

THE UNINTENDED HOSTILE ENVIRONMENT: MAPPING THE LIMITS OF SEXUAL HARASSMENT LAW

by

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I. Introduction

Sexual harassment scholarship is at a crossroads. What began largely in the academic laboratory of Catherine MacKinnon¹ and other scholars is now experiencing growing pains, uncertain of the direction it seeks to pursue. There is a sense that the equal opportunity promised by Congress when it passed the Civil Rights Act of 1964² – the federal statute that encompasses and proscribes sexual harassment – has not been fully realized, and that perhaps the law can only take individual employees so far. And there is the sense that the law would provide far less protection that it presently does had it not been for the efforts of scholars who pushed courts to recognize that the conditions of employment an employee labors under are as important – and as potentially unlawful – as less subtle forms of discrimination.³

But constraining the efforts of these academics (and to be fair, some jurists),⁴ is the law itself. Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of . . . [an] individual’s . . . sex” (or race, color, religion and national origin),⁵ and while the words are simply stated, they are applied with difficulty. For years “because of” has meant “motivated by.”⁶ And while that interpretation is the most consistent with the dictionary,⁷ it admittedly leaves a gap in the statute’s coverage. Take the case of a hypothetical Jane Doe who believes she is the victim of sexual harassment because her environment is filled with sexual innuendo and vulgarity. The vulgarity is not directed at her, but she is powerless to escape it. Is she a victim of sexual harassment? Setting aside other important issues, such as the objective and subjective severity of the environment and what role the employer has played to stop or prevent her working conditions,⁸ her claim may be doomed before it even gets started. This is especially true if the vulgarity existed before she arrived on the scene and it is undeniable (as it might not be) that her coworkers never turned up the heat upon her arrival to see how she would react. Or, even if they did, it may be uncontested that her coworkers turn up the heat on all new employees, making their motivation one of initiation or hazing rather than the plaintiff’s sex or gender.⁹

For nearly 40 years, the words “because of sex” in the statute have been interpreted as referring to the motivation, or intent, of the decision-maker, or the speaker, or the harasser.¹⁰ In short, in employment law, as in labor law, motivation matters. Courts do not protect employees from the environments that all employees face, or risk facing. The concern of Congress was the environments that only some employees faced on account of – or “because of” – their sex. (Actually, as sex was a last-minute addition to Title VII and was added only to defeat the bill¹¹ – a move which failed – it is clear that Congress was more concerned with race, not sex, discrimination at the time.) But far more women work full-time today than they did 40 years ago,¹² and many of them are single wage-earners and, indeed, raise families on their own. If there were a way to interpret – or re-interpret – the words “because of sex” so that women were more protected in the workplace, what could be the argument against it? After all, subsuming sexual harassment within sex discrimination (and thus within Title VII’s proscriptive power) itself is the creation of federal common law, not expressed Congressional intent.¹³

Three possibilities have emerged. The first is to allow the sexual harassment claim described above to go forward as a traditional disparate treatment case. Disparate treatment cases are intentional discrimination cases under Title VII, meaning the plaintiff’s job is to prove to the court that her coworkers targeted her and discriminatorily altered her working conditions “because of” her sex.¹⁴ In other words, she would not have been so targeted had she been a man.

How is that possible if the facts reveal that her coworkers have always behaved that way? And what if she were the first woman on the scene *and* the evidence revealed that her coworkers always acted that way?¹⁵ Typically that would kill her chances, unless the vulgarity that greeted her subordinated women in general and drew on stereotypical gender norms. Those norms – rooted in what some scholars refer to as a “heteropatriarchy” -- serve to persuade this woman that she does not belong in the workplace, or at least that she does not belong at the level of men.¹⁶ So her claim is one of intentional discrimination even if she cannot establish their motive. The words speak for themselves.¹⁷

A second approach is even more radical. It seeks to short-circuit the discussion of gender norms and any inquiry into the content of the language that surrounds the female employee. Under this approach, all sexual speech is de facto “because of sex” no matter what the exact content of the speech and the motivations of the speaker.¹⁸ Therefore, if the speech is also severe and pervasive, and there is a basis for employer liability, the speech is necessarily unlawful.¹⁹ The problem with this approach is that in seeking to define a new reality, it defies the reality of American workplaces today. The reality is that in more cases than not, men often engage in sexual profanity and vulgarity in order to insult and emasculate other employees.²⁰ In other words, the motives are often personal, not prohibited.²¹ If such language was also unlawful, then courts would, in fact, become what they do not wish to be: super-personnel departments armed as language police.²² Workplaces free from sexual language ought to be the norm, of course, but where they do not exist the problem (absent any evidence of unlawful motivation) ought to be one for human resources, not the lawyers.²³

There is a third approach, and it forms the basis for this paper.²⁴ It is two-fold. First, to call for a return to first principles and a textualist interpretation of the statute. Intentional discrimination cases should be just that – cases where the plaintiff can establish that it was her sex, or race, or religion, which prompted her treatment and working conditions. Second, while the hypothetical working conditions facing Jane Doe (described above) would not be actionable as an intentional discrimination case, the question should be asked whether the federal common law is broad enough to create room for her claim in another way. Title VII allows for cases grounded in unintentional discrimination so long as the plaintiff can establish that the conduct, though perhaps unconscious, disproportionately impacts one protected group more than others.²⁵ A disparate impact case would allow Jane Doe to sue her employer based on her working environment in a way that is both consistent with the text of Title VII and the statute’s underlying policy and purpose.²⁶ And while scholars (and courts) may ultimately and legitimately conclude that the claim should fail and that the common law is not broad enough to make room for such a claim, that it is more a prediction than a certainty.

There is no question that the law against workplace discrimination is narrowly tailored. The text itself is limiting. The issue here and going forward is whether the federal common law is the appropriate place to fill in the statute’s gaps, or whether that role is best left to the traditional law-making source: the legislature.²⁷ A single recent case – *Ocheltree v. Scollon Productions*²⁸ – is broad enough and important enough to both raise that question and perhaps to provide the answer. At the core of the case are working conditions that may not have singled out a new female employee and may have existed long before she arrived on the scene. But without a doubt the conditions were vulgar and foul. In that context, it would appear that only the claim described above – one grounded in disparate impact theory – would save her case.²⁹

The purpose of this paper is three-fold. First, to determine the current state of sexual harassment scholarship and to discuss what important scholars (and some jurists) would do in the case of Lisa Ocheltree.³⁰ The second is to determine whether the federal common law is broad enough to envelop a disparate impact hostile environment claim.³¹ That endeavor itself involves two competing traditions. The Supreme Court’s well-known *Erie* doctrine limits the development of federal common law.³² But labor law, in many respects the parent of contemporary employment law, embraces it. Finally, this paper scrutinizes the disparate impact hostile environment claim.³³ What would the claim look like and is it theoretically sound? The goal of the paper is to assist sexual harassment scholarship and jurisprudence through what can best be described as its teen-age years. Seventeen years after the Supreme Court officially recognized the harassment claim in *Meritor Savings Bank v. Vinson*,³⁴ sexual harassment scholarship and jurisprudence is experiencing the kind of growing pains and insurgency that parents can easily recognize. The decision in those cases is whether to engage the teenager in the fight, or find a peaceful (and workable) alternative. A disparate impact hostile environment claim may provide that imperfect peace.

II. *Ocheltree v. Scollon Productions, Inc.*³⁵

Perhaps no better case than the Fourth Circuit’s *Ocheltree v. Scollon Productions, Inc.*, exists to demonstrate the difficulties in interpreting Title VII’s terms. If conduct that is “because of sex” is unlawful, what exactly does “because of” mean? *Scollon Productions* hired Lisa Ocheltree to help make game mascots in South Carolina.³⁶ Ocheltree worked in an all-male work environment³⁷ and her coworkers routinely used foul, vulgar and profane language, and told sexually-oriented jokes. Whether or not she was near them, they mimicked having sex with mannequins.³⁸ They talked about how they had sex with their wives and girlfriends and whether their partners “gave good head,” “swallowed,” or “liked it from behind.”³⁹ They also sang songs. One song had this verse: “come to me, come to me, your breath smells like cum to me.”⁴⁰ There was more. On at least one occasion they showed her a picture of a man with pierced genitalia.⁴¹ And even her supervisor was involved. He showed a photograph of a nude woman around the shop and engaged in several sexually explicit conversations with Ocheltree’s coworkers.⁴² The same supervisor once stated that he enjoyed having sex with young boys.⁴³ As in many of the instances, the point was to see Ocheltree’s reaction.⁴⁴ Ocheltree tried to get her coworkers to clean up their act, but it was no use.⁴⁵ Ultimately, she did not have to make the decision to leave. The company fired her for (among other reasons) excessive absenteeism.⁴⁶

Ocheltree eventually won her case in front of a jury.⁴⁷ While the jury did not find her in need of much compensation for her injuries – it awarded only \$7,280 in compensatory damages – it was severe when it came to punishing *Scollon*.⁴⁸ The jury ordered *Scollon* to pay Ocheltree \$400,000 in punitive damages.⁴⁹ The district court disagreed. It reduced her award to a total of \$50,000 in both compensatory and punitive damages.⁵⁰

Scollon appealed to the United States Court of Appeals for the Fourth Circuit. Because the original panel decision has since been vacated and the case has been argued *en banc*,⁵¹ at this point Ocheltree can still be described as a winner in the case. But that result may be short-lived. By a vote of 2-1, the original panel reversed the verdict in her favor and remanded with instructions for the district court to enter judgment in favor of *Scollon*.⁵² The Fourth Circuit is largely seen as fairly conservative,⁵³ and though predictions are futile in this area, there is a sense that Ocheltree may lose a second time when the full court issues its decision. If she wins, it may well be in a narrowly tailored decision that leans on the jury’s role as the final arbiter of fact in these cases and a conclusion that the original panel improperly weighed some facts against her.⁵⁴

Whatever the ultimate result in the case (it is not impossible that the Supreme Court may provide the final answer), the original panel's decision and dissent reflect Title VII's current controversy: what exactly does it mean to suffer discrimination "because of" your sex?⁵⁵ For the majority in the *Ocheltree*, it means evidence that you would not have suffered discrimination if you were the opposite sex.⁵⁶ According to the majority, on that score Ocheltree failed. Indeed, the court could find in the record only three incidents – the vulgar song, the body-piercing photograph, and the simulated sexual acts with the mannequin – which were directed at Ocheltree.⁵⁷ The remainder of the conduct surrounded her, but her presence did not prompt it. Indeed, the majority concluded that it was important that most of the conduct pre-dated Ocheltree's arrival on the scene.⁵⁸ Therefore, Ocheltree's fundamental failing was an inability to prove that her sex, rather than some other factor, motivated her coworkers' speech and behavior. But what of the three incidents directed at Ocheltree? According to the majority, only the vulgar song and the mannequin incident could be interpreted as sex-related harassment.⁵⁹ Having reduced her case to these two incidents, the final decision came easily. The court concluded that it had "no difficulty concluding that the two arguably gender-related incidents directed at Ocheltree during the year and a half that she was employed at Scollon Productions were not severe or pervasive for purposes of Title VII."⁶⁰

The dissent framed the argument differently. It believed it very likely that Ocheltree's coworkers targeted her because she had invaded their terrain as the first woman at Scollon. But even more importantly for the purposes of this paper, the dissent argued the exact motivation behind the harassment may not matter.⁶¹ It was undeniable that the environment affected Ocheltree more than the other men who worked there.⁶² The language that her co-workers employed (much or it having to do with oral sex) subordinated women to men.⁶³ Ocheltree's sex may not have prompted the language, but a reasonable person could not believe that the language affected men and women equally.⁶⁴ The lopsided effect of the harassment provided, according to the dissent, the best evidence in support of her claim.⁶⁵ The fact that the sexuality pre-dated Ocheltree's hire did not impress the dissenting judge: "I conclude that a workplace environment could be abusive 'because of' a plaintiff's sex even if the environment was essentially the same both before and after the plaintiff entered the workplace."⁶⁶ How so? Because the language, while targeting a particular individual such as Ocheltree, was "disproportionately more offensive and demeaning to one sex."⁶⁷

A standard of disproportionality sounds like the basis for a disparate impact claim, but the dissent curiously steered clear of that suggestion. Instead, it cited two important recent articles in the sexual harassment field (both discussed below) and concluded that the "because of sex" requirement in Title VII "allows for more interpretive flexibility than the majority recognizes."⁶⁸ In a nutshell, according to the dissent the term allows for the case where the focus of the plaintiff's claim is not on the harasser's intent, but on harassment's impact. Language which is more demeaning to women than men satisfies that interpretation and would allow a plaintiff such as Ocheltree to ground her claim in traditional, intentional discrimination theory.⁶⁹

III. The Scholarship: Two Alternative Theories as to What Title VII's "Because of" Means

A. Professor Franke's Version of Title VII

Professor Katherine Franke, who has written on sexual harassment and discrimination in general for several years, was one of the scholars cited by the Ocheltree dissent. In her article, *What's Wrong With Sexual Harassment?*, Professor Franke argues that sexual harassment is unlawful not because the conduct is motivated by sex (as in biological sex), but because it perpetuates gender norms.⁷⁰ Franke refers to the norms as "hetero-patriarchal."⁷¹ Franke makes a point of using the term "gender" rather than "sex" for obvious reasons. By nearly any definition, sex is a more limited term than gender. It refers to one's biological sex – given, rather than chosen (typically) – which in turn is based on an individual's reproductive organs. While the term sex is typically a means of classification (as in you are either male or female), gender refers to the way in which a person animates his sex. Accordingly, one may be either a masculine or feminine male and a masculine or feminine female.⁷² Therefore, language which perpetuates norms in which females must be feminine and subordinate to men is discrimination "because of" sex.

The problem with Franke's approach is largely two-fold. First, her version of Title VII is correct only if Congress intended sex to be as broad a term as gender. The Supreme Court – though it has used the term "gender" occasionally⁷³ – does so clearly as an alternate way of saying "sex," not to send the message that anything more than biological classifications are protected under the law. It is difficult to imagine that when it added a term with ulterior motives (sex was added not to strengthen the bill, but to help defeat it),⁷⁴ Congress had even more protections in mind for working women. Title VII is the equivalent of an intentional tort statute,⁷⁵ and in such cases intent comes before injury. Of course, this does not mean that sex-based *decisions* drawn from sex stereotypes are lawful. Under the right circumstances, *Price Waterhouse v. Hopkins* tells us that they are not.⁷⁶ But the reason is not based in subordination theory. It is simply based on the text of the statute.⁷⁷ If a woman is too masculine to be promoted to partner, but an equally masculine man would be promoted, the difference is in their sex. So sex has prompted the decision after all.

A second problem with Franke's approach is in its application. Even if some conduct or language is "because of" sex on the grounds that it subordinates women, can we expect women to agree that language can be so easily classified? Would language concerning oral sex fall into this category or not? And if it did, is not that result suggestive of the very paternalism (women cannot handle such language) that Franke's theory targets in the first place?⁷⁸ Lastly, Franke's approach is the equivalent of razing a perfectly good house, only to build a more clumsy dwelling in its place. As discussed later in this paper, if, in fact, some language *is* – however intended – more demeaning to women than men, then that describes a disparate impact case and not a disparate treatment case.⁷⁹

B. Professor's Schwartz's Version of Title VII

The *Ocheltree* dissent also cites a recent article by Professor David Schwartz. In his article, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, Professor Schwartz argues for the adoption of a per se rule under which *all* sexual language in the workplace would be interpreted as presumptively "because of sex."⁸⁰ How could that be? He explains:

A sexual act creates and reinforces the gender of the person acting and the person acting upon. . . . The relationship between gender and any instance of sexual conduct is one of both cause and effect; sexual conduct is necessarily 'because of' the gender of all persons involved. Again, since 'gendered' beings are located in 'sexed' bodies, 'because of gender' also necessarily implies 'because of sex.'⁸¹

Schwartz describes a scary, overly-sexed world that is hard to reconcile with reality. Like television and contemporary American life,⁸² the American workplace is filled with sexuality that satisfies several purposes, only one of which may be to make life more difficult for women.⁸³ Some sexual language is rooted in personality and is the means by which individuals – especially men – demean each other.⁸⁴ But in Schwartz's world even that language apparently would support a same-sex harassment claim.⁸⁵ Beyond such oversexualization, Schwartz's approach fails because he makes it impossible to separate speech from an individual's sex. For Schwartz sexual speech is uttered "because of sex" simply because it is uttered by one sex or another, and that person is "gendered."⁸⁶ Under that rule, all speech would be actionable so long as Title VII's other requirements (e.g., severity or pervasiveness) have been satisfied. But the creation of a rule which allows jurists and academics to in a sense redact statutory language (the 'because of' term) or read around such language as if it existed simply to annoy or impede a plaintiff's progress is not good scholarship. It is a regrettable short-cut.

Surely the approaches of Schwartz and Franke are rooted in good intentions,⁸⁷ which makes it ironic that they seek to read intentionality out of the disparate treatment case. But *actus reus* is not enough under Title VII. The term "because of" means that a decision maker's "mens rea" is also critical.⁸⁸ The Supreme Court has made it clear that epithets – whether sexual, racial, or otherwise – are not unlawful unless motivated by the target's association with a protected class.⁸⁹ "The critical inquiry, the one commanded by the words of [the statute], is whether gender was a factor in the employment decision at the moment it was made."⁹⁰ So it is strange that the logical alternative – the alternative that would satisfy both Franke's and Schwartz's position that sensibilities, not sexes, should matter under the statute – is the one that both scholars carefully avoid. The disparate impact hostile environment claim exists for these scholars at the proverbial fork in the road. But rather than take the road that leads to that claim, they would rather slog their way down the intentional discrimination path. Once down that path they are met by the imposing statutory terms. Rather than cutting their losses and back tracking, they call for a version of Title VII that allows for considerable "interpretive flexibility."⁹¹ The only remaining question is this: if they used the same arguments in support of an unintentional, disparate impact claim, could they help a plaintiff like Lisa Ocheltree? The answer to that question is yes, but only if courts interpret Title VII as more than a statute. That is, only if they approach the law of employment discrimination as part statutory and part common law, the latter able to provide the "flexibility" that the statute cannot.

IV. The Ossification of Federal Employment Law?

Though there is no "free-floating" federal common law,⁹² there is a place for federal common law in the labor and employment law world. As Judge Posner pointed out in a case concerning the development of federal common law under ERISA, "statutes are rarely comprehensive; they are enacted against a rich background of common law principles that can be drawn on, as necessary, to put flesh on the legislative skeleton."⁹³ This is why some federal courts allow estoppel claims against pension plans under ERISA⁹⁴ even though the statute does not mention estoppel and requires that benefits may be paid only in accordance with written plans.⁹⁵ Allowing estoppel claims is consistent with the statute's emphasis on the rights of beneficiaries and is reserved for egregious cases of bad faith on the plan provider's part.⁹⁶

The Labor Management Relations Act (LMRA) is another example of how courts fill out a statute's terms and provide it with meaning over the years. Section 301 of the LMRA allows individuals to sue in federal court for the breach of a labor contract,⁹⁷ but until the Supreme Court resolved the issue in *Textile Workers Union of America v. Lincoln Mills*,⁹⁸ it

was unclear whether that section was a source of substantive law or simply the source of a federal court's jurisdiction.⁹⁹ The Court resolved a split in the circuit courts of appeals and concluded that Congress had more than jurisdiction in mind when it allowed federal courts to resolve what amounted to breach of contract suits. The Court concluded that the LMRA expressly furnished "some substantive law,"¹⁰⁰ and further that the remainder would be filled in by federal judges.¹⁰¹

If the issue today is the scope of the judiciary's power to create new law under Title VII, *Lincoln Mills* would seem instructive for a number of reasons. The National Labor Relations Act of 1935, amended by the LMRA in 1947, was also the template Congress used in drafting Title VII.¹⁰² The NLRA, LMRA and Title VII are each, in essence, workers' rights statutes,¹⁰³ though the LMRA is admittedly a conscious decision by Congress to tack back from what was perceived to be excessive rights given away to workers under the NLRA.¹⁰⁴ And in *Lincoln Mills*, the Supreme Court recognized what Judge Posner saw years later under ERISA:¹⁰⁵ that while Congress may attempt clarity when it fashions substantive law, and the text of a statute may provide many answers, ambiguity always remains:

The Labor Management Relations Act . . . points out what the parties may or may not do in certain situations. Other problems may lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.¹⁰⁶

And so judicial interpretation – and implementation of Title VII – has proceeded in the same way. In its simplest form (the proscription concerning unlawful disparate treatment on the basis of protected characteristics – the guts of the statute – measures only 50 words),¹⁰⁷ the statute tells employers what they may not do. But it did not resolve (and surely did not even contemplate) every problem that a later generation would confront.¹⁰⁸ For years the issue of sexual harassment itself percolated through the courts before they followed the lead of academics such as Catherine MacKinnon¹⁰⁹ and recognized what is largely taken for granted today.¹¹⁰ Whether same-sex harassment was also unlawful generated a curious circuit conflict and reams of scholarly input.¹¹¹ In the end the Supreme Court's decision on the issue added up to just a few pages in United States Reports,¹¹² surely leading scholars to wonder whether, in anguishing for so long over the statutory term "because of sex," they had drawn too much uncertainty from too little.¹¹³

In a culmination of its flurry of sexual harassment opinions in the late '90s, the Supreme Court also tackled the issue of employer liability.¹¹⁴ The simple statutory terms had run out of meaning, prompting the court – as *Lincoln Mills* instructed – to look to the policy of the legislation for its answer. Of particular interest, the court declined to take the lead of Judge Easterbrook on the United States Court of Appeals for the Seventh Circuit, who cited *Erie R.R. v. Tompkins*¹¹⁵ in concluding that the answer lay not in a federal common law but rather in the laws of the states.¹¹⁶ Under Judge Easterbrook's version an employer would be liable under federal law for supervisory sexual harassment in Illinois if the state law (common or statutory) would hold the employer responsible.¹¹⁷ The *Lincoln Mills* Court had been asked a similar question under Section 301. What is the substantive law to be applied in these cases?¹¹⁸ Forty years later, the Supreme Court (in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*) reached the same conclusion as *Lincoln Mills* in favoring a national common law to accompany what Congress saw as a national problem. The Court followed the instruction it gave years earlier in *Meritor* -- namely, that it look to common law agency principles in these cases to determine the extent of employer liability.¹¹⁹ Rather than condition that liability on the decisions of states, it chose to establish uniform rules with respect to supervisory sexual harassment.¹²⁰ At the very least, the result is horizontal uniformity across the federal courts (though clearly not vertical uniformity as conduct that now violates state anti-harassment laws may or may not violate Title VII).¹²¹

But there is a difference between on the one hand filling in the gaps *within* a statute by looking – or even creating – common law, as *Ellerth* and *Faragher* attempt to do, and on the other determining that new federal common law should be created because the statute *leaves* a gap in workers' rights by not going far enough.¹²² And the second approach is made worse by an attempt to recharacterize the plain language of a statute – in particular, the words "because of sex" – in order to fit the additional common law. What is described is not a good faith attempt to interpret a statute, nor a good faith attempt to fill in statutory gaps with common law. The suggested common law is purely additive, and what is worse, it actually conflicts with the original terms Congress wrote.¹²³

Of course what may be going on here is that academics – and some federal judges – are worried that employment law will become as ossified as labor law now is. At least one scholar has declared labor law to be clinically dead – or at least nearly so.¹²⁴ The comparison is made doubly powerful in light of the fact that Title VII is modeled after the preeminent labor law, the NLRA.¹²⁵ What results is a Dickensian 'ghost of Christmas future' moment, as scholars such as Franke and Schwartz (and the dissent in *Ocheltree*) surely look into the future and wonder whether the law that begat Title VII is a harbinger of things to come.

They need not worry. The need for judicial and academic activism in the area of workers' rights is in some respects understandable.¹²⁶ But as Professor Estlund argues, one of the primary reasons American labor law now stands still is that unionized workers have no private right of action against their employers.¹²⁷ In nearly every case, workers must choose

arbitration over Section 301 suits for breach of contract,¹²⁸ arbitration over a strike,¹²⁹ and even arbitration over unfair labor practice charges.¹³⁰ The entire statutory – and common law – scheme favors private, not public, dispute resolution,¹³¹ the latter being the right that every private sector worker *not* in a union enjoys under Title VII.¹³² Which brings us to yet another irony. In large part, Congress did not cause this ossification. Over time, courts did (with the assistance of the National Labor Relations Board) by developing a series of sweeping preemptive and preclusive common law doctrines that appear nowhere in the statute and remove, rather than reinforce, the rights of workers and their avenues of complaint.¹³³

Consider the example of a state law that seeks to give more rights to workers. While state anti-discrimination laws are not preempted by Title VII, and can add to both the definition of discriminatory conduct (such as sexual orientation discrimination)¹³⁴ and the remedies available to plaintiffs, labor law is broadly preemptive of similar state laws. A state law that added to the NLRA's remedies in redress of anti-union conduct on the part of employers would be preempted.¹³⁵ Similarly preempted would be any suit by a union employee that his employer breached his contract -- the contract he shares with others -- by not paying him for the work he has done.¹³⁶ That suit must begin as a grievance and will most likely be resolved, one way or another, by an arbitrator.¹³⁷ But the *nonunionized* employee with his own individual contract claim gets a free pass to court, without even experiencing the hassle or the delay of stopping first at the EEOC or state administrative agency, as the similarly aggrieved victim of discrimination must do.¹³⁸

Of course, no one should get the impression that stopping at the EEOC before proceeding to federal court is as burdensome or preclusive as a common law preemptive doctrine which forces workers out of federal court altogether and into arbitration. After all, while the arbitrator's decision is nearly binding and preemptive in its own right (a court will overturn it only after finding the most egregious error),¹³⁹ the complainant is free to truncate the EEOC's investigation and request a right to sue letter almost immediately.¹⁴⁰ The EEOC, often claiming to be overburdened, will happily comply. And why not? Its own regulations, interpreting the statute which created it (Title VII), allow it invoke what is really an *anti*-preemptive doctrine.¹⁴¹ At the same time common law preemption under the NLRA means that few grievances or unfair labor practice charges end up in federal court, the EEOC's rule-making and issuance of early right to sue letters mean that discrimination charges that *fail* to get to court are more likely the result of the plaintiff's inertia than the parties' alternative dispute resolution.¹⁴²

So in the Title VII context, both the statute that Congress wrote and its interpretive guidelines issued by the EEOC are litigation-friendly. By contrast, common law preemptive doctrines in the labor law world mean that few cases are ever litigated in front of federal judges.¹⁴³ It is therefore strange that the developing common law that has cost organized workers so dearly remains for some employment law scholars the route to true equal opportunity in the workplace.¹⁴⁴

This is not to say that common law has no place at all in Title VII jurisprudence. As noted above, *Ellerth* and *Faragher*,¹⁴⁵ look to the *Restatement of Agency*¹⁴⁶ in determining the limits of organizational liability for supervisory harassment, and as such these cases embrace the combination of common law and anti-discrimination statutory law. But the Supreme Court's exercise in those cases was less creative than it was the type of gap-filling that judges often must do.¹⁴⁷ Compare that to the judicial creation of a brand new cause of action based solely on the harm that the victim experiences and not on the motivation behind the act that caused the harm. While that may well describe a disparate impact case (discussed below),¹⁴⁸ it rules out an intentional discrimination case under Title VII, which does not protect against unconscious discrimination.¹⁴⁹

The desire to protect an employee such as Lisa Ocheltree is understandable. As discussed above, contemporary employment law scholars suggest doing it in two different ways, neither of which is consistent with Title VII's statutory terms.¹⁵⁰ I suggest a third approach which is more consistent with Title VII theory, and though it is an imperfect claim that ultimately may fail on its own account, it avoids the mess caused by tortured manipulations of the statute's simple terms.

V. The Disparate Impact Hostile Environment Claim

A. Overview of the Claim

The advantage of the disparate impact claim ultimately may only be the ease with which it can be pleaded by a plaintiff. But that advantage alone is significant. In many cases, the plaintiff's disparate treatment claim runs into the same imposing obstacle: no evidence establishing that the motivation behind the harassment was the plaintiff's sex.¹⁵¹ As a statutory tether, the "because of sex" requirement is strong.¹⁵² Ask Lisa Ocheltree. Or Craig Johnson, who was forced to endure a lengthy campaign of harassment at a Coca-Cola bottling company.¹⁵³ A coworker, Ollie Hicks, initiated the harassment and Johnson gave a little in return. But there was no real dispute in the case that Hicks, not Johnson, was the instigator when he often told Johnson that he was going to "make [him] suck his dick," and the like.¹⁵⁴ Sometimes Hicks would touch himself as if masturbating through his clothes; other times he would come up to within inches of Johnson's face.¹⁵⁵ And Johnson's fiancée was not off limits to Hicks, either. Hicks told Johnson that Hicks would have "that redhead bitch suck [his] dick."¹⁵⁶ Johnson and other workers complained about Hicks, but little was done.¹⁵⁷ Ultimately, Coca-Cola

fired both employees after the verbal barrage between the two men turned physical. One day they ended up across the street from the company during their lunch hour. Johnson won that round.¹⁵⁸ After the fight, Hicks went to the hospital and Johnson returned to work.¹⁵⁹

Johnson sued Coca-Cola for sexual harassment, but the facts of the case doomed his chances. Even before *Oncala*, the district court and the federal appeals court in *Johnson* recognized the viability of a same-sex harassment claim, at least in theory.¹⁶⁰ But more of these claims fail (than in opposite-sex cases) for the simplest of reasons: the language of male insult is almost always profane. The result is sexuality in the workplace. But, as the court concluded, the sexuality is not sex-based:

Most unfortunately, expressions such as ‘fuck me,’ ‘kiss my ass,’ and ‘suck my dick,’ are commonplace in certain circles, and more often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference – even when they are accompanied, as they sometimes were here, with a crotch-grabbing gesture. Ordinarily, they are simply expressions of animosity or juvenile provocation, and there is no basis in this record to conclude that Hicks’ usage was any different.¹⁶¹

So *Johnson v. Hondo, Inc.* is not a disparate treatment case, at least in the traditional sense. Hicks did not target Johnson because he was a man. Perhaps Johnson could have saved his claim by making the kind of nuanced argument that Franke and others would make on his behalf: that Hicks targeted him because he was not the right *kind* of man. He was not a “real man” in Hicks’ eyes.¹⁶² That simply describes a sex stereotype case, and if it is all that Franke, Schwartz and others want changed in Title VII jurisprudence, the change is unnecessary. *Price Waterhouse* allowed a sex stereotype claim in the case of a woman who was perceived as too masculine.¹⁶³ Perhaps Johnson’s best argument would have been that, from Hicks’ perspective, Johnson was not masculine enough. In a sense, the stereotype would be actionable for the same reason that “sex plus” claims are allowed. In a “sex plus” claim, a woman (in the usual case) wins if she can prove that her employer prefers certain kinds of women (such as those without the distraction of children).¹⁶⁴ In the same way, perhaps Hicks preferred to work alongside only certain kinds of men.¹⁶⁵

But as a disparate treatment case, *Johnson* diverges from *Price Waterhouse* more than it converges with it. There were many nuances to the discrimination experienced by Ann Hopkins, but at bottom the partners at her firm refused her promotion because her aggressiveness – coming from a woman – threatened them.¹⁶⁶ They would have expected (and tolerated) her personality in a man.¹⁶⁷ The source of Hicks’ animosity toward Johnson was only loosely connected with his sex. The partners at Hopkins’ firm liked her a great deal.¹⁶⁸ But not as a woman. Hicks disliked Johnson in general, but of course that is not enough. Johnson had to prove that Hicks disliked him *because* he was a man, a statutory hurdle made more difficult when plaintiffs such as Johnson work in single-sex environments.¹⁶⁹ Different treatment, after all, favors comparisons, and comparing the treatment of one man to the treatment of other men often leads a court to a single suspicion: something unrelated to sex is at play.

But if Johnson does not have a disparate treatment case, does that mean that he does not also have a disparate impact case? While *Ocheltree* is a prime example of how a plaintiff might make a strong disparate impact hostile environment claim in an opposite-sex workplace, the disparate impact claim proposed here might lose its appeal if it cannot be used in single sex environments. But what if Johnson argued that the language Hicks used had a disproportionate impact on certain kinds of men – namely, those who object to sexual profanity and vulgarity not simply because of the language itself, but because they feel threatened by it. In other words, they are as threatened as Lisa Ocheltree by the vulgarity. Perhaps they believe that they must participate in it or risk being noticed as a sensitive man, or potentially a gay man, or at the very least not the right kind of man. In that case, the sexual language impacts them differently than it would other men (the kind that *Johnson* describes as using sexual language almost unthinkingly).¹⁷⁰ Of course the typical disparate impact case would have a plaintiff prove an impact on one sex versus another sex, or one race versus another race. In other words, the comparison is between, not within, protected categories. But if same-sex discrimination is possible under disparate treatment theory, is it such a stretch to say that it is also possible in a disparate impact case?

Consider this example. A black employee begins working in an all-black work environment. The environment is infused with racist language and innuendo, and the workers often call each other “nigger.”¹⁷¹ The new employee receives the same treatment. He is deeply affected by the word and the similar language in a way the others are not. To him the word is the ultimate derogation of the history of his family and ancestors and his pride in them. Though a single word, to him it means the others have accepted their status in a sub-class, a class undeserving of respect. And though he understands that the words are not flung at him perniciously, the words injure no matter what prompted them to be uttered.

It is not a disparate treatment case. His coworkers do not intend to treat him differently because he is black. Rather, they intend to treat him in the same way they treat each other. But of course their motivation (or lack of motivation) does not excuse the language they use. And there is no denying the affect the language had on the new employee. So his case is a disparate impact hostile environment one even if his coworkers are also black. More so than in a disparate treatment claim, the focus in a disparate impact case is on the group the plaintiff identifies as injured rather than on the source of the injury. In this case, the plaintiff identifies blacks as the injured group even though blacks also caused the injury. After all, the fact that

some black employees are willing to use racial epithets or extreme derogation should not mean that others have lost their chance to object. Any other result would mean that disparate impact cases can be lost simply because individuals are becoming more vulgar and workplaces are becoming filled with more incivility and hate.

The example shows two things. First, that a same-race (or same-sex) disparate impact claim should be theoretically possible. Second, that a similar claim made on behalf of Craig Johnson would not succeed. There are differences between the black employee's disparate impact claim and the one that Johnson would make. The words hurled at the black employee are, on their face, hostile towards blacks in general. Such hostility did not motivate the words, but it explains the impact those words had on the new employee. The words and sexual innuendo hurled at Craig Johnson do not offend men in particular, but rather civility in general. That is, they offend civil men because they are civil, not because they are men. But just as these illustrations demonstrate why Johnson's disparate impact claim fails, they should also show why Lisa Ocheltree's might have succeeded. After all, if a disparate impact claim based on racial derogation is possible in a same-race work environment, then a similar claim based on sexual derogation or subordination should be possible in an opposite-sex world.

B. Advantages of the Disparate Impact Claim: Literalism's Limits

The disparate impact hostile environment claim comes with many advantages. Many cases fail because a plaintiff cannot prove discrimination "because of" her sex, or race, and so on. "Because of" are clearly words of intent,¹⁷² but scholars such as Franke and Schwartz have read intent out of the disparate treatment case by arguing that any claim should succeed so long as the plaintiff's particular injury could not have been experienced but for her sex.¹⁷³ That describes a disparate impact claim, but they resist it and instead seek to proceed under the disparate treatment framework.¹⁷⁴ Any such attempt is doomed. Disparate treatment cases routinely fail because the plaintiff cannot establish that the motivation behind his treatment was illicit. In some cases (more than imaginable), the supervisor appears to be nearly pre-pubescent and while the language is juvenile, it is not headed for the jury.¹⁷⁵ In other cases, such as in *Johnson*, the language is hostile, but the motive is strictly personal. And in still others the harasser is a rare breed: an equal opportunity harasser who treats men and women with equal hostility.¹⁷⁶ In each instance, the statutory words – "because of sex" – are enough to kill the claims. In short, motive matters. But loosed from such statutory mooring is a claim that concerns impact, not intent, and while that claim comes with difficulties (discussed below), they are arguments against its application and not its theory.

This is not to say that courts always know what they are doing when it comes to interpreting statutory language. For years some federal courts read Title VII to exclude same-sex harassment claims.¹⁷⁷ At least one federal circuit court of appeals precluded age discrimination claims when the plaintiff could not compare himself to another employee under the age of forty.¹⁷⁸ Both of those issues ultimately had to be resolved by the Supreme Court. The Court has agreed to resolve other issues of statutory interpretation, too, such as whether the "motivating factor" evidentiary standard applies to all discrimination cases or only those involving direct evidence of discrimination,¹⁷⁹ and whether younger employees may bring reverse age discrimination claims against their employers.¹⁸⁰ So the point is not to suggest that statutory interpretation is easy, or that a textualist approach, even when used to interpret "because of sex" under Title VII, yields easy answers in difficult cases.

An argument can even be made that courts are woefully poor at interpreting the language in Title VII that Congress wrote. Though the statute contains no multi-factored tests and burden-shifting schemes, the courts have supplied them nevertheless. The multi-stage *McDonnell-Douglas* method is one example,¹⁸¹ and perhaps the most egregious one because it has become such a routine formula that few courts dare to evaluate plaintiffs' cases in any other way.¹⁸² Generally, the *McDonnell Douglas* method applies in all cases where the plaintiff cannot point to so-called "direct evidence" of discrimination. "Direct evidence" itself is a term that can be found nowhere in Title VII and appears to be the legacy of *Price Waterhouse v. Hopkins*,¹⁸³ a Supreme Court case in which no clear majority opinion emerged and a concurring opinion, written by Justice O'Connor, has only served to confound courts for over a decade concerning the exact meaning of the term "direct."¹⁸⁴ To this day, the Supreme Court and lower courts struggle to understand what direct evidence is¹⁸⁵ – a task which is both difficult and altogether avoidable since the term was judicially created in the first place and exists only by virtue of federal common law. As if the language Congress writes is not difficult enough to interpret and apply, courts appear eager to add their own layers of complexity (and legacies?) to federal employment law.

A final example on this point. Recently, some courts have taken to using the term "materially adverse employment action" to describe the type of workplace retaliation that may prompt an employment suit under Title VII.¹⁸⁶ The problem is that Congress set the bar much lower in retaliation cases than in the garden-variety disparate treatment case. Indeed, retaliation need not even be employment-related to be actionable. Surely a worker shot for filing a charge of discrimination (or for participating in a discrimination investigation) would have a viable retaliation charge (though the plaintiff in that case might be looking beyond Title VII for his legal remedy).¹⁸⁷ The "materially adverse" language simply may be the result of

judicial sloppiness or inattentiveness to the fact that unlike the statute's main provisions, Congress included no "limiting language"¹⁸⁸ in Title VII's retaliation provision.¹⁸⁹

And it is worth noting that textualism in the extreme – literalism – can result in silliness and should be avoided. Take the claim made recently by James Twisdale in a retaliation case.¹⁹⁰ Twisdale sued his employer, the Internal Revenue Service, charging that his black supervisors harassed him because he is white and because he opposed a charge of discrimination filed by one of his employees.¹⁹¹ The employee claimed race and sex discrimination. There was no dispute that Twisdale participated in the IRS's investigation of the employee's complaint. He was not the investigator, but he did cooperate and give information about the employee to the IRS' equal employment officer.¹⁹² According to Twisdale, his cooperation backfired when his black supervisors targeted him and subjected him to various humiliations on account of the role he played.¹⁹³ (The employee's complaint of discrimination was eventually resolved in her favor.) Twisdale did not have a discrimination claim, obviously, but under his literal reading of Title VII, he should have been able to sue for retaliation.

Title VII forbids an employer "to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" the statute.¹⁹⁴ Read literally, it does not say exactly who is protected: an employee who participates by assisting a complainant in making a charge, an employee who participates by opposing a charge, or both. Twisdale did not assist the employee; he opposed her. According to the court of appeals, his interpretation that he was eligible for protection under the anti-retaliation provision was consistent with the statute but nevertheless not worth taking seriously. It did not "promote the policy of Title VII."¹⁹⁵ Rather, his interpretation was the kind of "[p]erverse and absurd statutory interpretation[] . . . not to be adopted in the name of literalism."¹⁹⁶ Indeed, Judge Posner, writing for the Seventh Circuit and arguably the most prolific and important appeals court judge since Learned Hand sat on the Second Circuit, noted that Twisdale's version of the retaliation provision "show[ed] the limitations of literalism as a mode of interpretation."¹⁹⁷

Judge Posner was correct, of course, at least with respect to his rejection of Twisdale's version of Title VII. The case is mentioned here because the textualist reading of "because of sex" advanced above could be – and has been – criticized as too literal.¹⁹⁸ But literalism is different from textualism, which is an honest attempt to limit judicial reach to the expressed, rather than unspoken, intent of Congress.¹⁹⁹ Interpreting "because of sex" as motivation-neutral, and capable of supporting the claim of Lisa Ocheltree, is not consistent with the statute. But it is exactly the theory of "unconscious" discrimination that is openly advanced by the dissent in *Ocheltree* and by scholars such as Professors Franke and Schwartz.²⁰⁰

Still, the disparate impact hostile environment claim will have to be made and argued, and this is where the quality of the plaintiff's advocacy matters. Take the issue of bathroom facilities for blue-collar female workers. Eileen Lynch worked as a carpenter apprentice for the Tennessee Valley Authority.²⁰¹ Audrey Jo DeClue worked as the only female linesman for the Central Illinois Light Company.²⁰² Lynch had no sanitary portable bathroom to use; the lack of one caused her urinary tract infections and great discomfort.²⁰³ DeClue had no portable bathroom to use, period.²⁰⁴ But Lynch's lawyer understood that her best claim was one of disparate impact discrimination,²⁰⁵ while DeClue's lawyer did not.²⁰⁶ So a federal appellate court affirmed the dismissal of DeClue's hostile environment claim,²⁰⁷ while a different federal appellate court reversed a district court's judgment in favor of Lynch's employer.²⁰⁸

Literalism has its limits. The prohibited practices under Title VII's main provision prohibiting disparate treatment include discrimination with respect to "conditions" of employment.²⁰⁹ Conditions of employment are not included in the statutory section describing a viable disparate impact claim.²¹⁰ But surely the statute's terms are broad enough to include a disparate impact claim based on unsanitary toilets. Under the statute, it is an unlawful employment practice "to limit . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."²¹¹ As the Sixth Circuit noted in *Lynch* (over a dissenting colleague's objections), "[t]he condition of the toilets did 'limit' female [construction] employees in a way that adversely affected their status as employees based solely on their sex."²¹²

Is a work environment that is infused with sexual profanity and innuendo and that adversely affects women more than men so different from the *Lynch* and *DeClue* bathroom cases? The workplace environment is every bit a "condition" of employment as bathroom availability. Indeed, *Lynch* and *DeClue* stand, at minimum, as tacit acknowledgements that seemingly neutral workplace conditions can support disparate impact claims as easily as official employment practices and policies.²¹³ Of course, the traditional disparate impact claim is rooted in a facially neutral employment policy,²¹⁴ such as hiring only high school graduates to be dishwashers, or imposing height and weight-lifting requirements on employees.²¹⁵ But "facially neutral," though it appears in hundreds of cases on the subject as boilerplate, does not appear anywhere in the statute.²¹⁶ And even as a judicial invention or common law, it can be overread. It does not mean a policy or practice that an employer would acknowledge or even claim pride in. Nor is it made a less substantial claim because sexual speech could never be justified by business necessity, which is the employer's typical defense in a disparate impact case.²¹⁷ It can be purely environmental, which of course is the basis for a hostile environment claim. A tacit acquiescence of workplace profanity and hostility on the employer's part surely has as much meaning – and can cause as much damage – to an employee

as an official employment policy or practice. The environment is “facially neutral” because explicit sex-based animus does not prompt it.

C. An Imperfect Claim

This is not to say that there are not difficulties inherent to the disparate impact hostile environment claim. There are several. First, how would the claim be proven? Take the typical work environment, which includes employees of both sexes. Say the men (in the typical case) engage in the kind of sexual innuendo and vulgarity that any reasonable person would find offensive. They do it in the open, around women, but not because they are surrounded by women. Rather, they do it because they are openly juvenile and they think it to be funny, or because they are incapable of understanding its offensiveness. Even if these facts rise to the level of a hostile environment (both subjectively and objectively), the insurmountable hurdle may well be the lack of motivation on the part of the men. They have not created the sexual work environment because they work with women; they would have sustained the same work environment had no women been present at all.

The solution suggested here may well be the disparate impact claim, for surely Franke and others are right in claiming that some sexual vulgarity demeans women in a way that it does not threaten men. Explicit discussions of oral sex may fall into that category, or at least the argument that it subordinates can be made.²¹⁸ But what if some reasonable men in this environment also find it offensive and objectionable? Does their civility doom the female employee’s chances of establishing a disproportionate impact? Maybe not. After all, while a disparate impact claim does rely on imbalances, it does not require one-sidedness. So the vulgarity can offend some men and still be actionable by female employees. A larger problem is the objective offensiveness of the language. In a typical disparate impact case, the plaintiff points to verifiable statistics in support of her claim. Requiring a high school diploma of dish washer applicants is unlawful and provably so. The plaintiff in that case can point to the local labor market and establish that the requirement, which is not job-related or excused by business necessity, disproportionately impacts minority groups more than others. But how does the same plaintiff establish uneven impact when the unlawful tool is not a term of employment but rather the *conditions* of employment? Establishing that some words and language are more offensive and threatening to women than men sounds like a worthy social science research endeavor, but even if the results of such a study supported a woman’s claim (or a black employee’s claim in the case of racial harassment),²¹⁹ presently it is a project that is more an idea than a reality. That means the results would be years away, and in all events, they in fact would be challenged.

There are other problems with a hostile environment disparate impact claim, but they are less evidentiary. Even if a plaintiff such as Lisa Ocheltree were allowed to make the claim, she would do so before a judge and not a jury. The Civil Rights Act of 1991 amended Title VII to allow for jury trials in discrimination cases, but only in cases where the discrimination was intentional.²²⁰ Accordingly, proceeding down the unintentional, disparate impact path means that Ocheltree gives up her right to a jury trial.²²¹ It also means that any relief she could win would be purely equitable in nature, as compensatory and punitive damages are not allowed in disparate impact cases, either.²²² This result may be regrettable. As the Supreme Court has stated on numerous occasions and most recently in its companion cases of *Farragher* and *Ellerth*, one of the purposes of Title VII’s remedial scheme is to support anti-discrimination efforts on the part of employers.²²³ Those efforts are more likely when the legal damages employers face is more certain, or at least not made impossible by the terms of the statute. But the statute is clear on this matter and not even the developing federal common law – which imposed strict liability on employers in cases where the statute was silent²²⁴ – can provide a plaintiff such as Ocheltree with relief that Congress expressly disallowed.

While the disparate impact hostile environment claim comes with both theoretical and practical hurdles to clear, it has one singular advantage: avoiding the prospect of squeezing fact patterns into the disparate treatment mode even though there is no evidence of unlawful intent. What MacKinnon’s early work started, scholars like Franke have advanced with an additional twist: allowing that some sex speech in the workplace satisfies Title VII’s “because of sex” proscription on the grounds that the speech perpetuates gender norms.²²⁵ Her path to that conclusion is somewhat circular – such speech comes from gendered bodies, either male or female, and therefore inherently perpetuates such norms – and the result is that the *Ocheltree* case would proceed as an intentional discrimination case.²²⁶ This despite evidence that Ocheltree’s co-workers engaged in such vulgarity before she arrived on the scene as the first female and in spite of an apparent lack of evidence that they turned up the heat on her or took special delight in embarrassing her because she was a woman. (That, of course, would have converted the case into one of intentional discrimination, as it matters little how the vulgarity started. It only matters why the plaintiff was targeted with it.) The problem with Franke’s approach is that the statute is not motivation-neutral and the words “because of sex” imply, if they do not expressly state, that intent matters as much as injury.

Franke’s contribution to the scholarship is advanced still further by Schwartz, who suggests what is the next logical step in this area: a per se rule that all sexual speech in the workplace is “because of sex.”²²⁷ The rule is clean. It avoids the messiness associated with examining the language for its content (does it subordinate?) as well as motive behind it (is it uttered ‘because of sex’?). But it is the approach least consistent with the law that Congress wrote as well as the realities of

American life. As the Seventh Circuit lamented in *Johnson*, sex speech is common in contemporary life and the workplace is no different.²²⁸ Especially in all-male environments, such speech is the tool by which men demean and emasculate each other. Ollie Hicks' abuse of Craig Johnson was personal, not sex (or gender) based. Schwartz's approach also would not be positive in terms of the developing common law. Common law advances are tolerated, and even created, by courts so long as they are consistent with statutory terms and intent. In effect Schwartz's approach is to conclude that the words "because of sex" are either too difficult to interpret or the equivalent of a statutory appendage, inviting surgical removal by a scholar.²²⁹ That is not developing common law. That is simply removing part of the law that is perceived to be too limiting.

There may well come a day when the approach advanced here is considered the most radical to date. It confines disparate treatment cases to those when intentional – not, in Schwartz's words, "unconscious"²³⁰ – discrimination occurs. But at the same time it allows – or proposes – that the environment experienced by Lisa Ocheltree may still be unlawful under the law as it is presently written. Her claim would be a disparate impact hostile environment claim, and its viability would not depend on any evidence that her coworkers set out to treat her differently because she is a woman. It would be hard to imagine a court suggesting that a workplace infused with racial profanity could not injure black employees more than white employees.²³¹ And if height, weight, and degree requirements can cause actionable disparate impacts on protected groups, it is unclear why workplace conditions should be excluded from similar scrutiny.

VI. Conclusion

Employment law is at a crossroads. The early work of Catherine MacKinnon – the argument that sexual harassment should be unlawful as a form of sex discrimination under Title VII – has mutated. Scholars and some jurists have now reached the conclusion that harassing workplace conduct should be unlawful whether or not it is prompted by a plaintiff's sex, or race, and so on. The suggestions are not based on the text of the statute (which in important respects has stood still since 1964), but on the notion that federal common law should advance the rights of employees such as Lisa Ocheltree where legislatures have not. Rather than make the case that *is* textually consistent with the statute – that Ocheltree's environment caused a disparate impact on women – they would rather tinker with the statutory terms that Congress wrote.²³² The approach is made more regrettable because the disparate impact claim suggests it may be unnecessary. The disparate impact hostile environment claim itself is flawed in part because of the difficulties involved in creating a new, complex claim within existing law. Though if what stands against this alternative is the academic and judicial creation of a *new law* (where intent is read out of the statute) to fit existing claims, then the choice is clear.

There is always a danger, of course, that laws can become ossified and no longer reflect the realities of the individuals they ostensibly protect. The argument that labor law has reached that point has been made and it is persuasive.²³³ But in that case the law should be changed to reflect those new realities. Congress, not the common law, can accomplish that change. In the end, the disparate impact hostile environment claim is forwarded as a bridge between the law as it is currently written and a better law, perhaps not far away, that is more protective of employees such as Lisa Ocheltree. Whether the bridge is necessary and itself consistent with the statute – both its terms and its promise – is an open question that must be asked. Lisa Ocheltree would provide one answer, and it would be hard to argue against it.

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¹ See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 50-70 (1979) (proposing and discussing the hostile environment sexual harassment claim under Title VII of the Civil Rights Act of 1964).

² 42 U.S.C. § 2000e-2(a)(1) (2000).

³ An example would be a case with direct evidence of discrimination, in which there is little doubt concerning the employer's illicit motivation. The direct evidence standard can be traced to the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989).

⁴ See *infra* Part III.

⁵ 42 U.S.C. § 2000e-2(a)(1) (2000).

⁶ See *Price Waterhouse*, 490 U.S. at 241 ("The critical inquiry, the one commanded by the words of [the statute], is whether gender was a factor in the employment decision *at the moment it was made.*").

⁷ For a typical definition, see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1993). It defines "because of" as "by reason of" or "on account of."

⁸ Typically, a hostile environment is not actionable unless the plaintiff can prove that she was targeted because of her sex, there is a basis for employer liability (e.g., negligence or vicarious liability), and the environment meets the threshold for severity that courts typically apply in these cases. See *e.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993) (discussing how severe the harassment must be). The United States Court of Appeals

for the Seventh Circuit has set the bar high. According to the appeals court, the workplace that is actionable is the one that is “hellish.” *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430 (1994).

⁹ These distinctions are discussed later in the article. See *infra* Part II (discussing *Ocheltree v. Scollon Productions, Inc.*, 308 F.3d 351 (4th Cir. 2002) (rehearing en banc granted, opinion vacated)).

¹⁰ *Price Waterhouse* contains the Supreme Court’s lengthiest discussion of the term “because of sex” to date. Based on that discussion, it clearly never occurred to the Court that the term referred to anything other than causation. “The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute.” 490 U.S. at 237.

¹¹ *Id.* at 244 n.9 (discussing the “somewhat bizarre path by which ‘sex’ came to be included as a forbidden criterion for employment” and noting that the term was added to defeat the bill).

¹² In 1964, 38.4% of American women worked outside the home. As of 2001, over 60% did. U.S. Department of Labor, Bureau of Labor Statistics, Table 4: Civilian Labor Force Participation Rates by Sex, 1960-2001 (Feb. 3, 2003), available at <http://www.bls.gov/fls/flsforc.pdf>.

¹³ The term “sexual harassment” does not appear in Title VII, but courts have concluded that it is unlawful as a form of sex discrimination. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”).

¹⁴ See 42 U.S.C. § 2000e-2(a)(1) (2000) (forbidding discrimination “because of such individual’s . . . sex.”).

¹⁵ These appear to be the facts in *Ocheltree v. Scollon Productions, Inc.*, 308 F.3d 351 (4th Cir. 2002). See *infra* Part II.

¹⁶ See generally Katherine M. Franke, *What’s Wrong With Sexual Harassment?* 49 STAN. L. REV. 691, 772 (1997) (arguing that “sexual harassment is sex discrimination precisely because its use and effect police hetero-patriarchal gender norms in the workplace”). Franke’s approach is discussed in detail in Part III.

¹⁷ This is the equivalent of a *res ipsa loquitur* case. Translated, the term means “the thing speaks for itself.” BLACKS LAW DICTIONARY (7th ed. 1999). In tort law, the *res ipsa* doctrine provides that “in some circumstances, the mere fact of an accident’s occurrence raises an inference of negligence so as to establish a prima facie case.” *Id.*

¹⁸ This is the approach recently advanced by Professor David S. Schwartz. See David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1784 (2002) (arguing for a “sex per se” rule in which all sexual conduct is interpreted as “because of sex”). Professor Schwartz’s model for interpreting Title VII is discussed in Part III.

¹⁹ See *id.*

²⁰ See *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997). In *Johnson*, a same-sex harassment case, the court explained that “[m]ost unfortunately, expressions such as ‘fuck me,’ ‘kiss my ass,’ and ‘suck my dick,’ are commonplace in certain circles.” *Id.* The court added that when these expressions are uttered, particularly by men speaking to other men, “they are simply expressions of animosity or juvenile provocation” and their use “has no connection whatsoever with the sexual acts to which they make reference.” *Id.*

²¹ See *id.*; see also *Davis v. Coastal International Security Agency*, 275 F.3d 1119, 1124 (D.C. Cir. 2002). In *Davis*, the D.C. Circuit noted that the case before it was “virtually identical” to *Johnson*. *Id.* According to the court, the vulgarity exchanged between two male coworkers involved “a gross workplace dispute” and not one consisting of unlawful sex discrimination. *Id.* at 1126.

²² See *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 80 (1998) (recognizing the criticism that Title VII risks becoming a general civility code and explaining that the risk is “adequately met by careful attention to the requirements of the statute”); see also *Davis*, 275 F.3d at 1125 (rejecting such an understanding of Title VII as “preposterously broad” and “requir[ing] little discussion”); *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1292 (7th Cir. 1997) (asserting that the court would not assume the role suggested by the plaintiff – namely, that of a “super-personnel department reviewing the business decisions of his employer”).

²³ See *Kariotis v. Navistar Int’l Transp. Co.*, 131 F.3d 672, 678 (7th Cir. 1997) (questioning the employer’s video surveillance of an off-duty employee but determining that even the most medieval corporate practices – if not discriminatory – are none of the court’s business).

²⁴ See *infra* Part V.

²⁵ Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides that it is an unlawful employment practice for an employer to:

limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Under this section, an employment practice or policy that has no discriminatory intent whatsoever may still be unlawful based on its disproportionate impact on a protected group. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87

(1988) (“In certain cases, facially neutral employment practices that have significant adverse effects on protected *groups* have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (outlining the disparate impact case and noting that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”).

²⁶ In *Griggs*, the Supreme Court explained Title VII’s purpose as follows:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, 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.

401 U.S. at 429-30.

²⁷ This issue is discussed in Part IV.

²⁸ 308 F.3d 351 (4th Cir. 2002).

²⁹ See *infra* Parts II and V.

³⁰ See *infra* Part III.

³¹ See *infra* Part IV.

³² See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

³³ See *infra* Part V.

³⁴ 477 U.S. 57 (1986).

³⁵ 308 F.3d 351 (4th Cir. 2002).

³⁶ *Ocheltree*, 308 F.3d at 353.

³⁷ This fact is cited by the dissenting judge. *Id.* at 367 (Michael, J., dissenting) (noting that Ocheltree was the “only female employee in the shop, working alongside ‘ten or eleven’ men”).

³⁸ *Id.* at 354.

³⁹ These facts are cited by the dissent. *Id.* at 369. In fact, the dissent criticizes the majority’s decision to describe Ocheltree’s work environment only in general terms. *Id.* According to the dissent, such “reticence blunts the force of Ocheltree’s case.” *Id.*

⁴⁰ *Id.* at 354.

⁴¹ *Ocheltree*, 308 F.3d at 354. One coworker asked, “Lisa, what do you think about this?” The remark generated laughter from the men in the shop. *Id.* at 368.

⁴² *Id.* at 354.

⁴³ Again, this fact comes from the dissent’s review of the record evidence. See *id.* at 369.

⁴⁴ The supervisor’s comments were “purposely said in front of [Ocheltree] because [the supervisor and two other production employees] enjoyed looking at [Ocheltree] and seeing [her] reaction.” *Id.*

⁴⁵ At one point Ocheltree said to her coworkers, “You guys are disgusting. This needs to stop.” See *id.* at 368. It did not stop. In fact, after Ocheltree made the remark and turned to leave the room, she heard laughter in the background. *Id.*

⁴⁶ *Ocheltree*, 308 F.3d at 354. The other reasons were excessive use of the telephone during working hours and because her husband had threatened physical violence against the company vice-president. See *id.*

⁴⁷ “Eventually” because Ocheltree’s initial case was dismissed by the district court. The court of appeals reversed that dismissal in light of the Supreme Court’s determination that employers can be vicariously liable for supervisory sexual harassment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (adopting the rule that an employer is vicariously liable for supervisory sexual harassment that is accompanied by a tangible job action, but may raise an affirmative defense in other cases); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (articulating the same standard).

⁴⁸ *Ocheltree*, 308 F.3d at 355.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The Fourth Circuit heard oral argument *en banc* in *Ocheltree* on February 25, 2003. As of the date of this writing, no decision has yet been issued. While the original published opinion is no longer citable by lawyers, it remains fair game for academics and it does provide insight into how three federal appellate judges interpret Title VII’s terms. Indeed, the rehearing *en banc* of *Ocheltree* only serves to draw attention to the case and the problems with sexual harassment jurisprudence. What remains to be seen is how the Fourth Circuit’s final decision in *Ocheltree* will resolve the issues discussed in this paper.

⁵² *Ocheltree*, 308 F.3d at 366.

⁵³ See generally, Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, March 9, 2003, § 6 (Magazine), at 40.

⁵⁴ One point of vulnerability might be the majority's conclusion that the record evidence is "uncontested" that Ocheltree would have been exposed to the same conduct had she been a male. *Ocheltree*, 308 F.3d at 356. According to the dissent, the record is unclear on this point and arguably supports a theory that Ocheltree was targeted in part because she was a prude and complained, but also in part because she was a woman. *Id.* at 371. In support of this theory, the dissent points out that while men also complained about some of the sexual incidents at Scollon, the jury heard no evidence to suggest that "any conduct subsequent to these complaints was intended to bother" them in the same way it was intended to bother Ocheltree. *Id.* at 372.

⁵⁵ Professor Franke begins her important article with two "seemingly simple" questions: "[w]hat exactly is wrong with sexual harassment" and "[w]hy is it sex discrimination"). *See* Franke, *supra* note 16, at 691.

⁵⁶ *Ocheltree*, 308 F.3d at 359 ("there is no evidence that those participating in the offensive conduct were attempting to bother [Ocheltree] *because of her gender*").

⁵⁷ *Id.* at 356-57.

⁵⁸ "[T]he uncontroverted record evidence demonstrated that the men engaged in the same type of behavior before Ocheltree began working at Scollon Productions." *Id.* at 359. This statement is in some tension with the majority's statement that "neither Ocheltree nor [coworker] Hodge could offer probative evidence regarding the atmosphere at Scollon Productions prior to Ocheltree's employment." *Id.* at 357 n.4. In all events, the majority concluded that even if the environment worsened during Ocheltree's employment, there was no evidence that the atmosphere became more crude because of her gender. "Without such evidence, the simple fact that the behavior worsened cannot support the jury's verdict." *Id.*

⁵⁹ *Id.* at 357-58.

⁶⁰ *Id.* at 359.

⁶¹ *Ocheltree*, 308 F.3d at 373 ("A reasonable jury could find that the content of much of the banter was 'particularly demeaning to women,' and therefore made Ocheltree's working environment more hostile to her as a woman, regardless of whether the banter was intended to bother her or was directed at her in any other way.>").

⁶² While there was some evidence that men complained about the sexuality, too, there was no suggestion that they were affected by the speech in the same way as Ocheltree.

⁶³ Much of the language involved discussions of oral sex. According to the dissent, "it is not too strong to say that the overall tenor of the workplace banter conveyed the message that women exist primarily to gratify male desires for oral sex." *Ocheltree*, 308 F.3d at 374. The dissent added that "they are instances of sexual harassment because they express or reinforce a regime of gender hierarchy in which men are portrayed as sexual subjects while women are portrayed as sexual objects." *Id.*

⁶⁴ Actually, the dissent employs a reasonable woman standard in its analysis. *See id.*

⁶⁵ According to the dissent, language can be actionable if is "more demeaning to women than to men." *Id.* at 376. The dissenting judge does not believe he is the first judge to reach this conclusion. *Id.* at 372 ("Courts have also recognized that harassing conduct can be 'because of sex' even when the conduct 'is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex.")(quoting *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991)).

⁶⁶ *Ocheltree*, 308 F.3d at 374.

⁶⁷ *Id.* at 372.

⁶⁸ *Id.* at 375.

⁶⁹ According to the dissent, pervasive workplace comments depicting women as sexually subordinate to men constitute discrimination "because of sex." *See id.*

⁷⁰ *See* Franke, *supra* note 16, at 772.

⁷¹ *Id.*

⁷² For these reasons, Justice Scalia has made it a point to use the term "sex" rather than "gender" where the former forms the protected class:

Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male. The present case does not involve . . . femininity or masculinity The case involves, therefore, sex discrimination plain and simple.

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

⁷³ *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.>").

⁷⁴ *See id.* at 244 n.9.

⁷⁵ See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 793-804 (1998) (discussing supervisory harassment as an intentional tort and determining those conditions under which an employer, as master, should be liable for the torts of its servants).

⁷⁶ 490 U.S. at 251 (noting that the case brought by Hopkins was “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”).

⁷⁷ *Id.* at 248 (contending that the Court’s decision – that sex stereotyping may, under the right circumstances, be actionable as sex discrimination – does “not traverse new ground”).

⁷⁸ The majority in *Ocheltree* believes so. “Also incorrect is the assumption pervading the dissent that women are more insulted and demeaned by sexual banter about heterosexual sex, and particularly discussions of oral sex, than are men. This assumption is paternalistic and contrary to Title VII itself.” *Ocheltree*, 308 F.3d at 363. The majority added that Title VII should not be interpreted in a manner that leaves women in a role of “Victorian reticence.” *Id.*

⁷⁹ See *infra* Part V.

⁸⁰ See Schwartz, *supra* note 18, at 1705 (“Under a sex per se rule, sexual conduct in the workplace is always, without more, ‘because of sex.’”).

⁸¹ *Id.* at 1784.

⁸² Children are becoming sexual at an earlier age:

[A]dolescents are exposed to a range of mass media sources, most of which are highly sexually charged. Each year, teenagers view nearly 15,000 sexual references, innuendos, and jokes on television; in fact, nearly one-third of family hour shows contain sexual references. Some research suggests that adolescents who watch a great deal of television tend to view such images as their sense of reality.

Gary W. Harper, *Contextual Factors That Perpetuate Statutory Rape: The Influence of Gender Roles, Sexual Socialization, and Sociocultural Factors*, 50 DEPAUL L. REV. 897, 913 (2001).

⁸³ This is the problem with determining that sexual language, on its face, demeans one sex more than the other. But according to the dissenting judge in *Ocheltree*, the language experienced by Lisa Ocheltree did exactly that. See *Ocheltree*, 308 F.3d at 372.

⁸⁴ See, e.g., Johnson v. Hondo, Inc., 125 F.3d 408, 413 (7th Cir. 1997) (affirming dismissal of same-sex harassment case in which the harasser’s language was vulgar and profane but was motivated by personal animosity of the plaintiff and not the plaintiff’s sex).

⁸⁵ Schwartz’s view simply cannot be reconciled with the Supreme Court’s decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). *Oncale* allowed for same-sex harassment claims under Title VII but restricted them to cases in which the plaintiff could prove he was targeted because of his sex. In deciding *Oncale*, the Supreme Court rejected a Seventh Circuit opinion in which Judge Rovner, writing for the majority, suggested an approach similar to Schwartz’s. See *Doe v. City of Belleville*, 119 F.3d 563, 593 (7th Cir. 1997) (questioning “whether it makes a whit of difference why [the plaintiff] was singled out for abuse” considering the fact that his genitals were grabbed to determine his gender and a co-worker regularly threatened to sexually assault him). In fact, in his article Schwartz embraces the *Doe* majority’s approach to interpreting Title VII. Schwartz calls *Doe* the “most sophisticated and well-reasoned” sexual harassment decision to date. See Schwartz, *supra* note 18, at 1725. It is a curious embrace given the Supreme Court’s *Oncale* decision. In *Oncale*, the Court cited *Doe* as a decision suggesting “workplace harassment that is sexual in content is always actionable, regardless of . . . motivations” and rejected such an “automatic[] discrimination rule.” *Oncale*, 523 U.S. at 80.

⁸⁶ See Schwartz, *supra* note 18, at 1784 (agreeing with and attributing to Franke the assertion that “since ‘gendered’ beings are located in ‘sexed’ bodies, ‘because of gender’ also necessarily implies ‘because of sex.’”).

⁸⁷ Indeed, Franke contends that she does “not suggest that we reject existing doctrine.” Franke, *supra* note 16, at 772. In fact, she argues that her “gender norm” understanding of Title VII is consistent with a proof structure that requires plaintiffs to establish discrimination “because of” their sex. See generally Franke, *supra* note 16. Schwartz concludes his article by pleading to scholars that they take the issue of causation seriously. Schwartz, *supra* note 18, at 1794. In light of his “sex per se” rule, it is hard to take his advice seriously.

⁸⁸ But see *Newton v. Department of the Air Force*, 85 F.3d 595, 599 (Fed. Cir. 1996) (expressly rejecting the insertion of a criminal-type “mens rea” requirement in sexual harassment cases and concluding that so long as the plaintiff can point to hostile or abusive conduct on the actor’s part, “the actor’s lack of specific discriminatory intent does not prevent his or her deliberate conduct from being actionable under Title VII”). But it is hard to reconcile *Newton* with the Supreme Court’s decision in *Oncale*, which focuses on motive. Consider this example: If an employer mistakenly but not intentionally treats a woman differently from a man by firing her, does she have a case of discrimination? Most courts would say no because the employer did not honestly intend to discriminate in that case. The result would be the same even if the employer’s practices were so medieval that the mistake was bound to occur. See *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997) (“Plaintiffs lose if the company honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish

or trivial or even baseless.”). But if some sex discrimination cases are not actionable because of a lack of intent, then why should harassment cases be treated any differently? It turns out that *Newton* may have had good intentions but may have relied on a contaminated strain of caselaw. (Like a computer virus infecting machines in a network, misapplied caselaw can yield bad results years later). In particular, *Newton* relied on a Fifth Circuit case, *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971), in stating that “the thrust of Title VII’s proscriptions is aimed at the consequences or *effects* of an employment practice and *not* at the employer’s *motivation*.” *Rogers* “was apparently the first case to recognize a cause of action based upon a discriminatory work environment.” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). While the result in *Rogers* was correct, it principally relied upon *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in support of its holding. *Griggs* was a disparate impact, not disparate treatment, case. Of course a showing of motive is not necessary in disparate impact cases. The only problem is that *Newton* was a disparate treatment case, making *Newton*’s reliance on *Rogers* (and, in turn, *Griggs*) questionable.

Of course, some harassing conduct speaks for itself and discriminatory intent can be inferred from it. That is often the case in opposite-sex harassment cases:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.

Oncale, 523 U.S. at 80.

⁸⁹ *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 80 (1988) (“We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”).

⁹⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

⁹¹ *See Ocheltree v. Scollon Productions, Inc.*, 308 F.3d 351, 375 (4th Cir. 2002) (Michael, J., dissenting).

⁹² *See Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 553 (7th Cir. 1997) (Easterbrook, J., concurring in part and dissenting in part), *aff’d by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁹³ *See Shields v. Local 705, Int’l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 904 (7th Cir. 1999) (Posner, J., concurring) (considering whether ERISA allows for a promissory estoppel claim).

⁹⁴ *See id.* at 900 n.3 (majority opinion) (acknowledging a trend toward allowing the use of estoppel in ERISA cases but commenting that “even among courts that recognize the availability of estoppel in ERISA cases, there is real resistance to the use of that doctrine”) (quoting *Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990)).

⁹⁵ *See* 29 U.S.C. § 1102(a)(1) (2000).

⁹⁶ *See, e.g., Sentara Virginia Beach General Hosp. v. LeBeau*, 182 F. Supp. 2d 518, 521 (E.D. Va. 2002) (allowing estoppel claim to go forward because the plaintiff alleged intentional misrepresentations on the employer’s part and noting that “[o]ther [federal appellate] courts have held an employer can be liable in its fiduciary capacity under ERISA for making affirmative misrepresentations”).

⁹⁷ *See* 29 U.S.C. § 185(a) (2000).

⁹⁸ 353 U.S. 448 (1957).

⁹⁹ “There is one view that § 301(a) merely gives federal district courts jurisdiction Under that view § 301(a) would not be the source of substantive law; it would neither supply federal law to resolve these controversies nor turn the federal judges to state law for answers to the questions.” *Id.* at 450.

¹⁰⁰ *Id.* at 457.

¹⁰¹ *Id.* (“It is not uncommon for federal courts to fashion federal law where federal rights are concerned.”).

¹⁰² *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 909 (1989) (“W[e] have often observed that the NLRA was the model for Title VII’s remedial provisions, and have found cases interpreting the former persuasive in construing the latter.”).

¹⁰³ Both the NLRA and LMRA protect an individual from discrimination on the basis of protected activities. 29 U.S.C. § 158(a)(3) (2000). Title VII protects the individual from discrimination on the basis of protected characteristics. 42 U.S.C. § 2000e-2(a)(1) (2000).

¹⁰⁴ *See Amalgamated Ass’n of St., Elec. Ry. and Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 320 (1971) (“Experience under the [NLRA] showed that labor organizations were quite as capable as employers of pernicious behavior, and in 1947 Congress enacted the Labor Management Relations Act, which, among other things, protected employees and employers against certain unfair labor practices by labor organizations that were defined by the Act.”). For a discussion of exactly how Congress, in enacting the LMRA, turned back some of the perceived excesses of the NLRA, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533-55 (2002). Professor Estlund compares the LMRA to the NLRA and notes that “[t]he Taft-Hartley Act of 1947 [the LMRA] represented a major setback for the labor movement.” 102 COLUM. L. REV. at 1533.

¹⁰⁵ See *Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 904 (7th Cir. 1999) (Posner, J., concurring) (discussing the role of federal judges in creating federal common law when interpreting a federal employment statute such as ERISA).

¹⁰⁶ *Lincoln Mills*, 353 U.S. at 457.

¹⁰⁷ See 42 U.S.C. § 2000e-2(a)(1) (2000) (describing intentional unlawful employment practices).

¹⁰⁸ The unforeseen problem describes the “unevisaged case,” which “arises when it is urged that a statute passed to deal with a specific problem also applies to a problem neither known to nor foreseen by the enacting legislature.” See Ronald Turner, *The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 DUKE J. GENDER L. & POL'Y 57, 60 n.21 (2000) (citing jurisprudential scholars in discussing the unevisaged case).

¹⁰⁹ Broadly stated, MacKinnon views harassment as an issue of sex-based power. See MACKINNON, *supra* note 1, at 59.

¹¹⁰ Not even the Supreme Court, in *Meritor Savings Bank v. Vinson*, seemed to think the issue was a particularly difficult one. 477 U.S. 57, 65-67 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”).

¹¹¹ See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (“[W]hen the issue of [same-sex harassment] arises in the context of a ‘hostile environment’ sexual harassment claim, the state and federal courts have taken a bewildering variety of stances.”) See also Turner, *supra* note 108, at 60 (discussing same-sex sexual harassment as Title VII’s “unenvisaged case”).

¹¹² *Oncale*, 523 U.S. at 75-82.

¹¹³ The Supreme Court certainly did not see the viability of a same-sex harassment claim (at least in theory) to be a close case. *Oncale*, 523 U.S. at 79 (“We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”). One federal district court case, *Goluszek v. H.P. Smith*, created just such a categorical rule. 697 F. Supp. 1452 (N.D. Ill. 1988). Over the ensuing years, the *Goluszek* decision generated considerable judicial and scholarly comment, and was even cited by the Supreme Court in *Oncale*. *Goluszek* was authored by Judge Ann Williams, who now sits on the United States Court of Appeals for the Seventh Circuit.

¹¹⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); see also *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 762-63 (1998).

¹¹⁵ 304 U.S. 64 (1938).

¹¹⁶ See *Ellerth*, 524 U.S. at 750 (“Although Judge Easterbrook did not think *Ellerth* had stated a *quid pro quo* claim, he would have followed the law of the controlling State to determine the employer’s liability, and by this standard, the employer would be liable here.”). Instead of adopting a 50-state standard, the Court determined that the Restatement of Agency could assist courts in determining the parameters of employer liability in harassment cases and would also provide uniformity. 524 U.S. at 755-57.

¹¹⁷ See *Ellerth v. Burlington Indus., Inc.*, 123 F.3d 490, 555 (7th Cir. 1997) (determining that because *Ellerth*’s complaint was actionable under Illinois law, “[f]ederal law then makes that conduct actionable”).

¹¹⁸ “The question then is, what is the substantive law to be applied in suits under § 301(a)?” *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957).

¹¹⁹ *Meritor* instructed courts to “look to [common law] agency principles” in determining the scope of employer liability in hostile environment harassment cases. 477 U.S. at 72. In the Seventh Circuit’s *Ellerth* decision, Judge Easterbrook wrote separately and commented that *Meritor*’s “look to” proscription did not mean “make up.” 123 F.3d at 553 (Easterbrook, J., concurring in part and dissenting in part).

¹²⁰ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); see also *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 762-63 (1998).

¹²¹ Judge Easterbrook believes that the result is *neither* horizontal nor vertical uniformity. “Thirteen federal courts of appeals comprising some 200 judges are bound to see these issues differently. . . . Prospects for a uniform federal common law in this field are dim.” *Ellerth*, 123 F.3d at 556. To be fair, Judge Easterbrook wrote those words before the Supreme Court granted certiorari in *Ellerth* and *Faragher* and before it set out to create the very uniformity that Judge Easterbrook feared would be forever lacking. Indeed, in granting certiorari in both cases, the Supreme Court doubled its precedent in harassment cases. *Id.* Prior to *Ellerth* and *Faragher*, “in the 33 years since Title VII was enacted the Supreme Court [had] heard only two [cases] involving workplace harassment.” *Id.*

¹²² This does not describe the unevisaged case described by Professor Turner, see *supra* note 108, but judicial law-making, plain and simple.

¹²³ See *Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 904 (7th Cir. 1999) (Posner, J., concurring) (“[A]ny common law elaborations of an incomplete statute must be consistent with the statute’s language and animating policies.”).

¹²⁴ See Estlund, *supra* note 104, at 1527 (“Evidence of morbidity abounds.”).

¹²⁵ See *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 909 (1989).

¹²⁶ “The law of the workplace is vast and dynamic. It includes the burgeoning of employment discrimination and individual employee rights, as well as the direct governmental regulation of terms and conditions of work.” Estlund, *supra* note 104, at 1527.

¹²⁷ Estlund, *supra* note 104, at 1551-56 (noting that Congress, in enacting the NLRA, chose administrative rather than judicial adjudication primarily by requiring aggrieved employees to file an unfair labor practice charge with the National Labor Relations Board).

¹²⁸ See *Republic Steel Corp. v. Maddux*, 379 U.S. 650, 652 (1965) (“As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.”) The purpose of this policy is to allow the union an opportunity to act on the employee’s behalf. *Id.*

¹²⁹ See *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235, 253-54 (1970) (permitting a court to enjoin a strike over a matter subject to arbitration, provided the employer agrees to arbitrate the dispute).

¹³⁰ This describes the National Labor Relations Board’s “deferment” policy. See *Collyer Insulated Wire*, 192 N.L.R.B. 837, 842 (1971) (ruling that it would require exhaustion of contractual arbitration remedies before it considered an unfair labor practice charge under section 8(a)(5) of the Act). The deferment policy outlined in *Collyer* was later extended by the Board to reach other charges of unfair labor practices against employers. See *United Technologies Corp.*, 268 N.L.R.B. 557, 559 (1984) (“[w]here an employer and a union have voluntarily elected to create dispute resolution machinery ..., it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery”). In some instances the Board will not only defer ruling until the parties arbitrate, but also will give deference to the arbitrator’s decision. See *Hammontree v. N.L.R.B.*, 925 F.2d 1486, 1491 (D.C. Cir. 1991) (discussing Board’s deference policies).

¹³¹ See Estlund, *supra* note 104, at 1554 (suggesting that one “relatively simple labor law reform” would be to allow for the creation of a private right of action for anti-union discharges).

¹³² Title VII requires that an employee, before filing suit, must exhaust his administrative remedies with the EEOC (or comparable state agency). See, e.g., *Simms v. Oklahoma ex rel. Dept. of Mental Health & Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir. 1999). But the EEOC is powerless to remedy discrimination in the private sector (it can only investigate and determine whether reasonable cause exists to believe the charge filed by the complainant is true). See 42 U.S.C. § 2000e-5(a)-(k) (2000) (granting power to the EEOC to prevent unlawful employment practices by requiring the Commission to investigate the validity of claims).

¹³³ See *supra* notes 128-130.

¹³⁴ Sexual orientation is a protected characteristic under several state human rights laws (and under many local ordinances), but it is not protected under Title VII. See 42 U.S.C. § 2000e-2(a)(1) (2000) (limiting the protected characteristics to race, sex, color, religion and national origin).

¹³⁵ “States may not, therefore, extend a private right of action, with make-whole remedies, to an employee fired for seeking union representation.” Estlund, *supra* note 104, at 1572. Two preemption doctrines serve to restrict state regulation in the field of labor law. The first is known as “*Garmon* preemption”; under that doctrine a state may not regulate activity that is arguably protected or prohibited by federal labor law. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The second preemption doctrine is known as “*Machinists* preemption”; under this doctrine, states and local governments may not affect labor disputes by regulating conduct that is unregulated by federal labor law. See *Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Empl. Rels. Comm’n*, 427 U.S. 132 (1976). “*Garmon* and *Machinists* together virtually banish states and localities from the field of labor relations.” Estlund, *supra* note 104, at 1572.

¹³⁶ See *supra* notes 128, 130.

¹³⁷ See *id.*

¹³⁸ A suit alleging a breach of an individual employment contract is not within the jurisdiction of the EEOC; it describes a garden-variety breach of contract case.

¹³⁹ See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (“The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. . . . Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.”).

¹⁴⁰ Under the statute (Title VII), the EEOC has 180 days to investigate a charge of discrimination after it is filed. 42 U.S.C. § 2000e-5(f)(1). If at that point the EEOC has not filed its own civil action or entered into a conciliation agreement with respect to the charge, it issues a “right to sue letter” to the charging party, who then has 90 days to sue the respondent. *Id.* But the EEOC has determined on its own – through its rulemaking function – that it will issue “early” right to sue letters in cases where it has determined that it will be unable to complete its investigation within 180 days of the filing of the charge.

See 29 C.F.R. § 1601.28(a)(2)(2002). The issuance of early right to sue letters has become routine. The problem with their issuance is that Title VII requires the EEOC to investigate charges of discrimination. 42 U.S.C. § 2000e-5(f)(1) (describing investigation process). The early right to sue letter deprives the parties of that investigation (and its results). The other problem with issuing these letters is that only charging parties are allowed to ask for them. 29 C.F.R. § 1601.28(a)(2)(2002). In other words, the power to truncate the EEOC's investigation is unilateral and not shared by respondents. Presently, the circuit courts of appeals are split as to whether the early issuance of right to sue letters is lawful. *See* Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1279 (10th Cir. 2001) (upholding early right-to-sue notice issued before 180 days had elapsed); Martini v. Federal Nat'l Mortgage Ass'n., 178 F.3d 1336, 1348 (D.C. Cir. 1999) (striking down the regulation allowing charging parties to ask for right-to-sue notices before 180 days had elapsed).

¹⁴¹ *See* 29 C.F.R. § 1601.28(a)(2)(2002); *see supra* note 140.

¹⁴² In *Martini v. Federal Nat'l Mortgage Ass'n.*, there was no question that the EEOC had not completed – and may not have even started – its investigation of Martini's charge. 178 F.3d at 1346. Martini asked for the early right to sue letter only 21 days after filing her discrimination charge. *Id.* at 1339. The Commission promptly obliged. *Id.* The D.C. Circuit pointed out that the EEOC's practice of issuing early right to sue letters means that more cases, not fewer, end up in court. Indeed, the court noted that the EEOC's own regulation allows it to issue such letters even if there remains a chance that the Commission *would* be able to complete its investigation within 180 days. *Id.* at 1346.

¹⁴³ There is, in fact, a congressional policy favoring arbitration of labor disputes, so long as the dispute is deemed arbitrable. This is one of the lessons of the so-called “*Steelworkers* trilogy.” *See* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

¹⁴⁴ *See supra* Part III.

¹⁴⁵ *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998); *see also* Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 762-63 (1998).

¹⁴⁶ RESTATEMENT (SECOND) OF AGENCY §§ 219, 228 (1958).

¹⁴⁷ As *Meritor* pointed out, “Congress’ decision to define ‘employer’ to include any ‘agent’ of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.” 477 U.S. at 72. When, in the 12 years between *Meritor* and the Supreme Court’s decisions in *Ellerth* and *Faragher*, Congress did not clarify what its exact intent was as to the limits of employer liability, the Supreme Court had to take its best shot. Indeed, it interpreted Congress’ silence during the intervening years as a tacit acknowledgement that the Court was on the right track in looking to agency principles for guidance. *Ellerth*, 524 U.S. at 763-64 (noting that “Congress has not altered *Meritor*’s rule even though it has made significant amendments to Title VII in the interim.”).

¹⁴⁸ *See infra* Part V.

¹⁴⁹ *But see* Schwartz, *supra* note 18, at 1704-05 (“I argue that the next stage of theoretical work on sexual harassment by feminist scholars should be to explain the term ‘because of’ in Title VII’s text in terms broad enough to include unconscious intentional discrimination.”).

¹⁵⁰ *See supra* Part III (discussing and comparing the approaches of Franke and Schwartz).

¹⁵¹ *See, e.g.*, Lack v. Wal-Mart Stores, Inc., 240 F.3d 255 (4th Cir. 2001); Johnson v. Hondo, Inc., 125 F.3d 408 (7th Cir. 1997).

¹⁵² *See* Lack, 240 F.3d at 261 (acknowledging that the comments directed at the plaintiff were sexual, but not uttered because of the plaintiff’s sex).

¹⁵³ *See* Johnson, 125 F.3d at 410-11.

¹⁵⁴ *Id.* at 410.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* According to Johnson (who received the benefit of the doubt on all factual disputes), he complained but the company did nothing. Indeed, Coca-Cola “ignored the complaints and ridiculed Johnson for his complaints.” *Id.*

¹⁵⁸ Actually, the fight was quite brutal. Hicks armed himself with a jack stand while Johnson used a baseball bat. *Id.* at 411. They exchanged blows and Johnson continued striking Hicks after knocking Hicks on his back. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 412 (“[W]e agree with [the district court’s] interpretation of Title VII as including a prohibition against sexual harassment of men by other men.”).

¹⁶¹ *Id.*

¹⁶² *Cf.* Franke, *supra* note 16, at 759 (“Workplace sexual conduct may injure women because it objectifies them as sex objects, and it may injure men because it assumes that all men conform to and join into a kind of sexualized hetero-masculine culture.”).

¹⁶³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

¹⁶⁴ *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (employer had policy against hiring women with preschool-aged children).

¹⁶⁵ Johnson did not make a sex stereotyping argument. Instead, he made a “strained contention that Hicks was making ‘homosexual advances’ toward him.” 125 F.3d at 413.

¹⁶⁶ The “coup de grace” came from a partner who told Hopkins that in order to improve her chances for partnership, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Price Waterhouse*, 490 U.S. at 235.

¹⁶⁷ One partner suggested that those who objected to Hopkins’ profanity did so “because it’s a lady using foul language.” *Id.*

¹⁶⁸ The assessments of Hopkins’ work product and work ethic were glowing. 490 U.S. at 234.

¹⁶⁹ This is simply because one way to prove sex discrimination is, after all, to establish a difference in treatment between men and women. That difference is impossible to establish in a single-sex work environment. It is still possible to prove discrimination in the same-sex case, but the plaintiff, as in *Johnson*, will often be left with nothing more than sexual profanity and vulgarity. When the vulgarity is exchanged between men, the inference of discrimination is simply not as strong as in the case of vulgarity directed at women. The Supreme Court has stated as much. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity.”).

¹⁷⁰ Unthinkingly because the words have no relation or connection with the sexual acts they reference and are simply the result of animosity or provocation. 125 F.3d at 412.

¹⁷¹ This is not such a stretch. *See Amy Adler, What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1553 (1996) (“Blacks also debate the resurgent appropriation of the word ‘nigger’ within their community. While some maintain that the co-option of this term can be empowering, others mourn the reemergence of the word and its hateful connotation.”).

¹⁷² *See supra* note 7.

¹⁷³ *See supra* Part III.

¹⁷⁴ For his part, Schwartz goes out of his way to cast his theory as a disparate treatment claim, and *not* as a disparate impact claim. One of his reasons is that disparate impact theory “is not on the ascendancy in Title VII jurisprudence.” Schwartz, *supra* note 18, at 1773.

¹⁷⁵ *Ocheltree* may be one of those cases. Without question, *Lack v. Wal-Mart Stores, Inc.*, falls into this category. 240 F.3d 255 (4th Cir. 2001). Lack’s supervisor suffered from a fourth-grade sense of humor. He often made comments about having “penis butter and jelly sandwiches” for lunch, and ended phone conversations with the phrase, “spank me very much.” *Id.* at 258. He would exclaim, “oh, my rod” when he saw an attractive woman. *Id.*

¹⁷⁶ *See Holman v. State of Indiana*, 211 F.3d 399, 404 (7th Cir. 2000) (noting that “Title VII is predicated on discrimination,” and, therefore, it was not “anomalous for a Title VII remedy to be precluded when *both* sexes are treated badly”). Of course, the fact that an individual harasses both sexes should not, in itself, mean that the plaintiff’s case fails. As *Oncale* instructed, the make-up of the workplace is not necessarily important in these cases. And, as in *Oncale*, if the same-sex harasser may yet be acting unlawfully (by harassing a member of his own sex), it follows that the equal-opportunity harasser may be acting unlawfully, too. *Id.* at 407 (Evans, J., concurring). The only issue in these cases is whether the plaintiff can establish that, whatever the makeup of the workplace, he experienced discrimination because of *his* sex. *See Oncale*, 523 U.S. at 80.

¹⁷⁷ *See Oncale*, 523 U.S. at 80 (recognizing and rejecting these courts’ categorical exclusion).

¹⁷⁸ *See O’Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995), *rev’d*, 517 U.S. 308 (1996) (unanimous opinion).

¹⁷⁹ *See Costa v. Desert Place, Inc.*, 299 F.3d 838 (9th Cir. 2002), *cert. granted sub nom. Desert Place, Inc. v. Costa*, 123 S. Ct. 816 (2003) (No. 02-679).

¹⁸⁰ *See Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002), *cert. granted sub nom. General Dynamics Land Systems, Inc. v. Cline*, 123 S. Ct. 1786 (2003) (No. 02-1080).

¹⁸¹ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (discussing three-part burden-shifting scheme). Under *McDonnell Douglas*, a plaintiff without direct evidence of discrimination proves his case indirectly through stages. The first stage is the prima facie case. It is flexible and adjusts to the plaintiff’s particular claim. If the plaintiff establishes a prima facie case of discrimination, then the employer, in step two of the burden-shifting scheme, must advance a legitimate, non-discriminatory reason for its decision with respect to the plaintiff. Once done, the ball returns to the plaintiff’s court to prove that the reason advanced by the employer in step two was a pretext for discrimination, or a lie. 411 U.S. at 802-05 (discussing three stages). For a good discussion of the *McDonnell Douglas* scheme and its application, see *Brill v. Lante*

Corp., 119 F.3d 1266, 1269-70 (7th Cir. 1997). In *Brill*, the Seventh Circuit commented that the *McDonnell Douglas* method has become a routine. But by no means is it a low hurdle for the plaintiff to clear, which may be one reason why more than 90% of employment discrimination cases are resolved, one way or another, before trial. 119 F.3d at 1270.

¹⁸² While the burden-shifting method sometimes is a useful schematic, it can be a distraction because of its narrow evidentiary focus. The important question in discrimination cases is whether the plaintiff has mounted sufficient evidence to prove her case. So long as the evidence is probative, where it comes from and what it looks like should matter little.

¹⁸³ 490 U.S. 228 (1989).

¹⁸⁴ In *Price Waterhouse*, the Supreme Court held that once a plaintiff proves that a protected characteristic played a motivating part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even without consideration of the characteristic. 490 U.S. at 258. In her concurrence, which has subsequently been interpreted as the decisive vote in a plurality opinion, 490 U.S. at 261, Justice O'Connor allowed that plaintiffs could shift the burden on the issue of causation to the defendant -- thus requiring it meet the "same decision" test -- if the plaintiff could "show by direct evidence that an illegitimate criterion was a substantial factor in the [challenged] decision." 490 U.S. at 276. Justice O'Connor did not define direct evidence in this context, but did allow that "stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard." *Id.* (internal citation omitted).

¹⁸⁵ "Courts have noted the difficulty of defining direct evidence for discrimination claims. Our own statements on what constitutes direct evidence are not in complete harmony." *Sanghvi v. St. Catherine's Hosp., Inc.*, 258 F.3d 570, 574 (7th Cir. 2001). See also *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting) (describing the "direct evidence" scheme adopted by the court's plurality as one "not likely to lend clarity to the process").

¹⁸⁶ See *Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 745-46 (7th Cir. 2002) (discussing cases); see also *White v. Burlington Northern & Santa Fe Ry. Co.*, 310 F.3d 443, 450 (6th Cir. 2002) (requiring plaintiff to point to "materially adverse employment action" in order to prove retaliation), *rehearing en banc granted and judgment vacated*, 321 F.3d 1203 (6th Cir. 2003).

¹⁸⁷ This scenario was offered by Judge Posner in *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996).

¹⁸⁸ *McDonnell*, 84 F.3d at 258.

¹⁸⁹ On this score retaliation is not like a constructive discharge claim brought by an employee who claims hellish workplace conditions forced her to quit. In that case, the underlying conditions must themselves be actionable in order for the constructive discharge claim to work. In other words, the discharge claim is derivative. See *Sweeney v. West*, 149 F.3d 550, 557-58 (7th Cir. 1998) ("At this point it would be hard to find that Sweeney has a viable [constructive discharge] claim because we already have determined that her working conditions were not discriminatory. . . . In other words, an employee can be constructively discharged only if the underlying working conditions were themselves unlawful (i.e., discriminatory in some fashion)."). This is not the case with respect to a claim of retaliation, which exists independent of any employment practice that itself may or may not rise to the level of an actionable claim.

¹⁹⁰ *Twisdale v. Snow*, 325 F.3d 950 (7th Cir. 2003).

¹⁹¹ *Id.* at 951.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ 42 U.S.C. § 2000e-3(a) (2000).

¹⁹⁵ *Twisdale*, 325 F.3d at 952.

¹⁹⁶ *Id.* at 953.

¹⁹⁷ *Id.*

¹⁹⁸ In dissenting from the *Ocheltree* majority opinion, Judge Michael argues that the "because of sex" requirement in Title VII allows for "interpretive flexibility." *Ocheltree v. Scollon Productions, Inc.*, 308 F.3d 351, 375 (4th Cir. 2002) (Michael, J., dissenting).

¹⁹⁹ It is worth noting that a textualist would have provided Judge Posner with a tool that would have supported his rejection of *Twisdale's* reading of Title VII. The interpretive maxim *ejusdem generis* allows that when specific terms are followed by a general one, the latter is meant to cover only examples of the same sort as the preceding specifics. The Supreme Court recently used the maxim in *Circuit City Stores, Inc. v. Adams*, a case in which it concluded that only employment contracts of transportation workers are exempted from the Federal Arbitration Act. 532 U.S. 105, 114-15 (2001). Title VII's anti-retaliation provision first protects the employee who has "made" the charge against his employer. The first term is therefore specific, and the later examples of employee involvement (the employee who testifies, assists, or participates "in any

manner”) should be read as conditioned and limited by that term. In other words, the participation must be on behalf of the complaining employee, not in opposition to her.

²⁰⁰ See *supra* Parts II and III.

²⁰¹ See *Lynch v. Freeman*, 817 F.2d 380, 381 (6th Cir. 1987).

²⁰² See *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000).

²⁰³ *Lynch*, 817 F.2d at 381.

²⁰⁴ *DeClue*, 223 F.3d at 436.

²⁰⁵ *Lynch*, 817 F.2d at 383.

²⁰⁶ *DeClue*, 223 F.3d at 437 (“But this case has not been litigated as a disparate-impact case.”).

²⁰⁷ *Id.*

²⁰⁸ *Lynch*, 817 F.2d at 389 (determining that the district court’s bench trial demonstrated that Lynch had proven her disparate impact claim and, accordingly, reversing and remanding with instructions to determine the appropriate remedy in the case).

²⁰⁹ See 42 U.S.C. § 2000e-2(a)(1) (2000).

²¹⁰ See *id.* § 2000e-2(a)(2).

²¹¹ *Id.*

²¹² 817 F.2d at 387.

²¹³ See *DeClue*, 223 F.3d at 437 (noting that *DeClue* had “waived what may have been a perfectly good claim of sex discrimination, though that we need not decide”); *Lynch*, 817 F.2d at 387 (“We reject [the] argument that working conditions may never be the basis of disparate impact claims.”).

²¹⁴ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) (“In certain cases, facially neutral employment practices that have significant adverse effects on protected *groups* have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.”).

²¹⁵ See *id.* at 988-89 (describing different disparate impact cases).

²¹⁶ See 42 U.S.C. § 2000e-2(a)(2) (2000).

²¹⁷ 487 U.S. at 997-98. A claim’s viability does not depend on the availability of a defense. Indeed, Lynch’s employer “made no attempt to prove business necessity” during the bench trial on her disparate impact claim. *Lynch*, 817 F.2d at 389. And in other cases, such as supervisory hostile environment cases, an employer is not obligated to raise an affirmative defense. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

²¹⁸ *But see Ocheltree v. Scollon Productions, Inc.*, 308 F.3d 351, 363 (4th Cir. 2002) (“Also incorrect is the assumption pervading the dissent that women are more insulted and demeaned by sexual banter about heterosexual sex, and particularly discussions of oral sex, than are men.”).

²¹⁹ *Cf. Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (“Perhaps no single act can more quickly ‘alter the conditions of employment and create an abusive working environment’ than the use of an unambiguously racial epithet such as ‘nigger’ by a supervisor in the presence of his subordinates.”), citing *Bailey v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1994) (“The use of the word ‘nigger’ automatically separates the person addressed from every non-black person; this is discrimination *per se*.”). But since *Rodgers*, the Seventh Circuit has clarified that when uttered by a coworker, not a supervisor, and when not directed at the plaintiff, the word “nigger” has a lesser impact. See *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 n.14 (7th Cir. 2002) (noting that in the case before it the use of the word “nigger,” while “highly offensive,” was made only once, was made by a coworker and not a supervisor, and management suspended the employee involved).

²²⁰ See 42 U.S.C. §§ 1981a(a)(1), 1981a(c) (2000).

²²¹ See 42 U.S.C. §§ 1981a(a)(1), 1981a(c) (2000).

²²² See *id.* § 1981a(a)(1).

²²³ See *Burlington Indus. Inc. v. Ellerth*, 542 U.S. 742, 764 (1998) (“Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.”).

²²⁴ See *id.* at 760-64 (explaining the basis for imposing vicarious liability on employers in cases of supervisory sexual harassment).

²²⁵ See *Franke, supra* note 16, at 772 (“On this account, sexual harassment is sex discrimination precisely because its use and effect police heteropatriarchal gender norms in the workplace.”). *Franke* asserts that she does not seek to abandon the “because of sex” requirement (actually, she uses the term “based on sex,” *id.*), but in fact that is the result of her approach. “All that I urge is renewed attention to the ‘based on sex’ element of the plaintiff’s case, such that we view the wrong of sexual harassment in systemic terms, rather than in terms that elevate a method of proof (‘but for’) over the nature of the harm itself.” *Id.*

²²⁶ See *supra* Parts II and III.

²²⁷ See Schwartz, *supra* note 18, at 1787 (commenting that the proposed “sex per se” rule would mean that “in a subcategory of cases, the plaintiff will be relieved of having to produce separate evidence of causation”).

²²⁸ See *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997).

²²⁹ See Schwartz, *supra* note 18, at 1787 (“The sex per se rule could take the form of a conclusive presumption that sexual conduct is ‘because of sex’ as a matter of law, which is how courts seemed to treat the issue prior to *Oncale*.”).

²³⁰ See *id.* at 1705. Actually, Schwartz appears to have created a new, albeit oxymoronic, term: “unconscious intentional discrimination.” See *id.*

²³¹ See *supra* note 219.

²³² See *supra* Part III.

²³³ See *supra* Part IV.