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Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins

Francisco Valdes*

This Article traces and critiques the early formalization of the Euro-American sex/gender system.¹ It seeks to illuminate the evolution of historical biases in American law and society that continue to dominate and destabilize sex/gender relations. As such, this Article is a prequel—it provides the origins of a story already partially told elsewhere. The earlier account investigated the ways in which modern law and society cross-construct and cross-associate “queers” and “sissies,” as well as “dykes” and “tomboys.”² The present account thus explains how and why “sex,” “gender,” and “sexual orientation” have historically been conflated, something that

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1. Gayle Rubin coined the term “sex/gender system” in her article *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 157-210.

2. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Culture*, 83 CAL. L. REV. 1 (1995). As with its predecessor, this Article addresses both the mechanics and the ideology of this conflation. Accordingly, the difference between this Article and its predecessor lies mainly in the cultural terrains and time periods covered: Whereas the earlier project documented and deconstructed the conflation of “sex,” “gender,” and “sexual orientation” in contemporary American law and modern Euro-American societies, this prequel focuses on the conception and application of these three constructs in ancient Greece. This Article thus traces the conflation to its origins. In so doing, this Article, in combination with its predecessor, shows why and how the conflation came to be. This union originated so long ago that it has become pervasive, resilient, and seemingly “natural.”

I argue has worked for the good of the few and to the detriment of the many.³ By studying the origins of the contemporary sex/gender status quo, this Article documents the path toward the union of androsexism and heterosexism in Euro-American culture and this union's culmination in hetero-patriarchy.⁴

This historical record has importance for several reasons, beginning with the sex/gender discontinuities that it lays bare for critical inspection. This record shows that the ancient Greek system studied here⁵ (and the modern and Native American systems studied in the predecessor project) used sex as the foundation of human identity and the basis of social organization via gender. Yet, I will argue, only the Euro-American system constructs gender as if it were immutable; only the Euro-American system deduces gender *exclusively* from sex, and only this system views the deduction as unassailable.

Moreover, only the Euro-American system is both androsexist and heterosexist. In contrast, Greek sex/gender arrangements remained aggressively androsexist, though not especially heterosexist.⁶ Consequently, this account reveals that the Euro-American sex/gender system is neither ahistorical nor universal, thus belying essentialist claims that help preserve the Euro-American status quo regarding "natrality," "normality," and "morality."

In turn, this record begs a critical reassessment of the conflationary sex/gender status quo and its claimed utility and necessity. The historical record elucidates the stakes involved in constructing the prevalent sex/gender system, and exposes the manipulation of this system to achieve particular results. My critique of the Euro-American sex/gender system reveals the ultimate interests at stake in this system to be nothing less than the control of destiny itself, both individual and societal—objectives achieved through control of sex/gender ideology and the regulation of socio-sexual identities.

3. The "few" are "masculine" men, and the "many" represent everyone else. *See id.* at 205-09, 261-73, 373-75.

4. The term "androsexism" is used in this Article to denote the type of "sexism" biased in favor of "male"-identified persons, concepts, and practices, while the term "heterosexism" is used to denote biases in favor of cross-sex relationships or "heterosexuality."

5. This Article, like much of the available literature, uses Athens' classical age as a model for discussion of ancient Greece; it therefore bears note that the discussion oversimplifies in order to avoid becoming lost in infinite particularities. There existed no single "Greek" system because other city-states, and different eras of ancient Greek history, present complex variations on the themes presented below. *See generally infra* note 58.

6. In addition, the Native American system remained relatively free of both biases; although it exhibited its own preferences and biases, the Native sex/gender system also exhibited a basic sense of equality and egalitarianism. *See* Valdes, *supra* note 2, at 209-44, 280-88.

Since Native American sex/gender arrangements do not constitute the focus of this Article, yet do present another view of the constructs in which I am interested, the footnotes provide a comparative glance at Native American conceptions of sex and gender. For a summary of these comparisons, see *id.* at 242-44.

Additionally, and perhaps more ambitiously, this record also aids in formulating a critical reconsideration of the legal value of human desire and intimacy—fields of human experience that legal actors frequently overlook or belittle. Specifically, this reconsideration helps strengthen efforts to make constitutional doctrines, like privacy and freedom of association, more affirmative and effective. This knowledge may thereby contribute to a transformation of the law's role vis-à-vis sexuality, helping to change law from an instrument of sex/gender oppression to an engine for sex/gender liberation.

Finally, I will argue, this historical record promotes empathic and inclusive analyses of hetero-patriarchal influences in law and society, and, accordingly, may provide impetus for sex/gender reform. In particular, this account helps identify commonalities among the structures of subordination imposed upon women⁷ and sexual minorities,⁸ as well as the differences that texture the historical, situational, and aspirational kinship between these two subordinated communities. This record may thereby help to couple feminist and Queer critiques of law and society in mutually enlightening and empowering collaborations. Ultimately, this expanded historical record can advance sex/gender equality and dignity both for women and sexual minorities.

Part I of this Article briefly summarizes the detailed deconstruction of the "conflation" of sex, gender, and sexual orientation that forms the linchpin of Euro-American sex/gender arrangements. This Section introduces key terms and presents a synopsis of previous conclusions that are especially germane to the discussion presented below. This summary also discusses the importance of control over sex/gender ideology, which translates into authority over the allocation of socio-sexual power and privilege.

Part II explains the genesis and growth of dominant sex/gender arrangements in antiquity, revealing the mechanics and consequences of the conflationary status quo. This Section first sketches the origins of the conflation during the classical era of the Greek city-states. By tracing the conflation to its origins, this account not only advances the historical record begun earlier but also sets the stage for the ensuing critique of this history and its contemporary consequences.

Part III focuses on the intersections and discontinuities of androsexism and heterosexism distilled from the historical record, and

7. The term "women" is used in this Article as shorthand for heterosexual women while the term "lesbian" is included within the term "sexual minorities" to acknowledge both the subordination of (heterosexual) women as members of the (hetero)sexual majority and the subordination of (lesbian) women as members of a (bi/homo)sexual minority.

8. The term "sexual minorities" is used in this Article to signify lesbians, gay men, bisexuals, transsexuals, and bi/transgendered persons to acknowledge the subordination of these various populations.

on the pivotal influence of gender in each of the systems discussed. This section first shows that current Euro-American arrangements indisputably fail to satisfy the claims of “naturalness,” “normality,” “morality,” “necessity,” and “utility” that historically have been asserted to justify the conflationary status quo.

Additionally, I will argue that the Euro-American sex/gender system, to a greater extent than even the Greek system, devalues the social and legal worth of human desire and intimacy. This devaluation, accomplished under both systems by dismissing the value of desires deemed lacking in instrumental utility, is anchored to sex/gender ideology. Part III therefore also reviews the ideological misuses of sexual expression in order to initiate a reconsideration of the social and legal worth of eros.⁹

Finally, since women, sexual minorities, and additional sex/gender “Others” suffer the most from hetero-patriarchy, a discussion of the lessons which feminists and Queers, in particular, may draw from this record remains crucial.¹⁰ This discussion closes Part III and concludes the Article.

I. AN OVERVIEW OF THE CONFLATIONARY SEX/GENDER STATUS QUO

A. *A Glossary of Terms: Sex, Gender, Sexual Orientation, and Sexuality*

Despite the ubiquity of the terms, “sex,” “gender,” and “sexual orientation” lack definitive cultural and legal meanings.¹¹ For purposes of this Article, however, these terms are employed as conventionally understood.¹²

Therefore, “sex,” as used below, denotes the physical attributes of bodies, specifically the external genitalia. Likewise, “gender” is used to describe personality attributes and socio-sexual roles that society understands to be “masculine” or “feminine” and which society ascribes on the basis of sex. Similarly, “sexual orientation,” describes the inclination of sexual or affectional interests and desires, as directed toward members of the same sex, the other sex, or both

9. This reconsideration is taken up in FRANCISCO VALDES, QUEERS, SISSIES, DYKES, AND TOMBOYS: HOW LAW AND SOCIETY (MIS)CONSTRUCT AND (MIS)USE SEX, GENDER, AND SEXUAL ORIENTATION (forthcoming 1996).

10. The term “Queer” with a capital “Q” is used in this Article to denote individuals with a conscious commitment to the dismantling of hetero-patriarchy. It is not necessarily synonymous with “lesbian” or “gay,” although at the moment most Queers happen to be associated with sexual minority communities. See Valdes, *supra* note 2, at 344-61.

11. *Id.* at 20-23.

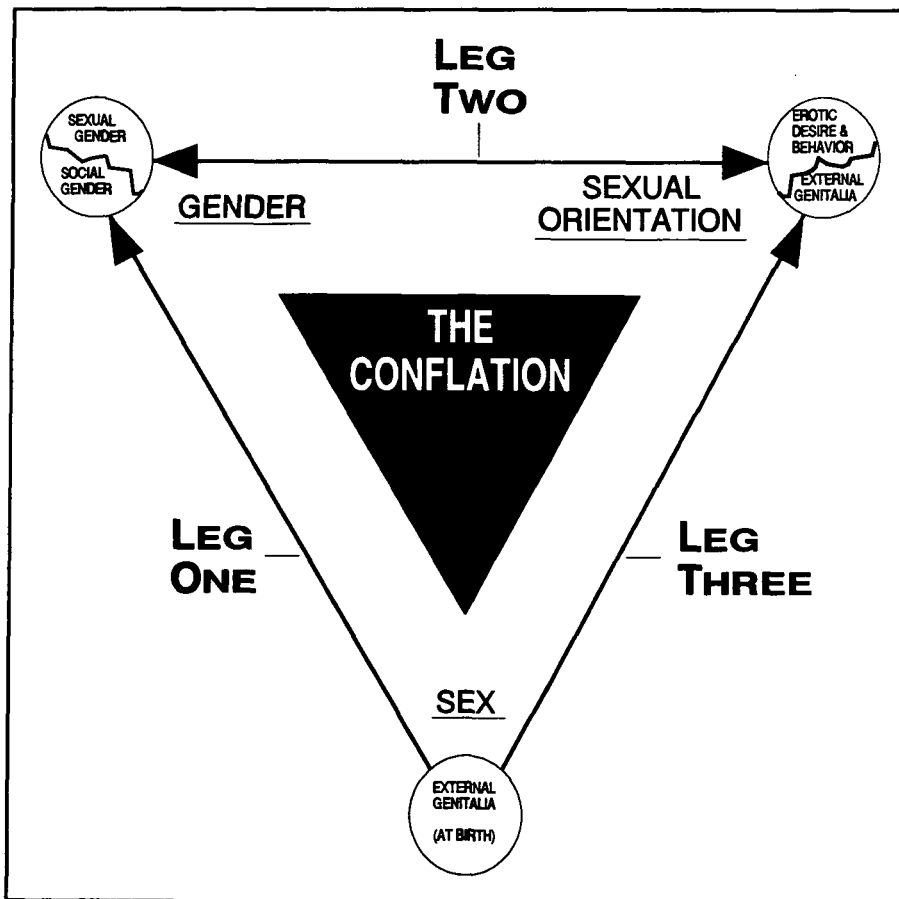
12. For further discussion of my use of these terms, see *id.*

sexes; however, the term does not extend to any behavioral manifestations of desire. Finally, the term “sexuality” refers to the erotic sensibilities of the person or group being discussed and disregards the distinction between desire and behavior—this final key term signifies both sexual orientation *and* sexual conduct.

B. The Conflation: Introductory Notes on “Legs” and “Endpoints”

The conflation comprises three constructs interconnected by three “legs.” As illustrated by the diagram below, these three constructs—sex, gender, and sexual orientation—thus form the “endpoints” for the legs that interconnect them.

The first leg of the triangle represents the conflation of sex and gender. The second leg represents the conflation of sex-based gender



and sexual orientation. The third represents the direct conflation of sex and sexual orientation. As the diagram indicates, sex stands at the base of this scheme—conflationary arrangements begin and end at sex.¹³

1. *Leg One: Conflating Sex and Gender*

The first leg conflates external genitalia (sex) with social personality (gender). Throughout society and within the law, this first leg is historically and popularly accepted as a truism,¹⁴ subject only to the relatively recent qualifications inspired by feminist legal theory.¹⁵ Thus, persons born with penises are supposed to exhibit a particular social personality and persons born with vaginas another; if not, they are disclaimed as “sissies” or “tomboys.”¹⁶ Moreover, legal institutions routinely decline to ameliorate societal pressure on, and discrimination against, socially gender-atypical persons.¹⁷ In this way, cultural and legal enforcement of Leg One ensures that sex determines, and becomes conflated with, gender. The conflation’s first leg is embedded in law as much as in society.

13. The conflation, and the strains of discrimination that it spawns, thus must be understood for what it is: sex-based. See Valdes, *supra* note 2, at 303-42.

14. *Id.* at 12-14.

15. See THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1991) (collecting works that represent various strands of contemporary feminist thinking); *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) (collecting various works on gender, identity, and law); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 618 (1990) (surveying feminist scholarship to “chart relationships among these bodies of work”); Symposium, *Recent Works in Feminist Legal Thought*, 59 TENN. L. REV. 441 (1992) (presenting diverse variety of works on contemporary topics and issues of special concern to women).

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. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); Regina Austin, *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.

Likewise, feminist legal theory generally has not explored the conceptual or strategic relationship of sexual orientation to traditional constructions of sex-determined gender. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191 (1990) (critiquing 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 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 also 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).

16. See Valdes, *supra* note 2, at 5 n.3, and sources cited therein (providing autobiographical accounts of such experiences).

17. *Id.* at 121-207.

2. *Leg Two: Conflating Gender and Sexual Orientation*

The second leg, conflating sex-derived gender and sexual orientation, may startle the unsuspecting mind. If so, this surprise 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.¹⁸ Nevertheless, the generally recognizable linkage between "queers" and "dykes" on the one hand, and "sissies" and "tomboys" on the other, suggests that some correlation between sex-determined gender and sexual orientation is at work.¹⁹

Although the first set of these terms invokes images regarding sexual orientation and the second set invokes images regarding gender, the two sets of images collapse into an undifferentiated jumble within the consciousness of children, legislators, judges, and others.²⁰ This collapse, or conflation, reflects the historical and contemporary fact that sexual orientation is an integral part of gender. Carved from gender, sexual orientation signifies sexual personality; it is the sexual dimension of gender.

As Leg Two of the diagram illustrates, sexual orientation serves as the *sexual* component of gender; indeed, sexual orientation amounts to the sexual performance of gender. This fact is exemplified by the exposition of clinical theories such as inversion²¹ and fixation,²² and by the current construction of "gender identity disorder" as a formal type of personality disequilibrium,²³ all of which use gender to explain sexual orientation. This aspect of the conflation is also manifested in anti-discrimination legal doctrines, which decline protection of "sissies" on the grounds that they may be "queers."²⁴ This second leg, like the first, thus exists both in law and in society.

18. This view formally (and formalistically) prevails in the law today. See Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination under Title VII*, 81 GEO. L.J. 1 (1992) (discussing courts' refusal to recognize discrimination on basis of sexual orientation as sex discrimination, and addressing viability of 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 role of courts in perpetuating sexism by not sanctioning discrimination on 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 form of gender discrimination although it is not treated as such by courts).

19. See Valdes, *supra* note 2, at 14-15.

20. See *id.* at 121-207.

21. See *id.* at 51-55.

22. See *id.* at 79-84.

23. See *id.* at 84-90.

24. In the cases, discrimination against heterosexual, effeminate men is condoned on the grounds that male effeminacy, or sissiness, is a form of sexual orientation discrimination, which is permitted under federal law. See *id.* at 121-76.

3. *Leg Three: Conflating Sex and Sexual Orientation*

The conflation's third leg may be the least familiar, but is discernible nonetheless. The direct conflation of sex and sexual orientation is shown by the way in which sexual orientation is surmised from the sameness or difference of sex within a coupling of partners to a sex act: A sameness of sex within such a coupling results directly in conclusions of homosexual orientation for each participant, whereas a difference of sex within a coupling produces conclusions of heterosexual orientation. Thus, genital configurations are deemed to determine sexual orientation identities; sexual orientation, in other words, is deduced from the coincidence of sex within a coupling. In this way, sexual orientation is conflated with sex directly—that is, without any mediation of this connection via gender.²⁵

In sum, the intellectual framework of the conflation constructs sex as the determinant of gender, conceptualizes gender as the social dimension of sex, and treats sexual orientation as the *sexual* performance of gender. 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.²⁶ This discussion thus shows 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.²⁷

25. *Id.* at 15-16. To situate this third leg within the existing literature, it should be mentioned that the conflation of sex and sexual orientation reflects the "miscegenation analogy." Generally, this analogy compares discrimination against individuals who form cross-race couplings to discrimination against individuals who form same-sex couplings. The analogy thus employs sex and race to explicate how sex and sexual orientation operate in tandem. 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). This analogy leads to the conclusion that discrimination currently viewed as sexual orientation discrimination is, in fact, but a species of sex-based discrimination. The operation of the conflation's third leg likewise reveals that the bigotry currently known as sexual orientation discrimination literally and unavoidably constitutes sex discrimination. See Valdes, *supra* note 2, at 198-304.

26. See *id.* at 290-94.

27. As the diagram above illustrates, acts of discrimination occurring along Leg One involve sex and gender, and thus do not depend on sexual orientation, whereas acts of discrimination occurring along Leg Two and Leg Three involve gender and sexual orientation, and sex and sexual orientation, respectively. From this viewpoint, the focus of critical legal inquiry shifts from endpoints to legs and refocuses upon the interconnections that make the trio operate as an interlocking set. This shift from endpoints to legs thereby can help legal actors and institutions to understand the normative dynamics of (re)cognition that spur everyday discrimination based on this trio of constructs. This shift facilitates contextual and holistic analyses of sex/gender discrimination that can combat the full gamut of sex/gender discrimination more effectively. See *id.* at 320-27.

By focusing on the legs of the above diagram and the interconnections that they represent, the law can better understand how sex, gender, and sexual orientation jointly motivate acts of discrimination that are presently perceived as being “based” only on one of these three endpoints.²⁸ This summary, in other words, depicts an analytically misguided and practically impotent anti-discrimination status quo in contemporary law.²⁹ Yet this status quo is not random; on the contrary, the status quo is imbued with a certain rationality that reveals itself once inquiry is made into the conflation’s ideology and its substantive objectives.

C. *The Conflation: Ideology, Identity and Destiny*

The sex/gender ideology produced and protected by the conflationary status quo represents a regime of compulsory heteropatriarchy.³⁰ This descriptor is appropriate because it captures the substantive fusion of androsexism and heterosexism within the Euro-American sex/gender system,³¹ and because it specifies the coercive enforcement of androsexist and heterosexist precepts via the conflation as regulatory apparatus.³²

The conflation, both product and producer of the sex/gender scheme, serves as the centerpiece of the system’s regulatory apparatus; the conflation establishes the sex/gender parameters that bound socio-sexual identity, or social/public and sexual/private human life. Thus, the conflation creates hetero-patriarchal categories and hierarchies that privilege masculine, heterosexual men and subordinate all other

28. By locating all forms of discrimination within one (or more) of the conflation’s three legs, it is always possible to ascertain which endpoints of the conflation are most salient in any particular manifestation of discrimination—in other words, we can see upon which endpoints the discrimination is “based.” See *id.* at 16-20. This suggests that, even though sex and gender discrimination have been formally outlawed, both can be practiced under the guise of legally acceptable sexual orientation discrimination.

29. *Id.* at 304-20. For suggested doctrinal reforms resulting from holistic and contextual analyses of conflationary sex/gender discrimination, see *id.* at 327-39.

30. This term builds on Adrienne Rich’s “compulsory heterosexuality.” See ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, in BREAD, BLOOD, AND POETRY: SELECTED PROSE, 1979-1985, at 23 (1986). State involvement in the compulsion of heteropatriarchy ranges from the direct to the indirect, as reflected in the cases reviewed in Valdes, *supra* note 2, at 121-207. State involvement in this compulsion more generally is reflected in the state-enforced prohibition of cross-sex marriage and by state enactment of sodomy statutes that in practice serve as vehicles for the suppression of same-sex desires, identities, and communities. See generally John Charles Hays, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Scrutiny After Bowers v. Hardwick*, 31 B.C. L. REV. 375 (1990).

31. See Valdes, *supra* note 2, at 261-64.

32. The conflation as regulatory apparatus encompasses law, medicine, and religion. *Id.* at 116-17, 274-75.

sex/gender types, consistent with the joined biases of androsexism and heterosexism.³³

To construct its hierarchies, the ideology of compulsory hetero-patriarchy rests on four key tenets: the bifurcation of personhood into “male” and “female” components under the active/passive paradigm; the polarization of these male/female sex/gender ideals into mutually exclusive, or even opposing, identity composites; the penalization of gender atypicality or transitivity;³⁴ and the devaluation of persons who are feminized. The combined impact of these four tenets is compulsory hetero-patriarchy.³⁵

The interests at stake under the conflationary status quo thus determine control over ideology, identity, and destiny. They represent control over every individual’s capacity to experience and express the self; to shape and direct personality, both socially and sexually; and to realize one’s being and fate, one’s subjectivity and agency. Moreover, this ideology and its effect are neither benign nor beneficial. On the contrary, through the hierarchical and coercive operation of these tenets, Euro-American sex/gender ideology inhibits sex/gender cultural diversity, harmony, and equality, and also subverts individual sex/gender autonomy and dignity.³⁶ Conflationary ideology fosters social acrimony because it betrays the ideals formally favoring liberty and equality that are ostensibly foundational values of this nation. This ideology thus inflicts unjustifiable harms on individuals, society, and the law itself.

D. The Conflation and the Legal Worth of Intimacy: The Status Quo

The record below brings to the fore a key theme: Desire is socially and legally devalued unless it is the instrument of ideology, a tool to serve specific social goals. This tendency partially explains why the Euro-American status quo exhibits a fundamentally instrumental view of the human desire for sexual pleasure and intimacy. For example, legal complicity in the devaluation of desire is manifested by the foundations proffered by courts for the doctrine of “privacy,” as presently devised under substantive due process principles.³⁷ Thus, the earliest pronouncement of the modern-day “right of privacy” under the Fourteenth Amendment was unabashedly instrumental: The Supreme

33. *Id.* at 266-73.

34. “Gender transitivity” signifies the fluidity of gender and belies the notion that sex fixes gender.

35. *Id.* at 264-66.

36. *Id.* at 280-90.

37. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 382-405 (5th ed. 1995).

Court in *Griswold v. Connecticut*³⁸ rationalized its holding in favor of a married couple's right to use contraceptives by emphasizing the heterocentric purposes of traditional cross-sex marriage. Marriage "is an association that promotes a way of life," the Court concluded.³⁹ This "way of life," informed and shaped by the conflatory sex/gender system, effectively represents hetero-patriarchy.⁴⁰

Indirectly, but effectively, this seminal analysis reinforced the grip of ideological control over sexual desire in traditional active/passive, male/female terms. And although subsequent rulings temporarily intimated a less instrumental view of state control over sexual desire,⁴¹ the law's protection of privacy (or other constitutional) rights ultimately depends on the extent to which judges perceive such rights as serving accepted social goals.⁴²

This dependence was confirmed ten years ago in *Bowers v. Hardwick*,⁴³ in which the Supreme Court denied the value of same-sex desire by hastily dismissing the analogy of same-sex couplings to cross-sex couplings in the most traditionalist and instrumentalist of terms: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated," the Court proclaimed.⁴⁴ Going even further, the Court discounted any connection between the expression of same-sex desire and "the concept of ordered liberty," deriding such a connection as "at best, facetious."⁴⁵ In effect, these conclusions rejected the privacy right in same-sex contexts because these relations were deemed devoid of the instrumental purpose previously imputed to cross-sex marriage and its service to the hetero-patriarchal "way of life."⁴⁶ Though these pronouncements were made in the privacy

38. 381 U.S. 479 (1965).

39. *Id.* at 486.

40. See generally Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991) (arguing that traditional cross-sex marriage constitutes institutionalization of sex/gender inequalities that combine androsexism and heterosexism, and which would be subverted by legalization of same-sex marriage).

41. For instance, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and in *Carey v. Population Services*, 431 U.S. 678 (1977), the Court applied *Griswold* to protect the rights of unmarried individuals and minors, respectively, to obtain contraceptives, thereby suggesting that privacy doctrine would protect more than instrumental intimacy within the confines of traditional marriage.

42. For further critical discussion of contemporary privacy doctrine, see generally Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); Steven J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 853 (1991).

43. 478 U.S. 186 (1986).

44. *Id.* at 191.

45. *Id.* at 194.

46. The Court's conclusion purports to flow from its finding that same-sex desire and its expression are not "implicit in the concept of ordered liberty," which the *Bowers* Court announced as one standard for determining the "fundamental" interests protected under

context, they are matched by similar pronouncements in other legal contexts, exemplifying a broader legal status quo.⁴⁷

On the whole, then, contemporary law fails to recognize the worth of non-instrumental desire or intimacy. But, as will be discussed below, the failure to recognize desire as intrinsically valuable can be harmful because it permits dominant forces to assess and govern the desires of all in self-serving fashion.

II. TRACING THE ORIGINS OF THE SEX/GENDER STATUS QUO

That classical Greece was the cradle of Western culture is axiomatic.⁴⁸ Recently, scholars have begun to document the Greeks' critical role in the institutionalization of patriarchy in the Western world.⁴⁹ Synthesizing the work of such scholars, this Section will show how the Greek sex/gender system, as mediated through Roman imperialism, gave rise to the sex/gender conceptions that birthed contemporary arrangements.

In doing so, this Section must and does selectively oversimplify; that is, in order to illuminate how sex, gender, and sexuality became conflated in ancient times, I focus on the most relevant portions of the historical record that has been adduced and passed down over the ages, a record that is replete with gaps, biases, and contradictions.⁵⁰ Because it would be impossible in the context of an article such as this to resolve the issues raised by the informational and interpretative problems of this history, doing so is not the task I undertake below. And because it would be impossible to recount comprehensively every nuance or particularity in the historical record that does exist, I also do not undertake a definitive history of social and sexual relations between or among the sexes. Instead, the following account focuses

substantive due process. *Id.* at 194. The other such standard queries in circular fashion whether the interest at issue is "deeply rooted in this Nation's history and tradition." *Id.*

47. For instance, the still-evolving "freedom of intimate association" protected by the First Amendment has been articulated by the Court and leading commentators in instrumental terms. *See, e.g.,* *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1983) (discussing purposes served by right of free association); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624 (1980); *see also*, Katie Watson, Note, *An Alternative to Privacy: The First Amendment Right of Intimate Association*, 19 *REV. L. & SOC. CHANGE* 891 (1992).

48. *See, e.g.,* MICHAEL GRANT, *THE FOUNDERS OF THE WESTERN WORLD: A HISTORY OF GREECE AND ROME* 1 (1991) ("We ourselves, whether we like it or not, are the heirs of the Greeks and Romans.").

49. *See, e.g.,* ROSALIND COWARD, *PATRIARCHAL PRECEDENTS: SEXUALITY AND SOCIAL RELATIONS* (1983); GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986); SARAH B. POMEROY, *GODDESSES, WHORES, WIVES AND SLAVES* (1975).

50. Therefore, for instance, much of the record, and thus of the following account, in fact is a discussion of classical Athenian arrangements. *See supra* note 5. Problems also exist with the availability and interpretation of historical information regarding women and other unprivileged groups (or aspects) of ancient Greek society. *See, e.g., infra* note 58. Of course, the problems of historiography arise with any study that involves historical or transcultural investigation. *See generally* Valdes, *supra* note 2, at 209 n.710, 212 n.717.

on relatively formal aspects of Greek sex/gender arrangements, and on populations that were relatively privileged by those formal arrangements.⁵¹ This twin focus is not only necessary, given the state of the historical record, it also is beneficial because it permits an important gain—the critical extrapolation of basic themes from antiquity that presage the contemporary Euro-American conflation of sex, gender, and sexual orientation, and that thereby help to elucidate the problems associated with this status quo. This focus is a reminder that the ultimate concern of this account, and of this Article as a whole, is the conflation and its cultural origins.⁵²

A. *Men & Women: The March to Hierarchy*

The march toward institutionalized patriarchy began with the gradual ascendancy of “phallocentrism,”⁵³ which followed the shift from socio-economic systems based on “collecting” to “pastoral” systems based on domesticated animals,⁵⁴ and thence to the Euro-American prototype of “the state” in the form of the Greek polis, or city-state.⁵⁵ This gradual transition from kin-based tribal systems to

51. In other words, this account (as the textual references that follow make clear) examines how formal constructions of gender and sexuality, and their related rules of conduct, sought to stratify and constrain sex/gender relations. This examination is trained primarily, though not exclusively, on the elite class of citizen males that occupied the apex of Greek society because that population provides a relatively rich record from which critical comparisons can be drawn between contemporary phenomena and their closest equivalents in antiquity. For a number of reasons, then, these comparisons are necessarily imperfect, but more helpful than none at all.

However, it bears emphasis that this examination is not intended to reify the patriarchal biases of the ancient Greeks, nor that of the historians who followed them. *See generally infra* note 58. On the contrary, this examination, which includes an express critique of those biases, is intended to help uncover and combat the ideological links between ancient Greek sex/gender arrangements and the contemporary Euro-American conflation, which remains the ultimate objective of this Article. This focus warrants constant attention to the origins of the phenomenon that I have denominated the conflation of sex, gender, and sexual orientation.

52. *See* Valdes, *supra* note 2, at 8 n.11.

53. The term is used by Professor Christine A. Littleton to encompass male-identified cultural arrangements “even when they appear to have little or nothing to do with either biological sex.” *See* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1280 (1987). *See generally* Jean-Joseph Goux, *The Phallus: Masculine Identity and the “Exchange of Women,”* 4 DIFFERENCES 40 (Maria Amuchastegui et al. trans., 1992) (reviewing and analyzing imageries and symbolisms associated with phallus).

54. Generally, “collecting” denotes natural agriculture, or harvesting of naturally occurring foodstuffs, as opposed to extensive agriculture that entails methodical planting and cultivation of crops. *See* KATHERINE S. NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES* 147-53, 163-65 (1983).

55. The sequence of historical upheavals leading up to the creation of the Greek city-state system generally is viewed as commencing with the invasion from the north by clans known as Dorians. *See, e.g.,* MICHAEL GRANT, *THE RISE OF THE GREEKS* 1 (1987). Scholars hypothesize that northerly invasions were prompted by geographic and climactic conditions: “[I]n cold and harsh climates where the margin of surplus in the necessities of life is much smaller or even non-existent, there would be a constant economic incentive to move on and look for better conditions.” ARTHUR EVANS, *THE GOD OF ECSTASY: SEX ROLES AND THE MADNESS OF DIONYSOS* 85 (1988). *See generally* J.P. MALLORY, *IN SEARCH OF THE INDO-EUROPEANS: LANGUAGE, ARCHEOLOGY AND MYTH* (1989) (tracing development of early European

established city-states was shaped by the value of physical prowess in conflicts among and within competing clans. The increasingly central relationship between brute force and political and economic power presaged, and gradually led to the incorporation of, phallogocentric and patriarchal values into the emergent "civilization" of early Greece.⁵⁶

In this way, a politics of physicality generated cultural norms and symbolisms that projected the superiority of "masculinity" in the Greek city-state, even in everyday circumstances that did not implicate actual physical strength. The construction and operation of "femininity" therefore increasingly denoted, and required, socio-sexual deference and surrender to "masculinity."⁵⁷ Institutionalized by Greece and disseminated by Rome, androcentric sexism, or androsexism, over time has become a fixture of Euro-American cultures.

B. Greek Patriarchy: Androsexism Established

The record described here as "Greek" focuses on Athens during its classical era because the historical legacy of Athens is well documented and because Athenian culture during this period was the most influential among the city-states of ancient Greece.⁵⁸

civilizations by tracing language permutations).

56. See GRANT, *supra* note 55, at 12, 30 (noting Plato's observation that "the natural state of affairs between one Greek state and another was war" and explaining that "females, generally, never possessed citizenship in their city-states, never held office and took no overt part in political activities at all. Disallowed charge of their own affairs, they were, as a matter of law, under the care of a male, and they had no legal right to own or dispose of property.").

57. Hence, the aptness of the term "phallogocentrism." See *supra* note 53. The symbolisms continue to reverberate in modern society, as well. See, e.g., John H. Gagnon, *Physical Strength, Once of Significance, in THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLE 169* (Deborah S. David & Robert Brannon eds., 1976) (noting that "economic value of physical strength is rapidly disappearing, if it is not gone already [but] physical dominance is still an asset," especially "in adolescence and social relationships"); see also BRIAN PRONGER, *THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX* (1990) (exploring distillation of "gender myth" in organized sports); Lucy Komisar, *Violence and the Masculine Mystique, in THE FORTY NINE PERCENT MAJORITY, supra*, at 201 (reviewing various social arenas in which men are allowed or encouraged to express aggressive or belligerent behavior in order to maintain "masculine" image); see generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (analyzing spouse battering as "the batterer's quest for control of the woman" and casting struggle for "power and control" as the "heart of battering process").

58. Athens during the classical era serves as the model for most analyses of "Greek" sexuality because its historical record is the richest. This era, spanning generally from the repulsion of the Persian invasion and the foundation of the Athenian confederacy in 477 B.C.E. to the conclusion of the internecine Peloponnesian War in 404 B.C.E., witnessed the apex of Athenian power: In effect, Athens enjoyed a virtual hegemony of cultural and political influence during this time. Overviews of this period in Greek/Athenian history are provided in GRANT, *supra* note 48, at 63-100; GRANT, *supra* note 55, at 34-72; MICHAEL RUSE, *HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY 176-82* (1988). Despite this concentration on Athens, historians have documented same-sex arrangements similar to the Athenian model throughout the Greek peninsula and nearby environs. See, e.g., GRANT, *supra* note 55, at 97, 135, 178, 194 (discussing Sparta, Thebes and Boeotian League, Lesbos, and Crete).

1. *The Conflation of Sex and Gender and Greek Regulation of Sexual Desire*

In ancient Greece, as in contemporary Euro-American societies, sex assignments adhered to external genital anatomy, and such assignments served as a key basis of social categorization and organization. The Greeks, like today's Euro-Americans, thus used sex as the basis of their sex/gender arrangements and of their socio-sexual relations. Moreover, the Greeks used sex to establish patriarchy as the organizing principle of their sex/gender ideology. Thus, on the

In addition to focusing on Athens, the scholarship has also focused on relations between males. This focus seems to be a product of androcentrism both among the ancient Greeks and the Euro-American scholars who have studied their ways. See, e.g., Evelyn Blackwood, *Breaking the Mirror: The Construction of Lesbianism and the Anthropological Discourse on Homosexuality*, in *THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR 1* (Evelyn Blackwood ed., 1986) (critiquing historic reliance on male behaviors for theoretical models of sexuality). A notable exception to this rule is EVA CANTARELLA, *BISEXUALITY IN THE ANCIENT WORLD* (Cormac O'Cuilleain trans., 1992). Though the bulk of Cantarella's study is devoted to male relations, she notes that her initial focus was on "the development of the female condition in classical antiquity" but that "male homosexual relations were so widespread, in both Greece and Rome, that they must necessarily have had an impact on the way in which women were loved." *Id.* at vii. After surveying male relations, she turns to the evidence that has survived the centuries on female relations. *Id.* at 78-93.

Finally, the scholarship largely has been virulently heterosexist, pointedly ignoring or revising references to same-sex relations in studies or translations of ancient texts. The landmark publication of KENNETH J. DOVER, *GREEK HOMOSEXUALITY* (1978), broke with this tradition. In his preface, Dover noted that "a combination of love for Athens with hatred of homosexuality vitiated the study of Greek homosexuality; and it has continued to do so," but explained that he was "fortunate in not experiencing moral shock or disgust at any genital act whatsoever, provided that it is welcome and agreeable to all participants (whether they number one, two, or more than two)." *Id.* at vii-viii. Quickly following Dover's book came other influential works. See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980); the trilogy of MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME THREE: THE CARE OF THE SELF* (Robert Hurley trans., 1986); *THE HISTORY OF SEXUALITY, VOLUME TWO: THE USE OF PLEASURE* (Robert Hurley trans., 1985); *THE HISTORY OF SEXUALITY, VOLUME ONE: AN INTRODUCTION* (Robert Hurley trans., 1979); EVA KEULS, *THE REIGN OF PHALLUS: SEXUAL POLITICS IN ANCIENT ATHENS* (1985).

Since then, and especially since the late 1980's, less demagogic and more expansive works have sparked a revival in the anthropology and historiography of sexual relations among the Greco-Roman ancients. See *BEFORE SEXUALITY: THE CONSTRUCTION OF EROTIC EXPERIENCE IN THE ANCIENT GREEK WORLD* (David M. Halperin et al. eds., 1990); CANTARELLA, *supra*; DAVID COHEN, *LAW, SEXUALITY, AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS* (1991); CHRISTINE DOWNING, *MYTHS AND MYSTERIES OF SAME SEX LOVE* (1991); EVANS, *supra* note 55; DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988); DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS ON GREEK LOVE* (1990); A *HISTORY OF PRIVATE LIFE FROM PAGAN ROME TO BYZANTIUM* (Paul Veyne ed., 1987); ROYSTON LAMBERT, *BELoved AND GOD: THE STORY OF HADRIAN AND ANTINOUS* (1988); JOHN J. WINKLER, *THE CONSTRAINTS OF DESIRE: THE ANTHROPOLOGY OF SEX AND GENDER IN ANCIENT GREECE* (1989).

whole, the Greek and Euro-American conceptions and uses of sex were administratively and ideologically similar.⁵⁹

The Greeks likewise sexed gender and gendered sexualities, making gender generally deductive, but only partially what I will term intransitive. Though the social aspects of gender were for the most part fixed by sex, gender was partially mutable due to sexual norms and practices among the citizen male elite, which called for sexual gender transitions under some circumstances for limited time spans.⁶⁰ The Greek model, in short, made gender *socially* intransitive, or fixed, but *sexually* transitive, or mutable, depending on sex, age, and class.⁶¹

Despite these differences of scope and degree regarding the intransitivity of the sexual element of gender, both the ancient Greek and modern Euro-American systems construct and manage gender under the active/passive paradigm.⁶² Consequently, the Greek system, like the Euro-American system, attributed to gender both social and sexual aspects: Active and passive distinctions applied in both social and sexual domains of life. Even though gender was intransitive only socially, it was articulated and regulated both in social and sexual terms under the active/passive paradigm.⁶³ Greek and Euro-American conceptions of gender, as with sex, were therefore similar in nature. In this way, Leg One of the conflation was substantially in place during Greek antiquity.

Though the existence of gender transitivity sometimes prompts modern Euro-Americans to mistake the Greeks as sexually liberated hedonists, Greek culture, like Euro-American societies, intensely

59. By comparison, the Native American system likewise defined sex by reference to external genitalia and also used sex as the basis of societal organization. However, Native arrangements were not systematically hierarchical, nor, specifically, patriarchal. See Valdes, *supra* note 2, at 212-16. As such, the Native system was similar to the Greek (and Euro-American) system in administrative terms, but markedly dissimilar in ideological terms.

60. See *infra* notes 98-105 and accompanying text.

61. In many respects, "sex" was the key marker, and it determined "class" at the threshold: Only males could belong to the highest class—"citizen"—but not all males were "citizens." Apart from the "sex" component, the most important trait was lineage; for instance, "free" versus "slave" or "native" versus "foreigner." The amalgam of attributes comprising "class" also included education, refinement, and wealth. See *infra* notes 90-97, 114-24 and accompanying text.

62. See Valdes, *supra* note 2, at 38-44; see also *infra* notes 70-72 and accompanying text.

63. In contrast, the Native American system was not based on the active/passive paradigm, though in Native contexts gender was also articulated in social and sexual terms. Instead of the active/passive paradigm, Native cosmology viewed each individual as born "raw," with life experience providing the "cooking" that amounted to the development of social and sexual personality in the form of "gender," which society then ratified via rituals specific to each gender. Though deemed fluid, this sense of individuated gender nonetheless was deemed innate; gender was both essential and mutable. This inductive/transitive gender model therefore did not impose on any individual's template cultural gender configurations and expectations akin to the active/passive paradigm; this model thereby obviated the concept of gender deviance. See Valdes, *supra* note 2, at 217-20.

regulated all human expressions of sexual desire. Greek society, however, did not use the tool of sexual orientation.⁶⁴ Though same-sex desires were cognizable and took place openly, sexual orientation did not arise as a meaningful concept of socio-sexual identity. Therefore, conflationary relationships akin to Leg Two (gender and sexual orientation) or Leg Three (sex and sexual orientation) did not have analogues in the ancient Greek system.⁶⁵

2. *The Sexualization of Social Regulation*

Several sex-based antinomies managed Greek socio-sexual relations, and thus sexualized the social regulation of Greek life. These antinomies jointly constituted a regulatory apparatus similar to the conflation. They also constitute the active/passive paradigm that has defined and delimited social and sexual relations since its inception.

a. *The Socio-Sexual Antinomies*

The first antinomy was male/female, which held "male" to be superior and which, as elaborated through the other antinomies, erected the sex-based gender lines that permeated Greek socio-sexual relations.⁶⁶ The second antinomy was moderation/excess, which exalted the male-identified virtues of self-control and constraint and disdained the female-identified vices of volatility, voraciousness, and

64. The Greeks had no concepts equivalent to "homosexual" or "heterosexual" as Euro-Americans have come to know such terms, and they therefore did not categorize people on the basis of what Euro-American societies have taken to calling "sexual orientation." Of course, Greeks observed that some citizens seemed to gravitate towards one "sex" or another or both, but society generally did not label or categorize its members along such lines. For an elaboration, see HALPERIN, *supra* note 58, at 15-43.

65. Native American sexualities also were expressed and experienced without any formal concept of "sexual orientation" as known to Euro-American sex/gender relations, mainly due to the inductivity, and to the social and sexual transitivity, of the Native gender model; this model simply did not provide fixed platforms, like sex and gender, from which to construct sexual orientation. The free-floating nature of Native gender, in particular, obviated any conceptual need for sexual categorization. For different reasons, though, the Native Americans, like the Greeks, engaged in a form of pan-sexuality that transcended the sexual orientation identities and categories that are so critical to the conflationary status quo. Valdes, *supra* note 2, at 220-22.

66. The basic view was that men were strong physically and mentally, capable of controlling themselves, and thus qualified to govern personal as well as public affairs, whereas women were weak and chaotic and thus disqualified from any undertaking that called for deliberation or soundness of judgment. Socrates, for instance, supposedly held that "women are by no means inferior to men. All they need is a little more physical strength and energy of mind." REAY TANNAHILL, *SEX IN HISTORY* 93 (1992) (quoting Xenophon's *Symposium*). In like vein, Aristotle wrote that "as between the sexes, the male is by nature superior and the female inferior, the male ruler and the female subject. And the same must also necessarily apply in the case of mankind as a whole." CANTARELLA, *supra* note 58, at 67 (quoting ARISTOTLE, *POLITICS* § 1254b (H. Rackham trans., Loeb Classical Library 1932)). Thus "[e]quipped with diminished and imperfect reasoning powers, incapable of controlling her lustful feelings, she is in fact highly dangerous if left to herself." *Id.* Accordingly, "the woman must be controlled not only by her husband but also by the state." *Id.*

wantonness.⁶⁷ The third antinomy was public/private, which mandated expansive, active pursuits for males and cloistered, submissive duties for females.⁶⁸ The fourth antinomy was honor/shame, which

67. "The Greeks associated sexual desire closely with other human appetites—the desire for food, drink, and sleep—and saw all these appetites as entailing the *same* moral problem, the problem of avoiding excess." DOWNING, *supra* note 58, at 134; see also 3 FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 58, at 38-49 (discussing historical "moral problematization of pleasures" and expansion of indulgence). This antinomy was central to the sex/gender politics of Greek society because, while men were held to be strong and self-controlled, masters of their impulses, women were cast as weak and inherently incapable of "auto-regulation." Thus, the control of males over females was viewed as a moral necessity and a civic virtue: "Women, then, are polluted because of a special tendency to go out of bounds, to lose their boundaries, to ally with the unbounded." Anne Carson, *Putting Her in Her Place: Women, Dirt, and Desire*, in *BEFORE SEXUALITY*, *supra* note 58, at 135, 159.

Sexuality brought these general conceptions and concerns about femaleness into sharp relief: "Because of the emphasis on the phallus as *the* sexual organ, women were imagined as more lustful than men, as obsessed with an insatiable lust to fill up their vaginal void with penises." DOWNING, *supra* note 58, at 136 (emphasis in original). Thus, "women [were] thought to embody a seething sexuality that can ignite an uncontrollable response in men. To preserve the social order, this potentially destructive force must be controlled and mediated through the institution of family." COHEN, *supra* note 58, at 141. "Since moderation [was] defined as an act of self-mastery, immoderation [was] seen as deriving from a passivity that relates it to femininity. To be immoderate [was] to be in a state of submission to the forces of pleasure." DOWNING, *supra* note 58, at 136. Female nature in general, and sexuality in particular, thus demanded male vigilance and suppression.

Consequently, "many of the notions, conventions, and rituals that surrounded female life in the ancient world [were designed to] isolate and insulate female eros, from society and from itself." Carson, *supra*, at 136. Pre-arranged marriage at an early age, in particular, served this purpose: "Putting a lid on female purity was the chief concern and ritual point of the ancient wedding ceremony." *Id.* at 161. Typical ages of females offered for marriage were 12 or 13 years, or immediately upon reaching puberty. CANTARELLA, *supra* note 58, at 40. Thus, "[t]he ancient wedding undertook, systematically, to redeem woman from her original roughness and sourness, and to purify her of chaos, by means of very specific ceremonies aimed at the dramatization and reinforcement of female boundaries. So we find in the marriage rite much emphasis on doorways, thresholds, lintels, exits, entrances, and a whole ceremonial apparatus whereby the bride is relocated from her father's house to her husband's house, from maidenhood to married status." Carson, *supra*, at 162.

Of course, these ritualistic emblems survive to this day in Euro-American marriage ceremonies; among the ancient Greeks, the "boundaries" symbolized in the rites also erected the public/private antinomy that eventually yielded the Euro-American "separate spheres" doctrine under the current public/private distinction. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); see also Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (noting how separation of men and women under public/private distinction contributes to invisibility of women).

68. A woman was typically excluded from political and intellectual life, virtually uneducated, married soon after puberty to a man often twenty years her senior, and thereafter sequestered in his home, while he spent most of his time outside it with other men. DOWNING, *supra* note 58, at 143; see also EVANS *supra* note 55, at 90; TANNAHILL, *supra* note 66, at 94. It should be emphasized that this isolation of women generally called for them to stay not just within the house, but within its innermost recesses, and avert any chance contact with males. See COHEN, *supra* note 58, at 135, 148.

Despite this web of isolation, women did have opportunities to develop neighborhood networks. For instance, "women both in rural and urban areas formed intimate friendships with their neighbors, constantly visiting one another for a variety of purposes, not least simple companionship." COHEN, *supra* note 58, at 88. Additionally, some women "worked outside their homes because economic survival required it." *Id.* at 151. Thus, the spatial confinement of women in the house kept them away from civic or intellectual affairs but did not seclude them hermetically: In practice, the "domestication" of women meant that women could "never leave the house without a purpose, a purpose that will be regarded as legitimate in the eyes of the

governed reputational interests and marshalled social sanctions to pull males into the culture's center and to push women out to its margins, both socially and sexually.⁶⁹ This fourth antinomy thereby cemented the sex/gender boundaries of the other antinomies.

b. The Active/Passive Paradigm

As a set, these antinomies delineated the acceptable universe of "correct" social and sexual expression. "Male" was viewed as socially and sexually "active"—the strong, public, self-willed master of the universe; in contrast, "female" was constructed as "passive"—the male's weak, volatile companion, whom he managed and protected for the benefit of all. These antinomies thus forged the essential dichotomies of Greek (and Euro-American) sex/gender ideology: the active/good/male versus passive/bad/female paradigm. The ideals and imperatives woven throughout these active/passive socio-sexual antinomies were buttressed through the bestowal of "honor" on those who conformed and the imposition of "shame" on those who

watchful community, for example, going to the fountain, going to work in the fields, visiting a neighbor, etc." *Id.* at 163. If a woman inexplicably tarried too long in such outings, she would bring doubt and disrepute on herself, her relatives and her offspring, thus connecting the public/private antinomy to the honor/shame antinomy: "The sexual differentiation of space operates within a framework of norms and values constructed around the poles of honor and shame." *Id.* at 147, 196.

Of course, this code of conduct concentrated on "respectable" females associated with "respectable" male citizens. Other women, generally categorized as *pornoi* (common prostitute) and *hetairai* (courtesan, companion, or classy prostitute), enjoyed greater personal autonomy but remained socially marginalized. See VERN BULLOUGH & BONNIE BULLOUGH, *WOMEN AND PROSTITUTION: A SOCIAL HISTORY* 35-47 (1987). Though prostitution generally was tolerated, at least by females, practitioners were often regarded as disreputable:

[I]t was possible for women living in Athens to enjoy a great deal of independence and mobility, but only if they were not 'respectable' citizens. The *hetairai* — concubines, who included resident aliens, ex-slaves, and independently working prostitutes — moved freely in Athenian male society, were sexually and economically autonomous and . . . were permitted to live with Athenian men in a kind of loose, common-law marriage but with the provision that children born to *hetairai* were not considered citizens and had problems inheriting property.

EVANS, *supra* note 55, at 17.

69. Thus, "the conduct which establish[ed] reput[e] depend[ed] upon the status of the person referred to. This [was] particularly evident in the differentiation of the sexes. The honor of a man and of a woman therefore implie[d] quite different modes of conduct." COHEN, *supra* note 58, at 60. Female chastity, of course, was the ideal; unbridled female sexuality, as discussed above, was the danger. Consequently, "[h]onor require[d] that [the home's] sanctity be protected, and the mere fact that strangers gain[ed] entrance to it, avoiding the vigilance of male members of the family, itself call[ed] the chastity of women into question. Any violation of the house [was] an attack on the honor of its men and the chastity of its women . . . The separation of women from men . . . [was] the chief means by which sexual purity [was] both guarded and demonstrated to the community." *Id.* at 147. "The male role, then, [was] to ensure the chastity on which men's reputation, in large part, depend[ed]." *Id.* at 141. Thus, the "nexus of honor, shame, and sexuality inform[ed] [the] politics of reputation and gender [that] characterize[d] ancient Athenian society." *Id.* at 143.

transgressed. The “nexus of honor, shame, and sexuality” was thus a key means of keeping this active/passive paradigm operational.⁷⁰

The design and operation of the active/passive ideals projected male dominance in classical Greek culture. Consequently, Greek society concentrated socio-sexual prerogatives in the elite, adult citizen males, and consigned passive (“female”) socio-sexual roles to the subordinated classes of society: slaves, non-citizens, women, and youths, regardless of their sex.⁷¹ As a result, the Greek sex/gender system harnessed sexual desire as a paramount means of perpetuating the configuration of androsexist male/female sex/gender power hierarchies.

Greek regulation of social life in general, and sexual relations in particular, was instrumental because it used sex, gender, and sexuality to reinforce class-based and sex-based power distributions: Greek approval for expressions of sexual desire was limited to those that specifically reified social, economic, and political boundaries based on the androsexist divisions encapsulated in the antinomies.⁷² Sexual desire thus became a commodity used more for the re-production of the society than for the reproduction of the species. The proto-conflationary Greek system thereby established androsexism as its dominant sex/gender ideology, and used it to enforce compliance with its mandates regarding identity, desire, and community.

70. *Id.* at 143.

71. In Greece, the sexual relationship was assumed to be a power relationship in which one participant was dominant and the other inferior. On one side stood the free adult male, on the other, women, slaves, and boys. DOWNING, *supra* note 58, at 135.

72. Halperin writes:

Sex in classical Athens, then, was not simply a collaboration in some private quest . . . [o]n the contrary, sex was a manifestation of personal status, a declaration of social identity; sexual behavior . . . served to position social actors in the places assigned to them, by virtue of their political standing, in the hierarchical structure of the Athenian polity.

HALPERIN, *supra* note 58, at 32. Thus, “the relevant features of a sexual object in classical Athens were determined not so much by a physical topology of the sexes as by the social articulation of power. Sexual partners came in two significantly different kinds—not male and female, but ‘active’ and ‘passive,’ dominant and submissive.” *Id.* at 33. Thus, the Greek sex/gender system conceived a “single undifferentiated phallic sexuality of penetration and domination.” DOWNING, *supra* note 58, at 137.

Of course, the conception and configuration of sexuality around cultural stances epitomizing “dominator” and “dominated” social statuses that included, but did not depend solely on, “sex” is the reason why “sexual orientation” did not arise as a formal or functional concept in the Greek sex/gender system. See HALPERIN, *supra* note 58, at 33 (explaining that “the currently fashionable distinction between homosexuality and heterosexuality . . . had no meaning for the classical Athenians: There were not, so far as they knew, two different kinds of ‘sexuality,’ two differently structured psychosexual states or modes of affective orientation, corresponding to the sameness or difference of the anatomical sexes of the persons engaged in a sexual act; there was, rather, but a single form of sexual experience which all free adult males shared”).

c. *Family, Intimacy, and Patriarchy*

One crucial respect in which Greek sex/gender arrangements differed from Euro-American socio-sexual relations concerned the family: Under the Greek system, the family was not the tight-knit group depicted in the modern Euro-American ideal of the “companionate” or “nuclear” family. The Euro-American family ideal centers around a cross-sex coupling based on sexual intimacy and affectional bonding.⁷³ Among the Greeks, however, cross-sex conjugal relations were not the center either of love or lust.⁷⁴ Demosthenes, for instance, supposedly remarked that Greek adult males “have . . . *hetairai* (courtesans) for [their] pleasure, concubines for [their] daily needs, and wives to give [them] legitimate children and look after the housekeeping.”⁷⁵ Fulfilling individual joys, dreams and desires was not the goal of this functional conception of Greek marriage.

Further, the household unit was not the main crucible for the socialization of the future citizens it produced. Plutarch, for example, summarized a citizen boy’s upbringing by observing that “the nurse rules the infant, the teacher the schoolboy, the gymnasiarch the athlete, [and] his lover the youth.”⁷⁶ The family household, or *oikos*, thus operated more like a small consortium or enterprise: Each member performed roles and functions that provided material supports and comforts, but not necessarily emotional, sexual, or educational sustenance.⁷⁷ Again, and depending on configurations

73. For a discussion of evolving constructions of “the family,” see Lee E. Teitelbaum, *Family History and Family Law*, 1985 WISC. L. REV. 1135.

74. For a general overview of Greek (and Roman) family arrangements, see JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 28-52 (1994).

75. TANNAHILL, *supra* note 66, at 100 (citing *In Neaeram*). In this vein, Evans has argued: Athenian husbands were usually much older than their wives, whom they married when the women were in their early teens and they themselves in their thirties. Athenian men customarily spent little time with their wives, who most often had minimal opportunity for any kind of sexual affection, either with their husbands or with other women.

EVANS, *supra* note 55, at 17. Thus, “Athenian society made a sharp cleavage between two types of woman: the legal wife who was kept restrained within the inner part of the house for the purpose of breeding legitimate male heirs and serving as a conduit for the patriarchal estate; and informal sexual playmates and companions.” *Id.*

76. LAMBERT, *supra* note 58, at 79 (quoting Plutarch’s *Erotikos*). See generally MARK GOLDEN, CHILDHOOD IN CLASSICAL ATHENS 23-50, 80-114 (1990).

77. See TANNAHILL, *supra* note 66, at 96-97 (noting that Greek wife was to be “competent at spinning, weaving, and tailoring, able to allocate suitable tasks to servants, to be economical with her husband’s money and property, to bear children, and to govern the household wisely and virtuously”). Thus, Lambert has observed:

In the leisured Greek family of classical times, the role of women was strictly limited, children were reared by slaves and the father was absorbed by the affairs of his city. There seems frequently to have been an emotional void in the relations of the conjugal pair and between fathers and sons.

of sex, age, and class, Greeks oftentimes sought and received emotional, sexual, or educational sustenance in extra-conjugal or extra-familial relations, sometimes of the same-sex variety.

This conception and organization of family relations was decidedly androcentric and classist because it subordinated women and male non-citizens. Nonetheless, it allowed same-sex relations to flourish because such activity filled some of the affectional and erotic gaps in Greek family life, especially among the male elite. Indeed, the Greek system of family relations relied on a form of institutionalized extra-familial same-sex relationship, at least among citizen males, that complemented the family's social functions.⁷⁸ The Greek system of formalized cross-sex and same-sex unions thus channeled the sexual desires of its inhabitants to reproduce its ideology even as it reproduced its population. The Greek cross-sex family, like the larger system and antinomies that it served under the active/passive paradigm, was therefore not heterosexist, though it was heterosexual.

3. *Same-Sex Relations and Socio-Sexual Arrangements*

The dominant mix of misogynist and classist precepts in Greek culture shaped Greek attitudes toward same-sex relations and facilitated male-to-male intimacy as a viable, though excruciatingly stylized, form of erotic coupling.⁷⁹ Three rules, extrapolated from

LAMBERT, *supra* note 58, at 78; see also COHEN, *supra* note 58, at 76 (discussing workings of Greek household).

78. See *infra* notes 90-97 and accompanying text.

79. In fact, Cohen argues that the scarcity of legitimate cross-sex contacts redirected sexuality toward same-sex relations: "Indeed, it seems that a sort of displaced courtship, leading to a sort of displaced marriage, is the appropriate context in which to understand the assimilation of the [youthful male in formal pederastic unions] to a woman, both in terms of his sexual identity, his role in courtship, and, in a mixed way, his social role in general." COHEN, *supra* note 58, at 193. Interestingly, to elaborate this point, Cohen refers readers to "an unjustly neglected article" that discusses "inversion," a turn-of-the-century Euro-American theory devised to explain gender atypicality. This reference underscores the ways in which later Euro-American conceptions regarding "sex," "gender," and "sexual orientation" parallel these early Greek arrangements. For a lengthier discussion of the theory of inversion, see Valdes, *supra* note 2, at 44-55.

Cohen's analysis suggests marketplaces driven by supply and demand. Not surprisingly, then, it is effectively refined and expanded in RICHARD A. POSNER, *SEX AND REASON* (1992). For insightful reviews of Posner's book, see William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992); Gillian K. Hadfield, *Flirting With Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992) (book review); Martha Nussbaum, "Only Grey Matter?" *Richard Posner's Cost-Benefit Analysis of Sex*, 59 U. CHI. L. REV. 1689 (1992) (book review).

Other commentators have suggested that institutionalized pederasty replaced not the marital bond but the father/son relationship, in a culture where adult males spent most of their time and energy in "public" affairs. "The Greek father usually failed to counsel his son; instead, he counseled another man's son in whom he was erotically interested. As for the boy, who needed an effective father to model himself upon, he had to rely on his *erastes*, who also served as a father surrogate." DOWNING, *supra* note 58, at 144 (discussing scholars who have articulated this view). This viewpoint counters Cohen's analysis thus: "If the primary impulse had been to replace a heterosexual relationship, corroded by alienation and hostility, with a nobler one,

broader principles of Greek sex and gender constructions, contoured social approval of (male) same-sex relations. These three rules effectively created and sustained a one-sex/two-gender arena for socio-sexual interactions among men of the ruling class. While privileging this limited class of people, these three rules nevertheless regulated same-sex desire in ideologically instrumental ways.

a. Male Same-Sex Sexuality, Androsexism, and Procreation

The first rule limited same-sex activity to men.⁸⁰ Same-sex relations among women were deemed to compound the sexual intemperance of women, which dishonored the men charged with controlling their compulsive impieties. Among men, however, same-sex arrangements allowed the ruling class to segregate women and solidify their elite status—female weaknesses and wickedness could be kept sealed in the household, out of sight and at arm's length. The first rule thus distills the androsexism of Greek culture, even as applied in a same-sex context.⁸¹

The second rule required male-to-male liaisons (like all others) to express gender sexually through the relative social statuses of the participants, based chiefly on the interlacing of age and class distinctions within the coupling; the man with the higher social status performed an "active" gender role sexually and the other man acquired a "passive" gender.⁸² Sex/gender ideology thus impacted male same-sex interactions much as it did cross-sex interactions. Accordingly, "females" were absent from this arena physically, but not symbolically. Androsexism inhered even in same-sex relations.⁸³

The third rule demanded that the liaison not be mercenary and, preferably, not even merely carnal, so that the instrumental value of

where sex could be mingled with friendship and intellectual stimulation, the ideal partnership would have been that between two men of comparable age, status, and educational level." *Id.*

80. Though it is probable, if not inevitable, that same-sex relations took place between women, the general suppression of female sexuality limited women's exposure to same-sex contacts. See CANTARELLA, *supra* note 58, at 78-93. Of course, the best known example is the "circle" of women associated with the educational group operated by Sappho on the island of Lesbos. *Id.* at 78-82. Interestingly, the earliest known Greek love poem was authored by Sappho herself. *Id.* at 3. See also EVANS, *supra* note 55, at 73 (discussing "renowned circles" of poetry and education that brought women together socially, intellectually, and intimately in ancient times).

81. Native American same-sex intimacies, however, apparently were not limited exclusively to men, though the historical record of Native American practices, as compiled by Euro-Americans, is most concerned with male relationships. See Valdes, *supra* note 2, at 233-34.

82. In this respect, the regulation of same-sex relations reflected the same concerns that governed socio-sexual regulation in Greek culture generally. See *supra* notes 70-72 and accompanying text.

83. Native American same-sex sexuality, like the larger Native American scheme of sexual relations, was relatively egalitarian; same-sex intimacies were not systematically governed by hierarchies of social status. Again, the chief limitation was the heterogender ideal. See Valdes, *supra* note 2, at 233-34.

same-sex elite relationships would be fully realized.⁸⁴ In fact, to the Greeks, male-to-male sexuality was highly esteemed because it was imbued with high purpose and refined aesthetics: Not only were male same-sex relationships supposed to accomplish the transference of political values, such relations also were deemed the ideal physical and spiritual venue for the pursuit of love, beauty, friendship, and camaraderie among those born to lead.⁸⁵ Conversely, cross-sex relations were viewed as merely bio-functional.⁸⁶ But this form of

84. Same-sex relations could not be mercenary in the sense that they could not amount to the prostitution of citizen males; any citizen male found to have prostituted himself could be disenfranchised. The most famous example centers on the trial of Aiskhines, who was appointed to participate in peace negotiations with Philip of Macedon and was subsequently accused of treason by Timarkhos. Aiskhines did not respond to the accusation's substance; rather, he attacked Timarkhos's right to bring charges and to speak before the polity assembled as judge and jury, citing the law forbidding any man who had ever prostituted himself from speaking in public fora. See CANTARELLA, *supra* note 58, at 48 (discussing case and male prostitution generally); EVANS, *supra* note 55, at 99; see also COHEN, *supra* note 58, at 175-80 (surveying Athenian laws regulating commercialized sex).

The prohibition against citizen male prostitution was based on the belief that such activity constituted a grave dishonor. *Id.* at 179. Citizens who prostituted themselves adopted "passive" roles unsuited for free males. Furthermore, prostitution demonstrated submission to an uncontrolled craving for sexual pleasure, which was incompatible with the self-mastery that citizen males were supposed to embody. Prostitution thus symbolically transformed a man into a woman. *Id.* at 183. Accordingly, to the extent that male prostitution was tolerated, it was confined to the non-citizen classes. Citizen-male customers of such male prostitutes were expected to assume "active" roles in any such interaction. See DOWNING, *supra* note 58, at 141.

Greek society preferred "honorable" long-term commitments over merely "shameful" indulgences to satisfy carnal lust, even if the free male dutifully performed "active" sex roles appropriate to his socio-political position. The most celebrated unions were "first of all spiritual, intellectual, and educational by nature [b]ut equally certainly . . . erotic." CANTARELLA, *supra* note 58, at 22. Momentary liaisons demonstrated the same abdication of self-control as prostitution or "passivity."

The Greek boy lost his honour only if he showed himself impatient and eager concerning his lover's choice. If he gave in at the end of a lengthy and serious courtship, having made sure that his lover's intentions were not only sexual, the situation was different: far from being blamed, the boy deserved honour and consideration.

Id. at 19-20. See also COHEN *supra* note 58, at 196.

85. "Most ancient writers—in striking opposition to their modern counterparts—generally entertained higher expectations of the fidelity and permanence of homosexual passions than of heterosexual feelings." BOSWELL, *supra* note 74, at 74. Plato, in particular, characterized cross-sex feelings and relations as "vulgar" while describing same-sex feelings and relations as "heavenly," because the latter were entwined with friendship, whereas the former were more of a civic duty. *Id.* at 74-76. See generally A.W. PRICE, LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE 84-89, 229 (1989); GREGORY VLASTOS, PLATONIC STUDIES 38-41 (1981).

86. "[B]oth Greek and Roman marriages were conceived to be chiefly practical matters of fact rather than complex interactions of law, theology, and morality, as they were to become later in Europe." BOSWELL, *supra* note 74, at 46. Cross-sex relations, and most notably marital ones, were viewed as a civic duty to help repopulate the community, but procreation *per se* was not elevated above other forms of instrumentality, such as the promotion of friendship, as evidenced by the exaltation of same-sex relations. See *supra* note 85. The elevation of procreation *per se* to a high, or ultimate, form of instrumentality accompanied the ascendancy of Christian sex/gender ideology and, even then, procreation was depicted as a secondary alternative to virginity or celibacy. See *infra* notes 137-145 and accompanying text. This elevation of procreation *per se* under Christianity served various needs of the then Christian minority, including the need to differentiate itself from the pagan majority. Procreative purposes, moreover, provided a rationale for the existence of desire that comported with the general Christian ideology of renunciation and asceticism. See BOSWELL, *supra*, at 112-15.

instrumentality was not regarded as especially pressing, noble or aesthetic,⁸⁷ which vitiated any potential for heterosexist ideology.⁸⁸

Indeed, the Greek interpretation of non-procreational intimacy was of critical importance: Because procreation was neither the exclusive

87. This perspective is captured in Plutarch's dialogue on the problems and benefits of same-sex relations, *Amarotius*. The proponent of cross-sex relations identifies "biological utility" as the "fundamental point in favor of women." Indeed, cross-sex relations are discussed solely within the marital context. CANTARELLA, *supra* note 58, at 70-71 (discussing PLUTARCH, AMAROTIUS (W.C. Helmbold trans., Loeb Classical Library 1961)). Plutarch's life of Pelopidas also articulates the view that "love between men. . . was the love which had always been considered the sentiment capable of spurring man on to valour and the practice of those virtues which, for the Greeks, held the highest place in the hierarchy of values: the public virtues. . . . By comparison, the private virtues induced by marriage were pretty negligible." *Id.* at 72-73.

Similarly, in Strato's *Greek Anthology*, a participant concludes that, "Having considered all the arguments . . . marriage is in fact necessary, and all men must get married. But at the same time. . . they must be allowed to make love to boys, thus cultivating the better part of themselves." *Id.* at 77. The most forceful articulation of the same-sex viewpoint is in Plato's *Symposium*, which describes the formal Greek model of pederasty as "heavenly" and all other forms of intimacy as "common." *Id.* at 58-60. This love exemplified the spiritualized love of idealized beauty, as embodied by the *eremenos*, and served to ennoble the youth's unformed character. See GRANT, *supra* note 48, at 95 (this "love, at first excited by a beautiful body, can finally and rapturously rise to a super-sensuous, transcendental passion for abstract beauty itself, which only the intellect can apprehend.").

Plato's legacy is particularly intriguing. Something of a misogynist, he engaged exclusively in same-sex sex and published a number of works exalting male same-sex relations, including *Lysias*, *Phaedrus*, and *Symposium*. These works are collected in ON HOMOSEXUALITY: LYSIAS, PHAEDRUS AND SYMPOSIUM (Benjamin Jowett & Eugene O'Connor trans., 1991). However, he also issued later works, *Republic* and *Laws*, in which he set forth the ideal rules and conditions for civilized humans. Among these, he favored cross-sex marriage and "equal opportunities" for women. See CANTARELLA, *supra* note 58, at 58-59. The apparent inconsistencies of his life experience and among his various writings have sparked considerable scholarly debate. Cantarella suggests, for example, that "Plato's aim in dictating the laws for his utopian city is not specifically to outlaw homosexuality, but by banning homosexuality to establish control over all Eros, confining it purely to relations designed for reproduction." *Id.* at 58-63. If so, this effort presages the extremely instrumental view of sexuality under the Euro-American conflation and its ideology. See also GRANT, *supra* note 48, at 93-98.

It may be that Plato's later views reflected the unease and disenchantment over the decline in Athens in the years between its defeat by Sparta in the Peloponnesian War in 404 B.C.E. and its eclipse by Philip of Macedon, formalized by the Peace of Philocrates in 346 B.C.E.; it was precisely the highly charged negotiation of this peace that resulted in the charges against Aiskhines, whose trial transcript survived the centuries and now forms an important part of the historical record on the Greek sex/gender system. See *supra* note 84. For a summary of these geopolitical events, see GRANT, *supra* note 48, at 70-73.

The important point is that, by Plato's time, the strict regulation of *paiderastia* and of same-sex relations among men had become lax. See EVANS, *supra* note 55, at 99 (explaining that "homosexual relations between men had become a mere personal predilection, admittedly respected just like any other personal behavior, but no longer an essential part of the community's educational or religious sensibility"). Moreover, the Peloponnesian War had decimated the population, and heightened concerns over procreation continued to linger in its wake. Thus, cross-sex relations received a newfound attention. See CANTARELLA, *supra* note 58, at 64-65; EVANS, *supra* note 55, at 101-05 (characterizing Plato as homophobic and noting that, despite evidence to the contrary, "the relative decline in the status of Athenian homosexual relations has been hotly contested by a number of recent scholars"). Thus, Plato's belated attempt to limit erotic activity to procreation may represent an implicit recognition that his life-long campaign to steer sexuality away from sensual gratification and toward intellectual, spiritual ("Platonic") connection had not succeeded. See GRANT, *supra* note 48, at 97 (characterizing Plato's *Laws* as "disillusioned afterthought").

88. Native American sex/gender arrangements likewise esteemed and exalted some forms of same-sex intimacy, especially in the context of *berdachism*. See *infra* note 97.

nor the preferred object of sexual or affectional intimacy, cross-sex couplings had no claim to intrinsic or instrumental superiority.⁸⁹ This deemphasis of procreation, which stands in sharp contrast to subsequent Euro-American history, allowed Greek sex/gender ideology to impart instrumental value to *both* cross-sex *and* same-sex desires and intimacies. Same-sex intimacy among males was thus not only generally accepted, but affirmatively celebrated, so long as it was practiced with due regard for the culture's overarching sex/gender rules and sensibilities. In elite same-sex male unions, specifically, it was the *social* attributes of status, such as age, that dictated *sexual* gender roles, and that thereby regulated the intimacies of the couple. The formal institution of *paiderastia*—the legitimate coupling of a youth with an “older” mentor—brings into sharp relief this social configuration of gender in sexual terms and relations.

b. Age, Class, Gender, Desire in “Institutionalized” Paidierastia

The Greek sex/gender system channeled same-sex desire and intimacy across generational lines as a means of teaching society's dominant values to *paides*, youthful citizen males destined for leadership.⁹⁰ To do so, the Greeks developed a practice known as

89. However, there remained proponents of cross-sex superiority who cited procreation as the reason why cross-sex relations were “natural” and thus “better.” These views are represented in the various works that present the opposing views in the form of dialogues. See *supra* note 87. Aristotle was associated with this school, though with a twist: His treatment of same-sex relations in *Nicomachean Ethics* posits that “some people devote themselves to this practice by nature, others by habit, such as for example those who have been sexually abused from their childhood years.” CANTARELLA, *supra* note 58, at 68. By “sexual abuse” he means boys and girls who “abandon[ed] themselves to pleasures when they [were] still very young [and thus became] ever more lascivious.” *Id.* Thus, if by “habit,” the practice was deemed perverse and had to be stopped; however, if by “nature,” the practice was acceptable because the anomaly was “natural.” See *id.* at 65-69. In this way, Aristotle set the stage for Euro-American conceptions of “congenital” and “acquired” inversion centuries later. See Valdes, *supra* note 2, at 49-50.

Perhaps the most ardent proponents of cross-sex superiority were Aristophanes, who savaged same-sex couplings in his comedies, and Xenophon, who wrote a work modeled and titled after Plato's *Symposium* to counter its advocacy of same-sex relations. See CANTARELLA, *supra* note 58, at 45-48 (discussing Aristophanes' works), 63-65 (discussing Xenophon's *Symposium*); see also COHEN, *supra* note 58, at 187-92 (summarizing views of cross-sex proponents and concluding that, “despite the variations as to details, for those who took procreation as their starting point the ‘natural’ pattern which provided the norm for sexual activity was the mating of male and female”). As Cantarella has observed, this viewpoint collapsed cross-sex sexuality into procreational activity, while omitting the possibility of cross-sex relations as expressions of affection for the woman apart from reproductive “utility.” See *supra* note 87. Again, this use of procreation to justify cross-sex superiority presaged the sex/gender instrumentalism of the Euro-American system.

90. For a more complete discussion, see David M. Halperin, *Sex Before Sexuality: Pederasty, Politics and Power in Classical Athens*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 37 (Martin Bauml Duberman et al. eds., 1985); see also CANTARELLA, *supra* note 58, at 6 (explaining that, among ancient Greeks, “homosexual love always play[ed] the essential role of an educational instrument, capable of transforming the boy into a man”); LAMBERT, *supra* note 58, at 58 (explaining that older participant was “expected not only to provide his beloved . . . with unstinting affection but to encourage and oversee his development of mind and

paiderastia, a trans-generational model of institutionalized “homosexuality.”⁹¹ Consequently, same-sex relationships generally involved male citizens between the ages of twelve and eighteen.⁹²

Paiderastia hinged on socially asymmetrical relationships that accorded the “active” male role to the older—and presumably wiser and wealthier—participant known as the *erastes*; the “passive” female role remained for the younger, socially inferior participant known as the *eremenos*.⁹³ The younger participant, in other words, adopted a cross-sex gender role during the limited time span allowable for this sexual union. *Social* gender dictated *sexual* gender roles and stances.

In this way, Greek *paiderastia* linked the social and sexual dimensions of gender to institutionalize and regulate same-sex desire and intimacy among its male citizen ruling class. But *paiderastia* also institutionalized and regulated gender’s sexual mutability in the service of class solidarity and power. These same-sex elite relationships were therefore governed by an intricate and intense gender etiquette pivoting on age and class. This gendered dance ensured that social and educational purposes were fulfilled, and that both short- and long-term class and gender issues were properly negotiated.⁹⁴ Etiquette, in other words, balanced same-sex expressions of desire against androsexist uses of gender.

Institutionalized *paiderastia* linked sexuality with socialization and education, and limited gender’s sexual transitivity to mediate this connection. Today, inter-generational relations superficially resem-

body and his training in the morals, customs and responsibilities of civic society”).

91. As previously noted, constructions such as “sexual orientation” or “homosexual” or “homosexuality” were not present in the ancient Greek sex/gender lexicon, even though same-sex intimacy was practiced and even though other sex/gender elements familiar to Euro-American minds were already in place at that time.

92. In the Greek scheme, the older “lover” could be any age over eighteen, while the younger “beloved” was generally twelve to eighteen years of age. See CANTARELLA, *supra* note 58, at 36-42. Before the age of twelve, youths were considered too immature to benefit from the experience, and any attempt by an adult to pursue such a relation was deemed reprehensible. *Id.* at 40. Beyond the age of eighteen, youths generally switched roles, thus removing them from the pool of potential beloveds. See *infra* notes 110-113 and accompanying text. Before reaching eighteen, however, an attempt to switch roles from beloved to lover constituted an attempt to “assume a virile role prematurely.” CANTARELLA, *supra*, at 44. See generally HALPERIN, *supra* note 58, at 55-57; LAMBERT, *supra* note 58, at 78-81; TANNAHILL, *supra* note 66, at 85-93.

93. See CANTARELLA, *supra* note 58, at 42 (noting that “between the ages of twelve and seventeen or eighteen, a male was a passive partner in a relationship which linked him to an adult”). See also DOWNING *supra* note 58, at 138-39 (discussing sexual conduct deemed proper to “active partner” and “receptive partner” and noting that distinction “was a rigid one”). However, when the youth reached the upper allowable ages for “passive” roles, he was strongly expected to shift sexually toward “active” roles, either with women or with other males whose ages and classes made them appropriate for “passive” roles in same-sex liaisons. *Id.*

94. See *infra* notes 98-105 and accompanying text.

bling *paiderastia* are derided and criminalized.⁹⁵ However, in classical Greece, *paiderastia* placed same-sex relations at the core of the acculturation of its citizen male youth and accommodated a limited range of gender transitivity to aid this purpose. In effect, *paiderastia* functioned as a regulatory scheme with instrumental control over the presence and manifestation of same-sex desire among the elite population.⁹⁶

The institution of *paiderastia*, like the institution of cross-sex marriage and family, therefore, was not about individual pleasure or desire. Under the Greek system, *paiderastia* was honorable precisely because it appropriated and applied same-sex desires to fill an important gap left by the Greek family model in the social, political, and sexual structure of the larger society. Institutionalized *paiderastia*, like the institution of the family in the cross-sex context, thereby marshalled desire to serve Greek society's sex/gender ideology.⁹⁷

95. Interestingly, other cultures have devised systems similar to Greek *paiderastia*. The indigenous peoples of Sambia "institutionalize homosexuality" in the rituals that induct boys into manhood: "Youngsters are forced to perform fellatio on grown men, not for pleasure, but in order to ingest [the] semen" that "provides them with the substance or 'seed' of a growing masculinity." DAVID G. GILMORE, *MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY* 146, 147 (1990). Likewise, in Lesotho, "institutionalized friendship" pairs an older and younger woman in "mummy-baby" relationships that provide emotional support and in which "sexual intimacy is an important aspect." See Judith Gay, "Mummies and Babies" and *Friends and Lovers in Lesotho*, in *THE MANY FACES OF HOMOSEXUALITY*, *supra* note 58, at 97 (1986). Similarly, the pirates of the Caribbean created *matelotage*, the "institutionalized linking of a buccaneer and another male—most often a youth—in a relationship with clearly homosexual characteristics." See B.R. BURG, *SODOMY AND THE PIRATE TRADITION: ENGLISH SEA ROVERS IN THE SEVENTEENTH-CENTURY CARIBBEAN* 128 (1983). In like vein, the Maya of Central and South America arranged for same-sex pairings of their male youth during adolescence, and prohibited cross-sex contacts during that time. See TANNAHILL, *supra* note 66, at 292. See generally Barry D. Adam, *Age, Structure, and Sexuality: Reflections on the Anthropological Evidence of Homosexual Relations*, in *THE MANY FACES OF HOMOSEXUALITY*, *supra*, at 19 (comparing selected examples of age-structured same-sex relations to demonstrate how such relations are integral, rather than aberrational, to societies in which relations appear).

For further transcultural readings on examples of institutionalized or formalized same-sex relations, see *OCEANIC HOMOSEXUALITIES* (Stephen O. Murray ed., 1992); *RITUALIZED HOMOSEXUALITY IN MELONESIA* (Gilbert Herdt ed., 1984); see also William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

96. Consequently, "[t]hose Athenian men who pursued boys were not merely seeking sexual gratification since . . . in this slave society cheap sexual fulfillment was available at every corner." COHEN, *supra* note 58, at 194. "The relationship between *erastes* and *eremenos* was seen as having an educational and moral function, to be part of the youth's initiation into full manhood." DOWNING, *supra* note 58, at 137-39 (explaining that *paiderastia* was one aspect of "the training for citizenship of aristocratic youth"). Accordingly, only relationships fulfilling this function—only instrumental relationships—were wholly proper and noble.

97. Native American culture created an institution, known to Euro-Americans as *berdachism*, which also accommodated and honored same-sex (but heterogender) intimate unions. In this type of coupling, both individuals were of the same sex, but of different genders. Heterogender couplings were deemed ideal because they brought together as partners two individuals with personality attributes that were mutually complementary from a socio-economic perspective. See Valdes, *supra* note 2, at 282-83.

Berdaches were men and women who were socially cross-gendered, and often sexually oriented to members of the same sex. However, their socio-sexual identities constituted an independent and unique gender category that transcended "male" and "female" genders; on this

c. *Gender Transitivity and (Male) Same-Sex Sexuality*

The elaborate etiquette of *paiderastia* called for the lover, or *erastes*, to woo the beloved, or *eremenos*, with courtship ardors that have since become classic staples of Euro-American cross-sex romance.⁹⁸ In turn, the beloved was supposed to receive his attentions with the “hard-to-get” coyness that likewise has become mythologized in modern Euro-American cross-sex romance.⁹⁹ Finally, this etiquette called for the state and the parents of the *paides* to shield the potential beloveds from “improper” advances,¹⁰⁰ in much the same way that the state and the family monitored cross-sex

basis, *berdaches* generally were highly regarded by their communities, respected and powerful because they personified a unity of dualities that helped to cohere the larger cosmology of Native American society. The *berdaches*, precisely because of their social and sexual gender transitivity, were deemed especially wise and capable members of Native American culture. *Id.* at 223-36.

Therefore, *berdachism* was akin to *paiderastia* in some basic, but certainly not all, ways. Both recognized and respected sexual gender transitivity, but only *berdachism* extended this recognition and respect to social gender transitivity. Moreover, only *berdachism* accorded individual autonomy over sexual gender transitivity; as discussed in more detail below, *paiderastia* calibrated and regulated even this limited form of approved gender transitivity. Nonetheless, these two institutions instrumentally channeled same-sex relations in accordance with societal preferences—the socio-economic complements of the heterogender ideal in the Native American setting and the classist androcentrism of the active/passive paradigm in the Greek setting. The two institutions therefore reflected the larger sex/gender schemes, values, and biases of their respective cultures.

98. Cantarella observes:

The noble lover does not pay court to little boys and then abandon them as soon as he finds a new love object more desirable than the last. He loves his boy in a stable manner, courts him with perseverance, and tries to show the serious nature of his intentions in every possible way.

CANTARELLA, *supra* note 58, at 18.

99. See DOWNING, *supra* note 58, at 139 (“Though youths were taught to resist, they were also taught that it was acceptable to yield to the worthy [lover]. . . . it was a disgrace not to be wooed—although also shameful to yield too easily.”). Upon yielding, the beloved was “expected to feel neither desire nor enjoyment” but rather to yield “out of admiration, compassion, or gratitude.” The beloved was “supposed to feel pleased at giving pleasure” to his lover. The “sexual desire felt by the active partner [was] called *eros*; the younger’s friendly affection, *philia*.” *Id.* Apart from being sexually inert, some scholars also believe that the beloved was supposed to “draw the line” at penetration even after yielding to the lover’s inducements. See *infra* notes 106-113 and accompanying text.

The resemblance between classical Greek pederasty and traditional Euro-American romance is uncanny. Indeed, it appears to some scholars that Euro-American “gender” roles during cross-sex courtship reflect the Greek same-sex pattern. See, e.g., CANTARELLA, *supra* note 58, at 18-20. As with Euro-American “ladies” during cross-sex romancing, same-sex courtship presented the Greek boy with “an opportunity to show his propriety.” *Id.* at 21.

100. “Athenian law was undoubtedly interested in the problem of pederasty. . . . Athens was careful to guarantee, as far as possible, that the life of *paides* should be carried out according to rules which would prevent non-educational, vulgar love affairs. It did not go beyond that, leaving citizens entirely free to engage in “licit” love affairs with *paides*, on condition that they had reached the age which would make them capable of choosing a good lover with their eyes open.” CANTARELLA, *supra* note 58, at 36; see also COHEN, *supra* note 58, at 175-82 (reviewing laws and norms designed to save male youths from “corruption”).

relations.¹⁰¹ This arrangement was designed to protect the future of society by ensuring the proper socialization of elite offspring,¹⁰² and by calibrating with cultural and political correctness the sexual gender shifts that same-sex relations required of elite beloveds.

This gender calibration entailed a palpable amount of transitivity—a programmatic progression by which a citizen male would effect “female” sexual (though not social) stances during early life stages to acquire “male” sexual (and social) standing later. This process consequently incorporated sexual gender fluidity and tension into the socialization and sexuality of citizen males: “The homoerotic valuation of boys became problematic, for, while they were in the process of being educated to be [quintessentially manly] citizens and warriors, they were also subjected to patterns of courtship and norms of behavior that assimilated them to women.”¹⁰³ In effect, the trick was to handle the *paides* as “female” objects in early sexual settings, while preserving their capacity to act as “male” subjects socially and sexually later in life.¹⁰⁴ This careful societal regulation of gender’s limited sexual variability therefore employed physical and symbolic boundaries designed to ensure the *paides*’ “correct” gender transitions and to keep intact at all times the ideological goal of same-sex desire in line with androsexist imperatives.¹⁰⁵

d. *Anus Surveillance and Gender Preservation*

Though the beloved unequivocally assumed “female” roles in this form of romantic relationship, some scholars have argued that the purely physical aspects of the relationship were more restrictively

101. “Propriety . . . ideally required that the lover inform the boy’s father of his inclination and see the boy in public, in the presence of the father or relatives.” COHEN, *supra* note 58, at 196. “Thus, the ideal boy was supposed to be modest and chaste, avoid contact with adult males who were not relatives or close friends of the family, keep his eyes lowered, and blush, etc. Their families protected them from male attention as if they were daughters.” *Id.* at 195.

102. See COHEN, *supra* note 58, at 181 (explaining that “the corruption of the future of the *polis*, [as] represented by the male children of citizen families” was chief danger against which Greek sexual regulation guarded). “Indeed, the fundamental antinomy that underlies all of the most important accounts of homoerotic courtship is that of honorable vs. shameful eros.” *Id.* at 183. Thus, the law provided, “A slave shall not be the lover of a free boy nor follow after him, or else he shall receive fifty blows of the public lash.” CANTARELLA, *supra* note 58, at 17.

103. COHEN, *supra* note 58, at 192.

104. “As not yet a free adult male, [the beloved] was an appropriate *object* of masculine desire; as already potentially a free citizen, his future *subjectivity* must be honored. . . . [The] older man’s desire was unproblematic; what was difficult was how to live that desire in a way that its object might in turn become a subject.” DOWNING, *supra* note 58, at 138.

105. The structure of the Greek’s limited form and range of sexual gender transitivity therefore was different from the Native American’s accommodation of sexual (and social) gender transitivity; the former structure was programmatic and the latter was individuated. Yet both forms of transitivity were delimited by the instrumental preferences of their cultures. See *supra* note 97. Therefore, neither form necessarily or primarily served the fulfillment of individual desire independent of larger instrumental concerns.

managed through “anus surveillance.”¹⁰⁶ This term colorfully describes the balance that gender calibration sought to strike in this sex/gender context by restricting the couple’s physical relations: The lover and his beloved were supposed to display their capacity for moderation and self-mastery by refraining from the ultimate pleasures of anal intercourse during the course of erotic intimacies.¹⁰⁷ Though scholarly disagreement on this point has been spirited, the controversy is somewhat narrow in scope: It implicates only the degree of sexual effeminization, or sexual gender variability, that classical Greek culture facilitated among its *paides*. The controversy does not address the progressions that the system expected of citizen males, but only whether institutionalized same-sex intimacies extended physically to the innermost sanctum of the beloved’s inchoate manhood.¹⁰⁸

In any event, the very concept of “anus surveillance” illustrates the key role that gender played in Greek socio-sexual relations; if accurate, it represents a concerted cultural effort to preserve the long-term basis of an “active” socio-sexual identity for the youth temporarily being channeled into a “passive” or cross-gender sexual role. In this way, the concept of anus surveillance illustrates how gender was directly implicated in sexual experience and expression, and how desire was harnessed in this context to maximize instrumental value rather than individual pleasure.

Even more broadly, this regulation of penetration, and its active/passive symbolism, points out the centrality of gender to socio-

106. The phrase is John J. Winkler’s. See WINKLER, *supra* note 58, at 186.

107. “The respectable *eremenos* refuse[d] payment, postpone[d] bodily contact until the *erastes* ha[d] proved worthy, and expect[ed] no physical gratification. When he finally accept[ed] his suitor, he insist[ed] on upright posture, avoid[ed] eye contact, and refuse[d] penetration.” This “refusal of penetration [was] central because it [was] construed as a demeaning act that effeminize[d] the receptive partner” and thus was also “an important part of honoring the youth’s anomalous position as present object and future subject.” DOWNING, *supra* note 58, at 141. Thus, the beloved was supposed to preserve his future manly virtue and capacity by protecting his anus from his lover’s penetration, much like the conventions about vaginal virginity that are applied to females.

On the other hand, the explicit fervor that the anus provoked among ancient Greeks, as evidenced by the historical record, indicates that intimacies between lovers and beloveds were not necessarily halted just short of the sphincter. See, e.g., CANTARELLA, *supra* note 58, at 22-27 (reviewing “erotic manifestations in the pederastic relationship” and asking, “[i]f the ethics of pederasty envisaged intercrural intercourse as the only form of sexual satisfaction for the lover, why speak of the beloved ‘submitting?’”).

108. In this way, the concept of “anus surveillance” aptly underscores the importance of that orifice, and its (im)penetrability, in the Greek construction of active/passive socio-sexual roles as the overarching sex/gender paradigm. The concept also captures the essence of the selective labeling process that figures so prominently in the subsequent Euro-American conflation of sex-determined “gender” and “sexual orientation,” which incorporated Greek active/passive imagery and connotations virtually unchanged. See Valdes, *supra* note 2, at 258-61. Greek preoccupation with the “gender” implications of same-sex relations thus provides the basis for later Euro-American constructions of “sexual orientation” that stem from, and also implicate, similar concerns. *Id.* at 51-71.

sexual identity and to the operation of sex/gender relations on the whole.¹⁰⁹ This regulation of penetration, specifically calculated to preserve the *paides*' long-term gender integrity, points to the cultural meaning and ideological resonance of sex and gender under the active/passive paradigm and its androsexist bents. Even though sexual orientation was not a formal construct in Greek ideology, and therefore could not be the sexual component of gender, the concept of anus surveillance reveals that gender concerns permeated Greek manifestations of sexual desire. This underscores how gender is intertwined with sexuality and, today, with sexual orientation. The Greeks, like contemporary Euro-Americans, made gender central not only to society but to sexuality, even in the absence of other features of the Euro-American conflation.

Regardless of the actual sexual practices in Greek same-sex liaisons, the limits of social approval for this form of coupling were seriously tested when overarching sex/gender boundaries were crossed. In the context of *paiderastia*, citizen males reached this limit when they retained sexual roles deemed "passive" after the appearance of facial or bodily hair.¹¹⁰ Prior to the growth of a beard (or other bodily hair), the *paides* and *eremonoi* were considered attractive for their slightness, their softness, and their prettiness; in effect, Greek male youths were valued during adolescence for approximating "femininity" physically.¹¹¹

The onset of facial hair, however, called for a sex/gender turn toward activeness and manliness: a switch in gender roles and symbolisms sexually that matched this physical change.¹¹² This switch was mandated because facial hair heralded manhood, and thus signaled the *paides*' turn to assume the privileged role of the "male," and to "take" others sexually. Thus, the appearance of such hair mandated an effective change in sexual gender stance, regardless of the individual's romantic preferences or "sexual orientation."

109. *Id.* at 291-93. The symbolism of penetration, in turn, was central to gender identity sexually. See KEULS, *supra* note 58, at 293.

110. "When the boy was seen as having become a man physiologically—after the growth of his first beard—he was no longer an appropriate object for pursuit. . . . [He] had become definitively a male." COHEN, *supra* note 58, at 195. However, it seems clear that some lovers and beloveds refused to discontinue their relationships despite the social disapproval of such arrangements. See *infra* notes 114-125 and accompanying text.

111. See, e.g., CANTARELLA, *supra* note 58, at 37 (reprinting poetic exaltations of boyish beauty and noting that, "when the beard and body hair sprouted thickly, boys stopped being desirable").

112. "The relationship between an *erastes* and an *eremenos* was expected to come to an end as soon as the youth was old enough to grow a beard—that is, as soon as he, too, was a fully mature male—for its purpose was precisely the transfer of manliness, of phallic potency, from the older to the younger." DOWNING, *supra* note 58, at 140.

As such, the growth of facial hair was the final catalyst for gender calibration appropriate to an elite member of society. The appearance of this hair, in other words, signalled the final turn of socially approved variations in the sexual element of gender. At this juncture, the sex/gender system mandated a level of sexual intransitivity that matched the fixed nature of the social element of gender among ruling class males.¹¹³ This appearance required a fixed and stabilized alignment of social with sexual gender identity that, as such, resembles the Euro-American conflation.

e. Proto-Queers/Sissies: Traces of Conflation

Although institutionalized *paidēraistia* was the paragon, it was neither the sole venue for same-sex relations, nor the only same-sex setting fraught with gender issues.¹¹⁴ The availability of non-citizen males, for example, provided various outlets for same-sex activity that were “proper” so long as the citizen preserved for himself the “active” role.¹¹⁵ Additionally, the literature and poetry of the times indicate that same-sex social equals sometimes bonded as mates, usually because two adult males fell in love at relatively advanced ages.¹¹⁶

However, these socially symmetrical bonds were deemed problematic under the active/passive paradigm and its androsexist ideology for two reasons. First, they exceeded the accepted purposes of same-sex desire and interaction; that is, they did not serve the inter-generational socialization process. Second, they violated the deductivity and eventual fixed nature of gender; that is, they transgressed the limits of sexual gender transitivity that androsexist ideology imposed. Like extended pederastic relationships, these couplings contravened basic cultural or systemic rules geared to active/passive constructions that served the categories and hierarchies of dominant sex/gender forces. As such, both symmetrical relation-

113. This final turn thus underscores the different structure of sexual gender transitivity among Greek and Native American cultures: The latter did not preordain a finite range of transitivity, nor a final stage of transitivity culminating in its termination.

114. “Of course, that [pederasty] was the socially validated form of homosexuality [did] not mean it was the only one practiced.” DOWNING, *supra* note 58, at 141. Boswell, in particular, makes the diversity of same-sex relations in ancient Greece clear, delineating four basic forms of such relations and providing illustrative instances of each culled from the historical record. BOSWELL, *supra* note 74, at 53-107.

115. The safeguards surrounding the institution of pederasty within the elite evaporated in the case of non-citizens. “A man might do whatever he wished with a slave boy or foreigner; this was not the law’s concern.” COHEN, *supra* note 58, at 182. Another obvious example is male prostitution, which was readily available through the services of non-citizen males. DOWNING, *supra* note 58, at 141.

116. See, e.g., HOMOSEXUAL VERSE (rev. ed. Stephen Coote ed., 1986) (reproducing, among other things, verses of love among same-sex, non-pederastic partners in ancient Greece); see also CANTARELLA, *supra* note 58, at 44-45 (discussing possible types of non-pederastic couplings).

ships and extended inter-generational relationships amounted to sex/gender non-conformity,¹¹⁷ much like same-sex unions today, and were similarly discouraged.¹¹⁸

Greek discouragement of socially symmetrical or extended inter-generational same-sex couplings thus presages many of the themes still embedded in Euro-American sex/gender ideology. One such theme is the suppression of sexual desires that do not serve specific ideological goals. Another such theme is the association of social and sexual gender atypicality. The Greeks discouraged socially symmetrical or extended inter-generational same-sex unions. Here, the initial traces of the conflation become visible. This cross-association parallels the eventual formation of Leg One and Leg Two of the conflation, and thus forecasts their joint operation. Thus, even in Greek culture there was strategic disapproval of same-sex relations.

Greek discouragement of symmetrical or extended inter-generational relations was prompted by fear that "men" might exhibit "women-like" sexual behavior in a manner that could not be justified by broader instrumental objectives. Thus, the discouragement of these relationships was rooted in androsexist imperatives and concerns. From this perspective, the problem with these relationships resided in the one man in a coupling who broke the active/passive gender code.¹¹⁹ Consequently, Greeks specifically condemned the male who adopted the "female" role.¹²⁰

117. See, e.g., DOWNING, *supra* note 58, at 142 (noting that "a mutual sex relationship between two adult men of approximately the same age and social standing negates the use of sex as the underpinning of a power structure. . . . [I]t was viewed as constituting a rebellion against the social order"); KEULS, *supra* note 58, at 291-96 (linking Greek reprobation of male same-sex peer relationships to active/passive sex/gender symbolism of penetration).

118. Though it could be severe, Greek disapproval and discouragement of these unions was limited to social pressures; legal interdictions of socially symmetrical same-sex couplings did not exist, probably because heterosexism was not integral to the Greek sex/gender system, and the system therefore was not sufficiently invested in the (actual or perceived) intersection of gender and sexuality (or "sexual orientation"). See CANTARELLA, *supra* note 58, at 46 (noting that, unless done for money, "sanction [against socially symmetrical same-sex couples] was exclusively a social one"). With the rise of Judeo-Christian heterosexism, and the system's consequent interests in cross-sex exclusivity, the reprobation of socially symmetrical same-sex unions also foretold the coercive legal interdictions commonly imposed upon Euro-American sexual minorities today.

119. "Males who pursued other males were a category defined in relation to a heterosexual norm. . . . [W]hereas males who submitted to other males were regarded as disgraced." COHEN, *supra* note 58, at 190.

120. "Love between two adult males posed some problems—at least for one member of the couple: the male who assumed the passive role of the beloved. He had to bear the heavy weight of social disapproval." CANTARELLA, *supra* note 58, at 45. "Following the model of the pederastic couple, couples consisting of two adults assumed that only one of them would take on the receptive role—and this gave rise to the social and moral problem that caused tensions, contradictions, and quite a lot of hypocrisy. Only one of the pair was formally breaking the rules. . . . One of the two was the degenerate, a butt of ridicule." *Id.* at 46.

In the Greek setting, the “passive” partner was deemed a *kinaidos*, who “made himself a woman.” The “active” partner performed his “rightful” role, albeit with the “wrong” object.¹²¹ Even though sexual orientation had not yet developed as a formal concept, the Greek *kinaidos*, like the Euro-American “invert” and the modern “homosexual,” endured opprobrium because he violated critical sex/gender taboos.¹²²

The Greek condemnation of sexual gender atypicality did not stop there. The *kinaidos* also was perceived as *malakoi*—generally “soft” and “effeminate” in manner, appearance, and personality; that is, he was perceived as atypical in the social expression of his gender as well as in its sexual expression. Much like the construction of the “invert” centuries later, male sexual “passivity” thus blurred into “femininity.”¹²³ In other words, *kinaidos* and *malakoi* were cross-associated. The *sexual* aspects of gender were linked with the *social* aspects of gender.

In sum, the Greeks combined differentials in sex, age, and class to constitute gender socially as well as sexually. Thus, they delineated social position within society, regulated socio-sexual desires and relations, and created rituals of sexual passage marked by gender (but not social) transitivity. Among the elite class of citizen males, gender was directly correlated with age: The adult participant was accorded the privileged role of “male.” This ordering regulated the evolution of sexual gender among citizen males, transforming them from “female” in adolescence to “male” upon the appearance of their beards. However, between the class of citizen males on the one hand

121. “[T]he man who adopts the passive role in homosexual intercourse can be rebuked as the impersonator of the female Such a man . . . abuses nature’s kindness by, having been born a man, changing himself into a woman.” COHEN, *supra* note 58, at 187-89. Thus, “[a]t the level of sexual role behavior, the man who adopts a submissive, passive role is unmanly, woman-like, and he therefore dishonors and shames himself.” *Id.* See also CANTARELLA, *supra* note 58, at 46 (“Only the one who had ‘made himself a woman’ was guilty of improper or shameful conduct.”).

122. See Valdes, *supra* note 2, at 44-71. It bears special note that *berdaches* were not analogous to these, or to any other, Euro-American sex/gender identities; a cross-cultural equivalent simply does not exist. *Id.* at 236-39.

123. “The conception of a *kinaidos* was of a man socially deviant in his entire being, whose deviance was principally observable in behavior that flagrantly violated or contravened the dominant social definition of masculinity.” WINKLER, *supra* note 58, at 177. Thus, the *kinaidos*, like the Euro-American “invert,” was not necessarily “homosexual,” although the two overlapped in cultural imagery: “To spell out the implications, *kinaidoi* were automatically assumed, according to the protocols that polarized penetrators and penetees, to desire to be penetrated by other men, which assimilate[d] them to the feminine role.” *Id.* at 184 n.36. See also CANTARELLA, *supra* note 58, at 44-47 (translating relevant vocabulary of “gender” to denote “passivity” in socially symmetrical same-sex couplings); COHEN, *supra* note 58, at 189 (pointing out that Aristotle characterized “the underlying principles of masculinity and femininity as based upon the dichotomy of active and passive sexual roles”).

and the classes of non-citizen males or women on the other, the “male” gender role was generally the citizen’s regardless of age.

For non-citizen males, fluctuations in sexual gender depended on whether any given coupling involved him with a social superior or inferior. If a coupling occurred with a social superior, the non-citizen male’s proper gender was “female” and thus differed from his sex. If, however, a coupling occurred with a social inferior, including a woman, the non-citizen’s proper gender was “male” and thus consistent with his sex. In these settings, as in elite settings, social gender assigned sexual gender. Unlike elite settings, however, the individual’s sexual gender was not calibrated methodically—each individual’s sexual gender was entirely contingent on the socially gendered class configuration of a particular inter-class coupling.

For women, gender was wholly fixed, both sexually and socially, and therefore even more conflated. Female gender always coincided with female sex, both sexually and socially, because women were generally disallowed same-sex liaisons and were assigned to submissive “female” social and sexual roles throughout their lives.¹²⁴ Since women were never allowed to be “active” social or sexual agents, or to be with other women in same-sex unions, the Greek active/passive paradigm subjected women to compulsory heterosexuality for life. Greek sex/gender ideology thus confined its instrumental use of same-sex desire and gender transitivity to sexual experience and expression among men.

In this way, the regulation of same-sex desire effectively served overarching androcentric sex and gender ends. This strategic use of same-sex sexuality foretells its similar use under the more formal Euro-American conflation, where it is deployed to promote active/passive and male/female hierarchies.¹²⁵ In other words, the cultural deployment of male same-sex sexuality in ancient Greece foretells the eventual employment of heterosexism to uphold androsexism.

Greece’s union of patriarchy and “homosexuality” produced a highly nuanced conception of gender that was androsexist and classist, but not heterosexist. In this way, the Greek system presents the preliminary traces of the conflation, specifically its first and second legs. The final trace of Greek proto-conflationary arrangements emerges in the Greek explication of erotic disposition (the equivalent of sexual orientation) which today corresponds to Leg Three of the conflation.

124. See generally *supra* notes 66-69 and accompanying text.

125. See Valdes, *supra* note 2, at 261-74.

f. *The Genesis of "Sexual Orientation"*

Plato's conceptualization of sexual proclivities provides the final element of the early conflationary process: It is the seminal exposition of a theory of "sexual orientation" in Western culture.¹²⁶ In the *Symposium*, the earliest known tract on sexuality in the Western world, Plato considered the causes of the phenomenon that Euro-Americans now denominate sexual orientation and devised a myth to explain it.¹²⁷

According to Plato's myth, the human form came in three basic species: men, who had two male "organs;" women, who had two female "organs;" and hermaphrodites, who had one of each.¹²⁸ The mighty god Zeus, displeased with these creatures, one day sliced each of them into two halves. Ever since, Plato posited, humans have sought their "other halves," thus explaining the same-sex "orientation" of some and the cross-sex "orientation" of others.¹²⁹

Though Plato used the myth polemically to exalt same-sex relations, the noteworthy point here is his use of sex/gender imagery to conceptualize the characteristic that Euro-Americans now call "sexual orientation." Plato explicitly linked his functional equivalent of sexual orientation to physiological circumstance—that is, to sex. The direct connection between sex and sexuality pronounced in this myth mirrors the direct conflation of sex and sexual orientation under Leg Three. Plato focused on the coincidence of genital anatomy within a coupling to demarcate hetero/bi/homo-sexual dispositions, which is the hallmark of Leg Three's operation in modern culture.

Coupled with the sex/gender landscape surveyed above, this extraordinary sex-based exposition of the phenomenon of "sexual orientation" set in place the final prerequisite for the conflation of sex, gender, and "sexual orientation": Plato specified a *direct* connection between sex and sexuality. This idea pervades subsequent Euro-American discourse.¹³⁰ The path to full conflation was thus set.

With this final proto-conflationary theory in place, the Greek sex/gender system established the basic elements and themes that

126. *Id.* at 21-22.

127. See CANTARELLA, *supra* note 58, at 59-60.

128. These creatures were "a rounded whole, with double back and flanks forming a complete circle; [they] had four hands and an equal number of legs, and two identically similar faces, which were turned in opposite directions. They had four ears and two organs of generation." CANTARELLA, *supra* note 58, at 59-60 (quoting PLATO, SYMPOSIUM § 189d (Walter Hamilton trans., Harmondsworth 1951)).

129. *Id.* See also BOSWELL, *supra* note 74, at 53-56.

130. See Valdes, *supra* note 2, at 198-204.

form the foundation of Euro-American sex/gender conflation. Like its Euro-American descendant, the Greek sex/gender system fixed sex based on external genitalia, assigned gender primarily (though not exclusively) on the basis of sex, and imbued gender with both social and sexual dimensions. Thus, the Greek system presaged the Euro-American system by highlighting sex as the basic arbiter of individual identities, social spheres, sexual relations, and sexual desires.

However, in contrast to its Euro-American equivalents, the relative lack of family hegemony over the enculturation of ruling-class male youths, and the relative insignificance of procreational ideology for Greek eroticism, imparted instrumental value to same-sex desires and relations. This instrumental value facilitated approval of a limited, but privileged, form of male same-sex sexuality. Moreover, the class politics of this instrumentality obviated a need for sexual orientation as a formal concept to advance heterosexuality, even though Platonic theorizing about sexual attraction in some ways approximated this construct, though to a different ideological end.

The proto-conflationary Greek system was like the conflationary Euro-American system in its androsexism, but unlike this system in its lack of heterosexism. Nevertheless, the active/passive symbolism that pervaded socio-sexual relations made gender central to same-sex relations, as well as to cross-sex relations. Using sex, class, and other markers of social status, this system generated a correspondingly limited and stratified gender transitivity that was focused on the citizen male elite. This scheme thus ensured that *all* expressions of desire were viewed ideologically and regulated instrumentally through the intensive gendering of sexual life.

Finally, in the Greek model, unlike the Euro-American model, gender at times did not coincide with sex. But this sexual transitivity of gender in same-sex relations was limited. When flouted, it triggered associations of social gender with sexual gender akin to today's conflationary association of sissies with queers, and of tomboys with dykes under the joint operation of Leg One and Leg Two. At the same time, Plato's seminal theory of sexual attraction drew a direct causal connection between sex and the functional equivalent of sexual orientation, a proto-conflationary connection akin to Leg Three of the conflation. These proto-conflationary elements of Greek sex/gender arrangements pointed the way toward the contemporary conflation of sex, gender, and sexual orientation.

C. *At the Cusp of New Transitions: The Rise of Rome, Christianity, and Heterosexism*

In the century before the birth of Christ, Greek and Roman cultures came into closer and more frequent contact with each other, culminating in the annexation of Greece into the Roman Empire.¹³¹ However, though Rome conquered Greece, the Romans were captivated by the Greeks.¹³² Adapting Greek traditions to their tastes, the Roman elite regarded the emulation of Greek customs as the epitome of civilization, and this adulation peaked during the reign of the Grecophile emperor, Hadrian, whose personal tastes and official policies exalted Greek ideals.¹³³ During his reign, Rome not only absorbed but also disseminated Greek sex/gender influences throughout Mediterranean cultures in the key decades of transition that preceded, and led up to, the ascendancy of Christianity.¹³⁴

In the short term, this meshing of Greek proto-conflationary tradition and Roman domination aggravated the Greek system's misogynist/classist features.¹³⁵ In the long term, this meshing created a sex/gender milieu that gave impetus to the impending insurgency of heterosexism, especially after the ascendancy of Christianity. This meshing of socio-sexual cultures thus produced a Greco-Roman synthesis that completed the first full step towards the overall conflation of sex, gender, and sexuality (or, today, sexual

131. Roman conquest of Greece and Macedonia, which by that time had come to dominate the Greek city-states, was accomplished in 146 B.C.E. See GRANT, *supra* note 48, at 133.

132. See, e.g., CANTARELLA, *supra* note 58, at 97 (quoting Horace as writing that "vanquished Greece vanquished its savage victor").

133. The emperor's infatuation with all things Greek is thoroughly documented in LAMBERT, *supra* note 58. Lambert's biography specifically documents Hadrian's relationship with a Greek youth, Antinous, along the Greek model of *paiderastia*. The relationship between the two ended abruptly when Antinous' body was found drowned in the Nile during an imperial tour of Egypt. The circumstances of the death were never established, though its timing has caused some speculation that Antinous committed suicide because his age heralded the appearance of facial hair, which, under the Greek model, would have left him unemployed. For a full discussion, see *id.* at 128-42. In any event, upon Antinous' demise Hadrian proclaimed him a god, establishing and endowing the cult of Antinous, which exalted same-sex intimacy. With the emperor's conspicuous patronage, Antinous' adherents became a prominent religious sect during the following years. Hadrian's personal life, and his official policies, thus reinforced and spread the Greek sex/gender system throughout the pagan Mediterranean. *Id.* at 143-54.

134. Hadrian's reign was not an isolated example of Roman absorption and dissemination of Greek ways. For instance, at the twilight of the Roman Republic, Julius Caesar's enemies sought to derail his imperial aims by publicizing his "passive" sexual role in an alleged affair with Nikomedes IV, last king of the Greek area known as Bythina. Denouncing him as the "Queen of Bythina," Caesar's opponents sought to ruin his reputation and turn his troops against him on the basis of his gender-bending sexual conduct. Caesar's troops remained loyal, though wryly singing on the march to Rome that "all the Gauls did Caesar vanquish but Nikomedes vanquished him." *Id.* at 82.

135. For a good comparative overview of Greek and Roman societies, see MICHAEL GRANT, *A SOCIAL HISTORY OF GREECE AND ROME* (1992).

orientation), and that exacerbated the instrumental regulation of desire, as it segued into Christianity.¹³⁶

Judeo-Christian leaders,¹³⁷ like their Greco-Roman counterparts, continued this patriarchal construction and regulation of sex, gender, and sexuality as key tools for cultural organization, but they introduced a new overriding objective: abstinence.¹³⁸ This objective, reflective of Christianity's socio-sexual asceticism, recognized only one potential exception: procreational sexual activity in the context of marriage.¹³⁹ Over time, this emphasis on sexual renunciation, and its toleration only of marital procreational sexuality, reversed the Greek ideal of non-procreational sexual intimacy: Under Christian sex/gender ideology, non-procreational sensuality was no longer

136. Rome modified and consolidated the socio-sexual scheme that Greece originated. Both societies defined sex by reference to external genitalia, used sex to organize androcentric societies, and linked gender to sex. In line with the active/passive paradigm, both conceived gender as comprising social and sexual components and also cross-associated sexual gender atypicality with social gender atypicality. Yet only the Greek system incorporated a formal (but limited) intra-class sexual gender transitivity. In contrast, Rome's indigenous arrangements symbolized and gave effect to a master/slave sex/gender order in socio-sexual relations, perhaps related to the centrality of aggression and domination to the Roman psyche. This Greco-Roman synthesis devised a system of social and sexual control that suppressed, but did not eradicate, both the limited gender fluctuations of the purely Greek system and the opportunity for cross-gender sexual practices. This Greco-Roman synthesis of sex/gender ideology thereby assembled the basic elements that set the stage for the conflation as we know it today; it intertwined ideology, identity, and desire with sex/gender constructs to preserve masculine primacy. For a more detailed discussion of Roman, Christian, and other eras leading up to the Euro-American status quo, see VALDES, *supra* note 9.

For discussion of Roman same-sex arrangements specifically, see BOSWELL, *supra* note 58, at 61-87; SAARA LILJA, *HOMOSEXUALITY IN REPUBLICAN AND AUGUSTAN ROME* (1983); Paul Veyne, *Homosexuality in Ancient Rome*, in *WESTERN SEXUALITY: PRACTICE AND PRECEPT IN PAST AND PRESENT TIMES* 26 (Phillipe Aries & Andre Bejin eds. & Anthony Forster trans., 1985).

137. The Judaic and Christian sex/gender arrangements were in some ways similar, but also differed. See generally JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 51-76 (1987). Basically, early sex/gender attitudes of Christianity blended elements of Jewish and Greco-Roman traditions with new imperatives, which themselves changed over time. *Id.* at 77-123. See also BOSWELL, *supra* note 74, at 108-217; BOSWELL, *supra* note 58, at 91-168; PETER BROWN, *THE BODY AND SOCIETY: MEN, WOMEN, AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* 33-338 (1988). This blending and unfolding, which culminated in the conflationary *status quo*, is addressed in VALDES, *supra* note 9.

138. "The principal and most idiosyncratic personal response of devoted Christians to their religion was celibacy . . . it was the premier lifestyle for both women and men." BOSWELL, *supra* note 74, at 110. This ideal, though not always practiced, was most associated with Paul, and it helped to distinguish the emergent minority from the pagan majority, in part by providing Christians with a righteous sense of moral superiority. See BROWN, *supra* note 137, at 33-41. See generally Philippe Aries, *St. Paul and the Flesh*, in *WESTERN SEXUALITY*, *supra* note 136, at 36.

139. See BRUNDAGE, *supra* note 137, at 57-76. "Sex was good only within marriage. . . . Christians who were spiritual giants might be able to do without marital sex; more ordinary folk needed sexual solace and had a right to seek it in marriage." *Id.* at 61.

sublime, it was “sin.”¹⁴⁰ This reversal altered the parameters of “correct” sexual personality and interaction.¹⁴¹

This new Christian emphasis on asceticism and procreation preserved Greek androsexism because it maintained the existing active/passive paradigm and its androcentric skew.¹⁴² On the whole, women were still inferior and subordinate to men, and female same-sex relations remained strictly forbidden.¹⁴³ The new ideals of renunciation or procreation therefore did little to improve the social or sexual lot of women.¹⁴⁴

However, this ideological transformation triggered profound consequential changes in other aspects and applications of sex, gender, and sexuality. These changes inched the sex/gender status quo further toward the eventual conflation these three constructs, and toward the increasingly dogmatic regulation of desire. Of these consequential changes, perhaps the most important was the vilification of *all* same-sex relations for two reasons.

First, this change effectively made deductive, or sex-based, gender entirely intransitive. Thus, this change effectively terminated the limited sexual mutability of gender, shutting down the sort of same-sex, but cross-gender, socio-sexual unions facilitated by Greek *paiderastia*. This wholesale vilification of same-sex relations thus caused a conflation of sex, gender, and sexuality. In this way, Christianity gradually expanded proto-conflationary sex/gender ideology beyond Greco-Roman patriarchy and introduced the even more conflationary structures of hetero-patriarchy.¹⁴⁵

140. For a detailed discussion of Christian justifications for sexual oppression, see BOSWELL, *supra* note 58, at 137-66. See generally HOMOPHOBIA AND THE JUDEO-CHRISTIAN TRADITION (Michael L. Stemmeler & J. Michael Clark eds., 1990); HOMOSEXUALITY AND RELIGION (Richard Hasbany ed., 1989); JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* (1985); BARRIE RUTH STRAUSS, *THE CATHOLIC CHURCH: A CONCISE HISTORY* (1992).

141. With procreation as the official and exclusive objective of legitimated sexuality, “correctness” effectively came to require three fixed elements: 1) cross-sex (married) couplings, 2) with each such coupling limited to procreational efforts, and 3) always assuming sex-based gender roles in the bedroom and the home, as well as in the community at large. This new sex/gender order thereby grafted heterosexism driven by procreation onto pre-existing Greco-Roman androsexism. See VALDES, *supra* note 9.

142. See *id.*

143. See generally Louis Crompton, *The Myth of Lesbian Impunity: Capital Laws from 1270 to 1791*, in *HISTORICAL PERSPECTIVES ON HOMOSEXUALITY* 11, 13-15 (Salvatore J. Licata & Robert P. Petersen eds., 1981) (discussing repression of female same-sex relations in early Christianity); Angela L. Padilla & Jennifer J. Winrich, Note, *Christianity, Feminism and the Law*, 1 COLUM. J. GENDER & L. 68, 73-81 (1991) (discussing subordination of women under the Bible).

144. Cf. POSNER, *supra* note 79, at 50 (comparing pagan and Christian arrangements of sexuality, marriage, and women). Even though Posner argues that “Christianity seems to have been, on balance, more solicitous of women’s interests than pagan religions had been,” he acknowledges the androcentric bottom line of the Christian sex/gender regime: “Despite its emphasis on common humanity, organized Christianity did not propose to abolish all human hierarchies. Among those to be preserved was the authority of men over women.” *Id.* at 47.

145. For further discussion of this development, see VALDES, *supra* note 9.

Second, this change stripped many kinds of desire of their imputed ideological purpose, thus expanding and intensifying, over time, the societal devaluation and regulation of desire; in making gender sexually intransitive and foreclosing the utility of any same-sex interaction, Christian sex/gender dogma progressively increased the range of desires deemed worthless.

By fixing sex and gender to each other, both socially and sexually, Christianity ultimately led to the consolidation of the deductive/intransitive gender model, while intensifying the devaluation of sexual desire. In doing so, the advent of Christianity signalled the eventual emergence of heterosexism as a key element of Western sex/gender ideology, and occasioned its incremental fusion with Greco-Roman androsexism. The triumph of hetero-patriarchy under Judeo-Christian sex/gender arrangements thus advanced the conditions for the modern-day invention of sexual orientation, and the concomitant formalization of the Euro-American conflation.

III. NOTES FOR LAW AND PUBLIC POLICY

Having previously documented the conflation's presence in contemporary law¹⁴⁶ and society,¹⁴⁷ and having previously also compared the Euro-American system to the Native American system,¹⁴⁸ and having just inspected the ancient Greek precursors to the status quo, this Article now concludes with notes that discuss how these histories and comparisons ought to inform the making of law and public policy.

A. *Reproduction and Re-production: Tradition and Today*

The conflation's long history, and its ongoing dominance, confer a continuing sense of Naturality, and thus Normality and Morality, on the status quo. This trinity—Naturality, Normality, and Morality—along with associated claims of Necessity or Utility, forms the basic rationale advanced today to justify the conflation and its protection of hetero-patriarchy.¹⁴⁹ Based upon the expanded historical and comparative record presented above, this section briefly revisits the mythology underlying these claims.

1. *Systemic Essentialism and Social Constructionism*

Tracing the conflation's roots and evolution helps to map not only its phenomenology and history, but also its ideological make-up. The

146. Valdes, *supra* note 2, at 121-207.

147. *Id.* at 36-118.

148. *Id.* at 209-44.

149. *Id.* at 110-15, 288-90.

conflation's history confirms that the modern Euro-American conflation of sex, gender, and sexual orientation is culturally contrived. The history of the conflation reveals its social genesis and construction because it documents the actual and incremental assembly of a sex/gender system mischaracterized as "natural." This tale thus corroborates the insights mined earlier from modern culture and legal culture (and Native American culture), and definitively negates the claimed essentialism of the conflationary status quo.

2. *Naturality, Normality and Morality*

The first justification for the status quo holds that the conflation's sex/gender precepts simply represent the "nature" of things.¹⁵⁰ Therefore, this first justification at its core is a claim of essentialism.¹⁵¹ It asserts the system's Naturality and posits this purported Naturality as an "objective" marker of Normality and Morality.¹⁵² The conflation is "normal" and hence "moral" because it is "natural." Most recently, this historical justification has surfaced with vicious force with calls for "cultural war" to restore the dominion of hetero-patriarchal "traditional values" purportedly reflective of Nature itself.

In this way, Naturality, Normality, and Morality combine to form a tautological trinity that serves as the primary justification for the status quo. However, human experience has proven this connection of Nature with value judgments and public policy to be wrong,¹⁵³ and the expanded historical record of its origins and maintenance presented above confirms that the sex/gender status quo is artificial rather than natural.

150. See *id.* at 111 n.305; see also MARTIN HOFFMAN, *THE GAY WORLD: MALE HOMOSEXUALITY AND THE SOCIAL CREATION OF EVIL* 100-13 (1968); cf. John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994) (advancing traditional arguments in favor of hetero-patriarchal status quo in these terms).

151. See Valdes, *supra* note 2, at 112-16, 288-90. Of course, since the rise of Christianity, this claim also is tethered to the Bible, which is routinely, though uncritically, said to mandate only cross-sex relations. This biblical attribution focuses on the Old Testament, and in particular the passages from Leviticus. See, e.g., Saul M. Olyan, "And with a Male You Shall Not Lie the Lying Down of a Woman": On the Meaning of Leviticus 18:22 and 20:13, 5 J. HIST. SEXUALITY 179, 206 (1994) (concluding that these passages prohibit only male anal intercourse, but not other "potential sexual acts between males" because this particular prohibition cannot be separated from purity-related concerns of ancient Jewish law). Olyan has observed:

[O]ther sexual acts between men, in contrast to intercourse, are unthreatening to the purity of the land because they do not involve the mixing of two otherwise defiling emissions in the body of the receptive partner. . . . In the coupling of two women, there is no threat of defilement by means of commingling two otherwise polluting substances in the body of the receptive partner.

Id. at 206.

152. See Valdes, *supra* note 2, at 377 n.1334.

153. This record of experience includes, most pointedly, this nation's social and legal sex/gender history and status quo. See generally Valdes, *supra* note 2.

The non-hierarchical societies that preceded the Greek city-states show that androsexist ideology is not “natural.”¹⁵⁴ Moreover, the very process of patriarchy’s construction in the Greek city-state system shows that androsexism is not a pre-existing or “natural” condition.¹⁵⁵ Hence, under the terms of the trinity, androsexism cannot sustain its claim of Normality and Morality.¹⁵⁶ Furthermore, the historical record compels the same conclusion for Christian heterosexism. The Greek example belies the claimed Naturality of heterosexism and hetero-patriarchy because it relied only on androsexist ideology; the absence of heterosexism and hetero-patriarchy from this example demonstrates that these Euro-American belief systems are neither natural, nor normal and moral.¹⁵⁷

3. *Necessity and Utility*

Accompanying the trinity of Naturality, Normality, and Morality is a second set of claims holding that the conflation is a necessary or beneficial feature of enlightened civilization, without which society would disintegrate into androgynous chaos.¹⁵⁸ The second claim to superiority, based on the Necessity and Utility of conflationary sex/gender precepts to civilization, thus presents hetero-patriarchy as an indispensable or beneficial pre-condition of a harmonious and productive social order. In this manner, the sex/gender status quo and its ideological bents are cast not only as natural, normal, and moral, but also as a proper result of Necessity and Utility.

But the varied sex/gender arrangements and experiences of other cultures suggest otherwise.¹⁵⁹ Most importantly, *this* nation’s cultural and continental predecessors provide apt examples of prosperous and sophisticated societies that did not practice state-sanctioned homophobia. Both historical and comparative experience show that Euro-American blending of androsexism and heterosexism simply is

154. See *supra* notes 53-55 and accompanying text.

155. See *supra* notes 56-57 and accompanying text.

156. The Native American example in particular shows that androsexist sex/gender ideology does not inhere in human nature: Native societies exhibited a basic or rough sense of sex/gender power parity among “male” and “female” identities and spheres rather than androsexist (or heterosexist) biases and hierarchies. See Valdes, *supra* note 2, at 212-16.

157. The same absence from the Native American record further demonstrates and corroborates this conclusion regarding Naturality, Normality, and Morality. See Valdes, *supra* note 2, at 212-16, 285-90.

158. This fear underlies judicial pronouncements such as those of *Griswold* and *Bowers*, and their invocation of a “way of life” or a “concept of ordered liberty” that the law must protect. This fear also reverberates in the call for “culture war” and its defense of “traditional values” to avert degeneration and chaos. See generally Hunter, *supra* note 15.

159. See *supra* note 95 (discussing sex/gender arrangements of some indigenous cultures around world).

not a prerequisite to the maintenance of an enlightened and peaceful social order.

Turning to Utility, the Euro-American experience itself suggests that hetero-patriarchy is neither useful nor beneficial to society.¹⁶⁰ On the contrary, the Euro-American system's incessant demands for sex/gender conformity produces untold stresses that, in practice, are antithetical to the vaunted ideals of equality and liberty that this nation purports to embrace and uphold.¹⁶¹ Indeed, the practice of hetero-patriarchy inevitably entails violation of, or disregard for, fundamental social *and* legal values professed by this nation, hetero-patriarchy not only lacks its claimed Utility, it affirmatively undermines the integrity of vaunted national values. On the whole, the Euro-American experience indicates that the conflationary sex/gender system does not and cannot satisfy the claim of Utility.¹⁶²

The Greek example furthermore belies the argument that hetero-patriarchy fulfills the mandate of Nature by designating the propagation of the species as an exclusive or unique function of traditional marriage.¹⁶³ On the contrary, ancient Greece demonstrates that humans can propagate in the context of cross-sex marriage, even if same-sex sexuality is allowed to flourish. Indeed, classical Greece sets *the* example of a prosperous and sophisticated civilization that obviously replenished its populace via traditions of cross-sex marriage without resort to the forcible repression of same-sex intimacy. Population and family maintenance, a corollary of the Necessity/Utility argument, depends on neither androsexism nor heterosexism. Thus, population and family policy should dictate neither compulsory heterosexuality nor compulsory hetero-patriarchy.¹⁶⁴

160. See Valdes, *supra* note 2, at 36-118.

161. *Id.* at 123-28 nn.330-33.

162. In contrast, Utility was relatively well served by the pragmatic features of the Native American system, which was comparatively supportive and accommodating of sex/gender liberty, diversity, and equality. See *id.* at 285-88.

163. See generally Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 103 U. DAYTON L. REV. 575, 587-89 (1985); Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994); see also Frederick Elliston, *Gay Marriage*, in PHILOSOPHY AND SEX 146, 148-50 (Robert Baker & Frederick Elliston eds., 1984). This point is further belied by Native American nations, which propagated in the context of cross-sex marriage without problem until the onset of European aggression, infection, and oppression. See Valdes, *supra* note 2, at 236-42.

164. More broadly, the Native American record demonstrates that the sexes can organize themselves into complementary roles without tearing nature or society asunder. See *id.* The Native American example shows that society can use sex and gender as reference points for social organization without turning either to androsexist or heterosexist precepts, while the Greco-Roman system shows that androsexism can operate without heterosexism. Only the Euro-American system combines the two. The joinder of these two -isms thus represents, in itself, a social construction.

The historical record demonstrates how the sex/gender status quo lacks justification on its own terms. By dispelling the claimed justifications and highlighting the substantive shortcomings of the status quo, the record underscores why the law should withdraw its continuing support of hetero-patriarchy. The way in which the record depicts the misuse of desire provides additional reasons for reform.

B. Desire, Intimacy, and Society

The historical and comparative record shows that both ancient and modern societies accommodated human desire for sexual and affectional intimacy to varying degrees, with the contemporary Euro-American conflationary system being the least tolerant.¹⁶⁵ However, this record also shows that each era or society viewed sexual pleasure or affectional desire in instrumental terms; that is, while these sex/gender arrangements accommodated human desire in various ways and to varying degrees, all attempted to harness or channel desire, and to deploy sexuality and intimacy for preferred social purposes. None of the systems viewed sexuality and intimacy, or the human desire for them, as intrinsically valuable.¹⁶⁶ This instrumental approach to desire stems from the androcentric gendering of sexual experience and expression, which has been common to each of these Western systems.

I have argued that, at least since the establishment of the Greek city-states, sex has been the basis for Western socio-sexual organization. Under the active/passive paradigm, sex was performed or articulated via gender, both sexually and socially, in male/active and female/passive terms. This gendering of sexuality, in effect, gendered sexual desire; having been so gendered under the active/passive paradigm, sexual personality, experience, and expression were channeled in accordance with patriarchal ideology. In this way, the human desire for erotic contact and intimacy has been exploited for its instrumental potential in the construction of society and its internal sex/gender borders. The Greek system effectively introduced the basic equation at play ever since: The construction of desire-as-sexuality-as-gender to advance dominant sex/gender priorities.

Within the Greek system, the gendering and misuse of desire supported the gendered class stratification of society as a whole.

165. The Native American system, on the other hand, was most tolerant because it allowed the greatest freedom of sex/gender organization both socially and sexually. See *id.* at 211-34, 285-88.

166. This much is true even of the Native American example: Native sex/gender arrangements favored the heterogender ideal precisely because of the socio-economic instrumental value imputed to such couplings. See *supra* note 97. Desires that ran contrary to this ideal therefore were disfavored.

Thus, even though the ideology of procreation was not paramount in Greek sex/gender beliefs, the regulation of desire nonetheless was chiefly instrumental. This ideological instrumentality focused on the maintenance of class and sex/gender categories that symbolized and sustained Greek patriarchy.

In marital cross-sex couplings, for instance, the fulfillment of individual desire was not a prominent consideration because the Greek family model did not emphasize love or lust in this form of coupling; functional utility on behalf of the culture's patriarchal arrangements, rather than sexual or affectional fulfillment *per se*, was the primary object of Greek marriage. This instrumental view was also present in Greek accommodation of same-sex desire, especially as institutionalized in *paiderastia*, which entailed an elaborate etiquette that regulated same-sex desire to replicate class and sex/gender power relations. *Paiderastia* harnessed same-sex desire to socialize and educate the citizen-male elite in conjunction with family rearing. These two key forms of institutionalized couplings therefore were thoroughly instrumental.

More broadly, Greek approval of various pleasure-seeking intimacies was tied to the articulation of interconnected gender and class rankings within each coupling, which were calculated to reproduce Greek patriarchy itself. These rankings, together with their cultural meanings, governed both cross-sex and same-sex relations. Though seemingly more "free" because they partially accommodated same-sex desire, Greek sex/gender arrangements heavily and instrumentally regulated the *entire* range of culturally permissible desires.¹⁶⁷

The current Euro-American system, in comparison, represents the culmination of the deductive/intransitive gender model, especially since the clinical codification of the conflation during the turn of this century.¹⁶⁸ Within this scheme, desire continues to be subordinated to the preservation of hetero-patriarchal dominance.¹⁶⁹

But under the modern conflatory system, desire is more regulated than even under the Greek system because of three factors:

167. Indigenous Roman sex/gender arrangements exhibited a similar instrumental attitude toward sexual or affectional desire: Rome, mirroring Greek ways, filtered desire through ideology. Roman sex/gender ideology, both before and after its incorporation of Greek influence, was highly androcentric. Indeed, the overarching master/slave configuration of Roman socio-sexual relations amounted to a raw use of sexual intimacy to reify the power and prerogatives of the androcentric ruling class. This indigenous Roman androcentrism survived Rome's embrace and emulation of Greek sex/gender traditions. See VALDES, *supra* note 9.

168. Valdes, *supra* note 2, at 44-71.

169. This subordination of desire along instrumental terms is exemplified by the Court's distinction between same- and cross-sex intimacy in *Bowers*. See *supra* notes 43-47 and accompanying text.

the continued gendering of desire under the active/passive paradigm, the formal absolutism of the deductive/intransitive gender model, and the gradual ascendancy of procreational ideology under Christianized hetero-patriarchy. It is thus plain to see why the Euro-American model is the most instrumental (and repressive) sex/gender regime: Of the systems reviewed, it carries the most ambitious and complex sex/gender agenda and, therefore, most needs desire to obtain and preserve this agenda.¹⁷⁰

2. *Toward the Defense of (Non-Instrumental) Desire*

As the expanded record shows, the sex/gender instrumentalism of this culture has produced skewed socio-sexual relations, as well as legal doctrines that not only fail to address the sex/gender inequities that they purport to rectify, but that actually fortify these continuing inequities.¹⁷¹ Privacy doctrine under the Fourteenth Amendment, mentioned at the outset, is an apt but not exclusive example. Other doctrines that depend in part on legal recognition of the worth of non-instrumental desire include the increasingly creaky definition of legally cognizable "marriage"¹⁷² and the still-evolving First Amendment right of intimate association.¹⁷³ Consequently, the reformation of constitutional doctrines, including, but not limited to, the right to privacy, depend in part on a reconsideration of the constitutional worth of eros.

This conclusion, of course, flows from the very way in which the law is complicit in the devaluation of desires, identities, and relations that are deemed lacking in instrumental potential under hetero-patriarchy, and by the way in which this complicity helps subordinate the populations and personalities that embody non-instrumental, and hence forbidden, desires and identities.¹⁷⁴ This historical sex/gender

170. Conversely, and for the same reasons, the Native American inductive/transitive gender system was the least instrumental (and repressive) with respect to desire, though it was still instrumental in its preference for heterogender couplings. See Valdes, *supra* note 2, at 209-44. This historical and comparative record therefore suggests an analytical and substantive connection between the deductivity/inductivity and the socio-sexual (in)transitivity of gender on the one hand, and on the other hand, the value or liberty associated with expressions of non-instrumental sexual desire. See *id.* at 285-88.

171. See VALDES, *supra* note 9.

172. See generally, Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994); see also John Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991).

173. See *supra* note 47.

174. At the present time, this complicity is perhaps most graphically seen in the continuing *de jure* subordination of sexual minorities. See, e.g., Valdes, *supra* note 2, at 124 n.331.

record points to the defense of (non-instrumental) desire as integral to doctrinal reform of sex/gender equality law, and ultimately to cultural sex/gender equality,¹⁷⁵ because the historical and current focus on ideological instrumentality has rendered these “rights” more theoretical than practical for the most vulnerable members of a hetero-patriarchal society. The pending task, therefore, is securing legal recognition and protection of human desire for intimacy and affection, independent of social goals as filtered through dominant sex/gender ideology.

In this task, women and sexual minorities share common interests, such as the need to break the repressive linkage of active/passive, deductive/intransitive, and procreational dictates. Moving beyond the extremist instrumentalism of hetero-patriarchy and toward the revaluation of desire, pleasure, and intimacy as intrinsically important aspects of human life ought to be understood as part of the quest for liberation mounted with increasing vigor by women and sexual minorities. The defense of desire as such is necessary to securing the socio-sexual agency of these traditionally subordinated populations.

C. Feminists, Queers, and Sex/Gender Others: Final Notes

Though the scope and depth of Euro-American sex/gender issues will require long-term social and legal reformation, it would behoove law and policy makers, and society more generally, to apply the lessons that this historical and comparative record offers. Because women and sexual minorities are particularly disadvantaged under the conflationary status quo, the lessons of this record are especially important for us; by tracing the successive layering of sex/gender ideologies from the rise of phallocentrism and androsexism to the invention of heterosexism, this Article underscores how women and sexual minorities are the specific targets for subordination under conflationary hetero-patriarchy and its particularized constellation of sex/gender dictates.

At the threshold, the record indicates that women and sexual minorities share a common, though not identical, interest in neutralizing the current operation of the active/passive paradigm. This paradigm has from the beginning defined women as deficient, and more recently, sexual minorities as defective. The paradigm thus mandates the social and sexual devaluation of women and sexual minorities.

175. Although equality is a disputed construct, our nation remains formally committed to attaining the ideal; thus, appeals to “equality” may justify social and legal reformation. *See id.* at 123 n.330.

Women and sexual minorities also share an interest in exposing the pernicious deductivity/intransitivity of gender under the Euro-American conflation. The deductive/intransitive gender model is used as a vehicle for locking women and sexual minorities into our respective definitional classifications as sex/gender subalterns as mandated by the ideological precepts of the active/passive paradigm. Because the deductivity/intransitivity of gender was built upon the active/passive paradigm, this model of gender must be confronted in its own right, if its intended targets of subordination—women and sexual minorities—are to be freed of its degradations and constrictions.

The misconstruction of gender must therefore be seen as a primary locus of critical investigation and reformatory action for both women and sexual minorities. Of course, a first and indispensable step is the holistic interpretation and application of existing anti-discrimination laws so as to protect gender transitivity, whether social or sexual.¹⁷⁶ Therefore, critical interrogations of the law's current failure to recognize gender's centrality to the joint oppression of women and sexual minorities, and more generally of all gender-atypical persons, is the point of departure for effecting reform. But the record also calls for a more careful reconsideration of how reform should endeavor to foster the legitimation and protection of gender transitivity, both socially and sexually. The historical account provides a textured record of relative experience from which legal and modern culture can reconsider what "gender" is and how it is (mis)used, and then to re-imagine what it might or ought to be.¹⁷⁷

This expanded record further shows that the interrogation of gender also entails a critical reconsideration of the way in which desire has been deployed instrumentally in the service of hetero-patriarchy. This critical reconsideration of desire is necessary to the interrogation of gender because it reveals the way in which sexual desire is itself gendered. This reconsideration, in other words, homes in on the way in which gender is performed sexually and on the way in which the desires that drive this performance are circumscribed and channeled according to hetero-patriarchal scripts. Women and sexual minorities have a joint interest in the defense of sexual desire and intimacy as such because the combination of active/passive, deductive/intransitive, and procreational imperatives, as controlled by hetero-patriarchy,

176. See *id.* at 303-42.

177. This record is expanded even further by the Native American experience; in stark contrast to Native-American conceptions of gender, in all of the other systems previously discussed, gender was primarily or entirely deductive, based on the active/passive paradigm. *Id.* at 209-42, 280-90.

amount to the exploitation of women's sexualities and to the righteous suppression of sexual minorities' sexualities.

Finally, and most generally, the exploration of the conflation's origins presented above also points to a continuing need for amplified understandings of the common histories and common challenges that women and sexual minorities share under the conflationary status quo. This historical account thus suggests a need for more excavation of the sex/gender discontinuities that help to misshape identity and destiny for women, sexual minorities, and sex/gender Others. These excavations inevitably will further unpack the common interest in the dismantling of hetero-patriarchal structures that is shared by women and by sexual minorities.

Simply put, Feminist and Queer critiques of law and society share common interests because conflationary hetero-patriarchy, through the active/passive paradigm, the deductive/intransitive gender model, and procreational ideology works for the joint subjugation of women and sexual minorities. This continued domination of socio-sexual personality ensures that both women and sexual minorities will continue to be cast as sex/gender subordinates or outcasts. It therefore falls upon Feminist and Queer legal scholars to galvanize a comprehensive sex/gender reformation that addresses both the androsexism and heterosexism of the law, and their joint operation in the form of conflationary hetero-patriarchy.

Accordingly, this Article closes with an exhortation for the cultivation of Feminist and Queer inter-connectivity.¹⁷⁸ That is, a call for the cultivation by Feminist and Queer legal scholars of an inter-group ethic in legal scholarship that values and promotes sex/gender inclusiveness in critical endeavors—projects that interrogate not only the way in which a construct like “gender” affects various groups, but that also interrogate the way in which sites of oppression are structured, deployed, and operated under the conflation in inter-connected ways. Connective sensibilities and efforts between and among women and sexual minorities are too important to ignore because inter-connectivity has the potential to enrich our insights and broaden our horizons, and thereby to empower our communities.

178. See *id.* at 371-72; see also Francisco Valdes, *Sex and Race in Queer Legal Culture: A Meditation on Identity and Inter-Connectivity*, 5 S. CAL REV. L. & WOMEN'S STUD. (forthcoming 1996).

