

Foreword

Notes on "The Conflation"

INTRODUCTION

Because sex, gender, and sexual orientation are central concepts in our society's sex/gender system,¹⁸ their histories and meanings are significant and complex. However, the conflation of this trio, and its effects, have gone largely unnoticed both in law and society. To introduce this phenomenon, and to open this Project, this Foreword provides an overview of the conflation and its constituent constructs. Then, it defines key terms to facilitate clarity of discussion. Finally, the Foreword closes with a general consideration of the conflation's significance to legal doctrine, culture, and theory; this consideration questions and explains, at the threshold of this Project, why this conflation matters (or should matter) to the law and those of us who work within it.

I

THE CONFLATION AS TRIANGLE

The conflation comprises three constructs: sex, gender, and sexual orientation. And, as the diagram of the conflation, which is depicted immediately below, illustrates, this phenomenon is a triangled web with three "legs" inter-connecting these three constructs, or endpoints.

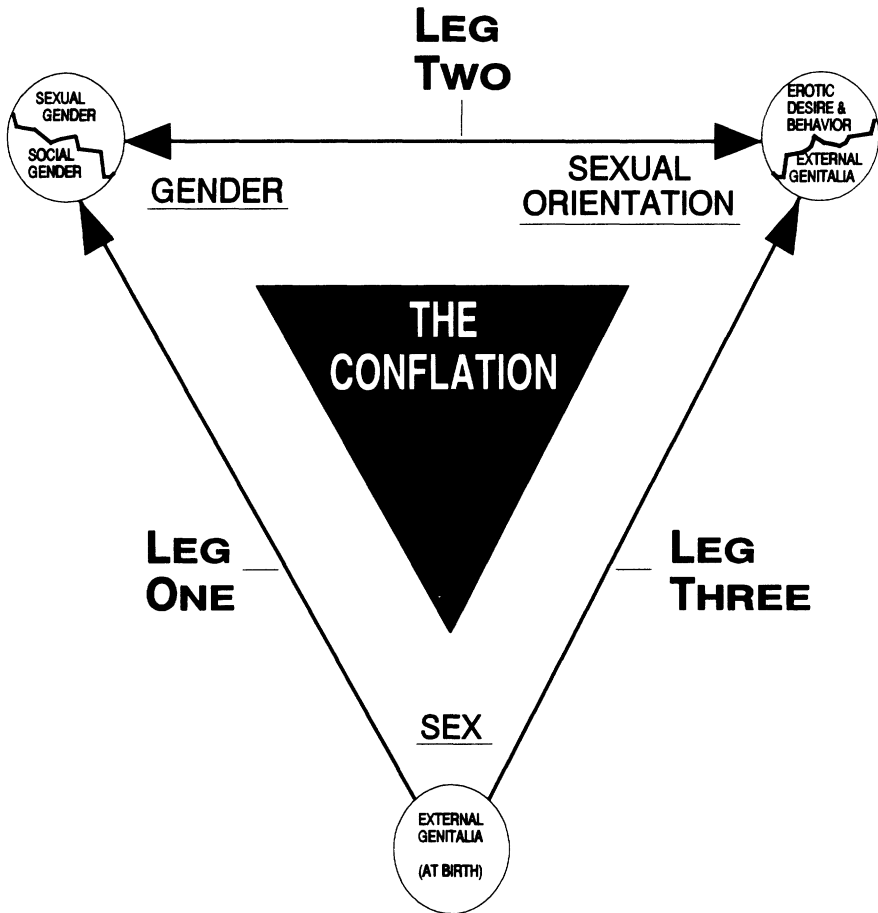
As the diagram indicates, the first leg of this triangle is the conflation of sex and gender. The second leg is the conflation of gender and sexual orientation. The third is the conflation of sex and sexual orientation. Each leg is described briefly below but, as this diagram represents, sex is at the base of the scheme—conflationary arrangements begin and end at sex. The conflation, and the strains of discrimination that it spawns, thus must be understood for what they ultimately are in fact: sex-based.¹⁹

A. *Leg One: Conflating Sex & Gender*

The first leg, conflating sex and gender, holds that every person's sex is also that person's gender. The prevalence of this leg in society is so familiar that it needs no explanation. Within the law, this first leg is histori-

18. The term, "sex/gender system" was coined by Gayle Rubin. See Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157, 159 (Rayna R. Reiter ed., 1975). The term denotes the various means through which society regulates sexuality, gender and procreation. See *id.* at 168. This Project employs it to convey the common and systematized sources of subordination of women and sexual minorities in our hetero-patriarchal culture.

19. See generally *infra* note 37. See also *infra* Chapter Five, Part II.A.8.



cally and popularly accepted as a truism,²⁰ subject only to the relatively recent qualifications inspired by Feminist legal theory.²¹ Generally speaking, however, Feminist legal theorists do not address the conflation directly; for the most part they take the conflation of sex and gender as a given. That is, Feminist critiques of law generally probe into the normative contents of gender while failing to address the underlying premise that sex determines gender.²² Likewise, Feminist legal theory generally has not explored the

20. See *infra* notes 340-66 and accompanying text.

21. See THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1991) (collecting works that represent the various strands of contemporary Feminist thinking); Symposium, *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism, Part Two: The Politics of Gender Identity*, 26 NEW ENG. L. REV. 1173 (1992); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 618 (1990) (surveying Feminist works to "chart relationships among these bodies of work"); Symposium, *Recent Works in Feminist Legal Thought*, 59 TENN. L. REV. 441 (1992) (presenting a diverse variety of works on contemporary topics and issues of special concern to women).

22. For instance, Feminist legal theorists have explored "difference" and "equality" to challenge the premise that to be "woman" (or "man") means to be "this" or "that." See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); Regina Austin,

conceptual or strategic relationship of sexual orientation to traditional constructions of sex-determined gender.²³ Consequently, these critiques challenge traditional, hierarchical allocations of gender roles between the sexes, but they stop short of questioning the threshold presumptions of the conflation. The conflation's first leg thus is embedded in law as much as in society.

B. Leg Two: Conflating Gender & Sexual Orientation

The second leg, conflating sex-derived gender and sexual orientation, is less familiar, at least initially. At first blush, the notion that gender and sexual orientation are integrally related may tend to spark some skepticism. If so, this skepticism is due to the practice within legal (and social) culture of relegating gender to the realm of "women's issues" and sexual orientation to the realm of "sexual minorities' issues"; the twain are assumed hardly ever to meet.²⁴ Nevertheless, the generally recognizable linkage between "queers" and "dykes" on the one hand, and "sissies" and "tom-boys" on the other, suggests that some correlation between sex-determined gender and sexual orientation *is* at work.

Black Women, Sisterhood, and the Difference/Deviance Divide, 26 NEW ENG. L. REV. 877 (1992); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

Feminist legal theory likewise challenges the sex and gender hierarchy that dominant sexual mores encapsulate. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982). See generally Ann C. Scales, *Towards A Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

23. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1990) (critiquing the omission of lesbian identity from Feminist legal theory); Leigh M. Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RTS. L. REP. 39 (1990) (expounding a similar critique). There are some exceptions to the rule. See, e.g., Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991) (arguing that same-sex marriage would denaturalize socially constructed gender differences); see generally HETEROSEXUALITY: A FEMINISM AND PSYCHOLOGY READER (Sue Wilkinson & Celia Kitzinger eds., 1993); HOMOPHOBIA: HOW WE ALL PAY THE PRICE (Warren J. Blumenfeld ed., 1992); SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (1988).

24. This view formally (and formalistically) prevails in the law today. See Samuel A. Marcossion, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (generally discussing the courts' refusal to recognize discrimination on the basis of sexual orientation as a species of sex discrimination, and discussing as well the viability of a claim based on same-sex sexual harassment); see also I. Bennett Capers, *Sex(ual) Orientation and Title VII*, 91 COLUM. L. REV. 1158, 1167-84 (1991) (discussing the role of the courts in perpetuating sexism by not sanctioning discrimination on the basis of sexual orientation); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 607-49 (1992) (arguing that anti-gay bias is a form of gender discrimination although it is not treated as such by the courts).

Although the first set of these terms invokes images regarding sexual orientation and the second set invokes images regarding gender,²⁵ the two sets of images collapse into an undifferentiated jumble within the consciousness of children, legislators, judges, and others.²⁶ This collapse, or conflation, reflects the historical and contemporary fact that sexual orientation serves as the *sexual* component of gender.²⁷ This fact is exemplified by the delineation and exposition of earlier clinical theories such as inversion²⁸ and fixation,²⁹ and by the current construction(s) of "gender identity disorder(s)" as a formal type of personality disorder:³⁰ all use(d) gender to explain sexual orientation. In other words, sexual orientation has been and still is part and parcel of gender because gender encompasses both social and sexual dimensions or components. This second leg, like the first, thus exists both in theory and in practice, and both in law and in society.

C. Leg Three: Conflating Sex & Sexual Orientation

The conflation's third leg may be the least familiar, but is discernible and demonstrable nonetheless. The conflation of sex and sexual orientation is shown by the way in which sexual orientation is surmised by the sameness or difference of sex(es) within a coupling: a sameness of sex within a coupling results directly in conclusions of homosexual orientation for each participant whereas a difference of sexes within a coupling produces conclusions of heterosexual orientation.³¹ Thus, sex(ual) configurations are deemed to determine sexual orientation identity; the (non)coincidence of sex in a coupling demarcates homo/bi/hetero domains of sexual desire and behavior. In this way, sexual orientation is conflated with sex.³²

25. See *supra* note 2.

26. As discussed below, same-sex sexual orientation has been conceived in two basic ways, both inordinately concerned with gender typicality/atypicality, or gender intransitivity/transitivity. See *infra* notes 150-183 and accompanying text. Even though same-sex orientation tends to be the most discussed category, it should be noted that "sexual orientation" represents a continuum, which includes cross-sex ("heterosexual") and pan-sex ("bisexual") as well as same-sex ("homosexual") orientations. For current readings on the former two categories of sexual orientation, see HETEROSEXUALITY, *supra* note 23; BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT (Lorraine Hutchins & Lani Kaahumanu eds., 1991); TWO LIVES TO LEAD: BISEXUALITY IN MEN AND WOMEN (Fritz Klein & Timothy J. Wolf eds., 1985). See generally Ruth Colker, *A Bisexual Jurisprudence*, 3 L. & SEXUALITY 127 (1993) (providing a personal account of bisexual identity).

27. See *infra* Chapter One, Part I.B.3.

28. See *infra* notes 131-48 and accompanying text.

29. See *infra* notes 210-29 and accompanying text.

30. See *infra* notes 230-37 and accompanying text.

31. See *infra* notes 667-90 and accompanying text.

32. See, e.g., Colker, *supra* note 26, at 127 (discussing definitions of sexualities or sexual identities that depend on the (non)coincidence of genitalia, or of sex). In isolation, the conflation of sex with sexual orientation under Leg Three may not appear to be entirely socially constructed in the same sense as the conflation of sex with gender under Leg One or gender with sexual orientation under Leg Two. After all, given our current understandings of sex and of sexual orientation, the *only* way to define a person's sexual orientation is by reference to sex—both that of the person whose orientation is being defined and that of his or her sexual partner(s). However, the conflation of sex with sexual orientation

To situate this third leg within the existing literature, it also should be mentioned at the outset that the conflation of sex and sexual orientation reflects and represents the “miscegenation analogy.”³³ This analogy, as explained in detail below, employs sex and race to explicate how sex and sexual orientation operate in tandem.³⁴ In doing so, this analogy leads to the same conclusion reached in this Project under the third leg of the conflation: the bigotry known as sexual orientation discrimination is shown, literally, effectively, and unavoidably, to constitute sex discrimination.³⁵

D. The Conflation: From Endpoints to Legs

This summary discussion of the conflation indicates, and the diagram of its three endpoints and three legs illustrates, that sexual orientation is at all times conflated with sex and/or with gender: with sex under the third leg of the conflation and with gender under the second leg. This Project thus reveals and concludes that, under the conflation, there is no such thing as discrimination “based”³⁶ solely or exclusively on sexual orientation. On the contrary, acts or strains of discrimination that involve sexual orientation always and necessarily occur within Leg Two and/or within Leg Three of the conflation, which extend to gender and to sex, respectively. Consequently, discrimination deemed based on sexual orientation also and necessarily is based on sex or on gender (or on both).³⁷ This inevitability is due

cannot properly be examined in isolation: its origins and effects are inseparable from the other legs of the conflation. Indeed, the very need for a formal(ized) concept of “sexual orientation” is a derivative byproduct of conflating gender with genitally-determined sex and of including gender within selective notions of (appropriate) sexual affinities. See *infra* Chapter Four, Part IV.A. That other societies have not needed or utilized a formal(ized) concept of sexual orientation highlights the socially constructed nature of the Euro-American concept itself. See *infra* Chapter Three, Part I.A.4 (discussing Native American societies); Valdes, *supra* note 9 (discussing classical Greco-Roman societies). Moreover, once it is acknowledged that sex is more accurately understood as a continuum rather than two binary categories, see *infra* note 46, it becomes clear that the extant construction of sexual orientation is premised on unrealistic views of sex.

Because sexual orientation is properly understood as the sexual component of gender, which in turn is conflated with sex, and because sexual orientation additionally is defined by reference to an oversimplified understanding of sex, sexual orientation itself is a problematic concept. See *infra* notes 53-55. Once viewed in the context of the Euro-American conflation as a whole, it becomes clear that sexual orientation, and hence the conflation of sexual orientation with sex, is in fact socially constructed, and not simply a benign or “natural” definitional construct.

33. For the latest exposition of this analogy, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). See also Koppelman, *infra* note 84.

34. See *infra* Chapter Two, Part V.

35. See *infra* Chapter Five, Part II.B.4.

36. For a brief explanation of the term “based,” as used here in conjunction with other terms, see *infra* note 43.

37. Discrimination that is deemed based on sexual orientation also is based either on sex and gender or on both because each leg of the conflation has the capacity to, and does, operate independently of the others. For instance, acts or strains of discrimination occurring along Leg Three conflate sex and sexual orientation directly and independently, and this discrimination therefore is not necessarily motivated by gender concerns located along Leg Two of the conflation. See generally *infra* Chapter Five, Part II.B.4. Yet, acts and strains of discrimination are not necessarily confined entirely to

to the make-up and operation of the conflation: the configuration of endpoints and legs within the conflation ensures that every act or strain of conflationary discrimination will be based on one (or on both) of these constructs because every leg of the conflation touches directly at least one of these two endpoints. Thus, *all* acts or strains of conflationary discrimination necessarily are based, at least in part, on sex and/or gender—even those thought to be based solely on sexual orientation.

Yet, the converse does not follow. Acts or strains of discrimination occurring within Leg One—and thus based on sex and gender—are not always and necessarily based on sexual orientation because Leg One does not extend to the sexual orientation endpoint.³⁸ This summary discussion and illustrative diagram therefore also show that it is possible to engage in sex and gender discrimination without simultaneously engaging in sexual orientation discrimination, but that it is impossible to practice sexual orientation discrimination without also practicing sex and/or gender discrimination. This showing of course means that, even though sex and gender discrimination have been formally outlawed, both can be and are practiced under the guise of legally acceptable sexual orientation discrimination.³⁹ This showing, in other words, highlights the complete incoherence of the legal anti-discrimination *status quo*: the nation's formal commitment to end sex and gender discrimination under Title VII and equal protection jurisprudence simply cannot be fulfilled until sexual orientation is incorporated into a holistic and contextual analyses of sex/gender discrimination under existing anti-discrimination laws.⁴⁰

More generally, then, this Project further reveals and concludes that, under the conflation, there is no such thing as discrimination “based” only on any single endpoint. In fact, all acts and strains of discrimination always occur, or are situated, within one (or more) of the legs linking the endpoints. Because each leg represents the conflation of two endpoints, every act and strain of discrimination is “based” on at least two endpoints—

any single leg of the conflation. In other words, any given act or strain of discrimination that is deemed based on sexual orientation can be based on sex (along Leg Three), or on gender (along Leg Two), or on both sex and gender (along both Leg Three and Leg Two).

Moreover, at a more fundamental level, acts or strains of discrimination occurring along Leg Two may be said to be based not only on gender and on sexual orientation, but also on sex because, under the conflation, gender itself is determined by sex. See, e.g., *infra* Chapter One, Parts I.A.3 and II.B.1-2. Generally, this “deductive” construction of gender ensures that discrimination based on gender will be based on sex as well. See *generally infra* Chapter Four, Part III.A.1. In other words, Leg Two conflates sex-determined gender with sexual orientation and, as such, discrimination occurring along this leg accurately may be said to be based on all three constructs.

38. These conclusions therefore indicate that sex, gender, and sexual orientation, as endpoints, are not co-extensive constructs in all respects. Accordingly, this Project cannot and does not conclude that sex, gender, and sexual orientation, as such, are entirely and always one and the same. Rather, as the diagram above shows, this conflation has three constituent parts, which in turn become, and operate as, a single set because they are inter-linked via the legs.

39. See *generally infra* Chapter Two.

40. See *infra* Chapter Five, Part II.A.

those connected by the leg(s) at issue. By understanding this conflation as one whole, we can see that each strain and every act of discrimination necessarily involves at least two of the endpoints, but specifically which two must (and does) depend on the facts or circumstances of a case. At the same time, as just emphasized above, we also can (and must) see that either sex or gender *always* serve and operate as (at least) one of these two.

This Project thus reveals the fundamentality of sex as the base of the conflation, the centrality of gender in the dynamics of conflatory discrimination, and the illusionism of sexual orientation as a derivative conflatory construct. This Project shows how sex is fundamental to conflatory acts or strains of discrimination because sex serves as the basis for the entire sex/gender system and *status quo*. This Project additionally shows that gender is central to the operation of this system and *status quo* by documenting how manifestations of gender (a)typicality in social and sexual affinities or activities serve as the trigger and target for conflatory acts or strains of discrimination. Finally, this Project shows how sexual orientation is a derivative construct, manufactured of sex and gender, which is used strategically under this *status quo* to uphold substantively sex and gender discrimination, both socially and sexually. Indeed, this Project indicates that, if the sex and gender components of sexual orientation discrimination are disaggregated from sexual orientation, virtually nothing remains to classify as discrimination “based” on sexual orientation.

This derivative illusionism of sexual orientation—and of discrimination deemed based on it—is especially important in light of the continuing legality of discrimination deemed based on this construct. As seen below, sexual orientation is used strategically both by defendants and decisionmakers to shift claims of unlawful sex and gender discrimination under Leg One over to Leg Two, thus enabling defendants and decisionmakers to (re)characterize, at will, a plaintiff’s sex and gender discrimination claim as involving only permissible sexual orientation discrimination. In this way, a sexual orientation loophole that ratifies sex and gender discrimination is created and activated.

Given these revelations and conclusions, this Project focuses on the three “legs” that bind together the three endpoints in the diagram above. Thus, while other legal scholars are studying and questioning the construction of the three endpoints themselves,⁴¹ this Project shifts the focus of inquiry from endpoints to legs; it inspects the cultural and doctrinal connections that make the trio operate as an interlocking set both socially and legally. This shift from endpoints to legs brings to light the conflation as one whole, and thereby helps legal actors and institutions to understand the

41. See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Mary Anne Case, *Disaggregating Gender From Sex and Orientation Or the Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. (forthcoming Oct., 1995); Williams, *Deconstructing Gender*, *supra* note 22.

dynamics of (re)cognition that spur discrimination based on this trio of constructs and their inter-connections, while also helping to shed light on the contents and contours of the endpoints as such. By focusing on the legs, we can better understand how sex, gender, and sexual orientation continually and intricately interplay to motivate acts of discrimination perceived to implicate only one endpoint.

Consequently, this Project furthermore reveals and concludes that each strain and every act of discrimination always “*implicates*” all three endpoints precisely because the trio operates as a bundled, or conflated, set. Thus, by locating all acts or strains of discrimination within one (or more) of the conflation’s three legs, we can always ascertain which endpoints of the conflation are most salient in the perpetration of any particular act or in the construction of any particular strain—in other words, as explained just above, we can see upon which endpoints the discrimination actually is “based.” And, by recognizing simultaneously that the three constructs always work in tandem, we can understand the larger system, framework, and background of conflationary inter-connections that help us to contextualize, and thereby to analyze and understand, the components underlying any given act or strain of discrimination.⁴² In this way, we can see how all acts and strains of sex/gender discrimination necessarily “implicate” all three endpoints, even though they are not necessarily “based” in uniform ways or in equal parts on all three endpoints.⁴³

In sum, the normative and intellectual framework of the conflation views sex as the determinant of gender, conceptualizes gender as the *social* dimensions of sex, and treats sexual orientation as the *sexual* dimensions of gender. Because the three conflate into and operate as one set, discrimination deemed based on any one endpoint or construct always will be based on at least one other endpoint or construct, and will always implicate all three. And, within this framework, sexual orientation discrimination plays a key role in the perpetuation of sex *and* gender discrimination *precisely* because sex-determined gender plays a key role in the construction of sexual orientation.⁴⁴ As described below, this framework has dominated Euro-American sex/gender relations and imperatives for generations. And, as

42. See generally *infra* Chapter Four.

43. The distinction drawn here between “based” and “implicated” is one of degree and relevance. The former term signifies a direct, primary, or immediate relationship between one or more construct(s) and specific act(s) or strain(s) of discrimination, whereas the latter term signifies an indirect, secondary, or attenuated relationship. Thus, discrimination that is said to be “based” on X and Y, and that also is said to “implicate” Z, signifies discrimination in which X and Y serve and operate as the main ingredients and in which Z serves and operates as a background or related factor.

Of course, this distinction between “based” and “implicated” flows from the recognition that the three endpoints are conflated but, as just noted above, that they are not coextensive. See *supra* note 38. This Project cannot and does not conclude that the three endpoints are always and in every respect constructed or deployed identically.

44. See, e.g., *infra* Chapter One, Parts I.A.3 and II.B.1-2.

demonstrated below, once it is noted at all, the conflation's presence and influence is found everywhere.

II

THE CONFLATION, LANGUAGE & COMMON (MIS)UNDERSTANDINGS

In order to discuss the conflation itself, one other point must be acknowledged: notwithstanding the ubiquity of the terms, "sex," "gender," and "sexual orientation" as yet lack precise and definitive meanings, culturally as well as legally. Some significant discrepancies in current uses are noted here, not in an attempt to resolve the uncertainties that they raise, but to clarify the terms' use in this Project and to advance a more principled application of them in legal doctrine and general culture. This Project works with existing terms and meanings, and within existing intellectual and normative frameworks, to discipline the use and application of these terms as legal concepts.

A. Sex

The first common (mis)understanding is purely conceptual: it is the equation of sex, as a physical or biological trait, with "penis" or "vagina." Thus, the existence of a penis or a vagina is deemed to settle the sex of the person whose body is at issue.⁴⁵ In fact, external genitalia is now considered to be only one of up to eight elements that cumulatively constitute sex.⁴⁶ Moreover, external genitalia as one element of sex is not generally

45. See *infra* note 366.

46. See JOHN MONEY, GAY, STRAIGHT, AND IN-BETWEEN 28-29 (1988) (listing the "criteria of sex" as: chromosomal sex, antigenic sex, gonadal sex, prenatal hormonal sex, internal morphologic sex, external morphologic sex, pubertal hormonal sex, and assigned sex, which is the sex of rearing and the usual basis for gender identity). Of course, they are not all necessarily accordant. *Id.* at 28-31.

It bears emphasis that genital anomalies occur in 2 or 3 of every 100 births, and approximately four million Americans "have genitalia that are neither or both male and female, but are sex assigned either male or female." LAUREL W. RICHARDSON, *THE DYNAMICS OF SEX AND GENDER: A SOCIOLOGICAL PERSPECTIVE* 5 (3d ed. 1988) (citation omitted). This number of persons—totalling several millions—cannot just be dismissed as socially, legally, or ethically insignificant.

Moreover, the determination of sex for classification purposes has been made critical to a number of important social and legal situations. See, e.g., *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975) (focusing on whether a post-operative male-to-female transsexual was "presently" a "female" for the purposes of changing the sex designation on her birth certificate); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974) (annulling the marriage of a post-operative female-to-male transsexual with another woman because the transsexual did not have a (normal) penis between his legs and therefore could not assume the "duties" of marriage). But, as indicated above, the relevance of the designation of sex is not limited to transsexuals. See also Pamela B. Fastiff, Note, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 HASTINGS CONST. L.Q. 937 (1992) (discussing the controversial "sex" testing of women for participation as women in the Olympic Games).

Finally, the potential and actual variety of sex-criteria mixes suggests that the categories that might be constructed around sex are not necessarily binary, but multiple—sex usefully and accurately may be viewed as a continuum rather than a dichotomy. See *infra* notes 118, 241, and 340-66 and

considered the paramount factor for living a healthy, happy, and productive life.⁴⁷ Still, the traditional view of sex that equates it to external genitalia generally continues to hold true even today, both socially and legally.⁴⁸

Because this Project proceeds from socially and legally dominant definitions, “sex” is used here to denote the physical attributes of bodies, and specifically the external genitalia of those bodies: “sex” as used in this Project means the same as sex under social and legal conventions.

B. Sex & Gender

The second common (mis)understanding is both definitional and rhetorical: it is the equation of sex and gender. Once upon a time, of course, sex referred to people and gender referred to nouns.⁴⁹ In other words, gender was an element of syntax used to denote the sex of the subject that the noun signified. However, both sex and gender now refer to people.⁵⁰ The former relates *physical* while the latter relates *social* dimensions of personhood. In other words, sex denotes bio-physical aspects of personhood associated with “man” and “woman” while gender denotes the social constructions understood as “male” and “female” or “masculine” and “feminine.”⁵¹ However, this physical/social distinction becomes confused when

accompanying text; see also Sue-Ellen Jacobs & Jason Cromwell, *Visions and Revisions of Reality: Reflections on Sex, Sexuality, Gender, and Gender Variance*, 23 J. HOMOSEXUALITY 43 (1992) (using a cross-cultural approach to analyze sex/gender dualisms and urging a need to expand Euro-American conceptions of sex and gender).

47. The last criterion—assigned sex, leading to gender identity—is considered the most significant factor socially, because it is most salient in the person’s ability to interact productively with her or his cultural environment. Moreover, studies have shown that young humans generally will assume the sex in which they are reared regardless of other relevant criteria. See RICHARDSON, *supra* note 46, at 4-7 (noting that “the evidence from a continuing series of studies on sex and gender . . . overwhelmingly supports the conclusion that biological sex is overridden by the gender of rearing”); see also Nathaniel McConaghy, *A Learning Approach*, in THEORIES OF HUMAN SEXUALITY 287, 316 (James H. Geer & William T. O’Donohue eds., 1987) (discussing research which showed that “the sex of rearing was decisive in determining the sexual orientation” of persons born with ambiguous genitalia).

48. See CLYDE W. FRANKLIN, II, *THE CHANGING DEFINITION OF MASCULINITY* 2-3 (1984) (discussing an example in which a male child’s penis was destroyed during circumcision, after which the child was “reassigned to the female category”); THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990) (discussing and analyzing sex/gender constructions throughout Euro-American history).

49. See Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981 (1992) (explaining that traditionally gender was an arbitrary attribute of nouns).

50. The most recent, and high-profile, recognition of this development issued from Justice Antonin Scalia’s 1994 dissent in *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994). He wrote, “The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.” *Id.* at 1436, n.1 (Scalia, J., dissenting).

51. See MONEY, *supra* note 46, at 52-53 (describing the relationship between the two constructs and terms: “sex is defined as what you are born with, as male or female, and gender is what you acquire as a social role, from a social script”); Williams, *Deconstructing Gender*, *supra* note 22, at 840 (“The deconstruction of gender allows us to protect [people] by reference to their social roles instead of their genitals.”). Thus, traditional norms hold that people of the sex called “men” are supposed to be strong, assertive, virile, macho, rational, and otherwise are considered “masculine,” and people of the sex called

sex and gender are used carelessly or strategically as equivalents.⁵² Once again, this Project follows the prevailing definitions and employs conventional terms conventionally: the following discussions use gender to signify the personal appearance, personality attributes, and socio-sexual roles that society understands to be “masculine” or “feminine,” and which society imposes on individuals on the basis of sex assignments.

C. Sexual Orientation, Sexual Conduct & “Sexuality”

The third common (mis)understanding also is both definitional and rhetorical: it is the confusion of sexual *orientation* with sexual *conduct*.⁵³ The former connotes a status, or a pre-behavioral proclivity, while the latter denotes behavior actually performed. However, as with sex and gender, this definitional distinction between orientation and conduct is ignored or blurred in practice.⁵⁴ These uncertainties produce profound distortions in the law that, once situated within the broader context of the conflation, must be explored fully.⁵⁵

“women” are supposed to be weak, passive, quiescent, soft, emotional, and otherwise are considered “feminine.” See generally 1 ROBERT J. STOLLER, *SEX AND GENDER: THE DEVELOPMENT OF MASCULINITY AND FEMININITY* (1968). The social construction of sex-derived gender attributes is discussed below. See *infra* Chapter Two, Part I.B. For incisive discussions of sex and gender, see, e.g., Judith Butler, *Variations on Sex and Gender: Beauvoir, Wittig and Foucault*, in *FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER* 128 (Seyla Benhabib & Drucilla Cornell eds., 1987); ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 253-83 (1986).

52. One example of this imprecision is found in Fastiff, *supra* note 46. The title of the work refers to gender but the contents focus on sex. In the context of the article, the author clearly intended to refer to the same feature(s) of personhood when using each term.

53. This (mis)understanding may have become less common after President Clinton’s failed effort to alter military policy regarding sexual minorities in the armed forces called attention to the matter. See Melissa Healy, *Clinton to Stress Conduct as Key for Gays in Military*, L.A. TIMES, Nov. 13, 1992, at A1; see also Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994) (discussing the status/conduct distinction in detail).

54. This imprecision also produces distortions in the substantive law. For example, in *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), the Ninth Circuit ruled that the plaintiffs, civilian workers for high technology employers associated with military projects, could be denied security clearances and, thus, career opportunities. The court’s conclusion was based on its view that the plaintiffs belonged to a class—“homosexuals”—defined by the commission of criminal acts—“sodomy.” Thus, the court reasoned, denying security clearance to these criminals was “rational” under equal protection standards. However, the conduct of “sodomy” was not present (or even alleged) in the record of the case; on the contrary, the plaintiffs had been identified as “gay” or “lesbian” based only upon their membership in certain organizations or other innocuous circumstances. In short, the case was about “status” or “identity” and not about “conduct” or “sodomy.”

Of course, the court’s analysis also overlooked another dispositive fact: in California, where all the plaintiffs lived and worked, “sodomy” between consenting adults is not a criminal act. See Valdes, *supra* note 53, at 439-45, 447-48 (critiquing *High Tech Gays* in depth).

55. See Francisco Valdes, *Identity Crises: Using the (Mis)Construction of “Sexual Identity” to Reconstruct Equal Protection Law* (exploring the sources and components of “identity” based on sexuality, and applying these findings to other sources or categories of identity) (manuscript-in-progress on file with author). See generally Vivienne C. Cass, *Homosexual Identity: A Concept in Need of Definition*, in *ORIGINS OF SEXUALITY AND HOMOSEXUALITY* 105 (John P. De Cecco & Michael G.