

# GENDER SIDELINING AND THE PROBLEM OF UNACTIONABLE DISCRIMINATION

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*Gender dynamics suffuse virtually every workplace. Indeed, the way that employees interact with one another turns not only on their individual backgrounds, skills and personalities, but also frequently on their gender. While many employees embrace gender diversity at work and appreciate the benefits of incorporating both male and female perspectives into workplace programs and projects, this ideal does not translate into every work environment. In many workplaces, female workers continue to experience unfair (and often unlawful) treatment based upon their gender. The law has done much to outlaw overt gender discrimination at work, providing a legal framework within which female employees can vindicate concerns regarding gender-based decisions about hiring, promotion, discipline or pay. Similarly, a robust body of sexual harassment jurisprudence has given women a vehicle for protesting workplace actions that create a sexually hostile working environment.*

*Despite all of these strides, however, there remains a subtle but significant undercurrent of less obvious gender bias in the workplace today. In a variety of settings—from conventional boardrooms and factory floors to less conventional workplaces like the art studio, the athletic field or the political stage—women experience a broad range of adverse treatment at work that the law does not address: Male workers often garner more of the limelight than their female coworkers, attracting more attention and recognition. Women often lack access to important opportunities or feel subjected to greater scrutiny than their male peers. The media often portrays female workers in a demeaning or condescending manner, belittling or diminishing their contributions. None of these slights, in isolation, likely would give rise to a viable antidiscrimination claim. Yet collectively, these incidents—which constitute what this article refers to as “gender sidelining”—accumulate to create very real obstacles and barriers to advancement for women at work.*

*This article explores the various ways in which women across a wide range of employment settings may find themselves sidelined, upstaged or otherwise marginalized in ways not reached by traditional antidiscrimination laws. It both*

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*defines the scope of gender sidelining and illustrates the significant impact that this phenomenon has on the workplace for men and women alike. While the law frequently does not (and arguably should not) reach these subtle harms, gender sidelining nonetheless warrants significant attention for its potential to silence creativity, stymie innovation, and negatively impact the productivity and advancement of women at work.*

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## INTRODUCTION

On a summer night during the 2016 Summer Olympics in Rio de Janeiro, thousands watched as Team USA swimmer Katie Ledecky smashed her own world record in the 800-meter freestyle, beating her previous record time by an astonishing two seconds.<sup>1</sup> Finishing more than eleven seconds ahead of the closest runner up, Ledecky not only captured the gold medal with her

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1. See Karen Crouse, *Katie Ledecky Smashes World Record in the 800-Meter Freestyle*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/13/sports/olympics/katie-ledecky-800-freestyle-gold.html>.

incredible performance, but also became the first woman in almost fifty years to win a gold medal in the 200-, 400-, and 800-meter freestyle races,<sup>2</sup> as well as one of only two swimmers in the history of the games to win a gold medal in consecutive Olympics as a teenager.<sup>3</sup> That same night, celebrated American swimmer Michael Phelps failed to capture a gold medal in what promised to be his last individual Olympic race, the 100-meter butterfly, ultimately becoming part of a three-way tie for second place.<sup>4</sup>

While most media outlets across the nation praised Ms. Ledecky's stunning achievement,<sup>5</sup> one previously obscure newspaper, the *Bryan-College Station Eagle*, attracted significant attention for its coverage of these two races. Reporting on the outcome of the day's swim meets, the *Eagle* ran a headline in large, bold font that said, "Phelps ties for silver in 100 fly."<sup>6</sup> Beneath the headline, in smaller and less prominent print, the paper wrote, "Ledecky sets world record in women's 800 freestyle."<sup>7</sup> Almost immediately, a backlash ensued, with members of the public condemning the *Eagle* for its biased coverage that seemed to downplay Ledecky's achievement.<sup>8</sup> University of Denver Law Professor Nancy Leong referred to the headline as "a metaphor for basically the entire world," with 34,000 people re-tweeting her comment,<sup>9</sup> and another commentator observed that the paper's framing of these events "made it seem like even the most historic achievements of a woman are less important than a pretty good performance from a man."<sup>10</sup>

One readily might attribute this incident to a simple case of sloppy editing by a small newspaper with minimal distribution or impact.<sup>11</sup> Yet while this

2. Emily Crocket, *Katie Ledecky Broke a World Record. Michael Phelps Won Silver. Guess Who Won the Headline?*, VOX (Aug. 17, 2016), <https://www.vox.com/2016/8/16/12490360/rio-olympics-2016-katie-ledecky-michael-phelps-sexist-headline>; see also Crouse, *supra* note 1.

3. See Crouse, *supra* note 1.

4. *Michael Phelps ties for Silver in 100m Butterfly*, DENVER POST (Aug. 12, 2016), <http://www.denverpost.com/2016/08/12/michael-phelps-ties-silver-in-100m-butterfly>.

5. See, e.g., Crouse, *supra* note 1; Nicole Auerbach, *Katie Ledecky Shatters World Record in 800 Free, Wins Fourth Gold in Rio*, USA TODAY (Aug. 12, 2016), <https://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/12/katie-ledecky-swimming-womens-800-freestyle-final-results/88646560/>; Dave Sheinin, *Katie Ledecky Sets New World Record in 800 Meters for Her Fourth Gold in Rio*, WASH. POST (Aug. 12, 2016), [https://www.washingtonpost.com/sports/olympics/katie-ledecky-sets-new-world-record-in-800-meters-for-her-fourth-gold-in-rio/2016/08/12/f99bd22e-6085-11e6-9d2f-b1a3564181a1\\_story.html](https://www.washingtonpost.com/sports/olympics/katie-ledecky-sets-new-world-record-in-800-meters-for-her-fourth-gold-in-rio/2016/08/12/f99bd22e-6085-11e6-9d2f-b1a3564181a1_story.html).

6. Crocket, *supra* note 2.

7. *Id.*

8. Dan Solomon, *How We Talk About Women in the Olympics*, TEX. MONTHLY (Aug. 16, 2016), <http://www.texasmonthly.com/the-daily-post/katie-ledecky-michael-phelps-headline>.

9. *Id.*

10. Crocket, *supra* note 2.

11. Indeed, the original Associated Press story filed by the author of the article did not include this much-maligned headline, but rather focused solely on Phelps' upset, covering Ledecky's achievement in a separate story. See Crocket, *supra* note 2.

newspaper's coverage diverged from the norm in this particular situation, this type of incident is far from isolated; Ms. Ledecy is not alone in having her momentous achievement brushed aside when compared with the accomplishments of a male peer. To the contrary, in a wide variety of workplaces both nontraditional (i.e., an Olympic swimming pool) and more generic, women continue to face an uphill battle in their quest for recognition, respect and reward. Female employees from the athletic field to the boardroom to the science lab often find that their male counterparts garner more of the limelight, attracting more attention and recognition.<sup>12</sup> Likewise, female workers frequently confront media portrayals and/or public perceptions that belittle or minimize their contributions.<sup>13</sup> Women often find their workplace accomplishments described using a different vocabulary than that applied to their male peers—one that fails accurately to portray their achievements.<sup>14</sup> Female workers lack access to important opportunities, encounter barriers to mentorship, or feel subjected to greater scrutiny than their male peers.<sup>15</sup>

None of these slights, in isolation, likely would give rise to a viable gender discrimination claim.<sup>16</sup> Indeed, whatever the workplace—the athletic field, the stage, or the corporate boardroom—these types of obstacles often blend into the background of the broader employment setting, seen as annoying and persistent but not particularly surprising—no more significant than the copying machine that habitually jams or the staff meeting that inevitably runs too long. Yet collectively, these incidents—which constitute what this article refers to as “gender sidelining”—accumulate to create very real obstacles for women at work.<sup>17</sup>

This article examines the many ways in which women across a wide range of employment settings face obstacles that inhibit their advancement at work through policies and practices not reached by traditional antidiscrimination laws. The article highlights the scope of gender sidelining and describes the significant impact that this phenomenon has on the workplace for all

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12. *See infra* at II.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.* Note that the word “gender” generally refers to an individual's social identity (including culturally traditional masculine and/or feminine characteristics), while the word “sex” generally refers to an individual's biological identity. *See, e.g.,* Francine Tilewick Bazluke & Jeffrey J. Nolan, “*Because of Sex*”: *The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J. OF C. & U. LAW 361, 362 (2006). Courts, however, frequently have failed to distinguish between these two concepts, deeming such distinctions unnecessary under Title VII. *See id.* at 365 (stating that “[b]ecause Congress intended that the term ‘sex’ in Title VII mean simply ‘man’ or ‘woman,’ there is no need to distinguish between the terms ‘sex’ and ‘gender’ in Title VII cases”) (quotations in original). While some academic writers have advocated for maintaining a distinction between these two terms, *see id.* (citations omitted), this article uses these terms somewhat interchangeably.

17. Many thanks to my colleagues Hannah Brenner, Leslie Culver and Catherine Hardee who helped to come up with the term “gender sidelining” to identify the type of bias discussed herein.

employees, male and female. The article argues that, despite generally falling outside of the reach of the courts, these harms warrant significant attention for their potential to silence creativity, stymie innovation, and negatively impact the productivity and advancement of women. Part I of this article discusses the relevant legal backdrop, focusing on Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>18</sup> and setting forth the limits that courts have imposed upon the scope of this statute. Part II delves more deeply into the definition of gender sidelining and describes how this phenomenon unfolds across a variety of work venues—from the movie set, to the political stage, to the science lab, to the boardroom. Part III focuses on the impact of gender sidelining, not only examining how this experience silences female voices in the workplace but also explaining why this silencing may have broader ramifications, both for those in the workplace and for the public at large. Part IV, finally, describes other mechanisms besides Title VII through which the impact of gender sidelining may be ameliorated or minimized.<sup>19</sup>

### I. THE LIMITS OF TITLE VII

Despite the existence of comprehensive federal, state and local legislation designed to redress gender discrimination in the workplace, these laws generally will fail to provide relief for most examples of gender sidelining. For most female workers, the ability to sue an employer for gender discrimination begins and ends with Title VII, or with a comparable state law anti-discrimination provision.<sup>20</sup> In proving their case under such a law, most employees—absent any direct evidence of discrimination—rely upon circumstantial evidence, using the well-established framework set forth by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>21</sup> Under this framework, a plaintiff must establish, *inter alia*, that she suffered an adverse employment action,<sup>22</sup> and must show that this adverse action was *because of*

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18. 42 U.S.C. §§ 2000e-2000e-17 (2005), amended by Civil Rights Act of 1991, 42 U.S.C. § 1981a (2005) (“Title VII”).

19. Without a doubt, the concept of “sidelining” may have a racial component as well, as both men and women of color may experience sidelining caused and/or exacerbated by their race. That issue, however, falls beyond the scope of this paper, which focuses solely on the way in which gender may lead to subtle obstacles for women at work. For a more detailed discussion of the role of race in this context, see Leslie P. Culver, *She v. She: How the Impostor Syndrome Contributes to Gender Sidelining by Women Against Women* (2017) (unpublished manuscript) (on file with author).

20. See *Laws Enforced by EEOC*, US EQUAL EMP’T OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/index.cfm>; see also, e.g., *Employees and Job Applicants are Protected From Bias*, CAL. DEP’T OF FAIR EMPLOYMENT AND HOUSING FACT SHEET, <https://www.dfeh.ca.gov/Employment/>.

21. *Michael v. Caterpillar Fin. Serv. Corp.*, 496 F.3d 584, 593 (6th Cir. 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

22. See *Michael*, 496 F.3d at 593 (setting out elements of prima facie case) (citation omitted).

her gender, and not because of any legitimate reason that might be set forth by the employer.<sup>23</sup>

Courts have adopted a fairly narrow view in interpreting what constitutes an “adverse action” for purposes of Title VII. Specifically, courts have held that “[a]n adverse employment action in the context of a Title VII discrimination claim is a ‘materially adverse change in the terms and conditions of employment because of the employer’s actions.’”<sup>24</sup> Accordingly, adverse actions generally have been deemed to include harms related to hiring, firing, failures to promote, reassignments with significantly different responsibilities, or decisions that cause a significant change in benefits.<sup>25</sup> Courts have made clear in this context that “a bruised ego is not enough.”<sup>26</sup> Thus, calling an African-American plaintiff ignorant and berating him in front of his coworkers has been held not to rise to the level of an adverse action for purposes of a Title VII race discrimination claim.<sup>27</sup> A confrontation between an African-American employee and her supervisor in which the supervisor “rudely interrupted” a meeting that the employee was attending and then made inquiries of the employee “in a very aggressive tone” likewise was deemed not to satisfy this requirement in the context of a race discrimination suit.<sup>28</sup> Even examples of a supervisor’s animus-laden language (telling an African-American employee that “he was lazy like the rest of his people and that is why they are all in prison”) or placing a black employee under constant observation when white employees were not monitored in the same way was deemed not to result in a “materially adverse” change in the employee’s employment status or in the terms and conditions of his employment.<sup>29</sup>

Further examples of this limited view of adverse action abound: In one case, a court declined to find a “hostile work environment” under Title VII,

23. *See id.* at 593 (discussing “pretext” phase of burden shifting framework).

24. *Id.* (citation omitted); *see also* *Allen v. MI Dept. of Corr.*, 165 F.3d 405, 410 (6th Cir. 1999).

Note that courts have established a similarly stringent standard in evaluating “adverse actions” for the purposes of retaliation claims brought under Title VII. These cases, which flow out of the Supreme Court’s 2006 decision in *Burlington N. & Santa Fe Ry. Co. v. White*, make clear that an adverse employment action must be something “that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Peter Panken, *Warnings and Evaluations May Not Be Material “Adverse Employment Actions” Even After Burlington Northern*, 010 ALI-ABA 2025, 2027 (July 23-25, 2009) (citations and internal quotations omitted).

25. *See Parks v. Geithner*, No. 3:09cv141, 2011 WL 6148701, at \*8, (S.D. Ohio Dec. 9, 2011) (citations and internal quotations omitted).

26. *Id.*; *see also* *Spees v. James Marine Inc.*, 617 F.3d 380, 391 (6th Cir. 2010) (citing *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004)).

27. *See Parks*, 2011 WL 6148701, at \*8.

28. *Michael v. Caterpillar Fin. Serv. Corp.*, 496 F.3d at 590, 594 (citation and internal quotations omitted); *see also id.* at 594 (quoting precedent holding that “a contentious oral confrontation involving stern words did not amount to . . . a materially adverse employment action”) (citation and internal quotations omitted).

29. *See Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405, 408, 410 (6th Cir. 1999).

despite recognizing that the plaintiff's work atmosphere resembled a "men's locker room environment."<sup>30</sup> In another case, a court held that a superior's refusal to greet or speak to the plaintiff were "trivial matters that do not rise to the level of actionable retaliation,"<sup>31</sup> observing, "not everything that makes an employee unhappy is an actionable adverse action."<sup>32</sup> Yet another plaintiff's claims that a supervisor "gave her the 'cold shoulder,' sat far away from her at meetings, became too busy to answer her questions, and generally tried to avoid her" likewise were not found to constitute adverse actions,<sup>33</sup> with the court observing that such "alleged 'snubs,' though surely unpleasant and disturbing, are insufficient to support a claim of retaliation under our caselaw . . . ."<sup>34</sup> In this respect, the courts have made clear that "Title VII . . . does not set forth a general civility code for the American workplace,"<sup>35</sup> nor does it prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."<sup>36</sup> According to at least one court, this might include tolerating "an unpleasant, harsh, combative or difficult work environment," or "the sporadic use of abusive language, gender-related jokes and occasional teasing."<sup>37</sup>

This narrow view of the "adverse action" requirement arises in a context of a narrowing view of antidiscrimination claims generally. In her book *Discrimination Laundering: The Rise of Organizational Innocence and the Crisis of Equal Opportunity Law*, Professor Tristin Green discusses the proliferation of limits that have been imposed upon antidiscrimination law.<sup>38</sup> Green discusses the various doctrinal and evidentiary rules (including the courts' interpretation of the adverse action requirement) that have developed in

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30. *Britt v. Merrill Lynch and Co., Inc.*, No. 08 CV 5356(GBD), 2011 WL 4000992, at \*1, \*13 (S.D.N.Y., Aug. 26, 2011).

31. *Bell v. EPA*, 232 F.3d 546, 555 (7th Cir. 2000) (citations omitted).

32. *Id.* (citations omitted). While this case arose in the context of a Title VII retaliation claim and not a discrimination claim brought under that statute, courts generally apply the same burden-shifting standard to both types of claims. *See, e.g., Shrira v. State University of N.Y. at Buffalo*, NO. 02-CV-2996A, 2007 WL 1201580, at \*1, \*2 (W.D.N.Y. Apr. 23, 2007) (citation omitted); *see also Johnson v. D.C.*, 947 F. Supp. 2d 123, 141 (D.D.C. 2013) (citations omitted).

33. *Johnson v. Weld Cty.*, 594 F.3d 1202, 1216 (10th Cir. 2010).

34. *Id.* (citations omitted) (citing cases holding that "silent treatment" is not adverse action).

35. *Britt v. Merrill Lynch Co., Inc.*, 2011 WL 4000992, at \*13 (citing, *inter alia*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (other citations and internal quotations omitted); *see also Panken, supra* note 24, at 2017).

36. *Britt*, 2011 WL 4000992, at \*13 (citations and internal quotations omitted); *cf. Panken, supra* note 24, at 2017 (opining on the definition of "material adversity" in the context of retaliation claims brought under Title VII and noting that "it is important to separate significant from trivial harms . . . .") (citation and internal quotations omitted).

37. *Britt*, 2011 WL 4000992, at \*13 (citations and internal quotations omitted).

38. TRISTIN GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* 47 (Cambridge Univ. Press 2017).

antidiscrimination cases.<sup>39</sup> According to Green, these developments are “aimed at reigning in judge and juror discretion . . . at focusing the legal inquiry on key employment decisions, those that indicate material job success, like pay and promotion, hiring, discipline, and discharge.”<sup>40</sup> Green also highlights the constrained view of Title VII’s “because of sex” requirement<sup>41</sup> that many courts seem to adopt, observing that “[s]ome judges openly resist using the law for work culture change in all-male work environments . . . . They see the cultures that develop in these workplaces as personal and private and beyond the purview of Title VII.”<sup>42</sup> Through all of these mechanisms, according to Green, antidiscrimination law has shifted its focus away from broader, structural concerns and instead has allowed courts to focus on isolated, concrete examples of bias, such as an executive making a biased comment or ordering lower-level decision makers to discriminate.<sup>43</sup>

Thus, Green argues, “[t]he law misses entirely discrimination that accrues over time or is otherwise difficult to identify in a precise moment . . . .”<sup>44</sup>—precisely the kind of systemic bias that often confronts women in the workplace. As discussed in greater detail below, not all bias appears in the form of a missed promotion, a cut in pay, or a seemingly groundless termination.<sup>45</sup> Rather, for many women, the obstacles that they face at work are more difficult to pin down—a lack of access to certain opportunities, the diversion of credit for an idea, a nagging sense of being held to a higher standard than their male peers.<sup>46</sup> In this sense, and as highlighted below, discrimination can creep its way into the workplace, not in the form of “specific, observable employment decisions” but rather “build[ing] subtly over time so that an identified moment of decision making—such as the manager’s decision not to promote—may appear perfectly natural even when it is in fact the product of biased perceptions, judgments, and behaviors of the manager and also of others.”<sup>47</sup>

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39. *Id.* at 105-06.

40. *Id.* at 105.

41. *See* 42 U.S.C. §2000e-2(a)(1) (2016) (making it an unlawful employment practice for employers “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 . . . sex”); *see also* 42 U.S.C. §2000e-2(a)(2) (making it an unlawful employment practice for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex”).

42. Green, *supra* note 38, at 90.

43. *See id.* at 3-4.

44. *Id.* at 101.

45. *See infra* at II.

46. *See id.*

47. Green, *supra* note 38, at 101-02; *see also* Deborah Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1065 (2011) (focusing discrimination claims against law firms and asserting that “in the contemporary legal workplace, most bias is not a function of demonstrably discriminatory treatment. It is rather a product of interactions shaped by unconscious assumptions and



For these plaintiffs who complain about this type of subtle discrimination at work, the courts' existing jurisprudence under Title VII means that obtaining legal relief may be an uphill battle.

While some might lament the inability of existing antidiscrimination law to reach these less obvious examples of bias in the workplace, extending Title VII or other statutes to cover these types of behaviors in fact would constitute a grave error. Title VII is not and never has been intended to reach every possible slight that an employee might experience in the workplace; employees are not encouraged or expected to turn to the courts to deal with every workplace complaint. In the harassment context, for example, renowned Judge Richard Posner has observed that the courts apply a standard of mere negligence, and not strict liability, to an employer's vicarious liability for harassment claims because of the "infeasibility of an employer's stamping out this sort of harassment without going to extreme expense and curtailing the privacy of its employees, by putting them under constant video surveillance."<sup>48</sup> Given the nuance that pervades much of what constitutes gender sidelining, it would be nearly impossible to expect employers to detect and deal with every incident of such gender bias at work. Employers would be forced to monitor daily minutiae in the workplace, examining workplace interactions both formal and spontaneous in an effort to prevent even subtle slights against female workers—something that a litany of cases makes clear is far beyond what Title VII was intended to require.<sup>49</sup>

## II. GENDER SIDELINING ACROSS WORKPLACES

At the same time that the law fails to reach this type of subtle discrimination at work, the instances of gender sidelining appear to be proliferating. In all sorts of workplaces, women frequently feel brushed to the side: Their ideas are undermined, their efforts are upstaged, and their contributions are ignored. For employees in nontraditional workplaces, like Ms. Ledecy in her "workplace" of a swimming pool, this sidelining may be sporadic and evanescent, encapsulated in episodic anecdotes or media coverage.<sup>50</sup> In more conventional employment settings, this sidelining may be

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organizational practices that cannot be traced to the sexism... [of a] bad actor.") (citation and internal quotations omitted).

48. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 511 (7th Cir. 1997).

49. See *supra* notes 24-37 and accompanying text.

50. See *infra* at II.A. While one might not immediately view the swimming pool or other athletic venue as a "workplace" in any traditional sense, those athletes who devote the vast majority of their time, energy, and effort to training and competing in these athletic environments (even "amateur" Olympic and collegiate athletes) likely would characterize their training as akin to any a full-time professional obligation. See *Elite Athletes Spend 10,000 Hours Training for London 2012*, INSIDE THE GAMES (Nov. 18, 2010), <https://www.insidethegames.biz/articles/11108/elite-athletes-spend-10000-hours-training-for-london-2012> (noting that "[t]he average British athlete will have been training six hours a day, six days a week, 12 months a year"); Jared Walch & Blake Marshall, *Should Athletes*

more entrenched, embedded in a host of policies, procedures and practices that function (perhaps unintentionally) to inhibit female employees' ability to succeed. Yet across all of these workplaces—whether the athletic field, the stage, the laboratory, or the boardroom—gender sidelining functions to undermine achievement.

A. *On the Field (or Court, or Pool): Sidelined Athletes*

The downplaying in the press of Ledecky's monumental accomplishment by no means represents an anomaly in the sports world, either with respect to athletic coverage generally or Olympic coverage specifically. Time and again, female athletes have found their feats minimized in the public eye and/or upstaged by those of their male peers. A recent study conducted by University of Southern California researchers found that coverage of women's sports barely has increased over the past twenty-five years, despite a substantial rise in the number of girls and women who play youth, high school, college and professional sports.<sup>51</sup> According to this study, which focused on Los Angeles broadcasting affiliates and ESPN's SportsCenter program, coverage of women's sports actually has *decreased* in recent years, with the Los Angeles-based stations devoting only 3.2% of their coverage to women's sports (down from 5% in 1989), and SportsCenter devoting a paltry 2% of airtime to women's sports (a number that has remained flat since the study began tracking this program in 1999).<sup>52</sup> The study also found that the manner in which female

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*Be Paid to Play?*, DAILY UTAH CHRON. (Oct. 17, 2016), <http://dailyutahchronicle.com/2016/10/17/print-great-debate-article/> (citing NCAA survey that found that in 2011, Division I football players averaged 43 hours of practice per week, Division I baseball players practiced 42.1 hours per week, and Division I basketball players practiced 39.2 hours per week); Allen Sack & Gerald Gurney, *Excessive and Exploitive Demands*, INSIDE HIGHER ED. (Mar. 22, 2016), <https://www.insidehighered.com/views/2016/03/22/college-athletes-must-spend-unreasonable-amount-time-their-sports-essay> (citing study that found that Pac-12 student athletes spend approximately 50 hours per week on athletics during the season); *but see* Kerry Close, *Why It's So Hard to Earn a Living as an Olympic Athlete*, TIME (Aug. 10, 2016), <http://time.com/money/4428302/2016-rio-olympics-earning-side-jobs> (noting the paltry compensation paid to most Olympic athletes and observing that many must take part-time side jobs to pay the bills while they train). While not directly comparable to the "work" of professional athletes and other more traditional employees, the efforts of these athletes – and the manner in which they are treated – remains a relevant point of comparison for purposes of the arguments articulated herein.

51. *See* Andrew Good, *When It Comes to Women in Sports, TV News Tunes Out*, USC NEWS (June 5, 2015), <https://news.usc.edu/82382/when-it-comes-to-women-in-sports-tv-news-tunes-out>; *see also* Kiley Kroh, *SportsCenter's Shameful Coverage of Women's Sports*, THINKPROGRESS (June 12, 2015), <https://thinkprogress.org/sportscenters-shameful-coverage-of-women-s-sports-44f532355497>.

52. *See* Good, *supra* note 51; *see also* Kroh, *supra* note 51; *cf.* Kelly Wallace, *The Real March Madness: When Will Women's Teams Get Equal Buzz*, CNN (Mar. 14, 2016), <http://www.cnn.com/2015/03/30/living/feat-march-madness-womens-sports-attention-money-men/> (noting that the men's Final Four teams received front page attention in the New York Times in 2016, while the women's teams garnered "a story without a photo deep in the sports section").

athletes are covered differs from that of their male peers. Sports announcers tend to tone down their typically boisterous and colorful commentary when covering women, adopting a much flatter delivery.<sup>53</sup> When female athletes do receive media attention, they often are portrayed as mothers and girlfriends, instead of as competitors.<sup>54</sup> In the words of one of the study's co-authors, "[t]hese shows function as a sort of 'mediated man cave'—a place set up by men for men to celebrate men's sensational athletic accomplishments, while for the most part ignoring women's."<sup>55</sup>

This different attitude toward male versus female athletes manifests in ways that surpass mere television airtime. While both men and women may obtain contracts to advertise products for Nike or Adidas, significantly more men than women receive these lucrative opportunities—prompting one recent headline to ask, "Why is it that men are given contracts with Nike, while women have to pose for *Sports Illustrated* to get paid?"<sup>56</sup> Moreover, while some female athletes (such as Venus and Serena Williams) may receive attention on par with their male peers,<sup>57</sup> others—such as Breanna Stewart, the "finest college women's basketball player in the world . . . now, and probably ever"—remain largely unknown to most of the sports-watching public.<sup>58</sup>

The 2016 Olympic Games in Rio seemed starkly to exemplify this dismissive attitude of the media when covering female athletes. For example, after Hungarian swimmer Katinka Hosszu swam to a record-breaking win in the 400-meter individual relay, shattering the world record by two seconds, NBC sportscaster Dan Hicks appeared to credit Hosszu's husband (who was also her coach) for the win, commenting as cameras panned to her husband, "[a]nd there's the man responsible."<sup>59</sup> After Corey Cogdell-Unrein (who happens to be married to Chicago Bears' lineman Mitch Unrein) won a bronze medal in trap shooting, the Chicago Tribune tweeted: "Wife of Bears' lineman wins bronze today in Rio Olympics . . . ," failing even to mention Unrein by

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53. See Good, *supra* note 51.

54. See *id.*

55. See *id.*

56. Sam Geraghty, *Why Are Male Athletes More Valued Than Female Athletes*, ODYSSEY (June 29, 2015), <https://www.theodysseyonline.com/why-male-athletes-more-valued-than-female-athletes>.

57. See Howard Megdal, *Women's Sports Shouldn't Suffer From Lack of Attention*, USA TODAY (Jan. 1, 2016), <https://www.usatoday.com/story/sports/2015/12/30/womens-sports-lack-attention-breanna-stewart/78081254>.

58. *Id.*

59. Susan Macdonald, *Twitterverse Erupts in Fury Over Sexist Reporting of the Olympics*, INQUISITER (Aug. 8, 2016), <http://www.inquisitr.com/3397137/twitterverse-erupts-in-fury-over-sexist-reporting-of-the-olympics>; see also Lee Moran, *The Media Are Saying And Doing A Bunch Of Sexist Stuff During The Olympics*, HUFFINGTONPOST (Aug. 8, 2016), [http://www.huffingtonpost.com/entry/rio-2016-sexism-media\\_us\\_57a840dbe4b056ba215f03c](http://www.huffingtonpost.com/entry/rio-2016-sexism-media_us_57a840dbe4b056ba215f03c).

name or note the sport in which she achieved this accomplishment.<sup>60</sup> The BBC incurred the wrath of many when it reported on the surprise engagement ring that Chinese diver He Zi received immediately after the medal ceremony in which she had won a silver medal, describing the ring as “an even bigger prize.”<sup>61</sup> Even the vaunted U.S. women’s gymnastics team was not immune from such demeaning coverage, as one unnamed NBC announcer observed the team’s excited huddle after dominating the gymnastics qualifying round and noted that the women “might as well be standing in the middle of the mall . . . .”<sup>62</sup>

Some may argue that slights like those discussed above are just that—minor slights that, in the broader context of coverage, do not define women’s role within sports in general or the Olympics in particular. In the heat of the moment, a broadcaster misspoke; a tactless (but not malicious) headline slipped past an editor. Such small missteps should not be magnified into expansive representations regarding the scope of gender bias in sports. Indeed, justifications abound for many of these incidents: SportsCenter and other programs devote more time to covering men’s sports because there is a greater demand and audience for that content.<sup>63</sup> As to the downplaying of Ledecky’s feat, Phelps was more famous than Ledecky, and therefore a newspaper—whose ultimate focus remains on maximizing sales—headlined their article with the swimmer whose “household name” was more likely to attract readers.<sup>64</sup> Chicago readers understandably would be excited to connect Ms. Cogdell-Unrein with their city’s more well-known football player, and Katinka Hosszu’s husband, in his role as her coach, presumably did play some role in her achievement. Yet as one commentator observed, “[t]here may be a reasonable explanation for this or that seemingly sexist incident, but that doesn’t make the big picture any less tiresome . . . .”<sup>65</sup>

Notably, the skewed coverage of all of these athletes appears to be part of a much bigger picture—one in which the very language that we use to describe female athletes profoundly differs from that which applies to their male peers. A recent study out of the University of Cambridge that focused on the

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60. See <https://twitter.com/chicagotribune/status/762401317050605568?lang=en>; see also Macdonald, *supra* note 59; Moran, *supra* note 59. Notably, even the Tribune’s accompanying article did little to ameliorate this disparity. Under the headline, “Corey Cogdell, wife of bears lineman Mitch Unrein, wins bronze in Rio,” the article similarly failed to mention the sport in which she had received her medal or to note that this was the second medal that she had won in the Olympics and her third time competing in the Games.

61. Rachel Verona Cote, *Silver Medalist’s Boyfriend Proposes, BBC Calls It ‘an Even Bigger Prize,’* JEZEBEL (Aug. 14, 2016), <http://jezebel.com/silver-medalists-boyfriend-proposes-bbc-calls-it-an-ev-1785283189>.

62. See Macdonald, *supra* note 59 (internal quotations omitted).

63. Geraghty, *supra* note 56 (“Many people cite the fact that female athletes get paid less due to the fact that men’s sports generate more spectators, and therefore more revenue for the owner.”).

64. See Crocket, *supra* note 2.

65. *Id.*

differences in how male and female athletes are described found, *inter alia*, that men are two to three times more likely than women to be mentioned in a sporting context, while women are disproportionately described in relation to their marital status, age or appearance.<sup>66</sup> The study found that the words “men” or “man,” when used in a sports context, were associated with words like “fastest,” “strong,” “big,” “real,” and “great.”<sup>67</sup> In contrast, notable word associations for women in sports included were “aged,” “older,” “pregnant,” “married,” or “unmarried.”<sup>68</sup> Differences also emerged even when stories focused just on athletes’ actual performance: Male athletes were associated with words like “mastermind,” “beat,” “win,” “dominate,” and “battle,” while female athletes were associated with words like “compete,” “participate,” or “strive.”<sup>69</sup>

While some may write off these differences in the amount and nature of coverage simply as a reflection of a biased and/or misogynistic media, these disparities in fact can significantly impact an athlete’s career trajectory. Not only will many female athletes garner substantially less revenue in endorsement deals as a result of this skewed coverage,<sup>70</sup> but this biased coverage also can directly impact an athlete’s overall performance. One study, reporting on a number of controlled laboratory and field experiments, found that “when negative stereotypes are brought to mind in a sports performance context . . . they create a burden that robs athletes of their potential.”<sup>71</sup> This result held true regardless of whether the stereotypes at issue took the form of blatant biased statements or more subtle reminders of gender differences.<sup>72</sup> Moreover, the study’s authors found that “being highly skilled, prepared, and invested in sport makes athletes more, not less, susceptible to stereotype threat.”<sup>73</sup> Focusing specifically on gender-related stereotypes, the authors found that the presence of such negative stereotypes impaired the performance of female athletes.<sup>74</sup>

Significantly, none of the treatment described above likely would fall within the ambit of existing antidiscrimination laws. Unlike situations in which female athletes have sued alleging that they have been paid less because of their gender,<sup>75</sup> or have been fired from their position because they are

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66. See *Aesthetics Over Athletics When it Comes to Women in Sport*, UNIVERSITY OF CAMBRIDGE (Aug. 12, 2016), <http://www.cam.ac.uk/research/news/aesthetics-over-athletics-when-it-comes-to-women-in-sport>.

67. *Id.*

68. *Id.*

69. *Id.*

70. See Geraghty, *supra* note 56.

71. Jeff Stone, Aina Chalabaev & C. Keith Harrison, *The Impact of Stereotype Threat on Performance in Sports*, in *STEREOTYPE THREAT* 217, 227 (Michael Inzlicht & Toni Schmader, eds., Oxford Univ. Press 2012).

72. See *id.*

73. *Id.*

74. See *id.* at 222-23.

75. See, e.g., Laura Santhanam, *Data: How Does the U.S. Women’s Soccer Team Pay Compare to the Men?* PBS NEWSHOUR (Mar. 31, 2016), <http://www.pbs.org/newshour/>

women,<sup>76</sup> an athlete likely could not prevail in a gender discrimination claim solely based upon the adjectives used to describe her to the public, or based upon the relative size of the newspaper font used to describe her accomplishments. Yet for the athletes who feel undermined, ignored, or pushed to the sidelines, these harms nonetheless are very real.

### B. *On the Stage, Screen or Canvas: Sidelined Artists*

Just as with female athletes, female artists and entertainers similarly have seen their “workplace” contributions downplayed or overlooked. In the visual arts, women remain significantly underrepresented, as museum exhibits tend to showcase works by male artists at a far greater rate than those of their female peers. One recent survey conducted in London (one of the capitals of the international art world) found that of 134 commercial galleries surveyed, representing a total of 3163 artists, only 31% of the represented artists were women, and only 5% of galleries surveyed represented an equal number of male and female artists.<sup>77</sup> Similar findings emerged from an examination of the Metropolitan Museum of Art (“Met”) in New York. Of the 169 artists whose works were covered by the survey, only 13 were women,<sup>78</sup> and not even 5% of the artists in the modern galleries were female.<sup>79</sup> (Ironically, 85% of the nudes found in those same galleries were female, prompting a feminist group known as The Guerrilla Girls to create a poster inquiring, “Do women have to be naked to get into the Met. Museum?”)<sup>80</sup>

There’s nothing new about female artists seeing their creative endeavors neglected. In years past, “male artists routinely signed their names to work by

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rundown/data-how-does-the-u-s-womens-soccer-team-pay-compare-to-the-men (discussing lawsuit filed by U.S. Women’s National Soccer Team against the U.S. Soccer Federation alleging pay discrimination); *see also* Andrew Das, *Pay Disparity in U.S. Soccer? It’s Complicated*, N.Y. TIMES (Apr. 21, 2016), [https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html?\\_r=0](https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html?_r=0) (same).

76. *See, e.g.*, *Sobba v. Pratt Cmty. Coll. & Area Vocational Sch.*, 117 F. Supp. 2d 1043, 1051-52 (D. Kan. 2000) (denying summary judgment to defendant on female plaintiff’s claim that termination from tennis coaching position violated Title VII); *cf.* Mark Zeigler, *Beth Burns Wins Wrongful Termination Suit vs. SDSU*, SAN DIEGO TRIB. (Sept. 28, 2016), <http://www.sandiegouniontribune.com/sports/aztecs/sd-sp-burnsverdict-20160928-story.html> (discussing \$3.35 million verdict received by former San Diego State University coach on claim of whistleblower retaliation following complaints of Title IX violations).

77. *See* Louisa Elderton, *Redressing the Balance: Women in the Art World*, THE WHITE REV. (July 2013), <http://www.thewhitereview.org/art/redressing-the-balance-women-in-the-art-world>.

78. *See Do Women Have to be Naked to Get into the Met. Museum?*, NAT’L GALLERY OF ART, <https://www.nga.gov/content/ngaweb/Collection/art-object-page.139856.html>.

79. *See id.*

80. *See id.*

their wives, sisters or daughters who worked with them,”<sup>81</sup> and dealers would forge men’s signatures on female artists’ work, which would allow them to charge more for such pieces.<sup>82</sup> For example, while artist Margaret Keane painted a series of pictures called “the big-eyed waifs” that gained great popularity in the 1960’s, her husband Walter Keane “convinced her that they would make more money if he put his name on the paintings.”<sup>83</sup> Works by nineteenth-century artist Caroline Louisa Daly for years were attributed to two male artists, even as they hung on the walls of one of the largest galleries in Atlantic Canada.<sup>84</sup> A recent exhibit by the Tate Modern museum in London attempted to ameliorate the extent to which female artists had been “removed and erased” from the story of the development of pop art,<sup>85</sup> featuring work by female artists from the 1960’s and 1970’s that previously had been “marginalised and ignored by a sexist art establishment.”<sup>86</sup>

Moving from the visual arts to the entertainment industry, female artists similarly have been shoved aside. No one blinks, for example, upon hearing about the double standard that applies to movie actresses with respect to their age and appearance.<sup>87</sup> While male actors successfully serve as leading men in romantic comedies and dramas well into their sixties, female actresses age out of these roles by their early forties, if not sooner.<sup>88</sup> Comedian Amy Schumer notoriously captured this dilemma in her skit “Last Fuckable Day,” which aired on her sketch comedy series, *Inside Amy Schumer*, in April 2015.<sup>89</sup> In the skit, Schumer (age 35) joins actresses Tina Fey (age 46), Patricia Arquette (age 48),

81. See *Are Women Artists Ignored by the Art World? You Tell Us*, THE GUARDIAN (July 16, 2009), <https://www.theguardian.com/lifeandstyle/2009/jul/17/women-artists-your-responses>.

82. See *id*; see also Jessica Samakow, *11 Women Who Did Groundbreaking Things that Men Got the Credit for*, HUFFINGTON POST (Mar. 16, 2017), [http://www.huffingtonpost.com/entry/11-women-who-did-groundbreaking-things-that-men-got-the-credit-for\\_us\\_58ca9e67e4b00705db4ca2f5](http://www.huffingtonpost.com/entry/11-women-who-did-groundbreaking-things-that-men-got-the-credit-for_us_58ca9e67e4b00705db4ca2f5); Ashifa Kassam, *19<sup>th</sup>-Century Female Artist Finally Gets Credit for Works Attributed to Men*, THE GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/world/2017/feb/01/caroline-louisa-daly-art-men-attribution>.

83. Samakow, *supra* note 82.

84. See Kassam, *supra* note 82.

85. Mark Brown, *Tate Modern Highlights Pop Art by Women Ignored by Sexist Establishment*, THE GUARDIAN (Sept. 14, 2015), <https://www.theguardian.com/artanddesign/2015/sep/14/tate-modern-pop-art-women-ignored-sexist-establishment>.

86. *Id*.

87. See Marshall Fine, *The Double-Standard for Movie Actresses*, HUFFINGTON POST (Jan. 3, 2012), [http://www.huffingtonpost.com/marshall-fine/the-double-standard-for-m\\_b\\_1073372.html](http://www.huffingtonpost.com/marshall-fine/the-double-standard-for-m_b_1073372.html).

88. See *id*; see also Adam Sherwin, *Emma Thompson: Women in Film Industry are Still Judged by Their Age and Appearance*, INDEP. (July 20, 2015), <http://www.independent.co.uk/arts-entertainment/films/news/emma-thompson-women-in-film-industry-are-still-judged-by-their-age-and-appearance-10401863.html> (describing interview of 56 year old actress Emma Thompson who argued that female actresses face greater sexism now than when she began her career).

89. Amy Schumer, *Inside Amy Schumer - Last F\*\*kable Day*, YOUTUBE (Apr. 22, 2015), <https://www.youtube.com/playlist?list=PL1gI2eKjrAW--IJe7gFmk5dt75EGVLzJd>.

and Julia Louis-Dreyfus (age 56) for a picnic to celebrate Louis-Dreyfus's "last fuckable day in Hollywood,"<sup>90</sup> a day that Louis-Dreyfus describes by saying, "in every actress's life, you reach a point when the media decides you're not believably fuckable anymore." Asked by Schumer, "but what about men, like who tells men when it's their last fuckable day?" the others laughed and responded, "honey, men don't have that day . . . they're fuckable forever."<sup>91</sup>

Pages of ink likewise have been spilled debating the seemingly inane question of whether female entertainers are as funny as men.<sup>92</sup> While speculation abounds as to the origins of this debate—with biological, genetic, and even anatomical explanations put forth by those who adhere to this view<sup>93</sup>—the fundamental idea that "women aren't funny" has become embedded in our social fabric.<sup>94</sup> When comedy translates to television or movies, whether through late night talk shows or big budget comedy films, it remains the purview of men.<sup>95</sup> Men predominate the writing staffs and hosting positions for late night talk shows, as well as the lead roles in the vast majority of big budget comedy films.<sup>96</sup> Even as female comics have garnered more prominence in recent years, their success still has seemed linked to their conforming to entrenched gender norms, including the apparent requirement that successful female comics also must be physically attractive.<sup>97</sup>

Even where women remain physically hidden from view, such as in voiceovers for television or movie trailers, they struggle to break into the entertainment industry. Women are seldom cast for such voiceover jobs, with producers invariably choosing deeper and more powerful male voices for these roles.<sup>98</sup> As one talent agent in this industry observed, "[t]here are some very talented, very gifted women in this business that can satisfy any request for a

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90. Bruce Handy, *An Oral History of Amy Schumer's "Last Fuckable Day" Sketch*, VANITY FAIR (May 3, 2016), <http://www.vanityfair.com/hollywood/2016/05/amy-schumer-last-fuckable-day> (internal quotations omitted).

91. *Id.* Ironically, the show's producers (including Schumer) initially had trouble casting this sketch because they were unable to "find[] three actresses willing to acknowledge age and vulnerability." *Id.*

92. See, e.g., Alessandra Stanley, *Who Says Women Aren't Funny?*, VANITY FAIR (Mar. 3, 2008), <http://www.vanityfair.com/news/2008/04/funnygirls200804>; Dean Burnett, *Why Do People Believe Women Aren't Funny?*, THE GUARDIAN (Feb. 11, 2014), <https://www.theguardian.com/science/brain-flapping/2014/feb/11/women-arent-funny-why-do-people-believe-this>.

93. See Burnett, *supra* note 92.

94. See *id.*

95. See Stanley, *supra* note 92.

96. See *id.*

97. See *id.* (noting that "[n]ow a female comedian has to be pretty—even sexy—to get a laugh," and observing that "the funniest women on television are youthful, good-looking, and even, in a few cases, close to beautiful").

98. See Andy Isaacson, *Why Men Always Tell You to See Movies*, N.Y. TIMES (Jan. 27, 2012), <http://www.nytimes.com/2012/01/29/movies/trailer-voice-over-work-scarce-for-women.html>.



narrator, but the opportunities aren't given to them."<sup>99</sup> Notably, this is true despite the fact that research indicates that the human brain is wired to *prefer* female voices over male voices (hence, the reason for using female robotic voices in GPS and other devices).<sup>100</sup> However, both males and females tend to trust male voices more, perceiving deeper (i.e. male) voices to be smarter and more authoritative.<sup>101</sup>

Finally, in some circumstances, women in the entertainment industry not only have been figuratively shoved aside, but also literally pushed out of the limelight, such as when Kanye West famously lunged onto the stage during the 2009 MTV Video Music Awards in the midst of Taylor Swift's acceptance speech, grabbed the microphone, and launched into a monologue about who *he* believed should have won her award.<sup>102</sup> While one might assert that Ms. Swift's gender had nothing to do with Mr. West's outburst (particularly given he stormed the stage to advocate for another female performer, Beyonce),<sup>103</sup> one wonders whether he would have had the temerity to elbow aside Bruno Mars or Justin Timberlake in the midst of their acceptance speeches.

Just as with the slights faced by female athletes, none of the upstaging or sidelining that female artists have endured likely would give rise to an antidiscrimination claim. Art, by its very nature, is subjective. A gallery or museum quite easily could defend a decision to favor male artists over their female counterparts on stylistic grounds, arguing that gender was irrelevant to their decision. Members of the public (and the casting directors, producers and other executives who cater to them) are entitled to their opinions regarding who is funny, beautiful, or sexually desirable. Taylor Swift might have felt insulted or demeaned by Kanye West's interruption, but she would be hard-pressed to fit his conduct within the framework of Title VII. Yet just as athletes who have been overlooked suffer from this treatment, so too do female painters, sculptors, singers and performers—if not legally, then psychologically, emotionally, financially and artistically.

### C. *In the Laboratory: Sidelined Scientists*

While athletes and entertainers represent somewhat non-traditional "employees" whose contributions often are minimized due to their gender, female scientists—more traditional workers—also have experienced sidelining at work. Even the briefest Internet search reveals a long list of articles describing the plight of female scientists who in years past saw their

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99. *Id.*

100. *See id.*

101. *See id.*

102. *See* Jessica Bennett, *How Not to Be 'Maninterrupted' in Meetings*, TEMIN AND COMPANY (Jan. 14, 2015), <http://www.teminandcompany.com/must-reads/women-girls-lead-ership/2246-how-not-to-be-maninterrupted-in-meetings> (hereinafter "Bennett Maninterrupted").

103. *Id.*

professional contributions devalued, disregarded, or in some cases usurped.<sup>104</sup> For example, many members of the public recently have come to learn about the accomplishments of Rosalind Franklin, a British biophysicist whose DNA research proved critical to the Nobel Prize-winning work of male scientists James Watson, Francis Crick and Maurice Wilkins.<sup>105</sup> Scores of female scientists like Franklin similarly have been overlooked throughout history. Jocelyn Bell Burnell's research on pulsars ultimately led to a Nobel Prize—not for her, but for her male supervisor, along with another male scientist.<sup>106</sup> Microbiologist Esther Lederberg worked alongside her scientist-husband to develop a way easily to transfer bacterial colonies from one petri dish to another.<sup>107</sup> Their work resulted in a Nobel Prize for Mr. Lederberg, but not for his wife.<sup>108</sup> Researcher Nettie Stevens' work proved crucial to determining how an organism's sex is determined, but a fellow researcher who conducted similar work was the only one to see his name credited in genetics textbooks.<sup>109</sup>

This upstaging of female scientists can take many forms. In some cases, as noted above, female scientists simply often are denied proper credit for their work,<sup>110</sup> instead seeing their research attributed to male colleagues (or, in some cases, their spouses or male siblings).<sup>111</sup> Female scientists also encounter unfairness in their appointments or academic standing, such as through being

104. See, e.g., Jawad Iqbal, *The Women Whom Science Forgot*, BBC NEWS (June 19, 2015), <http://www.bbc.com/news/science-environment-33157396>; see also Jane J. Lee, *6 Women Scientists Who Were Snubbed Due to Sexism*, NATIONAL GEOGRAPHIC (May 19, 2013), <http://news.nationalgeographic.com/news/2013/13/130519-women-scientists-overlooked-dna-history-science>; Alessandra Potenza, *Why It's So Important For Girls to Find Role Models in Female Scientists*, THE VERGE (Mar. 8, 2017), <https://www.theverge.com/2017/3/8/14835840/sam-maggs-wonder-women-stem-role-models-gender-sexism>.

105. Lee, *supra* note 104 (asserting that “Franklin was robbed of recognition throughout her career”); see also Iqbal, *supra* note 104 (calling Franklin's work on imaging the DNA molecule “critical to deciphering its structure—one of the biggest and most important scientific breakthroughs of the 20th Century,” but noting that only Watson, Crick and Wilkins received a Nobel Prize for their work).

106. See Lee, *supra* note 105.

107. See *id.*; see also Iqbal, *supra* note 104.

108. See Lee, *supra* note 104; see also Iqbal, *supra* note 104.

109. See Lee, *supra* note 104.

110. See *supra* notes 104-09 and associated text; see also Potenza, *supra* note 105 (observing that “there are actually *so many* women whose accomplishments have been lost to time, or the credit was taken by their male colleagues, or in some cases they intentionally gave away the credit”) (emphasis in original).

111. See Potenza, *supra* note 105; see also Lee, *supra* note 105 (citing sociologist who found that female scientists “typically had paltry resources and fought uphill battles to achieve what they did, only to have the credit attributed to their husbands or male colleagues”) (internal quotations omitted); *Are Women Artists Ignored by the Art World? You Tell Us*, *supra* note 81 (quoting reader letter that asserted that “five and six hundred years ago male artists routinely signed their names to work by their wives, sisters or daughters . . . Later, unscrupulous dealers forged men's signatures on female artists' work because they would fetch higher prices.”).

denied prestigious positions that they otherwise deserve.<sup>112</sup> Female scientists often lack appropriate role models to guide them into and through a STEM career.<sup>113</sup> Finally, they frequently face a public narrative that dismisses the idea that women are capable of scientific expertise.<sup>114</sup> Indeed, it was barely more than a decade ago that former Harvard University President Larry Summers drew ire from those both inside and outside of the scientific community with his now-infamous comment that certain “innate” differences between men and women might partially explain the under-representation of female scientists at elite universities.<sup>115</sup>

In addition to anecdotal evidence of the sidelining faced by female scientists at work, various studies also have documented the ways in which female scientists operate at a significant disadvantage when compared to their male peers. For example, one recent study by researchers at Yale University found that established scientists at top research universities unconsciously rate up-and-coming female scientists lower than men who have identical credentials.<sup>116</sup> According to the study, these scientists “judge women less capable, less worthy of hiring and less deserving of mentoring.”<sup>117</sup> A separate study, which examined the recommendation letters submitted for highly selective geoscience postdoctoral fellowships, found that female scientists are less likely than male scientists to be described as excelling beyond their peers.<sup>118</sup> Researchers found that letters written for female scientists typically characterized the students as “solid scientists doing good work,” using phrases such as “highly intelligent” and “very knowledgeable”—terms that were complimentary but were less likely to set female applicants apart from other candidates.<sup>119</sup> Letters for male candidates, in contrast, were more likely to

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112. See Lee, *supra* note 105 (noting that Esther Lederberg “had to fight just to be appointed a research associate professor, whereas she surely should have been afforded a full professorial rank”); see also Daniel J. Hemel, *Summers’ Comments on Women and Science Draw Ire*, THE CRIMSON (Jan. 14, 2005), <http://www.thecrimson.com/article/2005/1/14/summers-comments-on-women-and-science> (citing research finding, at the time of the study, that women comprised 35% of faculty at universities across the country but held only 20% of professorial positions in science and engineering).

113. See Giulia Alice Fornaro, *On female role models in science*, CERN (Mar. 7, 2014), <https://home.cern/cern-people/opinion/2014/03/female-role-models-science>.

114. See Potenza, *supra* note 105 (citing as one reason for female scientists being denied credit for their work the idea that “the public wasn’t willing to believe that women were capable of that kind of thought or invention or knowledge”).

115. Hemel, *supra* note 112.

116. See Meg Urry, *Why Bias Holds Women Back*, CNN (Oct. 1, 2012), <http://www.cnn.com/2012/10/01/opinion/urry-women-science>.

117. *Id.*; cf. Green, *supra* note 38, at 128 (discussing thirty-year-old study in which researchers identified “work culture” as a central component of women’s disadvantage in the traditionally male-dominated field of engineering, noting that success typically depended on one “conform[ing] to the image of the ‘technical jock,’ and women could not or did not want to do that.”) (internal quotations omitted).

118. Maggie Kuo, *Recommendation Letters Reflect Bias*, SCIENCE (Oct. 3, 2016), <http://www.sciencemag.org/careers/2016/10/recommendation-letters-reflect-gender-bias>.

119. *Id.* (internal quotation marks omitted).

describe the students as a “brilliant scientist,” a “trailblazer,” or “one of the best students I ever had.”<sup>120</sup>

Finally, another study conducted by Swedish researchers examined the peer review system of the Swedish Medical Research Council, one of the main funding agencies for biomedical research in Sweden.<sup>121</sup> The study’s results suggested that peer reviewers simply may not be able separate the scientific merit of an applicant’s funding application from his or her gender, finding that “peer reviewers over-estimated male achievements and/or underestimated female performance . . . .”<sup>122</sup> Specifically, the study found that peer reviewers gave female applicants lower scores than male applicants who had shown the same level of scientific productivity.<sup>123</sup> In fact, only the *most* productive group of female applicants in the study were deemed to be as competent as the *least* productive group of male applicants—a truly shocking disparity in how applicants were evaluated.<sup>124</sup>

To be sure, a female scientist today (unlike her predecessors) presumably would find relief under the law were her name wrongfully to be omitted from important research that she conducted.<sup>125</sup> She also likely would be entitled to relief if she could show that she was fired from her post due to her gender, or denied a promotion, or passed over for hiring because she was female.<sup>126</sup> She could not, however, prevail in a claim demanding that members of the public (including President Summers, as well as other less prominent individuals) change their views about women’s capabilities in the sciences. She could not use the law to generate appropriate female STEM role models where none presently exist. And while, in theory, she might prevail on a claim that asserted that a different standard applied to her work when compared to that of her male peers—particularly if some concrete, adverse action resulted from this discrepancy—proving that she was subject to this tougher standard likely would be difficult.

#### D. *On the Political Stage: Sidelined Politicians*

One might assume that female politicians—particularly those already in office—would enjoy immunity from this sidelining phenomenon given their ability to wield their power in order to make themselves heard. Sadly, however,

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120. *Id.* (internal quotation marks omitted).

121. Christine Wennerås & Agnes Wold, *Nepotism and Sexism in Peer Review*, 387 NATURE 341 (1997).

122. *Id.*

123. *See id.*

124. *See id.*

125. *Cf. Giordano v. Claudio*, 714 F.Supp. 2d 508 (E.D. Pa. 2010) (denying defendant’s motion to dismiss fraud, unfair competition, defamation, and civil conspiracy claims related to male scientist’s claims that he was improperly denied co-authorship credit for an academic article).

126. *See* 42 U.S.C. § 2000e-2(a).

female politicians also have had to struggle to overcome being undermined in their “workplace” of the political stage.

Perhaps the most illustrative example of sidelining in this context arose during the summer of 2016, after former Secretary of State Hillary Clinton won the Democratic nomination for President, following a nomination speech by her husband, former President Bill Clinton.<sup>127</sup> Despite the fact that Secretary Clinton made history as the first woman ever to be nominated for President, multiple newspapers—including the *Wall Street Journal*, *Chicago Tribune*, *Houston Chronicle*, and *Washington Post*—ran front page coverage the following morning that included a photograph only of *Bill*, with Hillary the nominee nowhere to be seen.<sup>128</sup> Several papers attempted to justify their decision by noting that Hillary had not been physically present for the nomination, appearing only via live video—a less attractive photo opportunity—and that Bill’s speech therefore had been the highlight of the night.<sup>129</sup> Other newspapers, however, found their way around this obstacle, publishing pictures of excited women in the crowd, or using archival images of Secretary Clinton, or simply resigning themselves to the less-than-ideal image of Hillary on the Jumbotron.<sup>130</sup> This photo gaffe involved more than simply Secretary Clinton’s wounded pride, but rather went to the core of undermining her historic achievement. As one commentator observed, “in using a photo of the former president instead of one of the candidate, the narrative about Hillary’s historic success is now preserved in the history books as a joint effort, or one made possible by Bill.”<sup>131</sup>

This undermining plays out in less momentous political moments as well. For example, male voices outnumber female voices by a ratio of more than two-to-one in voiceovers for political ads, despite evidence that in many circumstances, men and women are equally effective as voiceover announcers in this context.<sup>132</sup> Similarly, studies have shown that men generally speak

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127. See Caitlin Gibson, *Hillary Clinton Won a Historic Nomination—But Bill Was on the Front Page*, WASH. POST (July 27, 2016), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/07/27/hillary-clinton-won-a-historic-nomination-but-bill-was-on-on-the-front-page/?utm\\_term=.ef773364d3aa](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/07/27/hillary-clinton-won-a-historic-nomination-but-bill-was-on-on-the-front-page/?utm_term=.ef773364d3aa); see also Dayna Evans, *Newspapers Announced Hillary Clinton’s Historic Nomination With Photos of Bill Clinton*, N.Y. MAG. (July 27, 2016), <http://nymag.com/thecut/2016/07/papers-announce-hillarys-nomination-with-bill.html>.

128. See Gibson, *supra* note 127 (noting that “Hillary Clinton won a historic nomination—but Bill was on the front page”).

129. *See id.*

130. *See id.*

131. Evans, *supra* note 127.

132. See Patricia Strach, Katherine Zuber, Erika F. Fowler, Travis Ridout & Kathleen Searles, *In a Different Voice? Explaining the Use of Men and Women as Voice-Over Announcers in Political Advertising*, 32 POL. COMM., 183, 183-205 (Feb. 3, 2015); see also *Study: Male Voice-overs Dominate Political Ads, But Women’s Voices May Be More Effective*, PR NEWSWIRE (Mar. 31, 2016), <http://www.prnewswire.com/news-releases/study-male-voice-overs-dominate-political-ads-but-womens-voices-may-be-more-effective-300242959.html> (discussing Strach et al. study).

significantly more than women, particularly in male-dominated settings like the legislative arena.<sup>133</sup> Women also are twice as likely as men to be interrupted—both by men and by other women<sup>134</sup>—a phenomenon highlighted during the debates between Secretary Clinton and now-President Trump, in which multiple news outlets noted the excessive degree to which Trump interrupted Clinton.<sup>135</sup> Even in an environment as ostensibly egalitarian as the Obama White House, female staffers felt compelled to create a strategy that they coined “amplification” to avoid their ideas being downplayed or appropriated by their male colleagues, whereby they would make sure that at meetings where other women were present, they consistently would repeat each other’s ideas, emphasizing credit to the original (female) speaker.<sup>136</sup>

Supreme Court nominations represent an intersection between politics and the law, and in this context as well, women have seen their contributions marginalized. A recent study conducted by Professors Hannah Brenner and Renee Newman Knake found, *inter alia*, that the gender or sexuality of female nominees to the Court was mentioned more frequently than the gender or sexuality of male nominees, at least during the initial week following the nominees’ being named.<sup>137</sup> Likewise, a limited sample of articles in the study indicated that female nominees’ appearance was mentioned more frequently than that of male nominees in the introductory week of the nomination, and that during this same period, the family life of a female nominee tended to be mentioned more frequently than that of a male nominee.<sup>138</sup> Anecdotal observations bear out this finding of female Supreme Court Justices being taken less seriously than their male peers. One need only observe the unsettling media reaction to the recent nominations of female Justices, where headlines from the mainstream news and online blogs included such taglines as, “The Case for More Mothers,” “Elena Kagan v. Sonia Sotomayor: Who Wore it Better,” and “Put a Mom on the Court.”<sup>139</sup> Several years earlier, both the *New York Times* and *Washington Post* repeatedly reminded readers of nominee Harriet Miers’ affinity for “girls’ nights out” and for engaging in “girl talk” with “[then-Secretary of State] Condi [Rice] and the other single girls.”<sup>140</sup> Addressing experienced jurists and diplomats in this manner doesn’t just play into trite stereotypes about women and their role in the workplace. It also

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133. Jessica Bennett, *Hillary Clinton Will Not Be Maninterrupted*, N.Y. TIMES (Sept. 27, 2016), [https://www.nytimes.com/2016/09/28/opinion/campaign-stops/hillary-clinton-will-not-be-maninterrupted.html?\\_r=0](https://www.nytimes.com/2016/09/28/opinion/campaign-stops/hillary-clinton-will-not-be-maninterrupted.html?_r=0) (hereinafter “Bennett Hillary Clinton”).

134. *See id.*

135. *See id.*

136. *See Id.*

137. Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession’s Pipeline to Power: A Study on Media Coverage of Supreme Court Nominees (Phase I, The Introduction Week)*, 84 TEMP. L. REV. 325, 364 (2012).

138. *See id.* at 364, 368. Brenner and Knake noted that additional data would be needed to corroborate these findings. *See id.*

139. *Id.* at 328 (citations omitted).

140. *Id.* at 365-66 (internal citations and quotations omitted).

diminishes the tremendous achievements of these accomplished individuals, obscuring their many successes behind such superficial descriptions of their contributions.<sup>141</sup>

Like their female peers who are athletes, artists, or scientists, female politicians also would face significant hurdles transforming their concerns about receiving less attention in the media or about enduring gendered newspaper stories into an actionable discrimination claim. Newspapers retain editorial discretion to put on their front pages those images that the editors believe will sell the greatest number of papers. Barring any libelous or otherwise defamatory content, it is difficult to imagine what type of claim a female politician could bring in response to any perceived demeaning coverage. Yet just as their peers in these other professions suffer real harm from these unactionable slights, so too do female politicians see their broader career paths hindered by this treatment.

#### E. *In the Boardroom: Sidelined Corporate Executives and Employees*

Perhaps nowhere is the sidelining of women more notable than in the corporate world. From the manner in which men and women conduct themselves in meetings, to the manner in which they receive mentoring and guidance, to the manner in which they receive credit (or not) for their workplace contributions, men and women tend to experience the workplace in profoundly different ways.<sup>142</sup>

In one respect, the demographic makeup of the modern workplace creates a perfect storm for women to run into barriers. Despite decades of efforts at expanding the percentage of women at work, women remain drastically underrepresented at every level of the corporate ladder, from entry level to management to vice president roles to C-suite positions.<sup>143</sup> A 2016 report by

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141. Notably, gender sidelining not only seems to impact the Supreme Court nomination process, but also appears to infect the Justices' time on the Court. A recent study conducted by researchers at Northwestern Pritzker School of Law found that female Justices on the Court were interrupted on average three times more than their male colleagues. See Claire Zillman, *Ruth Bader Ginsberg Used This Simple Trick to Cut Down on 'Manterrupting'* FORTUNE (Apr. 6, 2017), <http://fortune.com/2017/04/06/ruth-bader-ginsburg-supreme-court-advice-interrupting/>. The researchers also found that, as female Justices spent a longer time on the Court, they tended to cut back on their use of prefatory words and phrases like "sorry," "may I ask," "can I ask," and "excuse me" – language which often gives other Justices an opportunity to jump in and interrupt. *Id.* As the researchers noted, "[e]ssentially, with experience, female [J]ustices learned to talk more like men." *Id.*

142. See Nikki Waller, *How Men & Women See the Workplace Differently*, WALL ST. J. (Sept. 27, 2016), <http://graphics.wsj.com/how-men-and-women-see-the-workplace-differently> (observing that "[m]en and women experience very different workplaces, ones in which the odds for advancement vary widely and corporate careers come in two flavors: his and hers").

143. Lareina Yee et al., *Women in the Workplace 2016*, at 5 (Lean In, McKinsey & Company), <https://womenintheworkplace.com/2016> (hereinafter "McKinsey Report"); see also Rachel Feintzeig & Joann S. Lublin, *Female CEOs, Still a Rarity, Face Extra*

McKinsey & Company (“McKinsey Report” or “Report”) found that women are both hired and promoted at lower rates than men, leading to far fewer women occupying senior roles.<sup>144</sup> While existing antidiscrimination law is rife with precedent that could be used to vindicate an alleged gender-based failure to hire or to promote,<sup>145</sup> the law likely would fail to redress many of the more subtle obstacles that women frequently face in the corporate world.

1. *Gender Sidelining Manifests In Female Corporate Employees’ Access To Leaders And Opportunities For Growth*

One subtle yet pernicious obstacle encountered by female workers is a lack of access and opportunity that they receive in comparison to that provided to their male peers. The McKinsey Report found that only 67% of women (compared to 74% of men) believe that they are able to participate meaningfully in workplace meetings,<sup>146</sup> and that only 62% of women (compared to 68% of men) claim to recently have received a challenging work assignment.<sup>147</sup> The Report noted that “[w]omen get less access to the people and opportunities that advance careers and are disadvantaged in many of their daily interactions,”<sup>148</sup> and observed that while both men and women view sponsorship by senior leaders to be a key component of ultimate success, women reported fewer substantive interactions with senior leaders as compared to their male colleagues—a gap that seemed to widen as men and women advanced up through the corporate hierarchy.<sup>149</sup>

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*Pressures*, WALL ST. J. (Aug. 9, 2016), <https://www.wsj.com/articles/female-ceos-still-a-rarity-face-extra-pressures-1470750908> (noting that “[s]till a rarity in the highest offices of corporations, women hold just 4.4% of CEO spots at S&P 500 companies, according to Catalyst, a research group that tracks executive women”); Douglas M. Branson, *Pathways for Women to Senior Management Positions and Board Seats: An A to Z List*, 2012 MICH. ST. L. REV. 1555, 1555 (2012) (noting that “[a]lthough women have been graduated from law school, graduate business school (MBA), and medical schools since the mid-1970s at a 30% rate, escalating to well over 40% in the 1990s, women constitute only 3.5% of the corporate CEOs, 14% of the executive managers, and 12.5% of the corporate directors, holding approximately 16% of the board seats in the Fortune 500.”); Brenner & Knake, *supra* note 138 at 326-27 (observing that “94% of managing partners in largest law firms and less than 16% of equity partners are women, that women represent less than 20% of general counsels in Fortune 500 companies, barely 20% of law school deans, and less than 30% of tenured law professors”).

144. See McKinsey Report, *supra* note 143, at 4; see also *id.* at 6 (finding that promotion rates for women lag behind those for their male colleagues).

145. See generally Ming W. Chin, Rebecca A. Wiseman, Consuelo M. Callahan & David A. Lowe, *Title VII and the California Fair Employment and Housing Act*, CAL. PRAC. GUIDE EMP. LITIG., Ch. 7-A, ¶¶ 7:95, 7:96 (Nov. 2016) (citations omitted).

146. See McKinsey Report, *supra* note 143, at 11.

147. See *id.*; see also Waller, *supra* note 142.

148. McKinsey Report, *supra* note 144, at 10; see also Waller, *supra* note 143.

149. See *id.* at 13 (noting that at entry level 36% of women, compared to 38% of men, report having a substantive interaction with a member of senior leader at least once per week. At the middle manager level, 40% of women, compared to 46% of men, report such



2. *Gender Sidelining Manifests In Female Corporate Employees Being Held To A Higher Standard Than Their Male Peers*

In addition to concerns regarding lack of access and opportunity, many female executives and lower-level corporate employees also cite the sense that they are held to a different (higher) standard than their male peers. Reviewers, evaluators and peers simply seem to require more of women than they do of men.<sup>150</sup> Female CEO's in particular seem to experience such scrutiny, with everything from their management decisions to their strategic plans to their personal lives often being subject to rigorous public examination.<sup>151</sup> As a result of this scrutiny, many female executives shy away from entering into transactions unless they are confident that they will come out on top, because failure can have devastating consequences.<sup>152</sup> Professor Joan C. Williams has referred to this higher standard imposed on female employees as the "Prove It Again" bias, in which women must prove themselves again and again in order to get selected for managerial positions.<sup>153</sup> According to Williams, because the public has an easier time visualizing men (rather than women) as CEO's, government leaders, or as others in positions of power, they see female leaders as more of a risk, forcing them "to prove themselves over and over again."<sup>154</sup> While men find themselves judged according to their *potential*, women find themselves judged according to their *performance*, making even small failures seem critical.<sup>155</sup> Accordingly, women's mistakes tend to be noticed with greater frequency and are remembered for longer; they tend to be judged more

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an interaction. At the senior management level, only 51% of women, compared to 62% of men, report to having this type of interaction at least once per week.)

150. See Curt Rice, *Peer Evaluation is Not Objective: Academia and Law Firms*, CURT RICE SCIENCE IN BALANCE (Nov. 2, 2011), <http://curt-rice.com/2011/11/02/peer-evaluation-is-not-objective-academia-and-law-firms>; see also Monica Biernat, M.J. Tocci & Joan C. Williams, *The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment*, SOCIAL PSYCHOLOGY AND PERSONALITY SCIENCE (July 18, 2011).

151. See Feintzeig & Lublin, *supra* note 143.

152. See *id.*

153. See Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597, 667 (2011) (defining bias as arising "[w]hen women have to prove their competence over and over again in order to be judged as competent as men"); see also *Prove Yourself... Again: Why Women Get Overlooked for Management Positions*, WOMEN ON BUSINESS (May 6, 2015), <http://www.womenonbusiness.com/prove-yourself-again-why-women-get-overlooked-for-management-positions> (hereinafter "Why Women Get Overlooked").

154. Williams, *supra* note 153, at 667; see also *Why Women Get Overlooked*, *supra* note 153; cf. Bennett Hillary Clinton, *supra* note 133 (discussing research indicating that "the average person finds it easier to pair words like 'president' and 'executive' with male names and pictures, while words like 'assistant' and 'aide' cause us to think instinctively female").

155. See *Why Women Get Overlooked*.

rigorously than men by their superiors; and they tend to receive more polarized evaluations.<sup>156</sup>

A recent study co-authored by Professor Williams highlights the extra scrutiny imposed on female employees, focusing on the treatment of female junior attorneys at a Wall Street law firm.<sup>157</sup> Examining the performance evaluations received by both male and female junior attorneys—evaluations that included both a numerical rating and a narrative component—the study found that male attorneys received more favorable numerical ratings than their female peers, even when compared to women who were described in the narrative section of the review as having high levels of perceived technical competence.<sup>158</sup> In other words, female attorneys who were described very positively in the narrative portion of their evaluations received numerical scores that did not match those of seemingly “comparable” men.<sup>159</sup>

This differential treatment and heightened scrutiny for female employees may emerge in less formal ways as well. In a telling experiment conducted by two employees of a movie reviewing website, a male writer and a female writer switched email signatures for two weeks, ultimately highlighting the different manner in which clients treated men and women within their company.<sup>160</sup> When the male writer responded to emails under his female colleague’s email signature, he described the experience as “hell,” with clients questioning “everything he asked or suggested,” and treating him in a condescending manner—despite the fact that he had had easy interactions with those same contacts in the past, when he dealt with them as a male.<sup>161</sup> In contrast, his female colleague, who previously had been experiencing problems with her productivity, suddenly “had the most productive week of her career.”<sup>162</sup> The male writer concluded that he “wasn’t any better at the job” than his female colleague; he “just [had] had this invisible advantage.”<sup>163</sup> He previously had been able to accomplish more than his colleague not because of any innate

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156. *See id.*; *see also* Feintzeig & Lublin, *supra* note 143 (noting that female CEO’s such as Marissa Mayer and others “frequently face extra scrutiny for their management decisions”).

157. *See* Biernat et al., *supra* note 150.

158. *See id.* at 190.

159. *See id.*; *see also* Rice, *supra* note 150.

160. *See* Oril Matlow, *Email Mixup Helps Man Learn What It’s Really Like to be a Woman in the Workplace*, SOMELIFE (Mar. 10, 2017), <https://www.someccards.com/life/workplace/email-mixup-sexism>; *see also* Zlata Rodionova, *Woman Behind ‘Sexist Email Experiment’ Says Boss Refused to Believe Gender Discrimination Exists*, INDEP. (Mar. 13, 2017), <http://www.independent.co.uk/news/business/news/sexism-email-experiment-woman-boss-refuses-to-believe-gender-discrimination-a7626501.html>.

161. Matlow, *supra* note 161.

162. *Id.*

163. *Id.*

greater skill, but rather because she had had to spend time “convinc[ing] clients to respect her.”<sup>164</sup>

3. *Gender Sidelining Manifests In Female Corporate Employees’ Ideas Being Overlooked, Ignored And Usurped*

When female workers in the corporate world are not searching for opportunities and access that seem out of reach, or navigating standards and expectations that seem to apply more strictly to women, they must grapple with an even more daunting obstacle to success—the fact that their ideas and contributions often are overlooked, ignored, or in some cases misappropriated. The same McKinsey Report that decried the lack of opportunities available to women at work found that only 49% of women (compared to 54% of men) believe that their workplace contributions are valued appropriately.<sup>165</sup> Moreover, only 56% of women (compared to 63% of men) believe that they are turned to for input regarding important workplace decisions.<sup>166</sup> Behind these statistics lie troubling examples of why women adhere to these views.

Much already has been written upon the tendency of female workers to remain quiet at work, withholding contributions for fear of the “backlash” that speaking up might create. In one recent study that focused of the speaking patterns of chief executives (among others), researchers found that male executives who spoke more than their peers received 10% higher competency ratings from colleagues, while female executives who spoke more than their peers were rated (by both men and women) to be 14% *less* competent.<sup>167</sup> Women in a professional setting must worry about what tone to adopt when they do speak, fearing the consequences if they are either too passive or too aggressive.<sup>168</sup> Many feel that they must “walk[] a tightrope” when speaking at work, balancing between being “barely heard” or being seen as unpalatably forceful.<sup>169</sup>

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164. *Id.* A separate but equally-important additional level of scrutiny that female executives often face relates to the daunting task of balancing their careers with the demands of home life—a challenge faced to a far greater degree by women than men. *See generally* Richard Collier, *Naming Men as Men in Corporate Legal Practice: Gender and the Idea of “Virtually 24/7 Commitment in Law*, 83 *FORDHAM L. REV.* 2387 (2015); McKinsey Report, *supra* note 143, at 17; Waller, *supra* note 142. As PepsiCo CEO Indra K. Nooyi observed in a recent interview with *The Atlantic*, “the biological clock and the career clock are in total conflict with each other. Total, complete conflict.” Conor Friedersdorf, *Why PepsiCo CEO Indra K. Nooyi Can’t Have It All*, *ATLANTIC* (July 1, 2014), <https://www.theatlantic.com/business/archive/2014/07/why-pepsico-ceo-indra-k-nooyi-cant-have-it-all/373750>.

165. McKinsey Report, *supra* note 144, at 11.

166. *See id.*

167. Sheryl Sandberg & Adam Grant, *Speaking While Female*, *N.Y. TIMES* (Jan. 12, 2015), [https://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html?\\_r=0](https://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html?_r=0).

168. *See id.*; *see also* Bennett Maninterrupted, *supra* note 102.

169. Sandberg, *supra* note 167 (observing that when a woman speaks in professional settings, “[e]ither she’s barely heard or she’s judged as too aggressive. When a man says

Related to this often-self-imposed silence, many women find that when they do speak up, their ideas are commandeered by their (usually male) colleagues. Numerous columnists and commentators have written about the tendency for women to be “maninterrupted” at work,<sup>170</sup> and about women finding their ideas “bropropriated” or “bro-opted” by male colleagues.<sup>171</sup> A cartoon by Riana Duncan, originally published in *Punch Magazine*, poked fun at this phenomenon, showing an image of a boardroom populated by one woman and five men, with the caption “That’s an excellent suggestion, Miss Trigs. Perhaps one of the men here would like to make it.”<sup>172</sup> More serious scholars have observed this phenomenon as well. In her thesis, *Perceived Muted Voice and Its Impact on Female Communication Techniques in the Workplace*, Masters candidate Rachel Lepchitz studied the communication patterns of women who already perceived their voices as being “muted” in the workplace.<sup>173</sup> Lepchitz’s interviews with these women exposed their feeling that “their ideas [were] being ignored yet when a male or other counterpart repeats the same idea, they run with it.”<sup>174</sup> The women interviewed noted “times when their ideas were not heard, but when a male counterpart said something similar it was acknowledged.”<sup>175</sup> In a separate report—this time, a journalistic examination of women working in Silicon Valley—one veteran software engineer described an interview in which a male job applicant ignored both her and one of her female colleagues, only responding favorably when a male employee was sent to interview him.<sup>176</sup> Another female Silicon Valley employee summed up the atmosphere in her workplace by saying “[i]t wasn’t overt sexism; it was more like being dismissed and disrespected, not feeling

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virtually the same thing, heads nod in appreciation for his fine idea.”); see also Bennett Maninterrupted, *supra* note 102; Liza Mundy, *Why is Silicon Valley So Awful to Women*, *The Atlantic* (Apr. 2017), <https://www.theatlantic.com/magazine/archive/2017/04/why-is-silicon-valley-so-awful-to-women/517788> (citing the “elaborate jiu-jitsu it takes for a women to hold her own” in the tech industry).

170. See, e.g., Bennett Maninterrupted, *supra* note 102; Bennett Hillary Clinton, *supra* note 133; Jayne Reardon, *How to Stop Silencing Women in the Workplace*, *WORLD ECON. F.* (Feb. 24, 2015), <https://www.weforum.org/agenda/2015/02/how-to-stop-the-silencing-of-women-in-the-workplace>; Soraya Chemaly, *How Our Culture Encourages Its Women to Be Silenced*, *EYEZINE* (Dec. 23, 2015), <http://www.eyearcollective.com/women-silenced>.

171. See Reardon, *supra* note 170; see also Bennett Maninterrupted, *supra* note 102.

172. See *Riana Duncan Cartoon*, *PUNCH MAGAZINE* (Jan. 8, 1988), [http://punch.photoshelter.com/image/I0000eHEXGJ\\_wImQ](http://punch.photoshelter.com/image/I0000eHEXGJ_wImQ). This cartoon recently was reprinted in Chemaly, *supra* note 170.

173. Rachel Lepchitz, *Perceived Muted Voice and Its Impact on Female Communication Techniques in the Workplace* (Dec. 2012) (unpublished Masters Thesis, Gonzaga University) (on file with author). The study used a concept known as “muted group theory” to analyze the communication patterns of these women, defining “muted group theory” as a concept that “considers the non-dominant members in a communication system” and “holds that marginalized groups must communicate in a manner that is representative of the dominant members’ experiences rather than their own.” *Id.* at 9 (citation omitted).

174. *Id.* at 31 (internal quotations omitted).

175. *Id.* at 36.

176. See Mundy, *supra* note 169.

like we were good enough to be there—even though, objectively speaking, we were.”<sup>177</sup>

Of course, all of these potential slights exist alongside more overt examples of gender bias in the business world—examples that likely *could* support a cognizable discrimination claim. Women continue to receive unequal pay for arguably comparable work.<sup>178</sup> They continue to be denied promotions for reasons that often seem tied to nothing other than their gender.<sup>179</sup> And of course, women continue to face severe and pervasive sexual harassment in many workplaces.<sup>180</sup> Such actionable examples of gender bias, however, are beyond the scope of this paper. The more subtle instances of upstaging, ignoring, or otherwise disadvantaging women, without more, remain more difficult to fit into a Title VII mold. Simply providing female workers with less access to leaders or not greeting women’s ideas with appropriate recognition likely would not, in isolation, violate the law.<sup>181</sup> Even the notion of holding a female worker to a higher standard than her male colleague—something that seems more concrete and easily provable—often won’t suffice on its own, due to the inherently subjective nature of most evaluation processes.<sup>182</sup> So long as

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177. *Id.* (internal quotations omitted). Notably, this veiled sexism within the tech industry exists alongside more blatant sexual harassment. See Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, NEW YORK TIMES (June 30, 2017), [https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html?\\_r=0](https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html?_r=0).

178. See NATIONAL WOMEN’S LAW CENTER, <https://nwlc.org/issue/equal-pay-and-the-wage-gap> (noting that “Women in the U.S. who work full time, year round are paid only 80 cents for every dollar paid to men”); see also Jeanne Sahandi, 6 Things To Know About the Gender Pay Gap, CNN (Apr. 12, 2016), <http://money.cnn.com/2016/04/12/pf/gender-pay-gap-equal-pay-day> (stating that that gap between median male and female pay had not changed significantly since 2000); cf. Williams, *supra* note 152, at 597 (discussing impact of law firm compensation on women, including alleged denial of origination credit for female lawyers); Theresa Beiner, *Some Thoughts on the State of Women Lawyers and Why Title VII Has Not Worked for Them*, 44 IND. L. REV. 685, 688 (2011) (noting that within law firms, even women partners are paid less than their male counterparts, despite the fact that they are not any less productive than men in generating revenue) (citation omitted).

179. See, e.g., *Kahn v. Fairfield Univ.*, 357 F. Supp. 2d 496 (D. Conn. 2005) (denying summary judgment to employer on female employee’s failure to promote gender discrimination claim); *Berroth v. Farm Bureau Mut. Ins. Co., Inc.*, 232 F. Supp. 2d 1244 (D. Kan. 2002) (same).

180. See Kristen Bellstron, *25 Years After Anita Hill, Have We Made Progress On Sexual Harassment*, FORTUNE (Apr. 19, 2016), <http://fortune.com/2016/04/19/anita-hill-sexual-harassment-eeoc/> (interviewing then head of EEOC who noted that harassment claims in general, including sexual harassment, accounted for 30% of the charges received by EEOC and that agency had received 6,800 charges of sex-based harassment in the prior year).

181. See *supra* Part I.

182. See, e.g., *Weinstock v. Columbia University*, 224 F.3d 33, 45-46 (2nd Cir. 2000) (rejecting plaintiff’s assertion that “she was held to a stricter standard for tenure because she is a woman” in tenure process by noting that tenure evaluations of scholarship include both a “productivity” component and a “quality” component); see also Kevin Kruse, *The Performance Appraisal: A Workplace Evil That Must Be Destroyed Like a Blood Sucking Vampire*, FORBES (July 9, 2012), <https://www.forbes.com/sites/kevinkruse/2012/07/09/>

the workplace permits, fosters and replicates these more subtle gender-based distinctions, women will continue to feel sidelined in the corporate world.

### III. WHY GENDER SIDELINING MATTERS

Understanding the range of workplaces in which gender sidelining occurs and the various forms that this sidelining takes undoubtedly is an important endeavor. Equally important, however, is recognizing why gender sidelining matters. Far from some theoretical, obscure problem that simply makes us feel not-very-good about one aspect of society, the policies and practices that lead to gender sidelining have a host of significant ramifications in the workplace and beyond, silencing female voices at work, undermining women's productivity and job satisfaction, and hindering their advancement and perceived value. As discussed in greater detail below, the harms that flow out of gender sidelining not only create negative ramifications for *women* in their respective workplaces, but also work to the great detriment of society as a whole.

#### A. *Gender Sidelining Silences Female Voices*

Perhaps the most insidious impact of Gender Sidelining is the silencing of female voices in the workplace. As women feel less valued with respect to their contributions, they may choose to refrain from speaking out with their thoughts and ideas. Notably, the idea that female voices are silenced in the workplace actually runs counter to some of common assumptions about how men and women interact, both inside the workplace and beyond. While many in society adhere to the stereotype of the "chatty female," statistics show that men speak much more frequently than women (at least within professional settings).<sup>183</sup> In fact, many women report not only feeling as if they must keep their ideas to themselves at work rather than speak out, but also cite concerns that when they do speak out, their ideas often are discounted or ignored.<sup>184</sup> Facebook COO Sheryl Sandberg described this experience in an editorial that she wrote for the *New York Times*, along with co-author and Wharton Professor Adam Grant.<sup>185</sup> Sandberg and Grant described the careful balance that women must strike when they choose to speak in a professional setting, noting that a

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performance-appraisal/#85913f0176c2 (citing subjectivity and vagueness of standards and grading scales within annual performance reviews as reasons for arguing for their elimination).

183. See Reardon, *supra* note 170 (observing that "[s]tereotypically speaking, women talk a lot. Statistically speaking, men talk more – at least within professional settings").

184. See Waller, *supra* note 142 (noting that "a large share of women feel invisible at work, compared with male colleagues. From ordinary meetings to executive offices and boardrooms, many more women than men feel that they don't get credit for their ideas, or that their contributions aren't recognized . . . .")

185. See Sandberg, *supra* note 167.

woman “either [is] barely heard or she’s judged as too aggressive.”<sup>186</sup> As a result, Sandberg and Grant noted that women often conclude that “saying less is more.”<sup>187</sup>

Much has been written about this pressure upon women to remain passive at work. In some cases, this deference may be tied to broader notions of a woman’s femininity. In an article compellingly titled, *Do Women Lack Ambition*, psychiatrist and Cornell University medical professor Anna Fels wrote about “the unspoken mandate that [women] subordinate needs for recognition to those of others—particularly men.”<sup>188</sup> In Professor Fels’ view, one of the significant forms of discrimination faced by women is “the expectation that ‘feminine’ women will forfeit opportunities for recognition at home and at work.”<sup>189</sup> She observes that “[w]omen tend to feel foolish asking for appropriate acknowledgement of their contributions. They find it difficult to demand appropriate support—in the form of time, money, or promotion—to pursue their own goals. They feel selfish when they do not subordinate their needs to those of others.”<sup>190</sup> Thus, according to Professor Fels, “[w]hen women speak as much as men in a work situation or compete for high-visibility positions, their femininity is routinely assailed. They are caricatured as either asexual and unattractive or promiscuous and seductive . . . .”<sup>191</sup>

The findings of the Lepchitz study, discussed above,<sup>192</sup> provide further support for this concern that female communication at work is affected by a perceived need to self-censor. One female worker interviewed in Lepchitz’s study noted that, when she pitches ideas, she tends to suppress her energy and excitement, because she believes that this lack of emotion will be better

186. *Id.*

187. *Id.*; see also Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 932 (2015) (noting that professional women who fail to conform to the norms of their particular workplace – perhaps by behaving in a more assertive manner than expected and speaking out about workplace concerns – may find themselves faced with disapproval from co-workers, colleagues, friends and others); cf. Sally M. Reis, *Underachievement in Talented Females*, WORK LEFT UNDONE: CHOICES AND COMPROMISES OF TALENTED FEMALES (Creative Learning Press ed., 1998), available at <http://talentdevelop.com/articles/UITF.html> (noting in the school setting that “bright young girls are often caught in a bind between their intelligence and their gender. An eager, questioning mind may cause a student to call out in class, to debate, to argue, to ask questions. A boy who acts in this way may be labeled precocious, while a smart verbal girl who asks too many questions may be labeled aggressive, or even unfeminine.”).

188. Anna Fels, *Do Women Lack Ambition*, HARV. BUS. REV. (Apr. 2004), <https://hbr.org/2004/04/do-women-lack-ambition>.

189. *Id.*

190. *Id.* (noting that “[i]n both the public and private spheres, white, middle-class women are facing the reality that in order to be seen as feminine, they must provide or relinquish resources—including recognition—to others.”)

191. *Id.*; see also Jessica Fink, *Madonnas and Whores in the Workplace*, 22 WM. & MARY J. WOMEN & L. 255 (2016) (observing that “[r]egardless of her identity or status, a woman in the news tends to be represented in one of two ways—in terms of her domestic role or her sexual attractiveness.”) (internal quotations and citations omitted).

192. See Lepchitz, *supra* notes 173-75 and associated text.

received by her peers.<sup>193</sup> Another woman admitted that she often “hold[s] back criticism because has the potential to be perceived as whining, needy or complaining.”<sup>194</sup> Echoing Sandberg and Grant’s observations about women needing to strike a delicate balance when speaking,<sup>195</sup> this employee said that she thinks carefully before speaking, noting that while her silence could lead others to perceive her as uneducated or ignorant, her speaking out too much might be equated with complaining.<sup>196</sup> Still other women interviewed confessed to “self-silencing,”<sup>197</sup> or to “toning down and softening the firmness of their communications.”<sup>198</sup>

This silencing of female voices at work not only arises due to women’s tendency to self-censor, but also may result from a more unconscious downgrading of women’s ideas. Research has shown that the manner in which listeners break down information when both a male and female speaker are saying the same thing may differ significantly according to the gender of the speaker.<sup>199</sup> Indeed, it turns out that “the voice itself is the source of unconscious bias for the listener, and women are interpreted differently as a result.”<sup>200</sup> For example, a listener who hears a male speaker say the word “academy” might assume that he is speaking about a school, but listeners who hear a woman say the word “academy” more likely will presume that she is discussing an awards show.<sup>201</sup> In addition, gender can impact the extent to which others find a speaker to be dependable, intelligent or reliable. Research indicates that even when a female voice generally is deemed trustworthy, clear, and comprehensible, her voice still will receive lower ratings when compared with a man’s voice.<sup>202</sup> In fact, even if a man’s voice is deemed not-so-reliable,

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193. *See id.* at 47.

194. *Id.* at 32.

195. Sandberg, *supra* note 167.

196. *See* Lepchitz, *supra* note 173, at 32.

197. *Id.* at 46.

198. *Id.*

199. Vivian Giang, *How Unconscious Bias Is Affecting Our Ability to Listen*, FASTCOMPANY (Sept. 8, 2016), <https://www.fastcompany.com/3063218/how-unconscious-bias-is-affecting-our-ability-to-listen>.

200. *Id.*

201. *See id.* Fascinatingly, it appears that this vocabulary-related gender bias affects not just humans, but also machines. In a recent, groundbreaking study by Princeton University researchers, computer scientists had a commonly used artificial intelligence program “crawl” the World Wide Web, leading it to develop a vocabulary of 2.2 million words that it was able to use in grammatically correct ways. *See* Melissa Healy, *How a Computer Program Can ‘Learn’ Human Bias*, LA TIMES (Apr. 21, 2017), <https://www.pressreader.com/usa/los-angeles-times/20170421/281784218973855>. In capturing this fluency, the program adopted many of the same gender (and race) biases already exhibited by humans: It learned to anticipate that certain occupations or interests, like “computer programmer” or “doctor” or “mathematics,” were more likely to be associated with males, while female names were more likely to be associated to home- and family-related words than to career-oriented words.

202. *See* Giang, *supra* note 199.



or not very intelligent on its own, his voice will benefit from a boost in ratings when it is compared to a woman's voice.<sup>203</sup> In this way, women may find themselves silenced not by the content of their comments, but rather by inherent assumptions associated with their gender as a speaker.

Finally, and perhaps most unfortunately, this silencing that women experience in the workplace often becomes part of a vicious circle: The more women feel silenced or “man-terruted” or as if their ideas have been “bro-opted” by male peers, the more they may doubt their real value in the workplace. They “shut down, become less creative, less engaged . . . revert into [them]selves, wondering if it's actually [their] fault.”<sup>204</sup> It is in this vein that various scholars have studied the “imposter phenomenon” among women, where women—despite garnering objective indicators of achievement (degrees, honors, professional recognition)—“do not experience an *internal* sense of success.”<sup>205</sup> Indeed, as at least one author has observed, the presence of sex and gender stereotypes “are not only prevalent, but sometimes also self-fulfilling,”<sup>206</sup> noting the extent to which men and women are trained from a young age to buy into biased and gender-based views.<sup>207</sup> Thus, the more that women disengage and doubt their value, the less likely they are to speak up in the face of further interruptions or appropriations. Silence begets further silence; disempowerment begets disempowerment. Without any positive reinforcement to encourage women to push back against marginalizing behavior in the workplace, women may continue to tolerate (or even grudgingly expect) such sidelining, writing it off as simply another cost of doing business in the predominantly-male working world.

#### B. *Gender Sidelining Robs the Workplace of Female Input and Perspectives*

Closely related to the notion that gender sidelining silences women in the workplaces is the idea that those in the workplace inevitably will lose access to female input and perspectives. In other words, it is not only the silenced female speakers who suffer when women's ideas are crowded out; those of both genders who could have benefited from those ideas also lose out.

In their *New York Times* article, Sheryl Sandberg and Adam Grant noted an experiment conducted by University of Texas researcher Ethan Burriss in which

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203. *See id.*

204. Bennett Manterruted, *supra* note 102.

205. Pauline R. Clance & Suzanne Imes, *The Imposter Phenomenon in High Achieving Women: Dynamics and Therapeutic Intervention*, 15 PSYCHOTHERAPY THEORY, RESEARCH AND PRACTICE, Fall 1978, at 241 (emphasis added); *see also* Abigail Perdue, *Man Up or Go Home: Exploring Perceptions of Women in Leadership*, 100 MARQ. L. REV. 1233, 1285-88 (2017); Susanne Aronowitz, *A Secret Epidemic in the Legal Profession*, 77-SEP OR. ST. B. BULL. 36, 36 (Aug./Sept. 2017).

206. Perdue, *supra* note 205, at 1285.

207. *See id.* at 1286-88.

he asked teams of individuals to make strategic decisions for a bookstore.<sup>208</sup> Burris surreptitiously informed one random member of each team of helpful data related to the bookstore.<sup>209</sup> According to Sandberg and Grant, Burris's subsequent analysis showed that when a female team member received this information and used it to suggest changes to the bookstore's operations, team leaders viewed them as less loyal and were less likely to act upon their suggestions.<sup>210</sup> In fact, even when all of the team members were told that one team member possessed inside information that could be helpful to running the bookstore, the suggestions from female team members with this inside information still were discounted.<sup>211</sup> This disregard for female voices on the team deprived the team of valuable information that could have benefitted the larger group.

Other benefits tend to emerge from female leadership—benefits that may be lost if women are crowded out of the environment. Women frequently drive innovation in the workplace, adopting novel approaches to addressing challenges.<sup>212</sup> They tackle problems with a perspective that often fundamentally differs from that of their male colleagues, and therefore can see solutions that might not appear to men in the workplace.<sup>213</sup> Women also tend to foster greater collaboration than their male peers.<sup>214</sup> A study by Harvard Graduate School of Education lecturer Catherine Krupnick, which examined a year's worth of recorded classes conducted by twenty-four instructors at Harvard College, not only found that male students spoke more frequently than female students (a conclusion that even the researchers noted was “scarcely

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208. See Sandberg & Grant, *supra* note 167; see also Ethan R. Burris, *The Risks and Rewards of Speaking Up: Managerial Responses to Employee Voice*, 55 ACAD. OF MGMT. J. 851, 863 (2012).

209. See Sandberg & Grant, *supra* note 167; see also Burris, *supra* note 208, at 863-64.

210. See Sandberg & Grant, *supra* note 167.

211. See *id.*

212. Sylvia A. Hewlett, Melinda Marshall & Laura Sherbin, *How Women Drive Innovation and Growth*, HARV. BUS. REV. (Aug. 23, 2013), <https://hbr.org/2013/08/how-women-drive-innovation-and>; see also Kevin Gaughan, Edward Smith & Jason Pierce, *Appointing a Female CEO? Beware of Media Attention*, KELLOGG INSIGHT (June 7, 2016), <https://insight.kellogg.northwestern.edu/article/appointing-a-female-ceo-beware-of-media-attention>.

213. See Hewlett et al., *supra* note 212 (describing novel steps taken by female bank head in India to increase performance of two failing bank branches, resulting in sales increases of 75% and 127% respectively).

214. See Brian Amble, *Collaboration and Gender*, MANAGEMENT.ISSUES (June 1, 2012), <http://www.management-issues.com/news/6495/collaboration-and-gender> (citing paper published in the Proceedings of the Royal Society which found that testosterone make men “less inclined to collaborate and more egocentric”); see also Gaughan et al., *supra* note 212 (citing “more collaborative work environments” as one of the advantages associated with female leadership); Catherine G. Krupnick, *Women and Men in the Classroom: Inequality and Its Remedies*, DEREK BOK CTR. FOR TEACHING AND LEARNING, HARV. UNIV. reprinted from ON TEACHING AND LEARNING, VOL. 1 (1985), [https://projects.vrac.iastate.edu/REU2016/wp-content/uploads/2016/05/Krupnick\\_1985\\_Diversity\\_Gender.pdf](https://projects.vrac.iastate.edu/REU2016/wp-content/uploads/2016/05/Krupnick_1985_Diversity_Gender.pdf) (citing egalitarian discussion patterns within all-female classroom groups).

news),<sup>215</sup> but also confirmed previous research that highlighted the impact of gender on discussion patterns within a group.<sup>216</sup> According to Krupnick's study, groups composed entirely of women tended to have a "rotating" participatory discussion style, in which women took turns speaking and contributed to the discussion on more or less equal parts during the class period, while male discussion groups tend to be more contest-like, with very uneven amounts of talking per male participant and an establishment of hierarchy.<sup>217</sup> For those who believe that collaborative discussions tend to lead to higher quality outcomes than those in which a few select speakers dominate, these findings shed further light on a risk inherent in blocking out female voices in the workplace.

If women are shoved aside in the workplace or made to feel that their efforts lack importance, many women may make the logical choice to remain silent and withhold their valuable contributions. They won't offer their novel insights; they won't try to collaborate with their male colleagues. In this way, the sidelining of women at work leads to a significant detriment within an organization itself, as that organization loses out on the valuable feedback and ideas that women otherwise could offer to improve overall operations.

### C. *Gender Sidelining Undermines Employee Morale and Productivity*

This sense that women have about being silenced in the workplace not only affects their ability to share their ideas with their fellow workers, but also may have the additional consequence of undermining workplace morale and hindering productivity. In her article, *Do Women Lack Ambition*, discussed above,<sup>218</sup> Professor Fels observed that "multiple areas of research have demonstrated that recognition is one of the motivational engines that drives the development of almost any type of skill. Far from being a pleasant but largely inessential response, it is one of the most basic of human requirements."<sup>219</sup> Citing research by renowned psychologist Jerome Kagan and his co-author Howard Moss, Professor Fels noted that the authors found a "high positive correlation between mastery and recognition" and that they observed that "it may be impossible to measure the desire to improve a skill independent of the individual's desire for recognition."<sup>220</sup> According to these researchers, acquiring expertise in any area often *requires* recognition.<sup>221</sup> In other words,

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215. Krupnick, *supra* note 214.

216. *See id.* (citing previous research by Rosabeth Kanter and Elizabeth Aries).

217. *See id.* The study also indicated that when groups were "mixed," comprised of both men and women, the "male competitive style" continues to pervade.

218. *See Fels, supra* note 188 and accompanying text.

219. *See id.*

220. *Id.* (internal quotations and citation omitted).

221. *See id.* (noting that "[r]esearch has confirmed that in the overwhelming majority of cases, the acquisition of expertise requires recognition").

Professor Fels observes, “[t]o attempt to master a skill, particularly one that requires prolonged effort, you must believe you are likely to succeed.”<sup>222</sup>

Others have reached similar conclusions about the impact that a lack of recognition and appreciation has on a woman’s level of productivity and drive to succeed. Rachel Lepchitz’s research, discussed above, found that an individual’s “level of perceived mutedness can impact productivity,”<sup>223</sup> leading employees to become frustrated, angrily disengaged, or in some cases resigned and apathetic.<sup>224</sup> A recent study conducted by researchers at the Wharton School at the University of Pennsylvania similarly found a clear relationship between gratitude and work engagement, noting that university fundraisers who received a pep talk from their supervisor expressing gratitude for their services made 50% more phone calls than their peers who had not received such recognition.<sup>225</sup> As one workplace consultant has observed, “[w]hen you’re feeling challenged and interested at work . . . you’re more likely to stay at a company and advance at that company.”<sup>226</sup> At bottom, therefore, the extent to which women’s efforts and accomplishments are (or are not) recognized in the workplace can create a self-fulfilling prophesy, either reinforcing achievement or worthlessness. Women who repeatedly are praised and recognized in the workplace will be motivated to try even harder, while women who feel overlooked and ignored may see their drive and ambition diminish.<sup>227</sup>

Thus, it’s not just that Gender Sidelining leaves women feeling ignored or slighted, with their tender feelings hurt due to the absence of an appropriate pat on the back. This lack of recognition—this “sidelining”—has a concrete impact on women’s desire and ability to excel, muting their drive and ambition. They move through their chosen professions receiving recognition that is “quantitatively poorer, qualitatively more ambivalent, and . . . less predictable,”<sup>228</sup> and as a result, become increasingly demoralized regarding the prospects for their own success.<sup>229</sup>

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222. *Id.*

223. Lepchitz, *supra* note 174, at 12 (citation omitted).

224. *See id.* (citations omitted).

225. *In Praise of Gratitude*, HARVARD MENTAL HEALTH LETTER (Nov. 2011), [http://www.health.harvard.edu/newsletter\\_article/in-praise-of-gratitude](http://www.health.harvard.edu/newsletter_article/in-praise-of-gratitude).

226. Waller, *supra* note 143.

227. *See Fels, supra* note 189 (observing that “[w]ithout earned affirmation, long-term learning and performance are rarely achieved. Ambitions are both the product of and, later on, the source of affirmation.”)

228. *Id.*

229. *See id.* (observing that “[t]his, for women, is why early aspirations so often do not translate into achievement later in life: A lack of appropriate affirmation of accomplishments in combination with threats to women’s sexual identity invariably lead to demoralization. And so the process continues.”).

D. *Gender Sidelining Fuels Existing Biases that Hinder Women's Advancement at Work*

In addition to all of the aforementioned ramifications of women experiencing sidelining at work—women's voices being silenced, their ideas and input being excluded from workplace discussions, their drive and productivity being muted—gender sidelining also produces another more concrete negative impact for women in that it actively hinders women's advancement up the workplace hierarchy. Abundant research confirms that, as a general rule, it simply takes longer for women to reach the top of their relevant work environment.<sup>230</sup> One recent study examined the career paths of twenty-four women who head Fortune 500 companies, finding, *inter alia*, that the median “long stint” for these female CEO's was twenty-three years spent at a single company in one stretch before being elevated to CEO.<sup>231</sup> When the authors compared this result to a random sampling of male Fortune 500 CEO's, they found that for men in that sample, the median “long stint” at a company was just fifteen years.<sup>232</sup> In other words, the climb to the top for these female CEO's was over 50% longer than that of their male peers.<sup>233</sup>

So how does this relate to gender sidelining? Other research shows that having a woman fill a top executive position can provide support for other female executives, because it allows that female leader to serve as a mentor or role model—even without creating an explicit mentoring relationship.<sup>234</sup> Moreover, the presence of female leadership within an organization “can also be a proxy for the organization's unobserved cultural and institutional characteristics, such as female-friendliness, affirmative action policies, or an egalitarian culture.”<sup>235</sup> In this way, the appointment of a women into a position of power can provide legitimacy for other women to step into leadership positions, both by diluting existing stereotypical views of women and by

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230. See, e.g., Sarah Dillard & Vanessa Lipschitz, *Research: How Female CEOs Actually Get to the Top*, HARVARD BUSINESS REVIEW (Nov. 6, 2014), <https://hbr.org/2014/11/research-how-female-ceos-actually-get-to-the-top>; see also Douglas M. Branson, *Pathways for Women to Senior Management Positions and Board Seats: An A to Z List*, 2012 MICH. ST. L. REV. 1555, 1556 (2012).

231. See Dillard & Lipschitz, *supra* note 230.

232. See *id.*

233. See *id.*; see also Branson, *supra* note 230, at 1556 (observing that a female employee's pathway to power tends not to be a straightforward journey, and noting that “[t]he sojourn women must undertake often is a circuitous one, especially compared to the similarly situated male); see also *id.* (noting that while a male employee's path to leadership tends to be linear in nature, women tend to reach the top by “side stepping,” often leaving business, obtaining a position in academia, the non-for-profit sector, government or consulting before re-emerging as a corporate director).

234. See Taekjin Shin, *The Gender Gap in Executive Compensation: The Role of Female Directors and Chief Executive Officers*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 258, 262 (2012) (citations omitted).

235. *Id.* at 262.

contributing to a more favorable view of women as leaders.<sup>236</sup> In this respect, there is a symbiotic relationship between the tendency to sideline women at work and the ability of women to emerge as leaders, with each of these dynamics feeding off of the other: The more women are undermined, ignored, or upstaged at work, the fewer women who will emerge as leaders within the organization. But the more women are able to claw their way to the top and capture leadership positions, the less tolerance there will be—*across the organization as a whole*—for policies and practices that disempower women.<sup>237</sup>

Sadly, significant evidence points to this vicious circle operating in a negative direction for many women, with increased sidelining undermining female advancement instead of female advancement decreasing sidelining. The manner in which companies approach the (still somewhat rare) appointment of women into leadership positions exemplifies this depressing and regressive result. As a recent study by Kellogg School of Management Professor Edward Smith and his colleagues revealed, many companies face great uncertainty in announcing the appointment of a new CEO when that new CEO happens to be female.<sup>238</sup> On the one hand, ample evidence supports the many advantages associated with female leadership, such as greater collaboration in the workplace and increased innovation, indicating that investors should respond favorably to the appointment of a female CEO.<sup>239</sup> On the other hand, separate research indicates that when a company announces the appointment of a female CEO, many investors react negatively.<sup>240</sup>

When Professor Smith tried to interpret these seemingly conflicting conclusions, he determined that much depended on the manner in which the *media* covered the female CEO's appointment: He found that when companies appointed female CEO's and received significant media attention for those appointments, they were more likely to experience negative market reactions.<sup>241</sup> Conversely, companies whose female-CEO announcements received less media attention were more likely to experience positive market reactions.<sup>242</sup> Thus, in Professor Smith's view, "investors can reward the

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236. See Dillard, *supra* note 230.

237. See Green, *supra* note 38, at 24 ("Longstanding social science research—and common sense—teaches that stereotyping, hostility, and biased action against members of certain groups in an environment make it more likely that individuals acting within that environment will also rely on stereotypes and biases . . .").

238. Gaughan, *supra* note 210.

239. See *id.*

240. See *id.*

241. See *id.*

242. See *id.* Notably, this difference in reactions held up even when Smith accounted for things like the tone and sentiment of the media coverage—i.e., even when there were no major differences in the tone or sentiment of the media coverage associated with the appointment of a male CEO versus a female CEO.

appointment of a female CEO, but *only* if Ms. Chief Executive Officer does not get too much press.”<sup>243</sup>

Hence, women continue to fall into a cycle of disempowerment and diminishment. The more that companies remain wary of publicizing their decisions to advance women up the corporate ladder, the more idiosyncratic those promotions will continue to seem. Rather than fostering a *norm* whereby women are viewed as being as naturally capable of leadership as their male peers, these policies feed into stereotypes that inhibit advancement. Women assume that they are not capable of achieving greater power because they have no example upon which to base such an ambitious path.<sup>244</sup> Without adequate role models to serve as a guide for the value that female leaders bring to the workplace, and for what can be accomplished by placing women in leadership roles, future generations of female workers may have an even more difficult time envisioning themselves in such positions—and future generations of employers may be more reluctant to place them in such roles.

E. *Gender Sidelining Encourages Women to Opt Out of Professional Opportunities*

On top of all of these other ramifications of gender sidelining, perhaps the least surprising but most unfortunate result is that it leads women entirely to opt out of professional opportunities. Women who feel unappreciated and marginalized in the workplace not only may experience lower productivity and morale, but also might determine that their current field (or, sadly, any field) simply holds no room for female contributions.

Much has been written about the low representation of women throughout various sectors of the workforce. Women hold only roughly one quarter of the computing and math-related jobs in the United States, a fraction that actually has decreased over the past fifteen years.<sup>245</sup> They remain underrepresented at every level within the corporate pipeline, from entry-level positions, to managerial and director roles, to Vice President and C-Suite positions.<sup>246</sup>

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243. *Id.* (emphasis added); *see also id.* (noting that “companies that appoint female leaders are better off if they avoid announcing those CEO appointments with anything approaching pomp and circumstance”).

244. Helen Fraser, *Young Women Need Female Role Models to Inspire Success*, GUARDIAN (Oct. 22, 2014), <https://www.theguardian.com/women-in-leadership/women-leadership-blog/2014/oct/22/women-role-model-penguin> (noting that it is “particularly crucial for young women to find successful women who can be those role models”); *see, e.g.*, Potenza, *supra* note 104 (discussing the gender gap in technology and science careers and citing one possible explanation as being “the real lack of role models for women in these fields”); *see also* Giulia Alice Fornero, *On Female Role Models in Science*, CERN (Mar. 7, 2014), <https://home.cern/cern-people/opinion/2014/03/female-role-models-science> (asserting that female role models are “vital” to encouraging young women who are starting out in STEM careers).

245. *See* Mundy, *supra* note 169.

246. *See* McKinsey Report, *supra* note 143.

While women enter careers in law, medicine and business at rates approaching those of their male peers, they represent a mere minority of the workforce in those professions within just a few years.<sup>247</sup> Theories abound as to *why* so many sectors of the U.S. labor market suffer from this shortage of women—from the lack of adequate paid maternity leave, to workplace policies that do not sufficiently accommodate a reasonable work-life balance, to overtly discriminatory and/or harassing behavior that drives women from the workforce.<sup>248</sup> Without a doubt, however, gender sidelining plays a role here as well. Perhaps one additional reason why many women choose to leave the workforce is that they no longer wish to feel like second-class citizens in their own workplace.

In some fields, this “dropping-out-due-to-not-belonging” seems prevalent and obvious. In the tech field, for example, women not only are hired in lower numbers than men, but they also leave the field at a rate more than twice that of their male peers.<sup>249</sup> Significantly, these women frequently are not leaving their positions for the often-assumed “family reasons,” or because they dislike the work.<sup>250</sup> Rather, they tend to leave due to “workplace conditions, a lack of access to key creative roles, and a sense of feeling stalled in one’s career,” with “[u]ndermining behavior from managers” also playing a major role.<sup>251</sup> Women similarly drop out at higher rates than men in the legal field, including women who already have reached high-level partnership positions.<sup>252</sup> Again, while family obligations drive many women to leave,<sup>253</sup> women also cite many other obstacles to their success, including gender stereotypes, a lack of mentoring, inflexible work structures, and receiving less desirable “grunt work” assignments.<sup>254</sup> Women seem to fare no better in medicine, leaving the medical

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247. See Theresa Beiner, *Some Thoughts on the State of Women Lawyers and Why Title VII Has Not Worked for Them*, 44 IND. L. REV. 685, 685-86 (2011); see also Hannah Douglas, *Why are Women Leaving Medicine*, MEDICAL ECONOMICS (Apr. 25, 2017), <http://medicaleconomics.modernmedicine.com/medical-economics/news/why-are-women-leaving-medicine>; Doug Lederman, *Why Women Leave Academic Medicine*, INSIDE HIGHER ED. (Sept. 21, 2007), <https://www.insidehighered.com/news/2007/09/21/women>; Katherine Reynolds Lewis, *Why Women Quit*, WORKING MOTHER (July 21, 2015), <http://www.workingmother.com/content>; Waller, *supra* note 143; McKinsey report, *supra* note 144 at 5.

248. See McKinsey report, *supra* note 144 at 5; see also Waller, *supra* note 143.

249. See Mundy, *supra* note 169.

250. See *id.*

251. Mundy, *supra* note 169.

252. See Beiner, *supra* note 247, at 687 (citing results of study on Massachusetts law firms that found that among junior and nonequity partners, twice as many women than men left the practice) (citation omitted); see also Lewis, *supra* note 247 (noting that while women comprise 45% of law firm associated in private practice, they represent only 20% of partners and only 17% of equity partners).

253. See Beiner, *supra* note 245 at 691 (citation omitted).

254. See *id.* at 690 (citation omitted); see also Lewis, *supra* note 245 (noting that the “dearth of women lawyers at the very top also helps fuel the losses . . .” because “[t]here aren’t enough role models for women to see and really learn from . . .”) (internal quotations omitted).



field at notably higher rates than their male peers.<sup>255</sup> Among the reasons cited for this departure is “burnout,” which is more common for female doctors than for male doctors and which can increase if a women does not feel well respected.<sup>256</sup>

Even in cases where women do not drop out of the workforce altogether, many forego significant opportunities for advancement due to feeling marginalized or overlooked. One intriguing finding in the McKinsey Report involved the extent to which working women reported being significantly less interested in achieving top executive status within an organization, with only 40% of women surveyed expressing an interest in such a position, compared to 56% of men surveyed.<sup>257</sup> Again, while it is tempting to chalk up this distinction to different views regarding family obligations and/or work-life balance, this conventional wisdom seems not to tell the whole story here. The McKinsey Report observed that both women and men worry equally about balancing work and family, with this being the main concern cited by both groups for their reluctance to promote.<sup>258</sup> Moreover, women with *and without* children disclaimed wanting the pressures associated with this type of promotion.<sup>259</sup> Thus, there seems to be more to this avoidance of advancement than a simple desire to spend more time with one’s family; even women without significant family obligations shied away from promotion opportunities, perhaps because of such feelings of muted disempowerment.

#### IV. TOOLS BEYOND TITLE VII FOR ADDRESSING GENDER SIDELINING

Despite the significant ramifications that result from gender sidelining, no obvious solution exists for eradicating the policies and practices that contribute to this experience. As already noted, much of the conduct that constitutes gender sidelining would not, without more, support a viable Title VII claim.<sup>260</sup> While a female employee’s complaints about feeling excluded or neglected during a meeting, or about seeing male coworkers receive more challenging assignments, or about hearing male colleagues referred to with greater deference and respect *collectively* might constitute legally actionable conduct (particularly in combination with more overt evidence of bias), it is unlikely that isolated examples of this treatment would forge a path to victory for a discrimination plaintiff.<sup>261</sup> Rather, these are more likely to be seen as one-

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255. See Douglas, *supra* note 245.

256. See *id.*; see also Lederman, *supra* note 247 (noting that women also drop out of academic medical positions at higher rates than men due in part to “expectations and criteria for success” that are imposed on female researchers and have a disproportionately negative impact on women).

257. See McKinsey Report, *supra* note 143, at 15.

258. See *id.*

259. See *id.*

260. See *supra* Part I.

261. See *id.*

off slights that do not reflect the entirety of a woman's workplace experience.<sup>262</sup>

Adding to the doctrinal difficulty of using these relatively subtle slights as support for a Title VII claim is the fact that many employers have become increasingly savvy about taking steps to guard against discrimination liability, adopting policies and practices that "mask" any appearance of bias in the workplace.<sup>263</sup> Employers will adopt formal complaint and grievance procedures, prominently post their nondiscrimination policies, or go through the motions of diversity training (even if they don't actually embrace diversity at work).<sup>264</sup> None of those policies and practices, however, seem likely to have an impact on gender sidelining. A female employee is unlikely to file formal grievance merely because she senses (without proof) that she is being held to a higher standard than her male peers. A nondiscrimination policy is unlikely to address (let alone prohibit) women from being interrupted during meetings. Even training programs, while perhaps effective if properly focused,<sup>265</sup> more often simply function to reinforce stereotypes and trivialize discrimination.<sup>266</sup>

This need not be viewed as a disastrous outcome. As discussed above,<sup>267</sup> Title VII simply was not intended to cover these sorts of wrongs, and stretching the doctrinal law to apply in this context leads to undesirable practical and legal results. In addition, more controversial than the doctrinal difficulty of stretching the law in this way are the practical concerns that might result from using Title VII to rectify these issues. For example, one possible result of using the law to address these concerns is the potential backlash that might ensue if Title VII liability was expanded to cover gender sidelining claims. There is ample evidence about the extent to which members of stigmatized groups who claim discrimination often find themselves perceived as "troublemakers" for voicing their concerns.<sup>268</sup> Indeed, this negative reaction has been found to take place

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262. *See id.*

263. *See, e.g.,* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964, 985 (1999) (describing the "litigation avoidance strategies" engaged in by employers); *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 705 (2003) (acknowledging that Title VII enforcement litigation can provide a foundation for increased compliance with the law, but noting that it often leads to the "adoption of merely symbolic reform"); Audrey J. Lee, Comment, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 488 (2005) ("[E]mployers' heightened awareness of the legal ramifications for discriminatory transgressions—learned through litigation, among other means—suggests that employers will be increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging.").

264. *See* Green, *supra* note 38, at 109-10.

265. *See infra* at notes 287, 306-07 and accompanying text.

266. *See* Green, *supra* note 38, at 112-13.

267. *See supra* notes 48-49.

268. *See* Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, GROUP PROCESSES AND INTERGROUP RELATIONS 6, no. 3 (2003), 227-37; *see also* Deborah L. Brake, *Retaliation*, 90 MINN. L.

even the evidence clearly indicates that the complaining individuals in fact experienced discrimination.<sup>269</sup> One can imagine this disapproval escalating even further when the complaints do not involve “typical” examples of discriminatory behavior (i.e., a termination or demotion or difference in pay), but rather involve less obvious slights, such as a female employee feeling overlooked when contributing during meetings, or claiming not to have received sufficient praise for her workplace achievements. In an environment where women already often suffer from the misperception of being too delicate, too sensitive, or “excessively confrontational”<sup>270</sup>—where men already “complain they have to walk on eggshells around women colleagues . . . out of fear of saying something they might find offensive”<sup>271</sup>—making a (literal) federal case out of wrongs that previously fell outside of the law might well exacerbate, and not alleviate, gender-based animosity at work.

To be sure, the discomfort or resentment that others in the workplace may feel at expanding the scope of Title VII to cover gender sidelining is not, in and of itself, a sufficient reason to decline expanding the scope of this federal law. This is not an argument that women should remain silent in the face of bias simply to avoid upsetting their male (or female) colleagues. To the contrary, one of the *intended* consequences of Title VII was to respond to and eradicate discriminatory treatment throughout the United States, without regard to those in the country who preferred to continue adhering to their biased attitudes and behaviors.<sup>272</sup> But it is important at least to recognize the potential ramifications

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REV. 18, 32-36 (2005) (describing social science research demonstrating that individuals who claim retaliation are disliked because they are seen as transgressing the social order, even asserting meritorious claims).

269. Kaiser & Miller, *supra* note 50, at 236; *see also* Brake, *supra* note 50, at 19-20 (noting that “[r]ecent social science research shows that women and persons of color are perceived negatively and are disliked by majority group members when they step forward to challenge discrimination.”). Brake discusses in particular Kaiser and Miller’s finding that “the social penalty persists even when the subjects [of the study] are exposed to persuasive evidence that discrimination actually occurred.” *Id.* at 33-34; *see also* Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 NEW MEXICO L. REV. 333, 341 (2008) (citing same).

270. David Margolik, *At the Bar*, N.Y. TIMES (Dec. 4, 1992), <http://www.nytimes.com/1992/12/04/news/at-the-bar.html> (citing federal judge Maryanne Trump Barry’s claims that the “excessively confrontational attitude of some women in the workplace was poisoning relations between the sexes” and that “[making a big deal out of small slight sights . . . not only angers men needlessly but trivializes the serious problems women face in advancing in the predominantly macho male world of law enforcement”]).

271. Katie Johnston, *Workers Happier With Members of Same Gender, Study Finds*, BOS. GLOBE (Oct. 6, 2014), <https://www.bostonglobe.com/business/2014/10/06/gender-diversity-increases-productivity-decreases-happiness/dOiNvWK9tj8qJyrKVGp3uI/story.html> (internal quotations omitted).

272. *See Pre 1965: Events Leading to the Creation of EEOC*, available at <https://www.eeoc.gov/eeoc/history/35th/pre1965>.

of expanding the scope of Title VII significantly beyond its current boundaries and to weigh whether such a result represents the best outcome.<sup>273</sup>

Despite the failure of Title VII and other antidiscrimination laws to reach gender sidelining—and despite the fact that maintaining the limited scope of these laws seems advisable<sup>274</sup>—gender sidelining need not be an inevitable and unavoidable aspect of the workplace. Women need not resign themselves to a permanent status of second-class citizen at work. To the contrary, there are several steps that employers can take to ameliorate the impact of (and perhaps entirely avoid) this marginalizing and upstaging of female employees.

To be sure, none of the steps described below are intended to represent any sort of “magic bullet” that will inoculate the workplace of any bias or mistreatment. Just as overt and actionable discrimination continues to persist in the workplace despite decades of litigation attempting to eradicate such conduct, so too have these more subtle forms of bias become embedded in the ways in which many workplaces function. Accordingly, the following suggestions represent not tidy solutions to a complex problem, but instead merely food for thought as to how society could begin to move forward in addressing this phenomenon.

#### A. *Get Women Into Positions of Authority in the Workplace*

Perhaps the most effective step that employers can take to curb the marginalization of women at work is to include more women in positions of authority, thus countering entrenched stereotypes regarding whether and how female employees can lead. In her article, *Antidiscrimination Law’s Effects on Implicit Bias*, Professor Christine Jolls examines the extent to which the current antidiscrimination law regime decreases not just overt bias in the workplace, but also implicit bias.<sup>275</sup> According to Jolls, social science research indicates that “discrete changes in either the population make-up of a group or the physical and sensory features of an environment can substantially reduce the degree of implicit bias.”<sup>276</sup> In other words, by altering the demographics of a workplace, or perhaps other physical or sensory aspects of the work environment, one might alter how employees view coworkers who hail from

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273. Cf. Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333 (2008) (asserting that Title VII and other antidiscrimination laws unintentionally may increase employer bias against certain protected groups).

274. See *supra* notes 48-56 and accompanying text.

275. Christine Jolls, *Antidiscrimination Law’s Effects on Implicit Bias*, in NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW, VOL. 3 BEHAVIORAL ANALYSIS OF WORKPLACE DISCRIMINATION, 69 (Mitu Gulati & Michael Yelnosky, eds. 2007).

276. *Id.* at 71; see also *id.* at 82 (asserting that “[a]cross American workplaces, schools, universities, and various types of voluntary organizations, existing antidiscrimination law tends to have the effect of reducing implicit bias”).

different backgrounds.<sup>277</sup> For example, focusing initially on race, Jolls cites an experiment in which including an African-American person in a leadership role within a group reduced the level of implicit racial bias exhibited by other members in the group.<sup>278</sup>

More apposite to concerns about gender sidelining, Professor Jolls' work also indicates that exposure to women in leadership positions can reduce implicit gender bias. Citing another study—this time focusing on implicit bias among college-aged women both before and after their first year of college—Jolls relays that researchers found that students who had the greatest number of female professors during the first year of college showed the greatest decrease in implicit gender bias.<sup>279</sup> Quoting the study's authors, Jolls notes that “[T]he more women see counterstereotypic ingroup members in their immediate environment[,] the more it undermines their automatic gender stereotypes.”<sup>280</sup> In other words, according to Jolls, “the simple fact of having a diverse workforce may well be an important means of reducing the level of implicit bias in the workplace.”<sup>281</sup> Sheryl Sandberg and Adam Grant echoed this sentiment in their article, asserting that “[t]he long term solution to the double bind of speaking while female is to increase the number of women in leadership roles,”<sup>282</sup> and opining that “[a]s more women enter the upper echelons of organizations, people become more accustomed to women's contributing and leading.”<sup>283</sup>

Anecdotal evidence bears out the effectiveness of this strategy. Global software giant SAP SE has dealt the problem of unequal opportunities for men and women in the workplace by essentially instituting quotas, mandating that 25% of all management roles within its 80,000 employee company be held by women by the end of 2017.<sup>284</sup> As of late 2016, its management ranks

277. *See id.* at 71.

278. *See id.*

279. *See id.* at 83-84 (citations omitted). Notably, this finding held for both students at all-female schools and at coeducational schools, although students at all-female school demonstrated the greatest reduction in bias because they encountered a far greater number of female professors during their first year. *See id.* (citations omitted).

280. *Id.* at 84 (citation omitted) (parenthesis in original) (internal quotations omitted); *see also* Leora Eisenstadt & Jeffrey Boles, *Intent and Liability in Employment Discrimination*, 53 AM. BUS. L. J. 607, 668 (2016) (citations omitted) (observing that “[o]ne of the most effective debiasing techniques involves showing individuals counterstereotypical images.”).

281. *Id.*

282. Sandberg, *supra* note 168.

283. *Id.* This proposal seems to bear out when tested in another context—that of the classroom. In Catherine Krupnick's study of participation rates in classes at Harvard College, mentioned above, she found that that male students spoke two and a half times longer than their female peers in classrooms with male instructors, where the majority of students also were male. *See* Krupnick, *supra* note 214. However, where the instructor was female, female students spoke three times longer than they did when they were in male-instructor classes.

284. *See* Waller, *supra* note 143.

worldwide had reached 24.1% female, with almost 30% of management roles in the U.S. and Canada being held by women.<sup>285</sup> While one might argue that such quotas merely establish diversity of diversity's sake, and even potentially could lead to a backlash if employees believe that women receive promotions due *only* to their gender,<sup>286</sup> SAP simultaneously has tweaked the training undergone by employees, with a focus on increasing the visibility of women in the company and on helping female employees to expand their networks and their risk-taking appetite.<sup>287</sup> In other words, SAP not only has placed women into positions of authority, but also has taken steps to give their female employees the tools to succeed in those positions. One can assume that the more women are able to thrive in management roles, the more they may erode stereotypes regarding their alleged inability to fit into such positions.<sup>288</sup>

Other industries similarly have made efforts to increase the presence and authority of women. The National Science Foundation's ADVANCE grant program has invested more than \$270 million into institutions of higher education and STEM-related not-for-profits over the past sixteen years, with the goal of "increase[ing] the representation and advancement of women in academic science and engineering careers."<sup>289</sup> Multiple programs exist for increasing women's presence in the political arena, both on a national and on an international level.<sup>290</sup> Programs similarly exist to increase women's opportunities in the entertainment industry,<sup>291</sup> in sports,<sup>292</sup> and in the visual

285. *See id.*

286. *See supra* notes 50-53 and accompanying text.

287. *See* Waller, *supra* note 143.

288. An interesting idea promulgated by at least one writer in this area is to apply the NFL's "Rooney Rule" to corporate boards. *See* Branson, *supra* note 230, at 1580-81. The Rooney Rule, named after Pittsburgh Steelers owner Dan Rooney, requires each professional football team in the National Football League to pledge to include a minority candidate among the finalists for any vacancy in a coaching or general manager position, and to conduct an on-site interview with that minority finalist. *See id.* Professor Branson asserts that "many corporate boards need their own Rooney Rule" (presumably as it applies to gender diversity on the boards). *Id.* at 1581 (citation omitted).

289. *Advance at a Glance*, NATIONAL SCIENCE FOUNDATION, <https://www.nsf.gov/crssprgm/advance> (archived Nov. 8, 2017).

290. *See, e.g.*, UN WOMEN, <http://www.unwomen.org/en/what-we-do/leadership-and-political-participation>; *Gender, Women, and Democracy*, NATIONAL DEMOCRATIC INSTITUTE, <https://www.ndi.org/what-we-do/gender-women-and-democracy>; *Women in Politics*, BARBARA LEE FAMILY FOUNDATION, <http://www.barbaraleefoundation.org/our-programs-partnerships/women-in-politics>. *See generally* CENTER FOR AMERICAN WOMEN IN POLITICS, <http://www.cawp.rutgers.edu>.

291. *See, e.g.*, Penelope Bartlett, *Women Filmmaker's Guide: Resources for Funding, Mentorships, Festivals, and More*, SHORT OF THE WEEK (Mar. 8, 2016), <https://www.shortoftheweek.com/news/resources-woman-filmmakers/>; *Resource Map for Women Filmmakers*, SUNDANCE INSTITUTE, <http://www.sundance.org/initiatives/womenatsundance/resource-map>. *See generally* WOMEN IN ENTERTAINMENT EMPOWERMENT NETWORK, <https://www.weenonline.org>.

292. *See, e.g.*, *Full Access Means Equal Opportunities*, WOMEN'S SPORTS FOUNDATION, <https://www.womenssportsfoundation.org/support-us/full-access-means-equal-opportunities/>; U.S. Department of State, Bureau of Educational and Cultural Affairs, Global

arts.<sup>293</sup> Increasing the presence and power of women within these various settings not only can contradict archaic gender stereotypes, but also can provide mentors and role models for other women who aspire to enter these fields.

The notion of increasing the presence of women in positions of authority not only applies to women working in traditional, corporate workplaces, but also could have a comparable positive impact for women in less traditional work environments such as the artists and athletes discussed above. Contemporary female artists, for example, will feel more empowered knowing that female predecessors have paved the way for them.<sup>294</sup> Female curators and gallery owners may be more amenable to showcasing the work of other women.<sup>295</sup> Female athletes who see competitors like the Williams sisters or Lindsey Vonn achieve prominence (and, of course, lucrative endorsement deals) will feel more emboldened to seek such success for themselves.<sup>296</sup> And of course, one imagines that increasing the presence of women in the upper echelons of the media might open the door to greater coverage of female athletes.

#### B. *Encourage and Foster Strong Relationship Between Men and Women at Work*

Not only should employers take steps to place women into positions of authority at work in order to normalize the notion that women possess ample leadership skills, but they also should encourage greater interactions between men and women at *all* levels within an organization. Fostering stronger relationships between male and female employees can do much to break down stereotypes that inhibit women's achievements. In her study, discussed above, Rachel Lepchitz found, *inter alia*, that for many women, "relationships are the

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Sports Mentoring Program, <https://eca.state.gov/programs-initiatives/sports-diplomacy/global-sports-mentoring-program>.

293. See, e.g., WOMEN IN THE ARTS & MEDIA COALITION, <http://www.womenartsmediacoalition.org/#index>; UNIVERSITY WOMEN IN THE ARTS, <http://universitywomeninthearts.com>.

294. See NYC-ARTS, *Women in the Arts on Who Paved Their Way*, HUFFINGTON POST: THE BLOG (May 4, 2013, 2:54 PM), [https://www.huffingtonpost.com/nycarts/women-in-the-arts-on-who-paved-their-way\\_b\\_2767290.html](https://www.huffingtonpost.com/nycarts/women-in-the-arts-on-who-paved-their-way_b_2767290.html).

295. See Rose Hoare, *From Muse to Moneymaker: A Brighter Picture for Women in Art*, CNN (July 15, 2014), <http://www.cnn.com/2012/10/31/business/leading-women-art-trends/index.html> (quoting one female museum director's observation that female museum directors seem to be "innately aware of striking a balance" between male and female artwork in a program).

296. See Harvey Araton, *Williams Sisters Leave an Impact That's Unmatched*, NEW YORK TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/31/sports/tennis/venus-and-serena-williams-have-a-lasting-impact.html>; Chryss Cada, *Lindsey Vonn Soars as a Winning Skier—and a Role Model for Girls*, THE DENVER POST (Feb. 5, 2015), <http://www.denverpost.com/2015/02/05/lindsey-vonn-soars-as-a-winning-skier-and-role-model-for-girls>.

key element in which muted voice is perceived.”<sup>297</sup> Thus, one of Lepchitz’s recommendations was for organizations to “pursu[e] efforts for ongoing relationship development among employees.”<sup>298</sup> If, according to Lepchitz, a “subordinate’s voice is less heard because they are trying to communicate experiences that are unimportant to the dominant group . . . .”<sup>299</sup> In fostering closer relationships between those who are dominant and those who are subordinate perhaps can bridge this gap between these factions. Tristin Green echoes this suggestion in her book, asserting that “[w]hat we need is more positive inter-group interactions at work, not fewer . . . .”<sup>300</sup>

Professor Green cites an interesting example that drives home the potential impact of strengthening the interactions and relationships between men and women at work. She cites an anecdote related to the different evaluation criteria that seemed to apply to men and women in one workplace,<sup>301</sup> quoting one male partner as saying: “A woman was found a little bit short, and we [male partners] didn’t see how she was going to get there. A man was found a little bit short, but we could figure out how he was going to get there . . . because he looked like me, and I knew what I looked like five years ago and I grew into this.”<sup>302</sup> In other words, gender sidelining may have little to do with any overt animus toward women. Rather, in some situations, women might find themselves sidelined because the men for and with whom they work simply cannot fully relate to their experiences, needs and potential for growth. Perhaps with greater interaction between men and women in the workplace would come a greater understanding not only of the specific challenges faced by female employees, but also of those employees’ strengths, skills and potential to overcome any obstacles to success that might be apparent.

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297. Lepchitz, *supra* note 173, at 50.

298. *Id.* at 51.

299. *Id.*

300. Green, *supra* note 38, at 5; *see also id.* at 137 (discussing need for “integrated work teams in which peer-like collaboration is encouraged”). Professor Jolls’ work also supports the extent to which building relationships across gender lines might decrease implicit gender bias. In another experiment, white test participants were paired with either white or African-American partners, and the pair was asked to complete a task requiring the individuals to evaluate each other. *See* Jolls, *supra* note 275, at 83 (citations omitted). According to Jolls, white participants who were paired with African-American partners ultimately showed less implicit bias than those who were paired with a white partner. *See id.* (citations omitted). Thus, this experiment further supports the hypothesis that exposing individuals to greater diversity in their immediate environment—including by encouraging collaboration between different groups (here, racial groups)—reduces implicit biases that might be held about that race.

301. *See* Green, *supra* note 38, at 139; *see also supra* notes 121-24, 150-64, 288-90 and accompanying text (discussing the extent to which women frequently seem to be evaluated according to more stringent criteria than their male peers).

302. Green, *supra* note 38, at 139 (internal quotations omitted) (brackets in original).



C. *Stop Hiding From the Problem*

Perhaps the simplest step that employers can take to begin chipping away at gender sidelining in the workplace is acknowledging that this phenomenon exists—admitting that “[w]e’re [a]ll a [l]ittle [b]it [s]exist” (and then attempting to correct for this bias).<sup>303</sup> Much has been written about the extent to which one can begin to counter unconscious bias by conceding that this bias exists and consciously correcting for this behavior.<sup>304</sup> According to adherents of this view, implicit bias can be controlled through “debiasing”—through a “deliberate ‘mental correction’ that takes group status squarely into account.”<sup>305</sup> Put another way, the first step toward eliminating gender inequality in the workplace is simply acknowledging the multitude of subtle ways in which bias suffuses so many aspects of a female employee’s life.

One important part of facing up to our biases involves having employees undergo bias training—specifically, training that goes beyond the (often rote and ignored) harassment training that most employers currently require. The McKinsey Report noted that while almost 100% of companies currently offer anti-harassment or discrimination training, far fewer offer bias training as it relates to hiring (only 67%) or performance reviews (56%).<sup>306</sup> The report argues that “[w]hen employees don’t understand how bias works, they are less likely to make fair and accurate decisions and push back on bias when they see it.”<sup>307</sup> While the report’s authors presumably had in mind bias that manifests in legally actionable discrimination, this need for understanding may be even more pressing when it comes to the more subtle treatment that generally comprises gender sidelining.

Finally, many have argued for greater transparency in the workplace when it comes to gender issues.<sup>308</sup> Both employers and employees should be made aware of how their organization is doing when it comes to gender diversity, both in terms of basic demographics (i.e., who occupies positions of power) as well as in terms of more nuanced issues, such as the gender breakdown in attrition, gender representation among candidates for new hires and promotions, and gender distribution on significant assignments or high

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303. Bennett Maninterrupted, *supra* note 102.

304. *See, e.g.*, Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1279 (1998); Eisenstadt & Boles, *supra* note 280, at 667-68 (citations omitted); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 969 (2006); *see also* Bennett Maninterrupted, *supra* note 102 (stating that “acknowledging that bias is an important step toward correcting for it”).

305. Krieger, *supra* note 304, at 1279.

306. McKinsey Report, *supra* note 143, at 23.

307. *Id.*

308. *See, e.g.*, Green, *supra* note 38, at 136; *see also* McKinsey Report, *supra* note 143, at 21 (suggesting that companies should disclose their gender demographics to employees and noting that presently, fewer than 1/3 of companies disclose any of this information to employees, and a mere 4% disclose all of their gender metrics).

visibility projects.<sup>309</sup> As Tristin Green notes, abundant research supports the idea that that “when decision makers know that they will be held accountable—that they will have to justify their decisions as fair—bias is less likely to occur.”<sup>310</sup> Shining a light on gender sidelining at work could minimize the conditions that allow it to take place.

#### CONCLUSION

Whether in the corporate boardroom or on the political stage, whether in the laboratory or in front of the camera or in the pool breaking yet another world record—women continue to see their contributions diminished, overlooked, and brushed to the side. While isolated incidents of this behavior may seem relatively insignificant, the tendency to relegate women to the sidelines has a massive impact on the workplace as a whole, as women’s ideas and contributions are lost, their morale and productivity are diminished, and their climb up the workplace hierarchy is riddled with obstacles, leading many to “drop out” of their careers altogether. Far from representing a mere workplace annoyance that women simply should toughen up and endure, gender sidelining represents a significant problem that drastically can impact how, when and whether individuals of both genders achieve success at work.

Not every problem has a “legal” solution. While the law may provide a path to relief for many women who feel wronged in the workplace, such as those who are terminated or denied a promotion because of their gender, the law cannot—and *should not*—be the solution for every slight that affects a female employee. The goal of this paper is not to provide a tidy solution to the complicated problem of unactionable workplace gender bias. Rather, it is simply to identify the subtle yet pernicious obstacles that many women face almost daily at work and to highlight the long-term detrimental impact of this experience—not only for women, but for all employees. Only when the accomplishments and contributions of all employees are recognized can a workplace truly reach its full potential.

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309. See McKinsey Report, *supra* note 143, at 24.

310. Green, *supra* note 38, at 136.