Sex Equality's Unnamed Nemesis

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SEX EQUALITY’S UNNAMED NEMESIS

Veronica Tercia*

INTRODUCTION

Sex inequality still exists. However, its manifestations have evolved since the early sex inequality cases were heard in courts and legislatures first began structuring statutory regimes to combat it. In particular, so-called “facial” discrimination against men and women on the basis of sex has no doubt decreased since the advent of this legal assault on sex inequality. Yet the gendered assumptions that structure our institutions and interactions have proven resilient. With sex discrimination now operating more covertly, the problem of sex inequality looks considerably different than it once did. Courts, however, have failed to successfully respond to the changing contours of sex inequality, allowing the problem to manifest itself in ways that are becoming increasingly difficult to identify and root out.

This Article proposes that courts formulate an alternative legal framework within which to understand the problem of sex inequality such that they are better equipped to address its evolving nature—a framework which unambiguously names bad ideology, not simply bad actors and differential treatment, as sex equality’s nemesis. Through such

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a renaming and reframing, U.S. law might become a more effective arena for negotiating the gendered assumptions that underlie the problem of sex inequality, should space be made within its discourse for such a conversation to take place.

Generally considered the centerpiece of U.S. equality legislation, Title VII of the Civil Rights Act of 1964 is an appropriate starting point for testing the workability of this alternative legal framework. In its call for national equality, Congress declared with the passage of the Act that no adverse employment decision may be made “because of such individual’s race, color, religion, sex, or national origin.” But the contours of Congress’s vision of equality are not entirely decipherable through the statute’s text or legislative history, and so have been hotly contested in U.S. courts for decades. The Congressional Record shows, for example, that the addition of “sex” as an impermissible basis of distinction under Title VII was added at the last minute by a senator seeking to sabotage the Amendment. Thus from its inception, the precise mandate of Title VII with regard to ending sex discrimination in particular has been especially unclear. It has therefore been left to the courts to define the contours of a regime targeted at combating sex inequality with only this broad purposive intent in mind.

As courts have struggled to identify what constitutes “sex discrimination” in Title VII cases, they have developed a discourse—marked by philosophies, lines of inquiry and legal frameworks—which attempts to describe the problem of sex inequality in legal terms. In this effort, courts have overwhelmingly defaulted to a discourse of categorical comparison for addressing questions of sex inequality. They ask as their central inquiry in any sex discrimination case: Has a member of the protected class (generally, woman) been treated “differently” than persons of another class (generally, man), even though both members are “the

4. Howard Smith, who chaired the House Rules Committee and strongly opposed the Civil Rights Act, suggested the addition of “sex” to Title VII’s list of protected classes in what is commonly described as a cynical attempt to defeat the bill by inserting objectionable amendments. See Jo Freeman, How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 Law & Ineq. 163, 163–84 (1991).
5. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–64 (1986) (“The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives . . . the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”).
Not only has this inquiry produced inconsistent and, at times, absurd results, but it has also spurred an arguably undesirable impetus for the multiplication of new protected categories. In their attempt to achieve legal acknowledgment of their experiences of discrimination, plaintiffs of different “classes” are now lobbying for explicit reference to their “category” in various pieces of equality legislation. Not surprisingly, the prospect of a never-ending list of protected categories has been met with resistance, even irritation, by courts and legislatures alike.

The current legal discourse surrounding Title VII fails to do justice to the complexity of the problem of sex inequality because courts lack a legal framework that can be applied consistently and broadly to Title VII sex discrimination cases, without it resulting inevitably in the incessant multiplication of protected categories. This Article therefore attempts to demonstrate the workability of an alternative legal framework for adjudicating Title VII litigation. Within this framework, problems of sex inequality can be more effectively assessed and addressed without descending into the feared endless relativism of proliferating categories.

This Article proposes that “gender ideology” become the central concept through which sex inequality is understood by courts and litigants. Gender ideology, as that term is used in this Article, refers to the

6. See Catharine A. MacKinnon, Sex Equality 6 (2007) [hereinafter MacKinnon, Sex Equality] (discussing the comparative features of conventional equality law which requires same treatment if one is the same, different treatment if one is different, and concluding that where “equality is like treatment for likes, inequality means different treatment for likes, same treatment for unlikes.”). MacKinnon refers to this classic conception of equality as the “sameness/difference” approach.


8. See, e.g., Degraffenreid v. GM Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976) (expressing concern that recognizing a special class of “black women” would create a new special sub-category and a new “super-remedy” giving plaintiffs relief beyond which the drafters of Title VII intended); Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986) (warning against the “many-headed Hydra” that could be created by multiplying subgroups under Title VII).

9. This Article assumes a distinction between the terms “sex” and “gender”: “Sex” being the term used to describe a person’s biological identity, as either a man or a woman; “Gender” being the socially constructed way we understand masculinity and
system of ideas which relies upon assumptions about the naturalness, inevitability, and propriety of sex inequality—that is, masculine dominance and feminine subordination—as well as the stability of sex/gender coincidence. "Ideology" in this sense can be understood as a set of myths that the ideology itself intends to naturalize as immovable facts not to be contested—a system of "illusions endemic to social reality." Ideology is not reality and need not (in fact should not) be accepted as a description of reality for one to nonetheless accept that it wields the power to govern reality.

Like any form of ideology, gender ideology is normative: it seeks to maintain blind acceptance of its underlying assumptions—about men and masculinity and women and femininity—by enforcing punitive consequences on those who challenge those assumptions. These challenges come in many forms, including subversive conduct, speech, and thought, or even an individual’s mere presence in a spatial or social location. And punitive consequences for those challenges are delivered in just as many forms—economic deprivation; political disenfranchise­ment; social humiliation; emotional, sexual, and physical abuse. This Article focuses on the operation of gender ideology in the employment context and how that ideology can be addressed through Title VII litigation. For example, a gender ideology analysis recognizes that the mere presence of women in the workplace—where they have the opportunity

10. The term chosen here, “gender ideology” is proposed in part for its lack of stigma and for its breadth, encompassing more than the concept of sex stereotyping, though the pervasiveness of sex stereotypes is certainly a component of gender ideology. The term incorporates both MacKinnon’s theory of gender hierarchy as well as the concept of a “gender regime,” as articulated in the work of R.W. Connell, a term which describes the “organized field of human practice and social relations’ through which women are kept in subordinate positions to men.” ANTHONY GIDDENS, SOCIOLOGY 463 (5th ed. 2006) (citing R.W. CONNELL, GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS (1987)). In Connell’s gender regime it is understood that “from the individual to the institutional level, various types of masculinity and femininity are all arranged around a central premise: the dominance of men over women.” Id.


12. See generally Thomas Lemke, Foucault, Governmentality, and Critique, in 14:3 RE­THINKING MARXISM 49, 49–64 (2002).
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... and often do, accrue economic, political, and social power—may challenge the “naturalness” of female subordination. Those women in turn face punitive consequences (in the form of firings, failures to hire or promote, unequal pay, harassment, abuse, and so on) for the threat they pose to the stability of a gender ideology which demands they remain subordinate, economically, politically, socially, and otherwise. Likewise, men occupying traditionally female spheres, or else failing to adequately perform their gender in traditionally male spheres, also face punitive consequences on account of this gender ideology, for the way in which their presence or conduct threatens cultural assumptions about masculinity and its inevitable dominance.

Understood this way, employers’ reliance upon contemporary gender ideology to structure their workplaces undergirds the problem of sex inequality and has created the need for an interventional statute like Title VII, a law which can and should be applied so as to negotiate and reshape this ideology. But Title VII has not been particularly adept at doing so, in part because those with the power to interpret the statute have failed to name gender ideology as sex inequality’s culprit, instead focusing solely on malicious intent and differential treatment by employers. If gender ideology underpins and explains people’s real life experiences of sex inequality, then it is gender ideology that should be named as the culprit by those seeking to enforce sex equality. Therefore, Title VII’s legal framework should be recast by courts such that it elicits a substantive debate in litigation about whether or not an actionable nexus exists between the plaintiff’s harm—his or her particular experience of injustice at work—and gender ideology. If a plaintiff can show that the defendant’s reliance upon or perpetuation of gender ideology is

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13. This Article argues on the premise that, in the face of a contradictory and inconclusive legislative history, courts are at liberty to interpret Title VII in response to increasingly sophisticated understandings of the meaning of sex discrimination. See, e.g., Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79 (1998) (stating that despite the fact that “male-on-male sexual harassment . . . was assuredly not the principle evil Congress was concerned with when it enacted Title VII,” the Court saw no justification in the statutory language for a categorical rule excluding same-sex harassment claims from the coverage of Title VII, because “statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”). This liberty to interpret makes space for courts to consider the underlying argument supporting this Article: That is, that “gender ideology,” as defined here, and its progeny, “sex stereotyping,” are not merely forms of sex discrimination, but rather, constitute the essence of sex inequality.
the source of his or her workplace harm, plaintiff's claim should be actionable as a Title VII sex discrimination claim.\textsuperscript{4}

Part I of this Article situates this argument in the context of competing lines of equality theories and feminisms. While not necessarily adopting or disavowing any particular strain of feminism, the validity of the legal framework argued for in this Article depends in large part on acceptance of the theory of Substantive Equality as articulated in the work of Catharine MacKinnon. Furthermore, the term “gender ideology,” as it is used in this Article, is in large part influenced by her assertion that sex inequality is the product of “gender hierarchy” (a system which assumes and reinforces masculine dominance and feminine subordination).\textsuperscript{15}

Part II analyzes four paradigmatic Title VII sex discrimination cases in order to demonstrate the general workability of the proposed gender ideology framework. In addition, this analysis demonstrates that each instance of discrimination would have been better addressed, for purposes of achieving sex equality, under this alternative framework. And this is so even when, perhaps especially when, the courts instead applied their current sameness/difference framework.

Part III proceeds by arguing that it is also gender ideology, and sex stereotyping in particular, that lies at the heart of the inequality experienced by homosexuals, and to some extent, transsexuals.\textsuperscript{16} Critically,

14. The question of whether a defendant's interface with gender ideology should ultimately sustain a finding of discrimination will ultimately hinge on a determination by the trier of fact that defendant's conduct in perpetuating an aspect of gender ideology is in fact endemic of sex inequality. This is the kind of determination suited for a trier of fact which has heard arguments from both litigants about whether the subversive nature of gender ideology has been perpetuated by the defendant's conduct.

15. Many litigants and their counsel (including MacKinnon) have already articulated their claims within a gender ideology framework, and some courts have already analyzed cases under this same framework. See, \textit{e.g.}, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). This Article is intended specifically for courts and counsel who have not adopted this reasoning, in an effort to convince them that a gender ideology framework can and should be consistently applied to Title VII sex discrimination claims.

16. Although this Article argues that creation of a “transsexual” category is problematic under a gender ideology framework, the debate over why a stereotyping analysis may or may not be appropriate in the case of discrimination against transsexuals is more complex than can be addressed here. For a thorough summary of the debate on this topic, see Chai R. Feldblum, \textit{Gay People, Trans People, Women: Is It All About Gender?}, 17 N.Y.L. Sch. J. Hum. Rts. 623 (2000). I only demonstrate here the applicability of the proposed framework to a few forms of sex discrimination (mainly, sex discrimination against women in Part II, sex discrimination against homosexuals in Part III, and sex discrimination against men who take paternity leave in Part IV). These forms are certainly not exhaustive and do not purport to encompass every type of sex discrimination claim litigated under Title VII. I encourage more literature to
sexual orientation discrimination must therefore be recognized by courts as prototypical sex discrimination: discrimination based on a man or woman’s failure to conform to stereotypical notions of masculinity or femininity. In advocating for this stereotyping framework to be applied to sexual orientation discrimination, Part III argues generally against the multiplication of categories as a method for addressing evolving forms of discrimination. Specifically, this section argues against the addition of the category “sexual orientation” to Title VII’s list of protected classes, not because sexual orientation discrimination is not real and should not be addressed, but because addition of that category perpetuates the faulty misconception that sexual orientation discrimination is somehow not about sex stereotyping, is not a form of sex discrimination, and, like “sex,” can also be adequately addressed by mere categorical comparison. Part III concludes that the addition of a sexual orientation category problematically allows courts to cling to a surface-level same-ness/difference discourse in sex equality law (i.e., by asking, “Are homosexuals treated differently than similarly situated heterosexuals?”), rather than pursuing a gender ideology analysis which more satisfyingly describes the experiences of inequality suffered by homosexuals.

Finally, Part IV uses men’s experiences of discrimination based on their decision to take paternity leave to demonstrate how a gender ideology framework more accurately describes and more effectively vindicates these men’s experiences with sex inequality as well.

In sum, in advocating that “gender ideology” provide the legal framework for Title VII sex discrimination litigation, this Article ultimately posits that a comparative categorical framework should no longer serve as the courts’ central tool of analysis. Instead, a comparative analysis should merely serve as one form of evidentiary proof. This alternative legal frame, focused on an inquiry into the subjugating effects of gender ideology, will allow courts to actually unpack the oppressive notions of masculinity and femininity that underpin sex inequality. It is this project of gender ideology analysis and criticism that must be engaged in by courts if equality litigation is to succeed at making more space for men and women to be less gendered and more fully human, more fully equal.  

17. As an important aside, I do acknowledge the postmodern concern that there are inherent conflicts in addressing problems of gender hierarchy through the law—an institution whose discourse is itself historically dominated by hetero-normative narratives and a masculine hegemony that remains largely naturalized and unacknowledged. Yet, as Carol Smart argues, law is nonetheless an integral site of struggle: “While it is the case that law does not hold the key to unlock patriarchy, it
The right to equality in American legal and political discourse is often described as the right to be treated with “the same consideration as anyone else,” with the Kantian notion of the individual as a rights-bearing entity echoing in the background. Ironically, however, Title VII’s demand that members of certain groups are to be protected from unequal treatment on the basis of their membership in that group has positioned the activity of legal grouping as a central concern in the enforcement of equality rights. For example, freedom from sex discrimination under Title VII is often formally framed as one’s right, as a member of the group woman to be treated the same as a given member in the group man. The framework is similar for race. In McDonnell Douglas Corp. v. Green, for instance, the Supreme Court held that a complainant in a Title VII trial establishes a prima facie claim of racial discrimination “by showing [first] that he belongs to a racial minority . . .” In essence, the validity of an individual’s claim that she had been discriminated against was imagined to hinge, first and foremost, on her ability to establish membership in a given protected class.

The advent of so-called “reverse discrimination” claims forced this group membership concept to evolve, however. It has been established, for example, that a man can make out a prima facie case for “reverse” sex discrimination if the evidence is sufficient to allow a factfinder to con-

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18. MacKinnon, Sex Equality, supra note 6, at 3.
19. See, e.g., Susanne Baer, Dignity or Equality? Responses to Workplace Harrassment in European, German, and U.S. Law, in DIRECTIONS IN SEXUAL HARASSMENT LAW 582, 594 (Catharine A. MacKinnon & Reva B. Siegal eds., 2004) (“In the United States, law against sexual harassment has been fought for by women who saw themselves as targets of discrimination, violated not only in their rights to bodily and psychological integrity, but in their rights as women . . . and because of their gender.”).
clude that the defendant had treated the plaintiff less favorably based upon a protected trait (i.e., his sex). And the Supreme Court affirmed in Oncale that “Title VII’s prohibition of discrimination ‘because of . . . sex’ protects men as well as women.” These holdings regarding a man’s right to sex equality echoed the individualist logic of Title VII jurisprudence as articulated years earlier in McDonald v. Santa Fe Trail Transportation Co. Thus two competing lines of equality theory—one based on group membership, the other based on individual rights—are now animating Title VII jurisprudence.

In an attempt to “reconcile” this tension between group rights and individual rights, courts have overwhelmingly responded with a vacuous and sterile solution: the similarly situated test. This test asks, as the central inquiry in most Title VII disparate treatment sex discrimination cases, “Has the plaintiff been treated ‘differently’ than a similarly situated individual of the opposite sex?” And this inquiry is then

22. See, e.g., Ladimarlo v. Runyon, 190 F.3d 151 (3d Cir. 1999).
24. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (emphasizing that Title VII prohibits the discharge of “any individual” and is not limited to discrimination against any particular group).
25. Title VII jurisprudence is sometimes crudely described as being conflicted between two competing theories of equality: Equal Treatment and Equal Opportunity. Equal treatment theory urges sex blind decision making, focuses on the individual instead of the group, and seems to discount the possibility of affirmative action. Equal opportunity theory, with its focus on the status of groups and patterns of subjugation and underrepresentation, allows for consideration of sex in decision making in order to remedy past and continuing effects of discrimination. Both have grounding in the text of Title VII. See Robert Belton et al., Employment Discrimination Law: Cases and Materials on Equality in the Workplace 5–6 (7th ed. 2004).
26. Circuit courts have demanded a “similarly situated” showing with varying levels of specificity and at different stages of trial. Some courts, for example, have required the plaintiff to prove as part of her prima facie case that she was treated differently than similarly situated employees who were not members of the protected group. See, e.g., Gains v. EchoStar Communications Corp., 148 F. App’x. 96, 98 (3d Cir. 2005); Spearman v. Ford Motor Co., 231 F.3d 1080, 1087 (7th Cir. 2000); Rutherford v. Harris County, 197 F.3d 173, 179 (5th Cir. 1999).

Under the Supreme Court’s methodology, pointing to a similarly situated employee the employer treated differently is just one way that a plaintiff may prove a prima facie case. See Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977):

Our decision ... [in McDonnell Douglas] ... did not purport to create an inflexible formulation. We expressly noted that ‘(t)he facts necessarily will vary in Title VII cases, and the specification ... of the prima facie proof required from (a plaintiff) is not necessarily applicable in every respect to differing factual situations.’ The importance of McDonnell Douglas lies,
dogmatically carried out without regard for how or if that treatment has either emblemized or perpetuated the problem of sex inequality.

Catharine MacKinnon has been particularly critical of the decontextualized character of the similarly situated analysis. This Formal Equality, or “Aristotelian” approach to equality, as she terms it, assumes as a starting point a structural equality that does not exist, and then proceeds to reason through discrimination cases using an abstract logic.\(^\text{27}\) Formal equality and its “similarly situated” methodology therefore does not investigate how “difference” is socially perceived through a lens of gender hierarchy; it does not acknowledge how social rankings are “artifacts of social power and location, social constructs that are deeply arbitrary rather than emanating from anything innate;” and it fails to recognize that promoting sex equality requires dismantling this socially constructed gender hierarchy.\(^\text{28}\) MacKinnon therefore argues instead for a Substantive Equality which understands sex inequality as a product of gender hierarchy and historical subjugation, and not “difference.” It is therefore gender hierarchy and not sex difference that must be dismantled if sex equality is to be achieved. And so it is gender ideology, and not some isolated bad actor with some identifiable evil motive, that Title VII litigation must identify and uproot.

If courts are to engage a substantive and not merely formalistic theory of equality in Title VII litigation, they must apply a legal framework which resolves the tension between group and individual theories of equality, and which also allows them to critically evaluate whether a

\begin{quote}
not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.” (emphasis added).
\end{quote}

Apart from whether a similarly situated showing is required for a plaintiff to establish a prima facie case, however, the Supreme Court has stated that the “critical issue” in a Title VII case, “is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J. concurring). This “critical issue” has been construed by courts as a question of similarly situatedness—of whether one sex has been treated differently than the other sex. See, e.g., infra Part IId (discussing Lyle)—which is a simplistic and flawed interpretation of the concept articulated by Justice Ginsburg. For example, employees can be “exposed” to differential disadvantage because of sex without being treated “differently” than a member of the opposite sex. See infra Part IId (discussing Lyle) and Part Ile (discussing Oncale). Furthermore, the “critical question” should be whether any person has been exposed to disadvantageous terms or conditions of employment because of sex, not whether some have suffered more or less than any other.

\(^{27}\) MacKinnon, Sex Equality, supra note 6, at 4–12.

\(^{28}\) MacKinnon, Sex Equality, supra note 6, at 7.
plaintiff’s experience is in fact emblematic of sex inequality. The remainder of this Article will test the workability of an alternative legal framework—a gender ideology framework—that seeks to accomplish these goals. The framework proposed here inquires not as to whether an employee is different or has been treated differently than a member of the opposite sex, but rather, whether she has suffered actionable harm because of gender ideology. In order to bring an actionable claim, a plaintiff must therefore situate her experience and frame the litigation in a way that is historically and contextually sensitive to the gendered assumptions, stereotypes, and accompanying realities that perpetuate masculine dominance and female subordination. In sum, this proposed framework for Title VII litigation requires a new central inquiry: Has plaintiff shown that gender ideology is the cause of the harm she has suffered? If so, impermissible sex discrimination can be established.

II. RECONCEPTUALIZING TITLE VII’S LEGAL FRAMEWORK

A. Gender Ideology and Sex Stereotyping Under Title VII

The U.S. Supreme Court recognized in Price Waterhouse v. Hopkins that Title VII’s prohibition on sex discrimination disallowed certain employment decisions to be made on the basis of “gender stereotype.” In writing for the majority, Justice Brennan famously stated: “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they...
matched the stereotype associated with their group." This statement seemed to prohibit more than the discrimination suffered by Ann Hopkins, whose employer “insisted” that she “walk more femininely, talk more femininely.” It also acknowledged discrimination against those who are harmed at work because of assumptions made about how a woman (or a man) stereotypically is in the world. Therefore, a woman who does not get hired because she walks femininely and talks femininely may also have a claim under Price Waterhouse.

Sex stereotypes and insistences that employees conform to them are common, ubiquitous, and paradigmatic of the gender ideology which works to maintain the status quo of masculine dominance and feminine subordination. By re-examining four Title VII sex discrimination cases, the following analyses will demonstrate the value of a judicial inquiry which focuses on gender ideology, and in so doing, the relative shortcomings of the sameness/difference inquiry the courts used. Had the courts in these cases applied a gender ideology framework, these sex discrimination claims would have been recognized as such and litigated in a manner that more effectively evaluates the problem of sex inequality.

B. Manhart

In City of Los Angeles, Department of Water & Power v. Manhart, women workers brought a Title VII disparate treatment sex discrimination claim for being required by the City pension plan to contribute more to the pension fund than men. The City defended the requirement on the basis that, as a class, women tend to live longer than men. Holding for plaintiffs, the Court stated that because many women, as individuals, would not live longer than men, those women were being unlawfully discriminated against (receiving smaller paychecks) because of their sex. And, it qualified, “the basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes.”

The Court acknowledged that “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” but then balks, because in this case, the generalization

31. Price Waterhouse, 490 U.S. at 251 (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”) (quoting City of Los Angeles, Dep’t. of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)).


33. Manhart, 435 U.S. at 709.
was “unquestionably true: Women, as a class, do live longer than men.”

In order to square this tension, the Court concludes that, employers can only comply with Title VII by being blind to all sex differences, declaring that, “[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”

What is not made clear by the Court’s opinion, however, is in what way, precisely, sex inequality was exacerbated by this particular distinction based on sex or, furthermore, how sex equality was realized by disallowing it. In contrast to the Manhart majority’s sex blind approach, a gender ideology framework would interrogate these questions by inquiring as to whether this employment decision emanated from and/or propagates a gender ideology which insists on feminine subordination.

Admittedly, this is a difficult foundational inquiry that is both normative and factual in nature. This inquiry requires the litigants to engage in a thoughtful debate about whether the “stereotype” that has been seized upon by the defendant is one that perpetuates a gender ideology of subjugation; it demands a sensitivity to the historical and cultural context of the institutions and individuals involved in the litigation; it requires conscious evaluation of the complex interplay between conduct, thought, ideology and experience; and it ultimately asks the trier of fact to make the difficult factual determination that a subjugating ideology has or has not been the cause of plaintiff’s harm, such that the defendant’s conduct constitutes discrimination. Nonetheless, it is this level of substantive inquiry that is required if litigation is to take the problem of sex inequality seriously—the problem of inequality is, after all and inescapably, both normative and factual.

In Manhart, it is evident that a pension plan which resulted in reduced pay-checks for the plaintiffs would be considered a significant enough change in the terms of plaintiffs’ employment to be actionable under Title VII if it were proven to have occurred because of sex discrimination. However, it is not obvious under a gender ideology analysis that the terms of the plan constitute sex discrimination because the notion that women live longer than men is not clearly a sex stereotype that is a bedrock of gender ideology’s presumption of male dominance. To argue this point, one might compare this “stereotype” about lifespan, seized upon by the Court, to those sex stereotypes that

34. Manhart, 435 U.S. at 707.
35. Manhart, 435 U.S. at 708.
36. See generally, Bazemore v. Friday, 478 U.S. 385, 395 (1986) (“Each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . .”).
have convincingly been argued to have sprung from a gender ideology which underpins male supremacy, such as: women are male sexual objects and servicers; women are weak and docile; women are vehicles of child bearing and the proper wards of child rearing. In comparison to these stereotypes, it is not immediately evident how the notion that “women, as a class, live longer than men” has been informed by gender ideology, reinforces feminine subordination, or has substantively contributed to the problem of sex inequality. However, this point is certainly open to debate and should be debated in court, by litigants in a Title VII case who are engaging substantively with the issue.

In other words, the Manhart decision is deficient not for its outcome necessarily, but for its process. The Court’s discussion in Manhart fails to interrogate why the specific generalization at issue—that women live longer than men—is endemic of sex inequality. Instead, the Court makes the formalistic assertion that any facial distinction based on sex difference is discriminatory, without ever investigating whether the distinction actually aggravates the problem of sex inequality. A gender ideology framework, on the other hand, demands that this inquiry into the nature and effect of the employer’s use of a given sex stereotype be conducted before concluding that discrimination has occurred. The Court in Manhart not only missed an opportunity to delve into a substantive discussion about the causes and manifestations of sex inequality, but it simultaneously seemed to foreclose the possibility that facial distinctions based on sex could ever be used to serve, rather than merely obstruct, the realization of sex equality. A gender ideology framework avoids this unnecessary result.

37. These are a few examples of “linchpin” issues of sex inequality—prime locations or original areas of vulnerability driving sex inequality in society. For a more extensive explanation of linchpin theory, see MacKinnon, Sex Equality, supra note 6, at 142–43.

38. For example, some contend that drawing any line on the basis of sex is invidious because it problematically reinscribes the salience of sex as a basis for distinction in a way that is essentializing. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1., 551 U.S. 701 (2007) (Kennedy, J., concurring). Alternatively, one might argue that the City’s facial distinction based on sex impermissibly perpetuates women’s historical disadvantage in the face of the reality that men and women do “even out” over the long run (as the City contested), therefore, any reduction in the pay of women as a class adds impermissible insult to the overarching reality that women are already economically disadvantaged as compared to men.
C. Lemons

As this alternative analysis of *Manhart* demonstrates, a gender ideology framework is sensitive to the reality that seeing sex (i.e., making facial distinctions based on sex) need not constitute "sex discrimination" if feminine subordination is not actually reinforced by the distinction. Accordingly, this framework is also sensitive to the inverse reality that sometimes it is necessary to see sex in order to address feminine subordination at all. In other words, sometimes failing to see sex difference is itself sex discriminatory.

In *Lemons v. City of Denver*, the District Court held, and the Appellate Court confirmed, that a class of plaintiffs made up of nurses did not have a Title VII sex discrimination claim despite their contention that the City of Colorado was paying persons employed in the nursing profession—a female dominated occupation—less than what persons doing comparable work in male-dominated occupations were being paid.\(^{39}\) The court acknowledged that history has created a lower pay scale for certain "female" occupations, and that women have often been discriminated against in higher paying occupations. Ultimately, however, the court concluded that these plaintiffs had not been discriminated against in the nursing profession itself, "because females outnumber males by a tremendous percentage."\(^{40}\) The court then applied a sameness/difference framework to conclude that Title VII does not mandate that employers pay the same salary to "different" professions, even if one is paid more for no reason other than being stereotypically "male" and one is paid less for no reason other than being stereotypically "female."\(^{41}\)

A gender ideology framework would force courts to proceed through the *Lemons* facts differently than did the Colorado court in this case. Again, the court's central inquiry would be: Has the defendant's subscription to or perpetuation of gender ideology caused the plaintiff's harm? In order to answer this question in a case like *Lemons*, where plaintiffs exemplify stereotypical generalizations (rather than defy them, as the plaintiffs did in *Manhart*), the court must decouple the experienced reality from the so-called "sex stereotype" and then evaluate that reality in its own right for the extent to which it is governed by gender

\(^{40}\) *Lemons*, 1978 WL 13938, at *5.
\(^{41}\) *Lemons*, 1978 WL 13938, at *5–7. By logical deduction, the court implies that men and women *would* have to be paid the same salaries if they were in the same profession.
ideology. In other words, gender ideology perpetuates sex stereotypes and punishes those who fail to conform to them; but in the process, gender ideology also has the power to inform reality—to coerce individuals into living out those stereotypes (without ever asking whether that is a life they would otherwise choose).

With that in mind, the reality exposed in *Lemons* is that most nurses are women. And the reality is that nurses are paid less than other professions of comparable worth. And gender ideology—not necessarily nature or the unadulterated logic of economics—has played an identifiable and integral role in creating that reality: because of its many assumptions about women, femininity and nurturance, gender ideology perpetuates the stereotype that “care work,” like nursing, is work that women innately can and want to do (even though it is paid less or nothing at all). In effect, commonly stereotyped as natural caregivers, women have found their greatest (sometimes only) opportunities to find work in “care giving” jobs. Those jobs involving care work, such as child care, teaching, therapy, and nursing, in turn offer low pay relative to

42. The Supreme Court has, arguably, already evidenced its ability to decouple stereotypes from reality and evaluate whether the defendant has relied on the gender ideology in a way that exacerbates sex inequality. In *Califano v. Webster*, 430 U.S. 313 (1977), an Equal Protection case, a social security provision allowed female wage earners to exclude from the computation of their average monthly wages three more lower-earning years than male wage earners. The Court explained that this (affirmative action-like) sex distinction was not motivated by a gender ideology or a stereotype about women—that it was not “the accidental byproduct of a traditional way of thinking about females”—but rather, that it was enacted to compensate for the “disparity in economic condition between men and women caused by the long history of discrimination against women.” *Califano*, 430 U.S. at 320. The Court was able to decouple the reality (women have made less than men) from the Plaintiff’s proposed “sex stereotype” (women cannot support themselves) and held that the distinction was not discriminatory. The Court was convinced that ignoring this reality would, in fact, exacerbate sex equality.

43. Postmodern feminists have critiqued the liberalist insistence that an individual is somehow above ideology, that she truly wields the capacity to make un tethered choices and exercise complete agency over her identity and opportunities. Susan Bordo, for example, argues that this understanding unrealistically reproduces “a construction of life as plastic possibility and weightless choice, undetermined by history, social locations, or even individual biography.” Susan Bordo, *Material Girl: The Effacements of Postmodern Culture*, 29 Mich. Q. Rev. 653, 657 (1990).

44. The *Lemons* court makes this finding definitively, though it declined to rule in favor of the plaintiffs. 1978 WL 13938 (finding that male-dominated occupations pay more for comparable work than is paid in the occupations dominated by females). See also, ELAINE SORENSEN, *COMPARABLE WORTH: IS IT A WORTHY POLICY?* 3, 7, 9 (1994).

their requirements for education and skill. Thus the gendered division of labor, and the economic inequality that exists between the sexes, have both been convincingly argued to be intimately linked to gender ideology: this sex stereotype—about women, their femininity, and their inherent care-giving affinity—has resulted in fewer opportunities being afforded to women to work in areas outside of the economy of care, as well as the economic undervaluation of the care work they do. And so (arguably) it is the City's perpetuation of gender ideology that has caused the distinct harm of lower pay for equal work that was endured by these plaintiffs.

As this analysis demonstrates, within a gender ideology framework plaintiffs are at liberty to identify the operative elements of gender ideology—its sex stereotypes and problematic assumptions—and then argue for the way in which the defendant's dependence upon, or perpetuation of that ideology has caused the plaintiffs' particular harm. The above line of reasoning shows that there is a potentially actionable nexus in *Lemons* between gender ideology, the City's actions, and the plaintiffs' harm. However, it must be acknowledged that this argument is difficult to articulate in a manner that will convince the trier of fact that an ideology—and not merely some isolated "bad actor" alone—is the legal cause of these plaintiffs' lower paychecks. And furthermore, as the *Lemons* opinion evidences, it is difficult to convince the trier of fact that the City should be held liable for institutionalizing that ideology. But at the very least, this argument does not fall flat simply because it does not fit within the sameness/difference framework (where "different work" can always be paid less without violating equality law). At the very least,


47. Cross-cultural studies support that in almost all cultures, women and men do different work, although what women do in one culture men often do in another. Yet whatever it is that men do in a culture is what is most valued. This supports the argument that there is an unconscious undervaluation of any work done by women. See, e.g., Sherry B. Ortner, *Is Female to Male as Nature Is to Culture?*, in WOMAN, CULTURE, AND SOCIETY 67 (Michelle Zimbalist Rosaldo & Louise Lamphere eds., 1974); Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157, 178 (Rayna R. Reiter ed., 1975).

48. See *Lemons*, 1978 WL 13938 (positing that Title VII was not intended to "abrogate the laws of supply and demand," that what plaintiffs sought was an "unrealistic" restructuring of the economy, and so finding for the City in light of the fact that its wage system "was set up in absolute good faith"). In response to this reservation, however, it bears reminding the trier of fact that Title VII was engineered with the unambiguous intention of holding employers responsible for the larger social problem of inequality where their policies and practices worked to perpetuate it, even if they are not exclusively to "blame" for it.
in escaping the confines of the sameness/difference framework, this gender ideology framework promises to elicit an important substantive debate, in a public legal forum, about whether and how certain gendered assumptions embedded in our economy in fact perpetuate sex inequality, and whether Title VII can and should be used to address them.

D. Lyle

Inquiry into the role gender ideology, and in particular, “sex stereotyping,” plays in a Title VII sex discrimination claim becomes particularly applicable to hostile environment sexual harassment cases because it provides a satisfying answer to the pivotal doctrinal question: Has the harassment occurred “because of sex?”49 In Lyle v. Warner Bros. Television Productions,50 the plaintiff brought a sex harassment claim against the television studio where she worked.51 Plaintiff testified to the following regarding her experiences with the writing staff while she was at work:

The writers regularly discussed their preferences in women and sex in general. Chase spoke of his preferences for blonde women, a certain bra cup size, “getting right to sex” and not “messing around with too much foreplay.” Malins had a love of young girls and cheerleaders . . . Malins constantly spoke of his oral sex experiences . . . Malins had a ‘coloring book’ depicting female cheerleaders with their legs spread open; he would draw breasts and vaginas on the cheerleaders during the writers’ meetings . . . Malins frequently used a pencil to alter portions of the name ‘Friends’ on scripts so it would read ‘penis’ . . . Chase, Malins, and Reich spoke demeaningly about another actress on the show, making jokes about whether she was competent in sexually servicing her boyfriend. They also

49. Generally speaking, in order to make out a hostile work environment claim under Title VII, the plaintiff has the burden of showing that she was subjected to harassment “because of sex,” that was “unwelcome” and “severe or pervasive” enough to affect a term, condition, or privilege of employment. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).
50. 132 P.3d 211 (Cal. 2006).
51. California’s FEHA statute essentially mirrors Title VII’s prohibition on sexual harassment, which prohibits sexual harassment on the basis that it is an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual’s sex[.]” 42 U.S.C. § 2000e-2(a)(1).
referred to her infertility once and joked she had ‘dried twigs’ or ‘dried branches in her vagina.’

Despite the lewdness of defendants’ behavior, the court held that there was no triable issue as to whether the writers had engaged in harassment “because of . . . sex” because: 1) they had not intended their sexual antics and sexual talk to make plaintiff uncomfortable, and 2) women and men were not treated disparately in this environment. In other words, women and men were “equally” exposed to the writer’s sexual “humor” and so there was no discrimination “because of sex.”

This lack of facial distinction of treatment on the basis of sex—so integral to the Lyle court—is essentially irrelevant in a gender ideology analysis. In a case like Lyle, the court would instead inquire as to whether the harassment endured by the plaintiff was caused by defendant’s dependence upon or perpetuation of gender ideology. There is a great deal of literature that would argue vehemently that the sexual objectification of women is a bedrock of a gender ideology which seeks to maintain female subordination—sexually and otherwise.

52. More specifically (and graphically), plaintiff’s declarations stated that Malins, Chase, and Reich, “would say that what they liked was ‘a woman with big tits who could give a blow job;’ ” the writers “would for hours on end make lewd and offensive drawings of women;” they “would also commonly sit around and bang their hands on the bottom of the desk to make it sound as though they were masturbating;” Malins would say “he gets to hang out with them [two of the actresses], get rich, dream about fucking them and yet nobody bothers him when he’s out in public;” Malins told a story “about a woman that when she had his penis down her throat had a gag reflex” and Malins thought she “was going to throw-up” on it; the writers made plaintiff sit “around waiting to go home” while they “were sitting around pretending to masturbate and continually talking about schlongs;” Reich “said that [one actress’s] pussy was full of dried up twigs and said that if her husband put his dick in she’d break in two;” Chase told plaintiff “he could have ‘fucked’ one of the actresses” but said it’s “not like she asked me to bang her in the ass;” Chase mentioned on at least two occasions that “he would have liked to have anal sex with [the same actress];” Chase “once rhetorically asked the group, of [one actress and her then boyfriend], ‘do you think they fuck in the dressing room;’ ” and the “blatant use of obscene language and flagrant discussions about personal sex lives occurred at least four days per week while [she] worked on ‘Friends’ and continued up until at least two days before [her] termination.” 132 P.3d at 217–19.

53. See 132 P.3d at 229.

54. See 132 P.3d at 229.

55. See, e.g., Andrea Dworkin, Intercourse (1987); Catharine A. MacKinnon, Toward a Feminist Theory of the State 3, 130 (1989) (“Sexuality is the social process through which social relations of gender are created. . . . Dominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity . . . . Being a thing for sexual use is fundamental to it.”); Susan T. Fiske & Peter Glick, Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change, 97 J. Soc. Issues 97 (1995) (theorizing that
ideology informed these writers' tendency to incessantly allude to the sexual penetration and domination of the female body—conduct which reaffirmed their masculinity. Their perpetuation of gender ideology created a workplace environment wherein men and masculinity dominated, and where the plaintiff was constantly reminded of her subordinate “nature” as, ultimately and only, a sexual object. Whether the plaintiff suffered an actionable harm is a different factual question altogether, related to the separate doctrinal question of “severity or pervasiveness”—an issue not addressed in this Article. But the genesis of plaintiff’s alleged harm was clearly gender ideology.

This argument would likely be countered by the Defendant employer’s insistence that this sexual banter was a product of harmless male bonding, primal and natural libido, and lust, and not of some socially constructed (or changeable) gender ideology. Kerry Segrave, in a pointed rebuttal to that assertion, argues:

Sexual harassment has nothing whatsoever to do with libido and lust. It has everything to do with exploiting, objectifying and dominating women. It is a manifestation of the extreme loathing many men bear toward women . . . . Linking sexual harassment with libido lays the groundwork for excusing, accepting and forgiving male violence against women. If sexual harassment is libido, then men cannot help it . . . . If it is libido, then nature is the culprit, and what can be done about nature?

Regardless of whether the trier of fact accepts the plaintiff’s argument or sides with the defendant, within a gender ideology framework the legal

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56. In one study, for example, 20 percent of men said they harassed women only in the company of men friends, indicating that sexual harassment of women operates at least at some level, as a method of male bonding, providing a common ground over which men can, together, assert and reaffirm their masculinity. See Cheryl Benard & Edit Schlaffer, The Man in the Street: Why He Harasses, in FEMINIST FRAMEWORKS 70, 71 (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed. 1984).

57. Whether a plaintiff has suffered actionable harm in the sexual harassment context is to be determined under the “severe or pervasive” standard of Title VII. After determining that the harassment was not “because of sex” since men and women were equally exposed to the banter, the court in Lyle determined that the behavior of the writers was also not severe or pervasive. 132 P.3d at 287–95. This is a separate doctrinal question not addressed in this Article.

and factual debate presented by the case would not focus, as the court did in *Lyle*, on whether men were also exposed to the “humor” to which the plaintiff was exposed. That comparative question becomes irrelevant to making the determination of whether the defendant’s dependence upon and perpetuation of gender ideology has caused the plaintiff’s harm.

**E. Oncale**

In *Oncale v. Sundowner Offshore Services, Inc.*, Joseph Oncale was employed on an oil rig with an eight-man crew where he was repeatedly physically assaulted in a sexual manner, subjected to sex-related, humiliating actions, and threatened with rape.59 These incidents were the basis of his hostile environment sexual harassment claim. Justice Scalia, writing for the majority, held that, “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant are of the same sex.”60 The Court further stated that on remand in this case and in others that may come to follow, same sex sexual harassment could be shown to be “because of sex,” if (for example) the harassers on board were gay and motivated by sexual desire; if the men on board were generally hostile to men in their workplace; or if there was comparative evidence plaintiff could show about how the alleged harassers treated members of both sexes in a mixed-sex workplace.61 Ironically, it is not likely that any of these hypothetical frameworks offered by the Court would actually have served to vindicate Joseph Oncale’s sexual harassment claim if that case had been heard on remand.62 A gender ideology analysis, however, would very likely reveal how and why Oncale’s experience is a clear example of discrimination, caused by (or endured “because of”) his sex.

A gender ideology framework would address the “because of sex” question by inquiring into the connection between the harm Oncale suffered and the role of gender ideology in the defendant’s conduct. This

60. *Oncale*, 523 U.S. at 79. The Court wrote in *Oncale* not to come to a judgment on the merits of the case, but rather, only to make clear that same-sex sexual harassment is actionable under Title VII; the case was remanded to the court below for a judgment on the merits. *Oncale*, 523 U.S. at 89.
62. Oncale did not argue that a) his harassers were gay and motivated by sexual desire (they were presumably straight); b) that they were hostile to men in the workplace generally (not all men were subject to this kind of harassment); or c) that women and men were treated differently on the oil rig (there in fact were no women on board).
inquiry is particularly important in the context of male-on-male sex harassment claims, where the nexus between the plaintiff’s harm and sex inequality is more attenuated in the cultural imagination than it is, say, in a case like Lyle. The following line of argument highlights just one way that Oncale might have established that the harassment and abuse he suffered at the hands of his coworkers was caused by gender ideology.

The narrative not brought to light in the Oncale decision is that Joseph Oncale was one of the smallest, youngest men on the oil rig. He had a very small stature, standing only five feet tall and weighing about 125 pounds. All of the harassment he suffered was highly sexualized, if not, evidently, feminizing. Toni Lester, for one, posits that Oncale was harassed because he was a man who failed to conform to cultural stereotypes about how men are supposed to act and look in our society. Oncale’s coworkers were policing stereotypical masculine norms, and Oncale was punished for the threat his failure to conform posed to those norms. In other words, if he was not a masculine man, he would not be allowed to walk around that oil rig as a man at all, and so he was tirelessly feminized, reminding everyone aboard, again and again, that he was not a "real man." Oncale’s physical appearance challenged an ideology which seeks to reinscribe the naturalness of the coincidence between the male sex and stereotypical masculinity. Oncale’s coworkers, in turn, sought to discipline him for his undermining of gender ideology’s tenets. This harassment was, therefore, prototypical sex discrimination. As Katharine Franke explains it,

sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex, not because it is sexual and not because men do it to women, but precisely because it is a technology of sexism. That is, it perpetuates, enforces and polices a set of gender norms that seek to feminize women and masculinize men.

In other words, the harassment endured by Oncale was sex discrimination because it occurred as a result of a gender ideology which demands the enforcement of masculine dominance and gender/sex coincidence:

64. Id.; see also, Toni P. Lester, Gender, Nonconformity, Race, and Sexuality: Charting the Connections 91 (2002).
65. Id.
SEX EQUALITY’S UNSIGNED NEMESIS

Oncale was subordinated and abused by his coworkers, the mouthpieces of gender ideology in this case, on account of his departure from normative conceptions of masculinity. The court’s inability to make categorical comparisons based on sex is therefore not pivotal for answering the question of whether sex discrimination occurred in this case—no women needed to be on board Oncale’s oil rig for the problem of sex inequality to be exacerbated by the normative demands of gender ideology.

III. The Problem of Multiplying Categories

A. An Argument Against the Addition of “Sexual Orientation” to Title VII’s List of Protected Classes

Judicial insistence on the centrality of a sameness/difference analysis to resolving questions of impermissible discrimination has incentivized persons to organize their claims around their group identity in order to have their rights vindicated. Plaintiffs, forced to argue that they have been treated differently as members of a given protected group (even though they are “the same” as any person in any other group), have thus created a kind of “politics of identity”\(^{67}\) surrounding U.S. equality law. The Gay Rights movement provides a prime example of how identity politics have developed in response to the growing salience of legal categorization in anti-discrimination law.

Mainstream political movements for gay rights in the U.S. have addressed the lack of legal protections for homosexuals by “attempting to meet the requirements of various legal doctrines on their own terms;”\(^ {68}\) that is, by insisting that because of an essential lack of difference between homosexuals and heterosexuals, one’s membership in the group “homosexual” cannot, under a system of equality, disentitle her to rights to which she would otherwise be entitled. The debate surrounding

\(^{67}\) Identity politics is defined in the Stanford Encyclopedia of Philosophy, as a phrase which “has come to signify a wide range of political activity and theorizing founded in the shared experiences of injustice of members of certain social groups. Rather than organizing solely around belief systems . . . identity political formations typically aim to secure the political freedom of a specific constituency marginalized within its larger context. Members of that constituency assert or reclaim ways of understanding their distinctiveness that challenge dominant oppressive characterizations, with the goal of greater self-determination.” \textit{Identity Politics, Stanford Encyclopedia of Philosophy} available at \url{http://plato.stanford.edu/entries/identity-politics/} (updated Nov. 2, 2007).

\(^{68}\) \textsc{MacKinnon, Sex Equality, supra} note 6, at 978.
whether or not to include the category “sexual orientation” in Title VII’s explicit protections highlights the broader problem which is being engaged in this Article: that is, the problem of understanding inequality in strictly categorical and comparative terms rather than as a product of gender ideology.

To begin with, it must be acknowledged that there is a strong rationale for adding sexual orientation to a list of statutorily protected classes in light of the axiomatic truth that that which is not named cannot be addressed.9 In other words, by failing to name sexual orientation as a basis for discrimination in a broad call for equality, there exists the danger that the disadvantage incurred by homosexuals will not be addressed at all and that the specificities of their discrete experiences will be silenced and rendered invisible. Additionally, if in reality, recognition of a certain group is tied to allocation of rights, resources, or obligations, a withholding of recognition may not only be considered a failure of the legal system to offer recourse to that group, but is an act of discrimination itself.70

Moreover, law—when understood as an institution engaged in the production of “political knowledge”—has the discursive power to frame, form, and in Foucault's terminology, “govern” identities, relationships, and material experiences of inequality.71 Legal decision making about which forms of discrimination should be recognized thus occupies an important space in an important moment within inequality discourse.72 In naming sexual orientation an impermissible basis of distinction, the law sends a message to homosexuals that their voices have been heard, their experiences have been recognized, and their equality has been prioritized; it politicizes discrimination against homosexuals by calling it a public wrong and not merely a private conviction; it denaturalizes certain discriminatory cultural impulses and assumptions about homosexuality and deems them socially constructed and changeable. And in enabling legal recourse, this naming provides more people with

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72. See id. at 55 (“Discourse” in the Foucaultian sense, as a process of “producing new forms of knowledge, inventing different notions and concepts that contribute to the ‘government’ of new domains of regulation and intervention.”).
more political currency and social capital to combat their personal experiences of inequality in a public forum.

On the other hand, creating a legal class of "homosexuals," like creating a class of "women" or "racial minorities," can be problematic in practice. First, class categorization itself is inescapably essentialist, as it is perhaps incapable of doing justice to the diverse experiences of the individuals it seeks to round up and describe. The European Commission's project on Measuring Discrimination highlights in its report the inherent inability of categories to capture the dynamic of human identity. It observes,

the reality that hides behind facially simple concepts such as . . . 'sexual orientation' is characterized by deeper and wider diversity than the essentialist use of these terms in legal texts or everyday speech would lead one to expect. Thus there are no tight fits between concepts and categories on the one hand and the empirical reality on the other.  

Nonetheless, as the report itself concedes, a pragmatic approach to tackling issues of discrimination means that certain compromises may need to be made during the process of categorization in order to address the problem at all.

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73. Measuring Discrimination, supra note 70, at 80–81.
74. See Measuring Discrimination, supra note 70, at 81. These compromises must also be made in order to accept a gender ideology approach to the problem of sex inequality. The gender ideology framework proposed here demands that sex discrimination claimants establish a nexus between gender ideology and the harm they have suffered at work. Therefore, the shared experiences of discrimination against classes of people must inevitably be discussed in court. How, for example, can one make a claim that a sex stereotype has caused harm without discussing the ideas society has about distinct groups of people, i.e., men and women? This framework is therefore admittedly essentializing in that it reifies the category "sex" (and in this section, the category "sexual orientation") by using that category as a reference point for organizing legal arguments. This framework does not assume, however, that just because categories, such as sex, sexual orientation, etc., are currently significant organizers of human experience, experienced in real ways by real people, that they are not also socially constructed and changeable. For example, in regards to the sexual orientation category, George Chauncey argues that hetero-homosexual binarism is a "stunningly recent creation. . . . Only in the 1930's, 1940's and 1950's did the now-conventional division of men into 'homosexuals' and 'heterosexuals,' based on the sex of their sexual partners, replace the division of men into 'fairies' and 'normal men' on the basis of their imaginary gender status as the hegemonic way of understanding sexuality." George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890–1940, at 13 (1994). Within the proposed gender ideology framework, categories are being used as a discussion point, yes, but they are also being scrutinized in an attempt to denaturalize them and to show how their
Thus, perhaps a stronger argument against the formation of a “sexual orientation” category within Title VII is not a criticism of categorization in the abstract, but a criticism focused on the effects of creating such a legal classification. One particularly problematic effect is the way in which a sexual orientation category may serve to obscure the content and meaning of the category that already is named in Title VII, namely, “sex.” As mentioned supra in Part I, the U.S. Supreme Court recognized in *Price Waterhouse v. Hopkins* that Title VII’s prohibition on sex discrimination disallowed certain employment decisions to be made on the basis of “gender stereotype,” stating that, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” Later, in *Oncale*, the Court again reaffirmed its understanding that sex and gender are separate concepts when it declared that gender harassment is not necessarily sexual and thus may be actionable as sex discrimination regardless of the sex of the parties involved.

The natural progression of this more sophisticated understanding of gender as a social construct would seem to result in recognition by the courts that those harms which plaintiffs endure because of normative conceptions of gender performance clearly are “because of” sex. But lower U.S. courts have failed to make this conceptual leap in full, perhaps because should that leap be made, all discrimination on the basis of homosexuality (an inherently nontraditional performance of masculinity or femininity) would be actionable under Title VII. Instead, sexual orientation discrimination has been cast as an essentially different “issue” than sex discrimination—one is about homosexuals, the other about women.

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unquestioned stability has perpetuated inequality. And within a Title VII framework where gender ideology is the main tool for analysis of sex discrimination claims, a plaintiff’s claim may be vindicated regardless of his membership in a given category, and more importantly, regardless of whether that category describes his reality (see supra Part II.C) or fails to encompass it (compare supra Part II.B). This framework thus discusses categories in an effort to destabilize them.

75. 490 U.S. 228, 251 (1989).
77. See *Mackinon, Sex Equality*, supra note 6, at 1068–69 (“When perceived and punished as gay men and lesbian women, they are discriminated against for flouting gender hierarchy, for failing to conform to male-dominant society’s requirements for women and femininity, men and masculinity.”).
What this category-driven approach misses, however, is an understanding that sex discrimination is not essentially about women, and sexual orientation discrimination is not essentially about homosexuals; rather, both forms of discrimination are a manifestation of the hierarchy of masculinity over femininity and society’s insistence on normative gender performance in order to maintain it. As Hilary Charlesworth observes, “[r]eading gender to be essentially about women does not capture the relational nature of gender, the role of power relations, and the way that structures of subordination are reproduced.” Instead, discrimination on the basis of sexual orientation can be explained, at least in part, by the threat same-sex sexual relationships pose to the “naturalness” of gender roles in that hierarchy. As MacKinnon explains:

Male inviolability and female violation are cardinal tenets of gender hierarchy. If men can do to men what men do to women sexually, women’s sexual place as man’s inferior is not a given, natural one, because a biological male can occupy it.

Failure to recognize—legally and otherwise—this connection between sex inequality and sexual orientation discrimination may be a fatal mistake in combating both problems: such a failure reveals a fundamental misunderstanding of the way in which gender ideology disciplines how we identify ourselves and relate to one another, and how gender ideology governs our experiences of injustice and inequality. Therefore, if we find it necessary to add the category of “sexual orientation” as a protected class under Title VII, we risk losing sight of the fact that gender ideology is the common source of homosexuals’ and women’s experiences of inequality. To conceive of these experiences of inequality as

79. See MacKinnon, Sex Equality, supra note 6, at 1068.
81. MacKinnon, Sex Equality, supra note 6, at 1068.
82. John Stoltenberg takes a stance against the concept of “sexual orientation” altogether, arguing in the process that “[c]linging to ‘sex difference’ is clinging to male supremacy. And our ‘sexual orientation’ is one of the ways we’ve learned to cling. . . . Insistence on having a sexual orientation in sex is about defending the status quo, maintaining sex differences and sexual hierarchy.” John Stoltenberg, What is “Good Sex”?, in Refusing to Be A Man: Essays on Social Justice 89, 93 (UCL Press rev. ed. 2000) (1989). In other words, for so long as we exist within a gender ideology whereby heterosexuality defines men’s masculinity, “sexual orientation” exists to discipline the gender performance of one’s sex. Therefore, the category of sexual orientation “actually and ultimately is sex-based.” Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CALIF. L. REV. 1, 336 (1995).
symptomatic of different cultural anxieties is to misunderstand both; to pull them together under one conceptual and legal framework is to more effectively combat them by targeting their common nemesis.

Not only is the proposed gender ideology framework wide enough to address discrimination against both women as a group and homosexuals as a group, it is in fact essential to combating these forms of inequality. It follows, then, that in order for a statute like Title VII to address what it purports to address—sex equality in the workplace—litigation surrounding this Act must focus not on whether a given individual falls into a protected class and has been treated differently because of his or her or membership in that class, but rather, on whether a complainant is suffering due to gender ideology's enforcement of its vision of gender normativity. And although the U.S. has yet to attempt formally this sort of a legal recasting, other countries have begun to loosen the hold of the dominant categorical discourse by incorporating elements of a gender ideology framework into the law and policy surrounding governmental enforcement of equality.

B. The EU's Application of a Gender Ideology Framework

The EU took a progressive step in recognizing sex inequality as a product of gender ideology when the European Parliament issued a Directive on “the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.” The Directive stated:

[T]he scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

The Directive was passed in recognition of the discrete experience of inequality endured by transsexuals at work. Yet, instead of creating a new legal category of “transsexuals” as a protected class, the Directive

83. See Valdes, supra note 82, at 324 (“[G]ender is the central device for the simultaneous oppression both of women and of sexual minorities under hetero-patriarchy.”).
conceptualized discrimination against transsexual individuals as a matter of sex discrimination.

The U.S., on the other hand, has not yet recognized a protection under Title VII for transsexuals as such, though it has struggled within its categorical framework to determine whether the discrimination they incur is a form of sex discrimination. In *Doe v. United Consumer Financial Services*, the court reasoned that a transsexual woman who failed to “pass” as a biological women was fired for one of two reasons: either 1) because she was a transsexual, in which case her claim is precluded under Title VII, or 2) because her appearance and behavior did not conform to the employer’s gender expectations, in which case she would have a valid sex discrimination claim under Title VII. Perhaps because the term “transsexual” (much like the term “homosexual”) has become so salient and familiar that it is imagined to describe a distinct “class” of persons, this court was unable to recognize that discrimination against transsexuals might nonetheless still stem from sex discrimination itself, and not some new form of “transsexual discrimination.”

Just as has been true for homosexuals, who have sought recognition for “sexual orientation” as a legal category deserving of equality law protections, this kind of constrained legal reasoning compels transsexuals to seek legal recognition and protection not merely as men or women but as “transmen and transwomen,” so that they might have access to government enforcement of equal treatment. The multiplication of these categories—demanded by courts and produced by identity politics—permits courts to continue to conceive of “sex discrimination,” “sexuality discrimination” and “gender identity discrimination” as matters of dissimilar treatment of different “classes” rather than as manifestations of gender ideology.

A gender ideology approach to sex discrimination recognizes that because sex inequality is dependent upon an ideology which enforces the dominance of masculinity over femininity (and only incidentally, men over women) it imposes punitive consequences on those who destabilize its naturalness and inevitability, namely, transsexuals and homosexuals. The EU has already demonstrated the tenability of framing discrimination on the basis of “gender reassignment” or transsexuality as a question

86. See Mackinnon, *Sex Equality*, supra note 6, at 175–76.
of sex equality. So too can U.S. courts make this conceptual leap, legally construing sexual orientation discrimination to be both source and symptom of sex inequality, and therefore, as an instance of sex discrimination under Title VII.\textsuperscript{88} This recasting performs the crucial job of challenging the stability of gender and sex as inextricably entwined bedfellows, and in the process, creates space for more claims against gender policing—the true nemesis of sex equality—to be brought and won.

IV. Male Caretakers and Gender Ideology

If the proposed framework is to illuminate how gender ideology manifests itself in people’s experiences of sex inequality at work, it must not hypocritically imagine itself to be limited to those “classes” of people thought to represent the underprivileged. Otherwise, this proposal would both revivify the categories it seeks to destabilize and fail to address the tension between the group-based and individualist theories of equality that it claims to reconcile. Therefore, the argument that sex inequality is in fact maintained by gender ideology’s insistence on strict gender performance must acknowledge that all individuals—even wealthy, white, heterosexual men—could make out valid sex discrimination claims that also serve to combat sex inequality.

Not surprisingly, because Title VII’s current legal framework focuses predominantly on whether or not women and men are being treated differently in the workplace, the men who have seen the most success in bringing sex discrimination claims have presented themselves as victims of reverse-discrimination.\textsuperscript{89} Male plaintiffs have typically argued that an employer provided women with “preferential treatment” by taking sex into account in making an employment decision.\textsuperscript{90} Because the alternative framework proposed here focuses not on comparisons between men and women but rather on whether or not the alleged harm has been caused by gender ideology, most of these reverse-discrimination claims should fail: the “harm” suffered by these men is caused by the employer’s attempt to reverse the subordinating effects of gender ideology, not by its uncritical perpetuation of gender ideology.\textsuperscript{91} In fact, many of these re-
verse discrimination claims ironically perpetuate the harms and injustices created by gender ideology and sex inequality. Under a gender ideology approach, the claims more likely to succeed would be those made by a man—no matter his race or sexuality—who has suffered punitive consequences in the workplace because of his failure to live up to strict norms of masculinity.

As was mentioned supra in Part II’s discussion of Lemons, much of the discrimination women in particular have suffered in the American workplace has been tied to gendered notions of care.92 Whether this discrimination be due to pregnancy (or potential pregnancy), “conflicting” family responsibilities, or general assumptions about women’s natural domesticity, the gendered economy of care has rendered many working women, in the eyes of the courts, not “similarly situated” to their male counterparts.93 As new generations take to the American workplace, however, new notions about the relationship between work and family, and sex roles within those institutions, are being negotiated. The U.S. Congress has responded to this evolution by passing the Family and Medical Leave Act, a non-gender specific protection for those taking leave to care for family members. The Act was passed with the purported goal of reassuring workers that they will not be asked to choose between continuing their employment and meeting their personal and family obligations.94 Even major American law firms have provided a number of weeks of paid leave for new fathers, a benefit which has in fact been utilized by the applicable workforce.95 This trend suggests that there may be a shift of meaning from an overwhelmingly female-gendered ethic of care towards a more gender-neutral concept of whose job it is to do the work of caring.

stantively equal. This argument is, again, informed by MacKinnon’s theory of substantive equality. See MacKINNON, SexEquality, supra note 6, at 282 (“If gender inequality is fundamentally abstract, any sex-based distinction . . . reinforces that system to women’s detriment. . . . Alternatively, if gender inequality is fundamentally substantive—is about keeping women down—official sex distinctions that rectify and compensate for women’s second-class status may change it.”).

92. See Gary S. Becker, A Treatise on the Family 56 (enl. ed. 1991) (“[T]he housework responsibilities of married women may be the source of much of the difference in earnings and in job segregation between men and women.”).

93. See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974); see generally Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job, 26 Harv. Women’s L.J. 77 (2003).


The unquestioned propriety of an economic system which overwhelmingly values "men's work" as superior to "women's work" is considered by many feminists to be a "linchpin issue" in explaining sex inequality. This linchpin theory posits that to challenge gendered notions of care may in fact destabilize and denaturalize the system of gender hierarchy under which women are subordinated as a class. Thus, the theory goes, should men's role in caring for children be recognized more seriously in the workplace, gendered assumptions about care may be significantly destabilized. In defense of this proposition, Charlesworth contends that achieving sex equality means more than allowing women to access an institution, such as work. It means transforming the structures and assumptions of that institution and "[i]t would involve working to change men's behavior as much as women's." Men's changing behavior within the institutions of work and the family would allow women to escape the confines of their role as caretakers, both in actuality and in the cultural imagination, and help pave the way for them to achieve equal access to the benefits of employment. It is in this capacity that paternity leave policies are disruptive to a system of gender hierarchy which depends on naturalized sex stereotypes.

If this theory is true, and whose job it is to care really is a question of sex equality, then a gender ideology framework should vindicate the claim of a man who feels he has been discriminated against at work for taking paternity leave, or perhaps because his employer fails to provide any paternity leave at all. Rather than staking his claim on differential treatment as between himself and the women at work, a gender ideology framework would recast his claim as a workplace injustice that he has incurred because of his failure to conform to masculine norms. His claim could be made regardless of the fact that "similarly situated" women are treated as he is in the workplace (i.e., "all people taking time off for family face consequences"), because that is not the question being asked by the court. All that is relevant is whether that harm is caused by the defendant's subscription to or perpetuation of gender ideology.

If one has doubts about the ability to incorporate such a "complex" theory into a workable legal framework, the EU would again prove them wrong. The EU demonstrated its ability to apply a gender ideology framework to its equality legislation when it recognized paternity leave

96. See MacKinnon, Sex Equality, supra note 6, at 142.
97. See MacKinnon, Sex Equality, supra note 6, at 147; see generally Williams & Segal, supra note 93.
99. Williams & Segal, supra note 93 at 161–62.
as a sex equality issue. It stated in Directive 2006/54 that rights to paternity leave would also be protected under the mandate to end sex discrimination. The Directive states:

Those Member States which recognize such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.  

By enforcing a man’s right to take paternity leave and return to his job without suffering punitive consequences, and furthermore, by framing this right as a central concern in achieving sex equality, the EU took a progressive step towards vindicating its mandate against sex discrimination.

Conclusions

Gender ideology wields the power to discipline and restrict individuals’ abilities to contribute to society, access resources, and fulfill their potentials. It is for this reason that combating sex inequality has become a national initiative. But the disheartening realization that we are not capable of simply imagining ourselves out from under this ideology—that we instead must do the hard work of disassembling it—is disempowering, overwhelming, even depressing. Furthermore, because unraveling the complex interplay between gender ideology and experiences of inequality is such a tough intellectual, political, and legal task, we might be tempted instead to revert back and cling, however unreasonably, to the seemingly simpler formula of categorical comparison. But the nature of inequality is complex, and to imagine that it can be disposed of in the abstract, without examining the impact of ideology on persons and institutions, is impractical.

No doubt, handing the trier of fact the power to make legally sanctioned statements about the admittedly difficult philosophical question of whether gender ideology has caused the plaintiff’s harm, could and likely will result in some factual determinations that many will find counterproductive to achieving sex equality. Nonetheless, it is arguable that

some (or even many) wayward determinations by the trier of fact will be less destructive to the project of achieving sex equality than is the current gender-blind discourse. Eliding this gendered analysis and implementing instead a sterile categorical framework has resulted in stagnation in courts, who ultimately seem to be stepping away from the prospect of multiplying protected categories in order to account for plaintiffs’ harms. Instead, courts have generally either given up, or else simply denied that sex inequality is the source of the conflict in front of them, since if the problem cannot be “solved” through their abstract comparisons, it must simply not be a problem of sex inequality.

Gender ideology has been most persuasive and destructive in its ability to remain invisible, even as many facially obvious forms of sex discrimination have been successfully addressed by the law. Consequently, the law must respond: gender ideology must now be dug out from our social subconscious and moved to the forefront of our legal and political discussions about sex inequality if we hope to continue to progress. Because of the law’s failure to expose gender ideology to the heat of public criticism and scrutiny by the trier of fact, the ideology’s faulty assumptions, its unreasonable demands, and its great power to shape experiences of injustice are left dangerously undisturbed. And so the law must now change to adapt to an inequality that can no longer be successfully contested by categorical comparisons.

Finally, if the prospect of such change gives one pause, solace might be found in what Justice Scalia himself once argued: that the need for considering such policy consequences in the evolution of our interpretations of law is so fundamental that it has been enshrined in Latin, Ratio est legis anima; mutate legis ratione mutatur et lex: “The reason for the law is its soul; when the reason for the law changes, the law changes as well.”