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Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society

Francisco Valdes†

This Project is about the way in which social and legal actors frustrate existing prohibitions against sex and gender discrimination by manipulating, whether through ignorance or calculation, the conflation of sex, gender, and sexual orientation. What Professor Valdes calls the "conflation" is the historic and contemporary confusion and distortion of sex, gender, and sexual orientation as social and legal constructs. As this Project makes clear, this conflation's long history and pervasive presence in our thinking and institutions combine to make it self-perpetuating and often invisible, but never absent. This confused and confusing history and status quo is what

† Associate Professor, California Western School of Law. J.S.D. 1994, J.S.M. 1991, Stanford Law School; J.D. 1984, University of Florida; B.A. 1978, University of California—Berkeley. This Project is dedicated to my family, who love and nurture me despite my heresies, and to all the men, women and children who have been, or will be, stricken by HIV, and especially to my esteemed colleague, Penn, and to my good friends, John, Todd, Lenny, and Quintin. I received more encouragement and assistance in the preparation and completion of this Project than I could possibly acknowledge (but I'll try). Because this constitutes the bulk of my dissertation, I first wish to thank Robert Weisberg, Lawrence Friedman, and Barbara Fried, my J.S.D. committee members, and Paul Brest, an early mentor, for their trust, confidence, and support. My special gratitude also extends to the faculty and staff at California Western School of Law for their unstinting support of this Project, and particularly to my colleagues, Tom Barton, Michael Belknap, Susan Channick, Bob Chang, Barbara Cox, Chin Kim, Scott Ehrlich, Marilyn Ireland, Bill Lynch, Linda Morton, John Noyes, and Mike O'Keefe for their individual support and comments. The comments, guidance, and support of Mary Coombs, Mike DeVito, Angela Harris, Todd Hughes, Marc Fajer, Tammy Koster, Christine Littleton, Joan Mahoney, Marnie Mahoney, Judy McKelvey and Ruthann Robson also were invaluable. In addition, I thank the editors and staff of the California Law Review, and especially Tom Peckham, Nancy Combs, and Jessica Karner, for their indefatigable contributions to the final stages of this Project. I furthermore owe a tremendous debt to the historians, anthropologists, sociologists, psychologists, and others whose scholarly works have reclaimed so much of the hidden past in recent years, and who thus enabled the discussions and analyses presented here. I thank as well my research assistants, Jeanne Johnson, Mark Hall, Jessica Hanlon, Rick Hartman, George Hunlock, Kim Jones, Louis Minicoczi, Dana Mitchell-Weiler, Elizabeth Todd, Amy Traynor, Honora Schultze, and Allan Wildstein; the librarians at Cal Western and Stanford, Bill Bookheim, Frank Daniels, Andy Eisenberg, Paul Lomio, Jane Pettimer, Linda Weathers, and Iris Wildman; the secretaries, Daphne Cogdon, Mary-Ellen Norvell, Carol mildos, Sandy Murray, Anita Simmons, and Sonia Smith and, finally, photocopying specialists Billie Bortz and Vicky Pfeiffer, all of whom have been indispensable to this Project. Despite the wonderful support and scholarly pioneering that benefited this Project, shortcomings are likely to be spotted in the pages that follow; they are all my own.
enables dominant forces to use the conflation—and more specifically the symbiotic roles of gender and sexual orientation within it—as a key means of achieving unprincipled and unwarranted results in sex and gender discrimination cases.

To help discipline the uses of these three constructs in legal venues, this Project documents and unpacks how sex, gender, and sexual orientation are conceived and applied in tight relation to each other both intellectually and normatively. In this way, Professor Valdes invites and urges scholars, judges, and policymakers alike to assess critically both the conflation itself and its detrimental effects on law and society. Professor Valdes also highlights how the conflation both reflects and projects androsexist and heterosexist values—a phenomenon he calls heteropatriarchy—to emphasize the mutual interrelationship of these twin biases in the Euro-American sex/gender system. This Project’s assessment of the conflation inexorably leads to the conclusion that the law cannot, and therefore will not, fulfill the nation’s formal commitment to ending sex and gender discrimination while the conflation retains its force in legal culture.

The Introduction and Foreword are intended not only to introduce the piece but also to summarize it. They also provide a roadmap of the piece so that readers may locate areas of particular interest. Chapter One provides a critical history of the conflation in Euro-American culture since the late nineteenth century, detailing its codification by the medical profession and its acceptance both by the sexual majority and by sexual minorities. Building on that history, Chapter Two traces the conflation’s presence in and effect on the law of this nation. Focusing primarily on Title VII cases, Professor Valdes documents how courts have simultaneously embraced and denied aspects of the conflation, and in the process have rendered laws against sex and gender discrimination unjustifiably underinclusive.

To provide a comparative perspective on the conflation, Chapter Three examines how Native American cultures conceptualized sex, gender, and sexual orientation in a relatively non-conflationary manner. The Native American example reveals that the conflation is socially constructed rather than natural, and provides a model for post-conflationary reform. Chapter Four gathers the lessons to be drawn from the first three chapters, while Chapter Five builds on these lessons in presenting principles to guide the reform of existing sex and gender anti-discrimination doctrine. Finally, the Afterword & Prologue closes the Project with a call for the initiation of Queer legal theory as a scholarly movement, and with some reflection on the role of that movement within critical legal thought and in legal culture generally.

As with all good scholarship, our hope is that this piece will cause readers to examine the way(s) they think—in this case about sex, gender, and sexual orientation. Even for readers who disagree with Professor Valdes’ suggestions for doctrinal reform, this Project presents overwhelm-
ing evidence of the conflation’s widespread influence and negative impact on our society and legal system. Moreover, the Project presents a framework through which legal and social conceptions of sex, gender, and sexual orientation can be accurately and beneficially reexamined, free of conflationary influences. The clarity enabled by the deconstruction of the conflation presented here is essential in our nation’s attempt to confront the pressing issues surrounding the roles and rights of women and sexual minorities.

A final note: the publication of this Project in a law review is almost as unusual as the scope and depth of the Project itself. We believe the significance this piece has to the law and to society in general warrants its publication in a forum not generally reserved for works of this length. This law review’s two-year association with Professor Valdes and this Project is a testament to the potential of the faculty/student relationships borne of necessity from student-edited journals. We made the decision to publish the Project when parts of it were not yet finished drafts, in itself an unusual decision. As Professor Valdes wrote and rewrote, we had the privilege of sharing in an academic creation on a much more conceptual and personal level than is the norm. While this Project taxed the Review to its limits, it also was tremendously rewarding. We hope it has the impact it merits, both in its current form and as a book based on this work, which will be published by New York University Press in 1996-97.

“It was easy for Americans to tolerate homosexuals as long as homosexuals were sissies. It is another matter altogether for many American heterosexuals to accept the very idea of sissy warriors.”

—Richard Rodriguez

Queer. Sissy. Dyke. Tomboy. What do these vulgar terms have in common? Why do they sting? And, perhaps more curiously, why do they carry a common sting?

Our childhood memories confirm that these epithets, and the stereotypes that they invoke, travel through American society as synonyms. For


2. Webster’s Ninth New Collegiate Dictionary (1983) records the following definitions. “Queer” signifies “one that is queer, esp[ecially] HOMOSEXUAL—usu[ally] used disparagingly.” Id. at 965. “Sissy” signifies “an effeminate man or boy.” Id. at 1102. “Dyke” signifies “LESBIAN—often used disparagingly.” Id. at 390. “Tomboy” signifies “a girl of boyish behavior.” Id. at 1241. The last term, “tomboy,” apparently is not as loaded with cultural denigration as the others, though it can be, and is, used as a disparaging term. See infra note 919.

many, these words resonate in memories harkening back to days in the school yard. They conjure remembered peers, or perhaps youthful selves, who were chosen to sustain and survive the common ridicule of their perceived transgressions against a sex-ordered world. Clearly, the synonymity of these terms, and others like them, informed the social order into which we were inducted as children.

More to the point, this synonymity also pervades the legal order in which we find ourselves now, as adults. Consequently, this Project is devoted to identifying and deconstructing the sources and nature of this synonymity, and thereby to answer the query of their (common) sting. To do so, this Project shows how this synonymity is created and sustained by a phenomenon named here: the “conflation” of “sex,” “gender,” and “sexual orientation.” As shown below, even though sex, gender, and sexual orientation popularly refer to putatively distinctive constructs, they formally

22, 22-23 (recounting how the example of gay football player Dave Kopay prompted the “straight guy” author to reconsider the “queer” and “sissy” cultural stereotypes instilled into him as a youth); see also infra note 4 and accounts cited therein. The instillation of these stereotypes of course is a continuing though oftentimes denied phenomenon. See, e.g., Two Types of Toys: “Gross” and “Pink”, L.A. Times, Mar. 21, 1994, at E1 (reporting that toymakers “insist that they’re not promoting stereotypes” when they design and craft toys for school children in two basic categories—“gross” for boys and “pink” for girls).


The first known autobiographical account of lesbian or gay life in the United States is recorded in Claude Hartland, The Story of a Life (Grey Fox Press 1985) (1901).


5. Generally, and as used here, the term “sex” denotes a physical attribute of humans: external genital anatomy. For a brief introduction to this terminology, see infra notes 45-48 and accompanying text; see also infra Chapter Two, Part I.A. Of course, the term “sex” also may be used to signify the activity of copulation, as in “having sex,” but this usage is not employed here.

6. Generally, and as used here, “gender” signifies the social or cultural dimensions derived from and determined by sex, which include attire, grooming, and other aspects of physical appearance as well as behavioral mannerisms or personal dispositions relating to hobbies, careers, intimacies, and other social aspects of human personality and interaction. For a brief introduction to this terminology, see infra notes 49-52 and accompanying text; see also infra Chapter Two, Part I.B.

7. Generally, and as used here, “sexual orientation” refers to the predisposition, inclination, or proclivity of humans toward affectional intimacy with members of one particular sex or of both sexes. For a brief introduction to this terminology, see infra notes 53-55 and accompanying text; see also infra Chapter Two, Part I.C.
and frequently conflate to forcibly homogenize human personalities, including sexualities. Through conflation, this triad of constructs regulates the social and sexual lives of everyone.

This conflation, moreover, is both a formal, intellectual belief system that was codified through various clinical theories and a pervasive normative standard that shapes and governs human life more generally. This conflation, in other words, reflects, and simultaneously projects, the dominant Euro-American social and sexual order. This conflation was and is encoded in the heritage and life of the United States—our children invoke terms signifying sex, gender, and sexual orientation interchangeably precisely because our society and its antecedents continually conceived and categorized the three as mutually dependent constructs.

Given the conflation's historic and current omnipresence, as evidenced by the rich record mined here, what is perhaps most remarkable is how the conceptual, ideological, and cultural mixtures that underlie it remain shrouded, sometimes intuited but rarely examined. As an example, in 1992, Federal Court of Appeals Judge Richard A. Posner candidly acknowledged his own "belated discovery that judges know next to nothing about [sex and sexuality] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much...screened out of the judiciary." And so it is. This ignorance thus

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8. Though other societies or cultures also may rely on conflationary customs and concepts, this Project focuses on the American experience and touches on the Northern European roots of the American experience. Of course, any attempt to characterize Northern European and American societies/cultures/eras with a single sobriquet is problematic. Still, as a short-hand device, the term "Euro-American" is used throughout this Project as a simplified signifier for the Western socio-sexual traditions, institutions, and attitudes that Northern Europe and its colonial progeny share. As the discussion that follows indicates, these traditions may be described as a joinder of androsexism and heterosexism into a sex/gender system built on hetero-patriarchal ideology, which generally and usually denigrates (heterosexual) women and sexual minorities in fairly equal doses. See infra notes 12-18.

9. The antecedents of the conflationary sex/gender status quo are the Greco-Roman and Judeo-Christian systems. A full discussion of Greco-Roman and Judeo-Christian arrangements is important to a complete critique of the conflation, but this discussion is beyond the scope of this Project. This discussion therefore is developed in Francisco Valdes, Unpacking Hetero-Patriarchy: Tracking the Conflation of Sex, Gender, and Sexual Orientation to Its Origins, 8 YALE J.L. & Hum. (forthcoming 1996).

10. See Richard A. Posner, Sex and Reason 1 (1992). Judge Posner came upon his "belated discovery" during the course of two events. First, he decided to read Plato's Symposium, the first European tract on sexuality, which exalts same-sex relations over cross-sex relations. "It had never occurred to me that the greatest figure in the history of philosophy, or for that matter any other respectable figure in the history of thought, had attempted such a thing," Judge Posner wrote. Id. at 1. After this reading, it "dawned" on the judge that the Supreme Court's approving analysis of laws criminalizing "sodomy" in Bowers v. Hardwick, 478 U.S. 186 (1986), was "superficial" though not necessarily "incorrect." Posner, supra, at 1-2. The second event was the adjudication of a case in which he and his colleagues on the Seventh Circuit Court of Appeals struck down Indiana's prohibition against nude dancing. Id.; see Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), rev'd sub nom. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). Posner's book introduces "the economic theory of sexuality." Posner, supra, at 3. Reviews of the book include William N. Eskridge, Jr., A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda, 102 YALE L.J. 333 (1992) (book review); Gillian K. Hadfield, Flirting With Science: Richard Posner on the
envelops, and in turn empowers, the conflation that is the focus of this Project. In this way the conflation remains a vital and defining force in both law and society.

However, the conflation's impact on life and law is neither natural, nor neutral, nor benign. On the contrary, this conflation is a highly problematic contrivance that exerts a divisive force on society and a destabilizing influence in law: this conflation embodies, exudes, and extends androsexist and heterosexist biases, which engender and accentuate social and sexual rankings and acrimonies in both law and society. In other words, this conflation constitutes and validates hetero-patriarchy. As such, it creates and reinforces artificial and oppressive dictates and distinctions that affect all of us, but that specifically impede social and legal equality for (heterosexual) women and for sexual minorities.

To overcome prevailing ignorance, and to help reform the biases and problems of the sex/gender status quo, this Project undertakes a comprehensive and critical examination of the formal and informal socio-legal discourses that historically and currently perpetuate the powerful (though obscured) links between and among sex, gender, and sexual orientation. And, to compose a comprehensive record of experience and insight, the Project takes a cross-disciplinary approach that brings together various strands of critical studies in legal humanities. Specifically, this Project sets

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11. Because the principal subject here is the conflation of sex, gender, and sexual orientation, the scope and focus of this Project are at once more specific and more general than Judge Posner's. Though the conflation is a part of the historic ignorance about human sexualities that Judge Posner laments, it is a more specific subject than human "sexuality" because it forms only one aspect of sexuality: the conflation is about the inter-connectedness with which sex, gender, and sexual orientation are imbued, rather than about human erotic experience as such. Yet this conflation is more general than "sexuality" in that it is concerned with more than the practices or theories of human eroticism. By focusing on this conflation, the Project moves beyond an examination of sexual expressions and toward social and legal juxtapositions of sex, gender, and sexual orientation more generally.

12. As used here, "androsexism" is the kind of "sexism" biased in favor of "male"-identified concepts, ideals, or constructions. See generally infra Chapter Four, Part I.E.

13. As used here, "heterosexism" generally refers to belief systems biased in favor of cross-sex social and sexual arrangements, or "heterosexuality." See generally infra Chapter Four, Part I.E.

14. As used here, "hetero-patriarchy" refers to the fusion of androsexism and heterosexism, both socially and sexually, to obtain and maintain the supremacy of "masculinity" and of "masculine"-identified (heterosexual) men, over personal, economic, and cultural life. See generally Valdes, supra note 9.

15. The term "women" is used throughout this Project as shorthand for heterosexual women, while the term "lesbian" is included within the term "sexual minorities." See infra note 16. These usages are intended to acknowledge both the subordination of (heterosexual) women as members of the (hetero)sexual majority and the subordination of (lesbian) women as members of a (bi/homo)sexual minority.

16. The term "sexual minorities" is used throughout this Project to signify lesbians, gay men, bisexuals, and transsexual or transgendered persons, including transvestites or cross-dressers as "sexual aberrations." See infra Chapter Two, Part IV.B. This term thus reflects and includes the blending of gender atypicality with minority sexualities. See generally infra Chapter One.
out to be comprehensive and critical in three principal respects. First, the Project traces the ways in which these three constructs are conceived and interpreted socially and legally in mutual relation to each other throughout the last century of (Western) history. Second, the Project details the significance of this phenomenon for, and its effects on, legal institutions, legal anti-discrimination doctrine, and legal theory. Third, the Project uncovers how these interrelationships constitute and represent ideology, and how they affect human lives. The Project’s method therefore is to examine how sex, gender, and sexual orientation are (dis)aggregated—both randomly and strategically, both by calculation and through ignorance—and to critique how this manipulable and manipulated process of (dis)aggregation serves identifiable social and legal ideologies that are antithetical to sex/gender egalitarianism.

At the same time, the Project draws out this pervasive phenomenon by focusing on the way(s) in which this conflation of sex, gender, and sexual orientation has (mis)shaped the histories and identities of sexual minorities. In effect, this Project traces a genealogy of the conflation by studying the populations that embody acutely problematized identities under the conflationary status quo. The Project, in other words, studies the general via the specific. It is at once focused and expansive: concentrating on sexual minorities, this Project investigates a particular but pervasive phenomenon that transcends multiple fields of human identity, experience, and knowledge and that negatively impacts all of our lives and many of our laws. The Project thus sets out to show how this conflation works generally to regulate and homogenize the life and personality of every human subject to Euro-American sex/gender arrangements, as well as how it works specifically to institutionalize the devaluation and subordination of women and sexual minorities.

This synthesis and emphasis is significant and beneficial because it arranges vast areas of data and views in a new way, thereby bringing to the fore a deeply ingrained and highly volatile phenomenon. In particular, this unpacking shows how and why legal rules or actions founded on or oblivious to this conflation are fundamentally unprincipled and inherently unworkable. More generally, unpacking the ways and means that have made this trio of constructs an interlocking set is significant because it locates and maps sources and sites of sexual oppressions that remain unsuspected in critiques trained on “sex” or on “gender” or on “sexual orientation” as separate constructs. Both of these benefits are important because each can help to motivate and engineer a cleansing of the conflationary hetero-patriarchal status quo and its detrimental effects on law and society.

The Project’s immediate purpose, then, is to bring the conflation into the open so that we may better resist its biases, and thereby help to make existing law—purporting to combat “sex” and/or “gender” discrimination—more sensible and more effective. The doctrinal and practical bottom
line thus emerges with clarity: the legal system simply cannot fulfill the
nation's existing, formal anti-discrimination mandate regarding sex and
gender unless and until we recognize how sex, gender, and sexual orienta-
tion are mutually-related constructs that animate mutually-reinforcing
strains of conflationary biases. The ultimate purpose of this Project, how-
ever, is to help neutralize the cultural and legal interpretative methods and
traditions that allow the conflationary deployment of these three constructs
for twin purposes: first, to constrain human agency regarding sexuality;
and second, to repress individuated expressions of sex/gender variety and
diversity in general. In this sense, the Project's ultimate ambition is to nur-
ture sex/gender liberty, autonomy, diversity, and equality.

To advance these aims, the Project divides into a Foreword, five main
Chapters, and an Afterword/Prologue. The Foreword introduces the confla-
tion, clarifies key terms, and briefly outlines the conflation's relevance to
the law in order to situate this Project within the larger picture of legal
culture,\textsuperscript{17} doctrine, and theory. Chapter One documents and deconstructs
the conflation in modern culture, both as an intellectual conception and a
normative standard, which historically and presently holds sway over main-
stream society, sexual minorities, women, and communities of color. Chap-
ter Two presents a similar deconstruction focused specifically on American
legal culture, evidenced primarily by Title VII case law. This Chapter
shows the sex/gender continuities between modern culture and legal cul-
ture, and the perpetual recycling of the conflation from modern culture to
legal culture and back again. Chapter Three continues the Project with a
summary presentation of Native American social and sexual arrangements,
which provides a concrete comparative counterpoint to the cultural and
legal deconstructions presented in Chapters One and Two. Chapter Four
follows by grouping together the "lessons" of the cultural, legal, and com-
parative deconstructions in order to take stock of the insights afforded by
the preceding discussions. Chapter Five turns toward doctrinal reconstruc-
tion, presenting principled bases for, and the results of, non-conflationary
treatments of sex, gender, and sexual orientation, both as social constructs
and as concepts underlying legal doctrines. Finally, the Afterword & Pro-
logue presents both a discussion of and a call to Queer legal theory to help
elaborate this Project's overall relevance to and within critical legal theo-
ries. In presenting these discussions, this Project endeavors to make some
contribution toward the attainment of sex/gender harmony in American law
and society.

\textsuperscript{17.} As used in this Project, the term "legal culture" signifies the system of persons, institutions,
and processes that make, interpret, and apply bodies of substantive rules or doctrines, typically in the
form of legislation, administrative rulings, and case law.