St. U. L. Rev. 153, 157 (1983) (noting that “the temptations of dishonest rationalization, misstatement of facts, disregard of impediments to a desired result, deliberate misinterpretation of precedent, misleading emphasis, and silence when explanation is impossible” are among the “factors external to ‘the facts’ of a case and ‘the law’ ” that continue to influence the adjudication of controversies). On the other hand, this explanation is not entirely persuasive since Judge Gesell wrote the district court opinions in both Hopkins and Strailey.

589. See generally Littleton, Double and Nothing, supra note 584 (discussing the sundry and volatile ways in which multiple aspects of identity, including race, sex/gender, and sexuality, intersect in this context).
tively. Whatever the reason(s) for this sex-based difference in labeling, however, Hopkins suggests that the absence of the sexual orientation label in that case caused the difference in result. That is, the reason why only Hopkins obtained relief is that only Hopkins was not categorized, either by the defendant or the courts, as a member of a sexual minority. Therefore, this case was not shifted over to Leg Two. The contrast between Hopkins on the one hand, and Smith and Strailey on the other, thus indicates once again the power of the homosexual label: in claims that are substantially identical, the presence or absence of the sexual orientation label(ing) may make the difference in the disposition of the case, regardless of the claimant's actual claim and regardless of the claimant's actual sexual orientation.

3. Hopkins' Conflationary Legacy

Though Hopkins ignored the conflation's second leg and thus afforded relief to the claimant for discrimination under the conflation's first leg, its precedential legacy, seen in conjunction with Smith and Strailey, is quite problematic. First, the three cases together suggest that while defendants and courts regularly exploit sexual orientation as a loophole for sex and gender discrimination in Title VII cases involving "sissies," defendants and courts more readily ignore this loophole when faced with "tomboys." These different results, though seemingly contradictory, are in fact consistent because they are both founded on and help to empower androsexist biases. "Sissies" are punished because they fail to project a male image, while "tomboys" are protected precisely because they do project a male image.

Judges, then, may deploy the sexual orientation loophole strategically to exonerate only discrimination that exalts male-identified gender qualities. This strategic and selective deployment of the sexual orientation loophole on the whole empowers sex/gender masculinity, or androcentrism, both culturally and legally. In this way, Hopkins indirectly manages to further the entrenchment and influence of the conflation's active/passive sex/gender traditionalism in the law. In juxtaposition with the "sissy" cases, this ruling continues the cultural and legal privileging of conventional or traditionalist conceptions of masculinity that historically and currently embody and exemplify androsexist and heterosexist biases.

Hopkins' facts and disposition also corroborate the idea that allegations or insinuations of minority sexual orientation can and do alter judicial

views and actions by shifting the case from Leg One to Leg Two. Here, the court did not acquiesce to the conflation’s cultural enforcement (at least in part) because heterosexist biases were not excited on the record, which in the negative suggests what might have happened if the employer had followed the litigation strategies of, say, the Smith employer. In other words, the absence of the homosexual label and the salutary influence of this absence on the outcome serves to prove its power, and the power of the heterosexism that the label, when used, excites. In this way, Hopkins effectively leaves intact, and confirms, the power of heterosexism within the conflationary status quo.

B. Valdes v. Lumbermen’s Mutual Cas. Co.

Although the Hopkins court protected a gender-atypical woman, the conflation does not disappear every time the claimant is female. Conflationary dynamics are far more complex. Indeed, the above discussion of Hopkins suggests that a primary reason why the court did protect Hopkins was that Hopkins was not labeled a lesbian by the defendant, thus averting the dooming shift to Leg Two. Valdes v. Lumbermen’s Mutual Casualty Co. provides an apt counterpoint. In Valdes, the court condoned an employer’s discrimination against a woman whom the employer erroneously believed to be, and thus labeled, a lesbian. Besides providing another example of the conflation’s ability to distort and confuse legal actions, Valdes specifically shows the power of the homosexual label in a Title VII “tomboy” case.

I. The Conflation’s Shaping of the Case

In her complaint, Valdes alleged that she resigned her position with the employer because she was unjustifiably passed over for several promotions within a couple of years. After resigning, Valdes learned from her former supervisor that the “true reason why she had never been promoted” was that the office manager “believe[d] [she] was a lesbian and stated that he would never promote her because of that [belief].” Valdes’ complaint also asserted that, “[a]s it happens, Ms. VALDES is not, was not, and never has been a lesbian.” Finally, the complaint contended that sexual orientation was never “utilized as a basis for [the] promotion or non-promotion” of male employees, even though males of “various sexual persuasions” knowingly were employed at the same office. This disparate treatment

591. 507 F. Supp. 10 (S.D. Fla. 1980). The author and the plaintiff are not related.
592. Id. at 12-13.
593. Complaint at 1, Valdes (Case No. 80-1466).
594. Id. at 5.
595. Id.
596. Id. at 5-6.
of sexual orientation along sex lines, the complaint concluded, showed that Valdes suffered discrimination "because of her sex, female." 597

The exhibits to the complaint portrayed the same scenario, but provided additional details regarding the source of the manager's belief. In her two EEOC complaint forms 598 Valdes recounted being told by one co-worker that another co-worker, Ileana de la Terriente, "was stating, as a fact, that both Mrs. Valdes and her husband were homosexuals." 599 Upon first learning of these comments, Valdes simply denied that she was homosexual and left matters there. 600 Several months later, however, Valdes overheard de la Terriente making the same type of comment about another co-worker, prompting her to confront de la Terriente directly about the comments made previously about her and her husband. She told de la Terriente that they "were untrue and should not be repeated." 601 After assuring Valdes that she would not repeat these comments, de la Terriente "[i]mmediately . . . turned around and ran into [the manager's] office where she repeated the conversation [between her and Valdes], and [de la Terriente and the manager] once more reached the conclusion that Mrs. Valdes was in fact a homosexual." 602 Although Valdes' supervisor was aware of the manager's prejudice against Valdes based on this labeling, she helped the manager prepare a pretextual memo denigrating Valdes' job performance in order to justify not promoting her. 603 After Valdes resigned, de la Terriente was promoted to her position, and the supervisor's brother received a promotion as well. 604 These facts set the stage for the litigation and adjudication of the case, and for the reinforcement of androsexist and heterosexist prejudice in the process.

Valdes' claim, as framed in both in her EEOC charge and in her complaint, unfolded in two steps. The first step was that the employer denied Valdes promotions because of its uninformed and erroneous belief that she was a lesbian. The second step was that the employer did not deny similar promotions to known gay men. 605 As a set, these two steps reveal both the androsexism and the heterosexism underlying this case: as a set, these two steps show the devaluation of (perceived) lesbians as "double and nothing." 606

597. Id. at 6.
598. The first form, dated January 22, 1980, was signed by Valdes and the second form, dated February 8, 1980, was signed by her attorney. Though both forms recount the same information, the first one provides more detail and therefore is used here as the basis for the facts recited below.
600. Id.
601. Id.
602. Id.
603. Id. at 4.
604. Id. at 5.
606. See Littleton, Double and Nothing, supra note 584.
The plaintiff argued that this discrimination was based on sex rather than on sexual orientation because it was directed at female but not male homosexuals.\textsuperscript{607} As illustrated by the prior cases, this framing was susceptible to conflationary twisting. Not surprisingly, then, the EEOC dismissed her charge due to a perceived lack of jurisdiction over Valdes' claim, which the EEOC (mis)perceived to be based on sexual orientation discrimination. The EEOC's disposition and rationale prompted Valdes to file her lawsuit and, in doing so, to emphasize her original framing of the sex/gender issues.\textsuperscript{608} Valdes, like Strailey, thus shows that even the EEOC disregards in practice the definitional distinctions of its dichotomy regarding sex, gender, and sexual orientation.\textsuperscript{609}

The employer moved to dismiss, asserting repeatedly that Valdes sought relief from "discrimination based upon sexual preference, i.e. homosexuality" and that the complaint "must be tested in this light."\textsuperscript{610} Citing the Voyles holding on transsexualism, as well as Smith and Strailey, the employer here argued that "Title VII does not prohibit discrimination due to an individual's sexual preference."\textsuperscript{611} As in Smith, this illegitimate focus on sexual orientation and transsexualism did not, in fact, address the claim presented in the complaint, but it did invite the court to indulge conflationary beliefs to condone and ratify the employer's discrimination. This defense, in particular, invited and encouraged an analytical shift from Leg One to Leg Two to exploit the sexual orientation loophole.

Accordingly, Valdes' reply to the motion tried to counter the employer's "attempt to condense this case into one in which 'sexual preference' is the issue."\textsuperscript{612} After repeating again that Valdes "is not, was not, and never has been a lesbian,"\textsuperscript{613} the reply to the motion emphatically pleaded for a non-conflationary approach to the case: "VALDES is not suing because she was discriminated against because of her sexual preference. The EEOC was incapable of understanding that. The Defendant refuses to understand that. . . . The Plaintiff urges the Court not to allow the rhetoric surrounding sexual preference to cloud the real issue in this case."\textsuperscript{614} This plea was partially successful, but mostly and ultimately not.

2. The Conflation's Grip on the Court

Although the court noted this dispute over the framing of the issues, it neatly sidestepped the question by relying on Smith and its earlier (mis)use

\textsuperscript{607} Id.
\textsuperscript{608} This administrative disposition is reported in the district court's opinion. \textit{Id.}
\textsuperscript{609} \textit{See supra} notes 380-90 and accompanying text.
\textsuperscript{610} Memorandum of Law in Support of Motion to Dismiss at 1, \textit{Valdes} (Case No. 80-1466).
\textsuperscript{611} \textit{Id.} at 2-3.
\textsuperscript{612} Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 1, \textit{Valdes} (Case No. 80-1466).
\textsuperscript{613} \textit{Id.} at 2.
\textsuperscript{614} \textit{Id.} at 3.
of the sex-plus doctrine.°\textsuperscript{15} Pointedly citing the reference in Smith to “effeminate mannerisms” as the “plus” in that case, this court incongruously asserted: “Substitute ‘lesbian mannerisms’ for ‘effeminate mannerisms’ and this case would be identical to Smith.”\textsuperscript{16} Furthermore, this court saw “no reason to conclude that the Fifth Circuit would reach a different result in this case where discrimination [was] based on the employer’s perception of Ms. Valdez [sic] as a lesbian and in Smith where discrimination was based on the employer’s perception of Smith as effeminate.”\textsuperscript{17} Thus, sex plus “lesbian mannerisms” combined here to weaken sex/gender anti-discrimination law just as sex plus “effeminate mannerisms” had combined toward the same end in Smith.

At the outset, the court’s conclusory equation of “lesbian mannerisms” with “effeminate mannerisms” in this case was not only simplistic but utterly conflationary because it equated same-sex sexual orientation with social gender atypicality; the court’s use of “lesbian mannerisms” rather than, say, “masculine mannerisms” to draw its analogy to Smith’s use of “effeminate mannerisms” revealed the conflation’s influence on this court’s (mis)understanding of, and (lack of) thinking about, the precise (f)acts and specific issues of this case.

Additionally, by citing to Smith in this way, the court in Valdes also situated the employer’s actions within the broader doctrinal category of sex-plus discrimination.\textsuperscript{18} Somewhat at a loss because the Fifth Circuit in Smith “did not explain why” it had denied “fundamental right” or “immutable characteristic” status to (male) effeminacy, the Valdes court simply rested its conclusion that the sex-plus doctrine applied here on its asserted analogy between “lesbian mannerisms” and “effeminate mannerisms.”\textsuperscript{19} The conflationary association of “lesbian” with “effeminate” mannerisms consequently served as the analytical centerpiece of the court’s conclusion that the sex-plus doctrine applied.

Unfortunately, neither the opinion nor the pleadings filed with the court sheds light on the precise nature of the “lesbian mannerisms” underlying this case. However, the court’s analogy is revealing: if Smith’s “effeminate mannerisms” are akin to Valdes’ “lesbian mannerisms” then Valdes was susceptible to branding as a lesbian because she was acting like a “tomboy.” Apart from this specific indication of social gender atypicality, the inference that Valdes is a “tomboy” case is more generally but strongly supported by the record from modern culture documented in Chapter One, coupled with the record from the “sissy” cases reviewed above in this Chapter.

\textsuperscript{615} See supra Part II.B.6.
\textsuperscript{617} Id. at 12-13.
\textsuperscript{618} See id. at 12.
\textsuperscript{619} Id.
In Valdes, unlike Hopkins but like the "sissy" cases, the defendant asserted the homosexual label(ing) and the court accepted it. This case therefore shows that the cross-association of social and sexual gender atypicality under the joint operation of Leg One and Leg Two applies in legal culture and doctrine both to women and to men. This case additionally shows the power of the label(ing) to overtake the litigation and adjudication of a conflationary sex/gender controversy.

The court’s conflationary situation of this controversy within the sex-plus doctrine turned out to be needless; the court did not reach the merits of that issue. Rather, and surprisingly given the influence of the conflation on this case, the court concluded that Valdes’ factual allegations withstood the motion to dismiss because of the specific allegation that the employer treated male sexual orientation differently from the way it treated female sexual orientation. Thus, Valdes’ sex claim partially found its way into the court’s mind. However, while allowing the litigation to proceed, the court could not resist a final note, inviting employers to engage in even more sexual orientation discrimination, revealing that the plaintiff’s effort to focus judicial attention on sex was mostly and ultimately unsuccessful. In closing, the court observed that the sex-plus issue “could probably be resolved more simply if Lumberman’s could show that they discriminate against both male and female homosexuals. If Lumberman’s could make such a showing... no distinction would be drawn on the basis of sex.”

In short, the court’s preferred remedial recipe called for expanded discrimination against avowed or accused gay men and lesbians in order to equalize the bigotry. This reasoning of course parallels the Orwellian “equal discrimination” arguments of the Smith defendant.

Moreover, this reasoning suggests that expanded discrimination against social gender atypicality among both sexes, if attached to sexual orientation label(ings), would be permissible because the label(ing) would transform the case into a matter of (mere) sexual orientation prejudice. This reasoning, in other words, suggests that “equal discrimination” against minority sexual orientation would legalize the sex/gender biases underlying this case. This closing commentary on the court’s part thus indicates once again the power of the homosexual label(ing), both legally and culturally. However, the defendant apparently was unable (or unwilling) to make this “equal discrimination” showing because the parties settled the case shortly after the court’s order.

3. Valdes’ Conflationary Legacy

As this account shows, the conflation entered Valdes at its inception, just as it had in Strailey and Blackwell. Valdes therefore illustrates again
the capacity of conflationary traditions and actions to create legal controversies. Also, this account further indicates the power of sexual orientation label(ing): here, one co-worker used the label to undermine the career of a colleague, exploiting its power as a tool for self-promotion. *Valdes* once again depicts how the conflation’s cultural operation facilitates, manufactures, and shapes legal controversies.

Though truncated by settlement, this litigation further entrenched the conflation in legal culture because the *Valdes* court relied on, and tracked, the conflationary examples set by *Smith* and *Strailey* under Title VII and by the other “sissy” cases reviewed earlier. Most significantly, *Valdes* effectively extended to Title VII cases brought by female claimants the sexual orientation loophole that exonerated sex and gender discrimination in the “sissy” cases.\(^6\) under *Valdes*, Title VII “tomboy” plaintiffs may be exposed to the same conflationary vulnerabilities faced by “sissy” plaintiffs under *Smith* or *Strailey*. This ruling likewise lends additional support to the sex-plus loophole that exonerates discrimination based on both sex and gender by (mis)casting social manifestations of gender atypicality as the “plus” in the analysis of the case.\(^7\) *Valdes*, like the “sissy” cases, shows how legal culture accepts, recycles, and perpetuates conflationary injustices.

IV

THE CONFLATION RUNS THROUGH IT ALL

As these cases demonstrate, the conflation runs through legal culture with great ease and enormous impact. Upon closer inspection, this record reveals that the conflation’s power in legal culture results from the combination of three techniques or practices that generally run through the cases and that, therefore, run through the points elaborated below. The first technique is judicial employment of the analytical double standard, which permits and activates judicial identification with the cultural operation of the conflation but which allows the courts to deny any legal relevance of the conflation in the analysis of claims arising from that operation. The second technique is the shifting of issues and cases from Leg One to Leg Two. This is made possible by the use of the analytical double standard and by the formal legality of sexual orientation bias, which thus allows defendants and courts to take control of the plaintiff’s claim in order to (re)situate it within an unprotected sex/gender domain. The third technique is the *de facto* result that accompanies the first two—the strategic use of Leg Two to uphold substantively the conflation of sex and gender under Leg One. As the foregoing discussion indicates, the bottom line of these practices is the generation of ignorant and pretextual but selective (mis)uses of sexual orientation to suppress gender transitivity or atypicality both in social/public

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623. See, e.g., supra Part II.B.5.
624. See, e.g., supra Part II.B.6.
settings and matters and in sexual/private settings and matters. Judicial employment of these analytical techniques and conflationary practices thus produces several themes that recur and several points that stand out regarding the conflation’s role in and influence on legal culture. These recurring themes and salient points, as critiqued below, betray the law’s self-ascribed values and ideals.

A. The Conflationary Power of Homosexuality

Perhaps most dramatically, these cases reveal that the label of “homosexuality” exerts a mesmerizing power over the courts in their (mis)adjudication of sex and gender controversies. The “homosexual” label(ing) overshadowed sex and gender in Smith, despite the plaintiff’s vehement denials of homosexuality. The label(ing) had the same effect in Strailey despite the attorney’s effort to focus the courts on the plaintiff’s gender atypicality claim. Likewise, this label(ing) displaced the transvestism claim in Blackwell even though transvestism was the only issue remaining after the district court’s initial ruling in that case. This label(ing) also transformed hair regulations into homosexuality regulations in Dreibelbis and in Poe. Finally, in Valdes the label(ing) eclipsed the plaintiff’s adamant position—that she “is not, was not, and never has been” a lesbian. This record demonstrates the overwhelming power of the conflationary cross-associations between social gender atypicality and minority sexual orientation in legal culture and in society-at-large: once conflationary sexual orientation label(ing)s attach, for whatever reason, an individual will have enormous difficulty regaining control over his or her perceived sexual orientation identity.

Adding substantive injury to this (mis)appropriation of identity, this label(ing) also will dictate the results of the case even if the plaintiff offers clear sex and gender grounds for judicial consideration. Indeed, this record shows that the conflationary power of the “homosexual” label is so compelling that courts routinely and insistently adjudicate claims that the claimants never presented. As such, the conflationary power of homosexuality reflects and displays judicial (mis)use of the techniques that empower conflationary analysis: the power of this label(ing) demonstrates at once judicial (mis)use of the analytical double standard, judicial shifting of claims from Leg One to Leg Two to exploit the formal legality of sexual orientation discrimination, and, therefore, judicial (mis)use of Leg Two via the sexual orientation loophole to uphold Leg One on the merits. This first

625. See supra notes 428-36 and accompanying text.
626. See supra notes 475-82 and accompanying text.
627. See supra notes 511-30 and accompanying text.
628. See supra notes 541-51 and accompanying text.
629. See supra notes 552-67 and accompanying text.
630. See supra notes 595, 616-19 and accompanying text.
theme, in other words, exemplifies how the operation of the conflation in legal culture continues and recycles its operation in modern culture.

B. "Sexual Aberrations" & the Conflation

The second theme does likewise. Smith, Strailey, and Blackwell, in particular, display how the courts readily evoke and invoke transsexualism, transvestism, and homosexuality almost interchangeably to dispose of social gender atypicality claims.\textsuperscript{631} These interchangeable evocations and invocations indicate either the courts' sincere but mistaken belief in the substantive similarity of these three sex/gender categories or their opportunistic exploitation of the conflationary cross-associations that make them superficially plausible. In this way, this second theme also reflects judicial (mis)use of the analytical double standard to finesse meritorious claims, issues, and cases from the formally protected sex/gender domains of Leg One to the unprotected sexual orientation domains of Leg Two to rebuff such claims, and judicial deployments of Leg Two to condone cultural and legal interventions on behalf of Leg One that uphold the social/public (and sexual/private) intransitivy of deductive gender.

Although the courts usually fail to disclose any basis for their conflationary cross-invocations of transvestism, transsexualism, and homosexuality, a passing phrase in a Smith footnote does provide an important clue: after citing the transsexualism rulings of other courts in a prior footnote, the court described Smith's social gender atypicality as evidencing "sexual aberration."\textsuperscript{632} Though cloaked in silence, this notion of "sexual aberration" is profoundly suggestive.

The reference to sexual aberration suggests that the court was imagining a larger category composed of individuals who share one feature—they are perceived as "aberrational" from traditionalist active/passive norms regarding sex, or gender, or sexual orientation. The category of sexual aberrations, then, mirrors the larger history of the conflation of sex, gender, and sexual orientation because it confuses—indeed, conflates—the distinct categories of homosexuality, transsexualism, and transvestism. This category lumps these three types of groups or persons indiscriminately into a conceptually amorphous and analytically untenable macro-category of sexual aberration.

The existence of this sweeping and imprecise sexual aberration category not only makes it unnecessary for the courts to consider legally relevant sex/gender distinctions among these "aberrations," but also encourages courts to insist (sub silentio) on ignoring any such distinctions because the larger category rapidly disintegrates if the phenomena gathered within it are examined critically.\textsuperscript{633} In other words, this macro-category is conceptually

\textsuperscript{631} See supra notes 449-54, 489-92, 509-40 and accompanying text.
\textsuperscript{632} Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 328 n.4 (5th Cir. 1978) (citation omitted).
\textsuperscript{633} See generally supra notes 450-51 and accompanying text.
incoherent and this incoherence is readily demonstrable, which increases judicial investment in avoiding and warding off explicit, searching, and critical inspections of its contents and contours. But, even more troubling than this cavalier and illegitimate conflation of homosexuality, transvestism, and transsexualism is the substantive implication to be drawn from the nature of this sloppy and strategic category.

If "aberration" is what ties these three phenomena together in the judicial mind, the macro-category that results is useful only to penalize the aberrational as such. The courts' imaginative but specious use of conflationary assertions to ratify prejudice against such "aberrations" thus confirms how the conflation in legal culture serves as a means through which dominant sex/gender norms are imposed and enforced across the cultural board. This generalized macro-category, in other words, is situated to operate as a catch-all classification that collects myriad forms of sex/gender "aberrations" or departures from the traditionalist configurations of the active/passive paradigm—those persons or phenomena that disregard or violate the paradigm's sex/gender themes and traditions.

This paradigm, as noted at the outset of Chapter One, establishes or foreshadows particular sex/gender conceptions that underlie and fuel the conflationary status quo both culturally and legally, including the fundamentality of sex, the intransitivity of deductive gender, and the cross-referencing (and cross-problematization) of social and sexual gender atypicality. This paradigm thus originates and helps to sustain hetero-patriarchy. This catch-all macro-category, therefore, is an especially insidious creation: it creates a bin into which dominant sex/gender forces can discard the sex/gender dissidents that hetero-patriarchy ideologically disdains and devalues.

C. The Conflation as a Mask for Gender Bias

The third point perhaps is the most foundational: the record shows that social/public gender bias motivated the acts of discrimination in each of these cases because the specific acts of discrimination being challenged in these cases were reactions to perceived disruptions of the sex and gender conflation under Leg One. Though the defendants in each case (with the exception of Hopkins) also triggered the conflation's second leg, thus pulling sexual orientation into the discriminatory dynamics of the cases, each act challenged in these cases was first and foremost a form of cultural retaliation for the plaintiffs' manifestation of social gender atypicality. This point therefore quintessentially manifests the trio of techniques that surround and sustain the conflation in legal culture; this point depicts the operation and effects of the analytical double standard, the shift of cases from

634. See supra Chapter One, Part I.A.
635. See infra Chapter Four, Part I.E.1-5.
Leg One to Leg Two via the sexual orientation loophole, and the strategic activation of Leg Two to buttress substantively Leg One.

The courts could have recognized the (f)actual primacy of, and focus on, the social/public aspects of gender in these cases if they had understood three key factors present in virtually all of the discriminatory acts or events. The first factor is specific to the cases: that the employers simply did not know the victim’s sexual orientation. Although this factor alone is not dispositive, it points out that, at most, the employer based its discrimination on conflationary suspicions about the plaintiff’s (unknown) sexual orientation. These suspicions, by everyone’s account, resulted exclusively from the claimants’ nonconformist social/public manifestations of gender. This factor thus brings into sharp relief the conflationary blend of bigotries in these cases: the employers merely suspected homosexuality but knew only of social gender atypicality. In each case only gender was in the employer’s face, so to speak.

One might think, as some of these defendants argued, that discrimination based on suspected homosexuality is sexual orientation discrimination, even if the suspicion operates as a secondary aspect of the motivation for the discrimination or even if it turns out to be erroneous in fact. But the second factor, also specific to this record, tellingly suggests otherwise: in each of these cases the employers uniformly and unflinchingly stood by, and thus ratified, their social gender discrimination even after the plaintiffs emphatically disclosed their real and “correct” cross-sex sexual orientations. Had the employers actually desired to discriminate only on the basis of homosexuality, they could and should have relented once they learned of the plaintiffs’ heterosexuality. That they uniformly and resolutely did not indicates that these employers did not want to employ or promote “sissies” or “tomboys”—even those who (f)actually were not “queers” or “dykes.”

Especially telling is the allegation in Valdes, which the employer did not deny, that the employer did not discriminate against known male homosexuals. Likewise telling is Hopkins, where the employer discriminated against a “tomboy” even while the “dyke” suspicion never surfaced. These facts strongly suggest that the bias motivating these acts of discrimination was intolerance of social/public gender atypicality. This persistent bias against “sissies” and “tomboys” who were not “queers” and “dykes” points to one conclusion: that Leg One was (f)actually and substantively paramount in each of these cases, and that the defendants’ subsequent marshaling of the sexual orientation loophole simply reflected their lawyers’

636. See, e.g., Delaney v. Superior Fast Freight, 18 Cal. Rptr. 2d 33, 35-36 (Ct. App. 1993) (holding that the California Labor Code prohibiting discrimination based on sexual orientation encompasses both actual as well as perceived sexual orientation).
637. See supra notes 594-97, 605-07 and accompanying text.
638. See supra Part III.A.2.
savvy recognition that the homosexual label(ing) was a strategic opportunity to secure judicial absolution of the employers’ social gender biases.

The third factor reinforces the first two by contextualizing them within the broader conflationary picture. This third factor is the existence and dissemination of studies repeatedly showing that a prime and continuing source of public antipathy toward sexual minorities is the belief that lesbians and gay men (and bisexuals) are social gender deviants.639 Indeed, numerous studies document how discrimination ostensibly based on sexual orientation in fact is directed most forcibly at persons who exhibit social gender atypicalities rather than at persons actually known to be members of a sexual minority.640 This point of course is the crux of the conflationary cross-associations that bind and blend androsexist and heterosexist prejudice, which were incorporated into and codified by inversion theory,641 and which continue to animate both clinical and cultural (mis)perceptions of sexual minorities to this day.642 Thus, in addition to the specific facts of the cases, the general history and cultural operation of the conflation strongly suggests that social gender discrimination was at the heart of each case reviewed above.

Had the courts focused on these three factors, they would have been better positioned to reject the conflationary (mis)perceptions that created the controversies in the first place. If so, the courts could and should have eschewed the three techniques or practices that guide the conflation’s operation in legal culture to legitimate and recycle its continuing operation in modern culture. Unfortunately, the courts, seemingly oblivious (or wedded) to the conflation in their legal analyses, (re)classified the biases in all of the cases except Hopkins as (merely) permissible sexual orientation discrimination, thereby making social/public gender atypicality a permissible basis of bigotry that, on the whole, promotes both androsexist and heterosexist prejudice.

D. The Use of Sexual Orientation to Weaken Sex & Gender Anti-Discrimination Law

The fourth point flows from the substantive doctrinal consequences generated by these cases and emphasizes how the conflationary power of minority sexual orientation weakens sex and gender anti-discrimination law. Consider that all of the claimants in the cases reviewed above presented substantive sex and gender claims and in some instances did so with mighty emphasis. Note further that all of the claims, except

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639. See supra notes 250-52 and accompanying text.
640. See supra note 148 and authorities cited therein on the normative associations and conceptual interrelationships that bind together various strains of sex/gender discrimination. See also supra notes 250-52 and accompanying text.
641. See supra Chapter One, Part I.B.
642. See supra Chapter One, Part II.B.
Hopkins's, were rejected. Finally, recall that all of these rejections were rooted in the substitution of sexual orientation for sex and gender. Legal culture, it seems, has stumbled upon the discovery that the conflation provides a means for circumventing the formal prohibition against sex and gender discrimination.

In fact, by substituting sexual orientation for gender the courts effectively licensed three interrelated but distinct species of sex/gender bigotry: (1) bigotry based on sex and gender stereotypes regardless of sexual orientation; (2) bigotry based on suspected minority sexual orientation regardless of actual sexual orientation; and (3) bigotry based on actual minority sexual orientation. Had the courts eschewed the trio of techniques that enable and empower the conflation's legal operation, they could have cut through the conflationary dynamics of the (f)actual situations in the cases. They therefore could have recognized that sexual orientation was wholly irrelevant to the disposition of all these cases on their sex/gender merits. In this way, the courts could and should have avoided both the analytical contortions and doctrinal distortions of these cases.

This point underscores a detail that is important to the principled application of Title VII’s sex provision but that generally is ignored and becomes lost in conflationary (mis)applications of the statute: on its face and as construed Title VII formally forbids discrimination based on sex and gender stereotyping, but on the statute’s face this protection is not limited to members of the sexual majority. In other words, Title VII protects perceived or even “real” homosexuals from discrimination that is based on sex (or gender). As the cases above illustrate, however, the courts tend to employ the usual trio of techniques and practices to uphold sex/gender traditionalism in cases where homosexual label(ing)s take place; by employing the analytical double standard, by shifting claims from Leg One to Leg Two, and by positioning Leg Two strategically to uphold Leg One substantively, the courts effectively and seriously weaken(ed) sex and gender anti-discrimination law.

These cases as a set thus portend far-reaching substantive consequences. In addition to circumventing the law and denying merited relief in particular cases, conflationary opinions create precedents and thereby establish doctrines that impair the efficacy and potency of sex and gender anti-discrimination law for the future. Indeed, the conflationary status quo in legal culture and doctrine indicates that the law literally may be incapable

643. See, e.g., supra note 582 and accompanying text. See also City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (“It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”). See generally Heather K. Gerken, Note, Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions, 91 Mich. L. Rev. 1824 (1993) (focusing on the 1991 statute to analyze the legality of sex-typed interviewing queries and techniques).

644. See supra note 425 and accompanying text.
of fulfilling its sex and gender anti-discrimination mandate so long as the conflationary power of minority sexual orientation can be deployed by defendants or applied by courts as it has been thus far.645

E. The Manipulable Conflation & Results-Oriented Adjudication

The fifth point to be drawn from the foregoing cases is how the conflation invites and facilitates various manipulative tactics in the pursuit of results-oriented adjudication. Indeed, both defense lawyers and legal decisionmakers selectively embraced or disavowed the conflation, or certain of its aspects, to achieve particular(ized) results. The defendants, their representatives, the EEOC, and the courts all shared a common interest and willingness to manipulate this manipulable conflation in order to secure exoneration of sex/gender prejudice.

For instance, in case after case, court documents show defense lawyers showcasing conflationary arguments in order to exploit the sexual orientation loophole.646 Despite the plaintiffs’ focus on and framing of explicit sex and gender claims, the defendants repeatedly insisted that the discrimination was not wrongful because they directed it at a (suspected) “queer” or “dyke”—even though the facts showed the employer reacting against and victimizing a “sissy” or “tomboy.” Defense manipulation is matched by judicial complicity.

The case critiques presented above depict the courts manipulating the conflation through the analytical double standard, the shift from Leg One to Leg Two, and the strategic exploitation of Leg Two to penalize disruptions of Leg One. Perhaps the most blatant example of judicial inconsistency on behalf of results-orientated adjudication is depicted by comparing the EEOC’s seminal administrative ruling with the Smith courts’ seminal judicial rulings: the EEOC, in erecting its dichotomy, embraced the conflation’s first leg,647 and yet the Fifth Circuit in Smith, while citing the EEOC’s ruling, emphatically disclaimed it.648 Conversely, whereas the EEOC ruling expressly rejected the conflation’s second leg,649 both courts in Smith (normatively) accepted it.650 None of these decisionmakers attempted to air or explain their reasoning. Rather, each decisionmaker simply issued conclusory pronouncements even while, in Smith, purporting to rely on inapposite authority. Only one commonality transcends and harmonizes these otherwise inconsistent decisional gyrations.

From these (and the other) rulings documented above, the conflation emerges as a results-oriented device used by legally (and culturally) domi-

645. See supra notes 330, 331 and 335; see also infra Part V.C. See generally Chapter Five.
646. See, e.g., supra notes 404-05 and accompanying text.
647. See supra note 382 and accompanying text.
648. See supra notes 417-21 and accompanying text.
649. See supra note 385 and accompanying text.
650. See supra notes 407-08 and 427 and accompanying text.
nant forces to regulate perceived sex and gender “aberrations” on behalf of conflationary traditionalism.\textsuperscript{651} Indeed, these analyses can be harmonized only by the uniformity of their substantive results. The convoluted treatments of the conflation in \textit{Smith} and \textit{Strailey}, for instance, are mutually exclusive;\textsuperscript{652} the two cases are reconcilable only if approached from a results-oriented perspective. The casual joinder of transsexualism and homosexuality\textsuperscript{653} likewise is comprehensible only from a results-oriented perspective. The district court’s analytical gymnastics in \textit{Blackwell}\textsuperscript{654} similarly make sense only if viewed as a results-oriented endeavor. Finally, the breezy equation of “lesbian mannerisms” and “effeminate mannerisms” in \textit{Valdes}\textsuperscript{655} is decipherable only from a results-oriented viewpoint. Manifestly, each of these rulings was oriented toward, and achieved, a single result: penalizing perceived “sex(ual) aberrations” in accordance with the dictates that conflate sex, gender, and sexual orientation under the joint operation of Leg One and Leg Two, and in accordance with the traditionalist active/passive sex/gender themes that underlie and constitute the conflation as a whole.\textsuperscript{656}

\textbf{F. Sex-Plus as Gender}

The next salient point to be drawn from the conflation’s record in legal culture is the intersection of deductive gender and the sex-plus concept. As already noted, the sex-plus doctrine was used in \textit{Smith}\textsuperscript{657} and in \textit{Valdes}\textsuperscript{658} as a loophole to aid the exoneration of sex and gender discrimination. In so doing, the courts in those cases severed gender from sex doctrinally, even though the two constructs are firmly conflated both in law and society. In other words, the courts employed the first among the trio of techniques that ensure conflationary results: the analytical double standard that withholds legal recognition of the way in which the conflation (f)actually had manufactured legal controversy. The use of this technique to create and apply the sex-plus loophole impairs the ability of both women and men to secure relief from sex and gender discrimination.

In \textit{Smith} and \textit{Valdes}, for example, a holistic and contextual non-conflationary perspective quickly shows that the “plus” in those cases was sex-determined gender itself. In \textit{Smith} “effeminate mannerisms” constituted the plus, while in \textit{Valdes} the plus was “lesbian mannerisms.” But given that deductive gender is determined intransitively by sex, gender atypicality, by definition can come into existence only through a nonconforming interac-

\begin{itemize}
  \item \textsuperscript{651} See supra Part IV.B.
  \item \textsuperscript{652} See supra Parts II.B and II.C.
  \item \textsuperscript{653} See supra Parts II.B.7 and II.C.3.
  \item \textsuperscript{654} See supra Part II.D.1-2.
  \item \textsuperscript{655} See supra Part III.B.2.
  \item \textsuperscript{656} See supra Chapter One, Part I.A.
  \item \textsuperscript{657} See supra notes 438-48 and accompanying text.
  \item \textsuperscript{658} See supra notes 615-21 and accompanying text.
\end{itemize}
tion between sex and gender that disrupts Leg One. Thus, this (mis)use of the sex-plus loophole in such cases simply is a means of circumventing the prohibition against sex/gender discrimination.

Moreover, because the conflation remains generally hidden, both culturally and legally, conflationary manipulation in the sex-plus setting to rationalize preferred but unwarranted results is more likely to escape direct and conscious notice. Though this point is true at a more general level as well, it is especially important to the sex-plus (mis)use of the conflation because this body of doctrine is not so obviously implicated in conflationary imagery; in other words, this area of doctrine, unlike areas that purport to focus on sexual orientation, is less likely to flag conflationary issues. The existence of the sex-plus loophole, allowing the use of gender (atypicality) as the “plus” that weakens the protection of sex, thus is made especially possible and seemingly plausible because its conflationary shadings have not been recognized.

A holistic and contextual non-conflationary perspective combats this (mis)use of the sex-plus loophole because it emphasizes that the discrimination in Smith and Valdes encompassed both sex and gender—the acts of discrimination in both instances occurred within or along the conflation’s first leg. This sort of conflation-sensitive perspective in the sex-plus setting also combats judicial (mis)use of the analytical double standard because it never forgets that sex and gender (f)actually cannot be disjoined by ignor-


This judicial disjunction of sex and pregnancy is especially remarkable because several major formulations of Feminist legal theory have grounded themselves on the experience of pregnancy being unique to women. See, e.g., Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 1007-13 (1984); Scales, supra note 22; Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

For interesting recent readings on these themes, see generally Dan Danielsen, Representing Identities: Legal Treatment of Pregnancy and Homosexuality, 26 New Eng. L. Rev. 1453 (1992) (exploring commonalities in courts’ treatments of pregnancy and homosexuality and recommending strategies for better outcomes in future cases); Gary Minda, Title VII at the Crossroads of Employment Discrimination Law and Postmodern Feminist Theory: United Auto Workers v. Johnson Controls, Inc. and Its Implications for the Women’s Rights Movement, 11 St. Louis U. Pub. L. Rev. 89 (1992) (arguing that the Supreme Court opinion in Johnson Controls reinforced the perception that women can claim protection only by analogizing their own experience to the experience of men); Katherine Kruse, Comment, The Inequality Approach and the BFOQ: Use of Feminist Theory to Reinterpret the Title VII BFOQ Exception, 1993 Wis. L. Rev. 261 (analyzing women-only employment policies in rape crisis centers and battered women’s shelters in light of Title VII BFOQ exception).
ing (whether ignorantly or strategically) the conflationary cultural norms that generated the discrimination in the first place. Consequently, a holistic, conflation-sensitive perspective would position legal culture to see through the fallacy of the sex-plus loophole in this context.660

G. The Inadequacy of the EEOC Dichotomy

The seventh point concerns the ultimate inadequacy of the EEOC dichotomy. As previously explained, the EEOC dichotomy accepts the conflation of sex and gender under Leg One, but rejects the conflation of sex-determined gender and sexual orientation under Leg Two because it defines the latter construct specifically as “sexual” proclivities or practices.661 On the surface, this rejection of the conflation’s second leg might appear to be an important inching toward non-conflationary legal analyses because it seems to establish a basis for distinguishing erotic from non-erotic targets of discrimination. The problem, however, is that this rejection of Leg Two for the purposes of legal analysis enables the courts disingenuously to ignore the conflationary influences in society that led to the very discrimination challenged before the court. In other words, the definitional approach of the EEOC dichotomy substantively embodies the analytical double standard—it denies legally what (f)actually occurs culturally.

As Chapter One comprehensively illustrates, for at least a century, Euro-American law and society formally, consistently, and pervasively have conflated sex-determined gender with sexual orientation.662 Legal doctrine must recognize that discrimination based on sex-determined gender and discrimination based on sexual orientation are tightly intertwined—conflated. So long as this recognition is neglected or suppressed, legal culture’s adjudication of conflationary controversies, whether under the EEOC dichotomy or any similar alternative, necessarily will be distorted and ultimately will be inadequate.663

Moreover, even if the EEOC dichotomy were a principled analytical framework in the abstract, the foregoing judicial (mis)applications of the dichotomy show how the dichotomy collapses in practice. Judicial (mis)applications of its definitional niceties suggest that the pervasiveness of the conflation and the power of the homosexual label currently are so great that they preclude the dichotomy’s principled application. Notably, the EEOC dichotomy appeared before any of the other cases were decided; thus, it was available for principled use in all of those cases. Furthermore, the courts undeniably were aware of the EEOC ruling because they cited to it. Nonetheless, the courts embarked on and continued with their confla-

660. See infra Chapter Five, Part I-II.
661. See, e.g., supra notes 384-86 and accompanying text.
662. See supra Chapter One.
663. See generally infra Chapter Four, Part IV.A.
tionary practices even though plaintiffs such as Smith and Valdes vehemently implored them to stop.

Even more telling—and egregious—is how the EEOC itself has disregarded these definitional niceties even after asserting them. For example, the EEOC dismissed both Strailey’s and Valdes’s administrative claims based on sex and gender in the mistaken belief that they were based on sexual orientation—presumably “sexual proclivities or practices.” In short, these post-dichotomy judicial and administrative rulings show an overwhelming social and decisional readiness to exploit in practice the substantive double standard embedded within the EEOC dichotomy.

In this way, these administrative and judicial decisions also show a social and legal acceptance of the conflation’s second leg which, by definition, nullifies the distinction between gender and sexual orientation posited by the EEOC dichotomy. In other words, the practice nullifies the theory. Decisional (mis)use of the double standard, decisional shifting of cases from Leg One to Leg Two, and decisional activation of Leg Two to ratify discrimination occurring within Leg One thus combine to reveal that the EEOC dichotomy is unworkable in a legal system (and society) influenced by the conflation.

H. Sexual Orientation & the Sexual Majority

The concluding point to be drawn from the legal record perhaps is the most unexpected: the sexual majority is just as vulnerable to conflationary bigotries as are sexual minorities. Notably, of the cases reviewed, only three—Strailey, Blackwell, and Poe—actually involved sexual minority claimants. These three without doubt suffered discrimination even though their sex and gender claims were analytically and substantively independent of their minority sexual orientation. But the other claimants (except Hopkins) also suffered discrimination (putatively) on the basis of sexual orientation even though their apparent or self-identified (and unchallenged) sexual orientations were “correct.” It is evident that self-identification with the sexual majority does not insulate individuals from conflationary aggression in everyday life or in formal legal situations.

As this Chapter shows, uniform results obtained among both the minority and majority claimants for uniform reasons: the employer, and later the legal system, conflated the claimants’ perceived social gender atypicality with minority sexual orientation under the joint operation of Leg One and Leg Two. Furthermore, recall again that this bigotry was not (easily) shaken once attached: in both Smith and Valdes the claimants strenuously and repeatedly denied the label of homosexuality. Yet these denials

664. See supra notes 472-74 and accompanying text.
665. See supra notes 593-609 and accompanying text.
666. This count does not include the EEOC ruling or Dreibelbis because the author was unable to determine or confirm the claimant’s self-professed sexual orientation in these two instances.
had no meaningful effect on the litigation, despite the fact that absolutely no evidence was introduced to support the imputed label(ing).

The results in these cases dramatize how membership in the sexual majority does not provide a shield from conflationary biases even after the litigation has commenced and the sexual orientation "facts" have been "established" on the record. Instead, confirmed members of the sexual majority who are perceived as socially gender-atypical are just as vulnerable to so-called sexual orientation discrimination, both culturally and legally, as are gays, lesbians, bisexuals, and others—i.e., transsexuals or transvestites. These cases thereby establish that sexual orientation bigotry socially and legally harms anyone who is "suspected" of being a homosexual for any reason whatsoever, including gender-related reasons.

In closing, it bears emphasis that mere unilateral suspicions are enough to disarm the protective guards of sex and gender anti-discrimination law. This disarming of the law, of course, takes place via the trio of techniques and practices that drive conflationary rulings and underscores the doctrinal power and effects of homosexual label(ing)s. Consequently, even though sexual orientation bigotries are calculated to strike at sexual minorities in particular, the conflation ensures that no one is safe from such bigotries, either in the course of everyday life or in the course of formal litigation.

V

THE MISCEGENATION ANALOGY & THE CONFLATION OF SEX WITH SEXUAL ORIENTATION UNDER LEG THREE:
ANALOGIZING RACISM, ANDROSEXISM, & HETEROSEXISM

The "miscegenation analogy" was prescient in the 1976 Strailey complaint, and since then has been developed and urged by various commentators. As asserted in Strailey and developed since, this analogy argues for legal (and cultural) recognition that sexual orientation (discrimination) is sex-based. This analogy therefore addresses the continuing legality of discrimination corresponding to Leg Three of the conflation, and is discussed here to illuminate the way in which the analogy intersects with the conflation in the anti-discrimination project. This discussion situates the

667. The complaint is dated May 27, 1976. Complaint at 3-4, Strailey v. Happy Times Nursery Sch., Inc. (N.D. Cal.) (Civil Action No. 76-1088).
668. See Mark Strasser, Family, Definitions, and the Constitution: On the Antimiscegenation Analogy, 25 SUFFOLK U. L. REV. 981, 981 (1991) (recognizing the "parallels between the current unwillingness of states to recognize same-sex marriages and their former unwillingness to recognize interracial marriages"); Koppelman, supra note 84 (applying miscegenation law to sodomy laws and concluding that sodomy laws impose a sex-based classification with the constitutionally impermissible purpose of imposing traditional sex roles); James Trosino, Note, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. REV. 93, 94 (1993) (comparing "the successful effort to legalize mixed-race marriage with the ongoing struggle to legalize same-sex marriage").
analogy conceptually and analytically within the overall context of the conflationary sex/gender status quo in modern and legal culture.

A. The Miscegenation Analogy

This analogy argues that sexual orientation discrimination is based on sex because it is animated by whether a coupling is same-sex or cross-sex. The analogy next argues that sexual orientation, like race, has no demonstrable correlation to personal ability or to capacity to engage in intimacy (or marry); thus, discrimination on this basis is arbitrary and invidious. Moreover, the analogy holds that the “equal discrimination” argument asserted by the defendant in Smith and alluded to by the court in Valdes is as specious in this setting as in the race setting. In the sex/gender setting, as in the race setting, this rationalization is designed to preserve traditionalist roles that subordinate minority groups, persons, and interests—in this instance, women and, by extension, femininity in general. The analogy concludes that the courts’ miscegenation rulings, if

669. Koppelman, supra note 84, at 149-51. The first scholarly exposition of the miscegenation analogy was articulated in Koppelman’s Note, and therefore the account that follows immediately below tracks his reasoning. For the most recent exposition of the analogy, see Koppelman, supra note 33.

670. During the past several decades, the U.S. Department of Defense has repeatedly documented this conclusion in its series of reports, ostensibly prepared to assess the “suitability” of sexual minorities for military service, but in actuality calculated to justify retroactively the military’s exclusionary policies. See Valdes, Sexual Minorities, supra note 53, at 397 n.42. The first, the Crittenden Report, was issued (but promptly suppressed) in 1957 and the most recent, the RAND Report, was released in 1993. Both studies found that minority sexual orientation had no demonstrable correlation to talent, ability, performance, or suitability. See supra note 263 and authorities cited therein on the ability of sexual minorities to function socially, and specifically on the suitability of minority sexual orientation for military service. Additionally, President Clinton’s announcement of the compromise so-called “Don’t Tell, Don’t Ask” policy in July 1993 included a lengthy peroration on the responsibility and professionalism manifested by sexual minority service members. See President’s Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WKLY. COMPILATIONS PRESIDENTIAL DOCUMENTS 1369 (July 19, 1993) (stating five “central facts” demonstrating that the historical experience in this country, and in others, already had shown that minority sexual orientation was not correlated to lack of personal capacity or professional ability).


672. See supra notes 413-415 and accompanying text.

673. See supra notes 621-22 and accompanying text.

674. Id. at 158-60. In general, “[h]ostility to homosexuals is linked to ... traditional, restrictive attitudes about sex roles.” Id. at 159 (footnote omitted).

applied in a principled manner, mandate the same result for sexual orientation as for race and sex. ¹⁷⁵

As noted earlier, this analogy corresponds to the third leg of the conflation because both address the direct connection between sex and sexual orientation. Leg Three of the conflation employs the (non)coincidence of sex in a coupling to characterize the sexual orientation of the participants in any given coupling. ¹⁷⁶ More generally, or fundamentally, sex is used in constructing and discerning the cultural and legal demarcations of homosexual, heterosexual or bisexual domains. ¹⁷⁷ This analogy, like the conflation’s third leg, therefore draws direct connections between sex and sexual orientation that are not mediated through gender.

Now, recall the exact phraseology of the Strailey complaint, and follow the ungendered linkage between sex and sexual orientation in that framing of the claim: “Discrimination based on sexual orientation is based upon the [sex] of the Plaintiffs as well as that of their sexual partners.” ¹⁷⁸ This formulation clearly emphasizes that sexual orientation follows from the genital make-up of a coupling. Perhaps, then, a more precise phrasing of the claim would read as follows: “Discrimination thought to be based on sexual orientation actually is based on sex because sexual orientation typically is deduced from the sex of the Plaintiffs and of their sexual partners.”

Under this reformulation, the logic of the analogy unfolds in three steps. First, the miscegenation analogy shows that sex serves as the touchstone of sexual orientation. Second, the analogy reasons that this interaction between sex and sexual orientation demonstrates that discrimination against humans with any particular sexuality must be recognized as based on sex. Finally, the analogy argues that this type of discrimination is akin to the invidious discrimination underlying miscegenation laws, and that such discrimination therefore is unlawful for the same reasons and despite the same asserted defenses. The miscegenation analogy thus relies on a trio
of traits: race, sex, and sexual orientation to make its point. Using race (and racism) to frame this analysis, the analogy thus urges termination of the legality attributed to "sexual orientation" discrimination due to its linkage—or conflation—with discrimination based on sex.

B. The Analogy & the Conflation

This discussion of the analogy and its placement within the larger conflationary sex/gender system demonstrates that the anti-miscegenation argument and a holistic, contextual anti-conflation analysis under Leg Three yield the same conclusion: sexual orientation must be recognized as protected under existing rules of law because discrimination on the basis of sexual orientation always implicates sex. The two analyses conclude that in practice, as well as in theory, sexual orientation discrimination directly and inevitably is a species of sex discrimination because the discrimination (f)actually is based on the (non)co incidence of anatomy. This analogy and Leg Three, individually and in combination, show how recognition of the conflationary correlation of sex and sexual orientation should guide principled applications of existing rules against sex discrimination.

Moreover, this analogy and Leg Three show how the conclusion that sexual orientation discrimination is based on sex is warranted, if not com-

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679. For instance, though cross-race intimacies are now constitutionally protected, the cultural attitudes fostered historically under the anti-miscegenation statutes continue to lend currency to miscegenation issues that parallel continuing tensions in sexual orientation issues. See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984) (overturning a court's deprivation of custody based on the mother's interracial relationship with a man); see also Racial Theme of New Yorker Cover Sparks Furor, L.A. TIMES, Feb. 9, 1993, at A12 (reporting on the criticism of a magazine featuring a "black woman and a Hasidic Jew embracing and kissing"); Isabel Wilkerson, Black-White Marriages Rise, But Couples Still Face Scorn, N.Y. TIMES, Dec. 2, 1991, at A1 (reporting the everyday encounters with discrimination that cross-race couples continue to endure). Within communities of color, miscegenation issues also continue to spark controversy or discomfort. See, e.g., Francis Wardle, Are Biracial Children and Interracial Families a Threat to the Progress of Blacks in the U.S.? INTERRACE, Sept./Oct. 1992, at 42 (discussing the view of some African-Americans that blacks should marry only other blacks to help preserve the cultural and collective identity of the group as a whole). Similar issues are also contentious within sexual minority communities as well. See, e.g., Sleeping With the Enemy? Talking About Men, Race, & Relationships, supra note 297, at 30 (presenting a roundtable discussion of cross-race issues in a same-sex male context). For a comprehensive historical overview of miscegenation statutes, see generally A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia, 77 Geo. L.J. 1967 (1989). Accordingly, this analogy effectively unifies the historical, social, and doctrinal continuities of racism, androsexism, and heterosexism as three species of inter-related and overlapping subordination.

680. Thus, the miscegenation analogy emphasizes that sexual orientation is conceptualized on the basis of sex, while the holistic and contextual analysis urged in this Project and developed in Chapter Five makes this point in addition to focusing on the fact that sexual orientation historically and currently is subsumed within sex-determined gender. On the whole, the anti-conflation approach emphasizes that social gender atypicality is consistently associated with minority sexual orientation. This analysis therefore focuses on the role of sex-based gender in creating perceptions and categories of sexual orientation through the joint operation of Leg One and Leg Two of the conflation. The holistic and contextual analysis developed in this Project in this way incorporates the insights of this analogy under Leg Three while additionally addressing the roles played both by sex and by gender in the practice of heterosexism under the joint operation of Leg One and Leg Two. See generally supra Chapter One.
pelled, independent of other and similar conclusions regarding sex and/or gender derived under the joint operation of Leg One and Leg Two. This analogy and Leg Three, in other words illuminate substantive reasons for legal recognition of putative sexual orientation discrimination as simply another strain of sex-based discrimination on the merits. This direct conflationary interrelationship between sex and gender is underscored by a recent case involving the sexual orientation of a woman married to a transsexual.

The issue in the case was whether the woman, a soldier in the Army, was a “homosexual” under military regulations due to her marriage. As we will see, the sexual orientation conclusion was entirely contingent on the perceived sex of both parties to the marriage. The facts and disposition of this case illustrate at once the analogy as well as the conflation’s third leg.

Marie L. Von Hoffburg had served in the Army for nearly two years, receiving two promotions and establishing a “good military record,” when she decided to marry Kristian Von Hoffburg, a female-to-male post-operative transsexual.681 As a result of this marriage, the brigade commander convened an “administrative board... to determine whether [Marie] should be discharged on grounds of homosexual tendencies.”682 The elimination board found that “plaintiff is a female; that she relates to Kristian L. Von Hoffburg as a male; that she considers Kristian L. Von Hoffburg her husband; and that although Kristian L. Von Hoffburg is a psychological female to male transsexual, Kristian L. Von Hoffburg is a biological female.”683 The board “further opined” that the Army’s anti-gay regulation intended “to define the sex of a person in the biological sense and therefore, the regulation makes no provisions for a husband-wife relationship between biological females.”684 The board then discharged Marie, finding that she “was unsuitable for... military service... because of homosexual tendencies.”685 Thus, Marie was deemed a lesbian because the military refused to recognize the sex change of her husband. Von Hoffburg thereby demonstrates the dispositive role of sex in defining an individual’s sexual orientation; a (perceived) change in sex by either participant in a coupling may trigger a corresponding change in (perceived) sexual orientation for both participants.

Despite the compelling force of the anti-miscegenation analogy, some courts, like the one in Strailey, simply have ignored the plaintiff’s invocation of the analogy.686 In doing so, these courts effect a shifting of claims based on sex from the protection of Leg One to the lack of protection for sexual orientation claims under Leg Three. This shifting of claims from

682. Id. at 635-36.
683. Id. at 636 n.7.
684. Id.
685. Id.
686. See supra notes 493-505 and accompanying text.
Leg One to Leg Three mirrors the similar shifting of claims based on sex-determined gender from Leg One to Leg Two: as noted in the foregoing review of cases, that shifting exploits the legality of sexual orientation discrimination and thus opens the sexual orientation loophole to sex and gender anti-discrimination law.\(^6\)\(^8\) Therefore both shifts—whether from Leg One to Leg Two or from Leg One to Leg Three—take advantage of this loophole to condone sex and/or gender discrimination under the guise of acquiescing in the legal permissibility of sexual orientation prejudice.

Other courts have gone further, wholeheartedly embracing the very same “equal discrimination” reasoning that had been rejected in the anti-miscegenation cases.\(^6\)\(^8\)\(^9\) This tense juxtaposition of the race rulings and the sex/gender rulings typically is ignored in conflationary opinions, perhaps to resist through silence the logic—and the results—compelled by this persuasive analogy.\(^6\)\(^8\)\(^9\) By contrast, the holistic and contextual approach developed below in Chapter Five remains untested\(^6\)\(^9\)—probably because the conflation and its dynamics still remain generally unrecognized or under-recognized both in law and society.

C. The Conflation, the Analogy & the Bottom Line

As noted above, a holistic and contextual analysis of conflationary discrimination under Leg Three makes the same point regarding sex and sexual orientation as is advanced under the analogy. However, a holistic and

\(^6\)\(^8\)\(^7\). E.g., supra Part II.B.5.

\(^6\)\(^8\)\(^8\). See Koppelman, supra note 84, at 149-50; Trosino, supra note 668, at 113.

Courts have accepted the “equal discrimination” argument in the transsexualism context as well, and with the same result. See, e.g., Kirkpatrick v. Seligman & Laut, Inc., 475 F. Supp. 145, 147 (M.D. Fla. 1979) (reasoning that an employer’s termination of a male-to-female pre-operative transsexual when she refused to dress in accordance with her pre-operative (male) sex did not constitute a civil rights allegation because the plaintiff “failed to allege any manner in which she was treated other than as all other (biological) men” were treated by that employer—i.e., all were forced to obey the conflation of sex and gender by dressing in accordance with expectations), aff’d, 636 F.2d 1047 (5th Cir. 1981).

The defendant in Smith also asserted an “equal discrimination” argument, but the circuit court failed to address it. See supra text accompanying notes 413-15. In Valdes, however, the court itself raised the argument as a possible means of absolving sex/gender discrimination. See supra notes 621-22 and accompanying text.

\(^6\)\(^8\)\(^9\). However, currently stirring some optimism regarding this approach is the Hawaii Supreme Court’s recent ruling in Baehr v. Lewin, 852 P.2d 44 (Haw.), reh’g granted in part, 875 P.2d 225 (Haw. 1993). In Baehr, the court held that the prohibition against same-sex marriage constituted a classification on the basis of sex. Id. at 64. Under Hawaii law, sex is a “suspect category” and therefore the state’s restriction on same-sex marriage would have to be narrowly drawn to fulfill a compelling state interest in order to survive the strict scrutiny test applicable under state equal protection analysis. Id. at 67. See also Barbara J. Cox, Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?, 1994 Wis. L. Rev. 1033 (discussing conflicts and federalism issues that will arise if the Hawaii Supreme Court, as expected, ultimately invalidates the cross-sex requirement of that state’s marriage law).

\(^6\)\(^9\)0. Even though Strailey’s attorney self-consciously tried to advance an anti-conflation analysis, the courts failed to discern and consider the point of the claim, and therefore it remains “untested” in the sense that the analysis has not been adjudicated in a direct or conscious manner. See supra notes 462-473 and accompanying text.
contextual analysis of conflationary discrimination makes the broader point that sexual orientation discrimination always and necessarily will involve sex and/or gender because discrimination thought to be based on sexual orientation always and necessarily takes place along Leg Three or Leg Two of the conflation. If discrimination occurs along Leg Three, “sexual orientation” discrimination is inevitably based on sex because that construct is the other endpoint of that leg, and if it occurs along Leg Two it is inevitably based on sex-determined gender for the same reason. The holistic and contextual analysis of conflationary acts or strains of discrimination urged in this Project thus discloses an inevitable and inexorable bottom line: it literally is impossible to practice “sexual orientation” discrimination without practicing simultaneously sex and/or gender discrimination.

Indeed, this realization reveals that, while it is impossible to practice “sexual orientation” discrimination without discriminating on the basis of sex and gender, the reverse does not hold: the conflation’s configuration plainly makes it possible to engage in sex and gender discrimination along Leg One without implicating sexual orientation because this construct is not connected as an endpoint to that leg. This realization thus leads to the conclusion that current sex/gender anti-discrimination rules and practices are fatally defective.

The conflationary status quo in legal doctrine and culture is fatally defective because, as this bottom-line discussion points out, it inevitably and inexorably leaves vulnerable the construct(s) that it expressly purports to guard: sex (and gender). In fact, as this Chapter demonstrates, current legal arrangements and treatments of sex, gender, and sexual orientation entirely overlook or misapprehend key conflationary dynamics that ensure the legal failure to protect sex (and gender) from discrimination. Unless and until the sexual orientation loophole is closed by outlawing sexual orientation discrimination, defendants and decisionmakers will effect the shifting of claims from Leg One to Leg Two or to Leg Three, thereby ensuring that sex and gender discrimination will be practiced with de facto legality.

This realization, in turn, places a premium on legal reform because it reveals that current (mis)conceptions and (mis)applications of sex/gender anti-discrimination law are inevitably, inexorably, and fatally underinclusive. Reformatory action therefore is addressed here briefly to close this deconstruction of the conflation in legal culture with forward-looking thoughts. This pause for notes on reform, however, also serves both as a prelude to the doctrinal reconstruction elaborated more fully in Chapter Five and as a springboard to the theoretical exhortations advanced in the Afterword & Prologue of this Project.

691. See infra Chapter Four, Part V.A. See also generally Chapter Five, Part I-II.
692. See supra notes 331 and 335.
693. See supra Foreword, Part I.A-D.
694. See infra Chapter Five.
To cut through the conflation, the courts obviously must disengage themselves from the conflation's operation in modern culture, and withhold with consistency and resolution the authority and prestige with which they now imbue societal conflationary practices. To do so, the courts specifically must eschew the trio of techniques that manipulate the conflationary elements of a case in the adjudication of sex and gender controversies. More generally, the legal community as a whole must understand the nature of the conflation and recognize the ways in which it interferes with legal processes, distorts adjudicative and doctrinal outcomes, and undermines legal values and institutions. Legal culture, as a whole, must recognize the shortcomings and costs of the status quo, the benefits of legal reform, and the need to invest in effective reformatory efforts. Legal culture, in short, must recognize why and how the conflation matters to the law, and must appreciate that cutting through the conflation will require an ongoing critical enterprise that matches the conflation's nuanced yet enormous impact on the law.

At the same time, this Chapter's deconstruction of the conflation in legal culture confirms what Chapter One indicated about modern culture: that women and sexual minorities are the groups that conflationary bigotries target for subordination. Even though the cases often involved "straight" men, those men were targeted only because their social gender attributes triggered sexual orientation biases through the conflationary operation of social gender biases. In other words, the "sissy" men in the surveyed cases violated the dominant cultural biases favoring maleness and heterosexuality, and equating each with the other; even the anomalous judicial treatment in Hopkins exhibited andro-centric and, indirectly, hetero-centric biases. As the conflationary dynamics of the discrimination in the cases indicate, androsexism and heterosexism generally work in tandem under Leg One and Leg Two to devalue the female gender, both among men and women, as well as same-sex sexual orientation.

Thus, women and sexual minorities, as the ultimate intended target groups, must take leading roles in attaining and defining a post-conflationary era. Certainly, ongoing Feminist critiques of andro sexist biases in law and society can only benefit from an enhanced sensitivity to conflationary, heterosexist forces. Likewise, the nascent legal scholarship on sexual orientation must take into account the varied dimensions of the conflationary era.

695. See infra Chapter Four, Part II.; Chapter Five, Part II.C.
696. See supra Foreword, Part III.
697. See infra Chapter Four, Part I.E.
698. See also supra note 23 and accompanying text.
ary constructs that propel androsexist biases.\textsuperscript{699} Indeed, the direct interaction in the cases of androsexist and heterosexist prejudice, under the joint operation of the conflation's first and second legs, calls into question whether either a Feminist analysis of androsexism or a sexual minority analysis of heterosexism can truly be complete without engaging in a conflation-sensitive critique that considers holistically and contextually the roles of both types of bias in creating hetero-patriarchy.

Of course, the leadership potential of women and sexual minorities in counter-conflationary critiques does not mean that the rest of legal culture should continue to look the other way. While those at the sex/gender bottom may be most acutely aware of the need for reform, in fact legal culture as a whole is invested in reformatory success because the \textit{status quo} and its reform implicate the law's institutional integrity.\textsuperscript{700} Thus, while women and sexual minorities may and should lead the way toward reform, critical activists and theorists across the sex/gender spectrum—and all others interested in the legitimacy of the law—can and should aid the law toward realizing its systemic or institutional function as an agent of just recourse in conflationary controversies.\textsuperscript{701} In this way critical theorists can help legal institutions to fulfill the values and ideals that legal culture so earnestly invoked,\textsuperscript{702} as well as help to ensure that legal institutions deliver the anti-discrimination results that Title VII promises.

Finally, wary acknowledgment is due that every critical enterprise is incremental, fitful, uneven. Nevertheless, legal culture, doctrine, and theory must begin working toward a post-conflationary vision in order to ensure the institutional legitimacy, the substantive cogency, and the practical justice of sex/gender anti-discrimination law.\textsuperscript{703} Accordingly, Chapter Five of this Project proposes one step toward a post-conflationary reconstruction of legal doctrine.\textsuperscript{704} Leading up to that effort, the next two Chapters respectively provide a comparative sex/gender perspective based on Native American culture and an in-depth analysis of the lessons and insights offered by these deconstructive and comparative discussions.

\textbf{Conclusion}

Though the law did not invent the conflation of sex, gender, and sexual orientation, legal culture certainly gives it effect and thereby helps to legitimize it. Moreover, the conflation hobbles the law's response to various acts

\textsuperscript{699} See, e.g., Hunter, supra note 342.
\textsuperscript{700} See supra notes 332-33; see also infra Chapter Four, Part II.B.
\textsuperscript{701} See generally Anthony D'Amato & Arthur J. Jacobson, \textit{Justice and the Legal System} (1992) (offering teaching materials focusing on arguments about fairness and justice). See also notes 332-33 and authorities cited therein on the law's devotion to impartial justice.
\textsuperscript{702} See supra notes 332-33 and accompanying text.
\textsuperscript{703} And, to do so, legal culture must look beyond its boundaries to the knowledge pioneered by its sister disciplines. See Posner, supra note 10; Friedman, supra note 80.
\textsuperscript{704} See infra Chapter Five.
and strains of sex/gender discrimination, and thus facilitates a systematic
denial of protection to those who seek rightful redress from sex/gender prej-
udice. Judicial indulgence of the conflation not only produces absurd
results, it also diminishes the law’s stature as an agent of principle and
justice. Consequently, the conflation’s impact on legal culture is detriment-
al to the legal system as well as to those whom the system purports to
protect. Ultimately, the conflation is detrimental to society as a whole
because it subverts the grand, formal promise of equality under the law that
underlies both this nation’s collective psyche and its scheme of anti-dis-
crimination laws.