BEYOND PERSONAL OFFENSE IN ANTIDISCRIMINATION LAW

Tristin K. Green[*]

Scholars have long cautioned against focusing too closely on individual bad actors in antidiscrimination law without sufficient attention to how organizations discriminate. This Article reveals why it is equally dangerous to focus too closely on individuals at the other end: on specific victims and their psychological harms. The Article exposes a turn in antidiscrimination law over the past several decades toward measuring individual harm in determining whether discrimination occurred. Judges began to see and emphasize individual, psychological harm as a principal discrimination harm and at the same time to raise concerns about claims for mere trifles or personal offense, fashioning new doctrinal rules under which an individual's harm must be measured not just in determining a person's remedies but in determining whether discrimination occurred at all. This turn has gone unnoticed in legal scholarship and has been implicitly embraced by progressives and conservatives alike. Yet it is deeply problematic. The Article reveals why—and shows how a seemingly narrow recent decision by the Supreme Court involving Title VII of the Civil Rights Act can be understood to upend it. Taking on recently percolating debates in employment discrimination law, including harassment as discrimination, challenges to DEI measures, and religious belief accommodation demands, the Article illustrates a future for antidiscrimination law in which

---

* Professor of Law, William M. Rains Fellow & Associate Dean for Research, LMU Loyola Law School, Los Angeles. I owe thanks to Kathryn Abrams, Stephanie Bornstein, Martha Chamallas, Hila Keren, Yvonne Lindgren, Orly Lobel, Kaiponanea Matsumura, Angela Onwuachi-Willig, Camille Gear Rich, Leticia Saucedo, Michelle Travis, Kimberly West-Faulcon, and Deborah Widiss for thoughtful discussion and feedback on drafts. The piece also benefited greatly from presentation and conversation at the American Bar Foundation Speaker Series, West Coast Sexuality, Gender & the Law Conference, Colloquium for Scholarship on Employment and Labor Law (COSELL), and Works-in-Progress Colloquium at Loyola Law School. Thank you also to LLS student Haley (Hyebinn) Kim for excellent work on several research projects.

institutional action and normative questions about what amounts to discrimination and why are returned front and center rather than being buried behind measurements of individual harm.

TABLE OF CONTENTS

INTRODUCTION 2
I. THE CENTERING OF PERSONAL OFFENSE IN ANTIDISCRIMINATION LAW 9
- *A. A Social and Political Environment for Centering Personal Offense* 12
- *B. The Turn to Centering Personal Offense in Law* 18
  - *1. Harassment and Hostile Work Environment Law* 18
  - *2. The Adverse Employment Action Requirement* 27
- *C. The Allure of Centering Personal Offense* 30
- *D. Conservatives Grab Hold: Personal Offense as Discrimination* 33

II. *MULDROW*'S RETURN TO WORK 34
- *A. Plain Reading* Muldrow 35
- *B.* Muldrow*'s Return to Work in Action* 38
  - *1. Centering Institutional Action & Context: Normative Determinations* 38
  - *2. Re-Aligning Hostile Work Environments as Discrimination in Work* 45
  - *3. Considering Challenges to DEI Measures* 48
  - *4. Against Weighing Individual Harms* 51
- *C. Resisting Centering Personal Offense* 54

CONCLUSION 57

INTRODUCTION

In February 2025, the Trump Department of Education issued a Dear Colleague letter to universities and K-12 schools in which it insisted that teachings that trigger feelings of guilt or "moral burden" because of race amount to discrimination by "deny[ing] students the ability to participate fully in the life of a school."[1] Several years earlier, during the first Trump administration's wave of workplace anti-DEI actions, the Executive Office of the President issued a letter directing all federal agencies to "cease and desist" in their workplaces from funding diversity training sessions that teach "divisive concepts," later defined by executive order as trainings suggesting that "any individual should feel discomfort, guilt, anguish, or any

1. Craig Trainor, Acting Assistant Sec'y for C.R., *Dear Colleague Letter*, U.S. DEP'T EDUC. (Feb. 14, 2025), https://perma.cc/YL3S-7YJD.

other form of psychological stress on account of his or her race."[2] The common idea across these directives is that teaching about racial bias, systemic racism, racial history or injustice amounts to discrimination against whites solely because it imposes harms related to race in the form of psychological stress or emotional anguish. In other words, psychological stress or emotional anguish, even "discomfort," related to race—feeling badly about race—renders the teachings discriminatory without any further inquiry.

The directives are framed with a veil of race neutrality, but it is the palpable individual harms that give them their traction. Their proponents gloss over larger normative questions about what amounts to discrimination and why by tying teachings about race to individual suffering. It should come as no surprise that the directives are aimed at easing discomfort of white men, given broader anti-DEI efforts.[3] What may be less evident, however, is that hinging the declaration of discrimination on psychological harm builds from a larger shift in antidiscrimination law over the past several decades toward measuring individual harm in determining whether discrimination occurred.

This shift is especially evident in cases involving employment discrimination under Title VII of the Civil Rights Act. Judges in the late 1980s began to see and emphasize individual, psychological harm as a principal discrimination harm. At the same time, these judges began to raise concerns about plaintiffs bringing claims for mere trifles, thereby creating legal doctrines designed to protect employers from liability through judgments about individuals' harms where no such doctrines existed before. Judges, in other words, fashioned law under which an individual's harm must be measured not just in

---

2. Memorandum from Russell Vought, Acting Dir., Off. Mgmt. and Budget, to the Heads of Executive Departments and Agencies 1 (Sep. 4, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf; Combating Race and Sex Stereotyping, Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sep. 28, 2020) [hereinafter Sep. 22 Order]. The Trump Administration executive order issued in January 2025 merely declared "DEI preferences, mandates, policies, programs, and activities" "illegal discrimination." Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025) (requiring, among other things, a list be made of "[f]ederal contractors who have provided DEI training or DEI training materials to agency or department employees"); Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

3. The directives are bound up with anti-DEI efforts in schools and workplaces and beyond, from immigration, education, and social welfare to gender identity and women's bodily autonomy. *See, e.g.*, Kevin D. Roberts, *foreword* to PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 1 (Paul Dans & Steven Groves eds., 2023) (Heritage Foundation laying out agenda); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

determining a person's remedies but in determining whether discrimination has occurred at all.

The Trump administration directives build from this shift by insisting that psychological or emotional harm related to race can itself be sufficient to render action discriminatory. The directives do their measuring whole cloth and in the background, declaring race- or sex-related psychological stress of certain individuals as always sufficient to render otherwise acceptable action—teachings of history or social science involving race—discriminatory. Mere trifles are of no concern when it comes to individuals envisioned under the directives, and yet the directives, as I will show, follow closely from an era in which judges centered personal offense in antidiscrimination law.

In this Article, I expose the turn in antidiscrimination law toward what I call "centering personal offense,"[4] a shift that has gone unnoticed in legal scholarship and has been implicitly embraced by progressives and conservatives alike, and I show why it is a mistake. Centering personal offense in antidiscrimination law is problematic because it decontextualizes and deforms the discrimination inquiry by burying normative determinations in individualized measurements of harm. Judges are left without adequate room to consider, for example, why certain trainings may be discriminatory, especially given current and historical context, and why certain other trainings may not be discriminatory. And, more broadly, this leaves the public without sufficient opportunity for debate. What's more, once measuring harm is part of the discrimination inquiry, it appears natural for judges to weigh individual harms against each other in deciding whether discrimination took place: One individual's judicially declared affront to dignity is put up against another individual's judicially declared much ado about nothing. Pitting one individual harm against another in this way substantially undermines the interest of the Civil Rights Act and other nondiscrimination laws in effectuating institutional and social change.

---

4. I call this turn a centering of personal offense in antidiscrimination law because personal offense quite literally captures the psychological harm that courts emphasized during this time and because the doctrinal hurdles detailed here developed out of courts' concerns about discrimination claims based on mere "trifles" or "merely offensive" experiences. *See, e.g.*, Muldrow v. City of St. Louis, 144 S. Ct. 967, 977 (2024) (Thomas, J., concurring) (requiring "more than a trifling harm"); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1983) (expressing concern about "making actionable any conduct that is merely offensive"); Muldrow v. City of St. Louis, 30 F.4th 680, 688 (8th Cir. 2022) (applying a "material employment disadvantage" requirement to distinguish from "every trivial personnel action that an irritable . . . employee did not like" (internal citation and quotation omitted)). *See generally infra* Section I.A–I.B.

There is no question that discrimination imposes significant individual harms. Researchers and scholars across a wide range of fields—from neuroscience and social psychology to law, sociology, history, and the humanities—have documented the myriad and deep harms suffered when people experience discrimination.[5] Efforts to understand and convey the range of harms that discrimination causes its victims have changed how we think about discrimination and its solutions, sometimes helping us to see structural as well as individual sources of harm.[6] These efforts are crucial for positioning law and society to address discrimination. The more we know about the extent and range of harms, the more likely we are to be motivated to seek change in the first place and the more likely we are to shape law appropriately to address problems as they actually exist.[7] However, it is one thing to advance our understanding of individual harms as a means of pushing for redress through legal and/or organizational change or for shaping the law so that it accounts for these harms—a declaration, for example, that segregation is a form of discrimination in part because of the psychological blows of inferiority that it lands or an expansion of remedies providing compensatory damages as well as injunctive or other equitable relief. It is quite another to create law

---

5. And these harms are more than economic; they are psychological and emotional, as well as physical. Harms can also carry over to impact the health and lives of victims' families and loved ones. *See, e.g.*, Arline T. Geronimus, *Weathering the Pandemic: Dying Old at a Young Age from Pre-Existing Racist Conditions*, 27 WASH. & LEE J. C.R. & SOC. JUST. 409, 413, 430 (2021) (on "weathering" as harm that "occurs across body systems in response to accumulated impacts of lives persistently affected by structural racism, poverty, social exclusion, and cultural oppression"); Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 335–41 (2016) (on group pain and cultural trauma). Individual harms are distinct from, even as they contribute to, larger societal harms that flow from discrimination, such as perpetuating status hierarchies and inequality and subordination of groups.

6. By this I mean that a rich, contextual inquiry into how discrimination operates with respect to individuals and their intersectional identities ties experience to systems and subordination, often calling for systemic change. Scholars in the area of CRT, queer theory, and disability justice center this work. *See infra* Section II.C (discussing the importance of this and similar work in thinking about maintaining institutions and context at the core of antidiscrimination law).

7. In the spirit of behavioral realism, judicial theories "should be periodically revisited and adjusted so as to remain continuous with progress in psychological science." Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1001 (2006); Jerry Kang, *Behavioral Realism About Color Confusion*, 102 B.U. L. REV. 2013, 2019 (2022) (defining behavioral realism as an approach that "insists that legal analysis and decision-making should incorporate a scientifically up-to-date model of human behavior").

that incorporates judicial determinations measuring an individual's harm in deciding whether discrimination has occurred.

Every once in a while, resolution of a seemingly simple doctrinal issue unveils something much larger afoot. The Supreme Court's recent decision in *Muldrow v. City of St. Louis*[8] presents one of these moments. The Court held in *Muldrow* that a plaintiff suing for employment discrimination under Title VII of the Civil Rights Act must show "some harm" with respect to an identifiable term or condition of employment, but need not meet a "heightened threshold of harm—be it dubbed significant, serious, or something similar."[9] In doing so, the Court reversed a decades-long doctrinal trend in which judges imposed such heightened thresholds as part of what was commonly known as an "adverse employment action requirement."[10] *Muldrow* is important for litigants because it opens the door for many plaintiffs to go forward with discrimination claims that otherwise would have been barred. But *Muldrow* presents an opening of another kind more crucial to the future of antidiscrimination law: a broader conceptual and theoretical opening to acknowledge a major misstep in the law and to plant a foothold for a better path going forward.

Situating *Muldrow* within broader societal and judicial shifts over the past several decades links the build-up of the adverse employment action requirement to doctrinal developments in hostile work environment law. While the lower court decisions in *Muldrow*—and the adverse employment action requirement that the Eighth Circuit and others had embraced—did not expressly discuss psychological harm, I show that the requirement nonetheless emerged as part of the broader move of emphasizing psychological harm and building doctrinal requirements for measuring it. And even as plaintiff-side civil rights advocates and legal scholars fought back in this era, they did so not by challenging the courts' centering of personal offense, but by emphasizing the extent or importance of individuals' psychological harms.[11] They, too, in this way, joined the turn toward centering personal offense.

One reading of *Muldrow* (a plausible one, I will show) is that it de-centers personal offense and thereby dislodges measures of individual harm from the center of antidiscrimination law, placing institutions and institutional action back at the core.[12] Measurements

8. 144 S. Ct. 967 (2024).

9. *Id.* at 973–74.

10. *See infra* Section I.B.2 (describing the requirement). For previous commentary on the adverse employment action requirement, see Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998); Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307 (2004).

11. *See infra* Section I.C.

12. *See infra* Section II.B.1.

of individual harm remain relevant for determining a successful litigant's remedies, but they do not determine whether discrimination took place. I call this move a "return to work" in employment discrimination law for two reasons. First, refocusing the law on institutions and their actions brings attention back to workplaces as spaces of work, regardless of whether those spaces involve a central, physically oriented office or not. Second, more metaphorically, refocusing the law on institutions and their actions in context puts the law back to work as a tool for effecting meaningful change. Without a return to work, antidiscrimination law, as part of a larger equality and anti-subordination project, will flounder.

The Article is part-untold story, part-examination of recent societal and legal trends, and part-doctrinal deconstruction to show how the pull toward individuals—including individual harm—can drive our antidiscrimination laws away from institutional change that would reduce discrimination even when those laws may appear to be on the right track.[13] Indeed, this is primarily a cautionary tale. Social scientists and antidiscrimination scholars alike have examined some of the disadvantages of focusing too closely on individual bad actors in antidiscrimination law and not enough on the relational nature of discrimination and especially the various ways that organizations discriminate.[14] This Article reveals why it is equally

---

13. In this way, the Article contributes to the sociolegal literature on discrimination and antidiscrimination law by considering how conceptions of experiences, harm, and discrimination shape legal doctrine, and vice versa. *See, e.g.*, ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017). The Article also situates changes in law in context of the broader history of political economy and neoliberalism. *See, e.g.*, Deborah Dinner, *Beyond "Best Practices": Employment Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017); Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391 (2023). The Article also puts scholarship on "regular" discrimination back in conversation with scholarship on harassment, something that has fallen to the wayside after a spate of articles seeking to unify employment discrimination law in the late 1990s. Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1591–94 (2000); Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 729–30 (1999); Steven L. Willborn, *Taking Discrimination Seriously:* Oncale *and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 677–78 (1999).

14. In the employment context specifically, scholars have documented numerous ways that work organizations influence explicit and implicit biases and emotions, stereotyping, micro-aggressions, and social closure, among other cognitive and social phenomena, through their practices, systems, and cultures, and thereby affect employment relations, decisions, and ultimately individuals' success in work. For a recent example of scholarship in this vein, see Victor Ray, *A Theory of Racialized Organizations*, 84 AM. SOCIO. REV. 26, 35 (2019)

dangerous to focus too closely on individuals at the other end: on specific victims and their psychological or emotional harms. Moreover, it responds to a recent inclination among even some progressive advocates and scholars toward embracing formal equality in antidiscrimination law as if tending closely to causation analyses will gain greater ground for nondiscrimination projects.[15] Decisions about what amounts to employment discrimination often necessarily involve normative questions that require attention to historical and present context. Even if causation is at the crux of some cases (cases in which an employer denies that it made a decision on the basis of a protected characteristic at all, for example), it will not resolve the discrimination inquiry in all cases. *Muldrow* returns the necessary normative questions front and center rather than allowing them to lurk behind the scenes in a measuring or weighing of specific individuals' harms.

The Article is organized in two Parts. Part I uncovers the turn toward centering personal offense in antidiscrimination law that occurred over the past several decades. Part II, taking on some of the recently percolating debates that reveal how deeply problematic centering personal offense can be, presents *Muldrow* as a de-centering of individual harm and a re-centering of institutional action. *Muldrow* offers a retreat from narrowly individualized, formalistic frames of discrimination to place discrimination back in context, both historical and present. In this way, *Muldrow*'s holding has much further reach than any have yet realized.[16] Among other things, *Muldrow* reframes the discrimination inquiry away from formal equality when normative determinations are at stake; provides clarity for when and how the severe or pervasive standard for hostile work environments must be met; shows why recent challenges to diversity trainings or other DEI practices that invoke "discomfort, guilt, anguish, or any other form of psychological stress on account of [an individual's] race" as a basis for a discrimination claim are unfounded; and demonstrates why religious belief

---

(advancing a view of structure that "explains divergent outcomes as the result of agency exercised in relation to organizational resources"). This line of research emphasizes the role of relations as well as institutions and organizations in discrimination and inequality. *See, e.g.*, Laura Beth Nielsen, *Relational Rights: A Vision for Law and Society Scholarship*, 58 LAW & SOC'Y REV. 1, 1–3, 6 (2024).

15. *See infra* Section I.C.

16. In a recent article, Sandra Sperino rightly argues that there is more to *Muldrow* than many have realized, but she nonetheless takes the position that *Muldrow* necessarily requires an individualized measure of "harm" rather than merely disadvantage in work. *See* Sandra Sperino, *When is Discrimination Harmful?*, 103 WASH. U. L. REV. 103, 105 (2025) (framing what she sees as the important question after *Muldrow*: "what counts as harm?").

accommodation claims should not involve a weighing of individual harms against each other.[17]

We may have moved firmly into an era in which psychological and emotional well-being take center stage, with attendant benefits of recognizing the many harms of discrimination and subordination, but this does not mean that we must embrace a move in antidiscrimination law toward measuring individual harms in determining whether discrimination has occurred. Current efforts to undermine antidiscrimination law rest on normative positions about what discrimination is and why they must be met head on. *Muldrow* shows the way.

I. THE CENTERING OF PERSONAL OFFENSE IN ANTIDISCRIMINATION LAW

Early Title VII litigation—and the Supreme Court decisions that came out of it—did not center personal offense. Rather, courts and advocates seemed to understand Congress's use of the phrase "compensation, terms, conditions, or privileges of employment"[18] as requiring only that a discriminatory action be employment related.[19] This means, for example, as legal scholar Rebecca Hanner White once put it, "were a bank to deny a home loan because of sex to an applicant who happens be an employee, or were a telephone company to disconnect service because of race to a customer who happens to be an employee, no Title VII claim would be present."[20]

Numerous cases heard by the Supreme Court support this understanding of the statute. These cases considered questions about how plaintiffs would prove that an employer had "discriminate[d] . . . because of" a protected group status, and, relatedly, how to understand the breadth of employers' nondiscrimination obligations.[21] Are employers prohibited from using employment practices when those practices have a disparate impact on members of certain groups, even when the practices treat groups equally in work?[22] Must an employer's asserted reason for an employment decision be related to the requirements of the particular

17. *See* Sep. 22 Order, *supra* note 2, at 60685.

18. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

19. *See* White, *supra* note 10, at 1123.

20. *Id.* at 1151 n.162.

21. *See supra* note 18.

22. Griggs v. Duke Power Co., 401 U.S. 424, 425–26 (1971).

job to be nondiscriminatory?[23] Can plaintiffs use statistical analyses to prove a "pattern or practice" of discrimination beyond an individual instance of discrimination?[24] These were highly contested and sometimes difficult issues, but nowhere in the opinions deciding them was there any hint of concern that plaintiffs might bring suit for harms that were too insubstantial to amount to discrimination, much less any doctrinal requirement that harm be bad enough to amount to discrimination.

Indeed, in one early case the Supreme Court made expressly clear that one's personal view about whether one job is better than another has no bearing on the question of whether discrimination occurred. In *International Brotherhood of Teamsters v. United States*,[25] the Department of Justice alleged that truck drivers had been kept out of long-haul, "line driver" positions because of their race and national origin.[26] The Court stated:

> Although line-driver jobs pay more than other jobs, and the District Court found them to be 'considered the most desirable of the driving jobs,' it is by no means clear that all employees, even driver employees, would prefer to be line drivers. Of course, Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another.[27]

A range of cases in the lower courts during this time also involved discrimination in various terms and conditions in work. Segregated employee eating clubs, discriminatory job assignments, and poor evaluations were raised in early cases, and none were declared off limits or subject to a heightened harm standard under Title VII.[28] As

---

23. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). The Court of Appeals in *McDonnell Douglas* had required the company to justify its proffered reason for the decision not to re-hire Green as related to Green's ability to do the job in question. Green v. McDonnell Douglas Corp., 463 F.2d 337, 344 (8th Cir. 1972).

24. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

25. 431 U.S. 324 (1977).

26. *Id.* at 329.

27. *Id.* at 338 n.18 (citations omitted). In *Hishon v. King & Spalding*, the Court also interpreted "terms, conditions, or privileges" as an expansive concept that covers all aspects of an employment relationship. 467 U.S. 69, 74–75 (1984) (rejecting defendant's argument that Title VII should apply only to contractual aspects of employment).

28. *See e.g.*, Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 514–15 (8th Cir. 1977) (employer's informal acceptance of segregated employee eating clubs); Jacobs v. Martin Sweets Co., 550 F.2d 364, 366 (6th Cir. 1977) (transfer from executive secretary position to clerical job at same pay); Gray v. Greyhound Lines, E., 545 F.2d 169, 176 (D.C. Cir. 1976) (unfair disciplinary and route assignment procedures); Swint v. Pullman-Standard, 539 F.2d 77, 89–90 (5th Cir. 1976) (discriminatory job assignments, even absent salary discrimination or economic harm); Steadman v. Hundley, 421 F. Supp. 53, 57

one court put it, "[I]f matters such as discipline and assignment of work and equipment were not considered 'terms, conditions, or privileges of employment,' it would be difficult to give that language any meaning at all."[29]

Congress also recognized a range of actions as discriminatory in the lead-up to the 1991 passage of amendments to Title VII, which in part provided for compensatory damages.[30] Examples of superior office and restroom facilities were noted as employer actions that would violate the act but allow for no or little monetary recovery without amendment.[31] The EEOC Compliance Manual from the early 1980s similarly interpreted employment practices falling within Title VII expansively, noting that "discriminatory work environment; duration of work; work rules; job assignments and duties; and job advancement" would all fall within the act.[32]

By the 1990s, however, courts were also at work centering personal offense, emphasizing psychological harm and developing legal doctrines that would serve to screen out discrimination claims based on a judicial measurement of an individual's harm. In this Part, I expose this shift. Without question, the centering of personal offense

---

(N.D. Ill. 1976) (supervisor's racial slurs and unfairly adverse recommendations); Johnson v. Lillie Rubin Affiliates, Inc., No. 5943, 1972 WL 252, at *2 (M.D. Tenn. Mar. 15, 1972) (black women referred to by first names, while white women were called "Miss" or "Mrs.").

Early cases also involved racially hostile environments. *See, e.g.*, United States v. City of Buffalo, 457 F. Supp. 612, 631–35 (W.D.N.Y. 1978) (hostile work environment for racial minorities constituted a 42 U.S.C. § 1983 claim for people of color employed by city police and fire departments), *aff'd as modified*, 633 F.2d 643 (2d Cir. 1980); Murry v. Am. Standard, Inc., 373 F. Supp. 716, 717 (E.D. La. 1973) (black employee called "boy"), *aff'd*, 428 F.2d 529 (5th Cir. 1973); EEOC Dec. No. 72-1561 (1972) (racially derogatory graffiti); EEOC Dec. No. 72-0957 (1972) (racial joke using "n[-word]" in training program); EEOC Dec. No. 72-779 (1971) (black employee called "n-[word]"); EEOC Dec. No. 71-720 (1970) (black employee called "little black Sambo"). *See also* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 709 n.76 (1997) (gathering cases).

Some of these courts understood adversity as helpful for creating an inference of discrimination from the prima facie case of *McDonnell Douglas*. *See* White, *supra* note 10, at 1151.

29. *Gray*, 545 F.2d at 176 (quoting 42 U.S.C. § 2000e-2). This focus on discrimination rather than on specific individual harm also makes sense in light of public accommodation cases. *See* Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORN. L. REV. ONLINE 70, 71 (2019).

30. 42 U.S.C. § 1981(a) (allowing for compensatory and punitive damages, with caps).

31. H.R. Rep. No. 102-40(I), at 68–69 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 606–07.

32. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1982-3, CM-613 TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT (1982) (providing examples of broad sweep of the phrase).

in employment discrimination law is intertwined with broader social and legal changes, including how we view individuals in society. It also, in turn, affects how we think about discrimination in our daily lives—and what we consider successful efforts to combat it. I begin this Part by briefly surfacing several aspects of the overarching environment in which the centering of personal offense took place before tracing the turn itself in caselaw as well as legal scholarship and advocacy.

A. A Social and Political Environment for Centering Personal Offense

Attention in society and also in scholarship and advocacy related to thinking about discrimination, subordination, and responsibility turned dramatically in the 1980s and 1990s toward individuals' psyches and experiences.[33] In the legal scholarship, critical theories and calls for recognizing intersectionality provided personal narratives as a way of conveying the experiences of people who suffer discrimination and subordination.[34] Moreover, as mentioned above, researchers and scholars across fields documented the extensive psychological (and physical) harms that can result both from violent acts of discrimination and from more subtle ones that accrue their harms over time.[35] A robust and very live debate continues about ways of viewing the self in relation to subordination and how those

---

33. In the legal scholarship and social sciences, this turn was particularly evident in the attention paid to implicit biases, stereotype threat, and other cognitive-based phenomena. The turn toward psyches converged with a turn toward neoliberalism and emphasis on individual legal rights pressed through the judiciary, which pervaded law. *See, e.g.*, Reddy, *supra* note 13; Dinner, *supra* note 13; Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 L. & SOC. INQUIRY 187 (2009).

34. Storytelling as influenced by postmodernism seeks to challenge the existence of objective truth, or at least to challenge a "current formulation of objectivity." Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1278 (1993). On the value of storytelling, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991). It is important to note that much of the literature that uses stories and emphasizes intersectionality also emphasizes structure and context—and the relational, co-constitutive nature of subordination systems, experience, and identity—even as it draws attention to individualized experience. *See, e.g.*, Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341 (2013) (describing the draw to context in intersectionality, including in Kimberlé Crenshaw's work).

35. *See, e.g.*, Geronimus, *supra* note 5, at 430; Onwuachi-Willig, *supra* note 5, at 335.

views affect strategies for change.[36] I leave that debate largely to the side here in briefly positioning the judicial centering of personal offense in context by reference to a change in ways of talking and thinking about individuals, harm, and redress: the emergence of a "therapeutic ethos" or "therapy culture" and corresponding neoliberal line of prominent critique of complaint.

As numerous scholars have documented, the United States experienced a shift in the years after World War II away from moral control through religion or family and toward a "therapeutic ethos"—a privileging of psychological understandings of the human experience (and accompanying expectation of self-help consumerism).[37] This culture shift arguably both prompted a rise in attention to—and general valuing of—psychological and emotional harm and at the same time elicited prominent critiques of a society that was proclaimed to foster "victimhood" and runaway, unwarranted rights-claiming. Although much of the literature is

---

36. For a taste of some of the broad range of research and discussion relevant to this debate, see, e.g., CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE (2010); Lynette J. Chua & David M. Engel, *Legal Consciousness Reconsidered*, 15 ANN. REV. L. & SOC. SCI. 335 (2019); and Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) on rights. *See also infra* Section II.C.

37. The study of the therapeutic turn is international as well as interdisciplinary. *See, e.g.*, EVA ILLOUZ, SAVING THE MODERN SOUL: THERAPY, EMOTIONS, AND THE CULTURE OF SELF-HELP (2008); EDGAR CABANAS & EVA ILLOUZ, MANUFACTURING HAPPY CITIZENS: HOW THE SCIENCE AND INDUSTRY OF HAPPINESS CONTROL OUR LIVES (2019); BARBARA EHRENREICH, BRIGHT-SIDED: HOW THE RELENTLESS PROMOTION OF POSITIVE THINKING HAS UNDERMINED AMERICA (2009); FRANK FUREDI, THERAPY CULTURE: CULTIVATING VULNERABILITY IN AN UNCERTAIN AGE (2004); NIKOLAS ROSE, INVENTING OUR SELVES: PSYCHOLOGY, POWER, AND PERSONHOOD (1998); SUVI SALMENNIEMI, AFFECT, ALIENATION AND POLITICS IN THERAPEUTIC CULTURE: CAPITALISM ON THE SKIN (2022); KATIE WRIGHT, THE RISE OF THE THERAPEUTIC SOCIETY: PSYCHOLOGICAL KNOWLEDGE & THE CONTRADICTIONS OF CULTURAL CHANGE (2010); Angela P. Harris, *Care and Danger: Feminism and Therapy Culture*, 69 STUD. L. POL. & SOC'Y 113 (2016); Suvi Salmenniemi, *Therapeutic Politics: Critique and Contestation in the Post-Political Conjuncture*, 18 SOC. MOVEMENT STUD. 408 (2019). *See generally* THE ROUTLEDGE INTERNATIONAL HANDBOOK ON GLOBAL THERAPEUTIC CULTURES (Daniel Nehring et al. eds., 2020). While traced to the rise in attention to psychology after World War II, the turn also has a distinctly emotional valence as individuals become responsible for their own "happiness" or general wellbeing. *See, e.g.*, Salmenniemi, *Therapeutic Politics*, *supra*, at 408–09 ("[T]he therapeutic industry of happiness and wellbeing has been rapidly growing on a global scale."). Some recent work studies concepts of well-being across cultures. *See, e.g.*, Mohsen Joshanloo, Evert Van de Vliert & Paul E. Jose, *Four Fundamental Distinctions in Conceptions of Wellbeing Across Cultures*, *in* THE PALGRAVE HANDBOOK OF POSITIVE EDUCATION 675 (Margaret L. Kern & Michael L. Wehmeyer eds., 2021).

critical of this trend, some deeply so (and often for different reasons),[38] I do not seek to stake a normative position here. Instead, my goal is to draw from the literature to provide contextual background for better seeing and understanding the centering of personal offense in antidiscrimination law.

Recall that the turn to personal offense in antidiscrimination law as I identify it is characterized by two features: a recognition of (and emphasis on) individual psychological harm as a principal discrimination harm and a corresponding construction of doctrinal barriers measuring individual harm to sift out claims brought for "mere trifles."[39] On the first aspect, therapy culture prioritizes psychological well-being.[40] Indeed, the rise of therapy culture is often traced to the influence of psychoanalyst Sigmund Freud in the early 1900s and to the later popularity of positive psychology, a movement that declared itself as one that sought to "break away" from a negative psychology that emphasized weakness and instead to focus on getting people to "flourish" and to "mak[e] people happier."[41] Scholars do not all characterize the shift in the same way, but together they point to a variety of evidence suggesting that a shift has occurred wherein psychological well-being and the quest for that well-being dominate modern discourse and action. They point to, among other things, a meteoric rise in attention to psychology and self-help consumerism in corporate culture and mass media,[42] pedagogical shifts in education,[43] data on individuals' use of psychologists, therapists, and coaches,[44] the addition of "quality of life" and other subjective survey measures of well-being in measuring impact and efficacy of national policies,[45]

---

38. *See* ILLOUZ, *supra* note 37, at 1–2 (noting numerous bases of critique).

39. *See supra* note 4 and accompanying text.

40. SALMENNIEMI, *supra* note 37, at 6–7.

41. Edgar Cabanas & Eva Illouz, *The Making of a "Happy Worker": Positive Psychology in Neoliberal Organizations*, *in* BEYOND THE CUBICLE: JOB INSECURITY, INTIMACY, AND THE FLEXIBLE SELF 25, 31 (Allison J. Pugh ed., 2017) (quoting MARTIN E. P. SELIGMAN, FLOURISH: A NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING—AND HOW TO ACHIEVE THEM (2011)). For fuller history and discussion of the influence of Martin Seligman and positive psychology, see *id.* at 25–49.

42. *See, e.g.*, Salmenniemi, *Therapeutic Politics*, *supra* note 37, at 408 ("Self-help books, life coaching, life management courses and alternative medical and spiritual services increasingly saturate the terrain of everyday life, corporate culture and mass media."); WILLIAM DAVIES, THE HAPPINESS INDUSTRY: HOW THE GOVERNMENT AND BIG BUSINESS SOLD US WELL-BEING (2015).

43. *See, e.g.*, KATHRYN ECCLESTONE & DENNIS HAYES, THE DANGEROUS RISE OF THERAPEUTIC EDUCATION 163–64 (2009).

44. Ronald W. Dworkin, *The Rise of the Caring Industry*, 161 POL'Y REV. 45, 45 (2010) (noting the rise of therapists and of patients in therapy).

45. Cabanas & Illouz, *supra* note 41, at 27.

and increased academic research on "happiness-related topics" such as "positive emotions," "flourishing," "optimism," and "resilience."[46]

As some scholars have argued, this emphasis on psychology and psychological well-being may have created an opening for judges and other lawmakers to recognize psychological harm independently of physical or economic harm, where they had long refused to do so.[47] Sociologist Katie Wright, for example, argues, as one scholar has put it, that "by reconfiguring the public/private division, the therapeutic discourse . . . opened up a new discursive space for 'speaking out' about suffering and injustices that used to remain unarticulated in public, such as child abuse and family violence."[48] Feminist legal theorists have made a similar point.[49]

To the second aspect of centering personal offense (concern about claims brought for mere trifles and creation of legal doctrines to measure individual harm), therapy culture also carried with it a strong embrace of capitalism and neoliberalism.[50] Indeed, therapy culture ties intimately with capitalism and neoliberalism in expecting, if not outright demanding, self-help through consumerism.[51] Individuals in this culture are responsible for their own psychological and emotional well-being.[52]

Placing responsibility on individuals for their own psychological well-being has wide-ranging implications, from how we view and navigate democracy and politics and our relationship to the state to how we view and navigate our most intimate relationships. Most relevant to understanding the centering of personal offense in antidiscrimination law, however, placing responsibility on individuals has carried with it a derogation of those who complain,

---

46. *Id.* at 28 (noting that research on these topics quadrupled "since positive psychology appeared in academia at the turn of the century").

47. WRIGHT, *supra* note 37, at 41 (arguing that negative critiques of the rise of a therapeutic culture understate its significance in breaking down public and private and in opening receptivity to psychological and emotional harms).

48. *See* Salmenniemi, *Therapeutic Politics*, *supra* note 37, at 410–11 (citing Katie Wright, *Theorizing Therapeutic Culture: Past Influences, Future Directions*, 44 J. SOCIO. 321 (2008)).

49. *See, e.g.*, Harris, *supra* note 37, at 117 ("Therapy culture may even have something to give back to feminism: it has made possible new ways of addressing subjection and the interrelation of the individual with culture and history."); *see also* Salmenniemi, *Therapeutic Politics*, *supra* note 37, at 410–11 (describing feminists' work and noting that "popularization of the therapeutic discourse has helped to energize movements politicizing violence, sexuality and gender, and has thus empowered individuals who were previously marginalized and voiceless").

50. Cabanas & Illouz, *supra* note 41, at 29.

51. *Id.* at 30.

52. *Id.* at 25. In the area of employment specifically, workers are valued for their happiness; "happy" workers are deemed "better" workers. *Id.* at 34.

those who identify individual harms and demand redress from others.[53] This derogation can be seen in much of the prominent commentary during the time when therapy culture was taking hold and into the 1990s when judges were centering personal offense in antidiscrimination law.[54]

Early concerns were often articulated as concerns about over-self-indulgence. As early as the 1960s, Philip Rieff declared that the moral authority of the Christian era had been displaced by a society in which the "self, improved, is the ultimate concern."[55] According to Rieff, this over-emphasis on the self resulted in a culture of "impulse release, projecting controls unsteadily based upon an infinite variety of wants raised to the status of needs."[56] Christopher Lasch in 1979 with *The Culture of Narcissism* similarly expressed dismay at the decline in cultural authority and especially in parental (paternal) control.[57] His book quickly became a bestseller, and Lasch was invited to the White House in connection with Carter's famous 1979 speech, sometimes known as the "malaise" speech.[58] In that speech, Carter

---

53. Not all critiques of therapy culture exhibit this derogatory tenor; some seek to challenge placement of responsibility with the individual in the first place. *See, e.g.*, Edgar Cabanas, *The Life and Death of Emotional Fads: A Review of Ashley Frawley's* Significant Emotions: Rhetoric and Social Problems in a Vulnerable Age, 38 INT'L J. POL. CULTURE & SOC'Y 139, 140 (2024) (making the point that all emotional fads "promote a vulnerable and diminished vision of the self that serves the neoliberal ideological purpose of individualizing social problems by reframing virtually every social and cultural problem and solution in terms of emotional deficits and strengths, respectively"). For additional works addressing happiness from a critical perspective, see Barbara S. Held, *The Tyranny of the Positive Attitude in America: Observation and Speculation*, 58 J. CLINICAL PSYCH. 965 (2002); SAM BINKLEY, HAPPINESS AS ENTERPRISE: AN ESSAY ON NEOLIBERAL LIFE (2014); DAVIES, *supra* note 42; CARL CEDERSTRÖM & ANDRÉ SPICER, THE WELLNESS SYNDROME (2015); *see also* CABANAS & ILLOUZ, *supra* note 37, at 13–14 (providing sources).

54. The derogation described here reaches well beyond critique of therapy culture and formal legal complaint. *See, e.g.*, Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 43 (reviewing DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997)) (describing critical race theorists as "lunatic[s]" who "exaggerat[e] the plight of the groups for which they are the self-appointed spokesmen" and claiming that they "come across as whiners and wolf-criers").

55. PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 62 (1966).

56. *Id.* at 17.

57. CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 176–79 (1979) (examining the impact of modern industrial society on parental control and authority).

58. *See* ELIZABETH LUNBECK, THE AMERICANIZATION OF NARCISSISM 13 (2014) (noting Lasch's visit to speak with Carter and Carter's speech as lamenting worship of self-indulgence and consumerism as "displac[ing] Americans' once-strong commitment to hard work, close-knit communities, and faith in God"); Ole

claimed that "too many of us now tend to worship self-indulgence and consumption," creating a moral crisis in the United States.[59]

By the 1990s, self-indulgence had become victimhood, and commentators began stressing concerns about changes in the state and demands on the state.[60] Frank Furedi, in his book *Therapy Culture*, notably tied therapy culture expressly to concerns about unwarranted legal claims for mere offense.[61] Furedi argued that therapy culture encourages individuals to make unwarranted legal claims based on their psychological or emotional harms.[62] According to Furedi, "It is now common for people to claim damages for unspecific, hidden pain. People are now demanding compensation for feeling offended, for loss of self-confidence or self-esteem or for being traumatised."[63] Relying on an "author of history of litigation,"[64] Furedi noted that courts had long "been reluctant to take seriously claims for compensation on the grounds of psychological injury alone," and argued that "[o]ne of the most extraordinary innovations of therapeutic culture has been the reclassification of existential psychological pain into a demand for financial compensation."[65]

Regardless of the political or normative position one takes with respect to individual responsibility and claims on the state and private businesses, there is no question that social and institutional context tend to disappear as the individual and their psychological fulfillment (or lack thereof) take center stage. And with the social and

---

Jacob Madsen, *Therapeutic Cultures: Historical Perspectives*, *in* THE ROUTLEDGE HANDBOOK OF GLOBAL THERAPEUTIC CULTURES, *supra* note 37, at 42, 45.

59. Jimmy Carter, *Crisis of Confidence*, PBS (Jul. 15, 1979), https://perma.cc/3QYV-D6TE.

60. In a 2017 interview, James Nolan explained the relationship between the therapeutic state and a "culture of victimhood" in which people "demand that their grievances and suffering are recognised as such." James Nolan, *On the Therapeutic State*, SPIKED (Sep. 1, 2017), https://perma.cc/2H92-YTSV. According to Nolan, the state responded to the therapy culture by serving as a therapist, taking a more invasive role in people's lives. *See* JAMES NOLAN, THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END 83–84 (1998) (discussing the increasingly therapeutic role of judges in Dade County, Florida's drug court).

61. *See, e.g.*, FUREDI, *supra* note 37, at 175–77 (arguing that the therapeutic ethos "endows the claim of emotional injury with authority").

62. *Id.* at 185.

63. *Id.*

64. *Id.* (quoting Peter Huber for the proposition that "[u]nless the victim of negligence had been physically abused, she would have to take care of her own psychic injuries"). Peter Huber was a fellow at the Manhattan Institute and outspoken advocate for "tort reform" to favor business interests. *See* WILLIAM HALTOM & MICHAEL MCCANN, DISTORT-ING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 40–55 (2004). For more on the link between tort and the rise of personal offense in antidiscrimination law, *see infra* notes 113–122 and accompanying text.

65. FUREDI, *supra* note 37, at 185.

political environment of increased emphasis on individual harm and individualized experience as backdrop, plaintiffs are more easily perceived as bringing claims of discrimination for mere "trifles"—and for psychological harms that "just happen to take place at work."[66] This is precisely what happened as courts centered personal offense in law.

B. The Turn to Centering Personal Offense in Law

In the late 1980s and 1990s, courts deciding Title VII cases began expressing concerns about discrimination lawsuits based on "perceived indignities," "trifles," or mere "offense" and constructing out of those concerns what became known as the adverse employment action requirement at issue in the Court's decision in *Muldrow*. They did so at around the same time that courts and commentators were struggling with arguments about whether—and when—sexual harassment could amount to discrimination in violation of Title VII. This was no coincidence. Indeed, early harassment cases set the groundwork for centering personal offense across antidiscrimination law, first by recognizing and emphasizing individual psychological and emotional harm, and then by raising concerns about claims brought for trivialities or mere "offense." These are the hallmarks of centering personal offense. To understand the full import of *Muldrow*, therefore, requires a telling of this doctrinally linked story within antidiscrimination law.

1. Harassment and Hostile Work Environment Law

The idea that a work environment can disadvantage someone in work and amount to an unlawful employment practice if it is discriminatory is not an idea that applies exclusively to sexual harassment. Even so, it was primarily sexual harassment cases that led to centering of personal offense in the law. In early cases involving men sexually harassing women at work, propositioning and physically touching them and demanding that they engage in sexual behavior to keep their jobs, for example, courts regularly held that Title VII was not violated.[67] Courts tended to frame harassment as a personal rather than work matter,[68] even stating that it was "natural

---

66. *See infra* Section I.B.

67. *See* Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 11 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

68. *Id.* at 1, 11 & 34 nn.56–57. Siegel provides two early cases as illustration: Corne v. Bausch and Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975) (holding that the plaintiff's supervisor's conduct was "nothing more than a personal proclivity, peculiarity or mannerism"; supervisor was "satisfying a personal urge" and "no employer policy [was] involved" nor was the company "benefited in any way");

and inevitable and nothing that law could reasonably expect to eradicate from work."[69]

By the 1970s, Catherine MacKinnon and others were making the case for Title VII to cover sexual harassment. In her influential book, *Sexual Harassment of Working Women*, MacKinnon argued that tort law was inadequate to address the problem of sexual harassment in work in large part because it missed the economic, group-based aspect of the act and the harm.[70] As she explained it, tort law misses the crux of the "group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared."[71] MacKinnon emphasized sexual harassment as a form of dominance and power—including economic power—to take.[72] She and others also argued that harassment based on sex was not simply a personal matter but was "used to force women out of jobs and deny them promotions and other benefits of employment."[73]

However, despite these and other arguments about gender and work-related power and the multiple ways that sexual harassment can disadvantage women in work, a psychological harm dimension of the arguments held particular sway in the courts.[74] This emphasis on psychological harm is evident in the early Supreme Court decisions considering sexual harassment and establishing the law of when such harassment amounts to a violation of Title VII. Indeed, although the Court may have stopped short of firmly centering personal offense in

---

and Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (stating that Title VII "is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley").

69. Siegel, *supra* note 67, at 11 & 34 n.58. *See also id.* at 14–15 (also noting the "sex-plus" rationale).

70. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 172 (1979).

71. *Id.* at 172, 174 ("Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market."). *See also* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 90 (1978) ("The function of sexual harassment in nontraditional jobs is to keep women out; its function in the traditional female job sector is to keep women down.").

72. *Id.*

73. *See* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2169 (2007); *see also* Siegel, *supra* note 67, at 10.

74. *See* Chamallas, *supra* note 73, at 2146–47 (describing emphasis on psychological harm and its consequences for women in work); *see also* Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J. ETHICS & PUB. POL'Y 335, 348–49 (1992) (describing the psychological dimension of harassment).

these cases, it set the stage for the move by fixating on psychological or emotional harm to individuals and raising concerns about claims brought for mere trifles.

The Supreme Court decided its first sexual harassment case in 1986, *Meritor Savings Bank v. Vinson*.[75] The plaintiff in the case, Mechelle Vinson, sued Meritor Savings Bank for sex-based discrimination under Title VII.[76] When Vinson applied for a job at the bank, Sydney Taylor took Vinson's application, hired her, and became her supervisor.[77] Soon thereafter, he began asking her for sex, and she acquiesced for fear of losing her job.[78] Vinson testified that Taylor forced her to have intercourse forty to fifty times over a twenty-month period, and that he also groped her and other female employees, followed them into the bathroom, and made lewd comments.[79] According to Vinson, Taylor also "tampered with her personnel records, lodged false complaints about her with management, denigrated and abused her in front of other workers, entrapped her into work errors, escalated his campaign of fault-finding against her job performance, and threatened her life when she threatened to report him."[80]

Meritor Savings argued that even if a supervisor's sexually harassing behavior "discriminate[s]" on the basis of sex, the statutory language "'terms, conditions, or privileges' of employment" covers only "tangible loss" experienced by a victim—loss, in other words, of "an economic character" and not "purely psychological aspects of the workplace environment."[81] Of course, as relayed above, although Taylor did not deny Vinson a promotion or dock her pay, the disadvantage experienced by Vinson in her work because of sex went well beyond "purely psychological aspects."[82] Nonetheless, the Supreme Court took the argument by Meritor Savings about those aspects and rejected it, expressly noting that "the language of Title

75. 477 U.S. 57 (1986).

76. *Id.* at 60.

77. *Id.*

78. *Id.*

79. *Id.*

80. Brief of Respondent Mechelle Vinson at 5, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979).

81. *Meritor*, 477 U.S. at 64 (quoting Brief for Petitioner, 30–31, 34). The trial judge had denied relief in part on the ground that Vinson had not lost any tangible job benefits, Vinson v. Taylor, No. 78-1793, 1980 WL 100, at *7 (D.D.C. Feb. 26, 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985); the court of appeals reversed, remanding the case for the trial court to consider whether Taylor had "created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." Vinson v. Taylor, 753 F.2d 141, 145 (D.C. Cir. 1985) (quoting Bundy v. Jackson, 641 F.2d 934, 943–44 (D.C. Cir. 1981)).

82. *Meritor*, 477 U.S. at 64.

VII is not limited to 'economic' or 'tangible' discrimination" and that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment for men and women.'"[83] Indeed, it is possible to read the holding of *Meritor* as largely resisting centering personal offense by emphasizing conditions of employment rather than a plaintiff's specific psychological state.

However, relying on several lower court decisions, the *Meritor* Court presented in its opinion a distinct portrait of sexual harassment as discrimination in violation of Title VII primarily—if not exclusively—because of its psychological toll, because it is experienced as demeaning or humiliating to a victim.[84] One of these earlier cases was *Rogers v. EEOC*.[85] *Rogers* is well known as one of the first cases in which a court specifically held that harassment could amount to discrimination in employment, but its centering of personal offense has been entirely missed. The case involved allegations of discrimination brought by a Latina woman, Josephine Chavez, who worked in an optometrist office.[86] She alleged that her employer segregated patients at the office and treated them differently based on their national origin.[87] The EEOC, in pursuing an investigation of Chavez's allegations, requested records maintained by the employer involving patients, which the district court denied, stating that even if "such a practice might be so offensive to Mrs. Chavez's sensibilities as to make her uncomfortable in her job, there still is no showing that she is 'aggrieved' in the sense contemplated by [Title VII]."[88]

The Fifth Circuit Court of Appeals in a unanimous panel opinion written by Judge Goldberg reversed, explaining that the language of Title VII referring to discrimination with respect to terms or conditions "evinces a Congressional intention to define discrimination in the broadest possible terms," not limiting it to certain types of harm.[89] As noted above, this is a straightforward reading of the statute, and it is supported by other case law at the time, including from the Supreme Court.[90] But another portion of the *Rogers* appellate court opinion came to dominate in *Meritor* and cases to come—and served as the kernel from which other courts have

83. *Id.* (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)).

84. *Id.* at 67.

85. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

86. *Id.* at 236.

87. *Id.* at 237.

88. Rogers v. EEOC, 316 F. Supp. 422, 425 (E.D. Tex. 1970), *rev'd*, 454 F.2d 234 (5th Cir. 1971).

89. *Rogers*, 454 F.2d at 238.

90. *See supra* Section I.A.

centered personal offense. In this portion, the court emphasized the psychological harm that work environments can have on employees. Judge Goldberg stated:

> I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.[91]

When the Supreme Court in *Meritor* later held that sexual harassment can violate Title VII, it quoted from *Rogers*.[92] In addition, *Meritor* quoted from *Henson v. Dundee*,[93] an Eleventh Circuit decision from 1982 involving sexual harassment in which the court stated:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[94]

In each *Rogers* and *Henson*, the hypothetical environment described is extreme and involves psychological harm ("so heavily polluted with discrimination as to destroy completely the emotional and psychological stability"[95] of workers or "run a gauntlet of sexual abuse" that can be "demeaning and disconcerting"[96]). And, in *Rogers*, the court specifically mentioned that an employer's "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to violate Title VII.[97] The Supreme Court in *Meritor* embraced both of these aspects of the cases, expressing concern that plaintiffs would bring

---

91. *Rogers*, 454 F.2d at 238.
92. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (quoting *Rogers*, 454 F.2d at 238).
93. 682 F.2d 897 (11th Cir. 1982).
94. *Meritor*, 477 U.S. at 66–67 (quoting *Henson*, 682 F.2d at 902).
95. *Rogers*, 454 F.2d at 238.
96. *Henson*, 682 F.2d at 902.
97. *Rogers*, 454 F.2d at 238.

lawsuits for mere "offensive feelings."[98] Indeed, in order for sexual harassment to be actionable under the Title VII, said the Court in *Meritor*, the harassment must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."[99] This statement was dicta in *Meritor*; it was picked up and ensconced in the law several years later in *Harris v. Forklift Systems, Inc*.[100]

By the time the Supreme Court decided *Harris*, the lower courts had dug in on psychological harm. Teresa Harris sued Forklift Systems, Inc., an equipment rental company, for harassment she experienced for two years on the job.[101] The case involved conduct of the president of the company, Thomas Hardy, who expressly belittled women and Harris.[102] According to the Court's review of the facts, Hardy "often insulted [Harris] because of her gender and often made her the target of unwanted sexual innuendos."[103] The magistrate judge in *Harris* relied on precedent in the Sixth Circuit, *Rabidue v. Osceola Refining Co.*,[104] which held that a plaintiff must show that they experienced conduct that created an intimidating, hostile, or offensive working environment that "affected seriously the psychological well-being of the plaintiff."[105] The *Harris* Court rejected this requirement that the plaintiff have suffered what it called "tangible psychological injury."[106] The Court explained that such an inquiry "may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require."[107]

To reject a requirement of tangible psychological injury was a relatively easy call, given the text of Title VII. The Court also seemed to understand that the experiences of Vinson and Harris were merely markers of the many ways that harassment can disadvantage an employee in their work. The Court noted, "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[108] And, yet, even this

---

98. *Meritor*, 477 U.S. at 67.
99. *Id.* (quoting *Henson*, 682 F.2d at 904) (alteration in original).
100. 510 U.S. 17 (1993).
101. *Id.* at 19.
102. *Id.*
103. *Id.*
104. 805 F.2d 611 (6th Cir. 1986).
105. *Id.* at 619.
106. *Harris*, 510 U.S. at 21.
107. *Id.* at 22. According to the Court, "Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct." *Id.*
108. *Id.*

acknowledgment emphasizes internal, psychological work-related harms, such as difficulty performing or being discouraged from staying on in a job, over the many ways that harassment can disadvantage in work by affecting how co-workers and supervisors, even customers or clients, regard, assess, and interact with direct victims of harassment as well as others who are considered part of their group.

The *Harris* Court also downplayed any emphasis on the work environment and discrimination at the core of Title VII by bringing attention back to personal offense in the legal standard that it created. Instead of asking whether a particular work environment amounts to discrimination that disadvantages an individual in work because of the individual's membership in a protected group (conduct that might "keep them from advancing in their careers,"[109] as the Court noted elsewhere), and leaving it at that, the Court created a standard (mostly mirroring that of the lower court in *Rabidue*) that hinged on a seemingly independent requirement of whether the harassment the plaintiff experienced was "severe or pervasive" such that it amounted to a "hostile" or "abusive" environment.[110] And it tied that severe or pervasive standard to each plaintiff's subjective experience of their work environment. According to the Court,

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[111]

Reasserting its concern about claims for conduct that is "merely offensive," the Court provided once again the quote from *Rogers* (earlier quoted in *Meritor*): "mere utterance of an . . . epithet which engenders offensive feelings in an employee" is not enough.[112]

It may be possible to interpret the "reasonable person," objective aspect of the *Harris* standard as focusing on the action of the employer or work environment (asking whether that environment is likely to disadvantage the plaintiff in their work) rather than on the psychological experience or perception of the plaintiff, but use of the term "reasonable" in conjunction with "severe or pervasive" and the stated subjective aspect of the standard is easily misconstrued as an inquiry into the reasonableness of the worker's perception of harm, a

---

109. *Id.*
110. *Id.* at 21.
111. *Id.* at 21–22.
112. *Id.* at 21 (alteration in original) (citation omitted).

judging of whether a victim's experience was bad enough. Even the language "hostile" and "abusive" suggests as much: When we think of something that is hostile or abusive, we tend to think of something that sends a message, that affects the psyche of those who are subjected to the hostility or abuse, rather than of how environments can disadvantage someone generally in their work. If the opinion is read this way, it is a centering of personal offense. It emphasizes psychological harm and then screens for cases in which plaintiffs have brought claims for mere trifles.

Indeed, the law of tort during this time provides a key contextual thread for understanding how the standard of severe or pervasive from *Harris* can easily center personal offense. Across much of tort law, to recover for psychological or emotional damages, a plaintiff must first establish physical harm.[113] The tort of intentional infliction of emotional distress developed to allow for damages for psychological or emotional harms that were not connected to physical harm, at least in some circumstances.[114] Intentional infliction of emotional distress was first recognized in the Restatement of Torts in 1948, and, by the time of *Harris*, the tort could be invoked in most states for any "extreme and outrageous" intentional or reckless act that resulted in "severe emotional distress" of a victim.[115] The tort has never been limited to discrimination (in some states discrimination cannot be a basis for the tort), and many tort cases do not involve allegations of action based on race or sex or other protected characteristic.[116] The cases instead involved things like threats of physical violence that did not amount to assault or, in one case, a "joke" in telling a woman (falsely) that her husband had been severely injured in an accident.[117]

Personal offense is centered in the tort of intentional infliction of emotional distress precisely because the tort is exclusively for psychological injury and not psychological injury tied to physical harm, which has long been conceived of as more "tangible" harm.[118] The Restatement of Torts specifically defines "extreme and outrageous conduct" as conduct that "goes beyond the bounds of human decency such that it would be regarded as intolerable in a

113. *See* EDWARD KIONKAS, TORTS IN A NUTSHELL 195 (2015).

114. *Id.*

115. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 46 (A.L.I. 2011).

116. *See* Chamallas, *supra* note 73, at 2121 (describing relationship between tort and civil rights).

117. *Id.* at 2152 (describing cases).

118. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 rep. note cmt. a–b (A.L.I. 2011) (discussing the history of Intentional Infliction of Emotional Distress and distinctions from torts requiring bodily harm).

civilized community."[119] It points out that "ordinary insults and indignities are not enough for liability to be imposed" and provides that the "outrageousness" requirement is central to the intentional infliction claim, that it "must do most of the important normative work."[120] In many states, the "extreme and outrageous conduct" requirement ties expressly to a sufficient harm requirement, where plaintiffs must also show "'severe' emotional harm" in order to recover.[121]

Early commentary on the tort of intentional infliction of emotional distress and its requirements is also helpful for seeing the centering of personal offense in antidiscrimination law. As Martha Chamallas notes in her article, *Discrimination and Outrage*, the champion of the tort (and Reporter for the Second Restatement of Torts) William Prosser expressed confidence that courts through requiring "extreme" mental disturbance and "convincing objective testimony to attest its genuineness" could ward off claims by deceitful plaintiffs.[122] Prosser later classified solicitation for sex as "nothing more than annoyance[]," contrasting it to "flagrant and outrageous" conduct that justified legal recovery.[123] Indeed, from Prosser we see some of the very same language that courts have used in the discrimination context to justify legal doctrines designed to limit plaintiff recovery based on judgment of their harm or experience. Prosser in the Restatement commentary distinguished "extreme and outrageous" conduct from "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[124] In this way, what is ostensibly a standard that focuses on the actor's conduct—

---

119. *Id.* at rep. note cmt. d.

120. *Id.* ("Especially when the actor does not act for the purpose of causing emotional harm, the requirement that liability only attach to extreme and outrageous conduct must do most of the important normative work." (citing MacDermid v. Discover Fin. Servs., 488 F.3d 721, 732 (6th Cir. 2007) (applying Tennessee law) ("'[T]he outrageousness requirement is an "exacting standard" which provides the primary "safeguard" against fraudulent and trivial claims.'" (quoting Miller v. Willbanks, 8 S.W.3d 607, 614 (Tenn. 1999))))).

121. *Id.* at rep. note cmt. a.

122. Chamallas, *supra* note 73, at 2153 (quoting William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 888 (1939)).

123. *Id.* at 2155 (quoting *Prosser*, *supra* note 122, at 888–89).

124. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). As Chamallas notes, Prosser also treated segregation as a "fact of life." *Id.* at 2164 (stating that Prosser "reported that in the absence of some applicable state civil rights statute, there could be no liability for refusing to admit a black person to a school, restaurant, or shop," even as he recognized that many courts "did recognize and place a value on white racial privilege") (citing William L. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 49–50 (1956)).

whether the conduct is "extreme and outrageous"—emerges out of Prosser's concern about psychological harm being too trivial.[125]

Putting aside whether "extreme and outrageous conduct" is the appropriate standard for the tort of intentional infliction of emotional distress, it is clear that the standard is doing the normative work of determining "mere trifles." The same thinking can easily swamp a court's analysis under the *Harris* "severe or pervasive" standard. In reaching for outrageousness (even while not expressly using that term), the "severe or pervasive" requirement for harassing conduct risks outsizing psychological harm. Psychological or emotional harm is always at issue in the tort of intentional infliction of emotional distress, after all; it is not, however, as the Court in *Harris* aptly acknowledged, always at issue in discrimination cases.[126] In discrimination cases, inflicting psychological harm in work can be one harm (or, more accurately, one disadvantage in work) of discrimination, but it is not the only, or the most common, one.

2. The Adverse Employment Action Requirement

At the same time that courts were centering personal offense in hostile work environment law, they were also developing the adverse employment action requirement. The first references to an adverse employment action were likely mere shorthand references to the statutory language that includes "terms, conditions, or privileges of employment."[127] Rapidly spreading over the 1980s and early 1990s, however, mere references to an adverse employment action morphed into an independent doctrinal requirement.[128] By 1998, when Rebecca Hanner White published her article documenting the rise in the requirement and its various iterations, she described a "phenomenon" in the works.[129]

The cases applying an adverse employment action as a screen, measuring individual harm and deeming it insufficient, are numerous. In one case, the plaintiff was denied full weekends off while others were allowed their weekends.[130] In another, the plaintiff

125. *Id.* at 2155.

126. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

127. Some of these courts understood adversity as helpful for creating an inference of discrimination from the prima facie case of *McDonnell Douglas*. *See* White, *supra* note 10, at 1177–83 (discussing this use of adversity in prima facie case of *McDonnell Douglas*).

128. *Id.* at 1122–26 (discussing cases in which a materially adverse employment action was required for an actionable claim).

129. *Id.* at 1122.

130. Hamilton v. Dallas Cnty., 42 F.4th 550, 555 (5th Cir. 2022). In another case, the plaintiff was suspended with pay, which the Eleventh Circuit held was insufficient. *See* Davis v. Legal Servs. Ala., Inc., 19 F.4th 1261, 1267 (11th Cir. 2021).

alleged she had been moved to a job with more duties.[131] In another, the plaintiff alleged he and his Black team members were required to work outside in high temperatures without access to water while white team members were assigned work inside with air conditioning.[132] In each, the courts held that the employer did not engage in an unlawful employment practice of discrimination, even if the decision at issue was otherwise discriminatory, because the plaintiff had not suffered a sufficiently adverse employment action.[133]

The precise substance of the requirement developed inconsistently across circuits. Some circuits required what they called a "materiality" standard under which the court required the plaintiff to prove that they suffered a "material significant disadvantage."[134] Others described the requirement as one of "serious and material change."[135] Still others required an "objectively tangible harm."[136] The requirement extended to claims under Section 1981,[137] as well as to claims alleging age discrimination under the Age Discrimination in Employment Act (ADEA);[138] it even edged its way into accommodation cases under the Americans with Disabilities Act (ADA).[139]

---

131. Currier v. Postmaster Gen., 304 F.3d 87, 88–89 (D.C. Cir. 2002) (alleging moved to job with more duties); *see also* Muldrow v. City of St. Louis, 144 S. Ct. 967, 973–74 (2024) (describing the Eighth Circuit's reasoning that the transfer to a "lesser" position did not constitute a sufficiently adverse employment action).

132. Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019).

133. *See, e.g.*, *Hamilton*, 42 F.4th at 556.

134. Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 128 (2nd Cir. 2004). One circuit reaffirmed its "ultimate employment action" requirement but insisted it really meant a "de minimis" standard. McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 483–84 (7th Cir. 1996).

135. Webb-Edwards v. Orange Cnty. Sheriff's Off., 525 F.3d 1013, 1033 (11th Cir. 2008).

136. Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999) (holding that a discriminatory transfer from one job to another was not actionable unless it was "materially adverse" to the employee when viewed "objectively" from the perspective of a "reasonable trier of fact"), *overruled by* Chambers v. District of Columbia, 35 F.4th 870, 873 (D.C. Cir. 2022).

137. Madlock v. WEC Energy Group, 885 F.3d 465, 470 (7th Cir. 2018) (claim under 28 U.S.C. § 1981).

138. *See* Williams v. Bristol-Myers Squibb, Co., 85 F.3d 270, 274 (7th Cir. 1996).

139. *See* Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784, 789 (10th Cir. 2020) (en banc) (vacating the panel decision relying on the requirement that it noted was "well established in judicial opinions" in the Title VII context that plaintiffs must prove an adverse employment action to hold that the plaintiff must therefore also so prove such an action when the plaintiff alleges that the defendant failed to provide a reasonable accommodation in violation of the ADA (quoting Exby-Stolley v. Bd. of Cnty. Comm'rs, 906 F.3d 900, 906 (10th Cir. 2018), *vacated en banc*, 979 F.3d 784 (10th Cir. 2020))).

Prior to the Supreme Court's decision in *Muldrow*, the requirement had become unsteady, with several circuits reversing their earlier precedent, mostly on textualism grounds. Yet even these courts sometimes declared their discomfort with this outcome, a discomfort founded in centering personal offense. The First Circuit, for example, held that discriminatory denial of a job transfer would violate Title VII, even though, in its view, "No doubt construing the statute in this manner opens the way to whimsical claims by employees who . . . are . . . aggrieved by slights."[140] And the dissent in the en banc decision in the D.C. Circuit overruling its precedent and rejecting an adverse employment action requirement insisted that "to 'discriminate' reasonably sweeps in some form of . . . a materiality threshold" and that Title VII "does not cover 'everything that makes an employee unhappy' at work."[141]

What is important for seeing the adverse employment action requirement as part of the centering of personal offense is less the doctrinal specifics from circuit to circuit but that the requirement existed at all. While courts were framing their crafted limits to employer liability in seemingly neutral, work-related terminology, as if they were keeping personal offense out of antidiscrimination law, they were in fact creating law that drew judgments about individual harm—and personal offense—into the core of antidiscrimination law.

One court explained its rationale for adopting a requirement that the plaintiff suffer a "materially adverse employment action" this way:

> Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.[142]

Another, in holding that a discriminatory transfer from one job to another was not actionable unless it was "materially adverse" to the employee when viewed "objectively" from the perspective of a reasonable person in the employee's position, reasoned that "[m]ere idiosyncra[s]ies of personal preference are not sufficient to state an

140. Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997).

141. Chambers v. District of Columbia, 35 F.4th 870, 890 (D.C. Cir. 2022) (Katsas, J., dissenting) (quoting Threat v. City of Cleveland, 6 F.4th 672, 678 (6th Cir. 2021)); *id.* at 889 (Katsas, J., dissenting) (quoting Russell v. Principi, 257 F.3d 815, 818 (D.C. Cir. 2001) (holding a poor performance rating unconnected to any "bonus differential")).

142. *Williams*, 85 F.3d at 274 (citations omitted).

injury."[143] The Eighth Circuit in *Muldrow* similarly mentioned that Muldrow had a "mere preference" for one job over another.[144]

Together, these and other cases creating and applying the adverse employment action requirement illustrate that courts in this area, like those addressing claims of harassment, sought to measure each plaintiff's harm as a way of limiting employer liability. Concerns about claims for "mere trifles," "idiosyncrasies," "dissatisfaction," and "mere preference" drove the courts to create a doctrinal hurdle to finding that unlawful discrimination had occurred.

C. The Allure of Centering Personal Offense

Legal scholarship and advocacy did little to dislodge this centering of personal offense in antidiscrimination law. Instead, in various ways, legal scholars and advocates leaned in. They did so often not directly—by expressly favoring the adverse employment action requirement, for example—but indirectly—by emphasizing psychological or emotional harm of individuals as a principal basis for finding an employer action discriminatory. Even as they dodged questions of how the law might incorporate the harms, numerous legal scholars emphasized individual, psychological harms, from humiliation to stereotype threat.[145] Other scholars broadly framed hostile work environments to include denial of training, job assignments, and meals. Brian Soucek and Vicki Schultz, for example, pointed out that the sexual harassment of female firefighters leading to several lawsuits against fire departments on the East Coast in the 1980s included denial of training.[146] "Equally humiliatingly," they noted, "male firefighters deprived the women of meals, cooperation, and 'the unique forms of communal living that are characteristic of the firefighters' workplace.'"[147] This work in

---

143. Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999), *overruled by* Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2022).

144. Muldrow v. City of St. Louis, 30 F.4th 680, 689 (8th Cir. 2022), *vacated*, 144 S. Ct. 967 (2024).

145. *See, e.g.*, Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 76 (2001) (arguing that workplace humiliation "should be a legally cognizable harm"); Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 IND. L.J. 393, 397, 416 (2016) (urging scholars to "think beyond adverse employment actions" but then arguing that individualized harm from operation of stereotype threat should be incorporated into hostile work environment law, leaving in place the existing adverse employment action requirement).

146. Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 233 (2019) (citing Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1771 (1998) (quoting Berkman v. City of New York, 580 F. Supp. 226, 232 (E.D.N.Y. 1983))).

147. *Id.* (quoting Schultz, *supra* note 146, at 1771).

describing how discrimination can operate in workplaces is especially important for its ability to capture broader institutional sources of discrimination as targets for change. As Vicki Schultz has pointed out, "[d]isaggregating the so-called sexual and nonsexual forms of misconduct can obscure a full understanding of the conditions of the workplace and make both the hostile work environment and accompanying disparate treatment claims look trivial."[148] However, in framing their arguments in terms of humiliation and harassment, Soucek and Schultz left in place the adverse employment action requirement (which creates a threshold for harm, pre-*Muldrow*) and thereby left plaintiffs to meet the hurdle of convincing a court that their treatment—even broadly understood—is sufficiently severe or pervasive to amount to a hostile work environment under *Harris*.[149]

Another line of scholarship leaned into centering personal offense by arguing that sexual harassment should be understood as a type of incivility or disrespect. Anita Bernstein made this argument in her article *Treating Sexual Harassment With Respect* and in doing so sought to reframe sexual harassment as a dignitary tort—one "incomprehensible without the language of emotion"—rather than as a problem of inequality and subordination in work.[150] Bernstein

---

148. Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 18–19 (2006) (noting, too, that "[w]hen considered apart from the larger workplace context of discriminatory hiring, assignments, training, evaluation, or pay that are associated with job segregation by sex, the complained-about sexual conduct often appears too minor to be actionable"). My own scholarship in critique of emphasis on individual bad actors also missed the fact that the adverse employment action requirement was part of a larger move to centering personal offense. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 149 (2003) (proposing a structural approach to provide redress and trigger change from forms of discrimination that "do not result in [a] . . . materially adverse employment decision").

149. For more on the importance of tying acts together, see *infra* notes 274–281 and accompanying text.

150. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 461 (1997) (noting that in her view "[a] hostile work environment is necessarily a cauldron of intense feelings"). Bernstein later emphasizes humiliation, *see id.* at 489 (describing a duty not to humiliate someone), and harm from humiliation, *see id.* at 491 ("Humiliation can . . . make a worker wonder what her job description really is and whether prior feedback must be reinterpreted in light of an erosion of her dignity."). For other dignity- or autonomy-focused framings of discrimination harms, see KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006) (emphasizing harms to sense of self); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-examining Appearance*, 66 LA. L. REV. 1111, 1145 (2006) (proposing a privacy analysis of appearance demands). The concept of dignity can be framed in ways that incorporate stronger equality components. *See, e.g.*, Kenji Yoshino, *A New*

ultimately proposed a legal standard that did not center personal offense in the way that I have identified in this Article (she emphasized instead the action of the employer and asked whether it was action of a "respectful" person), but she did squarely focus on narrow individualized harms (feelings of disrespect) over concerns about disadvantage, subordination, or inequality, thereby leaning into centering personal offense even if not outrightly embracing it.[151]

Legislative action post-#MeToo also illustrates this tendency to reinforce centering personal offense rather than to disrupt it. In several states, efforts emerged to ease the legal standard for when harassment amounts to discrimination in terms, conditions, or privileges of employment. These efforts, even as they eased the standard, however, emphasized individuals' psychological or emotional harms. For example, in 2018, the California legislature issued a findings and declaration of policy regarding its laws on harassment.[152] Specifically, the legislature declared that harassment

> creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.[153]

The New York legislature did much the same and specifically introduced a defense to liability if the employer can show that a reasonable victim would consider the plaintiff's experiences as "petty slights or trivial inconveniences."[154]

Birth of Freedom?: Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

Again, my point here is not that humiliation or other dignity harms are unworthy of attention as harm, including warranting damages, but that incorporating measures of individual harm into decisions about whether discrimination has occurred centers personal offense.

151. For critique on this ground, see Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORN. L. REV. 1169, 1171 (1998).

152. Findings and Declarations of Policy, 2 CAL. GOV'T CODE §§ 12920–23 (2025).

153. 2 CAL. GOV'T CODE § 12923. The declaration, unlike the Trump directives, *see supra* note 2, does allow for normative determination in what amounts to "harassment." *See* 2 CAL. GOV'T CODE § 12923.

154. N.Y. EXEC. LAW § 296(1)(h) (2025), *declared unconstitutional by* People v. Commons W., LLC, 224 N.Y.S.3d 364 (N.Y. Sup. Ct. 2024) (regarding provisions requiring landlords to consent to warrantless searches of leased premises). For more on this and other laws involving harassment, including discussion of earlier case law in New York, see Deborah A. Widiss, *The Sexual Harassment Silo*, 174

D. Conservatives Grab Hold: Personal Offense as Discrimination

As mentioned at the outset, conservatives have taken centering personal offense to a new level with their efforts to deem psychological or emotional harm in whites as always sufficient to amount to discrimination. In 2020, the Executive Office of the President, Office of Management and Budget, under then-president Donald Trump issued a letter directing all federal agencies to "cease and desist" from using taxpayer dollars to fund diversity training sessions that teach "divisive concepts" and any training suggesting that "any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race."[155]

A wave of anti-anti-racism bills targeting education and employment across the nation followed.[156] The law passed in Florida includes as an unlawful practice of discrimination "[s]ubjecting any individual, as a condition of employment . . . to training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe any of [a list of concepts]."[157] That list of "concepts" includes: "An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin."[158] Several recently filed cases, too, have argued that diversity or bias training amounts to discrimination solely because it involves race and engenders feelings of being demeaned in white employees.[159]

In early 2025, efforts by the second Trump administration followed. The Dear Colleagues letter declared teachings that trigger feelings of "moral burden" because of race a form of discrimination in schools (and presumably also in workplaces), and anti-DEI

U. PA. L. REV. (forthcoming 2026) (manuscript at 30–31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5177691.

155. *See supra* note 2.

156. For bills involving employment, see, e.g., ARIZ. REV. STAT. ANN. § 41-1494 (2021); ARK. CODE ANN. § 25-1-904 (22022); FLA. STAT. ANN. § 760.10 (2022); GA. CODE ANN. § 20-1-11 (2022); IOWA CODE ANN. § 25A.1 (2025); N.H. REV. STAT. ANN. § 354-A:29 (2021). *See generally* Tanya Katerí Hernández, *Can CRT Save DEI? Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action*, 71 UCLA L. REV. DISCOURSE 282 (2024).

157. FLA. STAT. ANN. § 760.10(8)(a) (2022).

158. § 760.10(8)(a)7.

159. *See infra* note 245 and accompanying text (discussing Young v. Colo. Dep't of Corr., 94 F.4th 1242 (10th Cir. 2024)). For discussion of similar cases in the education context and assessment of arguments made, see Osamudia James, *White Injury and Innocence: On the Legal Future of Antiracism Education*, 108 VA. L. REV. 1689, 1723–28 (2022).

proclamations broadly declared a range of practices as discriminatory.[160] Specific to workplace trainings, the EEOC also issued "technical assistance documents" on the EEOC website in March 2025, which, while not as direct as the January Trump executive orders, might be read to suggest that diversity trainings could regularly amount to discrimination.[161]

This is centering personal offense of a new sort, dispensing with all inquiry into whether an institution's action was discriminatory and declaring an individual's race-related guilt or anguish itself the basis for a finding of discrimination. As such, this effort dovetails with and yet is distinct from recent conservative efforts to challenge race-based ends as discriminatory, challenges, as Sonja Starr recently described, that demand "ends-colorblindness."[162] The efforts are related because they rest fundamentally on colorblindness arguments: that any consideration (or even thinking) of race—ever—is problematic. But they are distinct because while one challenge emphasizes consideration of race in policy goals, the other skips over that inquiry altogether and instead emphasizes negative feelings related to race in certain individuals ("The training made me feel badly about my race") as a basis for finding an action discriminatory.

II. *MULDROW*'S RETURN TO WORK

Centering personal offense in antidiscrimination law is problematic in numerous ways. In this Part, I expose some the problems of centering personal offense through consideration of currently percolating issues and the Supreme Court's recent decision in *Muldrow v. St. Louis*.[163] *Muldrow* rejects concerns about claims for mere trifles, thereby dislodging measures of individual harm from the discrimination inquiry and conceptually resituating

160. *See supra* note 2 and accompanying text.

161. *See What To Do If You Experience Discrimination Related to DEI at Work*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2025), https://perma.cc/4UQM-H444 (including in a short document: "Depending on the facts, DEI training may give rise to a colorable hostile work environment claim."). The EEOC technical assistance documents are much more guarded than the Trump directives, avoiding any outright declaration that trainings are widely discriminatory merely because they make white men feel badly about their race or sex. *See What You Should Know About DEI-Related Discrimination in Work*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2025), https://perma.cc/5EW3-VNCN (citing Brief of the EEOC as Amicus Curiae in Support of Neither Party, Vavra v. Honeywell Int'l, Inc., 106 F.4th 702 (7th Cir. 2024) (No. 23-2823) (discussing cases in which courts held trainings are not "inherently discriminatory" but can be discriminatory on a "fact-specific basis")).

162. Sonja Starr, *The Magnet Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 180 (2024).

163. 144 S. Ct. 867 (2024).

antidiscrimination law around institutional action. Whether an institutional action amounts to discrimination necessarily depends on historical and present societal context, including concerns about harms to individuals, psychological as well as economic, but it does not depend on measurement of any single individual's harm. In this way, *Muldrow* rightly takes the legal analysis of whether an employer has discriminated back to work, to questions about what amounts to discrimination, and why.

After briefly recounting the Court's holding in *Muldrow*, I turn to map the decision's implications.[164] I show that *Muldrow* has much further reach than many have realized. Among other things, the decision reframes the discrimination inquiry away from formal equality when normative determinations are at stake; provides clarity for when and how the severe or pervasive standard for hostile work environments should be met; shows why recent challenges to diversity trainings or other DEI practices that invoke "discomfort, guilt, anguish, or any other form of psychological stress on account of [an individual's] race"[165] as a basis for a discrimination claim are unfounded; and shows why religious belief accommodation claims should not involve a weighing of individual harms against each other.

A. Plain Reading Muldrow

Muldrow holds that the language of Title VII making it unlawful to "discriminate against" an individual "with respect to" the "terms [or] conditions" of employment because of an individual's protected status "requires that the employee show some injury" that "concern[s] the terms or conditions of her employment."[166] According to the Court, the "terms [or] conditions" phrase in Title VII "circumscribes the injuries that can give rise to [a discrimination claim]" only to the extent that it requires a plaintiff show "some harm respecting an identifiable term or condition of employment."[167] In the Court's words, nothing in the act requires that the plaintiff show harm that is "significant" or "serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar."[168] In addition to the job transfer at issue in *Muldrow*, the Court provided three examples to make this point: "an engineering technician is assigned to work at a new job site"; "a shipping worker is required to take a position involving only

---

164. Although the Part is framed in terms of what *Muldrow* does, the argument here is also itself normative: It is about what the law *should* do.

165. Sep. 22 Order, *supra* note 2, at 60685.

166. *Muldrow*, 144 S. Ct. at 975–76 (citing 42 U.S.C. § 2000e-2(a)(1)).

167. *Id.* at 974.

168. *Id.* The lower courts in *Muldrow* had applied a "significant" change requirement. *Id.*

nighttime work"; "a school principal is forced into a non-school-based administrative role supervising fewer employees."[169] Each of these cases, said the Court, was wrongly decided when the lower courts dismissed the claim on the ground that the plaintiff's harm was not sufficient.[170]

After *Muldrow*, many claims alleging discrimination will go forward that would not have made it past the initial "adverse employment action" hurdle in a pre-*Muldrow* world. Title VII is violated when an employer discriminates against any individual because of their race, color, religion, sex, or national origin, so long as that discrimination is disadvantageous in the employee's work. This makes sense as a matter of the statute's text, its history, and in light of earlier Supreme Court cases interpreting the statute.[171] As the Court of Appeals for the DC Circuit explained in a recent, pre-*Muldrow* case in which the court reversed its precedent requiring an adverse employment action:

> But of course, an employer remains free to transfer an employee from one department to another for no reason or for any reason at all—any reason, that is, except the employee's "race, color, religion, sex, or national origin." We disagree with the [position] that refusing to let women work in the power tools department because of gender stereotypes, for example, is part of the "minutiae of personnel management" that escapes Title VII's notice. To the contrary, it is exactly the sort of workplace discrimination Title VII aims to extinguish. . . .
>
> . . . .
>
> . . . In our view, we ought to read Title VII to mean what it says—that it prohibits any "discriminat[ion] . . . ," even if that . . . discrimination is "garden-variety." This saves courts the trouble of administering an open-ended requirement of objectively material injury found nowhere in the statute's text. And it is more consistent with the statute's "intent to strike at the entire spectrum of disparate treatment . . . in employment."[172]

The *Muldrow* Court also expressly rejected the argument that a heightened injury requirement is needed to prevent employees from

169. *Id.* at 975 (first citing Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); then citing Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 625 (10th Cir. 2012); and then citing Cole v. Wake Cnty. Bd. of Educ., 834 Fed. App'x 820, 821 (4th Cir. 2021) (per curiam)).

170. *Id.*

171. *See supra* Section I.A.

172. Chambers v. District of Columbia, 35 F.4th 870, 878–79 (2022) (en banc) (some alterations in original) (citations omitted), *overruling* Brown v. Brody, 199 F.3d 446 (D.C. Cir. 1999) (requiring a showing of "objectively tangible harm").

"'swamp[ing] courts and employers' with insubstantial lawsuits."[173] In his concurrence, Justice Thomas sought to incorporate a "harm that is more than trifling" requirement, folding it into the lower courts' decision by asserting that Muldrow "expresse[d] a mere preference for one position over the other."[174] Justice Kagan writing for the majority rejected this position.[175] According to the majority opinion, "It does not matter, as the courts below thought (and Justice Thomas echoes), that [Muldrow's] rank and pay remained the same, or that she still could advance to other jobs."[176] Discrimination must be "against" an individual to violate the statute, but this means only that the individual was harmed in some way, rather than benefited.[177] Muldrow therefore needed only establish that the work changes "disadvantaged" her, left her "worse" off.[178] And, as Justice Kagan pointed out later in the opinion, a transfer "is not usually forced when it leaves the employee better off."[179]

Muldrow in this way removes the extent of a plaintiff's harm from consideration in determining whether the statute has been violated and in doing so places institutions and their acts of discrimination back at the center of the antidiscrimination inquiry. In some cases, the defendant will dispute that a particular action was discriminatory; it may argue, for example, that an agent did not act "because of" the victim's sex or race or other protected characteristic but rather acted because of some other reason, such as tardiness or failure to follow workplace safety rules. The *Muldrow* Court pointed out that "in addressing that issue, a court may consider whether a less harmful act is, in a given context, less suggestive of intentional discrimination."[180] But after *Muldrow*, there is no independent assessment of whether the plaintiff suffered harm that is bad enough ("significant," "substantial," or any other measure) to trigger protection under the act. If the plaintiff has been disadvantaged in

173. *Muldrow*, 144 S. Ct. at 976 (alteration in original) (citation omitted).
174. *Id.* at 977–78 (Thomas, J., concurring) (alteration in original) (quoting Muldrow v. City of St. Louis, 40 F.4th 680, 689 (8th Cir. 2022)).
175. *Id.* at 977.
176. *Id.*
177. *Id.* at 974.
178. *Id.*
179. *Id.* at 974–75.
180. *Id.* at 976. The Court here identifies that in some cases the question is not about whether a particular decision, which was based on a protected characteristic, was discriminatory, but rather whether the decision was based on the protected characteristic at all, such as when a plaintiff argues that an action was taken because of their race and the employer argues that the action was taken because of the plaintiff's poor attendance record or, as in *McDonnell Douglas Corp. v. Green*, their illegal activities against the company. *See* 411 U.S. 792, 792–93 (1973).

work by an identifiable action of the employer, and if that action was discriminatory, then the statute is violated.[181]

B. Muldrow*'s Return to Work in Action*

Muldrow unseats personal offense from the center of antidiscrimination law. It rejects the mere trifles concerns of lower courts and places psychological harm on equal footing with various other employment-related harms or disadvantage. *Muldrow*, in other words, returns institutions and their discriminatory actions to the core of the discrimination inquiry. It is true, as Justice Kavanaugh insisted at oral argument, that "[n]ot everything that happens at the workplace affects an employee's 'terms, conditions, or privileges of employment.'"[182] But if the language "terms, conditions or privileges" of employment is given the meaning that *Muldrow* indicates it should, all discrimination *in* work does affect the terms, conditions, or privileges of employment. Once again, Rebecca Hanner White's explanation is helpful: "were a bank to deny a home loan because of sex to an applicant who happens to be an employee, or were a telephone company to disconnect service because of race to a customer who happens to be an employee, no Title VII claim would be present."[183] The bank and the telephone company in these scenarios are presumed to have engaged in discrimination, but their discrimination wasn't related to the plaintiff's work, it wasn't *in* work, which means their discriminatory actions would not violate Title VII. Scenarios like these are rare, however, which means that after *Muldrow*, the question in most cases will be whether the employer action is discriminatory, not whether the plaintiff's experience has met some threshold of harm such that it amounts to change in terms, conditions, or privileges of employment.

1. Centering Institutional Action & Context: Normative Determinations

The fundamental conceptual and analytical shift for employment discrimination law in a post-*Muldrow*, return-to-work era is in re-situating institutional action at the core of the discrimination inquiry. Dislodging individual harm from the discrimination inquiry allows institutional action to be judged openly (and in all cases, not just in those in which a plaintiff has made it past a threshold amount of harm). This shift importantly exposes that these decisions about whether institutional action is discriminatory often depend on

181. *See* Peifer v. Bd. of Prob. & Parole, 106 F.4th 270, 277 (3d Cir. 2024).
182. Transcript of Oral Argument at 33, Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024) (No. 22-193).
183. White, *supra* note 10, at 1151 n.162.

context, both present and historical; they are normative judgments about what actions society should and should not permit.

Segregation is as good a place as any to begin thinking about what it means for antidiscrimination law to return to work. Use of the word "segregation" often evokes policies of forced physical separateness that declare superiority and inferiority.[184] Jim Crow racism is the obvious example. States defended their Jim Crow laws on the ground that while facilities were separate, they were nonetheless equal in their services, whether train cars or teaching quality and facilities, and therefore no harm was suffered by individuals living under this regime, or at least no harm that was not "solely because the colored race chooses to put that construction upon it."[185] The Supreme Court once accepted this reasoning, but then in *Brown v. Board of Education*[186] famously rejected it, declaring that Jim Crow segregation in schools imposed "a feeling of inferiority as to [Black students'] status in the community" that had a detrimental effect on their educational opportunities, even when facilities had been deemed equal in all "tangible" respects.[187]

Brown emphasized personal, psychological harm,[188] but it did so only as reasoning for its decision, its explanation for why the action of directed segregation in education given the particulars of our U.S. history amounts to discrimination in violation of the Equal Protection Clause.[189] *Brown*, in other words, did not center personal offense—it did not require judging of individual harm, nor did it mention concern

---

184. For purposes of this point, I focus on directed segregation of the kind involved during Jim Crow at bottom declaring superiority of whites and inferiority of Blacks, but more nuanced understandings of segregation are key for considering discrimination in employment and elsewhere. *See* Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010); Tristin K. Green, *I'll See You at Work: Spatial Features and Discrimination*, 55 U.C. DAVIS L. REV. 141 (2021).

185. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

186. 347 U.S. 483 (1954).

187. *Id.* at 494–95.

188. *Brown* was a product of its time, including amidst the post-war rise of psychology. *See id.* at 494 & n.11 (relying on psychology studies and noting, "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority").

189. Nor was psychological harm as relayed in the studies the Court cited the full extent of the wrong of the segregation at issue. *See* Lawrence Blum, *"Separate is Inherently Unequal": An Unfortunate Legacy*, AM. J. EQ. L. (2024) ("The evil of Segregation lay not fundamentally in its actual psychological effects on members of the demeaned group but in the harm constituted by that enforcement and declaration of inferiority—far beyond the (inevitable) inequality in intangibles."). As is often noted, the empirical claims about psychological damage to Black children has been criticized. *See, e.g.,* DARYL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE 1880–1969 93–136 (1997); MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 138–68 (2010).

about claims for mere trifles; moreover, it did not render all actions that generate negative feelings associated with race discriminatory. Instead, it held plainly and simply that race-based segregation in the form of mandated separateness in schools like that in *Brown* provides inferior education to Black students; it cannot be made nondiscriminatory by framing as mere offense, as the Court in *Plessy* had done.[190]

Muldrow reinforces *Brown* to the extent it makes clear that employer policies, practices, or even one-off decisions that direct segregation and thereby disadvantage employees in their work because of their race or sex or other protected characteristic will violate Title VII.[191] But if we understand the return to work as removing personal offense from the inquiry of whether a violation of Title VII has occurred, then *Muldrow* does even more. It reinforces *Brown*'s focus on institutional action over measures of individual harm and forces judicial deliberation about employer decisions and policies to the question of whether the action was discriminatory.

Bringing the question of whether an action amounts to "discrimination" to the fore reveals the inherently normative aspect of this inquiry, pushing against recent efforts to rely on versions of formal equality. Over twenty years ago, Robert Post argued for what he called a "sociological account" of antidiscrimination law in which "antidiscrimination law is understood as a social practice that acts on other social practices."[192] Post posited that the "dominant conception of antidiscrimination law aspires to suppress categories of social judgment that are deemed likely to be infected with prejudice," and proposed that "shak[ing] free" of the "dominant conception" allows courts "to focus directly on the issue that ought to underlie discrimination law, which is the nature of the law's aims in seeking historically to transform existing practices of race and gender."[193] Other scholars have expressed similar arguments over the years, emphasizing the inherent dangers in accepting a colorblind or formal equality approach to determining what amounts to discrimination.[194]

Indeed, contrary to some of the discussion at oral argument in *Muldrow*, cases involving bathrooms and grooming codes are not

---

190. *Brown*, 347 U.S. at 495.

191. To be clear: This is not the same as formal equality; it is a normative determination that requires consideration of context.

192. Robert Post, *Prejudicial Appearances: The Logic of Antidiscrimination Law*, 88 CALIF. L. REV. 1, 31 (2000).

193. *Id.* at 30, 38–39.

194. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 236 (1971); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784 (2012); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 159 & n. 166 (pointing out similar arguments in the constitutional context).

easily set aside as "outliers."[195] On several occasions, Justices at oral argument asked counsel about sex-based bathrooms and grooming codes.[196] Counsel for the City of St. Louis responded that in these cases there is insufficient harm, that the distinction between sexes is "innocuous" so as to be "non-injurious."[197] This makes no sense, which counsel later admitted when they were asked about similar reasoning if the distinction were based on race; they remarked in response that perhaps it wasn't that the sex-based demands were "too immaterial to be significant" but rather that "sex is sometimes different."[198] Of course, after *Muldrow*, if there is no threshold of harm—and thereby no "de minimis" or "mere trifles" exception—discriminatory disadvantage in work is enough.[199] Whether sex-based bathrooms and grooming codes are unlawful depends then not on the extent of any individual's harm, but on whether the action of enforcing a gender-based distinction is understood as discriminatory. And this question turns on whether the sex-based distinctions involved are practices that *should* be disrupted—a normative determination, not a neutral or formal one. This normative determination is relational, by which I mean it requires consideration of interrelation between institutional policies and people's lived experiences, but, like with *Brown*, it does not require assessment or weighing of any specific individual's harm, nor is it determined by the mere fact of psychological or emotional harm.

The case of *Jespersen v. Harrah's Operating Co.*[200] provides a good illustration of what it means for *Muldrow* to re-center the discrimination inquiry around institutional action. In *Jespersen*, the plaintiff alleged that the employer's requirement that she wear makeup as part of her employer's sex-based grooming code (men not permitted to wear makeup; Jespersen as a woman required to do so) amounted to discrimination.[201] Jespersen's evidence consisted of her deposition testimony in which she described that she "felt very degraded and very demeaned" and that "'[the requirement of wearing makeup] prohibited [her] from doing [her] job' because '[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person.'"[202] The trial judge in considering this testimony held that the policy nonetheless was not discriminatory in part because

195. Transcript of Oral Argument at 108, Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024) (No. 22-193).
196. *Id.* at 61, 63, 65–66.
197. *Id.* at 61.
198. *Id.* at 63.
199. Muldrow v. City of St. Louis, 144 S. Ct. 967, 976–77 (2024).
200. 444 F.3d 1104 (9th Cir. 2006) (en banc).
201. *Id.* at 1106.
202. *Id.* at 1108 (all alterations except the first in original).

"prohibiting men from wearing makeup may be just as objectionable to some men as forcing women to wear makeup is to [Jespersen]."[203]

The Ninth Circuit Court of Appeals sitting en banc affirmed, holding that Jespersen needed to show that the requirement that she wear makeup imposed an "unreasonable" and "unequal burden" on women.[204] Instead of comparing a requirement of wearing makeup with one of not requiring makeup, the court then compared a requirement of wearing makeup with a requirement that men keep their hair short, and, emphasizing money and time, refused to take judicial notice that complying with the makeup requirement would cost women more than it would men to comply with the requirement that they keep their hair short.[205] Further, according to the court, Jespersen had not presented evidence that the grooming standards "would objectively inhibit a woman's ability to do the job";[206] she had submitted only her "own subjective reaction to the makeup requirement," which was not sufficient.[207] With concerns about claims for mere trifles at the forefront, the court went on:

> We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.[208]

Muldrow casts doubt on the reasoning of both the district court and appellate court up to this point. Title VII does not require plaintiffs to show that their harm meets a threshold of objectivity or to show that their harm is worse than another person's harm in order to establish discrimination. Jespersen's evidence of her individual harm can support an argument for discrimination, that the sex-based policy was discriminatory against women because of the gendered stereotypes that it reinforces, including that it made her job as a bartender more difficult, even if her individual feelings do not alone establish that the policy is discriminatory.

But *Jespersen* can easily be read as a debate about when sex-based grooming policies are discriminatory as a normative matter.

---

203. Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189, 1193 (D. Nev. 2002).

204. *Jespersen*, 444 F.3d at 1106.

205. *Id.* at 1110.

206. *Id.* at 1112.

207. *Id.*

208. *Id.*

While the majority saw the makeup requirement as part of an overall grooming standard that "appropriately differentiate[d] between the genders," the dissent saw the makeup requirement as carrying with it an "inescapable message . . . that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup."[209] This reasoning turns on whether one views this particular form of forced femininity as normatively problematic. Even though one of the dissenting opinions mentioned that the majority had inappropriately dismissed Jespersen's testimony about her own discomfort as "presuppos[ing] that Jespersen is unreasonable or idiosyncratic in her discomfort," the opinions as a whole reveal a debate about when sex-based grooming codes are discriminatory in violation of Title VII, disadvantaging someone in their ability to do their job by signaling inferiority, for example, not a debate about whether the plaintiff had suffered harm that was significant enough to violate the act.[210]

The same is true for gender pronouns.[211] Imagine an employer that has a policy of maintaining an imposed gender binary, refusing to use pronouns of an individual's choice, or even a policy or practice that allows its employees to refuse to use a person's gender pronouns of choice. Whether such a policy or practice violates Title VII depends on whether adhering to a strict binary—and choosing a rigid system for determining who fits within each—is deemed to be discriminatory. Sometimes this inquiry is framed in terms of whether the employer's action is "because of sex" or some other protected characteristics, but it is actually a determination of whether the employer's action is "unjustly perpetuat[ing] a status regime," as Reva Siegel once put it.[212] And the answer to this question necessarily turns on historical and social context.

---

209. *Id.* at 1109–10 (describing the law of sex-based grooming standards as requiring "a greater burden" placed on one sex or another and noting "[g]rooming standards that appropriately differentiate between the genders are not facially discriminatory"); *id.* at 1116 (Pregerson, J., dissenting).

210. *Id.* at 1117 (Kozinski, J., dissenting). Indeed, in a recent school gender codes case involving constitutional and statutory challenge, the Fourth Circuit majority in an en banc decision held that no unequal burden need be shown, only "some harm." *See* Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 129–30 (4th Cir. 2022). As Jessica Clarke has pointed out, formal equality after *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), has served as a starting point for cases like this one, *see infra* note 218 and accompanying text, but my point here is that ultimately the court's reasoning was normative.

211. And many other issues. *See* Franklin, *supra* note 194, at 157–61 (providing examples).

212. Siegel, *supra* note 67, at 16.

Muldrow thereby pushes back against recent efforts, including in progressive legal scholarship, to embrace formal equality, sometimes described as a "but-for cause" inquiry, an approach to antidiscrimination law that seeks to determine whether an action is discriminatory based in all cases solely on causation.[213] On the heels of *Bostock v. Clayton County,*[214] in which the Court using this reasoning held that discrimination against someone because they are lesbian, gay, or transgender is sex-based discrimination, several scholars have argued that the approach holds promise for the antidiscrimination project.[215] What these scholars miss is that a formal equality inquiry leaves antidiscrimination law entirely decontextualized, with no basis for making—or for critiquing—the key underlying normative determinations about when and why sex-based distinctions amount to discrimination. Formal equality, in other words, merely drives normative determinations underground.

Scholars who lean into formal equality reasoning sometimes maintain that any resistance by progressive scholars has been primarily about saving affirmative action, which they claim is currently unwarranted because affirmative action was already in the

---

213. Some recent scholarship presents opportunities for "progressive textualism" without arguing more broadly for formal equality. *See, e.g.*, Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 358–59 (2021).

214. 140 S. Ct. 1731 (2020).

215. *See* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1623, 1626–27 (2021) (arguing that antidiscrimination law is "in theoretical crisis" and that the crisis would be solved by embracing formal equality, what she terms "but-for" causation). Eyer is right that but-for causation is preferable as a starting point to searching for purpose or other state of mind in all cases. But-for causation, however, is only one part of determining whether an action amounts to discrimination. The other part is necessarily a normative inquiry that depends on goals of the statute and historical and present context of the decision, practice, or policy at issue in a specific case. For a recent account through comparison of tort law of why but-for causation cannot do the normative work of determining discrimination, see Robin Dembroff & Issa Kohler-Hausmann, *Supreme Confusion About Causality at the Supreme Court*, 25 CUNY L. REV. 57, 58, 68–69, 76–77 (2022). *See also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1542–43 (2004) ("[J]udgments about whether practices are constitutionally suspect classifications are normative as well as positive . . . [and] often depend on intuitions—shaped by social movement advocacy—about whether the practice unjustly perpetuates group inequality."). For another example of recent efforts to rely on formal equality, see Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699, 1703 (2023). Clarke does nonetheless acknowledge that normative determinations are being made. *See id.* at 1798 ("Critics of formalism are right that all formal rules are, to different degrees, indeterminate, requiring that judges make unforced choices, whether they realize it or not.").

cross-hairs of the Supreme Court.[216] *Muldrow* responds not by resolving the debate over affirmative action but by showing that the debate is itself a normative one and, even more importantly, that normative decisions in antidiscrimination law are much more widespread than many imagine, even when judges claim otherwise. Those normative decisions had built up prior to *Muldrow* in centering personal offense; they had, in other words, been taking place; they were merely buried behind judicial decisions about individuals' harms. *Muldrow* exposes this reality, putting normative determinations about employer action back at the moment of determining whether an institutional action amounts to discrimination rather than in measuring an individual's harm.

2. Re-Aligning Hostile Work Environments as Discrimination in Work

What then of discriminatory hostile work environments in a post-*Muldrow* era? *Muldrow*'s turn to institutional action over measuring individual harm has notable ripple effects here, too. First, it is important to see at the outset that there will be substantially fewer cases in which a plaintiff will need to rely on the law of hostile work environment at all. When a plaintiff experiences "some harm" from an employer policy, practice, or even one-off employment decision (such as a supervisor's decision regarding a transfer or job assignment or job review), the plaintiff need not rely on the law of hostile work environment.[217]

This said, there will remain cases in which a plaintiff has experienced an environment of harassing behavior with no identifiable employment decision (or policy or practice); in these cases, courts must determine whether a particular environment (the action of the employer) constructively altered the employee's conditions of work, whether, in other words, the environment is discriminatorily "disadvantageous" to the employee's work success. Of course, the paradigmatic sexual harassment—seeking sexual favors or physically touching or making sexual comments—comes to mind, but these cases can involve a variety of behavior, including graffiti or verbal use of epithets.

---

216. *See* Eyer, *supra* note 215, at 1628 ("Other sources of opposition have rested on fears that the but-for principle (or other anti-classificationist approaches) would endanger minority-protective doctrines such as affirmative action."); Clarke, *supra* note 215, at 1795 ("Civil rights scholars ought to reconsider the potential of formal equality" and "at the moment, sex discrimination formalism is ascendant, and decisions grounded on candid assertions of changing social norms or normative values, not encased in legal form, are rife for reversal.").

217. *See* Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024).

Considering what *Muldrow* means for claims alleging discriminatory hostile work environments circles back to the law of *Meritor* and *Harris*. This is what Kavanaugh seemed to want to get at when he sought counsel's agreement at oral argument in *Muldrow* that "[n]ot everything that happens at the workplace affects an employee's 'terms, conditions, or privileges of employment.'"[218] Kavanaugh may have had in mind something that could easily happen inside as well as outside of work—perhaps a sexual proposition or assault by a co-worker (or even a supervisor) on a work site. As noted earlier, this is a longstanding stated concern around harassment, and one that was used by courts to resist including sexual harassment as discrimination recognized by Title VII at all.[219] The proper distinction after *Muldrow* is not whether what the plaintiff experienced at work was bad enough to be deemed "significant" or "substantial" (as the lower courts in *Muldrow* required), but whether the employer's action (here the environment of work) was discriminatory and disadvantageous to the employee in their work.[220]

As detailed above, *Harris* has sometimes been read as inserting an objective check on a plaintiff's subjective perceptions of an experienced work environment.[221] This reading reflects a centering of personal offense, the desire to start with psychological harm and then to use doctrinal requirements to screen out claims for mere trifles. Another way of reading *Harris* and the "severe or pervasive" requirement for harassing conduct, however, is as merely offering one way in which a discriminatory environment can be disadvantageous in work. In *Meritor*, for example, Vinson alleged that in addition to demanding sex, Taylor groped Vinson and other female employees, followed them into the bathroom, made lewd comments about Vinson and other women and "tampered with [Vinson's] personnel records, lodged false complaints about her with management, denigrated and abused her in front of other workers, entrapped her into work errors, and escalated his campaign of fault-finding against her job performance and threatened her life when she threatened to report him."[222] First, notice that Vinson after *Muldrow* would not need to rely on *Harris*'s hostile work environment standard; a supervisor tampering with personnel records and lodging false complaints would

218. *See supra* note 182 and accompanying text.

219. *See supra* note 68 and accompanying text.

220. *See Muldrow*, 144 S. Ct. at 974. Indeed, Kavanaugh's concern draws up similar arguments pre-*Meritor* that harassment is not discrimination because it is merely personal behavior that can offend anywhere—on street corners and in bars—but just happens to occur at work.

221. *See id.*

222. *See supra* notes 78–80 and accompanying text.

no doubt amount to "some harm respecting an identifiable term or condition."[223] Moreover, while one would easily expect an individual in Vinson's shoes to have experienced psychological harm from the groping and demands for sex, harm that would amount to disadvantage in work, on Vinson's facts, Vinson arguably experienced a hostile work environment apart from any expected psychological harm. After all, Vinson (and other women at the bank) were openly treated by their supervisor as sexual objects, as deserving of less respect than men in work.[224] This open stereotyping and signaling of disrespect as workers because of their sex likely undermined their authority, facilitated stereotyping by others (stereotyping that was related to competence in work), and in this way made it more difficult for them to do their jobs.[225]

Muldrow supports this view by reinforcing that discrimination imposing "some harm" is sufficient.[226] Disadvantageous conditions from discriminatory harassment will arise any time a work environment is likely to undermine an individual's success in work, whether through harassing conduct that is "severe or pervasive," in the *Harris* Court's terms, so that it is psychologically more difficult for the victim to proceed in their work or in any other way, such as through open stereotyping, sabotage, or other means.[227] *Harris* tells us that "whether an environment is 'hostile or abusive' can be determined only by looking at all the circumstances";[228] sometimes the environment will involve sexualized harassment exclusively—the demands for sex that the lower courts and the Supreme Court focused closely on in its framing of the *Meritor* case[229]—but often, like in *Meritor* as relayed in the facts more broadly, the environment will involve a variety of behaviors (and a broader work environment) that together are discriminatory and likely to undermine a person's success in work.

---

223. *Muldrow*, 144 S. Ct. at 974.

224. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).

225. By highlighting disadvantage from harassment that is more publicly imposed in the workplace, I do not intend to suggest that sexual harassment kept behind closed doors would or should not be actionable.

226. *See Muldrow*, 144 S. Ct. at 974.

227. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993). Indeed, understood this way, there is no need for a subjective element. Discrimination in work is disadvantageous in work, regardless of the degree of psychological or emotional harm experienced by an individual victim.

228. *Id.* at 23.

229. *See Meritor*, 477 U.S. at 60. The *Harris* Court explains that all circumstances are not limited to sexualized behavior, but when thinking about such behavior, the circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23.

The same is true of epithets. The Court in *Harris* mentions that some work environments can involve "mere offensive utterances," suggesting that such an environment would not be discriminatory in violation of the act.[230] Whether an utterance is a "mere offensive utterance" after *Muldrow*, however, depends not on a specific individual's experience of any particular utterance but on the circumstances of the utterance, the action in historical and present context, and whether it is discriminatory. This again is a normative determination about which work environments are acceptable, and which are not. The determination simply cannot be made without an understanding of the ways in which language has been used historically, and in which it is used presently.[231] The Supreme Court has acknowledged as much. In *Ash v. Tyson*,[232] reversing the Fifth Circuit holding that a white supervisor's use of the word "boy" to refer to Black employees was non-racial, the Court held that the word "boy" could be discriminatory.[233] This makes sense because of the historical context of the term's use; whether use of the term in any specific case is discriminatory would depend on this historical context and, as the Court points out, on the present context, including who utters the epithet and when.[234] Just as whether an action is discriminatory requires consideration of context, historical and present, so, too, whether an environment is disadvantageous in work requires consideration of context.[235]

3. *Considering Challenges to DEI Measures*

In the lead-up to the *Muldrow* decision, commentators from across the political spectrum presented the case as potentially sounding the death knell of DEI measures voluntarily adopted by private employers.[236] Some of the Justices' questions at oral argument

---

230. *See id.*

231. In the sexual harassment area, Vicki Schultz has similarly argued that the context of the workplace matters in determining whether behavior amounts to discrimination. *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2138–39 (2003).

232. 546 U.S. 454 (2006) (per curiam).

233. *See id.* at 456.

234. *See id.*

235. Context also includes identity of the plaintiff (and others) in the workplace. *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, YALE L.J. F. 105, 110 (2018).

236. *See, e.g.*, Andrea R. Lucas, *With Supreme Court Affirmative Action Ruling, It's Time for Companies to Take a Hard Look at Their Corporate Diversity Programs*, REUTERS (June 29, 2023), https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/; STRICT SCRUTINY: *Fake Cases, Fake Facts, Real Implications*, at 55:09 (Spotify, Dec. 11, 2023); Andrea R. Lucas, EEOC, The Future of DEI,

asked whether someone could sue even when they were benefited by a decision, such as a woman who is promoted based in part on her sex,[237] and commentators picked up on this as a possible sign that some of the more conservative Justices would lean toward eliminating the adverse employment requirement, even apart from textualism.[238] Commentary after the decision similarly focused on implications of *Muldrow* for DEI measures, with progressive commentators noting that Justice Kagan's opinion requiring "some harm" was important because it "headed off [the] burgeoning effort among conservative lawyers and lower courts to repurpose Title VII as a weapon against 'reverse discrimination,' to kill programs that make sure women and people of color can get a fair shake in the workplace."[239] Conservative commentators emphasized a similar point, claiming that the decision opened up opportunity for more challenges, including when someone experiences discomfort for being required to undergo bias or diversity trainings.[240]

By focusing narrowly on the question of harm, these and other commentators have largely missed the significance of *Muldrow*'s return to work. DEI measures that expressly take race or sex or other protected status into account are threatened not by removal of the adverse employment action requirement, but by a wholesale embrace of a formal equality sometimes so-called "colorblind" account of discrimination like that put forward increasingly over the past few years, including in the Court's recent decision in *Students for Fair Admissions v. Harvard*.[241] Indeed, progressive framing of *Muldrow* as walking a strategic line to save DEI measures risks missing a crucial

---

Disparate Impact, and EO 11246 After *Students for Fair Admissions v. Harvard/UNC* (May 22, 2024) (transcript available on EEOC website).

237. Transcript of Oral Argument at 17–18, 44, Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024) (No. 22-193).

238. *See, e.g.*, STRICT SCRUTINY, *supra* note 236.

239. *See, e.g.*, Dahlia Lithwick & Mark J. Stern, *Elena Kagan Headed Off Disaster While Delivering a Victory for Civil Rights*, SLATE (Apr. 18, 2024), https://perma.cc/TR39-VGED (describing the case as risky because the case "might [have] given the conservative justices an opportunity to combat workplace diversity through Title VII"); Dallas Estes, Muldrow v. St. Louis*: The Title VII Balancing Act*, ONLABOR (Apr. 14, 2024), https://perma.cc/D7P3-49C3 ("[W]ithout a requirement of harm, employees could possibly bring Title VII claims for neutral or even benign differentiations or workplace DEI initiatives.").

240. GianCarlo Canaparo, *High Court's 9-0 Ruling Lowers Bar for Filing Anti-DEI Discrimination Lawsuits*, DAILY SIGNAL (Apr. 17, 2024), https://perma.cc/V45B-TR62 (portraying *Muldrow* as allowing a challenge for a white person "forced to undergo training telling her to 'be less white'").

241. 143 S. Ct. 2141 (2023). *See generally* James, *supra* note 159 (on dangers of embracing formal equality and colorblindness); Kimberly West-Faulcon, *Not Colorblind*, 120 NW. U. L. REV. 167 (2025) (on failure of term "colorblind" to capture the conservative project regarding race).

moment for defending Title VII from attack. To date, the law of Title VII regarding consideration of race and sex in employment decisions allows for consideration of race and sex in employment decisions under some circumstances.[242] Title VII does not, in other words, follow a pure formal equality model. Even if the Supreme Court's decision in *SFFA* is interpreted by judges in the Title VII context to overrule longstanding precedent allowing employer consideration of race in some circumstances, that decision should still be understood as a normative one, and as such one that can be made only by considering historical and present context.

At the same time, diversity or bias trainings are not discriminatory merely because they discuss race and result in an individual experiencing discomfort related to their race. Feeling badly about one's race is discomfort that is related to race, but an individual's race-related negative feelings or discomfort do not make an employer's action discriminatory. The case of *Young v. Colorado Department of Corrections*,[243] a recent case decided in the Court of Appeals for the Tenth Circuit, helps illustrate this point.[244] In that case, a white man sued his employer, the Colorado Department of Corrections, alleging that the Department's mandatory Diversity, Equity, and Inclusion training video violated Title VII because it "demeaned him because of his race and promoted divisive racial and political theories that would harm his interaction with other corrections' personnel and inmates."[245] The training, among other things, described the concept of "white fragility" as "[d]iscomfort and defensiveness, often triggered by feelings of fear or guilt, on the part of a white person when confronted by information about racial inequality and injustice."[246] Young alleged that the training required that he "hear and absorb statements that were facially based on race," and that this amounted to a hostile work environment.[247] The Tenth Circuit agreed with Young that the training was "objectionable," stating that "this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging," but it nonetheless dismissed Young's complaint for what it saw as a failure to satisfy the requirement that the harassment be "severe or pervasive," partly because Young had personally experienced the training only once.[248]

---

242. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208–09 (1979); Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987).

243. 94 F.4th 1242 (10th Cir. 2024).

244. *Id.* at 1244–45.

245. *Id.* at 1244.

246. *Id.* at 1246. The court provided a detailed account of the training. *See id.* at 1246–48.

247. *Id.* at 1244–45.

248. *Id.* at 1245, 1251.

The Tenth Circuit was wrong here in at least two interrelated respects: An official condition of employment like an imposed training, if discriminatory and disadvantageous in work, will violate Title VII, regardless of how many times the training is required. A training that declares members of one race less competent in work than members of another race, for example, would likely violate Title VII regardless of how often it has been viewed by the plaintiff. That said, sometimes the disadvantage in work is a matter of a work environment "detract[ing] from employees' job performance" or "discourag[ing] employees from remaining on the job," as the *Harris* Court put it,[249] and when that is the case, the frequency of acts making up the particular work environment experienced by the plaintiff would of course be relevant. But it is important to see that, even then, the action—the environment created—must be discriminatory to violate Title VII. Mention of race, systemic or institutional racism, the country's racial history, or reference to social science research about how bias operates, does not automatically make a training discriminatory, no matter how many times it is required; nor do strong feelings related to race or even difficulty in doing one's job because of those feelings render trainings discriminatory.[250] Bias trainings mention race—they are not, in other words, color blind—but they are only discriminatory if they are determined normatively to be subordinating or inconsistent with a racially just society.

4. *Against Weighing Individual Harms*

One more percolating issue is worth considering, for it presents one of the most troubling but again largely unnoticed dangers of centering personal offense. Indeed, this issue circles back to the recent anti-DEI directives in that it involves behind-the-scenes determinations about whose suffering matters. Some Supreme Court Justices have suggested recently that requests for accommodation in the religion context especially should involve a weighing of individual harms. The idea here is that an employer's obligation not to discriminate against one employee (or several employees) might bend to another employee's need for an accommodation to practice their religious beliefs.

---

249. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

250. For a recent decision considering more carefully whether a work environment that involved implementation of training as well as other interactions with co-workers and supervisors might amount to a discriminatory hostile work environment, see Chislett v. N.Y.C. Dep't of Educ., 157 F.4th 172 (2d Cir. 2025) (reversing summary judgment for the defendant on plaintiff's § 1983 claim involving allegations of a hostile work environment).

The Court's recent opinion in *Groff v. DeJoy*[251] involving religious accommodation presents a keen foreshadowing of this implication of centering personal offense. Title VII provides that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[252] The first question presented in the case was one of the appropriate standard for determining an undue hardship.[253] Groff, an evangelical Christian, sought a schedule that did not involve working on Sundays. The US Postal Service, Groff's employer, had a policy of employees in Groff's category rotating through Sunday work.[254] The Court held that "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business."[255]

This much may not call for measuring or weighing individual harms, but the Court's further "clarification" regarding the second question presented on certiorari may be read to do so.[256] This question involved the extent to which impact to coworkers is relevant to the undue hardship determination. Groff's brief to the Court insisted that impact on co-workers must cause "harm to the business" and specifically that "[a]n employer does not establish undue hardship by pointing to a more-than-de-minimis impact on an employee's coworker."[257] The Court in the majority opinion notes merely that "not all 'impacts on coworkers . . . are relevant,' but only 'coworker impacts' that go on to 'affec[t] the conduct of the business.'"[258]

Even this much from *Groff* may not suggest a weighing of individual harms in determining whether discrimination has occurred. But putting the Court's discussion together with a recent broader social and political move (a move embraced by several Justices of the Supreme Court) should help to reveal how individual

251. 143 S. Ct. 2279 (2023).

252. 42 U.S.C. § 2000e(j).

253. *Groff*, 143 S. Ct. at 2286.

254. *Id.*

255. *Id.* at 2294.

256. *Id.* at 2296.

257. Brief for Petitioner at 39-42, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) (quoting Groff v. DeJoy, 35 F.4th 162, 176 (2022) (Hardiman, J., dissenting)).

258. *Groff*, 143 S. Ct. at 2296 (alterations in original) (quoting Transcript of Oral Argument at 102–03, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174)). A number of courts pre-*Groff* held that such practices as misgendering or deadnaming cannot be reasonably accommodated because to do so would be an undue hardship (discriminating against other employees). *See, e.g.*, Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1147 n.172 (2024) (gathering cases).

harms may be weighed against each other. As others have amply documented, Christian conservatives in the late 1990s shifted their rhetoric away from the "disgust" and "public health threat" narratives that had dominated for decades to a narrative that claimed Christians as the "actual victims left in the wake of a cultural tide."[259] Justices Thomas and Alito have carried this idea prominently forward. They express deep concern about "vil[ification]" of "those with . . . religious beliefs [regarding marriage as a "sacred institution"] 'as bigots.'"[260] *Obergefell v. Hodges*,[261] the case in which the Supreme Court held that same-sex couples have the right to marry, in this view, "enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss."[262] This is so even when, as Justice Alito sees it, there is no evidence of "harm" on the other side.[263] As he stated in a recent speech before the Federalist Society, "for many today, religious liberty is not a cherished freedom. It's often just an excuse for bigotry, and it [religious liberty] can't be tolerated, even when there is no evidence that anybody has been harmed."[264]

It takes only a slight tweak to the *Groff* facts to present a case involving a religious belief much in the news (and in the forefront of much of the Court's recent jurisprudence), that marriage between people other than man and woman is a sin or relatedly that all people align to "sex assigned at birth." Imagine an employee who seeks an accommodation to misgender or to refuse to work with someone who is gay. If misgendering or refusing to work with someone because they are gay amounts to discrimination, then it should always be an undue

---

259. Hannah Baily, Note, *A New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court are Transforming the Free Exercise Clause*, 73 SYRACUSE L. REV. 199, 204–05 (2023) (quoting conservative Christian advocate Tony Marco). On the derogation and adoption of victimhood, see generally ALYSON M. COLE, THE CULT OF TRUE VICTIMHOOD: FROM THE WAR ON WELFARE TO THE WAR ON TERROR (2006) (arguing that victimhood in America has been vilified, resulting in a backlash with far-reaching political effects); Marie Gayte, *"The Moral Equivalent of Rosa Parks?" The New Christian Right's Framing Strategy in the Latest Chapter of the Culture Wars*, 68 AM. STUD. J. (2019) (describing the Christian right as a movement attempting to influence society by using the "discriminated minority" framing strategy).

260. Davis v. Ermold, 141 S. Ct. 3, 3 (2020) (statement of Thomas, J., respecting the denial of certiorari) (quoting Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J., dissenting)).

261. 576 U.S. 644 (2015).

262. *Ermold*, 141 S. Ct. at 4 (statement of Thomas, J., respecting the denial of certiorari).

263. Justice Samuel Alito, Address at the 2020 Federalist Society National Lawyers Convention, at 16:10, (Nov. 12, 2020), https://perma.cc/VW7W-CDAJ.

264. *Id.*

hardship to allow a religious observer an exception.[265] Nonetheless, *Groff* might be read to invite judges to weigh individuals' harms in a scenario like this, as if the question is one of insult to religion on the one hand (in Alito's view, calling religious believers "bigots" by denying them the ability to act according to their beliefs) and insult to a person who is gay—understood as invasion of personal identity or "dignity"—on the other.[266]

It is true, of course, that the employer's nondiscrimination obligation for religion under Title VII includes an obligation to provide reasonable accommodation for an individual's religious belief, and the Court is certainly correct that animus toward a particular religion or religion generally (or even toward any provision of accommodation) would not be a permissible reason for denying a requested accommodation.[267] But failure to provide an accommodation for religious belief is only discrimination where the employer can reasonably accommodate without experiencing undue hardship on its business.[268] With *Muldrow*'s return to work, its turn away from measuring individual harm as part of whether discrimination has occurred, we can see more clearly that whether refusal to use preferred pronouns or other action is discriminatory is its own independent inquiry. Once that determination is made, a court cannot revisit the question based on its measure of harm to a specific individual or individuals. In the case where accommodation would require discrimination against other employees, the accommodation should quite simply not be considered reasonable.

C. Resisting Centering Personal Offense

Even after *Muldrow*, judges and advocates will surely continue to argue that individual psychological harms among other employment-related harms are often mere trifles and not worthy of antidiscrimination concern or, on the other side, that they are so dire as to amount to discrimination.[269] Progressive advocates will have to

---

265. Indeed, the inquiry should stop at the reasonable accommodation stage of analysis; it is not a reasonable accommodation for an employer to discriminate against other employees. This is how the Court has analyzed reasonable accommodation in the ADA context. *See, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002) (framing the reasonable accommodation inquiry to include consideration of impact on other employees).

266. *See Obergefell*, 576 U.S. at 666, 681; *id.* at 741 (Alito, J., dissenting).

267. Groff v. DeJoy, 143 S. Ct. 2279, 2296 (2023).

268. 42 U.S.C. § 2000e(j).

269. There will also surely be various efforts in the lower courts to narrow the *Muldrow* holding, to re-draw the line of personal offense at something less than "significant," but still retaining a mere trifles threshold along the lines of Justice Thomas's position, which Justice Kagan writing for the majority expressly

fight for the core of antidiscrimination law, resisting the impulse to respond by emphasizing the extent of individualized harm without challenging the requirement of measuring harm in the first place. This fight is all the more important in the current political moment. Openly debating the fundamental normative commitments of antidiscrimination law and its contours will do more to set groundwork for future wins than will burying normative debates and determinations behind emphasis on individualized harms.

But the pressure to recenter personal offense is likely to emerge in other, less obvious ways as well. Courts are likely to respond to *Muldrow*, for example, by channeling their concerns about claims for "mere trifles" into tight time-filing requirements that make it easy for plaintiffs to lose their claims. Title VII requires that complainants file a charge of discrimination with the Equal Employment Opportunity Commission before filing a claim in court, and in most states this must be done within 300 days after the "alleged unlawful employment practice occurred," as stated by the statute.[270] In *Delaware State College v. Ricks*,[271] the Supreme Court held that for "discrete" acts of discrimination, the time frame starts running at the time the discriminatory act occurred.[272] Although the Supreme Court has not so held, most lower courts start the running of the period when an employee is notified of the action, not when the employee has reason to believe that the action was discriminatory.[273] If courts are permitted to apply this "discrete act" idea narrowly, they may hold a plaintiff time-barred from bringing a claim alleging discriminatory assignment of duties, for example, even if that assignment of duties only later resulted in a dock of pay or loss of promotion.

Plaintiffs (and their advocates) in these cases will need to work against this narrow frame by telling stories of discrimination that include multiple moments tied together and that identify institutional sources of discrimination rather than merely individualized ones.[274] Systemic claims, whether through systemic

---

rejected. *See supra* Section II.A. *See generally* Sperino, *supra* note 16 (describing some of these cases and courts' efforts post-*Muldrow*).

270. 42 U.S.C. § 2000e–5(e)(1).

271. 449 U.S. 250 (1980).

272. *Id.* at 258–59; *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112–15 (2002) (distinguishing *Ricks* as a case involving a "discrete" act of discrimination in contrast to a hostile work environment claim, where multiple acts contribute to an environment).

273. *See, e.g.*, Amini v. Oberlin Coll., 259 F.3d 493, 499 (6th Cir. 2001); Grayson v. K Mart Corp., 79 F.3d 1086, 1100 n.19 (11th Cir. 1996); McCants v. Glickman, 180 F. Supp. 2d 35, 40 (D.D.C. 2001); Yoonessi v. State Univ. of N.Y., 862 F. Supp. 1005, 1014 (W.D.N.Y. 1994).

274. Plaintiffs in discrimination cases do have a history of pressing broader stories, only to have their stories re-framed by the courts. *See generally* Tristin

disparate treatment theory or disparate impact theory, are another way of resisting efforts to re-instantiate measures of individual harm in law.[275] These theories historically have provided space for telling broader stories about action and harm, even as courts, including the Supreme Court, have recently resisted such efforts.[276]

As mentioned above, some legal scholars have sought to frame harassment broadly to include acts such as denial of training and on-the-job meals, and acts of insubordination.[277] And some scholars have pressed for "regular" discrimination to better incorporate allegations of environment and work culture, including harassment.[278] These efforts are key: Discrimination and harassment are not distinct acts with differing effects, one "material" and the other "psychological" or "emotional." In seeking to tell broader stories not just about what discrimination is but about how it is experienced, individuals can shift how they see themselves and discrimination in their workplaces. We know that work organizations play a substantial role in discrimination that is often overlooked with over-emphasis on individual bad actors and their states of mind. Leaning too closely into psychological or emotional harms, as I have shown in this Article, can leave us with an overly narrow employment discrimination law on the other end.

To re-center institutions at the core of antidiscrimination law does not require that we reject consideration of individuals' psychological or emotional harms altogether; only that we not allow it to overtake our sense (and determinations) of what discrimination is and why, and of what solutions are possible. Individual harm should not be measured in determining whether discrimination has taken place, and it should not constrain solutions toward individualized monetary over broader injunctive relief. Along these

---

K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. F. 152 (2018).

275. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 328–29 (1977) (systemic disparate treatment); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 301 (1977) (systemic disparate treatment); Griggs v. Duke Power Co., 401 U.S. 424, 425–26 (1971) (disparate impact); 42 U.S.C. 2000e–2(k) (codifying disparate impact). These systemic legal theories themselves rest on normative views about, for example, prevalence of discrimination and the importance of removing seemingly neutral barriers that can entrench subordination.

276. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366–67 (2011). For an alternative writing of Wal-Mart v. Dukes, see Tristin K. Green, *Wal-Mart Stores, Inc. v. Dukes et al.*, *in* FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS 430, 441 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020).

277. *See supra* note 145 and accompanying text.

278. *See generally* TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (2017).

lines, recent work in the area of disability justice rooted in intersectionality provides a promising model for keeping institutions at the core of antidiscrimination law.[279] Even in the context of thinking about accommodations, disability scholars are pressing for structural framing and solutions.[280] Building on the rich foundation and potential of critical theories, including intersectionality and multidimensionality, in thinking about race and sex and other protected characteristics in relation with institutions can also serve to broaden the lens.[281]

Indeed, this is a good moment to revisit the societal shift that serves as part of the backstory of *Muldrow*, to the centering of personal offense in antidiscrimination law in the first place. One critique of the therapy culture—related but separate from the neoliberal critique described in Part I—has been that seeing ourselves as individuals responsible for our own psychological and emotional well-being tamps down on collective action and otherwise buttresses the status quo of norms and structures that entrench inequality.[282] By gazing (and working) inwardly on ourselves and our psyches, we can lose sight of broader structural influences and injustices. But individuals can see themselves in their broader environments, and they can work for others even as they seek remedies for themselves. The two are not mutually exclusive. We can recognize the full range of our individualized harms, including psychological and emotional harms, and still use that recognition to sustain antidiscrimination law as a tool in the fight for broader change.

CONCLUSION

At the very least, seeing the centering of personal offense and its dangers opens a window—a lens in this moment for understanding where the law is and why, and importantly for engaging more

279. *See* Jasmine E. Harris, *Locating Disability Within a Health Justice Framework*, 50 J.L. MED. & ETHICS 663, 664 (2022).

280. For example, in thinking about accommodation with respect to future disabilities, Alice Abrokwa explains that instead of asking for "accommodations for oneself—test *my* water source, screen *my* blood for toxins," a structural response "would claim the rights attendant to environmental regulation—i.e., prohibit the state actor from exposing the community to toxins in the first place." Alice Abrokwa, *Anticipating Disability*, 114 CALIF. L. REV. (forthcoming 2026) (manuscript at 28) (on file with author).

281. *See, e.g.*, PATRICIA HILL COLLINS, INTERSECTIONALITY AS CRITICAL SOCIAL THEORY (2019). For an example of specific theorizing along these lines in thinking about work inequality, see Leticia Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257 (2014) (framing employer action to account for intersectional identities).

282. *See supra* note 53 and accompanying text.

deliberately in debate about where the law should be headed. Lessons from the centering of personal offense extend beyond Title VII and work to include thinking about discrimination under the Constitution and in other institutional contexts, including schools and access to public spaces and services. As I have shown, the centering of personal offense in antidiscrimination law is intricately intertwined with broader societal trends that lean us toward emphasizing individual harms—"I hurt therefore I must have been wronged"—together with derogation of complaint about those harms—"show me how badly you have been harmed before we will declare you wronged"—and with legal trends that offer formal equality and color-blindness as seemingly simple ways of ducking difficult normative questions. Removing individual measures of harm from antidiscrimination determinations will not resolve all difficult cases, but it will allow open discussion of the issues that are presented. If advocates and scholars do not take this moment seriously, with careful deliberation and willingness to debate normative questions openly, they will have missed a key opportunity for positioning antidiscrimination law to address ongoing inequality and subordination—in work and beyond.