Chapter One
Modern Culture: Codification & Internalization

INTRODUCTION

Chapter One of this Project documents the conflation of sex, gender, and sexual orientation in modern Euro-American culture in order to introduce and contextualize the critiques that follow. This documentation shows that mainstream sexologists effectively codified the conflation as a formal intellectual construct in the form of clinical theory based on a pre-existing active/passive sex/gender paradigm at or around the turn of this century. At the same time, leading members of sexual minority communities embraced and internalized this conflation. Today, the conflation is still clinically and culturally ubiquitous throughout American society.

Accordingly, Part I of this Chapter focuses on the formalization of the conflation through the combined efforts of mainstream sexologists and sexual minority activists concentrated in northern Europe. Part II focuses specifically on American society from the early decades of this century to the present in order to depict the conflation’s permeation of this nation’s culture and consciousness in modern times. Together, Parts I and II endeavor to provide a comprehensive, thorough, and critical presentation of the conflation’s presence in, impact on, and interaction with, modern Euro-American culture. Part III then provides a brief overview of nature, normality, and morality, and of their equation as a trinity. This trinity of concepts jointly drive the themes that shape(d) both mainstream and minority perspectives on the conflation, and thus help to shape the conflationary status quo. This discussion creates a historical, intellectual, and rhetorical framework for the investigations and critiques presented in the following Chapters of this Project.

I
THE CONFLATION OF SEX, GENDER, & SEXUAL ORIENTATION

Only during the past two decades have researchers in the social sciences charted the knowledge that is indispensable to understanding the conflation in law and society. That sexual minorities have attracted scholarly


In addition to books, several scholarly journals are devoted to issues that are of special concern to sexual minorities. Several are managed by the Haworth Press, based in New York City, including: the Journal of Gay & Lesbian Psychotherapy; the Journal of Gay & Lesbian Social Services; the Journal of Homosexuality; the Journal of Psychology & Human Sexuality. The University of Chicago publishes the Journal of the History of Sexuality. Tribe, a gay and lesbian literary journal, is published independently from New York City. The law school at Tulane University publishes Law & Sexuality, which is devoted to lesbian and gay issues. The nation’s first journal to be published via the Internet, the National Journal of Sexual Orientation Law, was founded at the University of North Carolina and debuted in 1994, and may be accessed by sending to telnet at “listserv@unc.edu” the following message (replacing the italicized phrases with the appropriate information): “subscribe gaylaw first-name last-name.”

This recent explosion follows ground-breaking works appearing either shortly before or after the Stonewall Riots of 1969 in New York City, which generally are considered the point of departure for the development of American contemporary sexual minorities. See, e.g., Vern L. Bullough, Homosexuality: A History from Ancient Greece to Gay Liberation (1979); Wainwright Churchill, Homosexual Behavior Among Males: A Cross-Cultural and Cross-Species
interest only recently is not surprising, given the history of silence that hampers modern researchers in this field.\textsuperscript{87} Because this burgeoning literature consistently points to the turn of the century as the critical moment at which the conflation was indelibly engraved in Euro-American formal thought,\textsuperscript{88} our deconstructive inquiry begins with that period. However, a brief sketch of the pre-existing, underlying sex/gender scheme is presented first as important background information. This Project denominates this scheme the “active/passive paradigm.”

\textbf{A. The Active/Passive Paradigm}

Not surprisingly, turn-of-the-century developments reflected the broader history and environment of Euro-American culture, and thus accommodated and continued, explicitly or implicitly, the official and “tra-

\textsuperscript{87} For instance, Del Martin and Phyllis Lyon, two of the earliest and most prominent lesbian activists in the United States, begin their book with the observation that, “[s]o little is known about the Lesbian that even Lesbians themselves are caught up in the myths and stereotypes so prevalent in our society.” \textit{Del Marti and Phyllis Lyon, Lesbian/Woman} 11 (Twentieth Anniversary ed. 1991); see also Jeffrey Weeks, \textit{Movements of Affirmation: Sexual Meanings and Homosexual Identities, in Passion and Power}, supra note 86, at 70, 83-84 (outlining the scholarly landscape and describing the “acute sense of intellectual isolation” that surrounded early research efforts during the mid-1970s); Jeffrey Weeks, \textit{Discourse, Desire and Sexual Deviance: Some Problems in a History of Homosexuality, in The Making of the Modern Homosexual} 76 (Kenneth Plummer ed., 1981) [hereinafter Weeks, \textit{Discourse, Desire, and Sexual Deviance}] (analyzing the lack of a universal theory and history of homosexuality). But see Kenneth Plummer, \textit{Building a Sociology of Homosexuality, in The Making of the Modern Homosexual}, supra at 17 (briefly chronicling the sociological inquiries into same-sex sexuality and discussing the dangers of an emphasis on the homosexual as a distinct category of study); Thomas Yingling, \textit{Sexual Preference/Cultural Reference: The Predicament of Gay Culture Studies, 13 Am. Literary Hist.} 184 (1991) (arguing that any attempt to separate homosexuality from sexuality in general contributes to the perpetuation of the status quo). See generally \textit{Forbidden History: The State, Society, and the Regulation of Sexuality in Modern Europe} (John C. Fout ed., 1992) (collecting essays that “are representative of the new approach to the history of sexuality and reflect the dramatic change in perspectives of contemporary scholarship”).

That historians, sociologists, anthropologists and others have redeemed so quickly such a wealth of data attests to the topic’s untapped richness, especially given the history of silence. The large quantity of recently uncovered data, however, prevents this Project from presenting a comprehensive, yet detailed, account of the literature. This Project therefore compresses nuances that are not directly relevant to the conflation of sex, gender, and sexual orientation in Euro-American societies. As partial compensation, the footnotes are designed to provide ample leads to sources that provide deeper and broader readings. See, e.g., sources cited at supra note 86.

\textsuperscript{88} Though the conflation’s origins stretch to antiquity, turn-of-the-century events provide a useful starting point for a historical analysis because the codification of the conflation at this time brings the subject into sharp relief. For a continuation of the analysis into antiquity, see Valdes, supra note 9.
constructions of sex/gender roles or identities that had been established over time. According to traditionalist standards, gender, though typically couched in masculine/feminine terms, in fact was officially and culturally conceived in two basic types: active and passive. These two types were then assigned formally to each sex in the form of a definite, fixed, and permanent gender deemed officially “correct” for each sex. In this way, the active/passive paradigm served as the progenitor of the conflation as we know it today; like the conflation today, this paradigm served to structure society based on active/passive precepts regarding sex-determined gender, and to secure adherence to those precepts and their resulting sex/gender categories and hierarchies.

89. These “traditionalist” sex/gender arrangements date from antiquity, when Greco-Roman societies institutionalized patriarchy as the formal ideological basis for the establishment and organization of the state. Accordingly, the conflation also emanates from antiquity. This gradual evolution is beyond the scope of this article, but is presented in Valdes, supra note 9. See also infra note 91 and authorities cited therein on ancient sex/gender culture.

90. For instance, inversion theory confirmed that the sex-determined gender of women did not permit an interest in education, careers, or public pursuits. See infra notes 138-139 and accompanying text. As others have noted, the traditionalist arrangement historically has been patriarchal, and has established control over sexuality as one of the most important means and objectives of social regulation. See, e.g., D’Emilio & Freedman, supra note 86, at xvii (“Systems of sexual regulation, like sexual meanings, have correlated strongly with other forms of social regulation, especially those related to race, class, and gender.”); Elaine Showalter, Sexual Anarchy: Gender and Culture at the Fin de Siècle 11 (1990) (delineating several elements of the system of patriarchy as “its class structures and roles, its system of inheritance and primogeniture, its compulsory heterosexuality and marriage, and its cultural authority”); Carol Groneman, Nymphomania: The Historical Construction of Female Sexuality, 19 Signs: J. Women Culture & Soc’y 337, 341 (1994) (“Starting in the late eighteenth century, woman’s nature was increasingly defined as inextricably bound up with her reproductive organs . . . creating the new framework within which physicians and other authorities found justifications for the limitations of women’s social and economic roles.”); see also Cynthia Fuchs Epstein, Deceptive Distinctions: Sex, Gender, and the Social Order 118-35 (1988) (exploring social controls exerted over women); Barbara Epstein, Family, Sexual Morality, and Popular Movements in Turn-of-the-Century America, in Powers of Desire, supra note 86, at 117 (analyzing the turn-of-the-century birth control movement as a threat to male authority in the family). For a general selection of readings, see Woman in Sexist Society: Studies in Power and Powerlessness (Vivian Gornick & Barbara K. Moran eds., 1971).


92. See generally Valdes, supra note 9.
Under this paradigm, and therefore under the conflation, gender in Euro-American culture was and is officially constructed both as deductive and as intransitive. The Euro-American construction of gender is officially and culturally "deductive" because it is deduced by society and its agents or institutions of power wholly and exclusively from the sex assignment. This construction furthermore is officially and culturally "intransitive" because gender's manifest fluidity among the populace—its popularly manifested transitivity—is adamantly denied and consistently repressed by dominant sex/gender forces. As seen below, both this paradigm and the conflation operate to secure the intransitivity, or the personal and collective uniformity, of deductive, or sex-determined, gender.

The deductive/intransitive gender model thus is rooted in the active/passive paradigm, which in turn is based on sex. This paradigm thereby arranged and applied sex-determined gender to create standards of "correctness"—and to identify areas of needed correction—regarding sex and gender. This paradigm, and later the conflation, in practice serve(d) to keep human life and culture in line with the societal interests of dominant sex/gender forces.

Thus, the paradigm and the conflation each pivot on sex, and both operate as bases for societal organization and for human identity. Both also serve(d) as key means of policing sex/gender arrangements; as illustrated below, both the active/passive paradigm and the conflation drawn from it regulate society and its members socially and sexually along these ancient, traditionalist, active/passive lines. And, both maintain and enforce these lines to deter and punish social or sexual departures from, or disruptions of, conflationary dictates. It is important, however, to emphasize at the outset that this paradigm was not exclusively or primarily about sexuality and its regulation; on the contrary, this paradigm provided a basic gender divide—active or passive—that encompassed both the sexual and the social domains, attributes, and interactions of humanity in Euro-American societies.

Because this traditionalist framework posited an active/passive sex-based gender paradigm as the foundation of societal order, the paradigm defined and pervaded social or "public" life. The paradigm institutionalized

93. See infra Part B.1 and Chapter Two, Part I.A; see also Chapter Four, Part III.A.1.
94. See, e.g., infra Part I.B.1-4 and Part II.B.1-3.
95. This "inverted" invocation of the now-cliched term, "political correctness," is deliberate, and is furthermore calculated to suggest here and throughout this Project the absurdity (and hypocrisy?) underlying the hue and cry raised in recent years by historically dominant forces over the imagined "political" tyranny purportedly being exercised by traditionally subordinated groups. See generally Janin B. Raskin, The Great PC Cover-up, CAL. LAW., Feb. 1994, at 68 (denominating the "PC" label as "conservative America's choice scare term of the '90s" and arguing that the "political correctness" charge actually is being deployed by culturally dominant forces to stifle the belated but vigorous expression of traditionally subordinated viewpoints).
96. See generally infra Chapter Four, Part I.E-F.
97. See infra Chapter Four, Part I.E.5 and F.
an overarching socio-cultural template over humans and their communities in which man/male was considered ineluctably active, superior, and dominant, and woman/female was rendered passive, inferior, and subordinate. 98

Socially, then, men performed and lorded over the “active” roles, arenas or aspects of life, while women performed supportive and supporting roles that “complemented” the idealized primacy and domination of masculinity, and of the sex imbed with it.

This traditionalist framework similarly assigned each sex a sexual gender role that corresponded to the overall active/passive paradigm: he active, she passive; he “on top” and she beneath him, literally and figuratively. 99 This arrangement therefore favored and demanded couplings that joined an “active” participant with a “passive” participant. Because “active” was deemed masculine and “passive” was deemed feminine, and because masculinity and femininity were dichotomized and assigned deductively based on sex, and because this assignment fixed gender intransitively, this arrangement favored, and ultimately demanded, cross-sex couplings in sexual or “private” life. 100 The application of this paradigm to sexual roles or arenas idealized, and over time generated the cultural (and legal) hegemony of, heterosexual and hetero-patriarchal couplings. 101

This paradigm, then, was and is first and foremost an androsexist scheme that (d)eveloped into heterosexism because it encompassed both social/public and sexual/private domains. In other words, androsexism is the paradigm’s substantive or ideological core; heterosexism is its

98. The active/passive framework of course was fundamentally unequal. Thus, in addition to classifying all humans, the active/passive divide also served to carve the political, economic, physical, and sexual geography of the community according to sex-determined gender in precise correspondence to the allocation of human endeavors into public and private spheres. For an account of the active/passive, public/private scheme as integrated into the regulation of sexuality during the ascendancy of Victorian sexology, see Jeffrey Weeks, Sex, Politics and Society: The Regulation of Sexuality Since 1800, at 81-93 (1981). See also Ruth Gavison, Feminism and the Public/Private Distinction, 45 Stan. L. Rev. 1 (1992) (observing that the public/private distinction contributes to the invisibility of women). For a general discussion of the public/private distinction in American law, see Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423 (1982); Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349 (1982). See also Karl E. Klare, The Public/Private Distinction in Labor Law, 130 U. Pa. L. Rev. 1358, 1359 (1982) (emphasizing the use of the public/private distinction “not just as a background motif but very often as an essential ingredient of the grounds for decision” in the adjudication of workplace disputes); Joseph W. Singer, Legal Realism Now, 76 Calif. L. Rev. 467, 477-503, 528-32 (1988) (reviewing Laura Kalmam, Legal Realism at Yale: 1927-1960, and discussing the origins of the public/private distinction in the context of classical contract doctrine, the legal realist critique of that distinction, and liberal legal theory’s attempt to recreate it).


100. For a quintessential expression of this ordering, see infra note 875 and accompanying text.

101. See also infra Chapter Four, Part I.E.1.
byproduct.  

Under the paradigm sex and gender were put to the service of patriarchy and in this way created hetero-patriarchy. This arrangement in turn set the stage for the interplay of Leg One and Leg Two of the conflation.

As we see below, in modern culture (as well as in legal culture) the interplay of Leg One and Leg Two involves the frequent (if not uniform) use of the second leg strategically in order to effectuate the first leg substantively. The respective roles of androsexism and heterosexism in the active/passive paradigm thus foreshadowed the strategic conflation of gender and sexual orientation under Leg Two to help keep in place the substantive conflation of sex and gender under Leg One. In tandem, the two legs serve to keep hetero-patriarchy in place: as this Project in its entirety demonstrates, the combined operation of the conflation's first and second legs in modern (and legal) culture (re)produces both the androsexism and the heterosexism of the active/passive paradigm.

The active/passive sex/gender divide thus formed the basic parameters and demarcations of the social/public and sexual/private order by regulating both aspects of life based on sex and through gender. In this way, the active/passive paradigm, and its official view of gender, served and serves as the basic organizing principle for Euro-American societies, identities, and affairs in both social/public and sexual/private matters.

This overarching paradigm consequently established or foreshadowed six key sex/gender themes that later became official and central features of modern conflationary belief systems clinically, culturally, and legally. These themes are:

1) First, this paradigm established the fundamentality of sex to personality and society; under the paradigm, sex became the basis for organizing the person, the sex/gender system, the society. Sex was and is the formal and normative base of conflationary structures, systems, and arrangements.

2) Second, this paradigm established gender as deductive, and foreshadowed the intransitivity of deductive gender; under the paradigm, gender was determined by sex and was heavily regulated to ensure compliance with society's sex/gender preferences which, at the time, officially permitted only a limited range of gender fluctuations. This mixed arrangement, in historical retrospect, set the stage for later clinical and cultural beliefs that regarded the sex/gender assignment as unalterable, thus foreshadowing the resulting problematization of gender intransitivity, or gender atypicality, in modern times.

102. See infra note 937.

103. See generally infra Chapter Four, Part I.A.-B.

104. The regulated but permitted fluctuation of gender in classical times under the active/passive paradigm as it existed then is discussed in detail in Valdes, supra note 9.
3) **Third, this paradigm established the bi-dimensionality of gender;** under the paradigm, sex-determined gender comprised both social and sexual dimensions that fixed and regulated both the social and sexual aspects and spheres of human personality and life. Gender's bi-dimensionality collapsed social and sexual life, and thus set the stage for the clinical codification of sexual orientation as the sexual component of sex-determined gender under the conflation at the turn of this century.

4) **Fourth, this paradigm established both the exclusivity and the mutuality of social and sexual aspects of gender;** under this paradigm, social and sexual components of gender were ascribed to each sex in mutually exclusive assignments, thereby inviting the conflationary linkage of social and sexual gender (a)typicality and (in)intransitivities. Consequently, this arrangement placed in motion the cross-association and cross-problematization of social and sexual gender (a)typicality or (in)transitivities that in modern times has played such a prominent role in the conflation's clinical and cultural operation.

5) **Fifth, this paradigm in part established and in part foreshadowed the problematization and pathologization of cross-gender persons and phenomena;** under this paradigm, gender's intransitivities, while not firmly established, was highly guarded and regulated, thus inviting and facilitating the subsequent wholesale pathologization of gender atypicality, both socially and sexually. This paradigm, in other words, effectively established a presumption against cross-gender persons and phenomena, thus presaging the modern-day clinical codification of this presumption in absolute terms to impose and enforce social and sexual gender correctness across the cultural board.

6) **Sixth, and finally, this paradigm established a preference for androsexist sex/gender arrangements and foreshadowed a preference for heterosexist arrangements as well;** under the paradigm, maleness was indubitably preferable to femaleness although cross-sex relations were not indubitably preferable to same-sex relations. Eventually, and perhaps inevitably, the five themes outlined above combined together to generate this final theme, making the androsexist paradigm heterosexist as well. This paradigm, therefore, ultimately portends the institutionalization of hetero-patriarchy under the conflation of sex, gender, and sexual orientation.

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105. See infra Chapter Four, Part I.E.1.
106. See generally Valdes, supra note 9.
As the conflationary record of modern culture unfolded below shows, these six themes frame and drive the clinical and cultural notions and actions that codified the conflation around the turn of this century.

Moreover, as the later parts of this Chapter show, these themes continue to frame and drive the conflationary status quo today. Finally, as Chapter Two shows, these six themes also frame and drive the conflation's operation in legal culture today. Understanding the active/passive paradigm, and the themes that flow from the paradigm, is therefore key to deconstructing (and disabling) the conflationary status quo historically, currently, and legally.

In sum, this basic framework, and its use of active/passive sex/gender rules and symbolisms, predated and provided the historical and conceptual genesis for the conflation's formalization in the early decades of this century. Accordingly, the active/passive paradigm set the stage for the eventual rise of inversion theory and its later clinical cousins, which in turn reflected and reinforced the paradigm's traditionalist and proto-conflationary regime to stigmatize and penalize (and thereby minimize) both social and sexual disruptions of its sex/gender order(ing).

B. Inversion Theory: The Conflation Codified

Reflecting Victorian notions of femininity and masculinity, British and other European sexologists developed a theory of "inver-
tion at the turn of the century to channel the development of humans. As a clinical theory, sexual inversion comprised a grab bag of perceived sex/gender (dys)functions that reached its zenith in the years preceding World War II. Basically, the diagnosis officially labeled the invert as an individual whose identification with, and performance of, “correct” sex-derived gender had been stunted, and thereby inverted. In other words, inverts were men perceived as having “passive” (or feminine) gender qualities, and women perceived as having “active” (or masculine) gender qualities; both were deemed inverted because both manifested gender transitivity, or gender atypicality. Thus, inversion theorists were primarily

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For general readings on sexology in recent decades, see New Directions in Sex Research (Ell A. Rubinstein et al. eds., 1976); Progress in Sexology (Robert Gemme & Connie C. Wheeler eds., 1977); The Prevention of Sexual Disorders: Issues and Approaches (C. Brandon Qualls et al. eds., 1978). See also Vern L. Bullough, A Historical Approach, in Theories of Human Sexuality, supra at 49 (explaining the way in which historical attitudes based on theological and other cultural sources helped shape clinical perceptions of human sexualities); Beth E. Schneider & Meredith Gould, Female Sexuality: Looking Back into the Future, in Analyzing Gender: A Handbook of Social Science Research 120 (Beth B. Hess & Myra Marx Ferree eds., 1987) (advancing a feminist sociological critique of research on sexuality); Carole S. Vance, Gender Systems, Ideology, and Sex Research, in Powers of Desire, supra note 86, at 371 (critiquing the biases of “modern liberal sexology”).

110. As used in this Project, the term “inversion” signifies the basic conceptual interrelationships of sex, gender, and sexual orientation that inversion theory encapsulated, and that equated the inversion of gender with homosexuality. See, e.g., C.A. Tripe, The Homosexual Matrix 22 (1975) (“In the past, homosexuality and inversion were universally thought of as identical.”). Of course, individual sexologists naturally added their personal glosses to the basic theory. See, e.g., Havelock Ellis, Psychology of Sex 222-24 (new ed. 1938) (summarizing the views of various sexologists); see also infra notes 122-47 and accompanying text. Indeed, sexologists sometimes modified their theories as the collective sense of sexology gravitated from one viewpoint to another. See, e.g., Jeffrey Weeks, Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present 25-31 (rev. ed. 1990) (summarizing development of inversion precepts). Such variations or modifications are not critical to this discussion, however, because they did not alter the theory’s fundamental premises or imperatives regarding sex, gender, and sexual orientation.

concerned with the culture's preferred alignment of the individual's sex and gender under Leg One.\textsuperscript{112}

However, as will become readily apparent below, the emergence of inversion theory, and of sexology generally, during the Victorian era codified both Leg One and Leg Two of the conflation. These two legs operate jointly because together they represent the conflation of sex-determined gender with sexual orientation.\textsuperscript{113} This codification thus incorporated the active/passive construction of gender as deductive and intransitive, and it formalized at once both the conflation of all three endpoints and of the conflation's first and second legs. In this manner, the turn of the century witnessed the formal construction of this conflation as one whole via the clinical codification of the first and second legs.

But inversion, and its subsequent clinical progeny, also shed light on the particular(ized) way(s) in which these two legs operate in tandem. This theory, and others that came later, effectively positioned and employed Leg Two to vindicate Leg One. In other words, inversion's theory and practice oftentimes cited Leg Two concerns in order to initiate and justify clinical interventions designed to terminate disruptions of Leg One. In turn, this strategic/substantive inter-relationship between these two legs is matched by contemporary clinical and cultural attitudes\textsuperscript{114} as well as contemporary legal practices.\textsuperscript{115} This critique of inversion theory and its codification of the conflation in the early years of this century thus begins this Project's searching examination of the way(s) in which Leg Two was and is used strategically to maintain and sustain Leg One substantively, and how both legs operate individually and as a pair to reinforce hetero-patriarchal supremacy.

This account, therefore, addresses all three endpoints, and focuses on the process of conflating deductive and intransitive sex-determined gender with sexual orientation, as represented cumulatively by Leg One and Leg Two of the conflation. In doing so, this account documents how these legs of the conflation operate(d) in tandem, both to inspire or impose traditionalist active/passive sex/gender precepts and to prevent or punish sex/gender "deviants" and dissidents. The third leg, corresponding to the miscegenation analogy,\textsuperscript{116} is discussed later in the Project to complete a comprehen-

\textsuperscript{112} The concern continues in modern times as well. See, e.g., Richard C. Pillard, \textit{Masculinity and Femininity in Homosexuality: "Inversion" Revisited}, in \textit{Homosexuality: Research Implications for Public Policy} 32 (John C. Gonsiorek & James D. Weinrich eds., 1991) (surveying recent studies that continue to reflect inversion's earlier conflation of sex, gender, and sexual orientation). See also infra Part II.B.1-3. See generally \textbf{Laurel R. Wallum}, \textit{The Dynamics of Sex and Gender: A Sociological Perspective} (1977) (discussing and analyzing the social history that fused sex and gender).

\textsuperscript{113} See generally supra note 37.

\textsuperscript{114} See, e.g., infra Part II.B.1-4.

\textsuperscript{115} See infra Chapter Two.

\textsuperscript{116} See supra Foreword, Part I.C.
sive charting of the conflation and its (re)production and enforcement of the active/passive sex/gender status quo.117

1. Leg One: Sex & Sex-Determined Gender

Lacking today's sophistication regarding the various elements that comprise the construct called "sex," sexology (following dominant traditions) routinely and officially assigned the attribute on the basis of observable or external genital anatomy.118 As with the active/passive paradigm, official assignments of sex therefore serve(d) as the basis of this conflation. And because official sex was assigned on the basis of external genitalia, this feature of the body also serve(d) as the basis for the sex/gender system as a whole.

However, the anatomical observation triggered not only the assignment of an official sex, but of an official gender as well: the "correct" gender identification was the one that coincided with the sex assigned to the individual at birth. This second assignment officially and permanently fixed the social (and sexual) personality attributes that the individual was

117. See infra Chapter Two, Part II.C.4 and Part V. See also infra Chapter Five, Part II.B.4.

118. The practice of assigning sex on the basis of external genitalia continues. For instance, one commentator explains that

[There is no formal legal determination of sex at birth. The decision as to the sex of a newborn child is ordinarily made at the time of birth by the attending physician or other person in attendance, and is customarily predicated upon a superficial examination of the external genitalia of the baby. The child's apparent sex is then recorded on a birth certificate.

John P. Holloway, Transsexuals—Their Legal Sex, 40 U. Colo. L. Rev. 282, 286 (1968). See also infra notes 340-366 and accompanying text.

However, contemporary experts maintain that an individual's sex comprises between six and eight elements, with "external genitalia" counted among them but not considered paramount. See, e.g., Money, supra note 46; Richard Green, Note, Spelling "Relief" for Transsexuals: Employment Discrimination and the Criteria of Sex, 4 Yale L. & Pol'y Rev. 125, 126 (1985). See generally 1 Stoller, Sex and Gender: The Development of Masculinity and Femininity, supra note 51, at vi (summarizing recent work regarding the "development, maintenance, and manifestations" of masculinity and femininity as sex and gender). This contemporary view indicates that varying mixes of the elements constituting sex may exist among people, thus inviting a view of sex as a continuum rather than a dichotomy. Therefore, an individual's sex may fall along many points in the spectrum of possible combinations of the elements of sex, rather than on one of two bi-polar extremes. See, e.g., Salvatore Cucchiari, The Gender Revolution and the Transition from Bisexual Horde to Patrilocal Band: The Origins of Gender Hierarchy, in Sexual Meanings, supra note 86, at 31, 33 ("That human beings are thought to come in two distinct varieties is primarily a cultural fact . . . ."). See generally infra Part III and infra Chapter Four, Part III.A.4 and B.

Interestingly, Havelock Ellis foreshadowed contemporary views.

It may seem easy to say that there are two definitely separated distinct and immutable sexes, the male that bears the sperm-cell and the female that bears the ovum or egg. That statement has, however, long ceased to be, biologically, strictly correct. We may not know exactly what sex is; but we do know that it is mutable, with the possibility of one sex being changed into the other sex, that its frontiers are often uncertain, and that there are many stages between a complete male and a complete female.

Ellis, supra note 110, at 225; see also Laqueur, supra note 48 (discussing the sex and gender dualisms in Euro-American history and culture); Bonnie B. Spanier, "Lessons" from "Nature": Gender Ideology and Sexual Ambiguity in Biology, in Body Guards, supra note 86, at 329 (discussing "gender ambiguity" as the biological state of affairs). See also infra note 241.
expected to exhibit as she or he matured. Under this arrangement, gender effectively became the social/public (and sexual/private) performance of sex. Thus, sex and gender were formally enmeshed, and Leg One emerged as the centerpiece of the conflation.

Although this arrangement formally and officially conflated sex and gender, a key difference between the two attributes was believed to exist, and this difference proved critical to the clinical and cultural treatment of gender: while sexology deemed both sex and gender inborn, only sex was deemed conclusively realized at birth. Gender, though ascribed deductively and intransitively at birth, remained socially (and sexually) inchoate. As the unstable attribute, gender became the object of enormous concern—the unceasing fear was that gender might diverge from sex, or that the “normal” performance of one’s sex via the “correct” gender might be interrupted or endangered. Consequently, the task of inversion theory and treatment was to protect hapless individuals from that danger intervening wherever and whenever such danger seemed imminent.

In effect, inversion theory amounted to the practice of sex/gender correctness. The mission of inversion theory was to enforce and reinforce the conflation and its active/passive sex/gender precepts, both socially and sexually; inversion’s diagnostic mission was to protect the traditionalist and official order(ing) from disruption by uncovering gender atypicality, dissen- sion, or resistance. Therefore, the result was the creation of formal gender profiles for each sex that, like the active/passive paradigm, extended over both social (or public) and sexual (or private) realms of human life to suppress sex/gender incorrectness in every respect.

2. From Leg One to Leg Two: Cataloging the Deductive Gender Composite

Because gender was mandated by anatomy, but not actualized by it, the prevailing cultural preoccupation with sex and gender conformities impelled sexology to devise means by which society and its clinical agents could gauge and steer each person’s “correct” actualization of his or her gender, and thereby his or her “normal” performance of sex. As just noted above, under inversion’s traditionalist sex/gender framework, the correctness of any given gender attribute or role hinged entirely on the sex assigned officially to the individual at birth; conformance to sex thus became the gauge for “correct” actualization of the individual’s gender. Logically, then, personality traits associated with each sex, and correlated to

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119. In this scheme, gender constitutes a “system of meanings [that] is related to other meanings in the realm of culture.” Cucchiari, supra note 118, at 33.
120. See supra Foreword, Part I.A.
121. Thus, “[c]ulturally specified ideals of gender characteristics are of signal importance, because they are the conscious goals of socialization, especially early socialization.” William H. Davenport, An Anthropological Approach, in Theories of Human Sexuality, supra note 109, at 197, 207.
each gender, required a thorough and definitive cataloging; sexologists
applied themselves to the task with the zeal of botanists in the jungle.122
Their efforts purported to scientize human sex/gender attributes, and
combined to mine social (and sexual) terrains with rules and regulations capable
of transforming the simplest interest or interaction into disorder or disease.

In their efforts to catalogue personality traits, sexologists, not surpris-
ingly, focused on inverts—those pathologized individuals exhibiting non-
conforming sex/gender attributes. Several mainstream sexologists, for
instance, explained that “male inverts like pleasant, artistic things, and
nearly all of them are fond of music. They also like praise and admiration.
They are poor whistlers. Their favorite color is green.”123 Richard V.
Krafft-Ebing, one of the most influential turn-of-the-century sexologists,
delineated various levels of deviance for the classification of inverts. Under
his taxonomy, women in the least afflicted category were capable of “not betray[ing] their anomaly by external appearances,” whereas women in the
most afflicted category apparently were mere shells of womanhood—they

122. Of course, the confidence with which turn-of-the-century sexologists undertook to catalogue
gender reflects the exuberance of “scientism” at that time, and, in retrospect, its naiveté as well. See generally supra notes 21 and 22 and authorities cited therein on feminist deconstructions of gender
issues in recent years.

123. KATZ, ALMANAC, supra note 86, at 456 (quoting John F. Meagher, Homosexuality: Its
Psychobiological and Psychopathological Significance, 33 UROLOGIC & CUTANEOUS REV. 505, 508-09
(1929)); see also ELLIS, supra note 110, at 230, 232 (“Many [male] inverts describe themselves as
‘sensitive’ or ‘nervous.’ . . . Male inverts are sometimes unable to whistle. . . . The love of green (which
is normally a preferred color chiefly by children and especially girls) is frequently observed.”).

The significance of the color green apparently has continued to resonate in more modern times as
well. For instance, Marjorie Garber writes that when she “was in grade school in the 1950s it was
green, not red, which was for some reason considered to be the ‘homosexual’ color; to wear green
inadvertently on a Thursday was to be the butt of jokes all the more tiresome for not being fully
understood.” MARJorie GABEr, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 2
(1992). Finally, as Ms. Garber notes, “These days it is lavender, or purple, that is the color that
proclaims gay self-identification—lavender, and also pink, in the pink triangles used by the Nazis to
label and stigmatize homosexual men, now defiantly ‘inverted’ by gay activists on T-shirts and buttons
as a sign of gay pride.” Id.

Of course, the Nazi choice of the color pink to signify gay males was itself a gender symbolism;
that is, it applied to the invert the color associated with female infants and youth. Interestingly, the Nazis
used a black triangle to denote female inverts, or lesbians. For more on the Nazi use of the pink triangle,
and the persecution of sexual minorities during the Nazi regime, see infra note 180 and authorities cited
therein.

Curiously, and perhaps to the horror of contemporary male “power players” on Wall Street, red
neckties also became a symbol (or symptom?) of inversion. Fifteen years before writing about the color
green, and following a tour of the United States, Ellis noted that “of recent years there has been a
fashion for a red tie to be adopted by inverts as their badge. This is especially marked among the
‘fairies’ (as a fellator is there termed) in New York.” KATZ, HISTORY, supra note 86, at 81 (quoting
Havelock Ellis, Sexual Inversion 299-300 (3d ed. 1915)). Ellis further quoted an American with
whom he corresponded, “himself inverted,” who provided more details on this point:

It is red . . . that has become almost a synonym for sexual inversion, not only in the minds of
inverts themselves, but in the popular mind. To wear a red necktie on the street is to invite
remarks from newsboys and others—remarks that have the practices of inverts for their theme
. . . . [Red neckties are] the badge of all their tribe.

Id. See generally CHANCEY, supra note 86 (recounting in detail the sexual minority male sub-culture
in New York at the turn of the century and during the early decades of this century).
"possesse[d] of the feminine qualities only the genital organs; thought, sentiment, action, even external appearance [were] those of the man."124

The very prominent and relatively progressive Havelock Ellis similarly concluded that "[i]n male inverts there is a frequent tendency to approximate to the feminine type and in female inverts to the masculine type; this occurs in both physical and psychic respects."125 Moreover, Ellis found that "[s]ome professions show a higher proportion of inverts than others. . . . [I]nversion] is more frequent among literary and artistic people, and in the dramatic profession it is often found. It is also specially common among hairdressers, waiters, and waitresses."126 Other sexologists devised their own classification schemes along similar lines.127 As such, gender became a highly complex official composite of personality characteristics mandated by sex and acted out through recognizable social (and sexual) roles. Inversion theory, like the sex/gender system as a whole, thus was constructed on the cultural adhesion of deductive, intransitive gender to external genitalia, and on the corresponding active/passive social/public boundaries that constitute(d) and animate(d) the first leg of the conflation.128

Within this clinical framework, the invert's condition was detectable in countless ways: women who looked like, acted like, or sounded like men, or who liked the things that were considered masculine, were deemed beset with the affliction. Likewise, inversion manifested itself in men whose looks or likes reflected the attributes normatively and clinically assigned to femininity. Inverts, in sum, were women and men who appeared to be gen-

125. ELLIS, supra note 110, at 231; see also Weeks, supra note 110, at 57-67 (discussing Ellis' theories of inversion).
126. ELLIS, supra note 110, at 221. See also ROBINSON, supra note 109, at 7 (discussing the "unusual artistic aptitude" that Ellis found among his case studies of male inverts). A similar connection between the inversion of gender or sexual orientation and aptitudes for certain jobs or professions was also espoused by a prominent female invert. See infra note 162 and accompanying text. Interestingly, a study of occupational choices by male homosexuals and heterosexuals conducted in Phoenix, Arizona and Sao Paulo, Brazil during 1977-78 issued similar findings: "[t]he most striking finding is the strong interest in entertainment and the arts among male homosexuals in both societies." Frederick L. Whitam & Mary Jo Dizon, Occupational Choice and Sexual Orientation in Cross-Cultural Perspective, in HOMOSEXUALITY IN INTERNATIONAL PERSPECTIVE 5 (Joseph Harry & Man Singh Das eds., 1980).
127. ELLIS, supra note 110, at 229-30 (summarizing several of the clinical schemes).
128. See supra Foreword, Part I.A.
der transitive, or gender atypical—individuals who articulated a cross-gen-

Thus, the hallmark of the invert was not the commission of same-sex
acts, nor even an erotic attraction to members of the same sex, but a failure
to adopt the multiple gender stances assigned to her or him at birth based
exclusively on external genitalia, or sex. The hallmark of the invert, was
sex/gender incorrectness socially: a failure to perform sex via gender in
accordance with the conflation of these two constructs under Leg One. This
focus on the proper social manifestations of gender highlights the substan-
tive primacy of Leg One to the conflation and its codification.

Yet, it was through these cataloging efforts that sexology also specifi-
cally codified the conflation’s second leg, making sexual orientation offi-
cially integral to this conflationary scheme as well. This additional
conflation thus suggests that Leg Two would serve as a buttress for Leg
One. Inversion’s additional codification of Leg Two, and its application of
Leg Two in practice, next shows how this leg was codified clinically, and
how it can be (and oftentimes is) used strategically to help police the sub-
stance of Leg One.

3. Leg Two: Sex-Determined Gender & Sexual Orientation

Through inversion theory, sexuality became subsumed within gender
because active/passive stances during or in sexual/private intimacies were
officially part of the overall gender composite being built for each sex on
the basis of the active/passive paradigm. Thus, sexology’s comprehen-
sive cataloging of deductive, intransitive gender inevitably ensnared sexual-
ity, and hence sexual orientation; having conceived and constructed gender
as the performance of sex, inversion also conceived and constructed sexual
orientation as the performance of sex-determined gender during sexual
activity. And because deductive gender was deemed officially intransitive,
both socially and sexually, sexual orientation officially became the sexual
component of sex-determined gender. This scheme thereby rendered and
problematic same-sex desire as an official form of sex/gender incorrect-
ness. In this way, Leg Two of the conflation was likewise codified at
this time: while making the conflation of sex and gender organic to inver-
sion theory, sexologists further conflated sexual orientation with sex-deter-
mined, or deductive, gender.

129. Inversion “referred to a broad range of deviant gender behavior, of which homosexual desire
was only a logical but indistinct aspect.” Chauncey, supra note 110, at 116; see also Weeks, Discourse,
Desire and Sexual Deviance, supra note 87, at 76 (addressing the distinction “between homosexual
desire and ‘homosexuality’ as a social and psychological category”).
130. See supra Foreword, Part I.B.
131. See supra notes 91-99 and accompanying text.
132. See supra Foreword, Part I.B.
133. While mainstream sexologists devised inversion theory, pioneering sexual minority activists
were engaged in parallel theorizing. This theorizing produced the original conception of
The codification of this second leg of the conflation was evidenced in the very title of the pre-eminent work on homosexuality of that time: Sexual Inversion. With this title Havelock Ellis indicated that sexual orientation was embedded in divergences from proper sex-derived gender norms. Even more explicitly, the prolific Dr. James G. Kiernan flatly defined "pure homosexuals" as persons whose "general mental state [was] that of the opposite sex." Other turn-of-the-century sexologists adopted his definition. For instance, Dr. G. Frank Lydston described "male sexual perverts" as "characterized by effeminacy of voice, dress, and manner," adding that "[t]heir physique is apt to be inferior." Likewise, New York City psychiatrist Dr. John F. Meagher warned that "[p]arents who sissify their sons tend to make homosexuals out of them." Dr. Meagher further explained that "women . . . who want a career" (careers being gender attributes of men only) often are driven by "an unsatisfied sex impulse, with a homosexual aim" whereas "[m]arried women with a completely satisfied libido rarely take an active interest in militant movements" (and thus remained contentedly at home, as their gender required). In like vein, Dr. Meagher continued, "a woman who yearns only for higher education . . . is usually of the frigid type." Thus, defective gender was central to defective sexual orientation, and vice versa.

This conflationary theorizing among eminent professional circles reached extremes that today might seem downright bizarre. For instance, Dr. Meagher concluded that "many homosexual kleptomaniac women are prone to steal silk underwear." Dr. Irving C. Rosse, Professor of Nervous Diseases at Georgetown University, prescribed "manly exercises" and athletics as useful for the avoidance or treatment of same-sex desires among men, asking rhetorically, "who would not rather have his son contract a bad

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"homosexuality" as a type or form of inversion, which illustrates the sex/gender nuances of the conflationary process. Also, it bears emphasis that, even though the minority activists were focusing on what today would be termed sexual orientation, they did not have a general framework of sexual orientation categories in which to situate themselves. Thus, they worked within the extant gender framework. In other words, they situated themselves as sex and gender anomalies due to a de facto sense of sexual orientation. As such, the term "homosexual" in its original usage was intended as a descriptor of sex and gender. See infra Part I.C.1-3.

134. For a good overview of Ellis' life and works, see ROBINSON, supra note 109, at 1-41.
135. KATZ, ALMANAC, supra note 86, at 147, 232 (quoting James G. Kiernan, Responsibility in Sexual Perversion, 3 CHI. MED. RECORDER 185, 198-99 (1892)). Interestingly, Dr. Kiernan defined "heterosexuals" as persons with "inclinations to both sexes" as well as "to abnormal methods of gratification." Id. Thus, heterosexuals originally were akin to today's conception of bisexuals and were not posed as diametrically opposed to homosexuals.

136. Id. at 213 (quoting G. Frank Lydston, Clinical Lecture: Sexual Perversion, Satyriasis and Nymphomania, 61 MED. & SURGICAL REP. 253, 254 (1889)).
137. Id. at 457 (quoting Meagher, supra note 123, at 511).
138. Id.
139. Id. (quoting Meagher, supra note 123, at 508). At least frigid toward men, that is.
140. Id. at 458 (quoting Meagher, supra note 123, at 518).
heart or hernia than to see him a sexual pervert?"

Perhaps the most extreme position was asserted by the renowned Dr. George M. Beard, who intoned that so-called inverts "hate the opposite sex and love their own; men become women, and women men, in their tastes, conduct, character, feelings, and behavior."

Even Sigmund Freud, whose primary emphasis was neither gender nor sexual orientation, felt the conflational pull of inversion precepts. For instance, Freud used the terms "homosexuals" and "inverts" synonymously. In one of his pre-eminent works, *Three Essays on the Theory of Sexuality*, he conceded in passing the utility of inversion's gender-based explanation of same-sex sexual desire. He also generally connected inversion, homosexuality, and gender in his views regarding psychosexual

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141. *Id.* at 235 (quoting Irving C. Rosse, *Sexual Hypochondriasis and Perversion of the Genitalic Instinct*, 17 *J. Nervous & Mental Disease* 795, 810 (1892)).

142. *Id.* at 200 (quoting George M. Beard, *Sexual Neurasthenia: Its Hygiene, Causes, Symptoms, and Treatment, with a Chapter on Diet for the Nervous* 106-07 (1884)) (emphasis added).

143. Freud focused on developing a broad theoretical framework that incorporated sexuality and sexual development into psychology and psychological development. For a summary discussion of Freud's work in light of other sexology theories, see Ethel Spector Person, *A Psychoanalytic Approach, in Theories of Human Sexuality*, supra note 109, at 385. However, Freud's use of concepts such as "penis envy" encapsulated conflational norms because they focused on external genitalia, or sex, as a predominant attribute of humans. For an interesting discussion of Freudian sex and gender constructions, see Leslie Camhi, *Stealing Femininity: Department Store Kleptomania as Sexual Disorder, 5 Differences: A Journal of Feminist Cultural Studies* 26, 27-28 (1993) (discussing Freud's link between "penis envy" and women's achievement in weaving, and how this "genital deficiency" more generally helped to construct femininity as a state of lacking). Additionally, Freud's conception of the Oedipus and Electra complexes shows how he relied on sex and gender conventions to rationalize cross-sexual orientation. The Oedipus and Electra complexes are Freud's account of the way in which sons and daughters resolve their gender and sexual orientation relationships with their fathers and mothers. In effect, Freud's Oedipal and Electra theorizing postulated that the proper development of sexual orientation depended on the proper evolution of sex and gender identity attributes. See, e.g., Eric de Kuyper, *The Freudian Construction of Sexuality: The Gay Foundations of Heterosexuality and Straight Homophobia, 24 J. Homosexuality* 137 (1993) (arguing that the homophobia of the sexual majority "is the result of the remnants of homosexuality in the heterosexual resolution of the oedipal conflict").


Freud's theorizing was highly nuanced and, some have argued, not entirely consistent. For instance, Freud frequently voiced opposition to medical and legal sanctions against inverts because he did not believe that inverts were degenerate or pathological, though he maintained that they nonetheless were inferior beings. See, e.g., *id.* at 54-55. Also, though he was extremely skeptical of, and often cautioned against, attempts to cure inversion or homosexuality, Freud did not absolutely rule out the possibility of "sexual reorientation." See, e.g., Timothy F. Murphy, *Freud and Sexual Reorientation Therapy, 23 J. Homosexuality* 21, 22 (1992).

Perhaps Freud's most remarkable comments about same-sex sexual orientation are contained in his letter to an American mother, written in 1935 as a response to an inquiry about possible therapy for her
Thus, despite his more specialized efforts, Freud was influenced by the conflationary pressures of his time, and in turn, his towering influence helped to catapult inversion’s conflationary tendencies into the future.

4. Summary

In sum, during the decades before and after the turn of the century, the inversion grab bag became the vehicle for the formal, clinical conflation of sexual orientation into sex-determined gender; that is, the means through which sexual personality was incorporated into, and regulated by, the official gender composite that also regulated social or public personality. Following traditionalist arrangements, inversion theory used sex, or external genitalia, as its baseline and then codified the conflation of sex and gender as a basic precept of sexology. Additionally, inversion integrated what we today call sexual orientation into its formal, clinical construction of sex-determined gender, specifically conflating gender atypicality with minority sexual orientation. In this way, inversion conceived and constructed sexual orientation as a sexual form of gender transitivity or sex/gender incorrectness.

In this joint codification of Leg One and Leg Two, however, the latter served as a strategic reinforcement for the former. While both legs operate in tandem, Leg One is the centerpiece of the conflation: disruptions of the sex/gender conflation under this leg is what triggers clinical and cultural

homosexual son. In his letter, Freud chides the mother for conspicuously omitting the term “homosexual” and then soothes her worries, writing:

I gather from your letter that your son is a homosexual. I am most impressed by the fact that you do not mention this term yourself in your information about him. May I question you, why you avoid it? Homoeroticism is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation. It cannot be classified as an illness. We consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals . . . . It is a great injustice to persecute homosexuality as a crime and a cruelty too.

Id. at 29-30 (reprinting the letter in full). Responding directly to the mother’s inquiry about treatment or “cure,” Freud wrote: “The answer is, in a general way, we cannot promise to achieve it.” Id. at 30.

146. Generally, Freud believed that incidents during early childhood with ongoing “after-effects” were typical for those who, as adults, were inverted or homosexuals. See, e.g., FREUD, supra note 145, at 6 (“In the case of many inverted, even absolute ones, it is possible to show that very early in their lives a sexual impression occurred which left a permanent after-effect in the shape of a tendency to homosexuality.”). Friedman notes that Freud explained (male) inverted “compulsive longing for men . . . [as] determined by their ceaseless flight from women.” FRIEDMAN, supra note 145, at 54.

147. For instance, Freud’s references to fear or “flight from women” and “arrested development” as explanations for inversion or homosexuality were later revived as the centerpiece of “fixation” theory after World War II, and were applied to women by extension. See infra notes 211-229 and accompanying text. Indeed Freud’s study of Leonardo da Vinci’s notes and paintings to analyze da Vinci’s psychosexual makeup provides an uncanny progenitor for the typical fixation diagnosis that became popular in the wake of World War II. Freud concluded that da Vinci as a child “had been the emotional dependent of his mother in the context of a distant but threatening father.” Murphy, supra note 145, at 26. Of course, the psychoanalytic framework initiated by Freud has been criticized. See, e.g., FRIEDMAN, supra note 145, at 268; see also WEEKS, supra note 111, at 127-81 (analyzing Freudian sexual constructs).
intervention. In other words, traditionalist concerns relating to Leg Two are asserted to justify the coercive enforcement of Leg One. Inversion thus codified same-sex sexual orientation as one among many aspects of deductive, intransitive gender gone wrong; inversion conflated social gender atypicality with sexual gender atypicality and viewed both as disordered disruptions of the conflationary sex/gender order. Consequently, inversion simultaneously formalized and jointly enforced Leg One and Leg Two of the conflation in order to protect and police traditionalist active/passive boundaries socially and sexually.

This conflationary theorizing became a regulatory device to induce or demand sex/gender correctness in every respect throughout modern culture. This theorizing fit both social and sexual personality firmly within broader societal conceptions of sex/gender attributes under the traditionalist active/passive paradigm. Social and sexual gender typicality (or correctness) confirmed sex/gender health; social or sexual gender atypicality (or incorrectness) revealed sex/gender disorder. Moreover, social and sexual gender (a)typicality were deemed to be cross-correlates. Society specifically targeted, diagnosed, and (mis)treated sexual minorities as part of a general campaign against persons who broke its official sex-determined gender codes. Individuals who today are denominated as gay or lesbian or bisexual were (and are) made sexual outlaws because they were (and are) perceived as gender outlaws by virtue of a gender-atypical sexual orientation.¹⁴⁸

¹⁴⁸. The historical links between sexual orientation and gender typicality remain substantially in place.

Those men, for example, who do not use power for their own benefit [as males]; who do not participate in the process of male power maintenance by defining and enforcing women's sexual roles (e.g., sexual harassment or sexual exploitation of women); and, who do not exhibit other sexual and nonsexual dominance traits can be labeled or threatened with being labeled “homosexual.” By labeling or threatening to label such men as “homosexual,” it is implied that they do not support the dominant male role, nor are they likely to use their male “power” to further the interests of males. This, in itself, justifies excluding some men from positions of power, since they constitute a threat to the continuation of male power.

FRANKLIN, supra note 48, at 167; see also Pillard, supra note 112 (surveying recent studies that reflect inversion's earlier conflation of sex, gender, and sexual orientation); Alan Taylor, Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals, in HOMOSEXUALITY, MASCULINITY AND FEMININITY 37 (Michael W. Ross ed., 1985) (finding a high correlation between traditional gender stereotyping and perceptions of homosexuality); infra notes 250-252 and accompanying text.

Not surprisingly, then, a like correlation exists between negative attitudes toward sexual minorities and opposition to equal rights for women. See, e.g., Kathryn N. Black & Michael R. Stevenson, The Relationship of Self-Reported Sex-Role Characteristics and Attitudes Toward Homosexuality, in BASHERS, BAITERS AND BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY 83 (John P. De Cecco ed., 1985) [hereinafter BASHERS, BAITERS AND BIGOTS] (confirming again the conclusions of a “number of studies [that] have shown that those persons who do not support equality between the sexes and who believe that males and females should maintain separate and traditional sex roles are more negative in their attitudes toward homosexuality”); Gregory M. Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY, supra note 112, at 60, 65 (reiterating findings of previous studies); A.P. MacDonald, Jr. & Richard G. Games, Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals, 1 J.
C. Uranian Self-Identity: The Conflation Internalized

The ascendancy of the scientific method around the turn of the century inspired a sense of hope that science would remedy societal shortcomings, and this hopeful climate set the stage for the pioneering efforts of activists seeking to secure legal rights and social acceptance for then-incipient sexual minorities. Their early efforts centered in Northern Europe—specifically, Germany—and traveled to the United States via England, thus overlapping both temporally and geographically with the efforts of mainstream inversion theorists.149 More significantly, mainstream and minority

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149 The early history of sexual minorities has been reclaimed from obscurity in several excellent works. The best overview is provided in Lauritsen & Thorstad, supra note 86. See also Barry D. Adam, The Rise of a Gay and Lesbian Movement (1987) (providing a general chronological account); D’Emilio, supra note 86 (recounting sexual minority history in the United States after World War II and until the 1970s); Duberman, supra note 86 (providing personalized accounts of the Stonewall Riots of 1969 in New York City); Chauncey, supra note 86 (focusing on gay male subculture in New York City during the late 1800s and the early-to-mid 1900s); Faderman, Odd Girls and Twilight Lovers, supra note 86 (focusing on lesbian history); Andrea Weiss & Greta Schiller, Before Stonewall: The Making of a Gay and Lesbian Community (1988) (focusing on the American experience from 1900 through 1970). See generally Symposium, Historical Perspectives on Homosexuality, 6 J. Homosexuality (1980-81) (providing essays and an annotated historical bibliography).

For broader historical accounts, see Boswell, Unions, supra note 86 (discussing the existence of same-sex unions in early Catholic Church history); Boswell, Tolerance, supra note 86 (recounting early history of “gay”-identified groups and persons); Greenberg, supra note 86 (providing a general historical account). For some transatlantic accounts, see Gay Life in Dutch Society (A.X. van Naerssen ed., 1987) (focusing on the relatively progressive experience in the Netherlands); The Pursuit of Sodomy: Male Homosexuality in Renaissance and Enlightenment Europe (Kent Gerard & Gert Hekma eds., 1989) (collecting essays that survey the various European countries). See generally Forbidden History: The State, Society, and the Regulation of Sexuality in Modern Europe, supra note 87.

Accounts focusing specifically on Germany include Homosexuality and Male Bonding in Pre-Nazi Germany (Harry Oosterhuis ed. & Hubert Kennedy trs., 1991); Lesbians in Germany: 1890s-1920s (Lillian Faderman & Brigitte Erikson eds., 2d ed. 1990); James D. Strakley, The Homosexual Emancipation Movement in Germany (1975).

camps and efforts shared theoretical overlap as well: ironically, in promoting their own conceptions of same-sex sexual orientation to promote acceptance of their nonconforming social and sexual personalities, minority activists adopted the same conflation of sex, gender, and sexual orientation that pervaded mainstream clinical sexology, and that defined them as disordered.

1. New Terms, New Theories, Old Results: Homosexuals, Uranians, The Third Sex & Homoeroticism

As a means of asserting some control over the way in which they were clinically and culturally constructed, early activists devised new terminology and theories to denote their nascent sense of self. The two key terms and concepts in this new vocabulary were “homosexual” and “Uranian.”


Randolph Trumbach has focused especially on the cultural intertwining of gender and sexual orientation within sexual minority identity. See, e.g., Randolph Trumbach, London’s Sapphists: From Three Sexes to Four Genders in the Making of Modern Culture, in Body Guards, supra note 86, at 112; Randolph Trumbach, Gender and the Homosexual Role in Modern Western Culture: The Eighteenth and Nineteenth Centuries Compared, in Homosexuality, Which Homosexuality?, supra note 86, at 149; Randolph Trumbach, The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern Culture, 1660-1750, in Hidden from History, supra note 86, at 129.

The first serious study of same-sex sexuality written in English was John Addington Symonds’ A Problem in Greek Ethics, privately published in 1883. Symonds later collaborated with Havelock Ellis on Studies in the Psychology of Sex, which originally included a reprint of his tract. Upon Symonds’ death a few years later, his family bought and destroyed all the copies of Ellis’ book that they could locate, and insisted that Symonds’ name be deleted from all future editions of Ellis’ book. Lauritsen & Thorstad, supra note 86, at 34. For an autobiographical account of Symonds’ life, see The Memoirs of John Addington Symonds (Phyllis Grosskurth ed., 1984). Symonds’ works were collected in 1964 by the Medical Press of New York. See John Addington Symonds, Studies in Sexual Inversion (1964).

Symonds’ book was followed by Edward Carpenter’s Love’s Coming-of-Age in 1896, which linked the burgeoning women’s movement with sexual minority liberation. Carpenter became one of the most prolific and influential activists in England. In 1914, Carpenter joined Ellis in founding the British Society for the Study of Sex Psychology, which included a special gay subcommittee. Lauritsen & Thorstad, supra note 86, at 33-34.

Though its current ubiquity might lead one to think that “homosexuality” is ancient, the term actually came into general usage barely a century ago. Of course, people did perform same-sex sex acts prior to the 1800s. But, until that time, human scientific knowledge cognized only sexual inversion. Homosexuality and homosexuals, as such, had not yet been invented. See, e.g., Mary McIntosh, The Homosexual Role, in The Making of the Modern Homosexual, supra note 87, at 30 (discussing the
By coining these terms and their corresponding ideas, early leaders among Euro-American sexual minorities consciously endeavored to influence official and public perceptions of themselves and their brethren in order to gain peaceful assimilation into the social mainstream. However, history did not reward them greatly.

At about the same time that mainstream sexologists codified the first and second legs of the conflation as medical science, activist theorists coined the first term—"homosexual"—to denote a subcategory of inverts in whom same-sex desires were a paramount source of gender disorder.
This self-description thereby provided a particularized clinical label within the more general clinical category of inversion. The second term—"Uranian"—provided a corresponding cultural (and political) self-identity; the subset of invert characterized by homosexuality assumed the name "Uranian" (or "Urning") in much the same way that we use terms such as "gay" and "lesbian" today.\footnote{152} These clinical and cultural self-conceptions therefore constructed identities that related directly to Leg Two issues or concerns, but that in fact served to keep intact sex/gender propriety under Leg One: these identities sought to explain the sex and gender dynamics of Uranians socially as well as sexually.

Therefore, along with these new terms, activists also sought to develop a formal scientific theory that would situate homosexuals or Uranians within the prevailing sex/gender framework, and that would help to normalize and justify the apparent anomaly of their existence. To accomplish this goal, most turn-of-the-century activists theorized a category of self-identity that posited a new sex (or, more precisely, gender).\footnote{153} This category consisted of male inverts who were basically feminized and female inverts who were basically masculinized, though all shared two key commonalities: they were apparently cross-gendered socially and they were definitely same-sex oriented sexually. In other words, both male and female inverts were born sexually and socially gender atypical, and thus personified apparent disruptions of both Leg One and Leg Two.

With lawyer/activist Karl Heinrich Ulrichs, a particularly vigorous advocate of this view, key Uranian leaders formally declared themselves members of an "intermediate" sex, or the "Third Sex."\footnote{154} They identified

\footnote{152. Other terms that were circulating at the time, and since, include "homogenic love," "third sex," "variant," "invert," "intermediate sex," and "tribad." See, e.g., D'EMILIO & FREEDMAN, supra note 86, at 226; KATZ, HISTORY, supra note 86, at 640; LAURITSEN & THORSTAD, supra note 86, at 33.}

\footnote{153. Describing it as a new gender category may be more accurate: in their efforts to construct an additional sex category, the Uranian leadership did not usually argue that their external genitalia were anomalous. Thus, given the cultural meaning attached to the term sex, their usage of that term was somewhat imprecise. See supra note 118 and accompanying text. This and other difficulties with the theory undercut its persuasiveness. See infra note 165.}

\footnote{154. Ellis, for example, quotes Ulrichs' definition of inversion as "a species of hermaphroditism." ELLIS, supra note 110, at 229.}

Ulrichs' vigor is sometimes attributed to his own effeminacy. See STEAKLEY, supra note 149, at 15-16 ("He was apparently very effeminate even as a boy, and it is unlikely that the concept of . . . a female soul confined in a male body . . . would have been formulated otherwise."). Perhaps Ulrichs' view prevailed because he was the most persistent, waging virtually a one-person campaign of agitation that was unprecedented and unmatched. For instance, he showed up at the 1867 Congress of German Jurists to protest the assembly's refusal to consider a motion he had submitted two years earlier, proposing the decriminalization of same-sex sexual acts. He was allowed on the platform to speak but was shouted down by the "shocked jurists." \textit{Id.} at 4-5. Nonetheless, Ulrichs persevered. When Symonds wrote his treatise, he began his chapter on the "polemical literature" with the observation that, "It can hardly be said that inverted sexuality received a serious and sympathetic treatment until a German jurist, named Karl Heinrich Ulrichs, began his long warfare." SYMONDS, \textit{Studies in Sexual Inversion}, supra note 149, at 159. Indeed, Ulrichs is credited with authoring the "largest body of literature on homosexuality" of his time. LAURITSEN & THORSTAD, supra note 86, at 9. This body of
work, though not popularly circulated, eventually influenced the scholarly communities of mainstream sexologists. See Steakley, supra note 149, at 8-9.

Another significant adherent of the Third Sex theory was Magnus Hirschfeld. In 1897 Hirschfeld founded the Scientific Humanitarian Committee, the first entity that in today's terms would be called a "gay rights" organization, and which in its day was the preeminent Uranian organization. Lauritsen & Thorstad, supra note 86, at 9, 19. During its nearly 35 years of existence, the Committee published numerous materials, including the popular pamphlet, What the People Should Know About the Third Sex. Id. at 9-11, 14. Hirschfeld and his colleagues also promoted the Third Sex theory at many public events presented through an affiliate, the Institute for Sexual Science, the Western world's first sexual policy think tank. Id. at 27-29. For an excellent overview of Hirschfeld's activities and the Committee, see id. at 9-31. For a full biographical account, see Charlotte Wolff, Magnus Hirschfeld: A Portrait of a Pioneer in Sexology (1986).

The Nazis selected the books and papers of the Institute's Berlin headquarters for their first book-burning bonfire during May, 1933. Lauritsen & Thorstad, supra note 86, at 40-43 (including a reprint of a first-hand account describing the raid on the Institute). The New York Times account of the attack is reprinted in Katz, Almanac, supra note 86, at 480-81. A few years after his death, Hirschfeld's followers collected and published many of his important writings on sexuality. See Magnus Hirschfeld, Sexual Anomalies and Perversions: Physical and Psychological Development, Diagnosis and Treatment (1938).

During 1930, Hirschfeld and other activists explored the idea of establishing a branch of their movement in the United States, but the plan did not go far. See Erwin J. Haeberle, A Movement of Inverts: An Early Plan for a Homosexual Organization in the United States, in BASHERS, BAITERS AND BIGOTS, supra note 148, at 127. Despite its premature demise and its failure to establish an American affiliate, the Scientific Humanitarian Committee germinated similar inspirations in other individuals, including American Henry Gerber. Gerber served in Europe with the U.S. Army and, in 1921, discovered the Uranian organizations that were agitating in Germany. After his return to the United States, Gerber founded in Chicago the first American gay rights organization: on December 10, 1924, the State of Illinois granted a corporate charter to Gerber's Society for Human Rights. However, Chicago police arrested Gerber and his associates shortly afterwards. Gerber was terminated from his post office job and the Society was disbanded. Gerber, however, continued to support gay rights efforts until his death from pneumonia in the Washington, D.C., Soldier's Home on December 31, 1972. He was 80. For a summary of his life and letters, see Katz, Almanac, supra note 86, at 553-66.

Gerber's failed organization did not signal the end of sexual minority activism, however. For instance, after World War II, Harry Hay and others organized the Mattachine Society, which became the preeminent gay male organization in this country during the post-War years. An account of an early meeting of the Mattachine Society is provided in Rosa Von Praunheim, Army of Lovers 37 (1980) (providing the recollections of activist Jim Kepner). A full account of Hay's life and activities is provided in Stuart Timmons, The Trouble with Harry Hay: Founder of the Modern Gay Movement (1990). See also Katz, History, supra note 86, at 611-32 (discussing Hay and his activities). Concurrently, the early lesbian counterpart to the Mattachine Society was the Daughters of Bilitis, founded by Del Martin and Phyllis Lyon in San Francisco during 1955, with the first East Coast chapter founded three years later in New York City. See Katz, History, supra note 86, at 420 (providing an interview with Barbara Gittings, the first president of the East Coast chapter, recounting the early days of the organization and reprinting its statement of purpose).

The post-War efforts of the Mattachine Society and the Daughters of Bilitis have matured in the late 1980s into a full-blown civil rights movement recognized by many as finally having come of age during the campaign season leading up to the 1992 elections. See, e.g., Scott Harris, Gay Militancy- The Last Great Civil Rights Move?, L.A. Times, Oct. 11, 1991, at Al; Alan C. Miller, Gays Say They've Gained a Place in U.S. Politics, L.A. Times, July 17, 1992, at A9; Torie Osborn & David M. Smith, At Last, the Mainstream Agenda Opens to Gay and Lesbian Issues, L.A. Times, June 3, 1992, at B11. Perhaps the most dramatic evidence of the movement as a nationwide phenomenon was the gathering in Washington, D.C. of sexual minorities from all parts of the country for the 1993 March on Washington for Lesbian, Gay & Bisexual Equal Rights and Liberation. Though the estimates of March participants ranged from 300,000 to one million, the event marked one of the largest political gatherings ever in American history, and was covered "live" by C-Span. See Bettina Boxall & James Gerstenzang, Gays, Lesbians Celebrate on Eve of Rights March, L.A. Times, April 25, 1993, at A1; Paul Houston,
themselves as "people born . . . on the dividing line between the sexes."155

Uranians were persons who,

while belonging distinctly to one sex as far as their bodies are concerned they may be said to belong mentally and emotionally to the other; . . . men, for instance, who might be described as of feminine soul enclosed in a male body . . . or in other cases, women whose definition would be just the reverse.156

Huge March Seeks Gay Rights, L.A. TIMES, April 26, 1993, at A1. Reflecting the growing visibility and strength of lesbians, 1993 also marked the first "Dyke March" in San Francisco, which attracted 30,000 participants, and was modeled after a similar event that had preceded the March on Washington. Jeanne Marie, Dyke March Draws 30,000 Lesbians to the Castro, GAY & LESBIAN TIMES, July 15, 1993, at 19, 26.

In some respects, the force of this movement results from the self-mobilization that originated with the alarm, terror, dread, sorrow, and fury engendered by the AIDS pandemic and by the general societal indifference to the pandemic’s devastation of sexual minorities, especially gay males: for years, the bitter comparison has been between the cataclysmic upheavals generated by Vietnam’s body counts and the relatively undisturbed calm that has absorbed the HIV body count, which long ago exceeded American casualties in Vietnam. See, e.g., Thomas Brandt, This Flap Won’t be ‘Marginalized’, L.A. TIMES, March 1, 1993, at B7 (denouncing the February 1992 report of the National Research Council that concludes AIDS will “disappear” because those who are most affected by it are “socially invisible, beyond sight and the attention of the majority population”); Josh Getlin, A Defiant Casualty of the War on AIDS, L.A. TIMES, March 1, 1993, at E1 (chronicling the battles of Dr. Don Francis, a pioneering AIDS specialist, who declined a Clinton Administration offer to head the Centers for Disease Control). The definitive current history of the rise and neglect of AIDS in this country is RANDY SHULTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987); see also Tom Morganthau et al., Gay America in Transition, NEWSWEEK, Aug. 8, 1983, at 30 (discussing the mix of gains and losses for sexual minority communities during the years of HIV’s discovery); cf. Bill Turge et al., Gays Under Fire, NEWSWEEK, Sept. 14, 1992, at 35 (reporting “an angry new backlash” against the progress or stridency of lesbian and gay gains in more recent years).

For an overview of lesbian and gay organizing within the United States, see D’EMILIO, supra note 86. Generally, the spontaneous rioting sparked by police harassment of patrons at the Stonewall bar in New York City during June of 1969 is considered the birth of the modern lesbian and gay civil rights movement. See Von Prainheim, supra at 51-54 (interviewing the Stonewall manager about the riots). See also DURERMAN, supra note 86 (providing personal accounts of the Stonewall Riots). For general readings on the “Gay Liberation Movement” of the 1970s following the Stonewall Riots, see OUT OF THE CLOSETS: VOICES OF GAY LIBERATION, supra note 86; TEAL, supra note 86. See generally Salvatore J. Licata, The Homosexual Rights Movement in the United States: A Traditionally Overlooked Area of American History, 6 J. HOMOSEXUALITY 161, 178-83 (1980-81).

Finally, it should be noted that the Mattachine Society and the Daughters of Bilitis inspired a similar effort in Canada. The Association for Social Knowledge ("ASK") was formed in Vancouver in 1964 by Canadians who were familiar with the American organizations, and was patterned after them. Though apparently only men attended the first meeting of the group, women joined quickly, and the organization soon attained a unique balance of gay male and lesbian members. The group also included friendly heterosexuals among its ranks. See GARY KINSMAN, THE REGULATION OF DESIRE: SEXUALITY IN CANADA 147-51 (1987) (chronicling the foundation and history of ASK).


156. Id. Selections of Carpenter's writings have been compiled in MARK THOMPSON, GAY SPIRIT: MYTH AND MEANING 152-64 (1987).
In short, the Uranian leadership generally self-identified in terms akin to contemporary conceptions of transsexualism: basically, a female mind or spirit inhabiting a male body, or vice versa.\textsuperscript{157}

Although these early activists had new terms and theories by which to identify and justify themselves, this coinage of vocabulary and ideas had limited potential and impact because neither the terms nor the concepts questioned the social and sexual conflationary underpinnings of the inversion regime. Uranians, in other words, did not question the premises of Leg One. Moreover, they did not question the strategic use of Leg Two to police those premises. Thus, homosexuals or Uranians were still deemed inverted both by themselves and society specifically because their sexual orientation was same-sex oriented. They cast themselves, and were regarded by others, as gender atypical socially, too.\textsuperscript{159} In this way, both majority sexologists and minority activists regarded same-sex orientation as a specific symptom or correlate of stunted gender development.\textsuperscript{160}

Activist, like mainstream, understandings of sexual orientation were built on premises related to both Leg One and Leg Two of the conflation. While minority activists and theorists consciously strove to assert control over their naming and status, they did not question the role of sex as the threshold determinant of gender; they did not question the deductive, introspective construction or model of gender upon which inversion was being built. They also failed to challenge official cultural rigidities about sex-determined gender that dichotomized “tastes, conduct, character, feelings and behavior”\textsuperscript{161} and designated them in mutually exclusive ways either to men or to women. Nor did they contest the relevance of social gender (a)typicality to sexual orientation. On the whole, Uranian activists first accepted conflationary sex/gender demarcations based on the active/passive

\textsuperscript{157} The contemporary definition of “transsexual” is “a person with a psychological urge to belong to the opposite sex that may be carried to the point of undergoing surgery.” \textit{Webster’s Ninth New Collegiate Dictionary} 1255 (1991). \textit{See generally} Edward S. David, Comment, \textit{The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma}, 7 \textit{Conn. L. Rev.} 288 (1975); \textit{see also infra} note 366 and authorities cited therein. For further discussion of the role of transsexualism in the conflationary process and legal culture, \textit{see infra} notes 449-54 and accompanying text.

\textsuperscript{158} Again, it must be noted that the use of the term “sexual orientation” here to describe the events of a century ago effectively superimposes on those events concepts that were formed and formalized subsequently. \textit{See supra} notes 107, 133, and 150. Therefore, to the Uranians, same-sex desire was an aspect of gender, which in them was inverted, but not yet a matter of sexual orientation as such. In other words, erotics were part of the official gender composite, which did not yet include a formal conception of sexual orientation. \textit{See supra} Part I.B.2-4.

\textsuperscript{159} \textit{See, e.g., infra} notes 162-166 and accompanying text.

\textsuperscript{160} Of course, the term “homosexuality” eventually became coopted by mainstream theorists during the medicalization of sexuality, thus transforming a term of liberation into a diagnosis of defectiveness. \textit{See, e.g., Katz, Almanac, supra} note 86, at 146-48 (discussing how medical journal writers “expropriated” words coined by early minority theorists “for their own purposes.”). \textit{See generally supra} Part I.B.

\textsuperscript{161} \textit{See supra} note 142 and accompanying text.
paradigm and then sexology's role in policing against disruptions of traditionalist arrangements; their conceptually limited, yet culturally radical goal was to seek acceptance through self-rationalization and normalization on mainstream terms.

Thus, internalized notions of femininity and masculinity drawn from the traditionalist active/passive paradigm remained the reference points for minority strategies, efforts, and theories. By explaining their apparent social/public and sexual/private gender transitivity in traditionalist terms, Uranians hoped to cast themselves as a new species of sex/gender conformists. Incongruously, early Uranian activists conformed to and relied on mainstream sex-based gender stereotypes under the conflation's first and second legs to describe and rationalize their concededly nonconforming sexual and social self-identities, and thereby to secure society's sympathy and approval.

A striking example is provided by Anna Rueling's landmark address to the Scientific Humanitarian Committee during its 1904 meeting in Berlin. A woman's suffrage leader and a lesbian, Rueling delivered a speech titled "What Interest Does the Women's Movement Have in the Homosexual Question?" in which she explained that, "Just as homosexual men often prefer professions that have a feminine quality, such as women's fashions, nursing, cooking, or being servants, homosexual women also lean toward certain professions. Thus, there are many homosexual women in the medical, judicial, and agricultural professions." She added, "It is true that homosexual women are specially suited for the sciences because they have those qualities lacking in feminine women." Rueling's remarks illustrate how minority activists found themselves conflating and cataloging numerous social (and sexual) gender attributes, just like mainstream sexologists, as they endeavored to make the Third Sex category cogent and comprehensible in practice.

The Third Sex theory enjoyed considerable success among leading Uranians and mainstream society largely because it indulged the culture and consciousness of the times. It conformed to the conflationary themes and tenor of mainstream sexology both under Leg One and Leg Two, and thereby appealed to the overall zeitgeist that sexology reflected. Most notably, whereas mainstream inversion theory derived gender from sex and rec-

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162. Lesbians in Germany: 1890s-1920s, supra note 149, at 90.
164. Perhaps the most elaborate classification scheme among minority theorists was devised by Ulrichs. While outlining its byzantine categories and subcategories, Symonds concluded that the scheme was "outlandish" but had "technical value." Symonds, Studies in Sexual Inversion, supra note 149, at 160-65; see also Hubert C. Kennedy, The "Third Sex" Theory of Karl Heinrich Ulrichs, 6 J. Homosexuality 103 (1980/81).
ognized two discrete sexes (and genders) based on observable anatomy, Uranian theorists seemed to accept the first point but sought to modify the second: a Third Sex (or gender) existed, Uranians urged, in which the psychic and physical (though not genital) aspects of the other two sexes commingled to produce a unique sex/gender profile. This commingling logically made it “correct” for men to adopt gender(ed) looks and ways considered “passive” (and hence feminine) and for women to adopt gender(ed) looks and ways considered “active” (and hence masculine).

Because mainstream inversion theory accepted sexual orientation as an aspect of gender, Uranians argued that persons constituting this Third Sex (and/or gender) also were characterized by “natural” (and hence “normal” and “moral”) same-sex erotic dispositions. In this way, the main faction of the Uranian movement embraced a theory of social/public and sexual/private personality that closely tracked the mainstream inversion theory: both theories relied on cross-gender stereotypes generally—and on gender atypical sexual orientation specifically—to explain same-sex sexual desire. Both theories thus situated Leg Two as a prop for Leg One, helping to establish clinically and culturally the first and second legs of the conflation as joint forces. More generally, both theories operated to coalesce and galvanize the power of official conflationary notions in policing against all violations of traditionalist sex/gender limits based on the active/passive paradigm.

The Third Sex theory was not the only viewpoint of turn-of-the-century activists. A few early leaders, with writer/activist Karl Maria Kertbeny in the vanguard, tried to steer their movement away from gender(ed)

166. Not all Uranians accepted this self-definition, however. Disagreements erupted over the gender issue even among those who generally accepted the Third Sex formulation. For instance, Symonds took issue with characterizations of Uranians that he considered excessively gendered. At one point, he criticized reports from Veniamin Tarnovsky, pre-Soviet Russia’s leading sexologist, see Weck, supra note 110, at 27, for “lay[ing] too great a stress upon the passivity of emotions in these persons, their effeminacy of dress, habits, [and] inclinations” concluding that “it must be supposed that [Tarnovsky] has not come across frequent instances of men who feel, look, and act like men, the only difference between them and normal males being that they love their own sex.” Symonds, Studies in Sexual Inversion, supra note 149, at 127.

167. See Herzer, supra note 150, at 10-11.
inversion constructs, and to instead promote "homoerotic" themes as the basis of sexual orientation identity. This alternative explanation for same-sex desire seemingly eschewed new sex/gender categories altogether. This theorizing seemingly averted the specific conceptual and political problems that inhered in the Third Sex approach of the Uranians. Nevertheless, the proponents of this view ultimately were unable to transcend conflational sex/gender notions, limits, and politics. Moreover, this homoerotic construction of same-sex sexuality was conceptually and normatively underinclusive because it focused on males and emphasized the masculinity of male homosexuals.

168. Although the homoerotic construction of sexual orientation has proven to have abiding appeal, see infra note 173, it has failed in its immediate self-assigned objectives in that its adherents ultimately (and perhaps unwittingly) found themselves focusing on gender as well. See infra notes 169-174 and accompanying text.

169. Another proponent of the homoerotic strategy was Adolf Brand, a firebrand who argued that both majority and minority theorists who embraced sexology "took away all beauty from eroticism." Harry Oosterhuis, *Homosexual Emancipation in Germany Before 1933: Two Traditions, in Homosexuality and Male Bonding in Pre-Nazi Germany*, supra note 149, at 1, 3. This homoerotic approach emphasized masculinity within male relations and continued the "tradition of romantic friendship between males" in Germany during the 18th and 19th centuries. *Id.* at 8. Homoeroticism also has been associated with nationalism and militarism in Germany. See, e.g., Harry Oosterhuis, *Male Bonding and Homosexuality in German Nationalism, in Homosexuality and Male Bonding in Pre-Nazi Germany*, supra note 149, at 241-63. In any event, it seems that Adolf Brand's school of thought was especially militant and androcentric. For an anthology of writings espousing the homoerotic construction of sexual minority status in pre-Nazi Germany, see generally *Homosexuality and Male Bonding in Pre-Nazi Germany*, supra note 149.

A somewhat less strident strain of homoeroticism has been associated with the love between comrades extolled by Walt Whitman in his *Calamus* poems. See generally *Walt Whitman, City of Orgies & Other Poems* (J. Lawrence Lembo ed., 1980); *Walt Whitman, Leaves of Grass* (3d ed. 1860). Whitman's homoeroticism was daring by the standards of his day, and the poetry electrified activists across the Atlantic. *Katz, History*, supra note 86, at 508-09; *Lauritsen & Thordstad, supra* note 86, at 32-33. Whitman's obituary in the *New York Times* cited his poetry's exuberant depiction of the "love of man for man" as part of his "chaotic creed." See *Katz, Almanac, supra* note 86, at 230. For an account of Whitman's sexual activities and an exploration of the influence of his sexuality on his poetry, see *Calamus Lovers* (Charley Shively ed., 1987). See also William Patrick Jeffs, "Man's Words" and Manly Comradeship: Language, Politics, and Homosexuality in Walt Whitman's Works, 23 *J. Homosexuality* 19 (1992).

As a general matter, the male camaraderie emphasized in the homoerotic construction emulated, and sought to revive, the Greek idealization of same-sex couplings among the noble citizen class in ancient Athens. See *Valdes, supra* note 9.

A somewhat similar homoerotic tradition has been documented among women in the form of "romantic friendships" or "Boston marriages." One example was the relationship between abolitionist and feminist Mary Grew and her lifelong companion, Margaret Burleigh. Grew described the relationship as "a closer union than that of most marriages." See *Katz, Almanac, supra* note 86, at 230 (quoting letter from Mary Grew to Isabel Howland (Apr. 27, 1892)). For further writings on similar same-sex arrangements among women, see *Faderman, Odd Girls and Twilight Lovers, supra* note 86, at 18-22; *Faderman, Surpassing the Love of Men, supra* note 86, at 103-44, 157-230; see also Caroll Smith-Rosenberg, The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America, 1 *Signs* 1 (1975). See generally *Lesbians in Germany*: 1890s-1920s, *supra* note 149, at ix-x. For a perceptive analysis of the intersection between the inversion and homoerotic viewpoints in a lesbian context, see Martha Vicinus, 'They Wonder to Which Sex I Belong': The Historical Roots of the Modern Lesbian Identity, in *Homosexuality, Which Homosexuality?*, supra note 86, at 171.
According to the homoerotic viewpoint, the ideal homosexual was similar to the idealized (heterosexual) macho man: strong, assertive, virile—in short, "manly." Attraction to traditionalist conceptions of masculine physical appearance and attributes was identified as the source of same-sex sexual orientation among male homosexuals. These were "men who felt, looked, and acted like men, the only difference between them and normal males being that they loved their own sex." Simply put, these "queers" were not "sissies" and did not go for "sissies."

Though avidly advocated, this homoerotic viewpoint was not widely accepted among leading circles of Uranians. The failure of the homoerotic sexual orientation model was due in large part to the perception that its emphasis on, and glorification of, same-sex erotics was too strident and confrontational, and thus politically at odds with the assimilationist leanings of the Uranian leadership. Consequently, despite the earnest efforts of

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1. Interestingly, this viewpoint may be seen as the point of origin for the image of gay men as sexual predators who exploit children, lust after non-gay men, or are indiscriminately promiscuous with each other. See, e.g., John Balzar, Why Does America Fear Gays?, L.A. Times, Feb. 4, 1993, at A1, A14 (discussing the "sexual predator" image). In some ways, this extreme version of the homoerotic construction thus generates the notion that obsession with sexual consumption is the defining, if not exclusive, baseline of gay male identity. See, e.g., Fajer, supra note 24, at 537-46 (discussing the "sex as lifestyle" stereotype). This notion was recently articulated in a revealing "letter to the editor" wherein the writer denies that he is homophobic, instead characterizing his position as "'homonausea' against a perverse lifestyle that is based upon unnatural passions, sexual promiscuity and lack of self-control." Art Edwards, Letters to the Times: Controversy Over Gays in the Military, L.A. Times, Feb. 13, 1993, at B7. Ironically, other observers have noted that this description seems to capture precisely the actions of non-gay male military personnel during a number of recent incidents involving sexual misconduct. See infra note 915. Consequently, and curiously, the problem becomes that gay men are faulted for being too much like men generally are supposed to be—driven by potent and volatile virility—except that the objects of their "manliness" are culturally incorrect.

Additionally, this depiction of gay male identity replicates the imagery of female sexuality that has been used since ancient times to justify the assertion of male control over women both sexually and socially. Since antiquity, women have been cast as voracious and intertemperate sexual creatures who require the steadying hand of the men around them to contain their innately out-of-control sexual dispositions. This theme is elaborated in Valdes, supra note 9.

Ultimately, these images of both gay males and women are schizophrenic: they depict both gay men and women as voraciously and frenetically sexual yet also sexually inert, passive, quiescent. Though schizophrenic, the two strands in this combination urge the same conclusion: control by "men" over all feminized beings, justified by the mythology of male capacity for self-control. It seems that the history of rape and harassment perpetrated by men against women (or against members of sexual minorities) should have laid to rest this mythology of self-control long ago. See, e.g., generally Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813 (1991); Susan Estrich, Rape, 95 Yale L.J. 1087 (1986). But, the dominant imagery evidently is quite resilient, as are the practices. See, e.g., infra notes 915 and 917.


2. This debate over tactics has continued to bedevil sexual minority activists ever since. For instance, the Mattachine Society, generally considered the first viable gay male activist organization in the United States, ultimately was fractured by precisely this type of dissension. For readings on the Mattachine Society and other early similar organizations, see supra note 154 and authorities cited therein. Even today, the debate continues within gay and lesbian communities over the propriety and effectiveness of the "in-your-face" efforts of "direct action" groups such as Queer Nation and Act Up.

In the 1991 San Francisco Freedom and Pride Day Parade, the raucous Chaos float sported a banner that captured the essence of the position staked out by direct action groups, proclaiming "Liberation Now—
the homoerotic faction, most early activists preached the gender-atypical Third Sex theory vigorously and successfully, making it the predominant self-explanation of same-sex sexuality during these formative years.\(^{173}\)


173. Of the leading turn-of-the-century activists, Kentbeny was the only one who espoused the homoerotic viewpoint over the Third Sex theory. See supra note 167 and accompanying text. However, since the 1960s, the homoerotic construction has gone from being a radical view espoused by a faction within a minority to a view with a fairly general level of acceptance. See, e.g., ALTMAN, supra note 86 (discussing the “invention of the new homosexual” self-image among lesbians and gay males).


This masculinization spawned the “clone,” who was characterized by “rugged” regalia such as 501 jeans, white t-shirts, flannel shirts, boots, leather jackets in either a motorcycle or military bomber style, and exuberant promiscuity—all of which reflected gender arch-conformity to “male” conventions that echoed the homoerotic approach to the construction of same-sex sexual orientation among men. See Michael S. Kimmel & Martin P. Levine, A Hidden Factor in AIDS: “Real” Men’s Hypersexuality, L.A. TIMES, June 3, 1991, at B5 (“In short, the clone looked more like a ‘real man’ than most straight men.”). For clone adherents, then, “sissy stuff” was the ultimate peccadillo.


Among lesbians, the emergence in the 1990s of self-described “Lipstick Lesbians” has produced a corresponding proto-clone that revels in nail polish, stiletto heels, tight and revealing dresses, and exuberant celebrations of same-sex sexuality. See Lindsy Van Gelder, Lipstick Liberation, L.A. TIMES MAGAZINE, Mar. 15, 1992, at 30. By consciously cultivating a heightened sense of femininity, this group also accentuates arch-conformity to sex-determined gender in same-sex sexual orientation among women. Id.

The new breed . . . are usually feminists by most definitions of the word, although many of them wouldn’t accept the title. But they’re rebelling as much against the restraints imposed by the more rigid dos and don’ts of feminist ideology as those dictated by the larger society—the endless processing, consciousness-raising, life-seen-through-a-political-prism that dominated lesbian/feminist culture for decades.

Id. at 32. This description would seem to fit with Cindi Lauper’s anthem to “Girls [who] just want to have fun.”
Moreover, because it was accepted by various mainstream sexologists, the Third Sex theory entered the collective consciousness of the larger society more quickly and effectively than its homoerotic cousin.  

2. The Third Sex, Homoeroticism & Gender

Together, homoeroticism, Third Sex, and inversion theories planted a preoccupation with gender (a)typicality at the very core of sexual minority identity during this formative time. By and large, neither minority theorists nor mainstream sexologists seemed capable of conceptualizing same-sex sexuality independent of stereotypical sex-derived gender norms. The inversion and Third Sex theories emphasized the deviation of gender from sex in similar fashion to explain same-sex sexual orientation: they invoked images of feminized males and virilized females. Homoeroticism, by contrast, purported to emphasize sexual drive, not gender, to explain same-sex sexual orientation. However, the homoerotic viewpoint managed to divorce sexual orientation from sex and gender only on the surface: it invoked arch-conformity to sex-derived gender as a hallmark of the erotics that create(d) same-sex sexual orientation. By emphasizing virilized males, homoeroticism substituted gender hyper-typicality for the gender atypicality highlighted under the inversion and Third Sex schemes.

Thus, the conflation, while being codified by mainstream sexologists, also was at the center of both the Third Sex theory and the homoerotic viewpoint. Both minority theories followed mainstream theorizing in encrusting gender onto sex, while simultaneously assuming that sexual orientation was an element of sex-determined gender. In their own ways, all three turn-of-the-century theories gave effect to the first and second legs of the conflation.

3. High Hopes Dashed & High Follies Fulfilled

Leading Uranian activists hoped that the Third Sex category would show the emerging homosexual identity and community as comporting with...
inborn qualities, and in this way help to establish same-sex desire and activity as natural, normal, and moral. Perhaps then society would be persuaded to decriminalize same-sex inclinations and intimacies. In this way, the Third Sex theory was a key tactical feature of the Uranian strategy to usher in an era of sex/gender tolerance, or even acceptance. The Third Sex theory, in other words, was more than an identity theory; it also was identity politics at work.

175. For instance, discussing Ulrichs, Symonds wrote that the Uranian goal was:

to establish a theory of sexual inversion upon the basis of natural science, proving that abnormal instincts are inborn and healthy in a considerable percentage of human beings. . . to argue that the present state of the law in many states of Europe is flagrantly unjust to a class of innocent persons.

Symonds, Studies in Sexual Inversion, supra note 149, at 159-60.

Similarly, lesbians have believed that grounding identity in nature would render same-sex sexual orientation relatively harmless, and certainly beyond the individual’s responsibility. See, e.g., Faderman, Odd Girls and Twilight Lovers, supra note 86, at 57-61. Another reason why lesbians may have found the inversion theory attractive is that the theory “phallicized” women, making the mannish lesbian a “potent persona” who possessed “active lust,” in an otherwise dreary, patriarchal world. See Esther Newton, The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman, in Hidden from History, supra note 86, at 281, 287.

176. The motto of the Scientific Humanitarian Committee is instructive: “Justice Through Science.” Lauritzen & Thorstad, supra note 86, at 29. The political pamphlets that brought the term “homosexuality” into the vocabulary are also prime examples of the Uranian strategy. Id. at 6-9; Steakley, supra note 149, at 8.


The most recent, and forthright, judicial voicing of these themes appears in Able v. United States, No. 94-CV-0974, 1995 U.S. Dist. LEXIS 3928 (E.D.N.Y. March 30, 1995), in which the court struck down the so-called “Don’t Ask, Don’t Tell” compromise policy crafted by the Clinton Administration and its Congressional adversaries in 1993. See generally infra note 265. The court’s ruling was based on the policy’s “Orwellian” juxtaposition of status and conduct. See also infra Chapter Four, Part IV.B.

178. In a technical sense, the Third Sex theory was, of course, about the necessary conformance of Uranians to the gender dictated by their Third Sex. But, in a broader sense, the theory responded to, and
But the activists hoped and tried in vain. Uranian theorists formulated their conceptions of sex, gender, and sexual orientation around an unsound, and ultimately fatal, compromise. Whereas their Third Sex theory sought to transform perceived discord between sex and gender from disease to nature, their theory of homosexuality placed same-sex sexuality squarely within the clinical scheme of inversion symptoms. Yet inversion, under the mainstream clinical framework, constituted disease: one could not be an undiseased invert. Accordingly, one could not be an undiseased Uranian or homosexual. The Uranian attempt at accommodation on mainstream terms would not work politically because its could not work conceptually.

In effect, the Uranians had struck something of a Faustian bargain. They sought to interpose medicine between themselves and the law; they were willing to accept the label of disease in order to jettison the label of criminality. However, their efforts to obtain decriminalization, tolerance, and acceptance were largely unsuccessful, at least in their lifetimes. Instead, events in the two countries where Uranians had clustered combined to seal this fate. The 1895 trial of Oscar Wilde in England reinforced and repopularized anti-homosexual sentiment. Later, the rise of Nazism in Germany during the 1930s led to the (ex)termination of the gradual but steady growth of the seminal sexual minority movements that had arisen in that nation. Thus, rather than bringing about tolerance, Uranian acquiescence to and internalization of mainstream sex/gender notions failed to

was animated by, a need to explain the Uranians' nonconformity to conventional sex/gender categories and norms in order to gain assimilation. Hence, the crafting of this theory was driven by political aims and exigencies. This theoretical framework was intended and used as a key tool of persuasion in the Uranian leadership's attempt to gain societal acceptance and respect. See supra notes 175-77 and accompanying text.

179. In England, the Uranian movement collapsed along with Oscar Wilde's career. The notorious trial of 1895 created such hysteria that "[t]rains were reportedly filled with homosexuals rushing to flee England for the continent." "[Edward Carpenter, a socialist author of that period, wrote that, beginning with Wilde's arrest, "a sheer panic prevailed over all questions of sex, and especially of course questions of the Intermediate Sex." Id. (emphasis in original). Carpenter's publisher canceled the publication contract for Love's Coming of Age, his opus, prompting Carpenter to conclude that "[t]he Wilde trial had done its work; and silence must henceforth reign on sex-subjects." Id. For more detailed accounts of the Oscar Wilde case, see H. Montgomery Hyde, The Trials of Oscar Wilde (1962) (reprinting portions of the trial transcripts). For a broader account of Wilde's trials and tribulations, see H. Montgomery Hyde, Oscar Wilde (1975).

180. In Germany, the decriminalization campaign collapsed with the ascendancy of Nazism in the early 1930s. Indeed, as noted above, the very first Nazi book-burning rampage targeted the headquarters of the Uranian movement in Berlin. See Lauritsen & Thorstad, supra note 86, at 40-43; Erwin J. Haebel, Swastika, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany, in Hidden from History, supra note 86, at 365, 368. Nazi persecution of sexual minorities is documented graphically in a first-person account of life as a gay male in a concentration camp. See Heinz Hauger, The Men with the Pink Triangle (David Fernbach trans., 1980). See also Richard Plant, The Pink Triangle: The Nazi War Against Homosexuals (1986); Rüdiger Lautmann, The Pink Triangle: The Persecution of Homosexual Males in Concentration Camps in Nazi Germany, 6 J. Homosexuality 141 (1980/81); Ian Young, Gay Resistance: Homosexuals in the Anti-Nazi Underground, in Gay Roots, supra note 86, at 177.
abate the law's hostility towards sexual minorities while ratifying the wholesale medicalization of same-sex desire. 181

As such, the cross-endeavors of the mainstream inversion sexologists, the Uranian Third Sex advocates, and the homoerotic proponents jointly intellectualized and compounded the conflation of sex, gender, and sexual orientation. This packaging of gender nonconformity in the inversion and Third Sex constructions of sexual orientation, and of gender arch-conformity in the homoerotic contra-construction, thus grounded the chief conceptual frameworks for explaining and understanding same-sex sexuality. 182

This packaging thereby established the first and second legs of the conflation as official and cultural knowledge, both scientifically and normatively. This packaging on the whole also elevated Leg One as primary within the conflation and positioned Leg Two as its strategic reinforcement. As a bundle of *ad hoc* and rarely examined beliefs and customs, this conflationary packaging still dominates and permeates the Euro-American imagination today. 183

This conflationary bundling therefore continues to perpetuate and to police active/passive themes and traditions to this day.

II

AMERICAN POSTCARDS

The history recounted thus far suggests that the formal conflationary process was centered largely in Germany and England during the critical decades preceding and following the turn of the century. However, as elaborated immediately below, the conflation was as much a part of turn-of-the-century American society, and it remains so today.

A. Examples of the Conflation in the Early 20th Century

In the United States, this conflation of sex, gender, and sexual orientation is exemplified by several events that span the century. Two exemplars are left to us by turn-of-the-century criminal investigations of male same-sex subcultures. Another is provided by lesbian literature of the times, and a fourth comes from the social life of sexual minorities of color during the early 1920s. In depicting diverse conflationary vignettes that reflect different slices of American society, all of these exemplars show how here, as elsewhere in Western culture, the construction of sexual orientation was


182. The chief conceptual frameworks were the three turn-of-the-century theories previously set forth in this account: inversion, under mainstream sexology; the Third Sex theory of Uranian homosexuals; and the homoerotic emphasis of other homosexuals. See supra Part I.B.1-3 and C.1-2.

183. See infra Part II.B.
inextricably intertwined with the construction of deductive, intransitive gender in and through the first and second legs of the conflation. These vignettes thus illustrate how Leg One and Leg Two of the conflation operate culturally in tandem: these vignettes show how Leg Two reinforces Leg One and how both legs jointly reinforce hetero-patriarchal notions. These vignettes ultimately demonstrate how the conflation was and is deployed to elicit or coerce compliance with active/passive sex/gender traditions both socially and sexually, and to suppress or contain disruptions of the official conflationary order(ing) in every respect.

1. Civilian Life: New York Nancys

In 1899, the New York State legislature appointed the Mazet Committee to investigate New York City public officials." Because the Mazet investigation was launched to discredit Tammany Hall, much of the testimony adduced at committee hearings focused on “vice” and City Hall’s alleged complicity in it. That vice, committee transcripts show, frequently amounted to gender-bending frivolity and intimacy." The committee’s proceedings depicted graphically the preoccupation with sex-based gender stereotypes among the outside observers who reported the alleged activities to the committee. If accurate, the committee transcripts also recorded a similar preoccupation among the so-called “Nancys,” “fairies,” and “degenerates” populating New York City’s turn-of-the-century same-sex underground. According to the transcripts, this milieu centered on “disorderly houses” frequented by “male prostitutes” who “act effeminately; most of them are painted and powdered; they are called Princess this and Lady So and So . . . and get up and sing as women, and dance; ape the female character; call each other sisters and take people out for immoral purposes.” This emphasis on social gender affectations per se strongly indicates that perceptions of social/public effeminacy or masculinity were at least as central to the construction of sexual orientation as the actual commission of same-sex sex acts.

The record produced through the Mazet Committee thus recounts a world where “queers” necessarily were “sissies,” where same-sex sexual orientation necessarily coincided with social gender attributes assigned to another sex. In doing so, the world of the same-sex underground at once

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184. See Katz, History, supra note 86, at 68.
185. Id. at 68-73 (reproducing selections from the testimony of various witnesses, including New York City Mayor Robert A. Van Wyck); see also Katz, Almanac, supra note 86, at 297-99 (supplementing the original account).
186. Id. at 72 (undercover agent Joel S. Harris describing the atmosphere as he saw it on the night of May 31, 1899 at the Paresis Hall, located at No. 392 Bowery).
187. The Mazet Committee’s findings are not aberrational, either. For instance, in a discussion of male and female same-sex subcultures in New York City during the 1890s, Dr. Charles Nesbitt described “male perverts, dressed in elaborate feminine evening costumes” and “masculine females who dressed in male attire.” See Katz, Almanac, supra note 86, at 218-22 (quoting Charles T. Nesbitt, Autobiographical account of encounters with “sexual perverts,” (1938) (unpublished papers, on file at
accepted and violated the official, traditionalist version of deductive, intransitive gender, both socially and sexually. This world, in other words, accepted yet flouted the official notion that sex determined gender, or that gender was deduced from and permanently fixed by sex. Additionally, this world accepted the official notion that social and sexual gender atypicality, or transitivity, were correlated. This world thus accepted both Leg One and Leg Two of the codified conflation.\textsuperscript{188} The remaining exemplars corroborate this cultural acceptance of the clinical conflation.

2. \textit{Military Life: Sailor Boys, Sailor “Girls”}

The second exemplar stems from George Chauncey Jr.’s study of the military investigation into same-sex activity at the Newport Naval Training Station during 1919-1920.\textsuperscript{189} Officers at the Training Station dispatched a team of enlisted men into the community “to investigate the ‘immoral conditions’ there.”\textsuperscript{190} The decoys sought out “‘sexual perverts,’ had sex with them, and learned all they could about homosexual activity in Newport.”\textsuperscript{191} The investigation led to the arrest of more than twenty sailors and sixteen civilians, and the decoys testified against them in the subsequent military and civilian trials.\textsuperscript{192} The trials produced thousands of pages of testimony detailing the social and sexual structure of the same-sex community in Newport.\textsuperscript{193} From these records Chauncey found that:

relatively few of the men who engaged in homosexual activity, whether as casual participants in anonymous encounters or as part-

\textsuperscript{188} See supra Foreword, Part I.A-B.

\textsuperscript{189} George Chauncey, Jr., \textit{Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era}, in \textit{HIDDEN FROM HISTORY}, supra note 86, at 294. For a novel that combines an account of same-sex activities with decoy military operations (and interracial themes) set during World War II, see Christopher Bram, \textit{HOLD TIGHT} (1988).

\textsuperscript{190} Chauncey, supra note 189, at 294.

\textsuperscript{191} \textit{Id.} at 294-95. It is ironic, given the military’s virulent homophobia, that these decoys engaged in same-sex relations as part of their “active” military duties (pun intended). Even though undercover agents infiltrating unlawful activities may typically engage in the outlawed behaviors that they are seeking to investigate, the cultural significance of the “pervert” role-playing in this instance is greater than most. Indeed, the fact that the military allowed or directed such assignments caused a public uproar when divulged by the media. See infra note 196 and accompanying text.

\textsuperscript{192} Chauncey, supra note 189, at 295.

\textsuperscript{193} \textit{Id.} A complete account was provided to the Sixty-Seventh Congress in \textit{Staff of Senate Comm. on Naval Affairs, 67th Cong., 1st Sess., Report on Alleged Immoral Conditions at Newport (R.I.) Naval Training Station} (Comm. Print 1921).
ners in ongoing relationships, identified themselves or were labelled by others as sexually different from other men on that basis alone. The determining criterion in labelling a man as "straight" . . . or "queer" was not the extent of his homosexual activity, but the gender role he assumed . . . [T]hose who assumed the sexual and other cultural roles ascribed to women . . . [were viewed as the] "inverts." 194

As Chauncey further recounted, smug distinctions between "straight" and "pervert" crumbled under cross-examination, even as the men who had volunteered to engage in same-sex acts as decoys insisted that they were "men" rather than "fairies." 195 When the investigation implicated a local minister, the citizenry began to oppose the inquiry, prompting the Senate Naval Affairs Committee to investigate the investigation, and eventually condemn the undercover operation. 196

Chauncey's study explicitly documents how sex-based gender stereotypes undergirded constructions of sexual orientation. Same-sex sexual orientation did not necessarily result from the voluntary, intentional, and repeated performance of same-sex sex acts. The dispositive issue was gender posture during sexual/private activity: only "bottoms," the passive or feminized participants, were inverts as well as perverts. Of the two men touching each other, only the sexual "sissy" was deemed the official and cultural "queer." Only the man violating the conflation with sexual gender atypicality was officially and culturally deemed inverted, and therefore targeted for conflationary condemnation and clinical intervention. 197

This study thus shows how in this instance, as in the New York exemplar, these early-20th Century persons and communities normatively accepted the first and second legs of the conflation as officially and clinically codified. Here, the decoys, their bosses, and (apparently) their targets accepted that gender was fixed by (or deduced from) sex and, furthermore, that this official gender deduction was permanent or intransitive in nature. Consequently, sexual manifestations of gender transitivity or atypicality

194. Chauncey, supra note 189, at 297. Of course, this selective labeling reflected inversion's concern for gender role-playing as a key criterion of sexual orientation and relied on the traditional active/passive gender symbolisms. See supra notes 89-107 and accompanying text. Chauncey's study further demonstrates that gender symbolisms were believed to be dispositive of sexual orientation: all types of same-sex liaisons, whether casual and momentary encounters or committed and ongoing relationships, were subject to gender demarcation in order to delineate sexual orientation.

195. Chauncey, supra note 189, at 302-07. The direct quotes from the testimony make fascinating reading. This dispute over identity and behavior reflects the larger debate over essentialism and social constructionism because the question in both scenarios is what makes a person a "man" or a "fairy." See Symposium, If You Seduce a Straight Person, Can You Make Them Gay? Issues in Biological Essentialism Versus Social Constructionism in Gay and Lesbian Identities, 24 J. HOMOSEXUALITY 1 (1993). For more on essentialism and constructionism, see supra note 85 and authorities cited therein; infra note 315 and additional authorities cited therein.

196. Chauncey, supra note 189, at 295. See also Katz, ALMANAC, supra note 86, at 398-99 (reprinting portions of a 1921 New York Times article on the scandal).

197. See generally infra Chapter Four, Part I.D.1 and 2.
Queers, Sissies, Dykes, and Tomboys were also deemed problematic in this instance. Finally, this study shows that same-sex sexual orientation—"queerness"—was perceived and imputed precisely on the basis of sexual gender atypicality. In other words, this study shows that sexual orientation was viewed as the sexual component of deductive, intransitive gender because this sort of "sissiness"—sexual gender incorrectness (rather than same-sex activity per se)—was viewed as the litmus test for the cultural identification of "queerness."

In this way, this exemplar illustrates how Leg Two may be used to reinforce Leg One and how both legs jointly reinforce hetero-patriarchy: sexual gender atypicality is feared because it represents but one form of gender atypicality—a sexual form of gender's divergence from sex. The "inversion" of active/passive arrangements sexually is feared under Leg Two because, under the conflation, it can suggest, connote, or conjure the possibility of similar inversions socially under Leg One. This exemplar therefore underscores the substantive primacy of the sex/gender conflation under Leg One, and how its mirroring under Leg Two is a device to keep sex and gender conflated along traditionalist lines in every respect.

3. Literature: Stephen's Lonely Love

Radclyffe Hall's novel, The Well of Loneliness, records the conflation's influence in female same-sex sexuality. Hall's protagonist is given a name culturally identified as male—Stephen Gordon—and is sympathetically portrayed as a "mannish" lesbian struggling with a masculine body that situates her on the gender divide that separates the sexes. Stephen's angst over her invert-identified physique serves as the thematic centerpiece of the book: staring at herself in the mirror, Stephen "hated her body with its muscular shoulders, its small compact breasts, and its slender flanks of an athlete. All her life she must drag this body of hers like a monstrous

198. Radclyffe Hall, The Well of Loneliness (Hammond 1968) (1928). Originally published in 1928 with introductory commentary by Havelock Ellis, the book was promptly declared obscene by a London judge and seized copies of it "were burned in the furnaces of Scotland Yard." Weeks, supra note 110, at 107-11 (describing the events surrounding the novel's publication); see also Katz, Almanac, supra note 86, at 444-46 (recounting British prosecution of the book). A New York City magistrate also deemed the book obscene upon its publication in the United States, but an appellate court reversed the decision. See Katz, History, supra note 86, 597-610 (providing excerpts from newspapers and court rulings on the book's obscenity trial in the United States, and recounting the perspective of Una Troubridge, Hall's partner of many years). For an excellent deconstruction of the novel, see Newton, supra note 175.

199. The cross-gender choice of names reflects Hall's own life: her intimates referred to her as John. See Katz, History, supra note 86, at 597. However, Stephen's misfortune differed from the joy that Hall apparently derived from her long relationship with Una Troubridge. See Weeks, supra note 110, at 110-11. Like the fictional character Stephen, "passing women" around the turn of the century adopted typical male names as well as cross-gender attire and behavior. See, e.g., The San Francisco Lesbian and Gay History Project, "She Even Chewed Tobacco": A Pictorial Narrative of Passing Women in America, in Hidden from History, supra note 86, at 183; see also Diana Souhami, Gluck, 1895-1978: Her Biography (1988) (recounting the life of Hannah Gluckstein, who became "Gluck," the cross-dressing lesbian artist that rocketed to fame during the early 1900s).
fetter imposed on her spirit. . . . She began to grieve over it, touching her breasts with pitiful fingers . . . . The plot thickens when Stephen falls in love with Mary, a noninvert female who is portrayed as a stereotypically feminine woman.201 Stephen and Mary embark on a sexual, romantic relationship that ends when Martin, a male admirer from Stephen’s past, enters the scene and competes for Mary. Though Mary clings to her relationship with Stephen, Stephen decides that Mary should lead a “normal” life and engineers her acceptance of Martin’s affections.

In The Well of Loneliness, Hall used a female invert protagonist to articulate and advance the Third Sex theory; in fact, Hall conceived the project as “a book on sexual inversion, a novel that would be accessible to the general public who did not have access to technical treatises.” Hall also intended to make a moral statement about the unjust, unnecessary pain that the Third Sex suffered as a “misunderstood and misjudged minority.” And, the novel certainly represented a landmark with continuing significance. But Hall, like the society around her, used gender indicia to symbolize same-sex love; that is, she bound up sex, gender, and sexual orientation into a conflationary triad.

To Hall, and thus to Stephen, the official assignment of sex at birth set the stage for personal and societal conflict or harmony regarding her sex-determined gender and her sexual orientation. Harmony flowed from the idealized convergence of all three attributes; any divergence signified disorder, abnormality, disease, anguish. Stephen’s conflationary predicament thus dramatized the tragic fate to which inverts were thought to be doomed, both officially and culturally, and it reflected the feelings of social and sex-

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200. Hall, supra note 198, at 187-88; Newton, supra note 175, at 289. The theme of body hatred due to sex/gender anxieties resonates in real life as well. See Friedman, supra note 145, at 19 (reporting that “sissy” boys often report “markedly negative feelings about their bodies”).

201. Feminist critic Vera Brittain complained at the time that Hall “appears to take for granted that this over-emphasis of sex characteristics is part of the correct education of the normal human being; she therefore makes her ‘normal’ woman clinging and ‘feminine’ to exasperation.” Weeks, supra note 110, at 111 (quoting Brittain).

202. Katz, History, supra note 86, at 597-98. Toward the end of her life, Hall wrote that she “always stood for fidelity in the case of inverted unions. I have tried to help my own kind by setting an example.” Weeks, supra note 110, at 111. Hall’s views were probably strongly influenced by Ellis’ theorizing. For instance, she wrote to him during the novel’s trial in England that she was a “humble but very gladly willing disciple.” Id. at 107.

203. See Katz, History, supra note 86, at 597. Hall explained to her publisher at the time:

I wrote the book from a deep sense of duty. I am proud indeed to have taken up my pen in defence [sic] of those who are utterly defenseless, who being from birth set apart in accordance with some hidden scheme of Nature, need all the help that society can give them. Weeks, supra note 110, at 107. By contrast, the prosecutor in England argued that, “[t]he book seeks to glorify vice or to produce a plea of toleration of people who practice it. It is propaganda.” Katz, Almanac, supra note 86, at 445.

204. “For another thirty years or so [Hall’s] novel represented the clearest moral stand on lesbianism, and a position beyond which few women were prepared or able to venture.” Weeks, supra note 110, at 111; see also generally Michèle Aina Barale, Below the Belt: (Un)Covering The Well of Loneliness, in Inside/Out: Lesbian Theories, Gay Theories 235 (Dianna Fuss ed., 1991) (analyzing the significance of the cover art used in the various editions of the novel over the years).
ual deficiency that inversion theory sowed among those whom it purported to characterize. This exemplar therefore depicts another instance in the cultural acceptance of the official conflation within early 20th century America.

4. The African-American Community: Colorful Affectations

The final exemplar reflecting the conflation in turn-of-the-century America is in the form of historical fragments from communities of color. Eric Garber’s study of the African-American sexual minority subculture of Harlem during the 1920s captures one such fragment. Garber described costume balls that were central to community life. Featuring “beauty contests” in which “the fashionably dressed drags would vie for the title of Queen of the Ball,” these events highlighted the gender affectations that helped define the sexual orientation of the participants. Indeed, Garber’s description of New York’s African-American sexual minority community bears a remarkable resemblance to the conflationary scene captured in the Mazet Committee transcripts.

Similarly, Dr. Charles R. Hughes, while visiting St. Louis in the early part of this century, reported that “[m]ale negroes masquerading in woman’s garb and carousing and dancing with white men is the latest St. Louis record of neurotic and psychopathic sexual perversion. . . . All were gowned as women at the miscegenation dance and the negroes called each other feminine names.” In communities of color, as in other segments of

205. Other contemporary novels with similar themes include DUNA BARNES, NIGHTWOOD (1937); JOHN HENRY MACKAY, THE HUSTLER (Hubert Kennedy trans. 1985) (1926); RICHARD MEEKER, BETTER ANGEL (1933). The first known autobiography of a homosexual was written in 1901. See HARTLAND, supra note 4. For further readings on lesbian sexuality in literature, see, e.g., LESBIAN TEXTS AND CONTEXTS: RADICAL REVISIONS (Karla Jay & Joanne Glasgow eds., 1990).


207. Id. at 325. Garber also reported that, “[t]he ‘sissies’ and ‘bulldaggers’ mentioned in the blues were ridiculed for their cross-gender behavior, but [were] neither shunned nor hated.” Id. at 320; see also Eric Garber, T’ain’t Nobody’s Bizness: Homosexuality in 1920s Harlem, in GAY ROOTS, supra note 86, at 141. This milieu was depicted on the screen recently in Looking for Langston, which used archival footage and voice-overs of vintage African-American poetry regarding same-sex relations, with African-American poet Langston Hughes as its centerpiece, to depict Harlem male homosexuality during the jazz era of the 1920s. Looking for Langston (PBS television broadcast, July 24, 1992). For a first-person account of the 1920s Harlem scene, see Charles Michael Smith, Bruce Nugent. Bohemian of the Harlem Renaissance, in IN THE LIFE: A BLACK GAY ANTHOLOGY 209 (Joseph Beam ed., 1986). See generally BLACK MEN/WHITE MEN: A GAY ANTHOLOGY (Michael J. Smith ed., 1983) (a collection of essays focusing on cross-race, same-sex issues). Among women of color, D’Emilio and Freedman report on “the cross-dressing lesbian Gladys Bentley [who] performed in men’s attire.” D’EMILIO & FREEDMAN, supra note 86, at 227; see also FADERMAN, ODD GIRLS AND TWILIGHT LOVERS, supra note 86, at 67-79 (describing lesbian life in Harlem during the 1920s).

208. See supra note 186 and accompanying text.

209. KATZ, HISTORY, supra note 86, at 75 (quoting Charles H. Hughes, Homo Sexual Complexion Perverts in St. Louis: Note on a Feature of Sexual Psychopathy, 28 ALIENIST & NEUROLOGIST at 487-88 (1907)). Katz observes that “[i]t is difficult to say whether racism or antihomosexual attitudes are more
American society, departures from traditional social gender norms went hand-in-hand with same-sex sexual desire.

In these communities, as in those from the preceding exemplars, gender was deduced from sex, was deemed intransitive, and was thought to cover both social/public and sexual/private dimensions of human identity. Departures from these traditionalist precepts, whether socially and/or sexually, were problematized because they disrupted the active/passive premises underlying the official and cultural conflation of sex, gender, and sexual orientation. In communities of color, as elsewhere in this country, the first and second legs of the conflation governed social and sexual arrangements prevailing during the early decades of this century.

This brief sampler of events tracks the omnipresence of the conflation of sex, gender, and sexual orientation across American society in the early part of this century. And, more particularly, this sampler illustrates the normative hold of the conflation’s first and second legs among both the sexual majority and sexual minorities; whether the participants were operating within sexual minority communities, or intruding upon those communities with regulatory missions, these actors drew upon sex-derived gender stereotypes to project and describe sexual orientation. Both majority intruders and minority members relied on conflationary (non)conformities to official active/passive concepts in order to regulate and replicate the traditionalist sex/gender status quo both socially and sexually, and to celebrate or decry disruptions of this status quo. This record thus depicts the cultural entrenchment and official deployment of the first and second legs of the conflation in American society at and around the turn of the century. This record likewise depicts how Leg One and Leg Two operate jointly in modern culture to mutually reinforce each other. Today, these conflationary sex/gender dynamics remain much the same.

B. Still With Us: The Conflation in Contemporary American Life

The conflation of sex, gender, and sexual orientation reviewed above continues to percolate through American life. Though the inversion and Third Sex regimes have been officially abandoned, key elements of these theories remain ingrained in the American psyche. As shown below, the conflation persists in contemporary medicine, throughout the public at large, in mainstream popular culture, within the government, in other major social organizations, and among sexual minority communities, including communities of color. This continuing record thus illustrates and demonstrates that the first and second legs of the conflation remain clinically and culturally entrenched in American society today, and that they continue to

pronounced in Hughes’s report.” Id. The correlations between race and sex/gender prejudices have been explored in more recent studies as well. See Ficarrotto, supra note 148.
operate jointly in modern culture on behalf of official active/passive traditions to police social or sexual disruptions of the sex/gender status quo.

1. From Inversion to Fixation

In the field of medicine, inversion’s popularity was abruptly interrupted by the rise of Nazism in Germany during the early 1930s and by the conflagration of World War II in the following years. Afterward, inversion never regained its primacy as a formal and self-contained theory, though it did not disappear entirely. Instead, following the war’s end, new theories echoing inversion emerged, which seemed to focus more on same-sex erotic activity and less on social(ized) manifestations of gender per se. This new era in clinical theorizing was epitomized by the 1962 report of the Research Committee of the Society of Medical Psychoanalysis, which correlated same-sex sexual orientation to “mother fixation” among males and, by extension, also among females. This theory clearly reflected inversion’s influences because it accepted the official and cultural notion that gender is deductive and intransitive, because it viewed gender as encompassing both social/public and sexual/private elements of human personality, and because it accepted the resulting association and problematization of social and sexual gender atypicality. Fixation therefore led to the consolidation and expansion of the conflation’s role(s) and use(s) in modern clinical sex/gender theory.

Generally speaking, fixation theory postulated that childhood traumas prematurely “fixed,” or halted, human psycho-sexual development. Implicitly revealing its negative outlook, the theory sought to explain why some persons did not develop sexual affinity for the “opposite” sex due to such crises. These traumas effectively rendered people homosexual by

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210. See supra notes 173-80 and accompanying text.
211. See Irving Bieber et al., Homosexuality: A Psychoanalytic Study 308 (1962). This report and its theories were home-grown American products. The study was based on case studies that compared the early childhood experiences of 106 homosexual males with 100 heterosexual males. Id. at 22-24.
212. Though the research included only males, Dr. Wilbur, a member of the committee, thought it “reasonable to suggest that male homosexuality may also apply to female homosexuality” until further research demonstrated otherwise. See Cornelia B. Wilbur, Clinical Aspects of Female Homosexuality, in Sexual Inversion: The Multiple Roots of Homosexuality 268, 269 (Judd Marmor ed., 1965) (noting also that “[father ‘fixation’ and mother ‘fixation’ ha[d] both been postulated as causes of female homosexuality”); May E. Romm, Sexuality and Homosexuality in Women, in Sexual Inversion, supra at 282, 284 (finding that “the essential dynamic factors causing homosexuality are in may respects similar in both sexes”); see also infra notes 217-19 and accompanying text. See generally C.W. Socarides, The Historical Development of Theoretical and Clinical Concepts of Overt Female Homosexuality, 11 J. AM. PSYCHOANALYTIC ASS’N 386 (1963) (reviewing the state of the literature on female same-sex sexuality at that time).
213. See supra Part I.A.
214. A member of the committee explained that “‘fixation’ usually refers to an attachment developed in infancy or early childhood that persists in an immature or neurotic form, with an associated inability to form normal attachments with other persons or objects” and that “[t]he ‘fixation point’ marks the level of development at which the fixation has occurred.” Wilbur, supra note 212, at 269.
instilling in them "hidden but incapacitating fears of the opposite sex." Fixation's conception of same-sex sexual orientation as a form of arrested personality development thus was strikingly reminiscent of inversion's more explicit and particularized model of sexual orientation as a type of stunted gender development.

Fixation theory in fact postulated a quite elaborate sex/gender scenario: it held that homosexuals were created during early childhood by a parental environment where the wrong parent was aloof or anxious in the upbringing of children. In the case of gay males, the "homosexually inducive mother communicate[d] a desire for singular and unusual closeness with her son" and emasculated her "detached" husband through undisguised contempt for him and through an insatiable domination of the household. In the case of lesbian females, the "typical" mother again was "an overbearing individual who [was] dominant in the family and excessively controlling of the girl who [was] destined to become the homosexual" while the "typical" father, again, was a "detached, 'submerged' individual." These "pathological" influences during early childhood were held to disorient the child's "normal" sexual orientation, thus making same-sex orientation the "pathological alternative" to a "thwarted" cross-sex orientation.

215. Id. at 268 (quoting Sandor Rado, An Adaptational View of Sexual Behavior, in PSYCHOSEXUAL DEVELOPMENT IN HEALTH AND DISEASE 186 (Paul H. Hoeb & Joseph Zubin eds., 1949)). Wilbur notes that fixation theory thus supported views expounded immediately after World War II that regarded sexuality as an aspect of the human capacity to adapt to circumstances. See Rado, supra.

216. Fixation also was reminiscent of Freud's early efforts. See supra note 147.


218. Wilbur, supra note 212, at 275.

219. Bieber and his colleagues wrote that they "assume[d] that heterosexuality [was] the biologic norm and that unless interfered with all individuals are heterosexual." BIEBER ET AL., supra note 211, at 319 (first emphasis added). Thus, "[t]he capacity to adapt homosexually is, in a sense, a tribute to man's bio-social resources in the face of thwarted heterosexual goal-achievement." Id. at 303. This threshold assumption, along with fixation theory's other tenets, had tremendous consequences for parents and children all over the United States during and since the 1960s for two primary reasons.

First, by placing the responsibility of their child's "normality" squarely on parents, this assumption heavily invested parents in the sexual orientation of their children. This assumption thereby encouraged parents, who were terrified of the "wrong" result and of their blameworthiness in that result, to unleash untold, guilt-ridden pressures on their children. See generally ONE TEENAGER IN TEN: TESTIMONY BY GAY AND LESBIAN YOUTH (Ann Heron ed., 1983) (compiling various accounts that describe how sexual minority youths must navigate parental fears and pressures before being able to come to terms with a minority sexual orientation).

Second, by postulating that "all homosexuals are latent heterosexuals" waiting to be cured, Bieber, supra note 217, at 253, the fixation theory heavily invested the medical profession in the "reorientation" of "thwarted" sexualities. The "treatment" of "thwarted" sexual orientations no doubt increased the number and acuity of coercive medical interventions imposed on susceptible individuals, and thereby disrupted or destroyed untold numbers of lives. Describing fixation's impact on medical practices, Bieber wrote that, "[t]he increasing trend among psychoanalysts to orient patients to heterosexuality rather than to help them 'adjust' to homosexuality is related to favorable therapeutic results, to changes in conceptions of the genesis of homosexuality, and to the increasing recognition that homosexuality is incompatible with a reasonably happy life." Id. at 260-61.
On the surface, then, fixation theory sought to trace the etiology of sexual orientation to the functions or dysfunctions of the household in which the child was reared. Yet, like inversion before it, fixation assessed function and dysfunction from a sex-derived gender baseline. This baseline, in turn, brings into sharp relief fixation’s acceptance of gender as deductive and intransitive: by blaming cross-gendered parents for the minority sexual orientation of their offspring, this baseline at once depicts both fixation’s acceptance of sex as the crucial determinant of gender and its consequent problematization of gender transitivity, or atypicality. Moreover, this baseline shows that fixation expanded its sex/gender focus beyond the homosexual to include the gender conditions of others deemed especially influential in the early shaping of the homosexual. Fixation therefore continued, and expanded, the clinical use of conflationary sex/gender precepts to police traditionalist active/passive divides.

In painting the “typical pattern” of mothering that creates homosexual sons as an overclose intimacy, possessiveness, domination, overprotectiveness, and demasculinization,” fixation effectively defined the “pathology” as a breakdown within the entire household of traditionalist sex-derived gender roles. At its core, fixation theory erected a tension-filled triangle, featuring a mother viewed as dominating as well as smothering, a father viewed as submerged as well as removed, and their combination producing

This hyperpathologized view of same-sex sexual orientation received tremendous attention in the United States during the 1960s, and came to dominate post-war society’s perception of sexual minorities. In retrospect, it seems incredible, given the authors’ explicit acknowledgment that the entire theory hinged on an unsupported assumption. Perhaps fixation’s popularity stemmed from the fact that its unabashed androsexist and heterosexist leanings were well tuned to the harsh, frantic tenor and politics of the Cold War. In any case, fixation theory predominated in official thinking and in the popular imagination following World War II. Thus, fixation projected the view of sexual orientation with which most presently-living Americans were raised, and it continues to serve as the conceptual source for still-lingering attitudes that regard same-sex sexuality as a tragic or wicked abnormality subject to social pressure, formal treatment, and disciplined abstinence. See, e.g., Douglas Martin, They Are Gay, and Beseeching God to Make Them Not So, N.Y. TIMES, July 21, 1990, at A10 (recounting a meeting of Living in Freedom Eternally (L.I.F.E.) in New York City, a group devoted to helping people “come out of homosexuality”).

However, the belief that gays or lesbians can be “cured” generally has been discredited among medical professionals in recent years. See, e.g., Eli Coleman, Changing Approaches to the Treatment of Homosexuality: A Review, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 81 (William Paul et al. eds., 1982); Richard C. Pillard, Psychotherapeutic Treatment for the Invisible Minority, in supra at 99. See generally RICHARD A. ISAY, BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT 109-27 (1989) (arguing that because the problems associated with homosexual identity do not result from sexual orientation as such, but from society’s disapproval of homosexuality, efforts to cure same-sex sexual orientation are not only misguided and unnecessary, but also constitute a harmful interference with the individual’s personality). Moreover, even earlier leading figures, such as Sigmund Freud, voiced grave reservations over the efficacy of putative “cures” for minority sexual orientation. See, e.g., supra note 145.

220. Bieber, supra note 217, at 250. “Thus, the parental constellation most likely to produce a homosexual son or a heterosexual one with severe homosexual problems is a detached, hostile father and a close-binding, intimate, seductive mother who is a dominating, minimizing wife.” Id.
a son (or daughter) who was a (de)feminized mess.\footnote{221} This tension was all about deductive and intransitive gender: "correct" gender arrangements between the parents were based on sex and were cast as central to the development of "normal" sexual orientation in young humans. In this way, fixation both expanded inversion's sex/gender focus and continued that theory's codification of sexual orientation as the sexual component of sex-determined gender under the first and second legs of the conflation.

Fixation theory likewise situated conflationary sex/gender concepts at the center of its sexual orientation conclusions about lesbians: "the triangular constellation of the father-mother-homosexual daughter... [generally featured] a father who tend[ed] to be passive, unassertive, gentle, and detached [and] a mother who [was] dominant, domineering, guilt-inducing, and hostile."\footnote{222} Thus, like inversion, fixation theory conceived gender as inherently unstable and, in this theoretical context, as capable of ricocheting within the entire familial triangle to create "abnormal" sexual orientation in the impressionable youngster who literally and figuratively was caught in the middle.\footnote{223} In this way, fixation kept fully intact the clinical association of social gender atypicality with sexual gender atypicality under the joint or combined operation of Leg One and Leg Two of the conflation, even while expanding the scope of inversion's sex/gender focus.

Consequently, as was the case with inversion theory, this clinical scheme also situated Leg Two as a prop for Leg One. Fixation, like inversion, took note of nonconformities to Leg One and justified their clinical and cultural repression by invoking concerns relating to Leg Two: sex/gender trouble in the home that disrupted Leg One, fixation forewarned, would result in future gender/sexual orientation troubles under Leg Two. Thus, as was the case with inversion (and with modern culture as a whole), inversion theory effectively deployed Leg Two as a means of substantiating its concerns over, and justifying its clinical coercion of, Leg One. To fixation, like to inversion (and society as a whole), Leg Two is a strategic device to enforce the conflationary substance of Leg One.

However, that fixation expanded the gender focus to include the familial constellation did not mean that the gender of the adult homosexual escaped clinical scrutiny. On the contrary, fixation's postulation of social

\footnote{221} The mother "babies" the son while the father distances him. \textit{Id.} at 250. Moreover, "[m]asculine attitudes and behavior are not encouraged and are even actively discouraged." \textit{Id.} Thus, "[v]arying in neurotic motivation, both parents quite specifically direct themselves toward inhibiting manifestations of assertive, masculine behavior, and they unconsciously attempt to extinguish the son's heterosexuality... [through] suppressive behavior that is effectively castrating." \textit{Id.} at 251. Other studies on the role of the family in the etiology of same-sex sexuality are summarized in \textit{Friedman, supra} note 145, at 57-78.

\footnote{222} Wilbur, \textit{supra} note 212, at 276. The father is described as an ineffectual "pallid figure" who "does not present a strong masculine ideal toward which the daughter may relate positively," while the mother's overly assertive "techniques" torment the daughter. \textit{Id.}

\footnote{223} "The data reveal the homosexual to be the interactional focal point for extraordinary parental psychopathology." Bieber, \textit{supra} note 217, at 249.
and/or sexual gender troubles at the parental or familial level as a source of minority sexual orientation among offspring did not alleviate the continuing problematization of gender for the offspring into adulthood. For instance, fixation asserted that adult male “homosexuals do not have a concept of self as ‘a real man,’ nor do they view other homosexuals as completely masculine.” Accordingly, fixation theory posited that sex between homosexuals merely imitates heterosexual sex: “the insertor acts as the dominating, powerful male . . . [while] the insertee . . . takes a feminine role.”

Fixation repeated this gender(ed) scenario among adult females. For example, fixation theorists considered “behavior that is predominantly ‘tomboy’ [to be among the] distinguishing factors for the homosexual group.” Accordingly, “some homosexual females seek ‘masculine’ qualities in their female partners.” Therefore, social and sexual gender role-playing was regarded as elemental to same-sex sexual orientation among adult women as well: “The partner who customarily plays the aggressive role and is considered the ‘masculine’ partner tends to insert her tongue, her fingers, or a priapus into the ‘feminine’ partner either orally or genitally” because “[t]he preferentially ‘feminine’ partner usually . . . prefers being touched to touching and prefers being stimulated by insertion.” Thus, as with men, social and sexual gender trouble was central to fixation’s construction of the adult female homosexual as an individual.

Fixation, then, reconfigured sexology’s sex/gender legacy after World War II, but its view of homosexual psychodynamics effectively and relentlessly kept social and sexual gender dysfunction central to same-sex sexual orientation.

224. Id. at 257. Instead, gay males were held to “regard themselves as castrates and [to] speak derisively of other homosexuals.” Id.

225. Id. Thus, same-sex sexuality was deprived of all integrity: it was viewed as same-sex gender role-playing and was perceived as a defective replication of the heterosexual imperative; the coincidence of genitalia within a same-sex coupling was deemed to render the union pathological. “The domination-submission parameter is integrated with the heterosexual constellation and is associated with controlling or appeasing the feared male.” Id. This majority model of same-sex relations kept intact the differential labeling process that characterized inversion theory: “real” men “do” it and the “others” (feminized men and women) get it “done” to them. See, e.g., supra notes 189-97 and accompanying text. See also infra Chapter Four, Part I.D.1-2. However, minority perspectives have challenged this dismissal of same-sex relations as mere mimicry of cross-sex sexual routines. See, e.g., infra notes 281 and 283.

226. Wilbur, supra note 212, at 277. As is still the case generally, “[t]he presence of ‘tomboy behavior’ in early childhood and concentration on athletics in adolescence [are] postulated as early signs of a tendency toward female homosexuality.” Id. at 271.

227. Id. at 278.

228. Id. Indeed, the “feminine” partner’s sexual passivity was so great that she was viewed as harboring “some aversion to performing cunnilingus on her partner.” Id.

229. And, conversely, gender nondysfunction was pivotal to “normal” cross-sex sexual orientation. Thus, gender was pivotal to both same-sex and cross-sex sexual orientation. In short, conflationary treatments of gender are ubiquitous and universal, see infra Chapter Four, Part I.C, as well as central to
focus, fixation inflated the role of sex-determined gender in the construction of sexual orientation. In doing so, fixation continued and expanded the deployment of active/passive themes and traditions to diagnose and (mis)treat the disruption of the conflationary order(ing). At the same time, fixation continued the official and cultural acceptance of gender as deductive and intransitive: fixation accepted that sex determined gender, that this fixture was inflexible and permanent, and that expressions of transitivity or atypicality, whether social/public or sexual/private, were problematic and went hand in hand. Fixation thus lent continued, if not increased, vitality to the first and second legs of the conflation as formal knowledge in modern times.

2. From Fixation to “Gender Identity Disorder”

Today, “gender identity disorder” has replaced both inversion and fixation as the official mainstream theory that houses the conflation. This disorder was created for inclusion in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) after homosexuality was removed as a formal disorder in 1973. The current edition of the Manual (fourth edition, or DSM-IV) constructs “gender identity disorder” as a category for “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex” such that the person desires to be, or insists that he or she is, of the other sex. Effectively, this disorder

the construction and treatment of everyone’s sexual (and social) personality, see infra Chapter Four, Part IV.A.

230. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532 (4th ed. 1994) [hereinafter DSM-IV]. This book is the bible of psychiatry, and itemizes all of the diagnoses officially approved and recognized by the American Psychiatric Association (which makes treatments for these diagnoses payable by the insurance industry).

The removal of homosexuality per se from the previous edition (AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III]) formally excised fixation’s view that same-sex sexuality was always a deviant alternative to cross-sex normality. See supra notes 214-19 and accompanying text. For an account of the process leading up to the removal of homosexuality per se from the DSM-III, see BAYER, supra note 110. However, the DSM-III reached a compromise in which “ego-dystonic homosexuality” was retained as an official disorder. See DSM-III, supra, at 281-82. As the name indicates, this compromise used the “ego-dystonic” qualifier to limit diagnoses to those who experienced social discomfort due to their same-sex sexual orientation—the “unhappy” homosexual who wished to be “cured.” Thus, under this compromise members of sexual minorities who were satisfied with their sexuality would not be diagnosed as disordered.

This compromise was extremely controversial and the category was removed from the revised third edition of the manual, DSM-III-R. See Frederick Suppe, CLASSIFYING SEXUAL DISORDERS: THE DIAGNOSTIC AND STATISTICAL MANUAL OF THE AMERICAN PSYCHIATRIC ASSOCIATION, IN GAY PERSONALITY AND SEXUAL LABELING, supra note 150, at 9 (elaborating on the conceptual difficulties that “ego-dystonic homosexuality” raised for the clinical concept of “disorder”). Nevertheless, the DSM-IV still classifies “persistent and marked distress about sexual orientation” as a “Sexual Disorder Not Otherwise Specified.” DSM-IV, supra at 538.

More generally, commentators have pointed out that medical science, and the DSM-III in particular, had no established or articulated definition of “disorder.” See Suppe, supra at 12. This larger definitional void became critical during the debate over homosexuality, prompting a study of the
diagnoses social/public gender atypicality, or the disruption of the conflation’s first leg. This disorder consequently, and yet again, accepts conflationary notions regarding sex and gender under Leg One: it proceeds from the traditionalist assumption that gender is deduced from sex in a permanent and intransitive manner, and that fluctuations of, or departures from, social gender typicality therefore are problematic both for the individual and for society.

Interestingly, the DSM-IV cautions that the “disorder is not meant to describe a child’s mere nonconformity to stereotypic sex-role behavior as, for example, ‘tomboyishness’ in girls or ‘sissyish’ behavior in boys.” But the disorder’s description nevertheless echoes inversion (and fixation) theory along precisely such lines: “Girls with [this disorder] prefer boys as playmates, ... rough-and-tumble play,” and “show little interest in dolls or any form of feminine ... role-play activity” while boys with this disorder have “a strong attraction for the stereotypical games and pastimes of girls” such as playing “house” or dressing up dolls. In sum, the distinction between inversion, fixation, and gender identity disorder seems reducible to a question of degree or emphasis; gender disorder today is officially reserved only for instances of inversion or fixation that are perceived as extreme by today’s standards. Yet gender disorder, like inversion and fixation, diagnoses violations of the conflation’s first leg because it represents and embodies historic conflationary (mis)perceptions. Gender disorder,

...elements of other listed ailments. Id. at 11-12. This study concluded that the key commonality among formal disorders was that all of them produced “distress” within a person due to conflict between the individual and dominant society regarding the individual’s attributes or behaviors. Id. at 12. Of course, this definitional framework erected a tautology that relied on social disapproval of this or that particularity, and thereby rendered purportedly “objective” diagnoses contingent on unstable cultural contexts. The entire diagnostic enterprise thus became mired in endless subjectivities and internal inconsistencies. For a compilation of research literature existing during the controversy over the listing of homosexuality and ego-dystonic homosexuality in the DSM-III, see Martin S. Weinberg & Alan P. Bell, Homosexuality: An Annotated Bibliography (1972).

231. See supra Foreword, Part I.A.

232. DSM-IV, supra note 230, at 536. Though portions of the DSM-III stress that the diagnosis should apply only in extreme cases, it also created “a residual category for coding disorders in gender identity” that might not have fit the bill of this one. DSM-III, supra note 230, at 266. This residual designation, which the DSM-III denominated “Atypical Gender Identity Disorder,” thus served as a potential catch-all diagnosis for milder cases of sissiness or tomboyishness. For a discussion of the scope of the “atypical” category, see Friedman, supra note 145, at 265-66. The DSM-IV, while removing “Atypical Gender Identity Disorder” as a category, still retains a residual diagnosis of “Gender Identity Disorder Not Otherwise Specified” for “transient, stress-related cross-dressing behavior.” DSM-IV, supra note 230, at 538.

233. DSM-IV, supra note 230, at 533. Recognizing the resemblance between this disorder and the inversion and Third Sex theories, sexologist John De Cecco referred to the disorder as “a bit of 19th century nonsense.” Lawrence Mass, Homosexuality as Behavior and Identity: Dialogues of the Sexual Revolution, Volume 2 132, 139 (1990) (interviewing John De Cecco). De Cecco argues that the current clinical scheme thus “amounts to a reopathologization of homosexuality.” Id. at 136.

234. Which, of course, underscores the subjectivity and instability of the diagnosis, see supra note 230, without even broaching the more vexing question of determining whose opinion should determine what is “extreme.” See generally Jay P. Paul, Childhood Cross-Gender Behavior and Adult Homosexuality: The Resurgence of Biological Models of Sexuality, 24 J. Homosexuality 41 (1993)
like inversion and fixation, is trained on persons deemed cross-gendered because they disregard or disrupt Leg One of the conflation.

And, though the disorder on its face addresses only the conflation, or dysfunction, of sex and gender, the clinical connection to sexual orientation is retained by marking this disorder as the only official predictor of adult same-sex orientation. In other words, the DSM-IV formally holds that "sissies" and "tomboys" are likely to, and in fact often do, grow up to be "queers" and "dykes." This official correlation thereby formally upholds the second leg of the conflation: it continues to define sexual orientation as an aspect or outgrowth of sex-determined gender gone awry, and vice versa. This disorder therefore continues to confute social gender atypicality with sexual gender atypicality, and to problematize both.

Gender identity disorder, in other words, amounts to a diagnosis of social/public or sexual/private nonconformities that do or might disrupt either or both Leg One and/or Leg Two of the conflation. Thus, the conflation of sexual orientation with sex-determined gender under Leg One and under Leg Two remains substantially intact within the official codes of knowledge maintained by contemporary medical science. Consequently, these two legs continue to operate in tandem in modern culture.

3. Gender Disorder & Sexual Orientation Today

Ever since the 1970s, clinical endeavors also have sought out normative corroboration of the theorized association between social gender atypicality and same-sex sexual orientation. For example, one research study in 1973 of male "homosexual subjects" from Chicago and San Francisco reported that 67% of adult gay males "were considered sissies during childhood" in contrast to 3% of adult non-gay males. In 1984 another study compiled sample populations from four nations, including the United States, to study male childhood behaviors such as "doll playing, cross-

(critiquing the "prehomosexual configuration" viewpoint that postulates childhood cross-gender attributes as linked to adult same-sex sexual orientation).

235. The current Manual states that "about three-quarters of boys who had a childhood history of Gender Identity Disorder report a homosexual or bisexual orientation" by adulthood, but states that "corresponding percentages for sexual orientation in girls are not known." DSM-IV, supra note 230, at 536. Nevertheless, the Manual finds that nearly all sexually mature females who exhibit this disorder are sexually attracted to females. Id. at 534.

236. More significantly, this linkage within the Manual has produced a common understanding among psychiatrists and sexologists that "childhood gender-identity disorder" is the most consistent predictor or the strongest predictor of same-sex sexual orientation in adulthood. See 1 LAWRENCE MASS, HOMOSEXUALITY AND SEXUALITY: DIALOGUES OF THE SEXUAL REVOLUTION, 214, 219 (1990) (interviewing Richard Green, Director of the Program in Psychiatry, Law, and Human Sexuality at the University of California, Los Angeles).

237. See supra Foreword, Part I.B.

238. The major studies are summarized in FRIEDMAN, supra note 145, at 33-48. Current research is summarized in lay terms in Chandler Buit, Homosexuality and Biology, ATLANTIC MONTHLY, March 1993, at 47.

239. FRIEDMAN, supra note 145, at 41-42.
dressing, being regarded as a sissy, play preference for girls, and preference for the company of adult females."240 This study concluded that, in all the societies studied, "cross-gender behavior is associated with later sexual orientation."241

Similarly, Richard Green's famous (or notorious) 1987 study, The "Sissy Boy Syndrome" and the Development of Homosexuality, reasserted a direct correlation between non-conformance to sex-based social gender stereotypes and same-sex sexual orientation. Using case studies of individuals and twins, Green concluded that, empirically, "sissies" are, or eventually become, "queers."242 These studies therefore provide apparent empirical proof of the correlation between social and sexual sex/gender (a)typicality among men, as posited and policed by inversion, fixation, and other conflationary clinical theories built on the active/passive paradigm.

Another research study, conducted during the 1980s, reached a similar conclusion with respect to women. Comparing the degree of social and sexual masculinity and femininity among and between a pool of self-identi-

240. Id. at 44. The four nations were the United States, Guatemala, Brazil, and the Philippines. Id.
241. Id. See also McConaghy, supra note 47, at 313 (reviewing studies of "sex-linked behaviors and the heterosexual/homosexual balance"). The author begins with the statement, "[a] few decades ago it was accepted by lay people and clinicians alike that feminine or effeminate behaviors in males were likely to be associated in adults with a predominant homosexual orientation and in children with the likelihood of their developing one." Id. at 313.

However, this linkage of gender and sexual orientation does not necessarily establish a further, corollary link between sex and gender. In other words, even if Euro-American culture employs sex-based gender nonconformities to predict same-sex sexual orientation, it remains unclear what the results would be if gender were not deduced from sex. See supra Foreword, Part I.A. and infra Chapter Four, Part III.A.1.

Interestingly, studies show that gender can be disconnected from biological sex. See, e.g., Susan R. Walen & David Roth, A Cognitive Approach, in THEORIES OF HUMAN SEXUALITY, supra note 109, at 335, 347 (reviewing various studies about the formation of gender identity). Moreover, despite the cultural importance imputed to sex for the formation of gender identity, long-term studies of twins born with "ambiguous genitalia and raised either in congruence with or in opposition to their chromosomal sex" concluded that "gender identity may be primarily a function of postnatal factors" such as rearing and socialization. Id. Infants raised as females regardless of genitalia acted accordingly, as did infants raised as males. Thus, "biology is not necessarily destiny." Id. Native American culture illustrates this point concretely. See generally infra Chapter Three.

Because sexual orientation is based on both sex and gender, and on the cultural adhesion or conflation of the three constructs, see supra Foreword, Part I.A-D, the ultimate veracity of the current associations regarding gender-atypicality and same-sex sexual orientation cannot be determined until the supposed sex/gender correlations are examined from a wholly non-conflationary perspective. Once again, Native American examples seriously undercut the conflationary correlations that are dear and familiar to modern Euro-American culture. See infra Chapter Three and Chapter Four, Part III. Therefore, acculturation and internalization offers an alternative explanation for this linkage. See infra note 243.

242. Richard Green, The “Sissy Boy Syndrome” and the Development of Homosexuality (1987). Green cites to predecessor studies spanning the 1950s through the 1980s to bolster his conclusions. See id. at 370-71. Similar correlations have been asserted by other clinicians. See, e.g., 1 Stoller, Sex and Gender: The Development of Masculinity and Femininity, supra note 51; 2 Stoller, Sex and Gender: The Transsexual Experiment, supra note 51. Green's most recent book is Richard Green, Sexual Science and the Law (1992) (arguing that the law's approach to sexuality has not kept pace with advances in sexual science).
fied heterosexual, bisexual, and lesbian women, the study found "some aversion ... to unmitigated femininity" among the self-identified bisexual and lesbian women. Furthermore, the study reported greater "androgyny" or gender "undifferentiation" among the self-identified lesbian group. Just as with "sissies" and "queers," then, it seems that "tomboys" indeed are, or tend eventually to become, "dykes." For both women and men, the empirical proof thus aligns social and sexual sex/gender (a)typicality with the active/passive delineations of conflationary clinical theorizing.

However, on the whole, these research studies reveal at once various aspects of the conflation's present-day influence in this country. First and foremost, these studies confirm that present-day theorists and researchers in sexology, like turn-of-the-century sexologists, continue to abide by and to enforce active/passive themes and traditions. These studies show that contemporary clinicians continue to (mis)treat gender deductively and intransitively because they continue to assume that sex determines gender and that gender atypicality, therefore, is problematic and pathological. These studies also show that contemporary clinicians continue to regard and approach sexual orientation as a marker or correlate of gender, thus pathologizing sexual gender atypicality as part of the overall sex/gender scheme. Therefore, these studies show how and why expressions of gender transitivity, social and/or sexual, are conflated; these studies confirm, and lend a patina of credence to, what sexology already had preached, codified, reified, mandated, and perpetuated at the turn of the century. These studies, in short, illustrate why social and sexual gender atypicality were and are officially

243. Ronald A. LaTorre & Kristina Wendenburg, Psychological Characteristics of Bisexual, Heterosexual, and Homosexual Women, in HOMOSEXUALITY, MASCULINITY AND FEMININITY, supra note 148, at 87, 96. The authors also noted that it was "relatively uncommon to find a bisexual or homosexual woman whose femininity far exceeds her masculinity." Indeed, their report identified only one. Id. at 95. This study, undertaken in Canada, replicates results from earlier studies in various Western societies. See, e.g., William Paul & James D. Weinrich, Whom And What We Study: Definition and Scope of Sexual Orientation, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES, supra note 219, at 23, 27 (reviewing research literature in the United States and concluding that "[h]omosexual orientation is frequently confused with social sex role, gender identity, [and] gender role"); Michael W. Ross, Homosexuality and Social Sex Roles: A Re-Evaluation, in HOMOSEXUALITY, MASCULINITY AND FEMININITY, supra note 148, at 1 (reviewing the literature generally).

244. LaTorre & Wendenburg, supra note 243, at 95.

245. The "proof" is not entirely consistent, however. For example, Barbara Finlay and Karen Scheltema conducted a study using a two-dimensional matrix to study both men and women who self-identified as gay, lesbian or heterosexual and concluded that fewer sex/gender differences exist between and among persons embodying various permutations of sex and sexual orientation than reported by studies using a single-dimensional approach. Barbara Finlay & Karen E. Scheltema, The Relation of Gender and Sexual Orientation to Measures of Masculinity, Femininity, and Androgyny: A Further Analysis, 21 J. HOMOSEXUALITY 71 (1991). These findings therefore bolster the probability that internalization is the (circular) cause of other clinical/empirical findings. See infra note 247.

246. These studies thereby reveal the continuing inability or unwillingness of mainstream scientific forces to explore or develop the sex/gender landscape beyond the traditionalist limits set by the clinical codification of the conflation: in circular fashion, the contemporary normative corroboration of conflationary theorizing lends a patina of credence to the clinical theories that at the turn of this century
and culturally cross-associated under and through the joint operation of the conflation's first and second legs.

Additionally, these research studies reveal the widespread internalization of the conflation among lay members of the sexual majority as well as among lay members of sexual minorities. Thus, in circular fashion, these studies show that the public—majority and minority alike—expects (and demands?) what they have been taught during, since, and about childhood: that child “sissies” and “tomboys” become adult “queers” and “dykes,”

codified historic normative attitudes in the first place. See also infra notes 247-53 and accompanying text.

247. However, assuming the accuracy of empirical observations that link sex-based gender atypicality to same-sex sexual orientation, the history of conflation suggests that the internalization of socially constructed norms could be a, if not the, cause of correlations between the two. Various studies have demonstrated the importance of internalization. See, e.g., Hoffman, supra note 110, at 123-26 (reviewing studies on the role of “social learning” in the development of personality); Tim Carrigan et al., Toward a New Sociology of Masculinity, in The Making of Masculinities: The New Men’s Studies 63, 67-72 (Harry Brod ed., 1987) (discussing and critiquing theories on “internalization” as “role acquisition”); Ruth E. Hartley, Sex-Role Pressures and the Socialization of the Male Child, in The Forty-Nine Percent Majority: The Male Sex Role 235, 235 (Deborah S. David & Robert Brannon eds., 1976) (additionally noting that “the desired behavior is rarely defined positively as something the child should do, but rather, undesirable behavior is indicated negatively as something he should not do or be—anything, that is, that the parent or other people regard as ‘sissy’ ”); Anastasia Toufexis, Coming from a Different Place, Take, (Special Issue) Fall 1990, 64, 65 (reporting the findings of recent studies on the influence of socialization among girls in the United States, including a widespread instillation of “self-doubt, ambivalence, panic and loss”).

The process of internalization, however, remains generally ignored in mainstream professional circles. See generally Liz Margolies et al., Internalized Homophobia: Identifying and Treating the Oppressor Within, in Lesbian Psychologies: Explorations and Challenges (Boston Lesbian Psychologies Collective eds., 1987). Making matters worse, the historic heterosexist bias of mainstream professional circles also remains generally unabated. See Gregory M. Herek et al., Avoiding Heterosexist Bias in Psychological Research, 46 AM. PSYCHOLOGIST 957 (summarizing heterosexist research biases, and suggesting ways to avoid them, as presented in the final report of the American Psychological Association’s Task Force on Non-Heterosexist Research).

The internalization hypothesis is also supported by a cross-cultural study that linked a culture’s overall rigidity about gender to its more specific readiness to equate gender-atypicality with same-sex sexual orientation. Comparing Australia, Finland, and Sweden, the study confirmed the existence of “a relationship between gender identity and degree of homosexuality, but only in societies that are anti-homosexual and have relatively rigid sex roles.” Michael W. Ross, Femininity, Masculinity, and Sexual Orientation: Some Cross-Cultural Comparisons, in Homosexuality, Masculinity and Femininity, supra note 148, at 27, 33. Consequently, the study concludes, “the relationship between degree of homosexuality and gender identity is a socially based one rather than biologically inherent in a homosexual orientation.” Id. The study concluded by noting that “the relationship between degree of homosexuality and sex role is dependent not on homosexuality as such but on the attitudes toward homosexuality and sex-role rigidity in the society” surrounding the individual. Id. at 35. Thus, the correlation between “sissies” and “queers” is constructed by societies where gender stances and boundaries are heavily policed; the correlation, in other words, is a by-product of socially constructed conditions. These findings are further supported by studies showing that people who harbor homophobic attitudes also tend to harbor androsexist beliefs. See supra note 148.

Whether conflationary precepts are deemed a purely “natural” phenomenon or a socially constructed and thoroughly internalized contrivance is not the ultimate point: either way, the conflation is “real,” as is its destructive impact on individuals, on the law, and on society at large. See infra Chapter Six, Part III. Thus, even if deemed “natural” and, therefore like a disease, society and law need not and, as with a disease, should not accept the conflation’s pernicious impact on our lives as individuals, on the law as a system of justice, and on society as a whole. See infra Chapter Four, Part II.
respectively. These studies on the whole depict the intellectual and attitudinal construction of all-enveloping and self-fulfilling conflationary prophecies related jointly to Leg One and Leg Two. Accordingly, these studies show yet again how conflationary imagery is drawn from active/passive imagery, and how these corresponding sets of images are employed to inhibit disruptions of the conflation’s legs and their combined sex/gender precepts.\footnote{248}

Finally, and more specifically, these research studies indicate how Leg One and Leg Two of the conflation operate in tandem in modern culture: these studies indicate that the cross-associations between Leg One and Leg Two are activated by social gender atypicality and that clinical or societal interventions to suppress such disruptions of Leg One can be rationalized and justified by invoking Leg Two concerns. In other words, these studies indicate that Leg Two can serve as a tactical tool for the preservation and advancement of the substantive sex/gender precepts that undergird Leg One. Public opinion and public images, as reflected in attitudinal studies of the American mainstream today, confirm this strategic/substantive interplay between Leg Two and Leg One, respectively.\footnote{249}

4. **Mainstreaming the Conflation**

Like contemporary medicine, the broad American mainstream also continues believing in this conflation and its policing of traditionalist active/passive sex/gender lines. This broader belief is reflected in public opinion surveys as well as in the images that the media disseminates, and that the public embraces, as icons of popular culture. The conflation’s hold on mainstream culture also is demonstrated by the posture of its governmental and social institutions. In short, in contemporary times the conflation’s official legitimacy and cultural influence is matched by its popular vitality.

a. **Public Opinion, Popular Images**

Present-day studies of public opinion reveal—and validate—the conflation’s present-day power. In 1985, for instance, *Homosexuality, Masculinity and Femininity* reported the results of a survey measuring the general public’s (mis)perceptions of homosexuals. Using a list of social/public personality attributes, the report asked a randomly selected pool of persons to rate men, women, gay men and lesbians as groups according to the social

\footnote{248. See *supra* Foreword, Part I.A-B.}

\footnote{249. This strategic/substantive interplay between Leg Two and Leg One is more vividly illustrated, and more strongly confirmed, by the operation of the conflation in legal culture: the cases reviewed in Chapter Two show how societal sex/gender discrimination is triggered by and directed at disruptions of Leg One and how defendants and courts often resort to Leg Two as a means of justifying and exonerating the discrimination. This interplay effectively means that Leg Two is used in both modern culture and legal culture as a strategic device that helps dominant sex/gender forces to command and coerce conformance to Leg One substantively. See *infra* Chapter Two.}
sex/gender attributes that they thought applied to most members of each group. Comparing these ratings to traditional stereotypes, the study found that "sex role definitions are a highly salient reference point for the public definition of homosexuals."\textsuperscript{250} Another recent study found that, even though the public generally "disliked" all homosexuals, "[c]onventionality of style" in the form of "‘standard masculine’ presentation of self in outward appearance appears to have the best chance for reducing dislike of homosexual males."\textsuperscript{251} Thus, it seems that popular opinion agrees with medical science: a "sissy" should, must, and does inhabit every "queer," and a "tomboy" every "dyke," and vice versa.

But, it further seems that the "queer" or "dyke" who socially/publicly most looks and acts like a "sissy" or "tomboy" is most disliked. The dislike of "queers," then, seems to result more from aversion to overt social or public manifestations of gender atypicality (and their perceived correlation to minority sexual orientation) than from aversion to actual same-sex sexual/private desire or intimacies.\textsuperscript{252} In other words, what the public reports disliking about "queers" is what they notice about "sissies." These studies thus depict a public that is primarily and specifically averse to social/public gender atypicality, that associates this form of atypicality with sexual/private gender atypicality, and that therefore "dislikes" perceived or actual

\textsuperscript{250} Taylor, \textit{supra} note 148, at 37. The author concluded that "the presumption . . . that homosexuals behave like the opposite sex, is alive and well." \textit{Id.} at 51. However, the author noted "a growing body of research [that] . . . clearly contradicts these public stereotypes of homosexuals." \textit{Id.} The study also cited earlier studies that "suggested that anti-homosexual individuals may be more cognitively rigid and authoritarian than individuals with positive attitudes" toward same-sex sexuality. \textit{Id.} at 41. "[T]hose who value traditional sex roles devalue homosexuals because they perceive them to be role deviants, and those who do not value the roles so highly do not care." \textit{Id.} at 50. \textit{See also supra} note 148 and authorities cited therein on the conflationary inter-relationship of androsexist and heterosexist biases based on sex, gender, and sexual orientation. This study was undertaken in Britain, and reiterates earlier findings from various Western societies as well. \textit{See supra} note 243 and authorities cited therein on the perceived, conflationary inter-relationship of sex, gender, and sexual orientation.

\textsuperscript{251} Mary Riege Laner & Roy H. Laner, \textit{Personal Style or Sexual Preference: Why Gay Men Are Disliked, in Homosexuality in International Perspective, supra} note 126, at 78; \textit{see also} Daniel Goleman, \textit{Homophobia: Scientists Find Clues to its Roots}, N.Y. Times, July 10, 1990, at C1 (reviewing recent research on public fear and hatred of gay men and lesbians). The author reports that "the stereotypes of gay men as feminine and lesbians as masculine persists in people's minds even though most gay men and lesbians do not, in fact, conform to those images." \textit{Id.} at C11. Moreover, the author reports that hostility to members of sexual minorities is most pronounced among people who demonstrate "[d]efensiveness about their own sexuality." \textit{Id.} And, the more effeminate the gay man is perceived to be, the more threatening he becomes: "Seeing a feminine man evokes a tremendous amount of anxiety in many men; it triggers an awareness of their own feminine qualities . . . which they see as being a sign of weakness." \textit{Id.}

\textsuperscript{252} This point is also suggested by the history of inversion theory and its successors: in each instance gender atypicality was the feared phenomenon, even though the purported focus was sexual orientation. \textit{See supra} Parts I.B and II.B. This point also is evidenced by the conflation's impact on legal culture. \textit{See generally infra} Chapter Two. The linkage of discrimination ostensibly based on sexual orientation and discrimination actually based on gender also has been urged by various other commentators. \textit{See, e.g.,} Capers, \textit{supra} note 24; Fajer, \textit{supra} note 24, at 607-50; Law, \textit{supra} note 84. \textit{See generally supra} Foreword, Part I.D.
members of sexual minorities. This, then, is a public that dislikes social gender incorrectness and that, in accordance with conflationary linkages, interprets social gender incorrectness as a correlate of sexual gender incorrectness; i.e., minority sexual orientation.

In contemporary public opinion, as these reports indicate, the association of social and sexual gender atypicality remains in place to (re)produce active/passive stereotypes and sex/gender bigotries that project and perpetuate the combined operation of the conflation’s first and second legs. This association reveals the public’s continuing adherence to the deductive and intransitive model of gender along traditionalist lines because it indicates a continuing belief that sex determines gender and that gender is definitively and rigidly contoured based exclusively on this deduction. This association also reveals the public’s continuing adherence to the construction of sexual orientation as the sexual component of sex-determined gender. In turn, this association reveals continuing public adherence to the specific construction of minority sexual orientation as the problematic, or troubled, expression of sexual gender atypicality, or incorrectness—in other words, continuing adherence to Leg One and Leg Two of the conflation.

As indicated immediately above with respect to the contemporary research studies, these popular studies also illuminate more concretely the way in which Leg One and Leg Two interrelate in modern culture. These popular results more specifically confirm what the research studies indicated: the cross-association of social gender atypicality and sexual gender atypicality under the combined operation of Leg One and Leg Two effectively employs the second leg to justify and implement the first leg. In everyday practice, Leg Two oftentimes (if not always) is used strategically to effectuate the substantive mandate of Leg One.\(^{253}\)

The conflation’s role in the molding of public (mis)perceptions also is revealed—and validated—by its continued resonance and influence in various forms of popular culture.\(^{254}\) A prime example is Vito Russo’s classic study, *The Celluloid Closet: Homosexuality in the Movies*, which not coincidentally opens with a chapter titled, “Who’s a Sissy?—Homosexuality According to Tinseltown.”\(^{255}\) The book documents numerous examples of

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\(^{253}\) This strategic/substantive interplay between Leg Two and Leg One is even more concretely and extensively demonstrated by the deconstruction of cases that follows after this Chapter. See infra Chapter Two.


the conflation's representations in the cinema, dating from the earliest days of Hollywood to the present.\textsuperscript{256}


\textsuperscript{256} The earliest example in Russo's book is \textit{A Florida Enchantment}, released in 1914 and pre-dating the "talkies" films, which set the standard for sissies as farcical, feminized weaklings. See Russo, \textit{supra} note 255, at 11. As Russo notes at the outset, his study focuses on the sissy rather than the tomboy because in the movies, as in society, "[w]eakness in men rather than strength in women has consistently been seen as the connection between sex role behavior and deviant sexuality. And while sissy men have always signaled a rank betrayal of the myth of male superiority, tomboy women have seemed to reinforce that myth." \textit{Id.} at 4-5. Within the sissy theme, "[c]rucially at issue always was the connection between feminine behavior and inferiority." \textit{Id.} at 17. Cast as nellole things in sharp contrast to manly heroes, "[e]arly sissies were yardsticks for measuring the virility of the men around them." \textit{Id.} at 16. But same-sex sexuality was the central subtext of the sissy theme: "Using in each case male intimacy as the thing all males secretly dread, the issue is raised indirectly yet goes unmentioned. In this way, the sissy remained asexual while serving as a substitute for homosexuality." \textit{Id.} at 18.

Though the silly sissy historically dominated cinematic portrayals of sexual minorities, Russo's comprehensive study covers various other portrayals, including some relatively benign or sensitive ones. \textit{See, e.g.}, \textit{id.} at 233 (discussing the "touching gay subplot" of 1979's \textit{Happy Birthday Gemini}, in which a father accepts his son's homosexuality). However, Russo also charts two less benign alternatives to the sissy theme in Hollywood's depictions of characters imbued with same-sex desires. The first and most common alternative was, and is, the vicious or kinky weirdo who manipulates, molestes, menaces, or otherwise preys on the world around him through promiscuity, violence, or murder. \textit{See, e.g., id.} at 259-62. In addition to perpetuating vicious stereotypes, Russo notes that this alternative "reinforces the fiction that violence is committed against gays most often by other gays or by those who are sexually confused and threatened by their own latent homosexuality." \textit{Id.} at 260.

The second alternative is the confused or sad soul who either bravely buries deviant impulses in virtuous mainstream living or is redeemed from deviance by fortuitous involvement with cross-sex sexuality. \textit{See id.} at 231 (discussing 1978's \textit{A Different Story}, a double whammy in which a nice gay man and a nice lesbian woman meet and become a nice normal "straight" couple). This representation reflects the continuing legacy of inversion theory as depicted decades earlier in \textit{The Well of Loneliness}. \textit{See supra} notes 198-205 and accompanying text.

Russo notes that, beginning in the early 1970s, lesbian and gay activists devised a list of suggestions to help guide filmmakers toward more diverse and balanced representations of lesbian or gay-identified roles, and began to protest skewed or one-dimensional representations of such characters. Russo, \textit{supra} note 255, at 220-21. These protests have increased in recent years with the continued release of films featuring characters that activists assert perpetuate distorting stereotypes of sexual minorities. For accounts of the much-publicized protests aimed at the 1992 Academy Awards presentations, see, for example, Edward Guthmann, \textit{Latest Plans to Upset Oscar}, S.F. CHRoN., Mar. 19, 1992, at E2; Chris Woodyard, \textit{Officials Confident of Security for Oscars}, L.A. TIMES, Mar. 30, 1992, at B1. Whether coincidentally or not, in 1993 and 1994 the entertainment industry began producing and releasing several works that included nonstereotyped sexual minority character portrayals, which were not marginalized or dismissed as cultural blips. Perhaps the most notable and influential productions were the 1993 Tony Award-winning play \textit{Angels in America: A Gay Fantasia on National Themes} and the much-acclaimed film \textit{Philadelphia}, both of which centered on the ways in which the nation mistreats its sexual minorities. For an overview of these and similar projects, see Michael Szymanski, \textit{Where Hollywood Fears to Tread: The Success of "Angels in America" Challenges the Way Movies Deal with Gays}, ENT. Wkly., May 21, 1993, at 28.

These issues, moreover, are not limited to the American media. \textit{See, e.g.}, Frank Pearce, \textit{How to Be Immoral and Ill, Pathetic and Dangerous, All at the Same Time: Mass Media and the Homosexual, in The Manufacture of News: Social Problems, Deviance and the Mass Media} 284 (Stanley Cohen & Jock Young eds., 1973) (reviewing portrayals of homosexuals in the British media).
Perhaps one of the most recognizable examples of the conflation in contemporary popular culture is the cinematic trilogy which began with *La Cage Aux Folles*. The original film and its two sequels depict a middle-aged gay male couple living a parody of heterosexual married life, complete with the stereotypical use of gender(ed) roles, decor and mannerisms to portray same-sex sexuality. While directly concerned with same-sex love, *La Cage Aux Folles* employs social gender atypicality as a trope for minority sexual orientation and thereby is able to omit any depiction of sexuality—even a kiss—to portray the relationship between these two lovers. The enactment of social effeminacy is, yet again, the substituted symbol for the unseen occurrence of same-sex intimacies, or for the unseen enactment of sexual effeminacy. By using cross-gender stereotypes to portray same-sex personas and activities, these three films demonstrate the conflationary use(s) of deductive, intransitive gender to depict minority sexual orientation.

Moreover, this type of contemporary conflationary depiction is not limited to the big screen but is prevalent in television as well. Thus, as

257. "The remarkable success in the United States of a film like *La Cage aux Folles* is a testament to the durability of the old-fashioned expansive femininity used to type male homosexuality." Russo, supra note 255, at 7.

258. Id. at 262-63. "[T]he gayness was sublimated into outrageous mannerism and decor" to "avoid any genuine homosexual passion." Id. at 263. Russo notes that Variety tagged the characters as "the Abbott and Costello of gaydom." Id. at 262. Incisively, Russo also points out that, "A gay reading of *La Cage aux Folles*, one that escapes most audiences, shows that in fact the film is about passing for straight and the accommodations gays make, large and small, each day of their lives in order to meet the expectations of the straight world." Id. at 263.

259. For instance, gender symbolism played a prominent role in the 1990s television hit, *In Living Color*. The weekly series ran a regular segment involving Blaine and Antoine, two typically effeminate gay male characters, in various settings. The segments consistently portrayed the characters as one-dimensional "sissies." See, e.g., *In Living Color* (Fox television broadcasts, July 14, 1991 & Feb. 7, 1993) (video recordings on file with author). Attesting to the conflation's cultural staying power, these portrayals continue to be popular in syndication and have produced a cult following for the characters, complete with lines of popular fashion and novelty items.

Similarly, *Saturday Night Live* popularized the character known as Lyle-the-Effeminate-Heterosexual, whose cross-sex sexual orientation constantly was mistaken for same-sex sexual orientation because his nonsexual gender indicia were culturally atypical for his sex. Lyle-the-Effeminate-Heterosexual, like Blaine and Antoine, also continues to live in syndication. See *Saturday Night Live* (Comedy Channel television broadcast, Feb. 7, 1992).

Likewise, the hit show *Designing Women* included Odell as an irregular character who was the younger brother of Charlene. In the episode debuting this character, Charlene describes Odell as a sweet young man who "knits sweaters and works at a beauty store." Based on this description, Suzanne immediately announces that Odell must be involved in "homosexual activity." During the bantering dialogue that follows, St. Francis of Assisi is referred to as the "patron saint of homosexuals," presumably as a play on words that, under the conflation, allows the audience to draw the cultural connection between "Assisi" (or "a sissy") with same-sex sexuality. Finally, when Odell introduces the Designing Women to his girlfriend, the canned audience voice-over swoons with relief and appreciation. Odell, too, continues to be seen in syndication. See *Designing Women* (KUSI-San Diego television broadcast, Dec. 6, 1993).

Similarly, trendy talk shows both manifest and perpetuate the conflation. For instance, one recent show focused on "straight" people who are mistaken for gay or lesbian. The show featured as its guests two teens, one male and one female, and the entire show quickly devolved into conflationary babble.
individuals and as a society, our cultural traditions trap us in the same vise that gripped mainstream sexologists as well as Uranian activists a century ago: socially and sexually ungendered sexual orientation is virtually inconceivable. Contemporary popular opinion and culture mirror the historic conflation of sex, gender, and sexual orientation as officially codified under Leg One and Leg Two of this phenomenon.

b. **Official Attitudes, Social Institutions**

Reflecting past and present beliefs, government officials likewise continue to rely upon the conflation as the basis for judgments regarding public affairs. One chilling incident occurred on the eve of the Persian Gulf War, when Vice Admiral Joseph S. Donnell directed the 200 ships and 40 shore installations under his command to redouble their efforts to expose and eject lesbian personnel.²⁶⁰ Lesbians might pose special difficulties, the admiral warned, because they are “more aggressive than their male counterparts” and thus more “intimidating.”²⁶¹ Ironically, the admiral feared that efforts to root out lesbians would be pursued “halfheartedly” simply because lesbians are “hard-working, career-oriented, willing to put in long hours on the job and among the command’s top performers.”²⁶² The lesbians, it seems, were feared to be superior to the “real” men at the social (and sexual?)


²⁶¹ Id.

²⁶² Id. Critics viewed the incident as a “caricature” of the military’s anti-lesbian and anti-gay policies. As openly gay U.S. Representative Gerry E. Studds commented, “Dear God, if it is the Navy’s policy to root out top performers, what is going on here? When any remotely fair-minded person thinks about [the admiral’s message] for two minutes, [the exclusionary policy] collapses under its own weight. This is a telling example . . . of a bankrupt policy.” *Id.* The military’s policy led gay activist Randy Shilts to observe that the Pentagon’s policy invited cynicism and deception: anyone could evade military service simply by claiming to be gay or lesbian. Randy Shilts, *Claim You’re Gay, Avoid the Military*, *N.Y. Times*, Jan. 7, 1991, at A19.

Ultimately, the military suspended its anti-lesbian and anti-gay policies during the Persian Gulf hostilities of 1991 in order to utilize lesbian and gay personnel during the conflict, intending, however, to resume investigations and discharges once the military emergency had subsided. *See*, e.g., Wade Lambert, *Gay GIs Told, Serve Now, Face Discharge Later*, *Wall St. J.*, Jan. 24, 1991, at B1. This inconsistent and self-serving plan prompted at least one service member to challenge the exclusionary policy by announcing her same-sex sexual orientation before being sent to the Persian Gulf. *See* *Reservist Headed for the Gulf Challenges Homosexual Ban*, *N.Y. Times*, Jan. 11, 1991, at A10.
performance of masculinity. Apparently, then, the admiral had concluded that the heterosexist nerves of his (presumably) heterosexual male sailors needed boosting, lest they be intimidated into toleration (or acceptance) by proverbially mannish lesbians apparently serving their country just a tad too well, a might too proudly, and without sufficient obeisance to conflationary active/passive strictures.263

Randy Shilts maintained that this official and opportunistic double standard has a long history. “From the first days of the Defense Department’s anti-gay regulations in the early 1940s, the government was willing to waive the for-heterosexuals-only requirement for military service if barring gays interfered with manpower exigencies.” Randy Shilts, What’s Fair in Love and War, Newsweek, Feb. 1, 1993, at 58; Randy Shilts, Dismissed: The Purging of Gay and Lesbian Troops from the Armed Forces, L.A. Times Mag., Apr. 25, 1993, at 10. For a more detailed account, see RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF (1993).

For a fascinating discussion of a case that was being litigated during the Persian Gulf hostilities, see Thomas B. Stoddard, Lesbian and Gay Rights Litigation Before a Hostile Federal Judiciary: Extracting Benefit from Peril, 27 Harv. C.R.-C.L. L. Rev. 555 (1992) (discussing Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989) rev’d, 920 F.2d 74 (D.C. Cir. 1990) rev’d, en banc, 41 F.3d 677 (D.C. Cir. 1994)). The case gained national notoriety after the district judge criticized the plaintiff’s discovery plan, commenting that discovery should relate to the plaintiff and “not every ‘homo’ that may be walking the face of the earth at this time.” Id. at 565. The judge refused to disqualify himself and eventually granted summary judgment in favor of the military on grounds that even the defendant had disavowed prior to the ruling: the judge ruled that the AIDS pandemic justified the exclusion of sexual minorities from the armed forces, even though lesbians are among the least afflicted and even though the exclusionary policy was implemented long before the HIV virus became known. Id. at 566-67.

263. Bizarre though Admiral Donnell’s pronouncement was, this incident is only the latest in an Orwellian history. In 1947 Newsweek reported that army files showed that homosexuals “topped the average soldier in intelligence, education, and rating.” KATZ, ALMANAC, supra note 86, at 617 (quoting homosexuals in Uniform, Newsweek, June 9, 1947, at 54). Similarly, two internal Pentagon studies completed in 1988 and 1989 flirtily contradict the official policy that deems minority sexual orientations as incompatible with military service. See GAYS IN UNIFORM: THE PENTAGON’S SECRET REPORTS (Kate Dyer ed., 1990) (reprinting the studies). The Pentagon attempted to suppress the studies; however, they were pried loose by Representatives Gerry Studds and Patricia Schroeder. Id. at xvii. In a similar act of public and self-deception, the Navy refused for twenty years to release the 1957 Crittenden report that concluded that no factual data existed to support the contention that homosexuals are a greater blackmail risk than heterosexuals. Id. at xv-xvi.

Since the release of the suppressed reports, two additional studies were undertaken at the request of Congress to review the military’s exclusionary policies and assess their fiscal costs. See U.S. Gen. Accounting Office, Defense Force Management: DoD’s Policy on Homosexuality (1992) [hereinafter GAO, DoD’s Policy on Homosexuality]; U.S. Gen. Accounting Office, Defense Force Management: Statistics Related to DoD’s Policy on Homosexuality (1992) [hereinafter GAO, Statistics Related to DoD’s Policy on Homosexuality]. The reports estimate that the average number of expulsions annually has been 1500, with the Navy reported as the most aggressive branch of the service. GAO, DoD’s Policy on Homosexuality, supra at 4. The reports did not include the costs of administering the policy nor the costs of investigating alleged cases of homosexuality because the Department of Defense does not keep records on those costs. Thus, the report only considered the costs of recruiting and training individuals to replace the personnel discharged for homosexuality. Id. at 3. Over the last decade, those costs alone have approximated $500 million. Pentagon Cost of Discharging Gays Put at $500 Million, L.A. Times, June 19, 1992, at A14.

Having finally seen the light of day, these reports have begun to play a key role in legal claims brought by lesbian and gay service members challenging their discharges from the military. See, e.g., Meinhold v. United States Dep’t of Defense, 808 F. Supp. 1455, 1457-58 (C.D. Cal. 1993) (citing and discussing, inter alia, GAO, Statistics Related to DoD’s Policy on Homosexuality and the Crittenden report), amended. 62 Empl. Prac. Dec. (CCH) ¶ 42619 (C.D. Cal. 1993), aff’d in part, rev’d
In part, vacated in part, Nos. 93-55242, 93-56354, 1994 U.S. App. LEXIS 23705 (9th Cir. Aug. 31, 1994). Meinhold had “established a reputation for being a dedicated and disciplined sailor” during his twelve years in the Navy, but was discharged when he announced he was gay on national television during an interview with Ted Koppel on ABC’s Nightline. Id. at 1456. The court ordered Meinhold reinstated, concluding that the military’s ban could not survive even under a “rational relation” level of equal protection scrutiny. Id. at 1457-58. The court reasoned that the cited reports contradicted the military’s bare assertion that same-sex sexuality is “incompatible” with service, and noted recent statements by various officials that cast doubt on the efficacy of the policy. Id. Most gratifyingly, the court cited Admiral Donnell’s statement acknowledging that the Navy’s experience confirmed that lesbians perform better than most other naval personnel. Id. at 1458; see also Pruitt v. Cheney, 963 F.2d 1160, 1166-67 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992) (ruling that the rational relation level of scrutiny required courts to examine the factual basis underlying the military’s exclusionary policy); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1328-37 (E.D. Cal. 1993) (holding the exclusionary policy to be irrational in light of the documentation of “suitability” in the various reports).

Most recently, the government commissioned an independent study, which was conducted by the RAND think tank as part of the Clinton Administration’s effort to reformulate the exclusionary policy. The RAND report, like all the preceding studies, concluded that same-sex sexual orientation is not incompatible with military service. See RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT (1993). This study, along with its predecessors, was cited in the most recent Gays-in-the-Military ruling, which struck down the so-called “Don’t Ask, Don’t Tell” compromise policy as an artful but deceptive replication of its problematic antecedents. Able v. United States, No. 94-CV-0974, 1995 U.S. Dist. LEXIS 3928 (E.D.N.Y. March 30, 1995). See also supra note 177.

Two recently published books also document the human toll of the military’s historic antagonism toward sexual minorities. See ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO (1990); MARY ANN HUMPHREY, MY COUNTRY, MY RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT (1990); see also MIKE HIPPLE, MATLOVICH: THE GOOD SOLDIER (1989) (recounting the celebrated case of highly decorated Air Force member Leonard Matlovich, whose challenge of the anti-gay military policy served as a catalyst for similar challenges that continue to this day).

Another account was compiled by the news media during the furor over the lifting of the military’s ban against lesbians and gay men in the early days of the Clinton Administration. See Bettina Bo xlall, GAYS RELATE WAR STORIES OF SHADOW LIFE IN MILITARY, L.A. TIMES, Feb. 7, 1993, at A1 (reporting first-hand contemporary accounts from sexual minority perspectives).

In like vein, Katz reports the instructive recollections of Dr. William C. Menninger, the chief consultant in neuropsychiatry to the U.S. Army’s surgeon general between 1943 and 1946. See KATZ, ALMANAC, supra note 86, at 634-39 (providing a first-hand account of the Army’s handling of homosexuality during World War II from an official perspective).

These studies, cases, and events seem to be having an impact on public attitudes. For example, in April, 1991 the Human Rights Campaign Fund commissioned a public opinion poll on the Pentagon’s exclusion of sexual minorities. Of the 900 individuals surveyed nationwide, 81% disapproved of the military’s policy of discharging soldiers found to be gay or lesbian. Rex Wockner, SURPRISE: POLL FINDS MAJORITY FAVORS GAY RIGHTS, BAY AREA REP., Apr. 25, 1991, at A1. Perhaps sensing this changing public sentiment, Democratic presidential nominee Bill Clinton promised to repeal the policy both as a candidate and as president-elect. See Healy, supra note 53, at A1. However, the senior military brass, supported by senior politicians in both the Republican and Democratic parties, quickly combined to frustrate Clinton’s execution of his promise. See Clinton Urged to Move Slowly on Gay Policy, S.D. UNION-TRIB., Nov. 16, 1992, at A1; Eric Schmitt, CHALLENGING THE MILITARY: IN PROMISING TO END BAN ON HOMOSEXUALS, CLINTON IS CONFRONTING A WALL OF TRADITION, N.Y. TIMES, Nov. 12, 1992, at A1. Nonetheless, Clinton vowed that he “would not be dissuaded” from honoring his campaign pledge. Douglas Jehl, CLINTON REBUFFS CRITICS ON GAY MILITARY BAN, L.A. TIMES, Nov. 17, 1992, at A1.

After taking office, Clinton encountered the same opposition, but effected a “partial” lift of the ban and ordered a six-month study of the practical consequences that might result from completely lifting the ban. David Lauter, CLINTON COMPROMISES, PARTIALLY LIFTS GAY BAN, L.A. TIMES, Jan. 30, 1993, at A1. Ultimately, the compromise “Don’t Ask, Don’t Tell” policy did little to alter the exclusionary status quo. See Valdes, supra note 53, at 465-73 (comparing and assessing the new policy against its
This modern American attitude toward homosexuals in the military contrasts sharply with that of the ancient Greeks, who believed that male same-sex lovers made the best fighters because they were spurred to courageous acts in order to excel on behalf of, and in the eyes of, their loved ones. See Kenneth J. Dover, Greek Homosexuality 191 (1978). In fact, the feats of a regiment “composed entirely of pairs of homosexual lovers” were as legendary in the ancient world as Valley Forge, the Alamo, and D-Day are to contemporary Americans. See id. at 192. This regiment, known as the “Sacred Band,” was formed in 378 BC and formed the “hard core” of the Boiotian army. Id. It was “a formidable army at all times . . . and at Khaironeia in 338 BCE, where Philip II of Macedon crushed Greek opposition, it died to a man.” Id. Dover noted that the Sacred Band was not an isolated example: “We cannot . . . dismiss all anecdotes of this type as romantic fictions.” Id. at 191. See generally Nussbaum, supra note 91 (outlining sex/gender and sexuality norms of classical Athens and detailing how and why the Greek experience should and does matter to present-day law and policy makers).

Some commentators have blamed the homoeroticism of “macho” military culture for causing the anxiety and controversy surrounding the Clinton Administration’s proposals regarding openly lesbian, gay, or bisexual service members. See, e.g., David Gelman, Homosexuality in the Ranks, Newsweek, July 26, 1993, at 28 (describing the “undercurrent of homoerotic tension” that pervades military life and the “Dionysian initiation rites, including simulated acts of sodomy” and “drag shows put on by the GIs for the entertainment of GIs”); see also Steven Zeeland, Barrack Buddies and Soldier Lovers: Dialogues with Gay Young Men in the U.S. Military (1993) (detailing the homoerotic dynamics of life in the U.S. Armed Forces); Steven Zeeland, Sailors and Sexual Identity: Crossing the Line Between “Straight” and “Gay” in the U.S. Navy (1995) (providing a similar account focused on the U.S. Navy).

The analogs between the military’s present discrimination against sexual minorities and its discredited past discrimination against racial minorities and women is examined in Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499 (1991). See also Who Defends America?: Race, Sex, and Class in the Armed Forces (Edwin Dorn ed., 1989). For earlier works on racial desegregation in the military, see Alfred H. Haursath, Johns Hopkins University, Utilization of Negro Manpower in the Army: A 1951 Study (1967); Lee Nichols, Breakthrough on the Color Front (1954). See also Social Research and the Desegregation of the U.S. Army (Leo Bogart ed., 1969) (reproducing the opinions of White soldiers about the abilities of Black soldiers, which are strikingly similar to the opinions expressed today by some non-gay soldiers about the abilities of gay soldiers).

More recently, similar analogs are presented in the ongoing controversy over women in combat positions. See, e.g., Christopher Horrigan, Comment, The Combat Exclusion Rule and Equal Protection, 32 Santa Clara L. Rev. 229 (1992) (criticizing the rule excluding women from combat positions as justified only by stereotypic notions of women’s roles); Mark Thompson, Military Women Fight Hard for Right to Go into Combat, S.D. Union-Trib., Oct. 29, 1992, at A1 (quoting Retired Army Major General George S. Patton, son of the celebrated World War II general, as predicting that women in combat positions would “surely degrade” the Army and destroy the special chemistry that binds the presumably macho, heterosexual, and heterosexist fighting men). The 15-member Presidential Commission on the Assignment of Women in the Armed Forces ultimately recommended some modifications in existing regulations but voted against including women in most combat situations. See Melissa Healy, Ban Urged on Women in Most Combat Roles, L.A. Times, Nov. 4, 1992, at A1. The Clinton Administration in 1993 began moving toward an incremental opening of combat opportunities for women. See Melissa Healy, Aspin to Allow Women to Fly Combat Missions, L.A. Times, Apr. 23, 1993, at A1.

The admiral’s fears and conclusions, as captured in this order, betray his conflationary premises. The order and its motivations were rooted in the view that gender is deduced from sex intransitively because his objective was to excise from the Navy service members who display(ed) gender transitivity, or atypicality. Moreover, the admiral’s juxtaposition of social gender masculinity with lesbian identity betrays his conflationary association of social gender atypicality with sexual gender atypicality—his association of cross-gender social attributes with members of sexual minorities. This combination of conflationary notions and associations led to his fear of the lesbians lurking in his soldiers’ midst, and to his conclusion that they were problematic under the first and second legs of the conflation.

As for gay male service members, the gender issues underlying the military’s official homophobia were succinctly captured by Richard Rodriguez in his commentary on the furor over President Clinton’s attempted modification of existing rules and practices: “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.” Once again, conflationary associations and fears dictated official policy: “queers” are poor warriors because they are deemed “sissies.” Thus, the exclusion of sexual minorities from service in the armed forces, ostensibly a sexual orientation issue, in fact implicates gender issues as well. In this way, Leg One and Leg Two of the conflation

and issues surrounding the participation of women in the military); Brian Mitchell, WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY (1989) (arguing that the sexual integration of the military threatens the strength of our forces and the very values upon which militaries depend).

Perhaps surprisingly, given this history, some sexual minority service members have reported that their comrades have congratulated them after they have “come out” as gay or lesbian. See Jenifer Warren, Gay Sergeant Told He’s Not Welcome in Army, for Now, L.A. TIMES, Apr. 30, 1993, at A3. Similarly, sexual minority service members who challenged the military’s exclusionary policies during the 1980s and 1990s also report acceptance. See Valdes, supra note 53, at 400-25 (detailing the facts and critiquing the analyses in the numerous military cases that were litigated during the 1980s and early 1990s).

Finally, it should be noted that, even though the focus of the exclusionary policies have been on gay men and lesbians, bisexuals also are targets for discrimination. See, e.g., Mark Gabrish Conlan, Bisexual Air Force Veteran Tells His Story, GAY & LESBIAN TIMES, July 15, 1993, at 22. The grouping of bisexuals with gays and lesbians as targets of exclusion is judicially condoned as well. See, e.g., Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991) (upholding the discharge of a Naval reservist for “being a bisexual”), cert. denied, 503 U.S. 951 (1992).

264. Rodriguez, supra note 1, at B7. Of course, the author’s phrasing is somewhat hyperbolic, as it was not especially “easy” for Americans to tolerate homosexuals, even as sissies. Instead, Americans simply became accustomed to this stereotype and tolerated the stereotype so long as the people that embodied it could be avoided and marginalized in society at large. Thus, the issue over privacy in military living quarters, in context, is but the howl of a complacent and privileged majority who fear that members of sexual minorities might get “too” close for personal comfort. This discomfort, moreover, is framed along traditionalist gender lines and stereotypes; as Randy Shilts recently noted, “[i]t is absolutely remarkable that all of the arguments [against sexual minorities serving openly in the military] have been focused on men and around sexual harassment... it’s like the men are petrified of the idea that they might end up being treated the way they’ve been treating women all these years.” Danica Kirka, Randy Shilts: Fighting Against the Rules Restricting Gays in the Military, L.A. TIMES, July 25, 1993, at M3.
effectively framed much of the sex/gender imagery and rhetoric surrounding the gays-in-the-military controversy of the early 1990s.\textsuperscript{265}

The government’s continued reliance on and enforcement of social/public and sexual/private conflationary norms is matched by other major institutions at the center of the American cultural mainstream. The Boy Scouts of America, an organization formed purposefully to buttress the traditional sex-based gender profile of male youths,\textsuperscript{266} is an apt example. From the outset, the organization was designed to counter the feared “feminization” of men due to the perceived “feminization” of the workplace by the entry of women into the labor force and by the relative decline of sheer physical labor, or “muscularity,” in occupational pursuits.\textsuperscript{267} “The REAL Boy Scout [was] not a ‘sissy.’”\textsuperscript{268} On the contrary, he was “a real boy, not too much like his sister.”\textsuperscript{269} So it was with the youthful scout’s adult counterpart and role model: “[a]t the core of the image of the ideal scoutmaster was assertive manliness.”\textsuperscript{270} Consequently, an official Boy Scout manual explicitly forewarned that “No Miss Nancy need apply” for the position of scoutmaster.\textsuperscript{271} Clearly, social gender atypicality was taboo for and among the Boy Scouts; whether among children or adults, the organization condemned and attacked any manifestation of sex/gender incorrectness that might threaten to disrupt Leg One of the conflation. In this manner, the Boy Scouts, like the military, betrayed the conflationary predicates of its exclusionary policy: gender comes in two mutually exclusive forms (active and masculine or passive and feminine) and gender is both deductive (fixed wholly by sex) as well as intransitive (endangered by atypicality or fluidity).

The organization’s emphasis on the social/public manifestation of masculinity brought it into the vortex of the conflation: its disdain for any male perceived as being, or having been, “hitched to his mother’s apron-strings”\textsuperscript{272} was coupled with a concomitant, conflationary disdain for gay men.\textsuperscript{273} The Boy Scouts, like the armed forces, conflate(d) social gender incorrectness with sexual gender incorrectness to enforce official and tradi-

\textsuperscript{265} It was the combined legacy of inversion and Third Sex gender atypicality and of homoerotic gender hyper-typicality that made it possible for the controversy to involve at once powerful but inconsistent images of gay men as predators in the shower and as cowards in the trench. See generally supra notes 262-64.

\textsuperscript{266} For a summary history of the founding of the Boy Scouts and its focus on gender, see Jeffrey P. Hantover, \textit{The Boy Scouts and the Validation of Masculinity, in The American Man} 285 (Elizabeth H. Pleck \& Joseph H. Pleck eds., 1980).

\textsuperscript{267} \textit{Id.} at 289-93.

\textsuperscript{268} \textit{Id.} at 295.

\textsuperscript{269} \textit{Id.} at 294.

\textsuperscript{270} \textit{Id.} at 296.

\textsuperscript{271} \textit{Id.} at 296. The Boy Scout organizers apparently were well in touch with the “Miss Nancy” vernacular of the same-sex subculture. See supra note 186 and accompanying text. See generally supra Part I.A-B.

\textsuperscript{272} \textit{Id.} at 296.

\textsuperscript{273} The organization was interested in males who were “men as traditionally defined.” \textit{Id.}
tionalist active/passive mandates under Leg Two of the conflation. This conflationary interposition of "sissy" or "Miss Nancy" with "queer" or "gay" has led the organization to ban sexual minority members, flatly asserting, like the military, that same-sex sexual orientation is per se incompatible with membership among its ranks, or with participation in its activities, on account of gender atypicality.\textsuperscript{274} In effect, gay males cannot be Boy

\textsuperscript{274} The ban, like the military's ban, has brought the Boy Scouts of America into the controversy over the civil and legal rights of sexual minorities. The controversy was fueled by several widely publicized expulsions of homosexuals throughout California. See, e.g., Gay Court Case Is a Morality Issue, Boy Scouts Say, S.J. MERCURY News, Dec. 11, 1990, at 6B (discussing the case of Timothy Curran, who was expelled from his assistant scoutmaster position when the Boy Scout hierarchy learned that he had gone to his prom with a male date); Tony Perry, Landmark Case Pits Gay Officer Against Boy Scouts, L.A. Times, Jan. 11, 1993, at A3. The Perry article focuses on the case of Chuck Merino, an openly gay member of the El Cajon police department in southern California. Merino founded the Boy Scout Explorer Troop that he led, but he was dismissed when he spoke out at a community meeting that addressed a rash of gay bashings. "How word of Merino's low-key comment got to the Scouting hierarchy is unclear. But without so much as questioning him, the Scouts sent a letter to Merino immediately banning him from any role with the Explorers." Id. at A24.

The Merino case has been viewed as having special legal significance because it was the first discrimination case filed after the enactment of a state statute outlawing job discrimination on the basis of sexual orientation. Id. at A3. However, a California appellate court held in another, long-pending case that this law did not prohibit the Boy Scouts from discriminating against scoutmasters who are gay or lesbian because the First Amendment to the federal Constitution protects the organization's associational rights. Curran v. Mount Diablo Council of Boy Scouts, 29 Cal. Rptr. 2d 580 (Ct. App. 1994), review granted, 31 Cal. Rptr. 2d 126 (1994); see also Bettina Boxall, Scouts Can Bar Gay Men as Leaders, State Court Rules, L.A. Times, March 31, 1994, at A3. Curran's appeal to the California Supreme Court was pending at the time of publication of this Project.

In any event, Boy Scout officials adamantly have insisted that gays cannot be proper role models for young males. See Curran, 29 Cal. Rptr. at 591 (quoting Boy Scouts' expert testimony on role modeling). Additionally, the organization has argued that the Boy Scout oath, which requires a scout to vow to keep "morally straight," effectively disqualifies gays from participating because homosexuality is immoral. See Gay Court Case Is a Morality Issue, Boy Scouts Say, supra.

 Ironically, the grandson of the organization's founder, William Boyce Mueller, is himself gay and argues that his grandfather founded the Scouts for "all boys and not just some boys." J.L. Wohls, Gays Latest Victims of Scouts' Bias, BRAVO NEWS Mag., Nov. 26, 1992, at 1. Others have noted in like vein that the organization's exclusion of sexual minorities, like the military's exclusion, simply reflects a tradition of institutional bigotries against historically subordinated or marginalized groups: "the Scouts resisted racial integration of troops and handicapped boys had to go to court to win the right to join the Scouts." Id. See also supra note 263.

In order to help defuse the growing controversy, the Boy Scouts recently announced that they will "develop a youth program that will allow gay members, atheists, and girls" to join. Boy Scouts to Allow Homosexuals in New Program, N.Y. Times, Aug. 14, 1991, at A10. The program, called "Learning for Life," will be "separate from the traditional Scout program but will be administered by local Scout councils that choose to offer it." Id. Critics, however, condemned the clearly "second-class program" for ghettoizing, and thus stigmatizing, the gay youth, girls, and agnostic or atheist children grouped into it. Id.

In the meantime, at least one local Scout troop has decided to break with the national policy. Dan Turner, Scout Troop Challenges Gay Policy, S.F. CHRON., Feb. 5, 1992, at A15 (reporting that the 12 active members of San Jose's Troop 260 unanimously passed a resolution to challenge the national leadership's "unreasoning fear of homosexuality"). In response, the national headquarters threatened the San Jose troop with the loss of its charter. Laura Myers, Scout Troop in San Jose Threatened with Ouster for Welcoming Gays, S.D. UNION-Trib., Feb. 5, 1992, at A3 (quoting a spokesperson at the organization's national headquarters in Dallas as saying that "[w]e can't let some little troop go off on its own and make its own rules").
Scouts or scoutmasters because their quantity of "assertive manliness" is, by conflationary definition, held inadequate. Under the combined impact of Leg One and Leg Two, "sissy scouts," like "sissy warriors," simply cannot and will not do.

5. Being Butchy, Femmy, or Queeny Today

The conflation today remains as firmly entrenched in sexual minority communities as it is in mainstream American society. This entrenchment is exemplified by the continuing sway of identifications like "butch" or "femme" or "queen" that project various conflationary configurations of sex, gender, and sexual orientation. And, though the butch-femme debate is often most directly associated with lesbian identity, its sex/gender issues extend to gay male identity as well because both female and male same-sex couples necessarily confront male/husband and female/wife roles and issues defined by traditionalist active/passive standards.275

For instance, both female and male same-sex couples frequently encounter queries from friends, relatives, or acquaintances in the sexual majority asking, "Who plays the 'wife's' role?"276 This query, in effect, seeks to determine who is the "butch" and who is the "femme"; in other words, who conforms and who does not—who is socially and sexually gender typical and who is socially and sexually gender atypical. Of course, this query effectively signals underlying confusion (or incredulity) over the

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275. Thus, one scholar has argued that same-sex marriage is prohibited in large part because same-sex couples, by definition, embody a challenge to the purportedly "natural" sex/gender ordering that is typified by the institution of "traditionalist" marriage. See Hunter, supra note 23.


[i]the butch, of course, is the person . . . who plays the masculine role, performing such tasks as opening beer bottles with their teeth, repairing vehicles, and watching sports on TV. . . . The femme, in contrast, plays the feminine role, which focuses more on the aesthetic than the practical. . . . An affair between two butches would be awkward at best: whose motorcycle would they ride?

Id.
possibility that sex-determined gender and sexual orientation are not necessarily correlated or conflated, either socially/publicly or sexually/privately.

Perhaps the most familiar example of the butch-femme issue in specifically gay male subculture might be the still-ubiquitous "drag" shows that glorify cross-dressing and other social gender-bending affectations as a means of representing sexual orientation to the audience. Much as we saw in the 1982 film, Victor, Victoria, these shows feature lip-sync impersonations of hyper-glamorous female performers, replete with wigs, make-up, gowns and gestures. Major cities often have at least one establishment specializing in the presentation of this type of activity, and many other bars or lounges across the country include such fare in their regular entertainment schedules. Literally and normatively, these shows place

277. The persistent reliance on sex/gender stereotypes for the construction of minority sexual self-identity is reported in John D'Emilio's excellent history. See generally John D'Emilio, supra note 86. D'Emilio, for instance, recounts the scene in San Francisco's Black Cat lounge during the 1950s. Jose Sarria's performance as a female impersonator concluded with everyone standing up and singing "God Save Us Nelly Queens." See id. at 187-88. Sarria's activities also are reported by Mark Thompson, Children of Paradise: A Brief History of Queens, in GAY SPIRIT: MYTH AND MEANING, supra note 156, at 49, 53-55 (observing that cross-dressing and female impersonation by "drag queens" has consistently played a prominent role in forming gay male consciousness). See also PRONES: supra note 86, at 220-27 (discussing gay male effeminacy as an ironic expression of gender paradox).


Both the gay male queen and the lesbian butch personified a politics of defiance to the conflation of sex, gender, and sexual orientation. Yet even their politics could not escape the conflation: like the homoerotic construction of sexual orientation, this politics of defiance merely shifted the emphasis from atypical to typical combinations of sex, gender, and sexual orientation. See supra notes 167-83 and accompanying text.

Most recently, cross-gender behaviors, such as cross-dressing, seem to be "crossing-over" into mainstream culture. See, e.g., Cross-Dressing Crosses Over, NEWSWEEK, July 12, 1993, at 70. Cross-dressing male performers such as RuPaul and Lypsinka have become so popular that mainstream networks such as MTV, and mainstream advertisers such as The Gap, have featured them in their programming and advertising. Kevin Allman, Dressed to Excess, L.A. TIMES, April 25, 1993, at E4 (reporting that drag has become the rage among the trendy in Los Angeles); Geraldine Baum, At Miss Vera's, the Mirror Reveals a Changed Man, L.A. TIMES, Dec. 23, 1993, at E1 (reporting on Miss Vera's Finishing School for Boys Who Want to Be Girls, located in New York City); David Wharton, Pretty in Pink, L.A. TIMES, Nov. 12, 1993, at B3 (reporting that a convention of the Society for the Second Self, a "nationwide group of about 1,200 men who like to wear women's clothing on a regular basis," drew 200 attendees). Of course, the current popularity of gender-bending activities is not unique; for instance, during the 1970s and 1980s, popular performers such as Boy George and David Bowie incorporated gender-bending into their repertoires as a means of furthering their careers.

278. Among the favorite impersonations are Diana Ross, Cher, and Marilyn Monroe. For a complete account, see Esther Newton, MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA (1979).

279. For instance, a popular guide to lesbian and gay establishments around the country includes the symbol "S" to identify clubs that feature impersonator shows. See DAMRON ADDRESS BOOK (The Damron Company ed., 30th Anniversary ed. 1994).
gender squarely at center stage in the cultural life of communities apparently defined by sexual orientation, and thereby project active/passive traditions represented and reproduced jointly by the first and second legs of the conflation.280

The ongoing butch-femme debate in lesbian communities, which contests the pros and cons of acting out sex-based gender roles socially and/or sexually within an all-female coupling, likewise attests to the conflation’s hardiness.281 For example, JoAnn Loulan’s groundbreaking surveys of les-
bians throughout the country illustrate the phenomenon well: her most recent data, from 1989-90, show 44% of the 589 lesbians interviewed electing to adopt a socially and/or sexually gendered role within the relationship, with 19% identifying themselves as butch (the male role) and 25% as femme (the female role).282 The conflation thus persists among sizable segments of lesbian communities, coexisting with the growing recognition that butch-femme categorizing often serves to perpetuate androsexist as well as heterosexist images.283 In short, under the first and second legs of the conflation, internalized active/passive traditions regarding sex and gender continue to drive, at least in part, the personal(ized) constructions of sexual orientation among many lesbians living today.284

Thus, as with gay male cross-dressing, the cultural and political significance of butch-femme identifications can be powerful. See generally Leslie Feinberg, Letter to a Fifties Femme from a Stone Butch, in The Persistent Desire, supra note 277, at 102 (reflecting on life as a “stone butch” lesbian); Joan Parkin & Amanda Prosser, An Academic Affair: The Politics of Butch-Femme Pleasures, in The Persistent Desire, supra note 277, at 442 (analyzing the merger of the personal and the political in a butch-femme relationship).

The various perspectives aired in the butch-femme debate are represented in the comments of lesbians around the country compiled in JoAnn Loulan & Sherry Thomas, The Lesbian Erotic Dance: Butch, Femme, Androgyny and Other Rhythms 33-35, 57-59, 79-83, 107-09, 133-38, 185-87, 225-32 (1990); see also A Celebration of Butch-Femme Identities in the Lesbian Community, in The Persistent Desire, supra note 277, at 454 (reprinting an edited transcript of a panel discussion held at the New York Lesbian and Gay Community Services on December 6, 1990). See generally Vicinus, supra note 169 (attempting to trace the complex history of the modern lesbian identity). The point remains, however, that identity based on sexual orientation was and is, in great measure, cast in terms of sex/gender norms, even if such norms were or are infused with special meanings and nuances depending on the actors and their perceptions of particular social or sexual contexts. See generally supra Parts I.B, C.

282. Loulan & Thomas, supra note 281, at 48. Additionally, 44% identified as “androgynous.” But, only 36% said the label was “somewhat important” or “very important.” Id. The questionnaire is reprinted in the book, together with statistical breakdowns. Id. at 253-64. See also Martin & Lyon, supra note 87, at 72-78. (concluding that the “butch-femme concept of relationship” has experienced a gradual decline since the mid-1970s, but “has not yet vanished”); Letitia Anne Peplau & Hortensia Amaro, Understanding Lesbian Relationships, in Homosexuality: Social, Psychological, and Biological Issues, supra note 219, at 241 (noting that butch-femme “role-playing was more prevalent” during earlier decades). But see Renay Sanders, The Butch-Femme Balance, in The Persistent Desire, supra note 277, at 370 ( recounting the author’s life journey, settling into a butch-femme relationship, and concluding that “yin and yang [the feminine and the masculine]” long for each other).

283. As one Loulan respondent commented: “The archetypal Lesbian couple—the untouched stone butch and the femme—is a puzzle of the history of women’s sexuality in a culture that perceives women as sexually passive. These butches developed an assertive, aggressive sexual stance, uncommon to women . . . .” Loulan & Thomas, supra note 281, at 50 (quoting Madeline Davis). Davis also noted, however, that the butch-femme dynamic exceeded the apparent mimicry of traditional cross-sex roles, and thus lent powerful liberational significance to the butch-femme tradition. Id. at 50-51. See also Gayle Rubin, Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries, in The Persistent Desire, supra note 277, at 466 (providing an insightful discussion of “conceptions and misconceptions of lesbian gender”).

284. See, e.g., Jeanne Cordova, Butches, Lies, and Feminism, in The Persistent Desire, supra note 277, at 272 (“As a butch I’ve walked a hundred alleys, seen a thousand stares. The question in those eyes is always the same: ‘Are you a man or a woman?’”). At the other end of the sex/gender spectrum, “Lipstick Lesbians” recently have come onto the scene, fashioning an identity that may be described as ultra-feminine in that it stresses dress and behavior that is prototypically feminine. See supra note 173. This phenomenon, like the homoerotic construction of same-sex sexual orientation,
In both male and female same-sex settings, the butch/femme/queen discourse manifests an awareness of and an acquiescence to official active/passive sex/gender themes and traditions. Among both the men and the women, sex is viewed as gender’s determinant. Among both sexes, gender is understood to comprise social/public and sexual/private personality. Among both, gender’s official intrastivity is recognized, even while it is being violated. Among both gay men and lesbians, social gender atypicality is associated with sexual gender atypicality. Thus, Leg One and Leg Two of the conflation remain jointly in place among both male and female segments of sexual minority communities.

In like vein, sexual minorities of color continue to live the conflation in much the same way that Eric Garber depicted in his study of early-to-mid-1900s Harlem. Indeed, the costumed events that Garber described now have evolved into the highly stylized recent innovation known as “voguing.” Popularized by Madonna’s 1990 pop music hit single, ‘Vogue,’ this activity involves “striking a pose” which, more often than not, amounts to glamorized and exaggerated social gender posturing; the voguing balls of today, as with their earlier equivalents, are characterized by flamboyant social gender regalia and props.

The popularity of voguing and balls among African-American and Latino sexual minorities in New York City was depicted in movingly graphic detail in the 1990 film Paris Is Burning. The film documents the “houses” that play central roles in the production of balls; each is headed by a “mother” who directs his/her house’s participation in the events. Participants compete in categories such as “Butch Queen,” “Pretty Girl,” and “Miss Cheesecake.” One set of categories, “Realness,” focuses on the ability of the competitors to emulate the subjects of the category; for instance, “Looking Like a Girl Going to School” or “Executive Man.”

substitutes an emphasis on conformance to sex-determined gender for an emphasis on deviance from sex-determined gender as a means of reinforcing constructions of sexual orientation. The shift in emphasis, as with homoeroticism, does not diminish the salience of sex-determined gender in sexual orientation identity. See supra notes 167-83 and accompanying text.

285. See supra notes 206-09 and accompanying text.
286. The term signifies an elaborate “dance” that combines extravagant costuming with exaggerated posing to affect the appearance, manner, and feel of a role or character.
288. The houses, film participants explain, serve as families for their typically youthful members, many of whom were cast out from their biological families due to their sex/gender profiles. Id.
289. Id. One participant explains that the balls evolved from single-category efforts to replicate the look of Las Vegas showgirls, to a broader mimicking of movie stars such as Marilyn Monroe or Marlene Dietrich, to a new interest in high fashion models such as Iman. Other participants note that television characters, such as Dynasty’s Alexis, also become objects of categories during their heights of popularity. Id.
290. Id. In a particularly moving segment, one participant explains that the “Realness” categories enable the competitors to indulge dreams that would be impossible in the “real” world. For example, one participant notes that the “Executive Man” category allows the competitors to show the world that they could be executives, if given educational and professional opportunities, but instead must settle for looking like the “real” thing. Other participants note that the balls provide a forum that allows them “to
an especially revealing comment on these categories of competition, one participant explains in the film that the object of the latter category is to "look like a real man, a straight man." Indeed, under the confutation's configuration and depiction of active/passive human identities and personalities, "real" men (and women) are "straight" men (and women).

Not surprisingly, then, social/public gender affectations provide much of the film's thematic centerpiece, attesting to the continuing vitality of the confutation's first and second legs even among youngsters unequipped to (re)cognize them: throughout the film, we repeatedly encounter young males in interviews and escapades who self-identify as gay, and who uniformly conceive and articulate that sexual identity by adopting in both outlandish and discreet ways the social/public attributes associated with femininity. This film, in fact, portrays individuals for whom sex-determined gender and sexual orientation are indistinguishable, and who live their lives today on that basis; these are persons who today define themselves as sexually and therefore socially cross-gendered, and who thereby apply to their beings and lives the active/passive dictates corresponding both to the first and to the second leg of the confutation.

Finally, there is Jacob's story. As an African-American growing up in the southeast just as the integration of public schools was getting underway, Jacob was a star student who excelled both in academics and in extracurricular activities. Fearful that his "effeminate mannerisms" (coupled with his apparent disinterest in girls) and general timidity toward sports might label him as gay, Jacob used his studies and activities to insulate himself from the social network of the balls. Another participant adds that the balls are the only setting in which he feels "100% right about being gay." Id.

As the "Executive Man" category indicates, not all the categories involve the emulation of female personages; for instance, the "Looking Like a Girl Going to School" category has as its counterpart "Looking Like a Boy Going to School." In all the categories, however, (including the “Executive Man”) it seems that gender is a salient component of the costuming. Thus, to a great extent, the balls and the social network that surrounds them are about gender identities.

291. Id. The equation of "real" man with "straight" man of course is telling. Similarly telling is a comment made by a 15-year-old, who explains that the regulars on the ball circuit call each other "sister" because "he's Gay and so am I." Id.

292. See supra Foreword, Part LA-B.


294. Jacob's expertise in academics and involvement with extracurricular activities, coupled with a lack of interest or success in sports and cross-sex relations, made him a stereotypical candidate for the label of sissy and, hence, "queer." See, e.g., James S. Coleman, Athletics In High School, in The Forty-Nine Per Cent Majority, supra note 247, at 264 (discussing the importance of proficiency in sports to acceptance among male high school students); Julius Lester, Being A Boy, in The Forty-Nine Per Cent Majority, supra note 247, at 270 (discussing the successive pressures of school boys who have to prove themselves first on the athletic field and then with the girls); Joseph Pleck, My Male Sex Role—And Ours, in The Forty-Nine Percent Majority, supra note 247, at 253, 259 (recounting Pleck's personal childhood experiences, which mirror Jacob's: using academics as a haven from sports and other arenas of "masculine competition"); see also FRANKLIN, supra note 48, at 154 (explaining that the sexual pressures such as those experienced by Jacob are "commonplace and to a great extent expected by society").
from suspicion: he deflected any questioning of his closeted (homo)sexuality by raising his “bookworm” persona as a shield. Additionally, he steered clear of any association with the “hard-core faggots” in his high school, characterizing the group as “very effeminate acting.”

As Jacob’s story indicates, for him as well as for his peers among both the “faggots” and nonfaggots, social effeminacy (in the form of mannerisms, activities, or talents) stood for, and therefore was interpreted as, same-sex desire. Social effeminacy, in other words, signalled and was tantamount to sexual effeminacy, and vice versa.

To avoid identification with the latter attribute of his personality, Jacob strategically deployed and disguised the former attributes of his personality. In doing so, and as a youngster yet, Jacob displayed an intuitive understanding of the way(s) in which active/passive sex/gender traditions under the conflation’s first and second legs operate(d) in tandem to shape his peers’ and his family’s (mis)perceptions of him, both socially and sexually. He intuited that society officially and culturally regards gender as deductive and intransitive; in turn, Jacob understood that his personal survival and prosperity depended on deflecting suspicion over his sexual/private personality which, by his own account, he consciously set out to do by disguising his apparently atypical or cross-gendered social/public personality.

Confirming this intuition, Jacob’s calculated disguises succeeded: though he engaged in same-sex liaisons throughout his high school years, Jacob was able to “pass for straight” in the eyes of both friends and family. In this way, Jacob enabled himself to avoid (some of) the stigma and

295. Sears, supra note 293, at 123-24. Describing how he “would psych them out,” Jacob explained that, “[i]t was like, ‘He don’t have time for girls. He’s smart. He’s doing his books.’” Id. at 123. When his younger sister nevertheless ventured a query on girlfriends, he rebuffed her with exaggerated bravura: “I don’t think there’s a girl out there good enough for me. Besides, I don’t have time. Look at my grades.” Id. at 124. His parents supported that stance, saying “He doesn’t have time for that. Child. He’s working on a scholarship for college.” Id.

296. Id. at 125-26. There were about ten “hard-core faggots” among a student population of 1500. Id. at 126.

297. Id. at 126. Though he had accepted his gay identity privately at the age of 16, Jacob’s tactic of disguise and avoidance succeeded so well that he was elected president of his high school class and graduated as class valedictorian. Id. at 123, 128. “It meant a lot to be able to win as president in a class that was 70% white,” he said. Id. at 123. Jacob also used his position occasionally to blunt criticisms of the “hard-core faggots.” However, clearly he would not have been elected if his (homo)sexuality had been suspected, as indicated by Jacob’s description of the “hard-core faggots” as “pretty much social outcasts.” Id. at 126. After graduating from college, Jacob organized a group of gay African-Americans to “share friendship and to work on social projects within the African-American community.” Id. at 128-29.

Jacob’s story is not unique, either. For instance, during a recent roundtable discussion, African-American activist Ken Dixon reminisced that he “grew up in a Black community, in a Black neighborhood and to be gay was to be effeminate—basically a Black queen.” Sleeping with the Enemy?: Talking About Men, Race, and Relationships, OutLOOK, Winter 1992, at 30, 33; see also Ron Vernon, Growing Up in Chicago Black and Gay, in BLACK MEN/WHITE MEN: A GAY ANTHOLOGY, supra note 207, at 33 (recalling that, once the sissy label arose among school mates, the author was classified as homosexual); Cf. COMPAÑERAS: LATINA LESBIANS, AN ANTHOLOGY (Juanita Ramos ed., 1987) (collecting essays, poems, short stories, oral histories, and art work by and about Latina
prejudice heaped on persons who somehow—socially, sexually, or both—are deemed cross-gendered.

Both voguing and Jacob display yet again the way(s) in which contemporary sexual minorities—including those living in communities of color—comply with traditionalist sex/gender conceptions, even as they bend or break official or cultural sex/gender rules accompanying those conceptions. In both instances, sex was understood to fix gender. In both instances, gender was understood to encompass both social/public and sexual/private components. In both instances, gender transitivity that was social was associated with gender transitivity that was sexual. And, in both instances, society’s problematization of gender atypicality socially and/or sexually was intuitively, if not intellectually, understood. Thus, while indulging, both socially and sexually, in various forbidden cross-gender attributes or activities, the individuals in these instances clearly were aware of—and accepted and accommodated—the official premises and the cultural power of the first and second legs of the conflation.

Although the history of the conflation in modern Euro-American culture presented above is necessarily oversimplified, it points to the inescapable conclusion that the conflation of sex, gender, and sexual orientation envelops our intellectual and attitudinal environment and shapes our personal and collective sensibilities. The conflation’s embodiment and enforcement of active/passive sex/gender themes and traditions relating to its first and second legs are so pervasive, so ingrained, so institutionalized, so internalized, that even our children unknowingly collect epithets like “queer,” “sissy,” “dyke,” and “tomboy” in single, automatic breaths. This record thus illuminates the answer to the query that opened this Project: under Leg One and Leg Two, social gender atypicality (in the person of a “sissy” or a “tomboy”) is conflated with sexual gender atypicality (in the persona of a “queer” or a “dyke”).

In short, this nation’s sex/gender system is designed, built, and maintained precisely along the conflation’s traditionalist active/passive fault lines, both socially and sexually. These official and cultural fault lines do not operate randomly: in practice, they operate to secure the social/public and sexual/private intransitivity of deductive gender, and thereby to secure the hierarchical imperatives that underlie and drive the Euro-American sex/gender system.298 Unthinking school yard comments only reflect and con-


298. See infra Chapter Four, Part I.E.
firm the conflationary system’s continuing grip on the nation’s senses, while underscoring traditionalist fear and loathing of social or sexual challenges to conflationary arrangements that (might) disrupt the sex/gender status quo. And, as we will see in Chapter Two, unthinking (or calculated) courthouse comments mirror this conflationary status quo.

III
THE (DE)CONSTRUCTION OF THE (UN)NATURAL, THE (AB)NORMAL & THE (IM)MORAL

The foregoing account began with a pivotal, defining moment in the history of the conflation and its active/passive traditions in modern culture: the formal codification of the conflation by modern medicine, a codification that, though amended and modified over the years, remains embedded in the medical field, and in popular culture, to this day. In particular, this account shows that sexual minorities have embraced and internalized the conflation with vigor and enthusiasm, to the same degree and in the same ways as the sexual majority. This account, in other words, shows that the conflation’s historical and contemporary support among lesbians and gay men parallels that of mainstream forces and institutions. This account thus shows that the conflation of sex, gender, and sexual orientation has a long history of replication, application, and validation from multiple sectors of modern culture.

This account, however, also yields, or leads to, further relevant points about the conflation’s legacy and operation in modern culture. Most notably, this account points to the universal equation of nature, normality and morality in the formalization of the conflation. As applied specifically to the conflationary sex/gender status quo, this account points inexorably to the fallacy of this equation; this account, as noted below, shows the conflation to be a social construction rather than a natural phenomenon.

Finally, this account of the conflation’s official and cultural construction during the past century leads to a point that is beyond the chronological scope of this Chapter but that nevertheless is germane to the conflationary record discussed above: forces apart from sexual majority institutions and sexual minority groups historically have helped to establish the conflationary status quo. Most notable among these was, and maybe still is, organized religion (although, as Chapter Two shows, law also sustains the establishment of the conflation). This Part therefore closes Chapter One with brief notes on these points, both to help achieve a more complete phenomenological comprehension of the conflation in modern culture, and to help set the stage for further substantive discussion later in this Project.

299. See supra Part I.B.
300. See supra Part II.B.4.
301. See supra Part I.C.
A. The Naturality, Normality & Morality Trinity

This history of the conflation in modern culture shows that both mainstream society and sexual minorities have associated the "natural" with the "normal," and the "normal" with the "moral," in their respective approaches to sex, gender, and sexual orientation. For instance, sexology's medicalization of the field via inversion, fixation, and other theories was marked by a continually felt need to define and enforce the natural, and hence the normal and the moral, active/passive alignments of sex, gender, and sexual orientation. Likewise, sexual minority activists strategically shaped their self-identity theories to appeal to dominant, official conceptions of the "natural" active/passive alignments of these three attributes, to claim sex/gender normality and morality based on naturality, and to blunt traditionalist charges of sexual perversion and moral degradation. Thus, mainstream sexologists codified the conflation and catalogued gender to gauge the natural, normal, moral alignments of active and passive attributes based on sex and gender while the minority activists situated and accommodated their self-conceptions to portray conflationary naturality, normality, and morality.

Indeed, the central terms and themes both of the mainstream clinical discourses and of the sexual minority discourses were freighted with transparent value judgments regarding nature, normality, and morality, both groups striving to satisfy dominant beliefs about this trinity of concepts. With the inversion and Third Sex theories as ready examples, the history of the conflation fairly may be viewed as the attempt of Euro-American culture to harmonize dominant views of nature with dominant views of normality and morality. In turn, Euro-American culture sought to channel everyday human diversities regarding sex, gender, and sexual orientation into alignment with its naturality, normality, and morality scheme. As this history thus indicates, the value judgments that animated the conflation were emanating from a model of sex/gender normality and morality that purported to be legitimate because it was based, "objectively," on nature.

Under this model, active/passive attributes, deemed biologically inborn or innate based on sex or external genitalia, were necessarily natural, and therefore normal and moral. This model also took guidance from the ways of life observed among other species because interspecies arrangements were deemed part of nature itself. Applied to the conflation, this naturality/normality/morality model thus relied on two main sources for its justification of the status quo: that which was deemed innate to humans.

302. See supra Part I.B.
303. See supra notes 175-83 and accompanying text.
304. For a discussion of the conflation's ideological imperatives, see infra Chapter Four, Part I.E.
306. See, e.g., id. at 14-19 (discussing the issue in light of what other species "do").
based on official sex assignments, and that which other species apparently did sexually. In this way, "nature" was used tautologically to justify both human (mis)perceptions of nature itself as well as human sex/gender arrangements thought to be based on nature.\textsuperscript{307}

This trinity of naturality, normality, and morality, and its tautological justification of the status quo, is relevant to modern culture (and legal culture) because, as this history shows, it (still) serves to justify the active/passive hierarchies of the traditionalist status quo, and vice versa. In other words, the conflation is at once a product and a producer of this trinity. Therefore, the equation of naturality, normality, and morality is, itself, conflationary.

1. The Trinity & Social Constructionism

Reflecting this history and status quo, the substance of contemporary discourse on conflationary themes and issues demonstrates a continuing concern with the natural, the normal, and the moral,\textsuperscript{308} and with the equation of naturality, normality, and morality is, itself, conflationary.

\textsuperscript{307} See also generally Chapter Four, Part III.B.

\textsuperscript{308} See, e.g., Michael Ruse, Homosexuality: A Philosophical Inquiry 188-92 (1988) (summarizing and critiquing the ongoing debate); Daniel Goleman, supra note 251 (recounting the moral beliefs and fearful self-righteousness of persons who harbor strong anti-lesbian/gay sentiments); Larry B. Stammer, Rethinking Origins of Sin, L.A. Times, May 15, 1993, at A1 (discussing how genetic findings have prompted religious leaders to take a new look at "good" and "evil," and questioning whether society may punish persons for genetic predispositions).

To this day, many organized religions expound traditional views on sex, gender, and sexual orientation that embody and perpetuate conflationary outlooks. See, e.g., Laura Sessions Stepp, Vatican Statement Supports Discrimination Against Gays, L.A. Times, July 17, 1992, at A14 (describing Vatican's position that same-sex sexuality is a disorder, and that homosexuals should be denied certain privileges in order "to promote the traditional family and protect society"); Archbishop Defends Vatican Stance on Gays, L.A. Times, July 25, 1992, at B6 (reporting U.S. Catholic Conference president's support for Vatican statement); William Trombley, Religious Right Wins Textbook Battle on Sex, L.A. Times, Aug. 2, 1992, at A3 (reporting on a successful campaign by groups such as Rev. Louis P. Sheldon's Traditional Values Coalition to prevent the influential California State Board of Education from approving a curriculum framework that included references to same-sex intimacy). Cf. Larry B. Stammer, Catholics Name Gay, Lesbian to Advisory Board, L.A. Times, Jan. 12, 1994, at B1 (reporting the appointment of a gay man and a lesbian to a new advisory board created to assist the Roman Catholic Archdiocese of Los Angeles conduct "outreach" to that city's sexual minority communities even though the archdiocese is "not backing down from traditional church teaching" that condemns same-sex intimacy).

The traditional antipathy of organized religion toward women also is a current topic in contemporary religious issues. See, e.g., Robin Abcarian, A Battered Woman Questions Her Church, L.A. Times, April 24, 1992, at E1 (reporting on the way in which religious beliefs and organizations buttress male control of women, even to the point of condoning physical abuse); Richard N. Ostling, The Second Reformation, Time, Nov. 23, 1992, at 53 (reporting on the historical exclusion of women from service as Christian ministers or priests and the efforts of women to break through the policy of exclusion). See also Rosemary Radford Ruether, Sexism and God-Talk: Toward a Feminist Theology (1983) (comprehensively critiquing Christian theology from a Feminist perspective). Thus, organized religion provides key support to the conflation's tradition of androsexism and heterosexism. See generally Kenneth L. Karst, Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective, 24 U.C. Davis L. Rev. 677, 679 (1991) (reviewing how "the confluence of religion, sex, and politics typically amount[s] to a zero-sum game of status dominance" and arguing for the use of judicial review as a means of upholding the "principle of equal citizenship").
tion or coincidence of the three. Perhaps most dramatically, several new reports linking physiology or biology with minority sexual orientation among both men and women have been released in quick succession since 1990. These reports have reignited the larger historical debate over naturality, normality, and morality in the context of the conflation because they have revitalized, for instance, the Uranian argument that innate attributes define, and therefore should help to assimilate, the members of sexual minorities. Simultaneously, contemporary studies into the "real" sex/gender differences between men and women more generally may be viewed as corroborating the innateness—the naturality, normality, and morality—of sex/gender qualities historically associated with masculinity and femininity. Contemporary debate and research thus continue to fuel and to com-

At the same time, it should be noted that some traditional religions have begun to grapple with some of these issues substantively and constructively. See, e.g., Church Stance on Gays Stirs Southern Baptists, L.A. Times, April 11, 1992, at B7 (reporting that individual congregations had begun to depart from the national denomination's anti-gay policy); John Dart, Conservative Judaism Re-Examines Views on Gays and Lesbians, L.A. Times, July 25, 1992, at B4 (announcing the initiation of a formal and comprehensive review of beliefs related to same-sex issues); David Haldane, A Vision of Tolerance: Laguna Jewish Congregation Gears Its Services to Gays and Lesbians, L.A. Times (Orange County ed.), Oct. 9, 1993, at B1 (reporting on the establishment in Orange County, California, of Kol Simcha, a Jewish congregation "specifically aimed at gays and lesbians"); Michael Hirsley, Church Conventions Turn Attention to Sex, S.F. Exam., June 8, 1991, at A9 (reporting that various churches were re-examining traditional dogma relating to sexuality generally); Homosexuality Issue Creating Most Sparks for United Methodists, L.A. Times, April 25, 1992, at B4 (reporting the controversy over a United Methodist committee report recommending abandonment of its traditional condemnation of same-sex sexuality); Kathryn Rogers, Be Tolerant of Diversity, Denominations Told, St. Louis Post-Dispatch, July 17, 1993, at 1B (reporting the passage of a resolution by the Disciples of Christ authorizing consideration of a boycott of the state of Colorado in light of its anti-gay rights law). The United Church of Christ has gone so far as to produce a briefing on "Civil Rights for Gays and Lesbians." See United Church of Christ, 1995 Issues Briefing Book 24 (1995) (summarizing the forms of discrimination encountered by sexual minorities, and concluding with "action/education strategies" designed to position the Church to help combat societal discrimination against lesbians and gay men).


311. See, e.g., Kathryn Phillips, Why Can't a Man Be More Like a Woman . . . and Vice Versa, Omni, Oct. 1990, at 42 (discussing research finding that differences in the human brain may account for gender and sexual orientation). A good lay summary of current research is presented in Burr, supra note 238, at 47 (this article forms the basis of a book that Burr is preparing on the subject). See also William A. Henry III, Born Gay?, Time, July 26, 1993, at 36.

312. See Laura Shapiro, Guns and Dolls, Newsweek, May 28, 1990, at 56 (reviewing contemporary research into the origins of "masculinity" and "femininity"); Mary Ann Hogan, He-Men in Training: Dolls or Trucks—The Play's the Thing, L.A. Times, Apr. 28, 1993, at El (discussing current "gender-difference research").
plicate historic controversies regarding the catalysts for, and the constituents of, sex, gender, and sexual orientation.\footnote{313. For instance, conservative columnist Ken Adelman announced that his “once-fixed views have been jarred” by the current research as summarized by Burr in the \textit{Atlantic} article, \textit{see supra} note 238. Ken Adelman, \textit{Lifestyle Plotting . . . and Rethinking}, \textit{Wash. Times}, Feb. 19, 1993, at F1. Adelman writes that, “[n]ot chosen and not changeable, then homosexuality is a given—yes, like skin color and gender. Then, integrating gays into the military would indeed be like integrating blacks into the military, and women.” \textit{Id.} (emphasis in original). However, Adelman’s column drew a quick rejoinder. \textit{See Tom Sheahen, Letter to the Editor, Real Science Doesn’t Back ‘Gay Gene’ Theory}, \textit{Wash. Times}, Feb. 26, 1993, at F2 (arguing that the \textit{Atlantic} is “lightweight” and that current scientific studies have “detected some correlations” but have not “shown” any conclusions).}

Of course, this official and cultural tendency to believe in “nature,” and to equate it with normality and morality, have most recently been challenged frontally by social constructionist critiques.\footnote{314. Generally speaking,} 

On the other hand, some scientists and gay activists believe that “[r]esearch indicating that homosexuality may be influenced by a cluster of cells in the brain, rather than solely by personal choice, probably will not change anti-gay attitudes anytime soon.” Cheryl Clark, \textit{Change in Attitudes Doubted}, S.D. \textit{Union-Trib.}, Aug. 30, 1991, at A1. Recalling the pattern of medical interventions against inverts, some members of sexual minorities also fear that the isolation of biological, genetic, hormonal, or other physiological sources of sexual orientation would permit abortions or “rewirings” of fetuses identified in the womb as destined to be gay or lesbian. Researchers, however, play down that fear. \textit{See Burr, supra} note 238, at 65. Issues relating to genetic engineering generally are becoming increasingly notable and noted. \textit{See, e.g., Jeff Lyon & Peter Gornor, Altered Fates: Gene Therapy and the Retooling of Human Life} (1995). \textit{See generally} Sonia M. Suter, \textit{Note, Whose Genes Are These Anyway?: Familial Conflicts Over Access to Genetic Information}, \textit{91 Mich. L. Rev.} 1854 (1993) (arguing for rules and policies that accord individuals primary control over personal genetic information specifically in the context of intra-familial disputes).

Moreover, as elaborated immediately below in the text, the social constructionist viewpoint argues that sexual minorities should not be drawn into models of self-justification that hinge on biological or essentialist premises. \textit{See infra} notes 314-16 and accompanying text.

As with the substance of the debate as a whole, the legal objectives behind the nature (or essentialist) viewpoint, as advanced by sexual minority advocates, has remained basically constant since the early years: to repeal and oppose proscriptions of same-sex sexuality on the grounds that minority sexual orientations are natural, or inherent to a person’s individuality. \textit{See, e.g., Elvia R. Arriola, Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority, 10 Women’s Rts. L. Rep. 143 (1988); Richard Green, The Immutability of (Homo)Sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis, 16 J. \textit{Psychiatry} & L. 537 (1988); John Charles Hays, Note, The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick, 31 B.C. L. Rev. 375 (1990); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, \textit{supra} note 177.}


\footnote{314. \textit{See supra} notes 83-85 and authorities cited therein.}
social constructionism seeks to show that the human condition, though perhaps depicted and defended as simply resulting from natural circumstances, actually is shaped by society and its ruling forces. Nothing about the human condition, therefore, is necessarily natural, normal, moral, or justifiable simply because it presently exists. Social constructionism thus invites, if not necessitates, critical and comparative discussions of current arrangements that test any status quo against potential alternative arrangements.

At the same time, and related to these developments, some sexual minority theorists have abandoned the claim to innateness altogether, as part of a larger (and political) dismissal of biological essentialism in favor of social constructionism.\textsuperscript{315} As just indicated, however, this theoretical and political repudiation of essentialism, and the accompanying ascendancy of constructionism, ironically is occurring at roughly the same time that new studies and reports purport to proffer mounting evidence of essentialist outlooks. This juxtaposition of events and views at this precise juncture in time leaves unclear where sexual identity politics and theories will lead next.\textsuperscript{316} Nonetheless, the conflation’s phenomenology in modern times, as recorded in this Chapter, makes at least one fundamental point clear: the conflation of sex, gender, and sexual orientation was and is a socially constructed artifact that is deployed officially and culturally to police traditionalist active/passive arrangements, which in turn are hetero-patriarchal in that they encapsulate and blend androsexism and heterosexism.\textsuperscript{317}

2. The Conflation in Modern Culture & Social Constructionism

By tracing the actual process of the conflation’s construction in the history of Euro-American modern culture, this Chapter helps to document and advance a central premise of social constructionism: that dominant Euro-American arrangements of sex, gender, and sexual orientation are humanly arranged rather than “naturally” just so. Indeed, the historical record recounted above methodically documents the intellectual and normative construction and establishment of the conflation through deliberate clinical

\textsuperscript{315} See, e.g., Carole S. Vance, Social Construction Theory: Problems in the History of Sexuality, in \textit{HOMOSEXUALITY, WHICH HOMOSEXUALITY?}, supra note 86, at 13 (addressing problems and advantages of both constructionism and essentialism). The constructionist rejection of essentialism often manifests a disdain for any implied need to “explain” the existence of sexual minorities while the sexual majority’s existence is simultaneously accepted as given. See generally \textit{FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY} (Edward Stein ed., 1990). Critics of constructionism, in turn, express concern that constructionist theory runs the danger of rendering the individual an empty, inert shell upon whom socially dominant forces externally impose a sexual orientation as a cultural construct. See, e.g., MacK, supra note 86, at 221-42 (critiquing and modifying constructionist theory); John P. De Cecco & F. John P. Ella, A Critique and Synthesis of Biological Essentialism and Social Constructionist Views of Sexuality and Gender, 24 J. Homosexuality 1 (1993) (introducing a series of essays and articles on the subject, and critiquing both schools of thought).

\textsuperscript{316} See generally Halley, supra note 41, at 546-68; Eskridge, supra note 10, at 365-86; Ortiz, supra note 85, at 1836-57. See also Valdes, supra note 55.

\textsuperscript{317} See infra Chapter Four, Part I.E.1-5.
codification and through mass cultural imposition. Under the naturality/normality/morality trinity, this history therefore shows that the conflation and its official and cultural active/passive dictates are neither natural nor normal nor moral; under this trinity, conflationary precepts and practices are not natural because they are socially constructed and they are neither normal nor moral because they are not natural.

Indeed, the conflationary record of modern culture portrays a relatively consistent interplay between Leg One and Leg Two, which in turn indicates an active or conscious human management of conflationary elements and issues. The clinical and cultural deployment of Leg Two strategically to uphold Leg One substantively is too consistent in clinical (and cultural) practices to reflect simply the vagaries of “nature” in a complex world. This consistent (mis)use of Leg Two on behalf of Leg One thus underscores the social construction of the conflation as well as the social construction of its deployment and operation in modern culture. The same consistency, found next in legal culture, confirms this conclusion.

In short, as applied to the conflation specifically, this history belies any claim of naturality, normality, or morality on behalf of the conflationary status quo and its validation of the hetero-patriarchal active/passive paradigm. And, more generally, this history underscores constructionist doubts about the validity of any argument that an “objective” legitimacy rooted in nature justifies traditional and still-dominant socio-sexual arrangements. Accordingly, these questions are addressed in more depth in Chapter Four, which examines the lessons and insights to be drawn from the conflation’s overall history, following the discussions of legal culture in Chapter Two and of indigenous North American culture(s) in Chapter Three.

B. The Role of Religion in the History of the Conflation

A final note on the role of religion (vis-à-vis law or medicine) in the historical institutionalization of the conflation closes this Chapter of the Project. Of course, the conflationary themes, associations, and value judgments of modern culture outlined in this Chapter embodied and extended a larger set of beliefs and a broader frame of history. In this bigger picture, another mainstream institution looms large: organized religion. Though

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318. See supra Part I.B-C. and II.A-B.
319. See, e.g., Hoffman, supra note 110, at 100-13 (tracing the “nature” debate to Greek philosophy about essence and analyzing evolving conceptions of nature to show that natural law “is based on a philosophy of science which is no longer acceptable”).
320. The ways in which religion has combined with other social forces to enforce dominant sex/gender norms and values are explored in various works. See, e.g., Boswell, Tolerance, supra note 86; James A. Brundage, Law, Sex and Christian Society in Medieval Europe (1987); Homophobia and the Judeo-Christian Tradition (Michael L. Stemmele & J. Michael Clark eds., 1990); Homosexuality and Religion (Richard Hasbany ed., 1989); John J. McNeill, The Church and the Homosexual (1976); Angela L. Padilla & Jennifer J. Wrinich, Christianity, Feminism, and the Law, 1 Colum. J. Gender & L. 67 (1991). The Catholic Church’s central role in European history has
a full account of the conflation's origins is beyond the scope of this Project, our comprehension of modern history, and of the official and cultural status quo, is aided by knowing how the value judgments underlying conflationary theories and politics were forged.

Originally, conflationary value judgments were prescribed by religion as the Judeo-Christian minority jockeyed with, and ultimately superseded, Greco-Roman pagan traditions. The theological dogma that crystallized the conflation transformed itself into positive law as part of Justinian's Code when that emperor converted to Christianity. Eventually, the conflation found its way into modern law when Justinian's Code was discovered during Europe's Middle Ages, and its provisions became a model for medieval societies.

As shown in Chapter Two, the conflation remains entrenched in legal doctrine and legal culture to this day. However, as noted in the preceding parts of this Chapter, the late 19th Century and early 20th Century witnessed the rise of medicine and science, bringing sexology to the forefront as a powerful social institution supporting the conflation. Historically, then, conflationary arrangements were (and are) accomplished and sustained through various, potent combinations of religion, law, and medicine.

CONCLUSION

The discussion presented above documents the intellectual formalization of the conflation and its active/passive sex/gender mandates in Euro-American society at the turn of the century, as well as their continued normative vibrancy and resilience in public sentiments, popular culture, and official attitudes since then. Throughout history, as this account demonstrates, the social/public and sexual/private meanings of sex, gender, and sexual orientation have been constantly interrelated with and cross-referenced against each other via Leg One and Leg Two of the conflation: the

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321. For a full account see Valdes, supra note 9.
322. Id.; see also Tripp, supra note 110, at 134-35 (observing that conflationary associations are part of a long tradition "reflected in the King James version of the Bible, where homosexuals are called effeminates" at 1 Corinthians 6:9).
323. See, e.g., Boswell, Tolerance, supra note 86, at 171-74, 271, 288, 315; Brundage, supra note 320, at 608-17 (outlining the survival of medieval sex laws in modern American law). See generally Sexuality and the Law, supra note 83 (presenting a comprehensive overview of key court rulings regarding the regulation of sexuality).
324. See infra Chapter Two; see also Brundage, supra note 320, at 608-17 (outlining the survival of medieval sex laws in modern American law). See generally Sexuality and the Law, supra note 83 (presenting a comprehensive overview of key court rulings regarding the regulation of sexuality).
325. See supra Part I.B.
326. Today, medicine and science have retreated somewhat from their outright codification of the conflation during the reign of inversion theory. Though the DSM-IV still officially links sex-determined gender to sexual orientation, the conflation of the traits has been scaled back from virtually unqualified terms to a definite but relatively limited linkage that depicts "gender disorder" as the prime official predictor of same-sex sexual orientation. See supra notes 230-37 and accompanying text.
sexual majority formalized and institutionalized these legs of the conflation while sexual minorities embraced and internalized them. Jointly, these legs represent the clinical and cultural conflation of sex with gender and of sex-determined gender with sexual orientation. They also represent the official and cultural domination of traditionalist sex/gender interests and imperatives.

Modern culture constructed this conflation socially, and regularly deploys it to demarcate and dispense hetero-patriarchal duties and privileges; to this day, modern culture uses the conflation to discern social and sexual gender (a)typicality, and to chastise social or sexual expressions of sex/gender incorrectness that might disrupt conflationary arrangements and hierarchies. Modern culture, in short, indulges and employs the conflation of sex, gender, and sexual orientation as blindly and as blithely as a child in the school yard.

Moreover, even though it is socially constructed, the conflation mediates the triad of traits that form its endpoints and legs in order to demarcate the boundaries of naturality, normality, and morality, and thereby to justify the conflationary status quo in American society. In other words, the conflation tautologically is deemed to encapsulate nature, normality, and morality while this trinity is deemed to justify the conflation. Various forces from medicine, religion, and law have worked mightily to construct and configure this arrangement, and still do, ensuring that the conflation of sex, gender, and sexual orientation remains key to the Euro-American conception of sex/gender naturality, normality, and morality, and vice versa.