Chapter Three
Indigenous Culture(s): A Comparative Perspective

INTRODUCTION

As we saw above, conflationary traditions in Euro-American law and society fix sex at birth, while simultaneously assigning gender based solely on the sex assignment. 705 Under this system, sexual orientation eventually came into being as a formal and normative aspect of personhood that demarcated culturally and legally significant groupings defined by erotic inclinations. Sexual orientation, in turn, became subsumed within the sex-derived gender composite as the sexual component of deductive gender. 706 As such, sexual orientation is used to bolster sex and gender boundaries socially and sexually, both in society and by law. The sex-derived gender composite, moreover, serves to promote hetero-patriarchal imperatives 707 by rationalizing and essentializing cultural preferences for androsexist and heterosexist arrangements. 708 Thus, the conflation is applied, both in modern culture and in legal culture, to facilitate hierarchical power relations that drive women and sexual minorities to the bottom of the sex/gender system both culturally and legally.

Because this conflationary status quo often is justified as being “natural,” and thus normal and moral, 709 a comprehensive study of the conflation must explore this rationale. This Chapter investigates the naturality (and normality/morality) claim of Euro-American sex/gender arrangements comparatively, by presenting an overview of Native American cultures. As explained below, native culture(s) dealt with the conception, assignment, and management of sex, gender, and sexuality in ways markedly different from Euro-American societies. Native American culture(s) 710 show us that

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705. See supra notes 118, 340-61 and accompanying text.
706. See supra notes 131-48 and accompanying text.
707. As used here, an "imperative" is an underlying and compelling societal belief or goal that shapes and drives a culture's mores and institutions.
708. See supra notes 697-704 and accompanying text.
709. See supra Chapter One, Part III.
710. This Chapter refers to Native American "culture(s)," "society(ies)," and "system(s)" sometimes in the singular and sometimes in the plural without any particular distinction being intended. Clearly, the treatment of sex/gender issues across native societies was not uniform, see infra note 724 and accompanying text, but when taken as a whole, Native American nations exhibited substantial similarities that stand in stark contrast to Euro-American sex/gender culture. See infra Part I.A-B and accompanying text.

Despite the widely recognized sex/gender egalitarianism of indigenous North American culture(s), some commentators have pointed out that Native American nations were not necessarily or entirely equal in their egalitarianism, nor did they uniformly honor absolute sex/gender equality. See infra note
viable alternatives to current conflationary sex/gender arrangements have occupied, and to some extent still do occupy, the same space and time as the Euro-American sex/gender system. Native American sex/gender arrangements thus demonstrate that Euro-American arrangements do not represent a "natural" (nor normal nor moral) state of sex/gender relations.

More importantly, Native American arrangements provide a concrete example of possibilities to help us visualize, and perhaps even to realize, more equal, sensible, and harmonious sex/gender relations. This comparative perspective, in other words, displays a sex/gender model from which reformatory Euro-American efforts can draw vision and inspiration. The Native American example not only disproves the Euro-American sex/gender system's sense of essentialism, it also can spark our imagination and expand our horizons as we strive to envision post-conflationary and non-conflationary relations that, ultimately, are more in accord with the self-professed ideals and values of this nation and its laws.

On the whole, the comparative analysis presented below shows various (dis)continuities between Native American and Euro-American sex/gender arrangements. Like Euro-American cultures, Native American nations based their determinations of sex on external genitalia, and also based their social organization on sex, but they diverged from Euro-American sex/gender prescriptions in significant ways. Most notably, Native American arrangements conceived gender in several critically different respects. Natives did not construct gender deductively and intransitively, they did not view masculinity and femininity as mutually exclusive genders, and, therefore, they did not cognize or problematize social or sexual gender atypicality. Similarly, native arrangements did not create formal conceptions of (nor did they have a need for) sexual orientation as such. Finally, Native American arrangements were neither essentially androsexist nor essentially heterosexist. In other words, native sex/gender arrangements did not stem from the Euro-American active/passive paradigm, and thus did not

724 and authorities discussed therein on male/female aspects of native sex/gender arrangements. For purposes of this comparative critique, however, it remains clear that hetero-patriarchy was not central or primary to Native American arrangements and that those arrangements therefore were relatively free of androsexist and heterosexist mandates.

711. See infra notes 718-35 and accompanying text.

712. As discussed below, gender was constructed and handled in an inductive and flexible or transitive manner that accorded substantial social (and sexual) sex/gender autonomy to the individual. See infra Part I.A.3-5.

713. As discussed below, sexual orientation did not exist as a formal construct among native societies. See infra notes 757-59 and accompanying text. However, to articulate a comparative analysis an analogous term that signifies specifically a sense of erotic desire or inclination must be used. See supra note 370. See generally supra Foreword, Part II.C. Therefore, the references in this discussion to "sexual orientation" among natives signify the actual existence of sexualities among members of native cultures in the sense that they experienced and exhibited erotic desires or inclinations that leaned toward one, or the other, or both sex(es). See infra Part I.A.4.

714. See infra Part I.A.2.
echo its themes and traditions.\textsuperscript{715} Despite some similarities between the two, the sex/gender system(s) indigenous to North America thus stand(s) in sharp contrast to the conflation that defines the Euro-American system. In this way native experience provides a real-life, close-to-home, and non-conflationary counterpoint for a critical and comparative perspective on Euro-American traditions and practices.

Accordingly, this Chapter of the Project surveys the basic components of Native American arrangements to compare and contrast the two systems in their basic and relevant aspects. Part I first provides an overview of the Native American system, introduces this system's "inductive" and transitive conception of gender, and explains the role of berdaches in this system. Part I then provides a brief account of how the Native American sex/gender system was initially (mis)interpreted and eventually overwhelmed by Euro-American forces as part of the European and, later, American drive to master this continent. Part II briefly outlines the lessons that can be drawn from a comparison of the native model and the Euro-American system. A more detailed discussion of these lessons follows in Chapter Four (and Chapter Five) of the Project.

\section*{Native American Sex, Gender & Sexual Orientation}

Using the relatively well-studied Zuni, Pueblo, and Navajo nations of the North American Southwest as the primary sources for a comparative model, the following discussion of indigenous sex/gender systems outlines their non-conflationary constructions of sex and gender, and their non-construction of sexual orientation. The bottom line, as we shall see, is that Native American sex/gender arrangements neither recognized nor depended on the conflationary active/passive suppositions, delineations, and associations that define Euro-American sex/gender arrangements. In effect, Native American systems left unregulated that which the conflation so heavily regulates within the Euro-American system. Indeed, the Native American avoidance of the Euro-American conflation resulted in a much greater degree of personal autonomy and societal harmony with respect to sex, gender and sexual orientation.

\subsection*{A. The Native Sex/Gender System}

A comparative study of the Native American sex/gender system reveals both foundational similarities and fundamental dissimilarities relative to the Euro-American system. In fact, some of the (dis)similarities elude direct or meaningful comparison because some attributes of one system simply have no direct or meaningful analogs in the other system.\textsuperscript{716}

\textsuperscript{715} See supra Chapter One, Part I.A.
\textsuperscript{716} E.g., supra notes 712-15.
Furthermore, the limitations imposed by thoroughly acculturated perspectives may cause oversimplification or clouding of the discussion within even alert and well-intentioned comparisons. With these dangers in mind, the following discussion structures the description of indigenous sex/gender arrangements to match the structure of arrangements familiar to the Euro-American reader.717

1. Sex (Without Gender)

Native Americans, like Euro-Americans, were deemed born with a sex based on external genital anatomy.718 Indigenous arrangements thus resembled Euro-American arrangements at the sex/gender threshold: both use(d) official birth sex to determine the sex of a person’s body. Unlike Euro-American conflationary arrangements, however, this sex assignment did not fix gender at birth among native nations.

Among the Zuni, for example, sex merely created a presumption of gender, rebuttable as each individual discovered her or his actual gender through personal development and through manifestation of individuated social propensities.719 Under this system, gender was induced from personality as part of the individual’s maturation, and thus was regarded as transitive. Native Americans, in short, did not conflate official birth sex with gender in a deductive, intransitive manner as is the case under Leg One;720 native gender was not merely the performance of official birth sex. Consequently, the native sex/gender system allowed each individual a high degree of autonomy and flexibility over gender, and generally facilitated sex/gender diversities based on personalized ability and appearance.721

2. Sex(uality) (Without Androsexism or Heterosexism)

Like Euro-American culture, Native American nations used sex to organize society. Thus, as with Euro-American arrangements, sex was the basis of the social order: sex defined roles or categories relating to occupational endeavors and personal appearance. Among the Zuni, for instance, men constructed dwellings, women performed the plastering. Men culti-
vated the corn, women supervised the staple’s storage and distribution; indeed, men were not allowed access to granaries at all. Weaving was for men, ceramics for women. Zuni society thus relied on sex as the starting point for society’s definition and organization of cultural and economic roles or categories.

However, a key difference between the two systems is that these roles or categories were not constructed to delineate and to enforce dominant/subordinate or active/passive power relations based on sex (or gender): even though “Zuni women and men specialized in separate areas of economic, social, and spiritual life they enjoyed largely equal prestige and status.” Equalized role allocations provided opportunity and status to members of both sexes by dispersing authority over important aspects of society along lines that roughly constituted a sex/gender checks-and-balances system.

Thus, even though Native American arrangements were apparently highly sexualized, they were not androsexist. While they fixed sex at birth and incorporated sex as a primary element in the organizational structure of their societies, Native American nations averted this construct’s exploitation as a means for imposing male or masculine superiority as a cultural imperative; as Chapter One and Chapter Two showed, this slant is both a cultural and legal imperative specifically under Leg One of the conflation. Native sex/gender policy, in contrast, promoted sex/power parity rather than sex/power hierarchies.

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722. Roscoe, supra note 718, at 18. Mrs. Ealy, the wife of the first Presbyterian minister among the Zuni, wrote in the late 1800s that she “wish[ed] to reverse their labors.” From her perspective, “all the difficult labor . . . is done by the women, while the men do the sewing and knitting.” Id. at 43. See also Ramón A. Gutiérrez, When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality, and Power in New Mexico, 1500-1846 15 (1991) (noting that “[t]he role men played in the construction of homes was rather limited. ‘The women mix the plaster and erect the walls; the men bring the [roof and support] timbers and set them in place’” (quoting Pedro de Castafleda)).

723. Roscoe, supra note 718, at 18.

724. E.g., Judy Grain, Another Mother Tongue: Gay Words, Gay Worlds 53 (1984) (noting critically that Euro-Americans have not been “taught that Indian women had genuine political and economic power in their tribes”); Walter L. Williams, The Spirit and the Flesh: Sexual Diversity in American Indian Culture 65 (2d ed. 1992) (noting that most specialists in North American indigenous cultures consider Native American societies among “some of the world’s best examples of gender-egalitarian societies”); Judith K. Brown, Iroquois Women: An Ethnohistoric Note, in Toward an Anthropology of Women 235 (Rayna R. Reiter ed., 1975). See generally Whitehead, supra note 718, at 104-06 (“[A] woman’s productive labor was not necessarily exhausted, any more than a man’s, in the service of immediate consumption needs, and a woman’s products circulated beyond the bounds of the domestic unit.”).

However, Whitehead also notes that certain aspects of Native American sex/gender arrangements could be interpreted as being androsexist. For instance, she notes how gender-crossing behavior seemed to have been more accessible to and prevalent among men, which she argues probably reflected greater inhibitions or burdens being placed on women who desired to engage in equivalent cross-gender behaviors. Id. at 86, 93. She also notes that this one-way practice could be interpreted as males deciding to co-opt “female” roles because women were “onto a good thing.” Id. at 108. For elaboration on these gender-crossing behaviors by berdaches, see infra notes 773-92 and accompanying text.
This rough sense of equality, coupled with non-conflationary alignments of sex and gender, also allowed a great deal of freedom for variated and individuated expressions of sexuality, regardless of sex or sexual orientation: because sex fixed neither gender nor destiny, because active/passive themes and traditions did not underlie native sex/gender arrangements, and because in this scheme sexuality was not elemental to gender, neither cross-sex nor same-sex relations could claim intrinsic superiority over the other.\footnote{725} In this way, native cultures also avoided the heterosexism that is endemic to Euro-American sex/gender arrangements specifically under Leg Two\footnote{726} of the conflation.

Instead, a form of egalitarian empowerment of both sexes through pansexual expression and interaction flowed from basic Native American beliefs about the nature of the human body and of human sexuality in general. In contrast to Euro-American skittishness, native cultures did not view bodily or sexual activities as embarrassing or shameful either for men or for

Other commentators in similar fashion have shown that some tribes were less egalitarian than others. See, e.g., James S. Thayer, \textit{The Berdache of the Northern Plains: A Socioreligious Perspective}, 36 \textit{J. ANTHROPOLOGICAL RESEARCH} 287, 288 (1980) (explaining that “[m]asculine values were clearly dominant, and women were, on the face of it, treated harshly” but that this characterization “is perhaps overdrawn”); Sherry B. Ortner, \textit{Is Female to Male as Nature Is to Culture?}, in \textit{WOMAN, CULTURE, AND SOCIETY} 67, 70 (Michelle Z. Rosaldo & Louise Lamphere eds., 1974) (positing the universal devaluation of women as represented, for example, by the Crow nation’s habit of requiring women to ride inferior horses during menstruation even though the Crow are considered relatively egalitarian).

Another view is posited by Native American lesbian scholar Paula Gunn Allen. Basically, Allen argues that the greater visibility of males in accounts of Native American living flows from the biases of European reporters rather than from Native American biases: “The history of Native America is selective; and those matters pertaining to women that might contradict a Western patriarchist world view are carefully selected out.” Paula G. Allen, \textit{Lesbians in American Indian Cultures}. \textit{3 CONDITIONS: SEVEN}, Spring 1981, at 67, 68.

In any event, even Whitehead’s analysis acknowledges the basic sexual parity of indigenous culture(s): the gender-crossing phenomenon “was a cultural compromise formation founded on an incipient, though never fully realized, collapse of the gender-stratification system.” Whitehead, supra note 718, at 111. Perhaps Whitehead’s interpretive emphases result from her focus on the “relationship between gender constructs and the organization of prestige.” Id. Certainly, Native American cultures included relative prestige levels for various roles; however, as indicated above, most commentators regard the collective or cumulative prestige of the roles or occupations distributed to “male” and “female” spheres and people in Native American cultures to be roughly equal. In like vein, Whitehead concludes that gendered occupational roles within Native American societies “did not generate the consistent inequalities in power and influence associated with full prestige differentiation.” Id.

A good summation of these somewhat conflicting assessments is advanced by Ramón Gutiérrez: Men envisioned a cosmos in which masculinity and femininity were relatively balanced. But the social world really was not so. In a largely horticultural society women asserted and could prove that they had enormous control and power over seed production, child-rearing, household construction, and the earth’s fertility. Men admitted this. But they made a counterclaim that men’s ability to communicate with the gods and to control life and death [through warfare] protected the precarious balance in the universe.

Gutiérrez, supra note 722, at 33. Gutiérrez further notes that much of the gender-crossing behavior of male \textit{berdaches} had religious connotations because the sacred half-man/half-woman was “a living symbol of cosmic harmony.” Id. at 35. Thus, men’s greater association with religion would have produced a greater involvement in gender-crossing behaviors among men. Id. at 33-35.

\footnote{725}{See infra notes 736-72 and accompanying text.}

\footnote{726}{See supra Foreword, Part I.B.}
women: "Modesty and shame were not sentiments the Pueblo Indians knew in relationship to their bodies." 727 Instead, "[s]exuality was equated with fertility, regeneration, and the holy." 728 More specifically, "[s]exual intercourse was the symbol of cosmic harmony ... because it united in balance all the masculine forces of the sky with all the feminine forces of the earth." 729 Therefore, "sexuality was deemed essential for the peaceful continuation of life." 730

Also in contrast to Euro-American arrangements was that in cross-sex (or heterosexual) settings, women were empowered through sexuality in several ways:

After feeding, the activity of greatest cultural import to Pueblo women was sexual intercourse. Women were empowered through their sexuality. Through sex women bore the children who would offer them labor and respect in old age. Through sex women incorporated husbands into their maternal households and expected labor and respect from them. Through sex women domesticated the wild malevolent spirits of nature and transformed them into beneficent household gods. . . .

Female sexuality was [a woman's] to give and withhold. . . .

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Society was made whole through libidinous female sexuality. 731

This egalitarian ability to realize empowerment through sexuality was part and parcel of the larger construction and regulation of marriage, also projecting a rough sense of native power parity between the sexes. 732

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727. Gutierrez, supra note 722, at 8.
728. Id. at 17.
729. Id. at 18. Note that this harmony stresses cross-gender, not cross-sex, sexual relations. Thus, the berdache, who composed a third gender, fit into this scheme. See infra notes 773-92 and accompanying text.
730. Id. at 17.
731. Id. at 17-18.
732. Roscoe shows that Zuni domestic relations represented the culture's sexual equality as well. Marriage was effected by personal commitment. Group acquiescence was not dispositive. Dissolution was effected by the woman's placement of the man's possessions on the outside doorstep. Anthropologist Ruth Benedict reports: "'When [the husband] comes home in the evening ... he sees the little bundle [of his belongings], picks it up and cries, and returns with it to his mother's house. He and his family weep and are regarded as unfortunate.'" Roscos, supra note 718, at 20 (quoting Ruth Benedict, Patterns of Culture 74 (1934)). Ownership of the home resided with the woman, even when the dissolution occurred "for no other reason than her flagrant infidelity." Id. (quoting Alfred L. Kroeber, Zuti Kin and Clan, 18 Anthropologica 1 Papers Am. Museum Nat. Hist., pt. 2, at 89 (1917)).

The matrilineal kinship system of the Zuni also buttressed women's sexual autonomy. Because children only needed mothers to be "legitimate," women enjoyed unfettered control over their bodies. Id.; see also Gutierrez, supra note 722, at 15 (explaining that women owned both the home and agricultural plots); E. Adamson Hoebel, The Law of Primitive Man: A Study in Comparative Legal Dynamics 127-76 (1983) (reviewing the customs of marital dissolution among the Comanche, Kiowa, and Cheyenne).
This egalitarian empowerment was not limited to cross-sex couplings, however: "Erotic behavior in its myriad forms (heterosexuality, homosexuality, bisexuality) knew no boundaries of sex or age. Many of the great gods . . . were bisexual, combining the potentialities of male and female into one—a combination equally revered among humans." The reverence for this type of "combining" among humans contributed to the rise of the berdache, a unique type of person and institution explained in detail below. At this juncture, however, the important point is that same-sex sexual unions were not singled out for cultural problematization; in fact, they were sometimes valorized and played a potentially important role in personal empowerment. Thus, non-conflationary indigenous arrangements regarding sex(uality) were relatively free of heterosexist biases as well as androsexist biases.

This brief comparative outline of sex(uality) reveals several remarkable points of convergence and divergence: even though Native Americans determined sex through external genitalia as observed at birth and relied on this construct as the foundation of social order, native arrangements did not rationalize or essentialize hetero-patriarchal power relations. Other such (dis)similarities carried over to the respective constructions of gender by and under each system.

3. The Inductive & Transitive Construction of Gender

As with sex, gender was (and is) central to both the Euro-American and Native American systems, but each system conceived gender, and its relationship to sex (and sexual orientation), in fundamentally different ways. At the outset, as noted earlier, official birth sex only raised a presumption about gender among indigenous cultures. More important than this presumption were other aspects of a person, especially personality. In contrast to the Euro-American conflationary construction under Leg One, native gender was neither static nor controlled. Rather, gender was primarily a matter of individual growth and self-awareness, which meant that members of either sex could grow into—discover—any of the three genders recognized under the Native American systems.

To the Zuni, for example, gender represented the budding of a person's character, behavior, being, spirit, nature, and essence. And, even though

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734. See infra Part I.B.
735. See infra notes 837-49 and accompanying text. This pan-sexuality also obviated any need for sexual orientation labels. See infra notes 757-59 and accompanying text.
736. The native third gender was constituted by male and female berdaches, a type of person that has no direct equivalent in Euro-American culture. See infra notes 850-66 and accompanying text.
737. See Roscoe, supra note 718, at 22-24; Williams, supra note 724, at 22, 25, 30, 49; Whitehead, supra note 718, at 86-87, 100. The use of "essence" is not intended to implicate the essentialism/constructionism discourse. See Roscoe, supra note 718, at 206-14.
personality or character usually became apparent before adolescence,\textsuperscript{738} individuals could undergo character changes, including changes in gender, throughout their lifetimes.\textsuperscript{739} In this way, gender was \textit{induced} transitively from personality, rather than \textit{deduced} intransitively from sex, as occurs in Euro-American societies under the conflation’s first leg.\textsuperscript{740} Because this inductive, transitive construction of gender emphasized a process of individual maturation that Native Americans considered analogous to “cooking,” this perspective had profound consequences for the overall treatment of sex and gender (and sexual orientation) among indigenous cultures: in native contexts, gender was the social and occupational performance of an individual personality profile, not the social and sexual performance of an official sex assignment.

\textit{a. The Cooking of Personality: Ability & Appearance}

Among the Zuni, gender was discerned in accordance with a person’s development and manifestation of personal, social or occupational interests and inclinations. This view was based on the notion that people are “raw” at birth, with life experience providing the necessary “cooking.”\textsuperscript{741} Thus, experience seasoned a person, who through this process matured into a full-fledged member of society. This cooking thereby revealed gender: as the individual grew and incrementally performed and embraced one gender or another, or a mixture,\textsuperscript{742} he or she \textit{became} that gender regardless of the genital anatomy under his or her garments. An individual’s gender development accordingly was considered simply a part of the natural cooking process.\textsuperscript{743} In effect, this approach recognized that gender belonged to the individual. In contrast, the Euro-American approach manipulates gender as if it belongs to culturally dominant forces.

The native personality-based, or inductive and transitive, construction of gender watched chiefly for two key aspects of personality to develop, and thereby to indicate gender: ability and appearance.\textsuperscript{744} The first aspect, ability, involved the manifestation of talents, a knack for doing this or that. Observed talents were taken as signs of an individual’s “natural” pre-disposition toward one or another gender under the pre-existing set of gen-

\textsuperscript{738} See \textit{Williams}, supra note 724, at 23, 50, 72.

\textsuperscript{739} See id. at 25; cf. \textit{Roscoe}, supra note 718, at 22 (noting that, though gender was not fixed at birth, \textit{berdachism} generally “became final at puberty when the youth adopted female dress”).

\textsuperscript{740} See supra notes 118-30 and accompanying text.

\textsuperscript{741} \textit{Roscoe}, supra note 718, at 127-32.

\textsuperscript{742} The gender of an individual might mix aspects of “male” and “female” without conflict. See \textit{Williams}, supra note 724, at 72-73. This ability to mix was personified in the \textit{berdache} social category. See infra notes 773-77 and accompanying text.

\textsuperscript{743} See \textit{Whitehead}, supra note 718, at 102 (noting that “[t]he potential ‘wandering’ of sex-associated activity patterns and social attributes was all of a piece with the potential wandering of activity patterns and social attributes generally”). \textit{Whitehead} also notes that much of the “wandering” regarding gender implicated “prestige-relevant occupations.” \textit{Id}.

\textsuperscript{744} See \textit{id.} at 85-88.
eral(ized) cultural associations of certain tasks with specific genders. The
ongoing observation of gender development in the form of manifested abili-
ties progressively steered the individual towards more formalized occupa-
tional pursuits that required or emphasized those skills and that, therefore,
were considered to belong within a particular gender sphere.\footnote{Id. at 87-88 (discussing the case of males). In the case of females, occupational labor was similarly salient, though Whitehead reports some differences that she attributes to women's "reproductive capacities." Id. at 90-92. However, the individual was not put to an either/or decision. As the berdache experience shows, the system as a whole was much more pliable. See infra notes 773-92 and accompanying text.}

For instance, a woman's manifest propensity for male-identified tasks
could facilitate her development of a male gender, or vice versa. In time,
she would take her place in an occupation that was male-identified and that
comported with her manifest gender. Thus, even though the various tasks,
pursuits, or occupations themselves were culturally or generically pre-asso-
ciated with "male" or "female" contributions to society, a specific individ-
ual's manifested abilities (not her or his sex) produced the gradual steering
of the person toward one occupation or another. With this steering taking
place, the second chief aspect of personality considered relevant to gender
identity came into play.

The other aspect of personality deemed key to gender development,
appearance, involved dress and demeanor, and was closely related to ability
and occupation.\footnote{Whitehead, supra note 718, at 88. Whitehead also notes that what is called appearance here included characteristics such as tone of voice. Id.} Of course, because personal talents or abilities were not
determined by sex, the appropriateness of appearance was not settled by sex
either. Rather, appearance flowed from the development and manifestation
of personality generally, and from the development of talents or abilities
specifically. Thus, as an individual was observed to excel in skills or tasks
viewed as "male" or "female," he or she was permitted and oftentimes
encouraged to effect an appearance deemed culturally consonant with his or
her manifest abilities.\footnote{E.g., WILLIAMS, supra note 724, at 50-54 (discussing examples of family acceptance and
facilitation regarding the child's apparent formation of gender).}
Thus, occupational costuming completed the for-
mation and projection of a person's gender; in this way, personality, ability,
and appearance merged into one whole—gender.

This arrangement indicates how gender was more closely intertwined
with work than with either sex or sexuality among Native Americans.\footnote{See generally Charles Callender & Lee M. Kochems, The North American Berdache, 24 CURRENT ANTHROPOLOGY 443, 447 (1983) (discussing the importance of occupation and occupational
garb to the berdache gender, and explaining that a "boy's interest in women's occupations and his
propensity for engaging in these might be interpreted as signs that he would become a berdache and
were sometimes advanced as the causal factors promoting change in gender status" (italics added)).}
Of course, this native intertwining of gender and occupational ability, and of
gender and physical appearance, is superficially reminiscent of Euro-
American arrangements.\footnote{See supra notes 125-28 and accompanying text.} However, this native intertwining also turned
the premises and practices of the Euro-American system upside down: rather than demarcate occupational choices by reference to sex-based or deductive gender, Native Americans looked to individuated occupational propensities as a guide to helping form and discern personality-based or inductive gender. Similarly, rather than fix and regulate appearance by reference to sex-determined gender, Native American societies allowed appearance to follow the formation, or cooking, of personality-determined gender. This seeming similarity between the two systems therefore is illusory in fact.

This comparative gender sketch shows that both systems linked gender to socio-economic roles or categories as well as to physical looks and comportment, but Native Americans did not indulge the deductive and intransitive conflation of sex and gender under Leg One. Instead, they permitted gender to flow from individual strengths regarding occupation and corollary choices regarding dress or appearance. This conceptual and normative distinction thus produced markedly different linkages between and among gender, ability, occupation, and appearance in the two cultural contexts. This difference in linkages in turn produced dramatically different sex/gender consequences for the people inhabiting the two cultures.750

b. Collective Ratification of Individual Gender

Even though gender belonged to the individual, native society, like Euro-American societies, was invested in each person’s realization of a gender. For native society, however, this investment was not due to ideology, but to the fact that gender identity was closely connected to occupation and productivity. Therefore, parents and others carefully watched for and monitored each child’s manifestation of personality in order to detect and facilitate gender development. Consequently, this monitoring was distinctly different from the social and sexual regulation of gender that characterizes the Euro-American experience under Leg One and Leg Two of the conflation: generally, Native American monitoring was designed to reinforce an individual’s propensities rather than to (re)channel them according to sex and the active/passive dictates that pivot on sex.

Consequently, native nations generally provided collective recognition and validation of the individual’s gender process through public ceremonies that initiated the individual socially into the male, female, or berdache gender sphere of the society.751 Through this interplay of personality development and societal “rites of gender,”752 an individual assumed and solidified

750. Basically, the Native American approach provided opportunities for self-determination whereas the Euro-American approach stressed societal regulation of the individual. See infra notes 760-66 and accompanying text.

751. Roscoe, supra note 718, at 132-36, 136-41, 144-46 (describing rituals for males, females and berdaches, respectively); see also Williams, supra note 724, at 23-25.

752. See generally Roscoe, supra note 718, at 123-46.
his or her manifest gender. Thus, native rites of gender were more like celebratory ratifications of individual growth than like the coercive intrusions or clinical interventions that ritualize(d) gender in Euro-American settings under the joint operation of the first and second legs of the conflations.

c. Fluidity & Innateness

The emphasis on personal development and collective ratification of gender in indigenous cultures should not obscure a critical fact: the Native American gender focus was on the unfolding and coalescing of the internal self rather than on the correctness of external manifestations. In other words, gender was deemed ultimately to emanate from the person's inner being, not from any outward attribute—whether anatomy, ability, or appearance.753 Outward manifestations of any gender were embraced and ratified by the society because the manifestations were understood simply as the individual's "natural" externalization of the inner gender being.754

In this sense, gender and its manifestations were deemed fluid yet innate. Gender was fluid because it was deemed unformed at birth, and it was innate because it was not regarded as a matter of "choice" for the individual. In other words, effecting gender was not akin to electing gender. Rather, manifesting gender was akin to discovering or realizing gender as a person grew and became integrated into the culturally pre-existing male, female, or berdache sphere of the socio-economic order.755

This fluidity and innateness, again, may seem superficially similar to Euro-American attitudes that regard gender as inborn yet inchoate.756 However, Euro-American attitudes on the whole are deployed to express societal fears over the disruption of conflational active/passive hierarchies whereas Native American attitudes on the whole were employed to support individual maturation and fulfillment. Thus, this similarity regarding gender's make-up and nature between the two systems is, yet again, a surface illusion.

4. Sexualities Without Sexual Orientations

Indigenous sex/gender arrangements had little grounds, utility, or occasion for formal(ized) conceptions or deployments of sexual orienta-

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753. See Whitehead, supra note 718, at 100-01. The disparate manifestations of gender among individuals in Native American cultures served "as a signal to the community of how destiny had decided to carve up the human landscape." Id. at 101.

754. Williams, supra note 724, at 25, 76 (noting that behavior regarding gender was viewed as the "acting out [of] . . . basic character" and explaining that "the particular clothing one wears is less important than one's basic character, one's spirit").

755. Id. at 49 (noting that "the idea that someone could freely choose her or his character is as ludicrous to the Zapotecs as the idea that someone could freely choose eye color").

756. See supra Chapter One, Part I.B.1-2.
tion, and in this way were dramatically different from their Euro-American counterpart. Because native systems facilitated an open-ended expression of pan-sexuality, native culture(s) did not create or (re)cognize definitional bases for the social construction and assignment of strict identities or typologies based on desires, orientations, or inclinations of a sexual nature. And, because the Native American system(s) operated with two sexes but three genders, and associated each gender with particular abilities and occupations more than with particular sexes or sexualities, the system did not make the (seemingly) tidy binarisms between either sex or gender and sexual orientation that are characteristic of the second leg and third legs of the Euro-American conflation. Simply phrased, native arrangements obviated or precluded formal(ized) sexual orientation; native culture(s) devised no platform—like sex or sex-based gender—from which to build sexual orientation categories, and therefore did not have or experience sexual orientation as a formal or relevant construct.

Additionally, native sex/gender systems had no ideological cause for creating or (re)cognizing sexual orientation categories and priorities that, under Leg Two and Leg Three of the conflation, are deployed to bolster sex and gender hierarchies. Because native societies were not based on or motivated by androsexist or heterosexist imperatives, native sex/gender arrangements were not designed or controlled to empower hetero-patriarchal interests. In this way, the sex/gender egalitarianism of native arrangements averted the Euro-American need for sexual orientation as the third endpoint of the conflation. Again, simply phrased, native culture(s) had no formal need nor categorical use for this construct, and therefore had no such construct.

The absence of sexual orientation as a formal and relevant construct in native sex/gender contexts thus flows from the absence of the active/passive themes and traditions that in Euro-American contexts serve both to anchor and to propel the conflationary construction and regulation of sexual orientation. Consequently, Native Americans generally expressed their sexualities without creating or implicating formal sexual orientation categories, or the sex/gender politics that demand and sustain such categorizations under the conflation. As explained next, native society vested substantial autonomy over sex/gender matters in its people, rather than making individ-

757. See, e.g., id. at 246-48 ("[Female berdaches] did not identify as lesbian in the Western sense of the word. American Indian women were not divided into separate categories of persons as is the case with Anglo-American homosexual and heterosexual women."). See generally Allen, supra note 724, at 68-69 (explaining that modern Euro-Americans can comprehend Native American arrangements only by acquiring a "new understanding of a number of concepts"). The native ability to experience sexual diversity without sexual orientation categories or concepts also is dramatized by the multi-sexualities of berdaches. See infra notes 837-45 and accompanying text.
758. See generally supra Foreword, Part I.B-C.
759. Of course, this discussion squarely implicates the ongoing essentialist/constructionist discourse over the nature and meaning of "sexual orientation" (or of "gay" and "lesbian" or "homosexual") over the ages and across cultures. See, e.g., supra notes 308-18 and accompanying text.
uals captive to external genitalia and to the active/passive themes and traditions that attach to anatomy under the Euro-American conflationary status quo.

5. Autonomy Over Anatomy & Sex(uality)

Finally, then, the inductive/transitive model of gender in indigenous cultures accorded substantial deference, respect, and validation to individual personality. Unlike the Euro-American deductive, intransitive construction of gender, this native model was able to accommodate individuals whose gender differed from their sex with equal ease as those whose gender coincided with their sex.\textsuperscript{760} Compared to the Euro-American experience, Native American sex/gender arrangements greatly favored autonomy over anatomy in matters pertaining to sex, gender, and sexual orientation.

For example, Zuni sexual parity specifically facilitated individual gender freedom. Even though the Zuni regarded weaving as a "male" activity and ceramics as a "female" activity,\textsuperscript{761} it was of no great moment to Zuni social order whether any given individual moved from weaving to ceramics, or the reverse.\textsuperscript{762} Zuni sexual parity accordingly accommodated gender fluctuations among both women and men.\textsuperscript{763} The pliability of native sex/gender systems thereby avoided gender absolutes from which individuals of either sex could be perceived as deviating, obviating the concept of gender deviance.

At the same time, this inductive and transitive construction of native gender rendered the genital configuration of a sexual or affectional coupling, whether cross-sex or same-sex, inconsequential to the social order; because native gender was not a fixed and controlled characteristic, society had no need to regulate sexuality (or sexual orientation) in order to help maintain the active/passive gender boundaries that dominate and pervade Euro-American sex/gender arrangements.\textsuperscript{764} Sexual orientation therefore did not matter.

\textsuperscript{760} See supra notes 736-40 and accompanying text.

\textsuperscript{761} See supra note 722 and accompanying text.

\textsuperscript{762} See generally Whitehead, supra note 718, at 101, 105 (noting the accommodating manner in which Native American cultures generally treated transgressions of the occupational boundaries signified through and by gender). "An occasional gender maverick did not threaten to prick the bubble of an elaborate domination mystique, because sexual domination in North America was not elaborate, therefore neither were its mystiques. Thus the boundary between the sexual spheres was not strongly defended." Id. at 105. See generally Williams, supra note 724, at 66 ("Since women had high status, there was no shame in a male taking on women's characteristics. He was not giving up male privilege, or 'debasing' himself to become like a woman, simply because the position of women was not inferior.").

\textsuperscript{763} As previously noted, Whitehead recognizes in part the basic sex/gender parity of Native American cultures, but notes as well that some inequality nonetheless persisted. See supra note 724.

\textsuperscript{764} This use of sexual orientation of course is a hallmark of conflationary Euro-American customs and practices. See supra notes 122-48 and accompanying text; see also supra note 713.
In other words, the (non)coincidence of anatomy within a coupling was not culturally or politically momentous, nor were the roles or positions of the parties to a coupling of special concern to society's sex/gender sensibilities. A societal conception of sexual orientation simply did not exist, either as the sexual component of gender corresponding to the conflation's second leg or as the (non)coincidence of anatomy corresponding to the conflation's third leg. Interestingly, then, sexual diversity flourished despite—or perhaps because of—the absence of sexual orientation categories. As with gender, the basic pliability of the native system(s) made society immune to the concept of sexual deviance.

The lack of hetero-patriarchy in native culture(s) allowed individuals a high degree of sex/gender autonomy, which in turn allowed gender and sexual diversity to flourish. In this way, and as elaborated further below, Native American arrangements portray and provide alternatives that better accord with this nation's professed interest in the protection of individual freedom, and that better facilitate implementation of this nation's formal commitment to sex/gender equality; by showing us how we can maximize personal autonomy over the socio-sexual self, regardless of anatomy or sexuality, Native American arrangements show us how we can begin to transcend the conflation and its active/passive themes and traditions. First, however, an overview of the berdache is in order.

Perhaps the best way to capture the (dis)continuities between the two systems, and thereby bring into sharp relief the way(s) in which native experience provides a model for contemporary reform, is to consider in some detail a unique sex/gender persona and phenomenon made possible by the Native American system but rendered impossible by the Euro-American system. This persona and phenomenon is the berdache and berdachism. As elaborated in the following part of this Chapter, berdaches and berdachism dramatically illuminate the constrictions that active/passive traditionalism imposes on Euro-Americans under the conflation; this persona and phenomenon illustrate the possibilities for personal(ized) sex/gender identities that are foreclosed and denied by the hetero-patriarchal bents and biases of the conflation.

B. The Berdache: Concept, Person, Institution

Three key features of the indigenous sex/gender systems—sex/power parity, inductive and transitive gender, and sexualities without sexual orientations—made possible what Euro-Americans have tagged the berdache.
The sex/gender synthesis institutionalized in the *berdache* is virtually incomprehensible in traditional Euro-American culture,\(^7\) but anthropologists have documented *berdaches* in over 130 Native American societies,\(^6\) including the Aleut, Apache, Arapaho, Bering Strait Eskimo, Cheyenne, Crow, Hopi, Mojave, Navajo, and Zuni.\(^7\) Moreover, other cultures around the world have developed a similar type of concept, person, or institution.\(^7\) Among the native nations of this continent, the *berdache* phenomenon exemplified and personified cultural patterns that avoided or ameliorated the sex/gender tensions that still plague Western societies.\(^7\)

1. Berdache Synergy & the Third Gender

Native American *berdaches* were individuals whose gender personality profiles transcended the bi-polar sex and gender categorizations that are viewed as mutually exclusive under the active/passive traditions of the Euro-American sex/gender system.\(^7\) *Berdaches*, then, were men who assumed, in variable mixes, the occupations, activities, roles and/or attire generally associated with women, or vice versa.\(^7\) This "intermediate sta-

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\(^{768}\) See generally infra note 853.

Leading accounts of *berdachism* and related issues are provided in Francisco Guerra, *The Pre-Columbian Mind* (1971) (studying the sexual practices and other features of natives as recounted and interpreted by Europeans); Williams, *supra* note 724; Callender & Kochems, *supra* note 748.

\(^{769}\) See infra notes 850-66 and accompanying text.

\(^{770}\) See North American Tribes with Berdache and Alternative Gender Roles, in *LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY* 217, 217-22 (Will Roscoe ed., 1988) [hereinafter *LIVING THE SPIRIT*]; Callender & Kochems, *supra* note 748, at 445 (listing 113 North American cultures recognizing the *berdache*). Despite this wide recognition, some Native American nations have been reported as rejecting *berdachism*. See, e.g., W.W. Hill, *Note on the Pima Berdache*, 40 Am. Anthropologist 338 (1938). In addition, though relatively widespread, *berdaches* apparently were not very numerous—typical accounts estimate a handful within a community. See, e.g., Callender & Kochems, *supra* note 748, at 446-47. Thus, like today's sexual minorities, *berdaches* constituted a literal, numerical minority within native culture(s).


\(^{772}\) See infra Chapter Four.

\(^{773}\) See supra Chapter One, Part I.A. and B.

\(^{774}\) See Gutiérrez, *supra* note 722, at 33-34 (defining *berdaches* as "biological males who had assumed the dress, occupations, mannerisms, and sexual comportment of females as a result of a sacred vision or community selection"); Callender & Kochems, *supra* note 748, at 443 (defining *berdaches* as "a person, usually male, who was anatomically normal but assumed the dress, occupations, and behavior of the other sex to effect a change in gender status"). As these definitions suggest, Euro-American accounts of *berdachism* focus on men, which has prompted some debate on the extent of female *berdachism* among Native American societies. See infra notes 823-36 and accompanying text.
tus that combined social attributes of males and females"\textsuperscript{775} created a figure who occupied an interstitial and symbolic place in Native American religious and social systems. "[H]e was both male and female by virtue of his physiological maleness and cultural femaleness, while at the same time he was neither male . . . nor female . . . ."\textsuperscript{776} Berdaches, in Euro-American terms, were not simply socially gender-atypical individuals: they were men and women with varying and self-customized mixes of social gender attributes that amounted to more than the sum of male-plus-female.\textsuperscript{777}

Within these mixes, as with native gender generally, the key attribute of the berdache gender was the adoption of occupational roles, duties, and/or garb more commonly associated with the other sex.\textsuperscript{778} This emphasis on occupation and costuming for the inscription of berdache gender thus follows from the larger Native American conception of gender, which generally made occupational talents, pursuits, and attire primary in the inscription of gender. Thus, specialization in productive labor, rather than engagement in same-sex relations or adoption of passive/active stances socially and sexually, was the key marker of the berdache gender.\textsuperscript{779} A second key marker of berdache identity frequently involved a "vision experience," which, reflecting the mysticism surrounding berdachism, was taken as supernatural validation of berdache destiny.\textsuperscript{780} Whether they discovered their gender through occupational skills and regalia or through a vision, berdaches were often honored at public ceremonial rituals.\textsuperscript{781}

In other words, Native American communities did not regard berdaches as anomalies in the freakish sense common to Euro-American "inversion" concepts.\textsuperscript{782} "[T]he status of berdache was not considered morally disgusting" within native communities.\textsuperscript{783} Instead, for the most

\textsuperscript{775} Callender & Kochems, \textit{supra} note 748, at 443.
\textsuperscript{776} Thayer, \textit{supra} note 724, at 291-92.
\textsuperscript{777} \textit{See generally} Midnight Sun, \textit{Sex/Gender Systems in Native North America, in Living the Spirit, \textit{supra} note 769, at 32-45 (discussing sex and gender roles among the Mojave, Navajo and Peigan). \textit{See also infra} note 792 and accompanying text.
\textsuperscript{778} \textit{See Whitehead, \textit{supra} note 718, at 85-89, 93; see also} Callendar & Kochems, \textit{supra} note 748, at 447-48 (discussing the importance of occupational choices). For a general look at the roles, traditions and garb of each sex, see C.J. BRADFORD & LAINE THOM, \textit{DANCING COLORS: PATHS OF NATIVE AMERICAN WOMEN} (1992); LAINE THOM, \textit{BECOMING BRAVE: THE PATH TO NATIVE AMERICAN MAJNOOD} (1992).
\textsuperscript{779} For a discussion of the interplay between sexuality and the berdache gender category, see \textit{infra} notes 846-49 and accompanying text.
\textsuperscript{780} \textit{E.g.,} Callender & Kochems, \textit{supra} note 748, at 451-53.
\textsuperscript{781} \textit{See Williams, \textit{supra} note 724, at 31-43 (discussing the mystical power and ceremonial roles of berdaches); \textit{supra} notes 801-03 and accompanying text.
\textsuperscript{782} \textit{See supra} Chapter One, Part I.B.
\textsuperscript{783} Forgey, \textit{supra} note 767, at 3 (noting that "[p]ublic sentiments towards berdaches varied among the different tribes, ranging from a neutral attitude of quiet tolerance . . . to a positive one of great esteem") (italics added).
part, *berdaches* were regarded either as just regular folks or as especially
gifted individuals. 784 Ruth Benedict, for instance, reported that
men who have chosen openly to assume women's dress have the
same chance as any other persons to establish themselves as func-
tioning members of the society. . . . If they have native ability, they
can give it scope; if they are weak creatures, they fail in terms of
their weakness of character, not in terms of their inversion. 785

Will Roscoe similarly explained that *berdaches* personify a "powerful
archetype of wholeness." 786 Likewise, Williams recounted that families
with *berdaches* were regarded as fortunate, and the Navajo in particular
believed that a "family that has a [*berdache*] born into it will be brought
riches and success." 787

Early European explorers also reported that the *berdache* enjoyed
social esteem at least equal to that of the other genders. Jacques Marquette
wrote in the early 1700s that *berdaches* were "summoned to [all] the Coun-
cils, and nothing [could] be decided without their advice" among the Illi-
ois and neighboring tribes. 788 Thus, *berdaches* were generally viewed as
anomalous mainly in a positive sense: where Europeans saw deviants and
stigmatized them, Native Americans mostly saw exceptional people and
honored them. 789

Perhaps more significantly, *berdache* identity constituted a third gen-
der in its own right: it was not a default category, nor an attempt to explain
away deviations from bi-polar active/passive male/female constructs. Rather it was an ancient, 790 widespread category of gender, generally at

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784. Callender & Kochems attribute this range of receptivity to *berdachism*—which sometimes
included scorn—to the "declining esteem, influenced by Western views," that had been in progress
since Europeans became aware of *berdaches*. In other words, reported attitudes of scorn and contempt
ward *berdaches* probably reflected the influence of European reactions more than actual, indigenous
native views. Callender & Kochems, supra note 748, at 453. For a discussion of Euro-American
policies toward *berdaches*, see infra notes 878-85 and accompanying text.

785. Roscoe, supra note 718, at 27 (quoting Benedict, supra note 732, at 264).

786. Roscoe, supra note 718, at 161.

787. Williams, supra note 724, at 61. The Navajo word for the type of person known to Euro-
Americans as *berdache* is *nadle*, which translates into "changing one" or "one who is transformed." Id.
at 19.

788. Williams, supra note 724, at 17 (quoting Jacques Marquette, *Of the First Voyage Made by
Father Marquette Toward New Mexico, and How the Idea Thereof Was Conceived, in 59 The Jesuit
Relations and Allied Documents 129* (Reuben Gold Thwaites ed., 1896-1901), reprinted in Katz,
*History, supra note 86, at 433*).

789. Among the Navajo
it is plain that [*berdaches*] enjoy more opportunities for personal and material gratification
than the ordinary individual. They are respected and to some extent revered. . . . In religion
and society they enjoy as much, if not more, opportunity and protection that the more normal
member of the society. In sex expression they are given the absolute sanction of the culture.
In fact every opportunity for personal adjustment to the culture is given.
Anthropologist 273, 276 (1935).

790. *Berdaches* have existed among Native Americans for at least 500 years or so, thus predating
European arrival in the Americas. See infra note 850.
least equal in social value and legitimacy to “male” and “female.”

Accordingly, berdache identity did not require berdaches to make a selection of gender between “male” and “female” binarisms and then to mimic or exaggerate the affectations of that gender. Instead, they were situated in an entirely separate and valid grouping:

A berdache thus transcended the boundaries of a gender category that was biologically and culturally defined to attain an intermediate gender status biologically the same [as his or her sex] but culturally redefined. Crossing the boundary between these gender categories was not a single process or a one-directional movement. Berdache status included a continuing crossing of [gender] boundaries, in both directions, to such an extent that [it is preferable] to characterize the status as gender mixing rather than gender crossing.

The range of berdache possibilities within this third gender allowed an individual’s sense of self to oscillate, or to settle at the point that best comported to her or his personality. It thus bears emphasis that the conception of this third gender simply was part and parcel of the sex/gender system as a whole. In short, the berdache gender was as pliable as the inductive, transitive sex/gender system that created it.

a. The Unity of Dualities

It also bears emphasis that this third native gender was based on a synergistic mixing, not a linear crossing, of male and female genders to attain an entirely distinct and new gender. This mixing represented a special talent or power to embody the physical and metaphysical elements of the human universe. The special status often accorded to berdaches thus stemmed from their perceived capacity to transcend or transform elemental dualisms underlying the native worldview.

Native Americans believed that “everything in the universe is related” and accompanied by a counterpart, for instance, “female” and “male.” Within this scheme, the berdache was seen as the unity of dualities: the berdache embodied and fulfilled the “role of mediator” between “male” and “female” and consequently helped to “keep the world from disintegrating.” Similarly, the admixture of female and male gender attributes

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791. See Roscoe, supra note 718, at 22; Williams, supra note 724, at 65-86.
792. Callender & Kochems, supra note 748, at 454.
793. See supra notes 714-77 and accompanying text.
794. See Callender & Kochems, supra note 748, at 453 (discussing the “supernatural power of berdaches” and the “intensity and extent of their ritual participation”). Hence, the “interstitial” nature of berdaches. Thayer, supra note 724, at 290-92.
795. “The importance or significance of their power for the societies to which berdaches belonged apparently lay in beliefs that this [supernatural power] could extend beyond the individuals belonging to this status to affect others.” Callender & Kochems, supra note 748, at 453 (italics added).
796. Williams, supra note 724, at 21.
797. Id.
embodied in a berdache's underlying spiritual essence was deemed to represent a synthesis of the psychic and the physical, the spirit and the flesh.\textsuperscript{798} Thus, the person and being of the berdache served to cohere central aspects of Native American cosmology.\textsuperscript{799} Indeed, the Navajo believed that "when all the [berdaches] are gone, that it will be the end of the Navajo."\textsuperscript{800} The berdache's perceived abilities, or gifts, therefore constituted a unique and valuable contribution to the cosmological order.

The berdaches’ personification of universal synthesis in turn produced a prestigious institution that fulfilled practical, sacred, and ceremonial functions in the native social order. For instance, berdaches often specialized in medicinal or spiritual occupations that called for leading roles in various ceremonies.\textsuperscript{801} Also, members of the community often vied for them as godparents for their children, believing that a berdache’s guidance, protection, and bestowal of a special name upon the child would provide fame, fortune, and other advantages. Both Sitting Bull and Crazy Horse, for example, had special names given to them by berdaches.\textsuperscript{802} The berdache role therefore encompassed more than individuated or idiosyncratic gender mixing; collectively, berdaches formed a respected, powerful institution with social as well as cosmological utility.\textsuperscript{803}

\textbf{b. Theories of Etiology}

Euro-American commentators have debated the causes or origins of berdachism for many years and have devised four theories to explain the phenomenon.\textsuperscript{804} The first three focus on the reasons why individuals would elect to become socio-sexual anomalies in the first place and describe berdachism as self-selected. These three theories uniformly employ Euro-American conceptions of sex, gender, and sexual orientation, and thus seek to explain berdachism from a conflationary perspective. Generally, these "psycho-functional" theories argue that "the berdache fundamentally represents a social adaptation of unacceptable inclinations and desires by means

\begin{itemize}
\item \textsuperscript{798} \textit{Id.} at 21-22, 41-42.
\item \textsuperscript{799} \textit{See Callender & Kochems, supra note 748, at 453; Thayer, supra note 724, at 290-91.}
\item \textsuperscript{800} \textit{Williams, supra note 724, at 63-64.}
\item \textsuperscript{801} If there were no [berdache], the country would change. They are responsible for all the wealth in the country. If there were no more left, the horses, sheep, and Navaho would all go. They are leaders just like President Roosevelt. . . . It does a great deal for the country if you have [berdache] around. You must respect a [berdache]. \textit{Id.}
\item \textsuperscript{802} \textit{Id.} at 42-43, 34-38 (discussing, respectively, the roles of berdaches as prophets and healers).
\item \textsuperscript{803} \textit{Id.} at 37-38.
\item \textsuperscript{804} These theories are briefly summarized in Callender & Kochems, supra note 748, at 454-55; \textit{see also} Thayer, supra note 724, at 287-89 (discussing shortcomings of psycho-functionalist theories).
\end{itemize}
of certain institutional elaborations whereby these deviants could find an acceptable social niche.\textsuperscript{805} The fourth theory, on the other hand, situates berdachism within its larger, and pointedly non-Western, cultural context to advance a holistic explanation that is grounded in native norms and needs. Each is briefly noted below.

The first theory categorizes berdaches as a type of sexual aberration in much the same way and in much the same terms that inverts, transvestites, transsexuals, and homosexuals were and are constructed in Euro-American settings, thus lumping berdaches into an undifferentiated heap of sex/gender deviants.\textsuperscript{806} The second theory hypothesizes berdachism as a practical means for unmasculine men to escape from the rigors of masculinity without shame, thus casting berdaches as "softies" or "sissies."\textsuperscript{807} The third theory postulates that berdaches served as an institutionalized "outlet" for same-sex desires,\textsuperscript{808} including the desires of non-berdache bachelors who could use berdaches sexually to quench their youthful and manly erotic rowdiness.\textsuperscript{809} These three theories gained wide currency among Euro-American scholars attempting to understand a phenomenon that was not

\begin{thebibliography}{99}
\bibitem{805} Thayer, supra note 724, at 287 (italics added).
\bibitem{806} An explanation of berdachism that echoes fixation theory's explanation of homosexuality aptly illustrates the point: "One possible reason for the adoption of the berdache role by a young man involves parental overprotection. . . . Overmothering produced a child neurotically anxious about his own masculinity . . . ." Forgey, supra note 767, at 10-12 (italics added) (citation omitted). Thus, Euro-Americans frequently use Western conflationary sex/gender concepts and terms to name this phenomenon. See infra notes 850-66 and accompanying text. For a description of fixation theory, see supra notes 210-29 and accompanying text.
\bibitem{807} See Callender & Kochems, supra note 748, at 448 ("Berdache status is often described as a sanctuary for males who were unable or unwilling to accept the role of warrior. . . . [Berdaches were] 'sissies' and 'mamma's boys' who could not face the hardships of hunting and warfare.") (italics added) (citations omitted); Forgey, supra note 767, at 10 ("To begin with, the institution of berdache provided an outlet for the individual with a strong aversion to the ultramasculine male role.") (italics added).
\bibitem{808} For example, Callender & Kochems note:
\begin{quote}
One hypothesis describes berdacheshood as a status instituted specifically for homosexuals. . . . \[It forced [homosexuals] into the open and robbed homosexuality of its glamor as something secret and forbidden. Requiring homosexuals to dress like the other gender prevented their misrepresenting themselves to seduce and recruit unsuspecting heterosexuals. It also allowed heterosexuals to satisfy passing impulses toward sexual experiment without jeopardizing their normal status. Anyone who had sexual relations with a berdache was only a temporary bisexual, apparently even someone who spent most of his life having sex with berdaches. These practices, according to Devereaux, promoted overall social health by localizing the homosexual "disorder."\]
\end{quote}
Callender & Kochems, supra note 748, at 454.
\bibitem{809} For example, Forgey states:
\begin{quote}
Besides providing an outlet for the introvert with a strong aversion to the male role, the custom of berdache also provided an outlet for aggressive homosexuality[,] . . . for individuals who would otherwise have become anti-social. . . . [W]arriors themselves might turn to the tribal berdache for homosexual relations. Thus, in some instances at least, the berdache appears to have served as an outlet for aggressive homosexual tendencies even for men who were not themselves berdaches.
\end{quote}
Forgey, supra note 767, at 10 (italics added); see also Gutierrez, supra note 722, at 35 (quoting early Spaniard accounts reporting that berdaches "could be used by all marriageable youths" and surmising that "[s]o long as bachelors were having sex with [berdaches], the social peace they represented was not beset with village conflicts between men over women").
only novel to them, but seemingly antithetical to their "civilized" world
view. The popularity and resonance of these theories of course resulted
from their conflationary familiarity. Having a critical understanding of the
conflation, however, reveals that these theories are implausible both empiri-
cally and conceptually.

Empirically, these three theories are unworkable because they unduly
emphasize the role of sexuality in the creation of berdache identity; as
noted above, occupational orientation rather than sexual orientation was the
primary marker of berdache identity specifically and of native gender iden-
tities generally. Moreover, these theories overlook or ignore the pan-
sexuality of natives generally and of berdaches specifically. In this
sense, these theories track the emphasis on "psychosexual development"
that is closely associated with Freudian psychoanalysis. These theories
thus shed more light on the sex-phobic yet sex-obsessive culture of the
Euro-American researchers and theorists than on the institution of
berdachism.

Conceptually, these three theories are implausible because they effec-
tively define and problemize berdaches as violators of the conflation, even
in the absence of conflationary norms in the cultural contexts of berdach-
ism. The specific correlation of berdachism to same-sex sexuality further-
more "embodies an archaic view of homosexuality as equivalent to
defective gender . . . ." These theories thus superimpose Euro-American

810. Consequently, "cultural bias strongly skewed the gathering of information" about berdaches such that "[d]escriptions of berdaches sometimes contain much more denunciation that data." Callender & Kochems, supra note 748, at 443 (italics added). See generally Guerra, supra note 767, at 1-5 (discussing European imputations of "rationality" and "irrationality" to indigenous beliefs, attitudes, and customs).

811. See Thayer, supra note 724, at 288 (pointing out that "psycho-functional" theories of berdachism tend "to reduce the institution to a socially acceptable form of perverted sexual activity, whereby all other aspects of the berdache's life . . . are irrelevant") (italics added); Forgey, supra note 767, at 3 (explaining that the author considered but rejected "homosexual behavior as the determinant" of berdache identity because the "berdache literature contains accounts of some berdaches who were not homosexuals and some homosexuals who were not berdaches. A definition of berdache which stresses erotic object, therefore, is not adequate") (italics added) (citations omitted).

812. See supra notes 748-50, 778-79 and accompanying text.

813. See supra notes 748-50, 777-79 and accompanying text.


815. See Thayer, supra note 724, at 293 (noting that the "problem" of the berdache "developed . . . from an overemphasis on its sexual aspects. This is due, no doubt, to an obsession on the part of Western travellers, missionaries, and even ethnographers with primitive and sexual 'odd customs' encountered in the New World). The origins of Euro-American culture's sex/gender phobias under the traditionalist active/passive paradigm, and the relationship of these phobias to the conflation, is discussed in Valdes, supra note 9. See also Peter Brown, The Body and Society: Men, Women, and Sexual Renunciation in Early Christianity 5-64 (1988) (exploring sexual attitudes among early Christian communities). See generally Boswell, supra note 86 (discussing the rise of Christian intolerance toward homosexuality); Brundage, supra note 320 (discussing the "Christian horror of sex").

816. Callender & Kochems supra note 748, at 454.
active/passive conflationary precepts on a world view that does not recognize, much less respond to, such sex/gender precepts and prejudices. Again, this forcible interjection of alien cultural notions sheds more light on the culture of the theorists than on the berdache. The “psycho-functional” theories thus oversimplify berdachism grossly while simultaneously complicating its cultural translations.

On the other hand, the fourth theory explores a different approach: the “berdache will always remain opaque to investigators until it is seen within a holistic context” that is sensitive to salient native cultural and religious factors. This theory thus concentrates on the social and religious functions of berdachism within native cultures and explains the existence of berdaches as a response to society’s religious, spiritual, or cosmological wants and needs. This theory in effect views berdachism as a calling, and a prestigious one at that, because it responded to important societal desires, including cosmological coherence. Thus, berdaches were those who assumed a key social role to help fulfill society’s spiritual wants and needs, not sex/gender deviants, cowards, or fugitives.

This theory accords more closely than the other three with the native emphasis on occupation as the definitive marker of gender generally, and of berdache identity specifically. This theory’s emphasis on the role of berdaches in spiritual matters also helps to explain the reverence and prestige associated with berdachism. Perhaps more significantly, this “holistic” theory abandons the conflationary biases and traditionalist limitations of the other theories. This shift in focus ultimately may help to free Euro-American translations of berdachism from the sex/gender distortions that follow from the active/passive themes and traditions of the conflation.

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817. The territorial imperialism of the Euro-Americans was matched by an equally fervent sense of cultural imperialism, which led to “pacification” policies that subordinated Native Americans generally and eradicated berdaches specifically. See infra notes 867-85 and accompanying text.
818. Thayer, supra note 724, at 289 (italics added).
819. See generally Whitehead, supra note 718.
820. See supra notes 748, 778-79 and accompanying text.
821. See supra notes 793-803 and accompanying text.
822. “Emphasizing the social and cultural context of berdachehood seems a more productive approach than analyses based on speculation about individual motivation, usually phrased in psychosexual terms that are embedded in Western cultural attitudes.” Callender & Kochens, supra note 748, at 455 (italics added).
2. Female Berdachism

Though the recognition of female berdaches was not universal, it seems clear that berdachism generally was open to both sexes. Disagreement on this point among scholars seems to focus primarily on the extent to which male and female berdaches were regarded as cultural equals. Some scholars, like Whitehead, perceive significant disparity, noting that the gender transformation seemed more difficult or elusive for female berdaches because “women who crossed social gender boundaries to engage in such male activities as hunting and warfare were not defined as berdaches.”

This withholding of transformative recognition, Whitehead argues, may have been due to the fact that the “biological component of gender had greater significance for women, whose reproductive capacity in the form of menstrual and parturient blood threatened males . . . and [their] supernatural powers in general.” This “biological component” also served as a steady reminder that no bodily sex/gender transformation in fact had occurred.

In contrast, other scholars, like Callender and Kochems, note that “[o]utsiders often overlooked the female system” because the “male system [was] the more visible, the more public, and [therefore] the more often described.” Yet, this viewpoint continues, the “greater visibility of the male system does not mean it was actually dominant or alone determined policy.” Callender and Kochems furthermore have argued that gender-crossing women simply and actually did not display the same commitment
to gender transformation as did male berdaches. "The gender-mixing activities of male berdaches... seem much less prominent among the female variety.... [T]he female counterparts of male berdaches were not female berdaches, but women who behaved in some respects like men without changing their gender status."831 Concluding, this viewpoint asserts that:

Rather than interpreting this [difference] as a restriction imposed upon such women by their reproductive capacity, [Callender and Kochems] view it as a privilege confined to women and suggest that it was at their insistence that men who entered their occupational sphere had to shift to an intermediate gender status, accomplished by the mixing of attributes of the two gender categories within their culture.832

Though these passages show that scholarly opinion is inconclusive at this point, the presence of "warrior women"833 and of "manly-hearted women"834 among Native American societies nonetheless is part of the documented historical record.835 Thus, what remains open to interpretation is whether such personalities constituted part of a system of female berdachism that was (or was not) on par with the better-documented system of male berdachism.836

3. Pan-Sexuality & Berdachism

The historical record establishes a kind of pan-sexuality among both berdaches and non-berdaches that was both "variable and very complex."837 Same-sex sexuality, though often occurring in tandem with berdache identity, was not limited to berdaches.838 Likewise, berdaches were not limited to same-sex relations.839 Even though many berdaches coupled in same-sex bondings, others coupled in cross-sex bondings, and still others did both at different times during their lives. This pan-sexuality

831. Id. (italics added).
832. Id.
833. See, e.g., Medicine, supra note 823, at 267 (indicating that "warrior women" were "widespread" in Native North America).
834. See, e.g., Grahn, supra note 724, at 60.
835. See supra note 824.
836. See Nancy O. Lurie, Winnebago Berdache, 55 AM. ANTHROPOLOGIST 708, 711 (1953) (in considering whether a "parallel" system of female berdachism existed, the author describes one "very doubtful account" of a "warrior woman" and concludes that she "probably represents an isolated example of a woman who went to war rather than an accepted type of role").
837. Callendar & Kochems, supra note 748, at 449. The best description of berdache sexuality is provided by Callender and Kochems. Id. at 449-51.
838. See Forgey, supra note 767, at 10 (recounting that "sodomy by no means occurred only between berdaches") (italics added); Hill, supra note 789, at 276 (recounting that "[s]odomy with a [berdache] is countenanced by the culture"). Reflecting entrenched Euro-American associations of sodomy with sexual minorities, these accounts apparently equate the act and term with same-sex intimacy even though sodomy takes place in cross-sex settings as well. See Valdes, supra note 53, at 446-47.
makes it "seem[ ] necessary to conclude that a number of berdaches were bisexual." 840

It should be emphasized that non-berdaches matched this pan-sexuality. 841 Like berdaches, non-berdaches sometimes coupled in same-sex bondings and sometimes in cross-sex bondings, and sometimes in both throughout their lifetimes. Some non-berdache males married both women and male berdaches simultaneously. 842 None of these couplings was especially problematized or disfavored. 843 Indeed, same-sex marriage with a berdache was not only officially and socially acceptable, but was sometimes highly valued because berdaches were deemed to possess extraordinary and culturally prized abilities or powers that they would bring into the family via the marriage. 844

On the surface, this pan-sexuality among Native Americans may seem comparable to the sexual patterns that may be found among Euro-American societies, because the Western concepts of heterosexuality, bisexuality, and homosexuality might be thought to encompass the same fields of erotic experience as Native American pan-sexuality. As reflected by the discussion in Chapter One, however, it should be clear that this apparent similarity once again is nothing more than surface appearance: while sexual variety (f)actually occurred in both cultures, it was an open and accepted part of pan-sexuality among Native Americans, but a closeted and repressed subaltern of compulsory heterosexuality 845 among Euro-Americans. The Native American and Euro-American conceptions and treatments of sexual variety thus are fundamentally and diametrically opposed.

840. Id. at 451 (italics added).

841. See Williams, supra note 724, at 120-23, 23-27, 91-93, 247-49 (discussing, respectively, heterosexual behavior of the berdache, homosexual behavior of the berdache, man-man homosexual behavior, and women-identified women); Roscoe, supra note 718, at 26-27 ("[T]he evidence shows that [berdaches] were typically homosexual, although perhaps not exclusively so. . . . In any case, if some berdaches were not exclusively homosexual, non-berdache men were not always heterosexual since some formed relationships with [berdaches].") (italics added); Williams, supra note 724, at 95-109 (discussing berdache sexual techniques, including promiscuity, sex with married men, and special occasions for sex).

842. Callender & Kochems, supra note 748, at 450 (noting that in such instances the berdache "insisted upon a separate lodge" but that in some native nations berdaches "could only be auxiliary wives").

843. Noting that evidence is "scanty," Callender and Kochems conclude that "homosexual relations with berdaches were generally accepted as long as they did not obstruct 'normal' marriages" designed to produce offspring. Id. (italics added).

844. See supra notes 793-803 and accompanying text; see also infra Part I.B.4; cf. Elsie C. Parsons, The Zuñi La'Mana, 18 AM. ANTHROPOLOGIST 521, 526 (1916) (describing a marriage between a male berdache and a non-berdache male and stating that the "families of both parties were said to have objected" to their union; apparently, however, such familial objections could not stop the marriage nor negate its cultural validity). For a good overview of same-sex marriage among Native American and other indigenous cultures, see William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419 (1993).

4. Berdachism & the Heterogender Ideal

The high value often given to marriage with a berdache raises another critical point: the synergistic combination of male and female qualities unified in the berdache gender meant that marriage to a berdache brought into the household a personage whose social/public gender composite would complement the social/public gender attributes of the non-berdache mate in especially rich and valuable ways. In other words, because gender was so tightly intertwined with occupation, and not with sex or sexuality, the gender compatibility of a couple was directly linked to the socio-economic complementariness of the couple and the berdache therefore was considered an especially "good catch." This heterogender ideal of native society thus looked at the social/public gender totality of a coupling, and encouraged unions that would produce a gender-balanced pairing in socio-economic terms. In this scheme, berdaches clearly were advantageously situated: they were deemed to possess a relatively rich and attractive social/public gender composite because this gender comprised elements of the other two.

This scheme on the whole also maximized opportunities for affectional or sexual choices that created compatible and complementary gender couplings within the community because they imposed no automatic and rigid (de)limitations regarding potential mates based on sex. Some accounts accordingly report that berdaches' "sexual partners were always non-berdaches" even though these partners may have been of the same sex. Obviously, homo-sexual couplings could nonetheless be hetero-gender(ed), while cross-sexual couplings could be homo-gender(ed). This historical record concerning the native intersection of sexuality and berdache gender therefore brings into focus how Native Americans favored heterogender couplings, though not necessarily heterosexual ones.

The rationale behind this heterogender ideal comes into full focus when understood specifically as an expression of overarching and collective concerns over socio-economic balance and compatibility within each couple's household. In the Native American scheme of things, the combination of genders within a couple very much represented the sum of their talents, skills, and abilities as a productive socio-economic unit. The joining of different genders (not sexes) thus signified that the participants within a coupling complemented each other's productive abilities and occupational propensities, which helped ensure both the success of the coupling and the overall prosperity of the community.

Anatomical configurations within the coupling, therefore, were not dispositive; unlike Euro-American culture, native culture(s) saw no great

847. See supra notes 731-32 and accompanying text.
848. See WILLIAMS, supra note 724, at 111-12.
urgency or benefit in policing the (non)coincidence of sex within coupling. The Native American system, in short, institutionalized a preference for heterogender couplings, though not necessarily heterosexual ones. As explained above, this preference was rooted in pragmatic and economic objectives, rather than in ideological sex/gender imperatives.

C. Collision, Collusion & Conflation

As this Chapter shows, the berdache, as a concept, person, and institution, exemplified the non-conflationary interplay of sex, gender, and sexual orientation in pre-European North America. In the native system, gender was induced transitively from individual personality, heterogender couplings were deemed ideal, and heterosexual couples received no particular privilege. This system was incomprehensible to, and incompatible with, the Euro-American sex/gender mindset of active/passive traditionalism. Thus it was forcibly destroyed by Euro-American explorers who supplanted it with their adamantly conflationary outlooks, institutions, and habits.

1. Euro-American (Mis) Interpretations of the Berdache: Past & Present

Berdachism, not surprisingly, has mystified and horrified Euro-Americans since they first encountered it. Historical accounts depict the arriving Europeans grappling in vain with the limitations of their sex/gender world view and vocabulary while seeking conceptual and cultural synonyms to describe berdaches. That search has continued in more recent times with the efforts of ethnographers and anthropologists to devise theories that encapsulate and explain berdachism. In this search, early as

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849. Though the Native American cultures were interested in self-perpetuation through reproduction, non-procreational sexuality was viewed as unproblematic because procreation in fact was occurring among other couples. It must be remembered that the emphasis on procreation that characterizes Euro-American sex/gender ideology originated as the means for the overwhelmingly outnumbered Judeo-Christian minority to form a community and foster a sense of solidarity while pagan Greco-Romans still ran the Western world. See Valdes, supra note 9; see also supra note 815 and authorities cited therein on early Christian history and attitudes regarding sex, gender, and sexuality. However, population growth throughout the Western world since then clearly demonstrates that Euro-American reproduction has continued while the historical record just as clearly demonstrates that same-sex relations also have continued. In practice, as native cultures apparently have long understood, propagation of the human species and same-sex sexuality are not necessarily incompatible nor mutually exclusive phenomena. See, e.g., supra note 843 and accompanying text.

850. Encounters date back to the 1500s, the early era of conquest by Spaniards and others. In 1540, for instance, Coronado became the first conquistador to encounter the Zuni. See Rosco, supra note 718, at 16. Cabeza de Vaca and others spotted berdaches while exploring Florida in 1530. Williams, supra note 724, at 67-68. French explorers reported the existence of berdaches among the Illinois nation in 1702. Id. at 50. Various accounts, and the tenor of their contents, are recounted or summarized throughout Callender & Kochems, supra note 748, and in Guerra, supra note 767. These reports and others prompted a determined cultural cleansing campaign waged by the newcomers that virtually wiped out berdaches. See infra notes 878-885 and accompanying text.

851. See, Rosco, supra note 718, at 211-14; Williams, supra note 724, at 71-80; Whitehead, supra note 718, at 93-99.

852. See supra notes 804-22 and accompanying text.
well as later Euro-Americans have labeled berdaches “inverts,” “transsexuals,” “transvestites,” “sodomites,” “homosexuals,” or “hermaphrodites”—in short, the litany of conflationary terms available in the Euro-American cultural and rhetorical lexicon to connote social/public and sexual/private devi-
atations from traditionalist hetero-patriarchal imperatives. In fact, berdaches combined sex/gender elements of almost all of these terms, but in a synergistic and unique sum that was distinct from all Euro-American sex/gender concepts under the conflation.

In some respects, berdaches were analogous to the Third Sex concept posited by Uranian activists in that they constituted a Third Gender, though not a Third Sex. However, berdaches were fundamentally different from Uranian conceptions of self because no sense of sex/gender defect was entailed by identification within the berdache category. Similarly, berdaches were somewhat akin to transsexuals in that they combined gender indicia from both sexes. They differed greatly, however, in that berdaches did not perceive in themselves any disharmony between sex and gender, and thus were unconcerned with surgical or other procedures to effect a conformance between gender and sex. Berdaches may still be seen as akin to transvestites in that they typically donned some of the garb of the other sex. Yet, the berdache’s appearance did not necessarily strive to pantomime the fashions of the other sex; typically, berdaches combined items of male and female costuming to create personalized styles that signified their distinction from both male and female genders. The analogy to the “sodomite” or “homosexual” sometimes sparks animated analyses because, though neither same-sex affinity nor behavior was a necessary or constant feature of the berdache role, berdaches frequently coupled sexually with others whose anatomy, though not gender, coincided with

853. Terms used by the early Europeans explorers included: in Spanish, amarianadas (from Mary, meaning “effeminate”), mujerados (literally “made women”), putos (male whores or prostitutes), and bardajes (a version of “bardaj”—a Persian/Arabic word meaning sexual “slave” or “kept boy”); in English, the terms include hermaphrodite, sodomite, man-woman, invert, transvestite and transsexual, tomboy, and girl-man. Roscoe, supra note 718, at 5, 28.

In more recent years, Margaret Mead once designated a male youth from the Omaha nation as both a “congenital invert” and a “transvestite” due to her perception of “marked feminine physical traits” on his part, including attire that she concluded constituted cross-dressing. Williams, supra note 724, at 72. However, berdaches mixed the fashions associated with “male” and “female” in highly individualistic patterns that signified their independence and distinctiveness from the other two “genders.” Id. at 72-73; see also supra notes 774-79 and accompanying text.

854. See supra notes 774-77 and accompanying text.

855. See supra notes 150-64 and accompanying text.

856. At the turn of this century Uranians had accepted and incorporated notions of disease related to inversion into their theories of self. See supra notes 175-81 and accompanying text.

857. See Williams, supra note 724, at 80.

858. Id. at 71-76.
The comparison to hermaphrodites is the most remote, for mixed genitalia or other physiological features were not typical in the berdache.\(^{860}\)

The unresolved controversy among contemporary commentators displays the continuing Euro-American bafflement over the berdache. Callender and Kochems, for instance, conclude that, “[r]ather than homosexuals’ becoming berdaches, many berdaches, perhaps most of them, became homosexual.”\(^{861}\) Williams concludes that, while the analogy to “homosexual” is not generally valid, berdaches may nevertheless be compared to “a subgroup of homosexuals—those whose character is very androgynous” and who “in the vernacular of the gay community [are known] as queens.”\(^{862}\) Noting that same-sex sexuality was not essential to being a berdache but that cross-sex gender identification was, Whitehead points out that, according to some, “the recently conceived Western category of ‘transsexual’” forms the closest Euro-American sex/gender analog.\(^{863}\) Other contemporaries continue with analogies to hermaphroditism or transvestitism.\(^{864}\) Perhaps, though, Roscoe provides the greatest insight in concluding that the berdache phenomenon was unique, which makes fastidious “single-dimensional” analogizing untenable. Still, he concludes that the “overlap between berdache [traditions] and gay roles among American Indians” alive today illustrates substantial though not complete “continuity” between the berdache and the modern “homosexual.”\(^{865}\)

The ongoing debate over the “best” Euro-American analog to the berdache, as illustrated in the foregoing (mis)characterizations, evokes and turns on conflationary notions of sex, gender, and sexual orientation; it is conducted through lenses clouded by conflationary influences and by traditionalist active/passive social and sexual preferences. Ultimately, the debate compels the conclusion that Western cultures simply have no sex/gender equivalent for the berdache—not even a word to articulate the concept—despite the coincidence that berdachism encompasses ingredients of sex, gender, and sexuality resembling aspects of the Euro-American system.\(^{866}\)

The varied and non-conflationary interplay of and between sex, gender, and sexual orientation within berdache identity thus illustrates the intri-

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859. See supra notes 837-45 and accompanying text.

860. See Williams, supra note 724, at 76-79. Amusingly, Roscoe recounts the experience of Dr. William Hammond, former Surgeon General of the U.S. Army. Conducting medical examinations among the Pueblo, he encountered male berdaches and wrote, “Of course, the most important parts to be inspected were the genital organs.” Roscoe, supra note 718, at 25 (quoting William D. Hammond, Sexual Impotence in the Male and Female 165 (1887)). He apparently was bewildered to find them “normal.” Id.

861. Callender & Kochems, supra note 748, at 444 (italics added).

862. Williams, supra note 724, at 125.

863. Whitehead, supra note 718, at 96.

864. See supra notes 850-60 and accompanying text.

865. Roscoe, supra note 718, at 210-11.

866. See supra note 854-65 and accompanying text.
cacy of *berdachism* as a concept, its pliability as a role, and its multi-facetedness as an institution. This native persona and phenomenon consequently brings into sharp focus the crudity of conflationary constraints imposed on sex/gender identity and individuality under Euro-American active/passive themes and traditions. *Berdaches* and *berdachism* thereby help to conjure egalitarian and liberational post-conflationary possibilities that Euro-American sex/gender reformers can contemplate and explore. The *berdache* and her/his legacy embody and represent precepts and possibilities that Euro-American forces have yet to fathom, but should.

2. *Invasion, Subordination, Assimilation & Decline*

In his acclaimed historical analysis of European conquest in the New World, Gutiérrez provides a critical and detailed account of the ways and means through which the natives were overwhelmed by the newcomers. The driving forces behind this cultural imperialism included the Europeans’ belief in their personal and cultural superiority as well as their technological and physical capacity to impose their will on indigenous peoples. Therefore, their objective was not merely the conquest of the land or the submission of the people, but the wholesale normative and religious assimilation of this continent’s inhabitants. In effect, the objective was the literal obliteration of pre-European civilization and consciousness. Native traditions had to be forcibly erased, then replaced in whole with European codes of conduct and thinking.

To accomplish this triumph the immigrants zealously humiliated and demeaned the natives; one “technique occasionally used to render an obdurate and cocksure Indian submissive was to grab him by the testicles and to twist them until the man collapsed in pain.” This type of tactic was made acutely effective by choreographing the “humiliation of . . . parents followed by gifts to the children calculated to indebt them” to the conquerors. Indeed, the alienation of native youths from their parents and other native adults was a pronounced feature of this cultural imperialism. Other contemporary works similarly have documented and critiqued how this gradual but steady process of invasion, subordination, assimilation, and decline encompassed an array of tools and tactics including torture, human

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868. For the Spanish, this cultural substitution centered on instilling among the natives their Catholic religion and their stylized conceptions of “honor,” both of which saturated Spanish sensibilities. See *id.* at 176-240.
869. *See id.* at 241-97.
870. *Id.* at 76.
871. *Id.*
872. *See id.* at 75-81.
enslavement, land confiscations, wealth appropriations, religious indoctrination, normative re-engineering, sexual repression, and brute force.\footnote{873}

Of course, this wave of destruction could not and did not leave native sex/gender arrangements or native expressions of sexualities untouched, whether cross-sex or same-sex. For instance, sexual positions within a cross-sex coupling that violated the conflation’s active/passive sex/gender paradigm were denounced and prohibited:\footnote{874} the European mandate was that the “man must lie on top and the women on her back beneath[,] because this manner is more appropriate for the effusion of the male seed, for its reception into the female vessel.”\footnote{875} Gutiérrez thus recounts how a Spanish theologian “railed about the mulier supra virum (woman above man) coital position” because it was deemed “absolutely contrary to the order of nature.”\footnote{876} Elaborating this view, the theologian continued: “It is natural for the man to act and for the woman to be passive; and if the man is beneath, he becomes submissive by the very fact of his position, and the woman being above is active; and who cannot see how much nature herself abhors this mutation?”\footnote{877} And, “nature” abhorred the berdache specifically no less, both as person and as institution.

3. The Eradication of the Berdache

Despite the ubiquity, utility, and prestige of berdaches in Native American communities, their numbers, power, and visibility declined dramatically with the onset of Euro-American conquest and Native American subordination.\footnote{878} Because the berdache represented ideas that were fundamentally intolerable to conflationary sex/gender dogma, they quickly


874. See supra notes 89-107 and accompanying text.

875. Gutiérrez, supra note 722, at 212 (quoting Tomás Sánchez, De Sancto Matrimonii Sacramento 37-38 (1607)).

876. Id. (quoting Sánchez, supra note 875, at 37-38).

877. Id. (quoting Sánchez, supra note 875, at 37-38).

878. Thus, in her 1916 article Elsie Clews Parsons began with the observation that, “[i]f these ‘men-women,’ there are today in Zuñi three or, one might almost say, three and a half.” Parsons, supra note 844, at 521. The “half” counted a “boy about six years old” who already was deemed as “qualifying” for berdache status. Id. Extensive accounts of berdachism’s decline under the pressures}
became prime targets of European colonial sex/gender policies. Of course, from its inception, the policy of berdache eradication was associated with the overall “pacification” policies that were more generally linked with Christianization: in effect, the salvation of Native American souls required the earthly repression of their minds, bodies and culture(s). At the same time, the berdache eradication policy was clearly connected to territorial expansionism and wealth appropriation because berdaches controlled both cultural power and material wealth. Consequently, berdaches went “under cover,” receding from public view in Native American social life under the European onslaught.

As the European overlord’s specific and virulent antipathy for berdaches became increasingly clear, Native Americans became increasingly reticent or silent about the existence or activities of berdaches. In some tribes, conversion to Christianity actually provoked active antipathy for berdaches within the tribal community itself. Over time, this combi-
nation of external and internal hostility virtually wiped out berdachism.\textsuperscript{885} As with Native American culture as a whole, the berdache was reduced coercively in stages to a virtually unmentionable and tragically pathetic vestige of its former vitality in the wake of North America's unrelenting Euro-Americanization.

II

A Brief Comparison: Two Systems in Contrast

Although a full discussion of the lessons to be extracted from the Native American sex/gender system is presented in the next Chapter,\textsuperscript{886} several major themes warrant emphasis here. These themes flow from the combination of a fundamental continuity and a fundamental discontinuity between Native American and Euro-American conceptions and arrangements regarding sex and gender: while both the Native American and Euro-American systems look to sex first to organize the social order, the native system's inductive and transitive conception of gender—as something to be discovered and accommodated—stands in stark contrast to the Euro-American fixing of gender deductively and intransitively at birth. The discontinuity focuses on the source(s) of gender and on its nature, as comparatively conceived in these two systems: whereas Euro-Americans deduce gender intransitively from sex, Native Americans induced gender transitively from each individual's talents and occupational predilections. The native inductive, transitive approach to gender resulted in a non-conflationary sex/gender culture which has significant implications and potential for our society and legal system today.

At the threshold, the Native American sex/gender system irrefutably illustrates that linking sex and gender into a single "immutable trait" at birth under Leg One of the conflation is neither inevitable nor "natural."\textsuperscript{887} Native society flourished before the arrival of Europeans under a system that did not fix gender through sex, that allowed parity between the sexes, and that fostered individual growth for its members. Unless we retreat behind conclusory (and unfounded) assertions of cultural superiority to declare indigenous cultures "uncivilized," the conclusion that it is possible and practicable to build a society on non-conflationary sex/gender principles is unavoidable in light of this comparative record. Moreover, doing so is desirable.

\textsuperscript{885} Roscoe, supra note 718, at 194. ("Between white intolerance and Indian reticence, memory of berdaches has been almost completely erased from the record . . . . In the end, berdaches were erased by silence as well as repression . . . .") (italics added). Williams likewise recounts the reluctance of Native Americans to disclose details about berdache existence to outsiders for fear of retribution. See Williams, supra note 724, at 140-41.

\textsuperscript{886} See infra Chapter Four, Part III.

\textsuperscript{887} See supra Chapter One, Part III.
As documented in Chapter One and Chapter Two, the Euro-American sex/gender system culturally and legally promotes and preserves the androsexism and heterosexism that combine in hetero-patriarchy. The regulation of both social/public and sexual/private activities in order to maintain androcentric (and heterocentric) power is, however, antithetical to the social and legal principles upon which this nation was built, and which this nation still purports to uphold. Moreover, conflationary practices in modern culture and legal culture propound harms that inflict arbitrary and invidious discrimination on individuals and that ultimately sow the sex/gender disaffection and disunity tearing at the nation’s fabric.

In contrast, the berdache captures and symbolizes the Native American belief that individuals’ abilities, not their adherence to fixed and arbitrary categories, determined their station in and worth to society. Under the native sex/gender scheme, gender identity was based on and shaped by individual personality. Under the conflationary sex/gender scheme, however, gender identity in the abstract dictates individual personality. Native arrangements thus require(d) gender to accommodate the person whereas conflationary arrangements require the person to accommodate gender. Consequently, not only did the native sex/gender system allow for greater individual freedom at the most basic level, it also employed its people in the socio-sexual roles and activities in which they were most comfortable and productive. Thus, the native scheme delivered greater respect and freedom in both public/social and private/sexual matters and relations. For these reasons and in this way the non-conflationary sex/gender arrangements of native culture(s) were on the whole more conducive to personal happiness, social harmony, and economic advancement.

On the whole, the Euro-American experience with the conflation stands in stark and disappointing contrast to the Native American avoidance of the conflation. Because conflationary arrangements undermine sex/gender equality and constrict individual freedom, the conflation exerts an arbitrary, invidious, and malignant influence on social and sexual life; the conflation is a rigid contrivance that permits culturally dominant forces in Euro-American societies to control, from the moment of birth, the most central aspects or spheres of public/social and private/sexual personality—what we do, how we look, even who we love. The inductivity and transitivity of gender in Native American culture, on the other hand, made the conflation of sex, gender, and sexual orientation impossible and unnecessary, freeing both society and individuals from conflationary demands, pressures, and constraints. In doing so, native societies made public/social and private/sexual life better both for themselves and for their people. We there-

888. See generally supra Chapter One, Part I.A-B and Part II.B.1-4.
889. See, e.g., Chapter Two, Introduction.
890. See infra Chapter Four, Part II.
891. See infra Chapter Four, Part III.A.5.
fore would do well to consider the native example and its sex/gender vision as we continue to grapple with the conflationary sex/gender inequities that characterize(d) the Euro-American status quo clinically, culturally, and legally.

**Conclusion**

Native American cultures did not conflate sex, gender, and sexual orientation. Thus, natives did not conflate gender atypicality with minority sexualities. Instead, even though Native American arrangements were similar to the Euro-American system in using sex as a point of reference for social and occupational roles, the Native American system granted individuals the ability to realize gender personally and flexibly, and independent of society’s official sex assignment. The native sex/gender system in like vein made social and economic roles based on sex (and/or gender) roughly equal in cultural power. Furthermore, the non-regulation of social/public life was matched by a similar freedom in sexual/private relations. In this way, native arrangements maximized the potential for individual sex/gender liberty and for societal sex/gender peace. Consequently, androsexism and heterosexism were not linked in indigenous societies as they are under the conflation in Euro-American societies. Indeed, androsexism and heterosexism were relatively absent from Native American culture. This absence demonstrates that hetero-patriarchy is not nature’s doing, it is man’s (mis)doing. This comparative example thus teaches that undoing hetero-patriarchy is both possible and advisable.

Because the different conceptions of sex, gender, and sexual orientation produced very different societies for Native Americans and Euro-Americans, these differences also can help to illuminate sex/gender possibilities open to American law and society for moving beyond the conflation and its active/passive delimitations. Ultimately, then, we can use the Native American example to expand our social and legal imagination, and to help guide us toward the attainment of more sensible and harmonious sex/gender arrangements for ourselves today and tomorrow. The next Chapter of this Project therefore takes careful stock of the lessons and insights offered by the first three Chapters of the Project in search of the next step toward a post-conflationary, non-conflationary reality in law and society.