Decoding Civility

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Decoding Civility
Kerri Lynn Stone†

ABSTRACT

If women outnumber men in graduate schools and are entering professional and other workplaces in unprecedented numbers, and if Title VII has aimed to eradicate workplace discrimination for almost fifty years, why are women still so woefully underrepresented at the highest levels of power, leadership, wealth, and prestige in the contemporary workplace?

This Article is about abusive speech in the workplace. It explores how the expression of bias in the workplace has evolved and been shaped by antidiscrimination legislation and jurisprudence. It identifies a category of biased speech that eludes prosecution under Title VII. Moreover, this Article seeks to provide explanations as to why this category of speech goes uncaptured by the law. It posits that changes in workplace behavior and demographics, as well as narrow judicial interpretations of the law, are responsible for the law’s failure to recognize and acknowledge the nexus between some abusive workplace speech and actionable Title VII harassment and “because of” claims. Is it the case that the strictures of Title VII, the benefits of free speech, and the unobstructed marketplace of ideas make this the appropriate result? Or is it the case that Title VII’s objectives simply cannot be met by mechanically relegating some biased speech in certain contexts to the realm of the unlawful, while allowing other, possibly equally corrosive, speech to taint and poison workplace operations and experiences?

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† Associate Professor, Florida International University College of Law. J.D., New York University School of Law; B.A., Columbia College, Columbia University. Thanks are due to Professors Howard Wasserman, M.C. Mirow, and Ediberto Román for their thoughtful comments. I would also like to thank my research assistants, Stephanie Harris and Ben Hefflinger, for all of their able assistance, as well as my husband Josh Stone and my son Dylan Stone for making the experience of writing this piece possible and fun.
I. INTRODUCTION

For years, federal courts have repeatedly opined that Title VII of the Civil Rights Act of 1964 must be “prevent[ed] . . . from expanding into a general civility code.”¹ Despite Title VII’s broad remedial goal of eradicating discrimination in the workplace, courts believe that it is important to separate major harms from trivial ones.² The precise contours of the statute’s coverage have always eluded and perplexed courts trying to discern whether an employer took an adverse employment action or whether workplace harassment may be deemed to be “because of” one’s protected-class status.³ Courts have also struggled to determine whether verbal comments rise to the level of actionable discrimination or are just part of the day-to-day give and take among coworkers. Supervisors with caustic or even abusive styles of dealing with subordinates

1. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); see also Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Morris v. City of Colorado Springs, 666 F.3d 654, 663-64 (10th Cir. 2012); Tepperwien v. Entergy Nuclear Operns., Inc., 663 F.3d 556, 568 (2d Cir. 2011); Barber v. C1 Truck Driver Training, LLC, 656 F.3d 782, 798 (8th Cir. 2011); Vance v. Ball State Univ., 646 F.3d 461, 472 (7th Cir. 2011); Wilkie v. Dep’t of Health & Human Servs., 638 F.3d 944, 953 (8th Cir. 2011); Jensen v. Potter, 453 F.3d 444, 449 (3d Cir. 2006).


3. See Amy L. Wax, Disparate Impact Realism, 53 WM. & MARY L. REV. 621, 701 (2011) (acknowledging the court’s confusion as to whether Title VII covers unconscious as well as conscious disparate treatment); Sandra F. Sperino, Rethinking Discrimination Law, 110 MICH. L. REV. 69, 108 (2011) (discussing “the current confusion over whether McDonnell Douglas survived the 1991 amendments to Title VII”); Kerri Lynn Stone, Clarifying Stereotyping, 59 U. KAN. L. REV. 591, 610-11 (2011) (stating that lower courts remain confused “about what type and strength of evidence could buttress a Title VII claim”); Lindsey E. Sacher, Note, Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine Under Title VII, 61 CASE W. RES. L. REV. 603, 613 (2010) (noting that “[w]hile the abundance of employment discrimination cases brought pursuant to Title VII has given courts and scholars ample opportunity to develop some consistency in that area of law, Title VIII doctrine remains relatively unexplored, creating substantial confusion . . . .”).
raise the same question. Indeed, the harm conferred upon women by “verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults,” termed “microaggressions,” has been identified for years.

Because people’s behavior shapes the law, which in turn shapes and guides people’s behavior, antidiscrimination law must keep pace with the evolution of bias in the workplace—but it has not always done so. Title VII-anchored harassment law, derived from the statute’s prohibition in the 1980s, and further expounded and refined in the 1990s and 2000s, has made clear that “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”

This Article is about abusive speech in the workplace. It explores how the expression of bias in the workplace has been shaped by antidiscrimination legislation and jurisprudence. It examines the benefits to and drawbacks of Title VII’s creation of a veneer of civility, or at least political correctness, in the workplace, despite the persistence of discriminatory bias in the thoughts and underlying actions of crucial decision makers. It identifies a category of biased speech that eludes prosecution under Title VII because it neither rises to the requisite level of severity or pervasiveness to be actionable harassment, nor

5. See Derald Wing Sue, Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation xvi-xvii (2010) (attributing the first use of the term “microaggressions” to Chester Pierce in his work with black Americans in the 1970s; see Chester M. Pierce et al., An Experiment in Racism: TV Commercials, in TELEVISION AND EDUCATION 62 (Chester M. Pierce ed., 1978)); see also Peggy C. Davis, Law as Microaggression, 98 YALE L.J. 1559, 1561 (1989) (discussing racial microaggressions within the court system); Daniel Solórzano et al., Critical Race Theory, Racial Microaggressions and Campus Racial Climate: The Experiences of African American College Students, 69 J. NEGRO EDUC. 73 (2000).
7. See Shawn Clancy, Note, The Queer Truth: The Need to Update Title VII to Include Sexual Orientation, 37 J. LEGIS. 119, 124 (2011-12) (“Oncale expressly acknowledged that Title VII’s discrimination protections advance beyond Congress’s original scope, expanding employee protections as our understanding of discrimination likewise evolves.”).
12. See infra Part II.A.
13. See infra Part II.B.
enables a finding that an act occurred “because of” a plaintiff’s race, sex, or other protected-class status.\textsuperscript{14} This category of speech, however, exacts a toll on the individuals’ morale, productivity, perceptions of themselves, and perceptions of others in the workplace, which seems contrary to the intentions of Title VII.\textsuperscript{15} Similarly, it might explain (at least in part) the seeming disconnect between the diverse, integrated classes that graduate from top schools each year and enter the workforce, and the portrait of those who emerge as captains of industry, political leaders, and generally senior, powerful members of the workforce.\textsuperscript{16}

Moreover, this Article seeks to explain why this category of speech goes uncaptured by the law.\textsuperscript{17} It posits that narrow judicial interpretations of the law have resulted in the law’s failure to recognize some categories of abusive workplace speech that should, but do not, create actionable Title VII harassment and “because of” claims.\textsuperscript{18} The Article concludes that courts could find that these categories of speech are discriminatory in nature without creating a “civility code.”\textsuperscript{19}

This Article utilizes examples from cases brought in both so-called white-collar and blue-collar workplace contexts. There has been widespread debate about whether and how much to factor in workplace contexts when determining whether alleged harassment is in fact actionable, particularly with respect to the requirement that actionable harassment be severe or pervasive and affect a reasonable person in the victim’s shoes.\textsuperscript{20} In any event, this Article will maintain focus on abusive speech that falls short of the standard for what is actionable in any given context, irrespective of whether that standard is consistent across contexts.

Although this Article is about the effect of this abusive speech on gender equality in the workplace, there are surely implications for its effect on racial equality in the workplace. In fact, this Article adverts to several racial harassment cases to make various points. Despite the fact that racial harassment and sexual harassment have key differences in their expression, perception, and treatment by courts, which are outside the scope of this Article, the use of these race cases can be instructive with respect to some of the proffered points.

A workplace culture tainted by bias uncaptured by existing law will invariably mean a skewed, imbalanced population will rise to the top and arrive at the helm. This may happen because of overt bias that current jurisprudence is not capturing.\textsuperscript{21} Alternatively, it may happen because of subtle, masked, or even

\textsuperscript{14} See infra Part II.C.
\textsuperscript{15} See infra Part II.A-C.
\textsuperscript{16} See infra Part III.A-B.
\textsuperscript{17} See infra Part III.C.
\textsuperscript{18} See infra Part III.D.
\textsuperscript{19} See infra Part IV.
\textsuperscript{21} See infra Part IV.A.
less than conscious bias—both reflected and fuelled by biased speech—that operates to pollute selection and promotion processes.\textsuperscript{22} It may also happen because large numbers of members of certain classes, often women and minorities, become weary from exposure to speech and attitudes that erode confidence and dignity at work while eluding ensnarement by the law.\textsuperscript{23} They may also interpret a lack of civility as a signal that a supervisor is a bad actor (or at least one who has trouble controlling negative feelings and lets them manifest themselves through behavior) and harbors other antisocial views, such as views on members of protected classes, which will manifest themselves overtly or subtly. Many members of these groups thus may shrink back from opportunity and advancement, and ultimately, weed themselves out of the workplace.\textsuperscript{24}

This Article seeks to identify and open up discussion and debate about this lawful, yet deleterious, category of speech. To the extent that one has not, under current interpretations of the law, been harassed or discriminated against because of a protected-class status, has Title VII done its job if individuals are nonetheless barraged with decision makers’ biased beliefs and subscriptions to stereotypes? Or can Title VII recognize that the voicing of these beliefs and stereotypes can be discriminatory, without creating a civility code?

\section*{II. BACKGROUND}

\subsection*{A. Title VII and Harassment}

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual’s race, color, religion, sex, or national origin.\textsuperscript{25} Initial claims under the statute, later termed claims for disparate treatment, alleged simple, facially disparate treatment on the basis of protected-class status.\textsuperscript{26} Later, the Supreme Court acknowledged an action for disparate impact discrimination in which a plaintiff could allege, without demonstrating discriminatory intent, that a facially neutral policy or practice, whose maintenance was a business necessity, conferred a disparate and ultimately discriminatory impact on a protected class.\textsuperscript{27}

In 1986, the Supreme Court recognized that a cognizable cause of action could lie in cases of sexual harassment.\textsuperscript{28} Thus, a plaintiff could demonstrate unlawful discrimination by showing that her “workplace [wa]s permeated with

\begin{itemize}
\item \textsuperscript{22} See infra Part III.C.
\item \textsuperscript{23} See infra Part III.
\item \textsuperscript{24} See infra Part III.D.
\item \textsuperscript{26} See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 953 (D.C. Cir. 1981); Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979).
\item \textsuperscript{28} Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).
\end{itemize}
discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." A typical sexual harassment plaintiff must prove the following elements:

1. that she (or he) is a member of a protected class;
2. that she was subjected to unwelcome sexual harassment;
3. that the harassment was based upon sex;
4. that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment;
5. that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and
6. that some basis for employer liability has been established.

B. How Title VII Helped to Make Some Abusive Speech Taboo

Just as behavior shapes the law by precipitating and demonstrating a need for legislation, so, too, does the law shape behavior. By creating social norms and awareness and setting the parameters for how rules will operate, law renders certain behavior socially taboo and incentivizes people to find ways around the rules. So has been the case with Title VII. As each progressive decade passed, the notion that explicitly hateful or harassing behavior was forbidden further crystallized. With each new frontier of class-animus-based or class-exclusionary behavior came, albeit sometimes slowly, a concomitant announcement that the law would be interpreted to capture the behavior and render the perpetrator liable.

Prior to the passage of Title VII, racial, gendered, and other epithets and

31. See supra note 6.
32. See Change Social Norms: Introduction, CTR. FOR APPLIED RES. SOLUTIONS, http://www.youthbingedrinking.org/strategies/norms.php (last visited July 22, 2012) ("Social norms are standards of behavior that prevail in our culture. They are shaped either consciously or unconsciously by our parents' attitudes and beliefs, peer influences, school rules, law enforcement policies, religious affiliations, cultural traditions, the mass media, advertising, and marketing practices.").
33. See Kevin Leo Yabut Nadal, Responding to Racial, Gender, and Sexual Orientation Microaggressions in the Workplace, in PRAEGER HANDBOOK ON UNDERSTANDING AND PREVENTING WORKPLACE DISCRIMINATION 23, 23 (Michele A. Paludi ed., 2011) ("Given that political correctness has become omnipresent in contemporary times, it is less acceptable for people to be overtly racist, sexist, or heterosexist. Individuals may still hold prejudices on the basis of race, gender, sexual orientation, and other identities, however, that manifest unconsciously in their interactions with others."); BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE 96 (2007) ("In the private-sector workplace, I can say, perhaps no less glibly but also no less appropriately, that you have no right to free speech except when you do.").
34. See infra Part II.C., IV.
stereotypes were often considered socially, culturally, and professionally acceptable. After its passage, however, society learned that such speech, once anchored to an adverse employment action, could serve as the “smoking gun”—evidence from which a trier of fact would conclude that the underlying motivation for an action was, in fact, unlawful discrimination. Inasmuch as certain speech about the very presence of women in the workplace, such as labeling a job as one for a “lady receptionist” or insisting that a subordinate sleep with her supervisor, was once taken for granted as funny, commonplace, and acceptable, Title VII has slowly sowed the seeds of awareness that such behavior is socially unacceptable and unlawful. Examples of this are countless.

Title VII and the judge-made doctrines that aid in its interpretation have had to evolve to capture and eradicate increasingly more sophisticated discriminatory speech and behavior. By the early 1970s, the Supreme Court had announced the disparate impact theory of Title VII liability, recognizing that a facially neutral policy or practice could still disproportionately impact a protected class. This sent a clear message to employers that even if they were able to disguise animus or intentional discrimination with a facially neutral policy or practice, the law would capture the behavior, and its adverse effect would be deemed “because of” protected-class status. Later, in 1986, the Court

35. See Navah C. Spero, Transgendered Plaintiffs in Title VII Suits: Why the Schroer v. Billington Approach Makes Sense, 9 CONN. PUB. INT. L.J. 387, 411 (2010) (“Before the [sic] Title VII was passed in 1964, it was permissible to discriminate against women and black people based on stereotypes about their ability or appropriate social roles.”); Susan M. Omilian & Jean P. Kamp, Theory and Concept of Illegal Sex Discrimination, in SEX-BASED EMPLOYMENT DISCRIMINATION § 1:2 (2012) (“Assumptions about the differences between men and women, whether or not they were valid, could have been, the Court recognized, the basis for an employer’s practice prior to the passage of Title VII of the Civil Rights Act of 1964 and similar laws.”); see, e.g., Bazemore v. Friday, 478 U.S. 385, 395 (1986).

36. See Anne Lawton, The Meritocracy Myth and the Illusion of Equal Employment Opportunity, 85 MINN. L. REV. 587, 603 n.76 (2000) (“The Texaco race discrimination case illustrates the prevailing concept of discrimination as overt bias. Until The New York Times broke the story of the secret tape recordings of Texaco executives allegedly referring to black employees as ‘[f]ucking n[*]ggers’ and ‘black jelly beans,’ the class action race discrimination lawsuit against Texaco received limited media attention . . . [t]he racial epithets, however, provided the ‘smoking gun’ for the race discrimination plaintiffs—‘real’ evidence of conscious, overt, and negative bias against black Texaco employees.” (citation omitted)); Jennifer L. Levi, Misapplying Equality Theories: Dress Codes at Work, 19 YALE J.L. & FEMINISM 353, 375 n.98 (2008) (“Examples of direct evidence, or ‘smoking guns,’ include ‘epithets or slurs uttered by an authorized agent of the employer, a decisionmaker’s admission that he would or did act against the plaintiff because of his or her protected characteristic, or, even more clearly, an employer policy framed squarely in terms of race, sex, religion, or national origin.” (citation omitted)).

37. See, e.g., Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001); Priest v. Rotary, 634 F. Supp. 571, 582 (N.D. Cal. 1986) (“Ms. Priest established a prima facie case by showing that Rotary grabbed her, touched intimate parts of her body, tried to kiss her, rubbed his body on hers, picked her up and carried her across the bar room, [and] made sexually suggestive comments to and about her . . . .”)

38. See Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (“Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).
held that even if a supervisor does not tangibly harm an employee by dismissing or otherwise excluding her from the workplace, he can still violate Title VII by rendering her working environment rife with sex-based abuse and ridicule. The notion that propositioning or otherwise making a female subordinate feel uncomfortable at work because of her sex was unacceptable also appeared throughout popular culture. Workplace trainings, social discourse, and the media began to reference sexual harassment and to highlight the unacceptability of this behavior.

With the 1990s came clarification that same-sex harassment was cognizable and that sexual desire did not need to underlie actionable workplace harassment. During this time, Congress also codified the notion that where a decision is made for both a lawful, permissible reason and a discriminatory, unlawful reason, liability will nonetheless inhere. These and other ideas caused people to think further about what they said and to whom they said it in the workplace.

With the advent of the 2000s came a new cause of action for family responsibility discrimination, a form of discrimination perpetrated against women with young children. This was significant because the cause of action delineated a specific subset of a protected class as warranting additional protection. It construed comments expressing attitudes of doubt or reservation about the capabilities of women with young children as evincing unlawful discrimination “because of sex,” even where plaintiffs were passed over in favor of other women without small children.

Further, courts recognized the so-called “cat’s paw” theory, under which a decision-maker who lacked knowledge of a plaintiff’s protected-class status could nevertheless engage in discriminatory decision-making to the extent that her decision was fuelled, tainted, or otherwise informed by information or

39. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (“Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.” (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982))).
41. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (“The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the “conditions” of the victim’s employment.”).
42. See 42 U.S.C. § 2000e-2(m) (2012) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).
44. See id.
45. See id.
reports that contained others’ biases against protected-class members. Thus, the speech and attitudes of not only decision-makers, but of evaluators, coworkers, and others who “reported on” an employee became relevant. Moreover, although sexual orientation and gender identity are still not protected classes under federal law, the swell of legislation passed at the state and local levels that protects gay, lesbian, bisexual, and transgender individuals from workplace discrimination indicates a sharper societal and professional awareness of discrimination against these classes. This awareness has, to some extent, permeated corporate and workplace culture. It has thus influenced public discourse—the ever-increasing realm of that which is socially taboo to say at work—and workplace employee trainings, among other things.

Despite all of the progress that employment discrimination law has made, it continues to cling irrationally to the precept that Title VII is not a civility code, leaving it tolerant of some of the most nefarious workplace speech and conditions. In the name of not prohibiting general or “neutral” workplace vulgarity and subtly expressed generalized attitudes, the law has turned its back on employees who are alienated, humiliated, and inhibited at work “because of” their protected-class status. Although U.S. courts are cautious not to create a civility code or provide a remedy for discrimination that is merely “in the air,” other countries have recognized a right to maintain human dignity in the workplace and are thus taking steps to eliminate workplace bullying. In the United States, these types of measures are becoming more recognized in the area of education and interactions among children. Is the workplace shielded from this type of progress because of a few stray and amorphous comments in Supreme Court decisions of the past?

C. “Discrimination in the Air”

In 1989, the United States Supreme Court found that Ann Hopkins was unlawfully denied partnership at Price Waterhouse because of her gender. The

46. See, e.g., EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 484 (10th Cir. 2006) (acknowledging other courts’ recognition of the cat’s paw theory, which, “[i]n the employment discrimination context . . . refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action”); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998).

47. Id.


49. See infra Part IV.

evidence there, the Court said, clearly demonstrated that the partners’ perception of Hopkins was colored by the fact that she was a woman, thus making her a victim of gender stereotyping.51

One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language.” Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but much more appealing lady ptr [sic] candidate.” But it was the man who . . . bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision to place her candidacy on hold who delivered the coup de grace: in order to improve her chances for partnership, [he] advised, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”52

Price Waterhouse argued that “Title VII does not prohibit discrimination ‘in the air’53 [and is] violated only if the discrimination was a ‘but for’ cause of an adverse employment decision.”54 The Court flatly rejected the notion that this was a case in which discrimination was merely “in the air,” agreeing with Hopkins that discrimination was actually “brought to ground and visited upon an employee.”55 Although Congress later amended Title VII to permit employer liability in cases where discrimination was “a motivating factor for any employment practice,”56 the precept that “discrimination in the air” is not actionable has persisted.57

The notion of what “discrimination in the air” means has not been uniform or consistent.58 In 1988, Ann Hopkins conceded in her brief that Title VII’s

51. Id. at 235.
52. Id. (internal citations omitted).
54. Id. at 21-22.
56. 42 U.S.C. § 2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).
57. See, e.g., Randle v. LaSalle Telecomm., Inc., 697 F. Supp. 1474, 1479 (N.D. Ill. 1988) aff’d, 876 F.2d 563 (7th Cir. 1989) (“As with negligence, discrimination ‘in the air, so to speak, will not do.’”); Harris v. City of Santa Monica, 56 Cal. 4th 203, 231 (2013) (“Were it otherwise, the causation requirement in section 12940(a) would be eviscerated . . . [i]t does not prohibit discrimination ‘in the air.’”); Williams v. United Dairy Farmers, 20 F. Supp. 2d 1193, 1199-1201 (S.D. Ohio 1998).
58. See infra notes 61-64 and accompanying text.
prohibitions are directed at conduct or employment practices, not thoughts. She noted that the district court below had “expressly rejected judicial involvement in insignificant matters and said that courts were not responsible for ‘polic[ing] every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex.’” Nonetheless, Hopkins prevailed in her case. But, the precise reasons for her victory went unarticulated.

Since then, courts have considered the term “discrimination in the air” to mean many different things. One court used it to mean discrimination that is not voiced explicitly, but rather inferred from looking at who has gained access to a workplace. Another court used the term to refer to discrimination that did not actually cause harm to any individuals. Yet another court used the term to mean discrimination that is not expressed by a person with decision-making authority in a context that would implicate him or her in unlawful discriminatory behavior. Finally, the term has also been used to describe weak, “tepid” evidence of discrimination.

The fact of the matter is that the comments made about Ann Hopkins represented discrimination that truly was “in the air.” These comments revealed that those around her held and expressed views and expectations of women that

60. Id. at 30.
   Kemplin’s second “piece” of evidence is that Gould’s history of discrimination is “evident from looking around the work place,” and that “no one coming into the company could be described as aged or overweight.” We find that these self-serving statements are simply not probative evidence that Williams’ stated reasons for choosing Freed over Kemplin was pretextual. We will not deny summary judgment on the grounds that Kemplin alleges there is “discrimination in the air.”

   Continental maintains that it “met its burden of proving that no one in Pittsburgh was affected by any alleged discriminatory policy . . . [and] thus, any presumption as to each Plaintiff and each class member disappeared and there was no basis for any remedy for anyone.” Continental moves too fast too fast. While the “discrimination in the air” concept is relevant to an individual’s entitlement to relief, it does not affect the presumption that arises upon proof of a discriminatory policy.

   The time, place and circumstances under which these remarks were made are not stated, nor are they alleged to have been made by persons who had the authority to terminate his employment. . . . Such comments, which may conceivably be construed as age-biased generally, do not bolster, much less support, Plaintiff Chiang’s claim. Discrimination in the air, so to speak, will not do.

would systematically disadvantage Hopkins as she interacted with, worked for, and was evaluated by them. \(^{65}\) Ann Hopkins, however, was fortunate because she could show a direct nexus between this expressed discrimination and the adverse employment decision that befell her. \(^{66}\) However, as the Court observed, “[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision.” \(^{67}\) Rather, “[t]he plaintiff must show that the employer actually relied on her gender in making its decision.” \(^{68}\) But, the Court announced, “[i]n making this showing, stereotyped remarks can certainly be evidence that gender played a part.” \(^{69}\) Notwithstanding, the Court found that Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. \(^{70}\)

Thus, the comments were inextricably linked to the adverse action. \(^{71}\)

Context, however, is crucial. In Hopkins’s case, the comments were somewhat of a “smoking gun,” made at the time of the actual decision-making juncture of the partnership. \(^{72}\) All too often, however, because of specific details—who made the comments, when the comments were made, who the comments were made about, and in what context—discriminatory beliefs voiced in the workplace are viewed as too attenuated from the adverse action at issue to qualify as evidence sufficient to put before a trier of fact or sustain a victory for the plaintiff. \(^{73}\) Moreover, this dilution of the speech’s potency as evidence of

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65. See supra note 52 and accompanying text.
66. See supra note 55 and accompanying text.
68. Id.
69. Id.
70. Id.
71. Id. (“This is not, as Price Waterhouse suggests, ‘discrimination in the air;’ rather, it is, as Hopkins puts it, ‘discrimination brought to ground and visited upon’ an employee.”) Id.
72. See id. at 256.
73. See generally Natasha T. Martin, Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace, 40 Conn. L. Rev. 1117, 1120 (2008) (“Efforts to explore the circumstantial terrain for meaningful markers of discriminatory conduct have . . . diminished the statute’s effectiveness as a shield for workers from the venom of discrimination. Hence, the courts have created various loopholes that allow organizations to . . . escape liability for workplace discrimination.”); Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 205-06 (describing the increased inappropriate use of summary judgment and the erosion of the fact finder’s role in federal employment discrimination cases, such that the efficacy of antidiscrimination laws are substantially undermined); Sandra F. Sperino, A Modern Theory of Direct Corporate Liability for Title VII, 61 Ala. L. Rev. 773, 791-92 (2010) (discussing the stray remarks doctrine and its deleterious effect on employment discrimination cases); Kerri Lynn Stone, Shortcuts in Employment Discrimination Law, 56 St. Louis U. L.J. 111, 123-41 (2011).
discrimination is furthered when the adverse action occurs (1) in a context in which other, nondiscriminatory reasons for the adverse employment action are evident, and (2) under circumstances in which the workplace population, comprised of people both affected and not affected by the action, is so diverse that it is not clear whether an individual has been treated in a given way “because of” his or her protected-class status. In this way, speech that is toxic to individuals and to workplaces eludes capture by the law—even after an adverse employment action befalls someone who is the target of such speech.

This speech may very well be the only admissible evidence of the discriminatory beliefs of those who populate and govern the workplace. Moreover, discriminatory sentiments in the workplace are sometimes unaccompanied by an adverse employment action. In such a case, the only Title VII theory that a plaintiff distressed by such speech could sue under is that of harassment. To the extent that the speech does not meet the rigorous requirements that harassment jurisprudence has set forth, especially the requirement that it be deemed “severe or pervasive,” it will not be rendered actionable. In this way, true discrimination “in the air” may have a palpably deleterious effect upon workplace interpersonal relations, communication, and culture/ethos, but still go unregulated by Title VII.

III. WHERE ARE WE TODAY?

A. The Gap

It is important to realize that we are in a very critical moment in the history of the civil rights movement. On one hand, it is significant that in certain

[hereinafter Stone, Shortcuts] (documenting several shortcuts used by Judges, often at the summary judgment stage, to dismiss employment discrimination cases, including, the same actor inference, the stray comment doctrine, and various temporal nexus requirements); Kerri Lynn Stone, Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law, 77 Mo. L. Rev. 149, 174-82 (2012) [hereinafter Stone, Taking in Strays] (examining the stray remarks doctrine, and stating, “|this mal-formed, misplaced doctrine has caused systemic harm to employment discrimination plaintiffs.”); Michael J. Zimmer, Slicing & Dicing of Individual Disparate Treatment Law, 61 La. L. Rev. 577, 585 (2001) (describing how the court’s “slicing and dicing” of the probative value of plaintiff’s evidence of discrimination has made it very difficult for plaintiffs to succeed in bringing disparate treatment claims under the McDonnell Douglas approach).

74. See, e.g., Villalpando v. Salazar, 420 F. App’x 848, 852-54 (10th Cir. 2011); McFadden v. Ballard Spahr Andrews & Ingersoll, LLP, 611 F.3d 1, 5 (D.C. Cir. 2010); Hairston v. AK Steel Corp., 162 F. App’x 505, 510 (6th Cir. 2006); Spearmon v. Sw. Bell Tel. Co., 662 F.2d 509, 512 (8th Cir. 1981).


76. See supra note 27 and accompanying text.

77. See supra note 28-29 and accompanying text.

78. Id.

79. Id.

80. See Brief for Petitioner, Price Waterhouse v. Hopkins, supra note 53.
respects, members of protected classes have been afforded access to education and opportunity at historically unprecedented levels. In fact, the gap between the ratio of females to males enrolled in college has only grown since 1991, with women now comprising the majority (56 percent) of college students (estimated to number about 11.3 million female students). In 2011, 64.6 percent of male recent high school graduates were enrolled in college, whereas 72.3 percent of similarly-aged women were enrolled. According to the National Center for Education Statistics, the number of women in post-baccalaureate programs has exceeded the number of men since 1988, and between the years 2000 and 2010, the number of women in these programs increased by 62 percent, while the number of men increased by only 38 percent. Even among part-time post-baccalaureate students, the number of women increased by 26 percent, compared to a mere 17 percent increase among men.

Some schools have taken action to maintain a more gender-balanced student body. In 2010, it was reported that college leaders admitted that their schools were giving an admissions “boost” to male applications in order to better

81. *Fast Facts*, U.S. DEPARTMENT OF EDUCATION, INSTITUTE OF EDUCATION SCIENCES, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=98 (last visited June 3, 2013) (“The percentage of American college students who are Hispanic, Asian/Pacific Islander, and Black has been increasing. From 1976 to 2010, the percentage of Hispanic students rose from 3 percent to 13 percent, the percentage of Asian/Pacific Islander students rose from 2 percent to 6 percent, and the percentage of Black students rose from 9 percent to 14 percent. During the same period, the percentage of White students fell from 83 percent to 61 percent.”); Richard Perez-Pena, *U.S. Bachelor Degree Rate Passes Milestone*, N.Y. TIMES (Feb. 23, 2012), http://www.nytimes.com/2012/02/24/education/census-finds-bachelors-degrees-at-record-level.html (“For many years, colleges have enrolled and graduated more women than men, and a historic male advantage in higher education has nearly been erased. In 2001, men held a 3.9 percentage-point lead in bachelor’s degrees and 2.6 percentage points in graduate degrees; by last year, both gaps were down to 0.7 percent.”); U.S. DEPT. OF LABOR, *College Enrollment and Work Activity of 2011 High School Graduates*, BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR (Apr. 19, 2012), http://www.bls.gov/news.release/hsgec.nr0.htm/ (“The college enrollment rate of Asian graduates (82.2 percent) was higher than for recent white (66.6 percent), black (58.2 percent), and Hispanic (70.3 percent) graduates”).


83. *College Enrollment and Work Activity of 2011 High School Graduates*, supra note 81 (“For 2011 graduates, the college enrollment rate was 72.3 percent for young women and 64.6 percent for young men.”).


85. *Id.*
balance gender ratios in admitted classes. These leaders defended their actions by noting that male and female students alike prefer balanced gender ratios. It was even reported that if Vassar College were to accept equal percentages of each sex that applied, female students would outnumber male students by more than two to one. According to *U.S. News and World Report*, numerous schools have applied preferences, admitting male and female students at sometimes very different rates in an attempt to strike a better balance. Bemoaning trends like these, one *New York Times* opinion piece asked “[w]hat messages are we sending young women that they must . . . be even more accomplished than men to gain admission to the nation’s top colleges?” This is quite a change from 1970, when 58 percent of college students were male. Further, projections indicate that the disparity between qualified male and female applicants to higher education will only increase with time.

Women have also made tremendous strides and gains in fields that have been historically dominated by men. For example, the percentage of women enrolled in law school increased from 7 percent between 1969 and 1970 to 47 percent between 2011 and 2012. Overall, as of 2010, 8.8 million women earned their master’s degrees, compared to 7.2 million men. In medical

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87. Id.
88. Id.
89. Alex Kingsbury, *Many Colleges Reject Women at Higher Rates Than for Men*, U.S. NEWS & WORLD REPORT, June 17, 2007, available at http://www.usnews.com/usnews/edu/articles/070617/25gender.htm (detailing that “[u]sing undergraduate admissions rate data collected from more than 1,400 four-year colleges and universities that participate in the magazine’s rankings, U.S. News has found that over the past 10 years many schools are maintaining their gender balance by admitting men and women at sometimes drastically different rates.” The article also noted that schools like Pomona, Boston College, Wesleyan University, Tufts, and the College of William and Mary tend to tip the scale in favor of boys when it comes to maintaining a balanced student body. The reason for this is because “[f]rom the early grades on up, girls tend to be better students. By the time college admissions come into the picture, many watchers of the ‘boy gap’ agree, it’s too late for the lads to catch up on their own.”).
92. THOMAS D. SNYDER & SALLY A. DILLOW, NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2010, 409 (2011), available at http://nces.ed.gov/pubs2011/2011015.pdf (projecting that by 2016-2017, women will earn 64.7 percent of associate’s degrees, 57.5 percent of bachelor’s degrees, 60.4 percent of Master’s degrees, and 54.8 percent of doctorate degrees).
schools, 48 percent of the graduating class of 2012 was women.\textsuperscript{95} Master’s degrees earned by women in business management increased from 34.5 percent in 2002-2003 to 36.8 percent in 2010-2011.\textsuperscript{96} The percentage of women earning their Doctorate degrees in engineering jumped from 0.3 percent in 1966 to 20.2 percent in 2006.\textsuperscript{97} In 2010-2011, 56.7 percent of women, compared to 43.3 percent of men, earned their Master’s degree in the field of professional sciences.\textsuperscript{98}

Moreover, protected class members have been afforded entry into professional and other workplaces at similarly unprecedented levels.\textsuperscript{99} But, while the chasm between the employment rates of young male and female workers has indeed become smaller since the 1970s—largely due to the fact that fewer males than females attend college and female employment has increased generally—men have continued to hold a larger percentage of the workforce than females across all levels of education.\textsuperscript{100}

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\textit{100. See Employed Persons by Occupation, Sex, and Age 2011, 2012 EMPLOYMENT & EARNINGS ONLINE, available at http://bls.gov/opub/ee/2012/cps/annavg9_2011.pdf (finding women 16 years and over comprise 46.9 percent of the labor force, whereas men 16 years old and over continue to occupy 53.1 percent); Educational Attainment by Sex, 1910-2010, INFOPLEASE,}
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The disparities do not end there. Focusing specifically on the professional workplace, it is notable that even today, in the midst of this shift towards equality of opportunity, as one approaches the apex of power—the highest level concentrations of power, compensation, recognition, and longevity in the professional workplace—the disparity between those who have traditionally occupied the highest levels, men, and those who have not, women, remains as glaring as ever. In fact, compensation for women has not kept pace with the strides women have made in training and education. In 2011, men’s median weekly earnings for full-time work totaled $824 nationally, whereas women’s totaled $669 nationally. Across education levels, women continue to earn less than their male counterparts.

According to a 2006 New York Times article, despite the fact that law schools’ graduating classes are typically roughly half male and half female, and despite the fact that law firm hiring tends to be similarly split, “something unusual happens to most women after they begin to climb into the upper tiers of law firms. They disappear.” In 2005, a mere 17 percent of law firm partners at major firms nationwide were women, representing only a slight increase since 1995. Likewise, according to McKinsey research, 53 percent of entry-level corporate jobs belong to women, while only 37 percent of middle management positions and a mere 26 percent of vice president and senior manager positions are held by women.
belong to women. The research further indicates that men are twice as likely
to advance at every level in the corporate world.

If civil rights laws, and Title VII in particular, are to advance the goals
of true equality of opportunity and access to professional advancement and
wellbeing in the workplace, then a far more searching look into the workplace
achievement gap is needed. What forces are working to winnow out women
from the workplace, thereby keeping them from the highest levels of
achievement? What are women encountering between the point at which they
enter the workplace and the point at which the pyramid narrows at the highest
levels of workplace power, influence, and compensation, where women are
conspicuously absent?

On one hand, many have posited that women self-select out of the
workplace because they want to be home to have and care for families. In the
alternative, it has been argued that women would like to remain in the workplace
but feel forced out by the lack of accommodation for and understanding of
working mothers. To be sure, work/life/family balance issues have long

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107. Faw, supra note 99; see also Statistical Overview of Women in the Workplace, supra note 99.
108. Faw, supra note 99.
    Metro-N. R.R. Co., 658 F.3d 154, 165 (2d Cir. 2011); Cole v. Illinois, 562 F.3d 812, 816
    (7th Cir. 2009); Weger v. City of Ladue, 500 F.3d 710, 726 (8th Cir. 2007); Moore v. City of
    Phila., 461 F.3d 331, 346 (3d Cir. 2006); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir.
    1999).
110. See, e.g., Brenda Cossman, The “Opt Out Revolution” and the Changing Narratives of
    Motherhood: Self Governing the Work/Family Conflict, 11 J. L. & FAM. STUD. 407, 426
    (2009) (“Instead of denying the descriptive, analytic, or normative reality of choice, an
    effective feminist response may be to shift its analysis to the terrain of self governance and
    governmentality, and begin to consider the multiple ways in which motherhood is being
    reconfigured on this terrain.”); Heather Antecol, The OPT-OUT REVOLUTION: RECENT
    TRENDS IN FEMALE LABOR SUPPLY (2010), available at
    http://www.cmc.edu/berger/pdf/oo_paper15v2.pdf (finding evidence of the opt-out
    revolution among white, college educated, married women in male-dominated occupations).
111. PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME
    (2008) (“The majority of women I’ve spoken to who have decided to stay home to raise
    children certainly frame their decision in terms of choices. But when they told me their
    stories, the truth was very, very different. They describe the decision as a choice. But in the
    end it was a highly conflicted choice and truly a last resort.”); E.J. Graff, The Opt-Out Myth,
    COLUM. JOURNALISM REV., Mar.-Apr. 2007, available at
    http://www.cjr.org/essay/the_optout_myth.php; Joan C. Williams, Jessica Manvell &
    Stephanie Bornstein, Opt Out or Pushed Out?: How the Press Covers Work/Family Conflict,
    http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf (arguing that women are leaving the
    paid workforce “because they are being pushed out by (1) an outdated, unrealistic workplace
    structure designed around the 1950s concept of the Ideal Worker, (2) workplace bias and
discrimination against mothers, and (3) the failure of U.S. public policy to help workers
balance work and family responsibilities”); Dina Bakst, Pregnant, and Pushed Out of a Job,
N.Y. TIMES (Jan. 30, 2012), http://www.nytimes.com/2012/01/31/opinion/pregnant-and-
pushed-out-of-a-job.html (“As a result, thousands of pregnant women are pushed out of jobs
that they are perfectly capable of performing—either put on unpaid leave or simply fired—
when they request an accommodation to help maintain a health pregnancy.”); Meghan
Casserly, Why is ‘Opting Out’ A Bad Word for Women?, FORBES ONLINE, Feb. 28, 2012,
http://www.forbes.com/sites/meghancasserly/2012/02/28/why-is-opting-out-a-bad-word-for-
plagued women and hampered their attempts to ascend to the highest levels of power and compensation in employment, both at the individual and the collective level.\(^{112}\) This is undeniable. As the *New York Times* has reported, while it is the case that some women do leave their firm jobs to raise their children fulltime, the results of recent studies indicate that women lawyers “often feel pushed into that choice and would prefer to maintain their careers and a family if a structure existed that allowed them to do so.” Moreover, “[s]ome analysts and many women who practice law say that having children isn’t the primary reason that most women leave law firms.”\(^{113}\) It is thus important that queries about the achievement gap in the workplace do not end at the issue of work and family balance. What about women without children? What about women with children who continue to work, but seek less time-consuming or prestigious jobs?

Flexibility and the accommodation of family responsibilities in the workplace, which are suggested by many scholars and direly needed,\(^{114}\) should not be seen as a panacea that will necessarily close the gap. Workplace cultures that alienate women must be identified and transformed through legal and non-legal means. Addressing abusive, gendered workplace speech and its effects is the first step in this direction.

**B. A Tale of Two Eras—The Case of a Contemporary Female Associate**

Discrimination is, ironically, harder to discern in an era in which historically underrepresented groups are increasingly afforded opportunities and placements they have been historically denied.\(^{115}\) Take, for example, the case of a thirty-four-year-old female associate, who filed a complaint in the Southern District of New York in January 2011, alleging unlawful termination because of her sex.\(^{116}\)

In 2003, she joined the Toronto office of a multinational law firm, and in

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112. Williams, et al., *supra* note 111 (discussing how many “fast-track women” take time off from work, and the “mommy track,” wherein women undertake a “full-time job that reduced their hours, or put up with deskilling in order to access a family-friendly job (by declining a promotion or taking a job with fewer responsibilities and lower compensation that they were qualified for”)).


115. *Id.*

2004, transferred to its New York branch. According to her complaint, she generated “high-caliber work” throughout her tenure with the firm. She alleged that “[t]ypical review comments were that she had ‘very good long-term prospects,’ was ‘very dependable and resourceful’ and provided ‘great client service.’” This allegedly changed, however, after the appointment of a senior partner as the Legal Professional Committee (“LPC”) New York representative. As the complaint recited, through his words and actions, “[the senior partner] encouraged an environment that was hostile and demeaning towards women.”

Examples cited include: facetiously referring to a female member of the board of directors of one of the firm’s clients, who was rumored to have had a relationship with the CEO of the company, as being in charge of “oral communications”; a discussion with a male law student who planned to leave the firm to pursue a master’s degree at Harvard Law School, where he stated, “that’s great you are going to Harvard—you might meet some pretty women pretending to get a legal education”; and a comment made in response to a former associate’s request for maternity leave asking if she was aware that such a decision would take her off partnership track. He later explained that he hated working with women because “they just get pregnant and leave. Out of every three years you only get one good year out of them.”

Moreover, the complaint described the associate’s annual review with the senior partner and another partner as follows:

Despite the fact that her performance had remained consistently good, [he] told her that they “didn’t think she wanted to be partner” and that she “must be more than a pretty face.” He told [her] to “show ME you want this” and that she’s “not helping herself coming to work looking well put together.”

The complaint alleged that, consequently, the associate was told by the partner that her salary would be frozen and not increased in comportment with the firm’s lockstep program. When she asked the partners for specific things she could do to improve, she alleged he told her to “stop acting like a child that’s been taken to the woodshed and spanked;” she had to figure this out on her own; and that “everyone can improve.” Further, it is alleged that he provided no criteria by which she could measure her performance or areas she could work on.

117. Id. at 2.
118. Id.
119. Id.
120. Id. at 3.
121. Id.
122. Id.
123. Id.
124. Id. at 3-4.
125. Id. at 4.
126. Id.
improve.\footnote{Id.}

After the associate complained about her frozen salary and the comments that had been made to her and encouraged a partner investigating the incident to talk with other women at the firm, the complaint alleged that the senior partner was sent to sensitivity training and removed from his position as representative.\footnote{Id. at 5.} The associate alleged that she was then retaliated against when she received new negative evaluative comments at a subsequent review from the board of partners. The board included the senior partner as well as partners with whom the associate had hardly worked. Moreover, in some instances, the evaluative comments were related to work for which she was not even responsible.\footnote{Id. at 6.} Despite her protests, her salary remained frozen and she was told that if she failed to improve, the firm would likely “not want her there at the end of the year.”\footnote{Id.}

Despite what the complaint characterizes as a series of career successes over the next six months, the associate’s salary was raised only minimally and kept below her class level; she was also denied any bonus.\footnote{Id. at 7.} In June 2009, she was terminated.\footnote{Id.} Although the case appears to have settled, it proves instructive as to the current state of the law.

The problems with the associate’s case are both multifold and illustrative. Based upon the facts alleged in her complaint, it is hard to conceive of a way in which she can substantiate a cognizable claim under Title VII. In the first place, while the partner’s comments and the apparent atmosphere in which the associate worked may indicate that her failure to retain her employment was somehow “because of” her sex, the context in which her case took place seems to belie a case of sex discrimination.

Unlike \textit{Price Waterhouse}, where Ann Hopkins was the only woman being considered for partnership that year,\footnote{See Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989) (“Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1-Hopkins-was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20-including Hopkins-were ‘held’ for reconsideration the following year.”).} the associate was far from the only female in her firm. The firm, unlike \textit{Price Waterhouse} in the 1980s, had a somewhat respectable number of female partners.\footnote{See OSLER, \textit{Our People}, http://www.osler.com/OurPeople/ (last visited July 22, 2012).} It is also likely that just as many men as women were fired during the layoffs the firm claimed were economy-based.\footnote{See Elie Mystal, Aggrieved Women Potpourri: Sexual Harassment Canada-Style, and the Return of Charlene Morisseau, ABOVE THE LAW, http://abovethelaw.com/2011/02/aggrieved-women-potpourri-sexual-harassment-canada-} Indeed, in an age in which civil rights laws have worked well...
enough to ensure there are at least some female partners and decision makers, it is ironic that it may be harder now to discern cases in which sex discrimination took place. In *Price Waterhouse*, the plaintiff’s status as the only potentially viable female partnership candidate, coupled with the dearth of women promoted to the highest positions, indicated exclusion and possibly even discrimination. This conclusion was relatively easy to reach; it appeared, even before any “smoking gun” evidence was considered.

In the more modern scenario, however, women’s increased presence at all levels of employment seems to militate against any premise that actionable sex discrimination occurred. Furthermore, once modern adjudicatory doctrines, such as the so-called stray comment doctrine, which focuses on comments not directed to the plaintiff or those made too far apart in time from the moment the employment decision was made, are applied to discount evidence, it seems highly unlikely that there will be enough remaining evidence at the summary judgment stage to permit a contemporary case to survive.

The associate’s complaint tells a compelling, albeit common narrative: she worked under at least one man who seemed to harbor negative, stereotyped ideas

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136. See infra Part III.B.

137. See supra note 133.

138. See, e.g., *Twymon v. Wells Fargo & Co.*, 462 F.3d 925 (8th Cir. 2006). In *Twymon*, the court held that the comments were stray because while the speakers were involved in the decision to terminate [the plaintiff], none of the statements were related to the decisional process itself. Hall’s alleged “Uncle Tom” statements, while racially offensive and misguided, were apparently made in the context of attempting to preserve and promote [the plaintiff’s] career at Wells Fargo, not in relation to deciding to terminate [her]. Similarly, none of the statements were made during the decisional process accompanying Wells Fargo’s termination of [the plaintiff].

*Id.* at 934; see also Stone, *Taking in Strays*, supra note 73, at 167 (“Numerous cases have discounted or dismissed as worthless comments that might otherwise be probative simply because they were not directed toward the plaintiff, they were not said in the context of the adverse action at issue, or both.”).

139. See, e.g., Stone v. Parish of E. Baton Rouge, 329 F. App’x 542, 546 (5th Cir. 2009) (holding that the “evidence presented does not show either sufficient temporal proximity or any relationship between the remarks and the challenged conduct[,]” and thus, “these remarks do not mandate reversal of the district court’s [grant of summary] judgment”); *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1026 (6th Cir. 1993) (holding that the comments “made . . . nearly a year” before a termination “were made too long before the layoff to have influenced the termination decision”); *Home Repair, Inc. v. Paul W. Davis Sys., Inc.*, No. 98-C-4074, 2000 WL 126905, at *6 (N.D. Ill. Feb. 1, 2000) (“Such a long time period between racially-offensive actions and the adverse action serves to defeat the inference of a causal nexus between the racially-offensive actions and the adverse action.”); see also Stone, *Shortcuts*, supra note 73, at 136-37 (“[C]ourts adjudicating claims of employment discrimination brought under federal statutes have routinely excluded evidence at trial or refused to accord evidence of biased comments enough weight to stave off a grant of summary judgment for the employer without any thought as to what probative value or insight they might have provided—simply because an arbitrary time limit had been exceeded.”); Stone, *Taking in Strays*, supra note 73 (examining the stray remarks doctrine).
about women, and about her in particular for being a certain type of woman—one who was too “put together” to be seen as taking her career seriously. However, because she could not proffer an attitude as evidence, and the comments she can proffer are simply too few, far between, and diffuse (not directed at the plaintiff), she would likely be unable to propel a “because of” claim forward. Ironically, it is the awareness of sex discrimination generated by high profile cases like *Price Waterhouse* that chills a good deal of overtly prejudiced or inflammatory speech. Consequently, much of the way sex discrimination is expressed is muted, more infrequent, and subtle, thus making it difficult for existing law to detect or capture.

It is also unlikely that the associate would have a viable claim of actionable sexual harassment under Title VII. An actionable hostile workplace exists when one’s workplace environment becomes rife with ridicule, humiliation, or other abuse that can be said to be “because of sex.” To have a cognizable claim, the alleged harassment must be severe or pervasive, the behavior must subjectively affect the plaintiff, the behavior must objectively affect a reasonable person in her shoes, and there must be a basis for employer liability.

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140. *See* Complaint, Laskis v. Osler, Hoskin & Harcourt LLP, *supra* note 116, at 5 (“[He] told her that they ‘didn’t think she wanted to be partner’ and that she ‘must be more than a pretty face.’ He told Ms. Laskis to ‘show ME you want this’ and that she’s ‘not helping herself coming to work looking well put together.’”).

141. *See supra* Part II.B.


143. *See generally* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); *Harris*, 510 U.S. 17. Liability attaches to an employer when it is found to be negligent in the maintenance of a workplace environment in which coworker or peer harassment is permitted to occur. *Faragher*, 524 U.S. at 807. Where supervisory harassment occurs, liability may be imputed to the employer where it is accompanied by a tangible employment action, like a termination or demotion. *Id.* Even where there is no tangible employment action, a supervisor’s harassment gives rise to a cause of action against his employer unless the defendant can successfully assert an affirmative defense maintaining that it had reasonable policies and procedures in place, and the plaintiff unreasonably failed to avail herself of them. *Id.*

144. *See, e.g.*, Guthrie v. Waffle House, Inc., No. 10-15090, 2012 WL 335629, at *4 (11th Cir. Feb. 3, 2012) (“Guthrie’s evidence—alleging only a few dozen comments or actions by Lawery and Barnett, spread out over a period of eleven months . . . failed to show that the alleged harassment was sufficiently frequent to support her claim.”); Morris v. City of Colo. Springs, 666 F.3d 654 (10th Cir. 2012) (holding that a “reasonable jury could not determine that Ms. Morris experienced a hostile work environment due to sexual discrimination [because t]here is no indication that the relatively isolated incidents in this case ‘altered the terms or conditions of [Ms. Morris’s] employment and created an abusive working environment.’”); Vajdl v. Mesabi Acad. of KidsPeace, Inc., 484 F.3d 546, 551-52 (8th Cir. 2007) (concluding that isolated comments and touchings were not sufficiently pervasive); Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1365-66 (10th Cir. 1997) (holding that “five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in her presence in a sixteen month period” did not amount to actionable sexual harassment).
which were made directly to or about the plaintiff, and they were made over such a long period of time, any claim based upon a hostile workplace environment would probably be disposed of on summary judgment due to a lack of harassment severe or pervasive enough to meet the standard. This does not comport with the reality that the associate probably found those comments to be degrading and severe. Some in her shoes might just as easily have sought out another job, perhaps trading status or compensation for dignity and a fair chance to achieve the highest levels.

The associate’s case presents an all too common scenario in the modern workplace. A member of a protected class works for or around others who harbor negative attitudes about members of that class. These attitudes then manifest themselves in the form of hateful speech, or may result in a crass workplace environment full of vulgarities. The problem arises, however, when the perpetrators of the hateful speech or vulgar environment act in a way that erodes the progress, well-being, and success of class members while evading liability or another form of deterrence. Yes, Title VII is not a civility code. However, Title VII’s primary objective is to rid the workplace of discrimination that excludes class members from unfettered opportunity to enter into and advance in the workplace. This goal is wholly thwarted when the law is reluctant or unable to keep pace with (1) evolving evidence of the effect of abusive speech and expression on both the dynamics of workplace decision making and individuals’ abilities to thrive in the workplace; (2) the changing demographics of the workplace which, while good in terms of evincing increased diversity, can obscure instances in which discrimination occurs; and (3) the more suppressed, nuanced expression of biased speech borne of widespread awareness

145. See, e.g., White v. Gov’t Emps. Ins. Co., No. 10-31105, 2012 WL 13783, at *5 (5th Cir. Jan 4, 2012) (holding that there was no cognizable claim for harassment because, among other reasons, “the ‘ni*ger’ comment was not directed at” the plaintiff); Alexander v. Opelika City Schs., 352 F. App’x 390, 393 (11th Cir. 2009) (holding that any purported harassment suffered by the plaintiff was not sufficiently severe or pervasive so as to alter the terms and conditions of his employment in violation of Title VII of the Civil Rights Act because, among other reasons, the comment about how to tie a noose around a person’s neck was not directed at the plaintiff). But see Harris v. Mayor and City Council of Balt., 429 F. App’x 195, 201 (4th Cir. 2011) (quoting Petrosino v. Bell Atl., 385 F.3d 210, 222 (2d Cir. 2004)) (“The fact that much of this offensive material was not directed specifically at [the claimant] . . . does not, as a matter of law, preclude a jury from finding that the conduct subjected [the claimant] to a hostile work environment based on her sex.”).
147. See Oncale, 523 U.S. at 81.
of anti-discrimination law and the taboo nature of explicit racist or misogynistic speech in modern times.

It is ironic, indeed, that a woman like the associate, afforded the opportunity to attend Harvard Law School and to commence her career at a prestigious firm in an era in which the high rate of such occurrences for women is unprecedented, looks to have a more difficult time proving discrimination than did Ann Hopkins. Whereas, based upon the facts available, both clearly worked with and were evaluated by men who harbored stereotyped and negative impressions of women, Ann Hopkins, climbing the corporate ladder in the 1980s, won her case. Concededly, Ann Hopkins had more comments made directly to her and about her in the context of her candidacy for partnership than did the associate. That said, based upon the evidence the associate had, she should have been able to establish that she was being judged through the lens of gender bias. More than anything else, what loomed large over her case was the context in which it occurred: her evaluation and termination occurred in the midst of a bad economy, in a situation in which she had, presumably, been educated, worked, and terminated alongside relatively equal numbers of men and women. Moreover, while the comments that she alleges her supervisor made to and around her positively bespeak a gender bias, the comments were neither as direct nor explicitly sexist as those made to Ann Hopkins. For these reasons, it is likely that her case would not have survived summary judgment; a judge likely would have found that there was no triable issue in dispute as to either a “because of” claim based on her termination, or any sexual harassment claim.

C. Unconscious Bias

But should a case like the associate’s survive? The news is rife with stories about women who bemoan the “general attitude” of their supervisors or employers toward women.\textsuperscript{149} Is this a problem that can, or even should, be redressed by the law? The notion that a new, perhaps more evolved, form of sexism than the more blatant sexism Title VII was passed to eradicate, may have

\textsuperscript{149} See Melissa J. Anderson, \textit{Firms Must Employ Transparency to Eliminate Hidden Bias against Female Leaders}, \textsc{The Glass Hammer} (Apr. 27, 2011), http://www.theglasshammer.com/news/2011/04/27/firms-must-employ-transparency-to-eliminate-hidden-bias-against-female-leaders/; Victoria Pynchon, \textit{Working Mothers Pose Fewer Burdens for Employers Than Their Coworkers}, \textsc{Forbes Online} (Feb. 13, 2012), http://www.forbes.com/sites/shenegotiates/2012/02/13/working-mothers-_pose-fewer-burdens-on-employers-than-do-their-coworkers/ (“There must be something about gender roles nested in the anger employers express when describing the burdens they have to endure for the benefit of their pregnant and working mother employees.”); Gayle Tzemack Lemmon, “I’m Not Your Wife!” \textit{A New Study Points to a Hidden Form of Sexism}, \textsc{Above the Law} (June 5, 2012), http://www.theatlantic.com/national/archive/2012/06/im-not-your-wife-a-new-study-points-to-a-hidden-form-of-sexism/238057/ (noting Harvard research fellow and UNC Assistant Professor Sreedhari Desai’s assertion “that so many of the attitudes her work unveils are of an ‘unconscious nature,’ which makes beating them back particularly difficult. She says male leaders may think they are elevating women, not stifling them.”).
taken hold in the contemporary workplace has certainly started to enter the public’s consciousness.\textsuperscript{150} It has not necessarily captured the public’s interest, though. Perhaps, sexist comments are not being made as often, as loudly, or as bluntly as they once were, but sexist attitudes, long entrenched and reinforced by attitudes cultivated in the media, popular culture, and even employees’ own homes, persist and continue to color and influence the way women are seen and treated in the workplace.

Countless works inside and outside of legal scholarship have tried to draw attention to issues surrounding the development, expression, and consequences of subconscious or unconscious bias.\textsuperscript{151} Some courts have delved into this literature and attempted to come to the right results, or at least answer the correct questions, when adjudicating sex discrimination and sexual harassment suits, particularly at the summary judgment stage.\textsuperscript{152} But when deep-rooted biases take the form of behavior that cannot easily be forced into the traditional frameworks for claims (because of infrequent but telling comments, vulgar, or disrespectful behavior not necessarily targeted at the plaintiff, etc.), patterns of exclusion persist, despite the lofty goals of the statutes in place.

In a newly published research paper entitled “Marriage Structure and Resistance to the Gender Revolution in the Workplace,” researchers from Harvard, New York University, and the University of Utah sought to answer the question of whether adherents to the “traditional” American family and its assigned gender roles could simultaneously function in a truly fair and impartial manner at work. Defining a “traditional marriage” as one in which the wife does not work outside the home and a “modern marriage” as one in which the wife does work outside the home, the paper examined the fact that, despite earning more advanced degrees and having more employment opportunities, women have failed to make their way into the highest ranks of employment.\textsuperscript{153} The

\begin{itemize}
\item \textsuperscript{150} See Lindsay Cross, There’s an Unconscious Bias Against Working Mothers. Let’s Talk about It., THE GRINDSTONE (Feb. 14, 2012), http://thegrindstone.com/work-life-balance/lets-talk-about-a-companys-responsibility-to-working-mothers-710/.
\item \textsuperscript{153} Sreedhari D. Desai, Dolly Chugh & Arthur Brief, Marriage Structure and Resistance to the Gender Revolution in the Workplace (Mar. 12, 2012), available at
paper reported that “husbands embedded in traditional and neo-traditional marriages (relative to husbands embedded in modern ones) exhibit attitudes, beliefs, and behaviors that undermine the role of women in the workplace.” 154 It concluded that employed husbands in traditional marriages, compared to those in modern marriages, tend to (a) view the presence of women in the workplace unfavorably; (b) perceive that organizations with higher numbers of female employees are operating less smoothly; (c) find organizations with female leaders as relatively unattractive; and (d) deny, more frequently, qualified female employees opportunities for promotion. 155

The researchers further concluded that the viewpoints and structure of the personal lives, families, and worlds of the men who captain industry and their personal viewpoints ultimately contour the treatment of women in the workplace. 156 Those who are the most highly compensated in our society and who typically make decisions at the highest levels of our institutions more often have the economic means to be part of a single wage-earner family, while those further down the ladder often could not make ends meet as part of a single wage-earner family. Indelibly etched into the worldviews of some men whose wives do not work outside the home, it seems, may be the notion that women in the office who seek advancement do not and should not have prospects as bright as similarly situated men. Confronted with, for example, the results of experiments in which subjects presented with identical hypothetical candidates given female versus male names preferred the male candidates over the females, 157 it is difficult to deny or to decry the validity of modern fears of unequal treatment evinced only in ways that are difficult to use as viable evidence in a lawsuit. Further, these results compel investigation into issues like how women are viewed and treated in environments in which the men who run them see nothing wrong with consuming and imitating media, such as radio shows, websites, and publications, in the workplace that exploit and demean women as a group.

These researchers are optimistic about future investigations. According to a popular blog, when one of the authors of the research paper on marriage structure and resistance to the gender rebellion was interviewed, she expressed hope that her work “will help leaders think about the best way to form teams and consider what invisible barriers might be holding back some of their top talent.” 158 She further noted that many of the attitudes her work uncovers are of an “unconscious nature,” “which makes beating them back particularly


154. Id.
155. Id.
156. Id.
157. Tzemach Lemmon, supra note 149.
158. Id.
difficult.”

The New York Times recently used a story about a sex discrimination suit to pose the question: “[A]re [Silicon Valley] men trapped in the past even as they create the future?” The suit was against a major venture capital firm in Silicon Valley in which the plaintiff allegedly faced retaliation after she rejected sexual advances in the workplace. In addition to alleging facts about her specific plight, the plaintiff’s complaint painted a very grim picture of women’s prospects at her workplace. In the complaint, the plaintiff described how she was told that women would not succeed at her workplace “because women are quiet,” and that women were excluded from important business dinners, because they would “kill the buzz.” The Times reported that the firm discriminated against women “by failing to promote them comparably to men, by compensating them less than men through lower salary, bonus and carried interest, [and] by restricting the number of investments that women are allowed to make as compared to men.”

The Times noted that the suit was “exposing an uncomfortable truth about Silicon Valley: starting tech companies in 2012 is still a male game, and so is funding them.” It explored the fact that the plaintiff’s complaint probed beyond the facts at issue to depict venture capitalists in Silicon Valley as “a group of 21st-century men who may be hard at work building the 22nd century but, when it comes to dealing with women in the workplace, are stuck firmly in the caveman era—or at least in the 1950s.” What emerges, the Times concluded, commenting on the broader male-dominated workplace culture of Silicon Valley, was “a portrait that many women in tech find all too familiar.”

What the female professionals in the field interviewed for the article described was neither a series of discrete, readily identifiable and actionable incidents, nor was it a pattern of actionable harassment. They described a confluence of factors, including the idea of an attitude projected by those for whom they work and the relative dearth of women in their field and at the general helm of the industry. Indeed, women make up a mere 9.1 percent of the board members of Silicon Valley companies, a considerably lower percentage than Standard & Poor’s 500 companies, where 16 percent of board members are women. Moreover, as recently as 2009, a mere 11 percent of companies on the receiving end of venture backing had a female CEO or

159. Id.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
167. Id.
founder. One woman recounted that if “[y]ou talk to any woman in technology . . . she will have a personal story or know a story where she felt conscious of her gender in subtle or significant ways.”

D. The Effect of Abusive Speech on Employees

As previously discussed, not all speech or behavior that one might consider gendered or discriminatory will be deemed unlawful by a court. Difficulties in meeting standards of proof, high evidentiary thresholds set forth by judges using adjudicatory frameworks, and definitions of terms like “harassment” that call for precise and high standards to be met, all work to impede Title VII’s ability to eradicate such speech and behavior from the workplace. Nonetheless, this speech has clear deleterious and demoralizing effects on employees.

The psychological impact of abusive, discriminatory speech should not be underestimated. Research studies show that workplace morale, as well as individual employees’ psyche, productivity, and mental health, are all threatened by abusive, discriminatory workplace speech. One study, for example, explored the link between self-reported workplace discrimination and depressive symptoms among hospital employees from diverse ethnic backgrounds. The study found that African American employees were more likely than members of other racial or ethnic groups to report frequent discrimination experiences and that the frequency of workplace discrimination was positively associated with depressive symptoms. It concluded that “[r]educing workplace discrimination may improve psychosocial functioning among racial/ethnic minority hospital employees at greatest risk of exposure.” The study’s authors associated the

168. Id.
169. Id.
174. Hammond et al., supra note 173.
175. Id.
176. Id.
occurrence, kinds, and frequency of discrimination in the workplace with depressive symptoms above and well beyond that of simple job strain or general social stress. The authors also found that their study reaffirmed earlier findings that workplace discrimination’s effect on mental health is distinct from the effects of other occupational and psychological stressors on employees.

Another study in the United Kingdom further reinforces this idea. In this study, discrimination was defined as “reports of insults; unfair treatment at work; or job denial stemming from race, religion, or language.” The study found that members of ethnic minorities who reported unfair treatment had the highest likelihood of developing mental disorders. Still, another study found that coworker, supervisory, and organizational discrimination all affect factors like employee job satisfaction, attitude toward and commitment to the organization, and organizational citizenship behavior. Specifically, those employees who perceived greater discrimination from their coworkers were found less likely to engage in informal, “prosocial” behaviors, while employees who perceived discrimination from the organization generally reported less organizational commitment and less job satisfaction. Although these studies dealt specifically with racial or ethnic minority groups exposed to abusive speech, women in the workplace are similarly experiencing noncognizable abusive speech that implicates similar workplace disadvantages.

It is well established that enterprises that retain and manage diversity effectively enjoy, among other things, increased productivity, higher retention rates, and a greater capability to recruit high achieving applicants. However, discrimination, as well as behavior that employees perceive as discriminatory, may have an impact on employee behavior, job tension, decreased job satisfaction, and loyalty. Indeed, perceived discrimination against women has been associated with a diminished sense of occupational power and prestige.

On one hand, the numbers of women who are, for example, graduating from top graduate schools, or commencing employment each year at law firms, medical practices, businesses, and other workplaces, are at their highest rates in history—largely because of the inroads to equality forged by legislation like

177. Id.
178. Id.
179. Kamaldeep Bhui et al., supra note 173.
180. Id. at 499.
181. Ensher et al., supra note 172.
182. Id. at 66-67.
184. Ensher et al., supra note 172, at 53.
185. Id. at 57.
186. Id.
Title VII. In fact, women make up nearly half of a typical entering class at a professional school or typical large firm. On the other hand, women are conspicuously underrepresented in and absent from the highest leadership and most senior levels of employer enterprises. Thus, while discrimination may be operating less to keep historically marginalized groups out of the workplace, discriminatory sentiments and perceived discrimination, not all of which are prosecuted or even necessarily actionable, are now operating to weed these group members out of the workforce.

To illustrate this point, a 1996 study concluded that, while perceived race discrimination among black women did not keep them from entering the labor market, it did impede their level of on-the-job engagement and lower their odds of rising up through the ranks of their respective organizations. The subjects’ levels of work-related stress were raised by their perception of racial discrimination on the job. This perception also curtailed their skill-honing and development, and was connected to the interpersonal dynamics of their workplace relationships and coworker and supervisory interactions. In contrast, behavior indicative of good organization citizenship seems, according to researchers, to stem from an employee’s sense that she is being treated fairly and is rewarded for loyalty. Thus, an environment poisoned by the toxicity of a discriminatory culture or discriminatory sentiments will engender a weakness in interpersonal relationships, which will in turn foster a lack of commitment or engagement on employees’ parts.

The effects of even perceived discrimination look to be almost as inescapable as they are harmful. It is the case, however, that very successful

187. See, e.g., Christen Linke Young, Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms, 118 YALE L.J. 1182, 1186 (2009) (“Today, women make up 49% of new associates.”); NATHAN E. BELL, ENROLLMENT AND DEGREES IN PROFESSIONAL SCIENCE MASTER’S (PSM) PROGRAMS: 2010, available at http://www.cgsnet.org/portals/0/pdf/R_ED2009.pdf (showing various tables indicating that females are attaining more doctorate degrees than males); NEW YORK CITY BAR, LAW FIRM DIVERSITY BENCHMARKING REPORT 2006 REPORT TO SIGNATORIES OF THE STATEMENT OF DIVERSITY PRINCIPLES 8-9 (2008) (stating that “[a]t the top 20 law schools, over one-quarter of 2005 graduates were racial/ethnic minorities (26%) and nearly one-half were women (46%),” and providing data indicating that “over one in five associates are racial-ethnic minorities and over two in five are women”).

188. Id.


191. Id.

192. Id.

193. Id.

194. Ensher et al., supra note 172, at 57.

195. Id.
people who are among those most invested in their achievement have been posited to be most likely to stereotype threat. Stereotype threat occurs when people fear that their performance failures, as gauged by some measure, will be generated by a negative stereotype about a group to which they belong, rather than their own actual performance. Because these individuals fear that their own personal evaluations will "serve as a referendum on the abilities of everyone in their group . . . the stress and self-doubt this brings on demonstrably reduces their performance—creating the very outcome they were striving to avoid."  

IV. REDEFINING TITLE VII

The real question is how, despite Title VII being in its sixth decade of existence, while so many believe our society has socially evolved to the point of being "post race" and "post gender" and with equal opportunity spreading to the point that those gaining entry into the professional arena are more diverse than any group or generation has been, the status gap continues to persist at the highest levels of employment. This Article posits that while factors like

197. Id.
198. Id.
200. See Regina F. Burch, Worldview Diversity in the Boardroom: A Law and Social Equity Rationale, 42 Loy. U. Chi. L.J. 585, 586-87 (2011) ("Secretary of State Hillary Clinton’s presidential bid and Associate Justices Sonia Sotomayor’s and Elena Kagan’s appointments by President Obama to the Supreme Court have fueled media coverage about whether the United States has become a 'post-gender' or 'post-racial' society"); Jessica A. Clarke, Beyond Equality? Against the Universal Turn in Workplace Protections, 86 Ind. L.J. 1219, 1224-25 (2011) (stating that "[t]he race between Barack Obama and Hillary Clinton for the 2008 Democratic nomination for president caused many to ask whether the United States has moved beyond equality"); Tyrone Forman, Beyond Prejudice? Young Whites' Racial Attitudes in Post Civil Rights America, 1976 (2010), available at http://userwww.service.emory.edu/~tforman/working/Forman_Beyond_Prejudice_Web.pdf ("In fact, a cursory review of news articles might lead one to conclude that young Whites have moved completely beyond the prejudicial attitudes espoused by their parents and grandparents to become truly colorblind."); Stephanie Sipe et al., University Students' Perceptions of Gender Discrimination in the Workplace: Reality Versus Fiction, 84.6 J. Educ. & Bus. 339 (2009) (finding that students believe they are entering a gender-neutral workplace).
201. See U.S. Equal Employment Opportunity Comm’n, Diversity in Law Firms, 3 (2003), available at http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf (stating that "[s]ince 1970, the gender and race composition of elite law firms has changed considerably at the associate level. By 1980, 23.2% of the associates in the sample were women; by 1990, 36.2% of associates in the sample were women. Although the level of racial diversity is much lower, it too has increased. By 1980, 3.6% of associates in the sample were minorities; by 1990, 6.5% of associates were minorities").
202. See U.S. Bureau of Labor Statistics, Highlights of Women’s Earnings in 2009, 1-2 (2010), available at http://www.bls.gov/cps/cpswom2009.pdf (stating that "[a]lthough women are more likely than men to work in professional and related occupations, they are not as well represented in the higher paying job groups within this broad category. In 2009, only 9 percent of female professionals, compared with 43 percent of male professionals, were employed in the relatively high paying computer and engineering fields.").
having children and choosing to leave the workforce or face work/life balance difficulties and prejudice are partially to blame, there is another, overlooked, explanation for why women are being winnowed out as they climb the ranks toward greater earnings and professional power. The culture of too many workplaces operates to alienate and exclude women while evading capture by existing law.

Federal workplace legislation, and the resulting culture of compelled tolerance and “political correctness” has eradicated a great deal of overt discrimination, exclusion, and harassment from the workplace. Yet, a residual category of deleterious class-based interference with the terms and conditions of employment remains untouched by current law. This category is seemingly deemed unworthy of a designation as invidious by those who write, interpret, and otherwise shape the law. This interference comes in the form of expressed attitudes, language, and behavior that tends to undermine, degrade, or alienate members of protected classes, like race or gender, while failing to meet the criteria that is traditionally ascribed to unlawful workplace behavior. This includes speech or behaviors directly targeting a victim, even occurring frequently, nevertheless being deemed as not being “because of sex” or “because of race,” or not conferring enough harm simply because it is more subtle, nuanced, or suggestive than that which had been previously deemed unlawful.

A. Abusive Workplace Speech

Nonactionable abusive workplace speech quietly, but steadily, erodes the confidence, morale, and performance of women in the workplace. This speech must thus be identified and examined to ascertain whether the law’s extant boundary between what is considered lawful bullying and what is considered unlawful class-based discrimination is furthering the broad remedial goals of Title VII.

Abusive workplace speech is typically rendered nonactionable for one of two reasons. It may be deemed too unfocused or not directed enough to the
plaintiff to affect her in her work, or “because of” her protected-class status. It also may not be considered severe or pervasive enough to be deemed actionable harassment. Additionally, if the plaintiff suffers an adverse employment action, and a “because of” claim is made, speech that may very well belie discriminatory intent, or even animus, may be disregarded because it is deemed “stray” or too temporally remote. Numerous scholars have bemoaned the failure of courts to discern intent to harass or actual harassment from one or more revealing comments.

In the following scenario, a decision maker’s workplace speech, whether or not directed at a specific employee, repeatedly belies his systemic stereotyping of a discrete protected class or his biased beliefs about it.

i. Reeves

Reeves v. C.H. Robinson Worldwide, Inc. is one recent example of a case in which the judiciary started to critique and rethink the traditional boundaries of Title VII. In this en banc opinion, the Eleventh Circuit Court of Appeals reversed a grant of summary judgment to a defendant employer on a Title VII claim that the district court deemed too legally deficient to proceed to trial.

In Reeves, the plaintiff, a sales representative named Ingrid Reeves, resigned from her job—driven out, she claimed, by the sexually hostile workplace environment in which she was forced to work. Ms. Reeves, the only woman on the sales floor alongside six male coworkers, claimed that she had been subjected to hearing her coworkers use explicit, vulgar, and derogatory language when speaking over the phone or with one another, or listening to the radio. While, as the court recited, Ms. Reeves was “no stranger to the coarse language endemic to the transportation industry,” frequently using “generic swear words,” herself, she was consistently subjected to a workplace culture rife with words that were “unusually offensive,” though not typically, “gender-specific.” She was also, however, consistently exposed to gender-derogatory language addressed specifically to women as a group in the workplace. Her coworkers used such language to refer to or to insult individual females with whom they spoke on the phone or who worked in a separate area of the branch. Although not speaking to Reeves specifically, Reeves said that her male coworkers referred to individuals in the workplace as “bitch,” “fucking bitch,” “fucking whore,” “crack whore,” and “cunt.”

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206. 594 F.3d 798 (11th Cir. 2010).
207. Id. at 803.
208. Id. at 806.
209. Id. at 803-06.
210. Id. at 803-04. For example, “[h]er coworkers, she claimed, regularly used curse words such as ‘fuck,’ ‘fucker,’ and ‘asshole.’ Id. at 804. They used the intensely offensive epithet ‘Jesus fucking Christ,’ and the terms ‘fucking asshole,’ ‘fucking jerk,’ and ‘fucking idiot.’ Id. They also discussed sexual topics such as masturbation and bestiality.” Id.
coworker . . . frequently shouted the epithets “fucking bitch” or “fucking whore” after hanging up his phone. He also called one woman a “cunt.” Indeed, Reeves’s supervisor . . . often referred to his female colleagues by the term “bitch.” Among other examples offered, he ordered Reeves to speak with “that stupid bitch on line 4,” and described a former female colleague . . . as a “lazy, good-for-nothing bitch.”

Moreover, Ms. Reeves was daily forced to hear “a crude morning show” on the office radio. This show “featured . . . regular discussions of women’s anatomy, a graphic discussion of how women’s nipples harden in the cold, and conversations about the size of women’s breasts.” Ms. Reeves was also subjected to crude and pornographic images displayed on coworkers’ computer screens and her coworkers’ singing about subjects that the court termed “gender derogatory.”

While Ms. Reeves was never personally singled out for targeted sex-based abuse, she was forced to observe her only female coworker in her branch be subjected to this treatment, as other coworkers called her a “bitch” and made crude comments about her anatomy. Further, despite Ms. Reeves’s frequent objections to the cruel, demeaning, and degrading behavior she was forced to observe, she claimed that this offensive conduct occurred “on a daily basis.” She testified that “if you were to pull out a calendar right now and I were to look at, you know, summer of 2001 to spring of ’04, I could point at every day of the year that some of this behavior went on. It went on every day.” She indicated that “this type of phrase, ‘You fucking whore,’ was commonplace.”

Indeed, Ms. Reeves’s coworkers made it clear to her that her protests would be to no avail and she testified that it was obvious to her that complaining to coworkers was not bringing about results, and that “nothing ever changed.” She further noted that a coworker once told her to wear her earplugs so he could behave “any way he liked.” Even her complaints to management fell on deaf ears. Her supervisor conceded that while he had promised to pay more attention to the language and behavior Ms. Reeves was forced to endure, it “did not stop.” Moreover, he acknowledged that he failed to escalate her complaints to the corporate office in derogation of his

211. Id.
212. Id.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id. at 806.
218. Id. at 805.
219. Id. at 806.
220. Id.
responsibility to do so. When Ms. Reeves went further up the chain of command to complain to corporate executives, she found them similarly nonresponsive.

Ms. Reeves eventually resigned and sued her former employer, alleging that she had been subjected to a hostile work environment. When the district court granted summary judgment against her, it found that there was insufficient evidence of an actionably hostile environment. The court reasoned that because the derogatory language was not directed to her in particular and because the language was used and the radio program was played in front of all employees, both men and women were afforded equal treatment. Thus, the court held that the plaintiff was never “‘intentionally singled out for adverse treatment because of her sex.’”

The Court of Appeals acknowledged that “Title VII is not a civility code,” and the “bedrock principle” that “not all profane or sexual language or conduct will constitute discrimination in the terms and conditions of employment.” It also acknowledged that the objectives of Title VII nonetheless call for “the removal of employment obstacles, not required by business necessity, which create ‘built-in headwinds’ and freeze out protected groups from job opportunities and advancement.” Ultimately, the court found that a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well.

Emphasizing the importance of evaluating claims and circumstances in context, the court engaged in a granular analysis that distinguished between language that is truly generically vulgar and offensive and language that may seem commonplace and generic, but operates to harm women because of sex:

Even gender-specific terms cannot give rise to a cognizable Title VII claim if used in a context that plainly has no reference to gender. Thus, for example, were a frustrated sales representative to shout “Son-of-a-bitch! They lost that truck,” the term would bear no reference to gender. In contrast, however, when

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221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id. at 807-09.
228. Id. at 808.
229. Id. at 810.
a coworker calls a female employee a “bitch,” the word is gender-
derogatory. . . . [T]he terms “bitch” and “slut” are “more degrading to women
than to men.” The original definition of the term “bitch” is “the female of the
dog.” The term’s secondary meanings are likewise gender-specific: “a lewd or
immoral woman” or “a malicious, spiteful, and domineering woman.” Calling
a female colleague a “bitch” is firmly rooted in gender. It is humiliating and
degrading based on sex.230

Similarly, the context may illuminate whether the use of an extremely vulgar,
gender-neutral term such as “fucking” would contribute to a hostile work
environment. “Fucking” can be used as an intensifying adjective before
gender-specific epithets such as “bitch.” In that context, “fucking” is used to
strengthen the attack on women, and is therefore relevant to the Title VII
analysis. However, the obscene word does not itself afford a gender-specific
meaning. Thus, when used in context without reference to gender, “fuck” and
“fucking” fall more aptly under the rubric of general vulgarity that Title VII
does not regulate.231

Significantly, the court held that where speech and behavior are amply
gender-specific and sufficiently severe or pervasive, a plaintiff may have a viable
hostile environment claim, even if she was not the direct target of the speech or
behavior.232 As the court put it, “[i]t is enough to hear coworkers on a daily basis
refer to female colleagues as ‘bitches,’ ‘whores’ and ‘cunts,’ to understand that
they view women negatively, and in a humiliating or degrading way. The
harasser need not close the circle with reference to the plaintiff specifically: ‘and
you are a “bitch,” too.’”233 The court also noted that language or behavior that
appears to be generally vulgar, but consistently paints a protected class as the
target or object of humiliation, exploitation, or belittling, does discriminate
against the group’s members by uniquely subjecting them to “disadvantageous
terms or conditions of employment,” as proscribed by Title VII.234 Moreover,
when group members, like the plaintiff, have their complaints ignored, this
disregard may be read as corporate ratification of the unlawful behavior.235 As
the court concluded,

[i]f the environment . . . had just involved a generally vulgar workplace whose
indiscriminate insults and sexually-laden conversation did not focus on the
gender of the victim, we would face a very different case. However, a
substantial portion of the words and conduct alleged in this case may
reasonably be read as gender-specific, derogatory, and humiliating. . . . A

230. Id. (internal citations omitted).
231. Id. at 810 n.4.
232. Id. at 811.
233. Id.
234. Id.
235. Id.
jury . . . could find on this record that . . . conduct in the office contributed to conditions that were humiliating and degrading to women on account of their gender . . . . The terms “whore,” “bitch,” and “cunt,” the vulgar discussions of women’s breasts, nipples, and buttocks, and the pornographic image of a woman in the office were each targeted at Reeves’s gender. Like “bitch,” “whore” is traditionally used to refer only to women . . . . The social context . . . allows for the inference . . . that the abuse did not amount to simple teasing, offhand comments, or isolated incidents, but rather constituted repeated and intentional discrimination directed at women as a group, if not at Reeves specifically. It is not fatal to her claim that Reeves’s coworkers never directly called her a “bitch,” a “fucking whore,” or a “cunt.”

The court further rejected the defendant’s argument that where words that appear to be targeted at women are used to refer to men and women alike, they are divested of their discriminatory nature, noting that “[i]t is undeniable that the terms ‘bitch’ and ‘whore’ have gender-specific meanings. Calling a man a ‘bitch’ belittles him precisely because it belittles women . . . . Indeed, it insults the man by comparing him to a woman, and, thereby, could be taken as humiliating to women as a group as well.”

Reeves signifies a ground-breaking recognition by the judiciary of principles and understandings that need to be advanced and implemented. First, a woman need not be directly targeted for abuse in order to suffer an actionable hostile workplace environment “because of” her sex. Second, language and behavior that many are inclined to write off as generically vulgar or generally offensive can be rife with implications that women as a group are inferior, exploited, and unwelcome in the workplace. By humiliating and disparaging women uniquely, such language and behavior operates to pervade and erode individuals’ sense of dignity and wellbeing in the workplace. It thus operates to discriminate on the basis of sex, exposing only women to disadvantageous terms and conditions of employment. Third, the mere fact that men and women alike are being exposed to certain conduct or words does not mean that women are not being discriminated against because of the significance of the language used or the nature of the depictions embodied in the speech, among other things.

236. Id. at 811-12 (internal citations omitted).
237. Id. at 813.
ii. Post-Reeves

In the wake of Reeves, some district courts in the Eleventh Circuit seemed to take heed of its lessons, cautioning defendants that despite Reeves’ admonition that general vulgarity does not rise to the level of harassment, “the mere fact that there is evidence of personality conflicts and vulgar, but not sex-based comments, does not diminish the fact that there were multiple, repeated sex-based comments.”239 Many courts, however, have not learned the lessons in Reeves. Even courts in the Eleventh Circuit, for whom Reeves is binding authority, continue to grant summary judgment to defendants in cases involving egregious, alienating, and abusive protected-class-based speech and behavior. These courts have persisted in disaggregating evidence in ways that might seem to contravene Reeves.240

In 2010, the district court that initially heard the Reeves case eschewed an application of Reeves to a case in which the alleged harasser was described as a misogynist who “could not work with intelligent, effective, powerful women,” but could work with and did not have problems with “intelligent, effective, powerful men.”241 The court acknowledged evidence that the defendant “treated women differently than men in the workplace, that the different treatment was based on gender, and that this different treatment was to the disadvantage of women.”242 The court further clarified that it was not a situation in which women were simply taking more offense at the conduct than men. Instead, the court found evidence that the defendant did not “misbehave” around men, but did so around women.243

Despite these findings, the plaintiff’s claims for sexual harassment, discriminatory termination, and retaliation were all disposed of on summary judgment.244 The court found that the harassment the plaintiff faced was not severe or pervasive, and, despite its mandate to construe evidence in the light most favorable to the plaintiff and the court’s own characterization of the evidence, the court dismissed the behavior as “annoyances and communication issues that do not come close to creating a hostile work environment.”245 For the purposes of summary judgment, the court clearly divorced instances of the plaintiff’s poor treatment at the hands of her alleged harasser from the court’s own conclusion that he “was generally known . . . as a misogynist” who could

242. Id.
243. Id.
244. Id.
245. Id.
not work with strong women.\textsuperscript{246} Similarly, it relegated her recounting of his targeting her with “aggressive, angry, and physically threatening” conduct to “isolated screaming incidents” that did not sufficiently alter the conditions of employment to create a hostile work environment.\textsuperscript{247} The court refused to see how even a handful of episodes of selective acting out could amount to behavior that was severe or pervasive.\textsuperscript{248} Finally, the fact that the plaintiff was terminated in the course of a larger reduction in force ultimately proved fatal to her claims for intentional discrimination on the basis of sex and retaliation.\textsuperscript{249} Unfortunately, this happens all too often. Employers utilize reductions in force to rid themselves of those whose protected-class status or protected activity has made them undesirable, while obscuring the true motive amidst the termination of many others.\textsuperscript{250}

In 2012, the Eleventh Circuit affirmed a grant of summary judgment to a defendant, finding that a plaintiff did not properly allege harassment that could be seen as severe or pervasive despite evidence of lewd and clearly sex-based abusive language, behavior, derision, and propositioning.\textsuperscript{251} The court did this based on a rote analysis of how many incidents occurred over a period of months and a rather mechanical comparison to other cases in which the requirement had or had not been found to have been met.\textsuperscript{252} Infusing any more meaning into the severe or pervasive requirement appeared to be out of the question, and the few dozen comments or incidents alleged by the plaintiff to have occurred over a period of eleven months would not suffice. A jury would never get to hear this evidence.

In a 2011 district court case involving alleged racial harassment, the court used a similar rationale for granting summary judgment to the defendant despite its acknowledgment that the defendant “treated [the plaintiff] harshly, yelled at him, and ‘rode him’ in a way that he did not do to other workers.”\textsuperscript{253} The court dismissed as “friction or personal animosity” the plaintiff’s allegations that he was repeatedly called “boy,” subjected to racist graffiti, confronted with a noose, and surrounded by people in T-shirts bearing Confederate flags.\textsuperscript{254} The environment, construed as a whole and in the light most favorable to the plaintiff, appeared to be clearly racialized. Refusing to look at the aggregate effect of the allegations in the light most favorable to the plaintiff, however, the court found that “even if [the ‘boy’ comments] were evidence of racial animus, [they] were infrequent and non-threatening, and plaintiff has made no showing

\begin{itemize}
\item \textsuperscript{246} Id. at *15.
\item \textsuperscript{247} Id. at *19.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id. at *26.
\item \textsuperscript{250} See id.
\item \textsuperscript{251} Guthrie v. Waffle House, Inc., 460 Fed. Appx. 803, 807 (11th Cir. 2012).
\item \textsuperscript{252} See id. at 807-08.
\item \textsuperscript{254} Id.
\end{itemize}
that they interfered with his work performance.” Moreover, the court found that nothing in plaintiff’s evidence of racial graffiti or Confederate t-shirts [sic] shows that these types of occurrences were sufficiently severe or pervasive to alter the terms or conditions of his employment. Woods’ testimony illuminated only a few examples of racial graffiti and was silent as to the frequency with which he observed or heard about those kinds of racial symbols being displayed on Austal property. The handful of instances of racial graffiti that he observed in an Austal bathroom were vulgar and offensive, to be sure; however, plaintiff’s evidence is they amounted to mere offensive utterances, not severe or threatening comments directed at him personally. And plaintiff offers no evidence that exposure to sporadic racial slurs and symbols scrawled on bathroom walls interfered with his work performance. The same is true of the rope that Woods saw, which he perceived to be a noose, as well as the two nooses about which he heard. Unquestionably, nooses are racially charged symbols of hatred and oppression, particularly in the Deep South. But the Eleventh Circuit has never held that the temporary display of a noose by a rogue employee creates a per se hostile work environment.

Conclusory and almost defiant sounding, the court found that there was not even a triable issue as to whether the allegations could possibly amount to severe or pervasive harassment.

In another 2011 district court case in which the plaintiff alleged a racially hostile work environment, the court attempted to apply Reeves to allegations that after the plaintiff took a day off to observe Martin Luther King, Jr. Day, his supervisor told him, “they should have killed four more n**gers, and you would have had the whole week off.” The plaintiff also alleged that his supervisor “routinely addressed African American employees as ‘n*gger,’ ‘motherfuckers,’ and ‘boy,’ and used additional, unspecified profanity to ‘speak down’ to African American employees.” The plaintiff further alleged that the supervisor “stated that he did not want African Americans working for him, but that he did not have a choice in the matter, and . . . that he purchased a two million dollar insurance policy because he knew that he would eventually ‘get caught’ calling African Americans ‘n[*]ggers’ and ‘bastards.’”

The court agreed with the defendant that the plaintiff had failed to set forth a prima facie case of racial harassment alleging a hostile work environment. It

255. Id. at *20.
256. Id.
257. Id. at *21.
259. Id.
260. Id.
261. Id. at 1195.
emphasized that the supervisor in question never specifically directed the word “n*gger” at the plaintiff, noting that while the plaintiff had testified that he overheard the supervisor use the word, the supervisor’s back was turned, and it was not clear that the supervisor was aware that the plaintiff was in the room.262 The court concluded that because the plaintiff’s testimony did not establish that the supervisor addressed employees with that word, the plaintiff could not claim to have perceived a hostile environment with regard to that particular allegation.263 Whereas Reeves held that it was not necessary for the harasser to reference the plaintiff specifically in order for the language to be seen as affecting the conditions of employment,264 the district court was quick to presume that because the speaker’s back was turned away from the plaintiff, and the supervisor was seemingly unaware of the plaintiff’s presence, the impact of hearing his supervisor use the word n*gger was somehow mitigated.265 This, and the fact that the plaintiff’s testimony only specified one incident of usage, wholly discounted the presence of this incendiary word in the workplace.266

Thus, while some courts have started to construe alleged harassment against a backdrop of the actual effect that speech or behavior is likely to have on an employee, the others need to follow suit if the real problem of the disproportionate winnowing of women and other minorities from the workplace due to alienation is ever to be addressed.

B. The First Amendment

There have always been those who contend that Title VII, as it has been construed, might violate the First Amendment. Thus, some might raise concerns about the First Amendment implications of an expanded Title VII and a more holistic approach to determining whether speech and behavior meet the requirements of actionable harassment.

Some notable scholars, such as Kingsley Browne and Eugene Volokh, have argued that Title VII’s general prohibition of workplace harassment may violate the First Amendment.267 Professor Browne maintains that Title VII harassment regulation should be confined to cases that deal with unwanted physical contact, to avoid running afoul of the First Amendment.268 Professor Volokh, on the other hand, advocates distinguishing between “directed” and “undirected”

262. Id. at 1192.
263. Id.
265. See Mason, 816 F. Supp. 2d at 1192.
266. Id.
268. Browne, supra note 267.
expressions and finding only the former to be actionable. Professor Browne has argued that “evidence of protected speech should not be admitted at trial to support a claim of hostile environment” and that holding employers liable for their employees’ speech may chill protected speech because “fear of litigation and liability creates a powerful incentive for employers . . . to censor the speech of their employees.”

Even feminist scholars like Nadine Strossen have maintained that, while Title VII does properly render some hate speech prohibited, “[t]o broaden the range of prohibited hate speech would not only undermine the central guarantee of free speech, but it also would fail to serve the avowed purpose of advancing gender equality. Overly broad definitions of prohibited harassment or hate speech are at best ineffective in advancing equality.”

The delicate issue of abusive workplace speech must be addressed in a way that comports with bedrock principles of free speech. It is equally as important that the approach reflects the evolving nature of discourse in society and the workplace, the ways in which a contemporary “hostile work environment” is generated, and the deleterious effect that such environments have on the progress and retention of women and other minorities. As Professor Volokh notes,

[i]f one wants to support a new speech restriction without putting at risk the existing scope of Free Speech Clause protection, one has to provide a limiting principle, a “discernible [and] defensible boundar[y],” a robust explanation of why this speech is different: Why this speech deserves to be unprotected, but why at the same time the Free Speech Clause should continue to protect other sorts of speech. This, it seems to me, is the challenge facing those who argue that speech which creates a hostile work environment ought to be unprotected.

This challenge, he concludes, has not been met.

But these concerns aside, the constitutionality of Title VII is generally presumed. Professor Cynthia Estlund notes that “[m]uch of the commentary echoes the untidy collection of Supreme Court decisions on the First Amendment in the workplace, which creates a vague and incoherent picture of permissiveness toward speech restrictions.” In order to wield the law as a tool with which to effectuate true equality in the workplace and to close the gap between those who have historically been underrepresented in employment and in public life, and those who have not, Title VII provides a widely accepted basis

269. Volokh, supra note 267.
270. Browne, supra note 267 at 483-84.
272. Volokh, supra note 267, at 313.
273. Id.
for employer liability where speech transforms the workplace into a hostile environment and palpably alters one’s wellbeing or opportunities. Moreover, in light of what we currently understand about the effects and dynamics of workplace discourse that is punctuated with abusive speech, speech that lacks the traditional hallmarks of harassment, but which nonetheless systemically alienates protected-class members, ought to confer employer liability. Judge Marcus’s point in Reeves, that the harasser need not add “and you are one too,” for some generalized but derisive comments which seem to systemically alienate protected-class members to become actionable, should become wholly integrated into the law of Title VII. 275

As Professor David Oppenheimer concludes, it is clear that “[w]hile Title VII imposes tort liability on employers for sex and race-based on-the-job harassment, our traditional rules protecting freedom of speech remain intact,” because

[w]orkplace harassment, like fighting words, is conduct, or language, which provokes actual injury, in the form of an injurious and verifiably altered work environment. The wrong is not simply in engaging in the harassment, but in causing foreseeable injury to another—i njury not only subjectively experienced by the plaintiff, but objectively injurious to a reasonable person. Unwelcome conduct, whether words or deeds, which constitutes intimidation, ridicule or insult and is objectively sufficiently severe or pervasive to alter the conditions of its workplace, making it abusive to employees, may be properly regarded as outside the protection of the First Amendment . . . . Women and minority group members in the workplace are a captive audience . . .[and t]hey look to their employer to protect them, just as they expect protection from other unsafe working conditions. 276

Professor Oppenheimer further argues that “the First Amendment is not the only Constitutional protection at stake when we consider the legitimacy of governmental regulation of workplace harassment.” 277 Constitutional amendments that promote and ensure equality ensure that “minority group members have a particularly strong entitlement to the state’s protection from harassment.” 278 There are

persuasive arguments that racial and sexual harassment, like obscenity and fighting words, is outside the scope of the First Amendment’s protection; that even if harassment is entitled to protection in some environments, it may be banned in the workplace; and that countervailing Constitutional interests in

275. Reeves, 594 F.3d at 811.
277. Id. at 324.
278. Id.
In any event, any perceived expansion of Title VII entailed in a more holistic, context-based approach to determining Title VII liability should not raise First Amendment issues beyond those some already perceive with the law in its current state. As one scholar has noted, “a person who is convinced that sexually harassing speech could sometimes be constitutionally protected will not support [a] suggestion of expanded Title VII...liability, and no one who is convinced that sexually harassing speech is not constitutionally protected should object to [expansion]...on First Amendment grounds.”

V. CONCLUSION

To the extent that the culture of the contemporary workplace, specifically the culture of abusive workplace speech, operates to alienate and impede women in their quest to advance, what may be done about this phenomenon? And given that the pervasiveness of this speech engenders and perpetuates “the gap” as much or more than the failure to accommodate the work/family balance needs of women, what can be done, inside or outside the legal system, to address it?

Some possible solutions are immediately identified as implausible or unworkable. For example, one approach might be to say that the pervasive attitudes and culture are so rife with speech that alienates women that they can be defused only by infusing new views, attitudes, and approaches into the highest levels of corporate leadership changing the culture from the inside out and from the top down. Under this approach, only through the forced integration of the upper echelons of workplace power and prestige will that which is considered acceptable and commonplace be transformed into that which is considered taboo and intolerable.

In 2012, the European Union embarked upon a new effort that could result in legislation requiring women to occupy up to 60 percent of the seats on corporate boards. The rationale propelling this European movement is that industry and companies’ self-regulation of gender equality has failed, and

279. Id. at 324-25.
280. Mary Anne Franks, Sexual Harassment 2.0, 71 Md. L. Rev. 655, 697-698 (2012).
legislation is needed to effectuate change, diversity, and equality of opportunity.\textsuperscript{282} As of 2012, a mere 3.2 percent of European Union companies’ presidents and chairs are women, and women occupy a mere 13.7 percent of the seats on the boards of large companies. The United States is not much farther ahead with only 16 percent of its corporate board seats going to women.\textsuperscript{283} Whether for this reason or for others, the legislation appears to have received strong support from European legislators and public citizens alike. A poll showed that up to 75 percent of respondents in the European Union favored legislation to balance gender representation on company boards.\textsuperscript{284}

Moreover, several European countries, including France, Italy, the Netherlands, and Spain, have legally-compelled quotas or legal recommendations that forcibly place women in high-powered positions in companies.\textsuperscript{285} In Italy, for example, it has been mandated that at least one third of a company’s board be comprised of women by 2015, lest these companies face fines of up to 1.3 million dollars.\textsuperscript{286} After a three-month consultation discussing the objectives of the quotas, European Union Commissioner Viviane Reding has announced that she will propose legislation in the fall of 2012 that would impose a 40% gender quota on all publicly traded companies in the EU; the policy continues to be debated as of the writing of this Article.\textsuperscript{287}

However, such an aggressive approach is vulnerable to attack, especially if proposed in the United States. Rigid quota requirements are considered anathema to American law, even under affirmative action jurisprudence in this country.\textsuperscript{288} Title VII does not, and should not, guarantee anything more than equality of opportunity, absent the most extreme and compelling circumstances.\textsuperscript{289} Though there does need to be an extreme shift in workplace culture, the answer does not lie in such an extreme measure. Such a shift will likely arise from a greater awareness of what is going on, and such awareness will need to be cultivated both within and outside of the law. Just as sexual

\textsuperscript{282.} Id.
\textsuperscript{283.} Id.
\textsuperscript{284.} Id.
\textsuperscript{285.} Id.
\textsuperscript{286.} Id.
\textsuperscript{288.} Richard L. Barnes, \textit{Quotas as Satin-Lined Traps}, 29 NEW ENG. L. REV. 865 (1995) (“Use of rigid mathematical quotas risks turning the remedy into a satin-lined trap for the group seeking redress. It may be a softer and more appealing mechanism, but it can be a trap nonetheless.”).
\textsuperscript{289.} \textit{See generally Griggs v. Duke Power Co.}, 401 U.S. 424, 436 (1971) (“Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.”).
harassment was not recognized as something out of the ordinary, let alone impermissible, prior to the recognition of a discrete cause of action within the law, so must gendered abusive speech and workplace cultures of alienation be recognized by courts as both harmful and unlawful. Just as fear of sexual harassment liability begat sexual harassment training and the notion of sexual harassment made its way into popular culture (books, magazines, television plots—and not just on shows about lawyers) from the 1980s onward, so too should gendered, abusive speech and hostile workplace environments be discussed and identified as a barricade today.

Courts need to inform their construction of terms like “severe or pervasive” or “because of sex” with a contemporary understanding of and appreciation for how language and behavior operate to alter or even transform one’s workplace environment, wellbeing, and opportunities. Courts should stop rejecting the reasoning and logic embodied in Reeves and begin to acknowledge the real-world effects of abusive speech in the workplace. Even if these cases do not always result in liability for the employer, the possibility that these instances could go to trial may cause employers to think more carefully about allowing this category of speech to go on within their organizations.

290. See Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (“[T]here may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers . . . the sexual harassment would not be based upon sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII.”); Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981) (discussing that a woman’s options when faced with sexual intimidation present a “cruel trilemma” in which the woman may (1) endure the harassment; (2) attempt to oppose it; or (3) leave the job, with little prospect of gaining legal relief).

291. See supra note 69 and accompanying text.