TITLE VII'S FLIGHT BEYOND FIRST AMENDMENT RADAR: A YIN-TO-YANG ATTENUATION OF "SPEECH" INCIDENT TO DISCRIMINATORY "ABUSE" IN THE WORKPLACE

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INTRODUCTION

> *A syllogistic, or two-valued, logic requires that the data which is employed be cast in the form of categories and that all phenomena be classified as either included or excluded with respect to each category. It has no means of dealing with differences in degree or differentiations on a continuum. A probabilistic logic, on the other hand, specifically takes account of the differences of degree in its data. It does not require categorization into A and Non-A, and therefore is many-valued in its ability to deal with an infinite variety of phenomena that are differentiated only in degree or position on a continuum.*[1]

Title VII of the Civil Rights Act of 1964[2] represents a comprehensive effort to remediate all vestiges of workplace discrimination against employees based on their race, color, religion, sex, or national origin.[3] The focus of this article is on one branch of Title VII's prohibition of sex discrimination in the workplace. That branch, commonly known as hostile-environment sexual

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[1] Lee Loevinger, Facts, Evidence and Legal Proof, 9 Case W. Res. L. Rev. 154, 171 (1958).

[2] Codified at 42 U.S.C. §§ 2000e through 2000e-17 (1994).

[3] Title VII makes it illegal "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *See* 42 U.S.C. § 2000e-2(a)(1) (1994).

harassment,[4] is conceived of here as a critically important but mathematically imprecise line drawn by Title VII in the vast cosmos of workplace activity. The uncertain line delineates a threshold into a realm of sex-specific "abuse" that can undermine workplace equality just as seriously as outright denials of tangible job benefits on the basis of sex.[5]

Extreme incursions into the realm of sex-specific abuse are easy to identify. At the extreme, these abuse cases involve provocative patterns of verbal and physical assault directed at particular employees because of their sex. Typical of the extreme cases are individually targeted patterns of assaultive sexist insult (e.g., "dumb ass woman"[6]), assaultive sexual propositions (e.g., "hey pussycat, come here and give me a whiff"[7]), and assaultive touching, groping, and grabbing. Although not expressly forbidden by Title VII, severe or pervasive patterns of such activities clearly constitute a form of discriminatory abuse by implication contemplated by Title VII's prohibition of sex discrimination in the workplace.

Over the past decade, however, this fundamental branch of Title VII remediation has been constitutionally questioned.[8] The question tends to focus on closer cases that involve application of Title VII to expressive-looking elements of workplace activity, thus raising an apparent First Amendment conflict.[9] Typical of these thorny cases are elements of facially less assaultive, albeit individually directed, jokes and remarks (e.g., "you're a woman, what do you know"[10]) or pornographic pictures (e.g., nude pinups or drawings that

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[4] *See* 29 C.F.R. § 1604.11(a)(3) (1999).

[5] The underpinnings of hostile-environment sexual harassment are discussed *infra* in Part I.A. Definitional details of this theory of harassment are discussed *infra* in Part II.

[6] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993) (emphasis added). For a discussion of Harris, see *infra* Part II.

[7] This example is based on an actual event in Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1498 (M.D. Fla. 1991), which is discussed below in Part I.B. The discriminatory essence of this particular remark is also explained by Professor Catharine A. MacKinnon, as follows: "When male workers say, 'Hey pussycat, come here and give me a whiff,' it is a sexual invasion, an act of sexual aggression, a violation of sexual boundaries, a sex act in itself." Catharine A. MacKinnon, Only Words 49, 58 (1993) (footnote omitted). This argument is especially persuasive if the remark is directed at a discernable victim because of the victim's sex. *See* Cynthia L. Estlund, Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment, 75 Tex. L. Rev. 687, 691 n.13 (1997).

[8] For the source of the constitutional question, see *infra* Part I.B.

[9] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

[10] *See* Harris, 510 U.S. at 19.

superimpose a particular employee's name or likeness[11]). The thorny cases have even occasionally involved elements of undirected verbal or pictorial activity, such as sexist jokes and remarks overheard by insulted employees, or abstractly pornographic pictures posted within view of insulted employees.[12]

This article is largely about a competition of characterization — discriminatory "abuse" versus First Amendment "speech" — presented by these thorny Title VII cases. The issue in these cases, as I see it, is indeed one of characterization, for I do not believe that there can be any appreciable element of speech in the realm of workplace activity enjoined by Title VII's prohibition of sex-specific abuse. In other words, a workplace scenario that crosses Title VII's abuse threshold so attenuates any ostensible elements of speech as to place the scenario beneath the First Amendment's radar. Conversely, a workplace scenario that maintains a constitutionally cognizable predominance of speech cannot, in my view, be deemed abusive under Title VII.

This mutual exclusivity follows from highly contextualized concepts of what counts as First Amendment "speech" and what counts as Title VII "abuse." For First Amendment purposes, Justice Holmes once aptly explained that "the character of every act depends upon the circumstances in which it is done."[13] Justice Holmes' observation, as famously explained with his crowded theater illustration,[14] describes a realm beyond the pale of the First Amendment, when, *in context*, "speech and action are so closely brigaded that they are really one."[15]

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[11] *See, e.g.*, Bowman v. Heller, 66 Fair Empl. Prac. Cas. (BNA) 194 (Mass. Super. 1993) (discriminatory harassment of plaintiff with workplace dissemination of pornographic pictures superimposing a picture of her face), *aff'd on other grounds*, 651 N.E.2d 369 (Mass. 1995).

[12] *See, e.g.*, Robinson, 760 F. Supp. at 1493-1502.

[13] Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).

[14] In Schenck, Justice Holmes drew a contextualized speech-versus-nonspeech dichotomy, as follows:

> We admit that in many places and in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.

Id.

[15] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting).

This sort of contextualized brigading of speech and action apparently is contemplated by the regulatory scope of Title VII's harassment prohibition. For Title VII purposes, the Supreme Court has defined hostile-environment harassment as an *objective* threshold of *discriminatory abuse*: specifically, a threshold that is crossed when, considering "all the circumstances," workplace activities occasion a degree of "discriminatory intimidation, ridicule, and insult" that alters a discernible "victim's" conditions of employment.[16] Discernible discriminatory abuse of this sort, as explained further in this article, necessarily involves a predominance of harm over expression[17] — the same sort of predominance of harm over expression that, in Justice Holmes' famous illustration, strips the word "fire" of constitutional significance when shouted by a jokster in a crowded theater.

I thus conceive of First Amendment "speech" and Title VII "abuse" as occupying opposite sides of a sort of yin-yang continuum. These characterizations account, in mutually exclusive fashion, for all potentially harassing workplace scenarios. Additionally, the predominant characterization in any given case is entirely a function of context: the same contextual realities that drive a holistic Title VII abuse determination also attenuate a holistic First Amendment speech determination, and vice versa.

The speech-conduct model suggested here differs from speech-conduct models generally advanced or assumed by commentators who write about the thorny Title VII issue.[18] Other commentators generally follow either of two polarized tracks when defining *non*expressive workplace bigotry. At one extreme, there are commentators who advance liberal nonspeech models that tend to *acontextually* impute the effect of force to entire categories of activity, such as pornography, occurring at any time and place. At the other extreme, there are commentators who advance conservative nonspeech models that tend to *acontextually* assume the weakened imperative of entire categories of activity, such as pornography, focusing instead on utterance-specific imperatives of facially forceful appearance (e.g., "sleep with me if you want a raise").

These polarized models tend to overgeneralize when analyzing the sexually subordinating influence of something like abstract workplace pornography. The liberal and conservative models, respectively, do not adequately account for holistic middle-ground differences between, for example: (1) Playboy pinups displayed at a pornographers' convention that is staffed and

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[16] *See infra* text accompanying note 135.

[17] *See infra* Part III.A.

[18] Speech-conduct models used by other commentators are critiqued at length below. *See infra* notes 150-166 and accompanying text.

managed equally by men and women subject to reasonable antiharassment policies; versus (2) the same Playboy pinups displayed in an industrial shipyard that is staffed and managed predominantly by men who have a pervasive history of harassing the minority of women workers.[19] The speech-conduct model suggested here envisions a holistic Title VII abuse determination that may well apply to the second scenario, but not the first scenario; conversely, the model envisions a holistic speech determination that may well apply to the first scenario, but not the second.

Under the contextualized speech-conduct model suggested here, there is a point somewhere between these two scenarios where "speech" cognizable under the First Amendment yields to the critical mass of a mounting discriminatory imperative; at critical mass, the mounting imperative simultaneously establishes the starting point of Title VII "abuse."[20] There is no overlap, and thus no conflict. There is only context, which simultaneously defines and, to be sure, blurs an unyielding line along the yin-yang continuum. The blur occurs because every workplace presents a unique social milieu of potentially infinite variability, and the speech-versus-abuse characterization is one of holistic predominance discerned against the complex backdrop of any given workplace milieu.

The model suggested here thus rejects current scholarly approaches that contemplate what is, in my view, a doctrinally impossible oxymoron: "abusive speech."[21] I reject current scholarly approaches that would apply, in piecemeal fashion, new First Amendment inroads to various components of "abusive speech," such as variously defined inroads for directed and undirected sexist speech in the workplace. A workplace scenario that presents both directed remarks (e.g., "hey pussycat") and undirected displays of pornography, in my view, is subject to one holistic speech-abuse characterization — not a threshold Title VII abuse determination, then bifurcated constitutional analyses for First Amendment compliance, and then reevaluation of Title VII's application in the event of partial, episodic First Amendment displacement. For purposes of both Title VII and the First Amendment, any given episode of allegedly harassing

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[19] The shipyard case, Robinson, has become the classic illustration of Title VII's alleged clash with the First Amendment. *See infra* note 58 and accompanying text; *see also infra* Part I.B.

[20] Underlying Title VII's discriminatory-abuse characterization is a theory of sex-specific subordination occasioned paradigmatically by a synergistic interplay of sexist activity, verbal or physical, and a variety of aggravating collateral circumstances, such as a numerical predominance of male employees, a lack of women in supervisory positions, and managerial participation in or indifference to potentially harassing activities. *See, e.g.*, case discussed *infra* Part I.B. and cases cited *infra* notes 124-125 and accompanying text. This theory of sex-specific subordination is discussed further in a companion article to this article. *See* article cited *infra* note 215.

[21] For the contours of scholarly commentary on the issue, see *infra* Part I.C.

verbal or pictorial activity, whether directed or undirected, is but one scene of a play that can only be understood *in context*, that is, by holistic analysis of the entire performance.

Commentators often underestimate the formative influence of context for purposes of holistic harassment analysis. Some commentators assert charges of formalism and simplicity against broad proposals of a speech-conduct interplay between the First Amendment and Title VII.[22] "Calling speech conduct," some commentators say, "does not make it so";[23] nor does mere reliance on the mantra "context."[24]

But few commentators (and no court) would ever deny Title VII regulatory authority over viciously assaultive sexist words, such as "dumb ass woman" or "hey pussycat," when fired into the face of an objecting worker, just as few would deny Title VII application to the word "colored" when posted over a workplace water fountain. Notably, the abusive force of even these utterance-specific imperatives is dictated, for Title VII purposes, entirely by workplace context; otherwise, Title VII would not permit me to use these illustrations here in this paragraph and then require an editorial employee, perhaps an African-American woman, to review this paper as part of her job duties in my workplace.

At bottom, commentators who criticize the equation of Title VII abuse with nonexpressive conduct advance their own brand of formalism. They apply wholesale speech assumptions to categorical fragments of workplace activities based on acontextualized notions about the weakness of the abusive imperative. This brand of formalism is suspect. We should never assume the label "speech" based on preconceived notions about "harmless" sexist remarks when "merely" overheard by a woman, or workplace displays of Playboy pinups "merely" happened upon by a woman. Harmlessness is indeed the pivotal question for both Title VII and First Amendment purposes. That question is not satisfactorily answered when isolated events are divorced from the entire tapestry of the workplace milieu and then acontextually labeled as "speech." Simply calling an isolated event "speech" does not make it so.

Ultimately, my rejoinder to the critics[25] traces to Supreme Court precedent directly supporting my position.[26] The Court has already stated, twice,

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[22] *See, e.g.*, Kent Greenawalt, Fighting Words: Individuals, Communities, and Liberties of Speech 81-82 (1995); Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark, 1994 Sup. Ct. Rev. 1, 12-13 (1994).

[23] *See* James H. Fowles, III, Note, Hostile Environment and the First Amendment: What Now After Harris and St. Paul?, 46 S.C. L. Rev. 471, 488 (1995).

[24] *See* Eugene Volokh, How Harassment Law Restricts Free Speech, 47 Rutgers L. Rev. 563, 569-70 (1995) (delimiting the formative influence of context).

[25] Professors Kingsley R. Browne and Eugene Volokh are perhaps the most vocal critics

that Title VII's hostile-environment harassment prohibition, as applied to ostensibly expressive activity, is a "permissible content-neutral regulation of *conduct*"; indeed, the second pronouncement was made unanimously. In other words, a rejoinder to the critics is tantamount to explaining the wisdom of the Court's unanimous decision to flout the backlash of "[c]alling speech conduct."

The effort to side with the unanimous Court begins below in Part I, which critiques scholarly perspectives that focus excessively on isolated fragments of allegedly harassing workplace activities, claiming that these activities have appreciable expressive import. Part II then redefines the issue in terms of Title VII's holistic concept of abuse, as developed by the Supreme Court and repeatedly applied by lower courts throughout the country, with remarkable indifference to the First Amendment. An explanation of the courts' remarkable indifference is offered in Part III, which posits that a truly abusive workplace scenario for Title VII purposes is simply antithetical to a finding of constitutionally detectable speech.

I. CURRENT APPROACHES TO FRAMING THE FIRST AMENDMENT ISSUE

This section begins in Part I.A. with a review of the basic underpinnings to Title VII hostile-environment sexual harassment law. That discussion will bring into focus the source of the First Amendment issue, which is explained in Part I.B. Then, Part I.C. will flesh out current scholarly approaches to Title VII's tension with the First Amendment. This section concludes that current perspectives place exaggerated focus on category-based fragments of expressive-looking workplace activities that may contribute to sexually hostile working environments.

A. The Underpinnings of Title VII's Prohibition of Hostile-Environment Sexual Harassment

All Title VII sex-discrimination cases, including all cases of sexual harassment, are driven by two theories of discrimination: either "disparate treatment" or "disparate impact."[27] The first theory, disparate treatment, involves

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of treating verbal and pictorial abuses as essentially nonspeech beyond the pale of the First Amendment. *See infra* text accompanying notes 106-107. Even commentators who are more accepting of Title VII intervention in such cases tend to do so on grounds other than treating such abuses as essentially nonspeech. *See infra* notes 103-104 and accompanying text.

[26] *See infra* Part III.B.

[27] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (broadly defining the

an element of gender targeting that occurs when a particular employee is treated adversely "because of" the employee's sex.[28] This theory traditionally applies when an employee is denied a tangible job benefit, such as a promotion, because the employee is a man or woman.[29] The label itself, "disparate treatment," derives from a rebuttable presumption of discriminatory intent that can arise from the bare fact that similarly situated men and women have been treated differently, as might occur, for example, if an employer promotes a man rather than an equally qualified woman to a supervisor position.[30]

Sometimes, however, discriminatory intent can be established without the help of a presumption. In the above promotion situation, for example, discriminatory intent might be established by direct evidence[31] if the employer had gratuitously explained the decision with an obviously incriminating statement (e.g., "I need a man to run this shop"[32]). Alternatively, discriminatory intent might be established by circumstantial inference. In the promotion situation, for example, discriminatory intent might be inferred if the employer had, on other occasions, revealed a gender bias either expressly with more ambiguous

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contours of Title VII's prohibition of "discrimination").

[28] *See id.* (noting that the disparate-treatment theory applies when an "employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]") (citation and internal quotation marks omitted) (alteration in original). *See generally* Harold S. Lewis, Jr., Civil Rights and Employment Discrimination Law 217-18 (1997).

[29] *E.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6 (1981) (qualified woman passed over for a promotion that was ultimately given to a male who had been under her supervision).

[30] *See, e.g., supra* note 29. *See generally* Lewis, *supra* note 28, at 227-228. An additional factual predicate might be needed when a man is denied a promotion in favor of a woman. *See* Parker v. Baltimore and Ohio R.R. Co, 652 F.2d 1012, 1017 (D.C. Cir. 1981) (adding, for majority plaintiffs, evidence of "background circumstances support[ing] the suspicion that the defendant is that unusual employer who discriminates against the majority"); *but see* Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1320-23 (W.D. Mo. 1990) (rejecting a heightened factual predicate in reverse discrimination cases). *See generally* Scott Black, McDonnell Douglas' Prima Facie Case and the Non-Minority Plaintiff: Is Modification Required?, 1994 Ann. Surv. Am. L. 309 (1995).

[31] Lewis, *supra* note 28, at 218.

[32] The evidentiary use of such a statement should not raise a First Amendment issue because Title VII in this situation applies to the tangibly discriminatory promotion decision, not the statement itself. *Cf.* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (explaining that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent").

statements[33] (e.g., "women should not be working in this shop"[34]) or impliedly by some pattern of conduct[35] (e.g., a historical pattern of denying women promotions). As used in this article, the phrase "disparate treatment" applies to all such cases of gender-targeted adverse treatment, whether discriminatory intent is established by presumption, direct evidence, or circumstantial inference.[36]

The second type of discrimination prohibited by Title VII, disparate impact, involves sex-specific adverse treatment occasioned *incidentally* by employment practices that are applied evenhandedly to both men and women.[37] Suppose, for example, that the employer in the promotion situation has a practice of limiting supervisory promotions to applicants who themselves can perform every task done by their prospective subordinates. If one of those tasks involves lifting heavy objects, the employer's criteria might disproportionately exclude women from advancement. Under Title VII, this sort of sex-specific disparate impact is illegally discriminatory, even absent any discriminatory intent, unless the strength-based criteria can be justified as a matter of business necessity.[38]

As noted above, these theories, disparate treatment or disparate impact, underlie every claim of sex discrimination asserted under Title VII, including every claim of sexual harassment.[39] Claims of sexual harassment, in turn, are

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[33] *See* Lewis, *supra* note 28, at 226.

[34] Again, the evidentiary use of such a statement should not raise a First Amendment issue. *See supra* note 32.

[35] *See* Lewis, *supra* note 28, at 253.

[36] *See* Lewis, *supra* note 28, at 217-260 (breaking disparate treatment into various "modes of proof" — direct, inferential, and systemic — all of which have in common discriminatory intent).

[37] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (recognizing that Title VII prohibits "practices that are fair in form, but discriminatory in operation"). *See generally* Lewis, *supra* note 28, at 218, 262-76. The disparate-impact theory is codified at 42 U.S.C. § 2000e-2(k) (1994), which states that an employment practice is illegal when the practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."

[38] *Cf.* Dothard v. Rawlinson, 433 U.S. 321, 328-31 (1977) (upholding trial-court finding that minimum height and weight requirements disproportionately excluded women from counselor positions in state prison system). *See also* Mack A. Player, Employment Discrimination Law 380 (1988) (discussing strength and agility tests that "often may be shown through applicant flow data to adversely affect women").

[39] The two theories are sometimes described as providing the basis for Title VII's

further divisible into two categories: (1) *quid pro quo* harassment, which generally involves efforts to extort sexual favors from an employee in exchange for employment benefits;[40] and (2) hostile-environment harassment, which generally involves unwelcome verbal or physical conduct that creates a sexually abusive working environment for aggrieved male or female employees.[41]

The first category, *quid pro quo* harassment, is generally conceived of as being driven by the disparate-treatment theory, as workplace efforts to extort sexual favors classically occur on a heterosexually motivated, and thus gender-discriminatory, basis. Although typically accomplished with words (e.g., "sleep with me if you want a raise"[42]), *quid pro quo* harassment involves a dominance of harmful action (i.e., extortion) over expression, and thus is recognized by most commentators as raising no First Amendment issue.[43]

More controversial for First Amendment purposes is the hostile-environment category of sexual harassment, which can be driven by either a theory of disparate treatment or disparate impact, or by both theories simultaneously, though the reported cases typically involve just disparate treatment. The typical cases of hostile-environment harassment involve degrading verbal or physical conduct on the part of male supervisors or coworkers who harass particular women because of their sex.

Claims of this disparate-treatment variety are usually based on patterns of individually directed and sexually motivated words (e.g., "hey pussycat") and conduct (e.g., pinching, groping, and grabbing).[44] Because the activity has such

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"causation requirement" as applied to claims harassment. *See, e.g.*, Robinson, 760 F. Supp. at 1522. To meet this causation requirement, the victim must establish either (1) disparate treatment, i.e., that the harassing conduct was directed at the victim "because of" the victim's sex; or (2) disparate impact, i.e., that the harassing conduct, though undirected, caused adverse effects disproportionately borne by persons of the victim's sex. *See id.* at 1522-23.

[40] *See* 29 C.F.R. § 1604.11(a)(1)-(2) (1999).

[41] *See* 29 C.F.R. § 1604.11(a)(3) (1999).

[42] Of course, *quid pro quo* requests are usually more subtle. *See, e.g.*, Jones v. Clinton, 990 F. Supp. 657, 664 (E.D. Ark. 1998) (allegation of a *quid pro quo* request where the Governor of Arkansas allegedly asked a low-level State employee to kiss his penis while simultaneously reminding her of his authority over her immediate supervisor).

[43] *See infra* note 191 and accompanying text. The significance of this consensus is explained later in the article. *See infra* notes 191-196 and accompanying text.

[44] Indeed, the EEOC defines sexual harassment solely in terms of conduct with sexual overtones — specifically, "[u]nwelcome *sexual* advances, requests for *sexual* favors, and other verbal or physical conduct of a *sexual* nature." 29 C.F.R. § 1604.11(a) (1999) (emphasis added).

obvious heterosexual overtones, the inference of gender-specific discriminatory intent requires little explanation: the sexually motivated abuses would not have occurred if the victim's sex was the same as the harasser's.[45] Claims of disparate-treatment hostile-environment harassment have also involved patterns of individually directed words and conduct that apparently are motivated more by sex-specific hostility than by heterosexual desire.[46] Discriminatory intent in such cases is also usually obvious given the stark gender-specificity of the hostile words used (e.g., "dumb ass *woman*"[47] or "fucking flag *girls*"[48]) and the harassers' transparently gender-specific aim (e.g., male road workers urinating in the gas tank of a car owned by one of the "fucking flag girls"[49]).

The key to these disparate-treatment harassment cases, again, is individually targeted sex-specific abuse. Absent this element of targeting, allegedly harassing activity can come within Title VII's scope, if at all, only under a theory of disparate impact.[50] For example, a disparate-impact theory would necessarily underlie the claims of women workers aggrieved as bystanders to the repeated sexual assault of *other* women around them;[51] or aggrieved as bystanders to pictorial depictions of such assaults permanently posted on the

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[45] "Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex." Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998). Of course, same-sex harassment remains possible. *See id.* at 1001-1002 (holding that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the [victim] and the [harasser] are of the same sex").

[46] *See* Robinson, 760 F. Supp. at 1522 (noting that Title VII reaches "behavior lacking a sexually explicit content but directed at women and motivated by animus against women"). *Accord* Oncale, 118 S. Ct. at 1002 (noting that harassing conduct need not involve sexual overtones); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3rd Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988).

[47] *See* Harris, 510 U.S. at 19 (emphasis added). For a discussion of Harris, see *infra* Part II.

[48] *See* Hall, 842 F.2d at 1012 (emphasis added).

[49] *See id.*

[50] The disparate-impact theory is thus sometimes described as providing an alternative basis for establishing Title VII's "causation requirement." *See supra* note 39.

[51] *See, e.g.*, Robinson, 760 F. Supp. at 1499 (taking into account abuse of women other than the plaintiff for purposes of plaintiff's claim of hostile-environment harassment).

walls of their workplace;[52] or aggrieved as bystanders who overhear jokes about such sexual assaults within their workplace.[53] Although nontargeted, these bystander situations can produce adverse effects, generally conceived of as visual or auditory "assault,"[54] disproportionately borne by bystanders of the victim's sex. Title VII thus applies to these situations, unless the employer can establish business necessity[55] — as might be the case if the observations of sexual assault occur while a woman works as a police officer, or if exposure to pornographic wall decor and remarks occurs while a woman serves tables in a strip joint.[56]

As suggested by this discussion of hostile-environment sexual harassment, workplace activities that contribute to a Title VII violation can, in isolation, be very expressive in appearance, whether the case is driven by elements of disparate treatment, disparate impact, or both. Harassment analysis, as suggested above, may well sweep within its purview isolated words targeting someone of a particular sex for the very purpose of enhancing the expressive impact of a sexist joke or point of view. The analysis may also take into account undirected words or pictures of sexist content when expressively projected for the amusement or offense of persons in the vicinity, men and women. Indeed, even an isolated pinch or grab might be conceived of as advancing an expressive agenda of sexist viewpoint to the person on the receiving end or others in the vicinity. This potential for Title VII regulation of sexist expression is explained further in the next subsection against the backdrop of Robinson v. Jacksonville Shipyards, Inc.,[57] a case that purportedly epitomizes a First Amendment tension.[58]

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[52] *See, e.g., id.* at 1493-1502 (describing abusive pictorial representations of women permeating the plaintiff's workplace).

[53] *See, e.g., id.* at 1498-99 (plaintiff subjected to a "joke" about sodomous rape).

[54] *See, e.g., id.* at 1495. The assault characterization applies so long as the entire scenario, considering all the circumstances, is predominantly abusive. *See infra* Parts II and III.A. (discussing the Court's standards of discriminatory abuse). However, if the scenario remains predominantly in the realm of First Amendment expression, i.e., is predominantly not abusive, then Title VII applies, if at all, under a theory of *secondary* harms *prospectively* risked to persons of the victim's sex. Under this latter theory of discrimination, which is the subject of a companion article, injunctive relief under Title VII may be appropriate when predominantly expressive workplace activities appreciably risk the prospective abuse of persons of one sex. *See* article cited *infra* note 215.

[55] *See supra* notes 37-38 and accompanying text.

[56] The latter illustration, to a limited degree, reflects Title VII's potential to serve as a "time, place, and manner" regulation of pornographic speech. Again, this theory of speech regulation, as applied to sex-specific secondary effects, is the subject of the companion article referred to above in note 54 and cited below in note 215.

[57] 760 F. Supp. 1486 (M.D. Fla. 1991).

B. The Source of the Tension Between Title VII and the First Amendment

Imagine an American workplace with a working environment that is permeated with the sights and sounds of industrial activities relating to the employer's primary business mission, say, ship repair.[59] But in addition, this working environment, which happens to be dominated by men,[60] is also gratuitously permeated with pervasive patterns of sexually prurient sights and sounds that are uniformly demeaning of women. Virtually wall-to-wall throughout the workplace are vast arrays of prurient pornographic pinups and other assorted pornographic depictions of nude and seminude women in sexually suggestive and submissive poses.[61] The walls are also riddled with sexually charged graffiti of the same sex-specific theme, such as "lick me you whore dog bitch . . . eat me . . . [and] pussy."[62] And within those sexually charged walls there is an intense level of sexually prurient discourse among groups of predominantly male employees, who frequently bellow within earshot of bystanders such remarks as "Black women taste like sardines."[63]

To be sure, the employer is well aware of the sexually demeaning sights and sounds permeating its working environment. Indeed, its managerial personnel from the very top down, all of whom are men,[64] both condone the demeaning

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[58] Robinson is regarded by some commentators as a most extreme illustration of Title VII's potential to regulate speech. *See* Estlund, *supra* note 7 at 691 n.13 (noting that one strong First Amendment proponent has been able to "unearth" only Robinson to illustrate a finding of sexual harassment based "solely on . . . verbal conduct"). *See also* David M. Jaffe, Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses, 80 Minn L. Rev. 979, 1012 n.122 (1996) (suggesting that Robinson "provides the best example of speech serving as the basis for a Title VII violation").

[59] Robinson, 760 F. Supp. at 1491.

[60] At the workplace involved in Robinson, women held less than five percent of the skilled craftworker positions. *Id.* at 1493. This underrepresentation of women was two to three times as severe as the underrepresentation of women at other shipyards. *Id.* at 1509. Furthermore, no woman had ever achieved a position of substantial supervisory responsibility. *Id.* at 1493.

[61] *See id.* at 1493-1502 (detailing the vastness and the prurience of the pornographic wall decor).

[62] *See id.* at 1499.

[63] *See id.* at 1498.

[64] As of the time that the lawsuit was filed, no woman at Jacksonville Shipyards had ever

activity and even directly sponsor some of it.[65] They even permit and promote the pornographic environment over the repeated objections of a dedicated employee, a welder named Ms. Lois Robinson.[66]

Ms. Robinson's objections have been met with more than mere insensitivity. Some of her male coworkers, who proudly describe the workplace as "a boys club" and "a man's world,"[67] have responded to Robinson's complaints with outright hostility. The transparency of their harmful design was perhaps most vividly illustrated on one occasion by their painting the words "Men Only" on the door to a shipfitters' trailer shortly after Robinson complained to management about a sexually derogatory calendar in the trailer.[68] Managerial personnel, to be sure, exacerbate this hostility by the rarity of their response to Robinson's complaints, and perhaps even more so on the rare occasions when they do respond. On these occasions, removal of objectionable pictures has been followed by prompt and mocking reposting of the materials without any supervisorial repercussions.[69]

This much of Robinson's story is just the beginning. The situation actually presented two additional layers of harassing activities, which will be explained below. For the moment, however, this first layer of activity involving sexualized pictures, graffiti, and overheard remarks will be filtered through the Title VII harassment principles outlined above in Part I.A. The next two layers will also be separately filtered through those principles, in keeping with current scholarly approaches to framing the constitutional issue.[70]

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achieved a position of substantial supervisorial responsibility. *See id.* at 1493.

[65] *See id.* at 1494 (noting that "[m]anagement employees from the very top down condoned [pornographic] displays; often they had their own pictures"). *See also id.* at 1493-94 (describing employer's practice of distributing to employees calenders that "feature[d] women in various stages of undress and in sexually suggestive or submissive poses").

[66] *See, e.g., id.* at 1513-17.

[67] *See id.* at 1493.

[68] *See id.* at 1498, 1514-15.

[69] *See, e.g., id.* at 1497, 1498.

[70] As explained below, many commentators apply a segmented approach to constitutional analysis in a case like Robinson's. They evaluate Title VII intervention episodically — that is, one picture or remark at a time — to determine whether the First Amendment displaces Title VII in whole or in part. Ultimately, this article rejects this segmented approach. *See infra* Parts I.C. and III.A.

Of the two forms of harassment, *quid pro quo* and hostile environment, the latter seems to be the better category for the first layer of Robinson's situation. There are no signs of sexual extortion in the situation; instead, Robinson's complaint seems to be that the pervasive patterns of sexualized pictures, graffiti, and overheard remarks, all of which are demeaning of women, create a working environment that is disproportionately insulting to women. As described so far, the situation thus lends itself to a "disparate-impact" brand of hostile-environment harassment. Notably, a claim of hostile-environment harassment is equally available under Title VII whether Robinson's employer personally promotes the pornographic activity or merely permits it.[71] And in this case, as explained above, the employer is doing both.

At this point, however, the analysis can present a constitutional concern. To be sure, Robinson objects to ostensibly expressive activity, albeit pornographic, that may seem to deserve First Amendment protection.[72] Indeed, this constitutional concern can be traced directly to a fairly recent case decided by the Supreme Court.

That case, R.A.V. v. City of St. Paul,[73] involved expressive activity of a most offensively bigoted nature: the burning of a cross on the lawn of an African-American family.[74] One of the cross-burners was charged with violating a city ordinance that prohibited public displays of bigoted fighting words and symbols,[75] including those of offensive racist or sexist content.[76] The ordinance,

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[71] Negligence liability under Title VII extends to sexual harassment that an employer "knew or should have known about . . . and failed to stop." Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2267 (1998). *Accord* 29 C.F.R. § 1604.11(d) (1999). An employer may even be liable for sexual harassment without knowledge or notice. *See* Burlington, 118 S. Ct. at 2270 (explaining vicarious-liability standards for harassment committed by supervisory agents); Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998).

[72] *See* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 49 n.2 (1986) (explaining that pornography is protected speech, albeit of lower value than core political speech).

[73] 505 U.S. 377 (1992).

[74] *Id.* at 379.

[75] *Id.* at 380, 381. "Fighting words" constitute a category of speech that the Court has identified as "unprotected" for First Amendment purposes. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). Other unprotected categories of speech include obscenity, *see* Miller v. California, 413 U.S. 15, 29 (1973); true threats, *see* Watts v. United States, 394 U.S. 705, 707-08 (1969); and most instances of tortious defamation and outrage, *compare* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (claims of defamation and outrage brought by a public figure subject to strict First Amendment limitation) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (claim of defamation brought by a private person subject to lesser First Amendment limitation).

however, was struck down as unconstitutional by the Supreme Court. According to the Court, the ordinance was an invalid *content-based* regulation of speech;[77] for First Amendment purposes, the offensive impact of bigoted speech is not regulable, even if the speech is unprotected.[78]

The rule of R.A.V. would seem to preclude Robinson's case on First Amendment grounds. Her disparate-impact theory of Title VII harassment seems to mirror the content-regulatory aim of the ordinance struck down in R.A.V. Similar to the City in R.A.V., Robinson seeks to suppress ostensibly expressive activity based on the offensive impact of its bigoted message. Moreover, the activity that Robinson complains about, pornographic wall decor and overheard sexist remarks, would seem to deserve even greater First Amendment protection than the unprotected cross-burning regulated by the ordinance struck down in R.A.V. Notably, the pornography and remarks that Robinson complains about, if not obscene, would seem to be protected speech.[79] And again, even if the activity is unprotected obscenity, the rule of R.A.V. would still seem to apply because the rule applies even to unprotected speech.

Disparate impact, however, is only the first layer of Robinson's story. Upon closer inspection, much of the facially generalized sexual provocation in her working environment has a way of targeting her individually. This sort of *mixed-aim* provocation occurs repeatedly among male coworkers whose transparent design is one of intimidation, ridicule, and insult. This mixed aim was vividly displayed, for example, on an occasion when a male coworker, before a limited audience of six men and Robinson, waved around a picture of a nude woman with long blond hair holding a whip; Robinson also has long blond hair and also happens to work with a welding tool known as a whip.[80]

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[76] The ordinance made it a misdemeanor to "'place[] on public or private property a symbol, object, appellation, characterization or graffiti, including . . . a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'" R.A.V., 505 U.S. at 380 (citation omitted).

[77] Content-based regulation of speech is "presumptively invalid" under the First Amendment. *Id.* at 382. To overcome this presumption of invalidity, a content-based speech restriction "must be narrowly tailored to serve a compelling governmental interest." *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990). *See also* Carey v. Brown, 447 U.S. 455, 461-62 (1980).

[78] As explained in R.A.V., even if speech fits within an unprotected category, "[t]he government may not regulate [its] use based on hostility — or favoritism — towards the underlying message expressed." 505 U.S. at 386.

[79] *See supra* note 72.

[80] *See* Robinson, 760 F. Supp. at 1496.

The same sort of mixed aim was apparent on at least two occasions when pictures of nude women were conspicuously placed within Robinson's plain view, both times on tool boxes that she used.[81] Several men were present on one occasion and laughed at Robinson when she appeared upset by the picture.[82] Similarly, on another occasion, several male coworkers amused themselves with a picture of a nude woman with a welding shield. One of them remarked, "Lois [Robinson] would really like this," and then they posted the picture in a welding area where she worked.[83] Likewise, the mixed aim of ostensibly abstract graffiti was apparent, for example, when the phrase "lick me you whore dog bitch" was written on a wall directly over a spot where Robinson left her jacket; when the phrase "eat me" was freshly painted in Robinson's work area when she first happened upon it; and when the word "pussy" was written in Robinson's work area while she took a break for a drink of water.[84]

These mixed-aim activities, to be sure, augment Robinson's disparate-impact harassment case with an element of "disparate-treatment" discrimination under Title VII. In other words, Robinson's complaint is not limited to the ever-present visual and auditory assault of abstract sexual provocation permeating her work environment. In addition, many ostensibly abstract components of that pornographic environment target her individually, much the way the display of a Playboy pinup can target a woman because of her sex if the pinup superimposes a picture of her face.[85] And the addition of this mixed-aim layer, again, still does not complete Robinson's story.

But I will again momentarily consider the segmented analysis of Robinson's situation, for the same element of mixed aim was perpetrated by the cross that was burned on the lawn of the African-American family in R.A.V. The burning cross presumably was directed at the victimized family because of their race; it may also have been generally directed at bystanders, whatever their race. The defendants in R.A.V. apparently had a mixed design of targeted and generalized dissemination of their shockingly bigoted message. Accordingly, the R.A.V. rule against content-based speech regulation still seems applicable to Robinson's situation, even though her situation involves, in addition to abstract

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[81] *Id.* at 1497, 1501.

[82] *Id.* at 1497.

[83] *Id.* at 1501.

[84] *Id.* at 1499.

[85] *See, e.g.*, Bowman v. Heller, 66 Fair Empl. Prac. Cas. (BNA) 194 (Mass. Super. 1993) (discriminatory harassment of plaintiff with workplace dissemination of pornographic pictures superimposing a picture of her face), *aff'd on other grounds*, 651 N.E.2d 369 (Mass. 1995).

sexual provocation, mixed-directed provocation that humiliates her individually before an audience of coworkers.

The final layer of Robinson's story is predominantly about harassment of the outright disparate-treatment variety, motivated by transparent sex-specific hostility and prurient sexual interest. Robinson endured, for example, an occasion when a male coworker told her of his wish that her shirt would blow over her head;[86] another occasion when a coworker told her to wear tighter shirts;[87] another occasion when a foreman candidate asked her to sit on his lap;[88] several occasions involving a male coworker who told Robinson, among other things, that "women are only fit company for something that howls";[89] many occasions when coworkers or supervisors called her "honey . . . dear . . . baby . . . sugar . . . sugar booger . . . [and] momma";[90] and one occasion when a coworker yelled "boola-boola" at Robinson, a reference to the punch-line of a joke about sodomous rape.[91] That reference to sodomous rape also became a nickname for Robinson among some of her male coworkers.[92]

Robinson is not the only woman worker who has been transparently targeted in this perverse fashion. Other women workers have experienced individually directed verbal insults of the sort that Robinson has suffered.[93] In addition, they have experienced extreme patterns of gestural and verbal sexual propositions,[94] as well as physically harassing touching, pinching, grabbing, and sniffing.[95] (As to Robinson, of course, this severe mistreatment of *other* women

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[86] Robinson, 760 F. Supp. at 1498.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 1498-99.

[92] *Id.* at 1499.

[93] For example, one woman who testified in Ms. Robinson's case recalled experiencing such individually directed remarks as "are you on the rag . . . go to hell for culling pussy . . . [and] if you fell into a barrel of dicks, you'd come up sucking your thumb." *Id.* at 1500.

[94] *Id.* at 1500, 1501.

[95] *Id.* at 1499-1500, 1501.

factors into the disparate-impact side of her case.[96]) These extreme patterns of sex-specific mistreatment, according to at least one of Robinson's female coworkers, coincide directly with men who tend to concentrate in the vicinity of pornographic wall decor.[97]

Not surprisingly, this sex-specific pattern of mistreatment also coincides with a larger pattern of exclusion. Women represent less than five percent of the skilled workforce in Robinson's workplace.[98] This underrepresentation of women is two to three times as severe as the underrepresentation of women at other shipyards.[99] Furthermore, no woman in Robinson's workplace has ever achieved a position of substantial supervisorial responsibility.[100] In other words, Robinson's employer maintains an absolutely airtight glass ceiling three decades after Title VII was enacted.

Having roughly completed the story,[101] I will digress one last time into segmented constitutional analysis of just one portion of it: specifically, that portion of outright disparate treatment involving targeted insults, such as the "boola boola" remark, fired directly into Robinson's face. About the only notably expressive circumstance incident to such remarks has been the presence of others when such words have been hurled at Robinson. Of course, that sort of circumstance also serves to enhance a targeted person's feeling of insult, and thus perhaps attenuates application of the R.A.V. rule against content-based speech regulation. On the other hand, however, Robinson's feelings of insult, no doubt, have been mediated largely by the sexualized content — perhaps even the sexist viewpoint — inherent in a remark like "boola boola," which jokingly endorses sodomous rape. So even if such remarks involve unprotected fighting words or some other category of unprotected speech, the rule of R.A.V. would still seem

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[96] *See supra* note 51 and accompanying text.

[97] Robinson, 760 F. Supp. at 1500.

[98] *Id.* at 1493.

[99] *Id.* at 1509-10 (*defendant's* evidentiary proffer regarding other pornographically charged shipyards irrelevant, in part, because their workforces consisted of a "much higher" percentage of women, i.e., "approximately 10 to 15 percent").

[100] *Id.* at 1493.

[101] To more fully appreciate Ms. Robinson's story, readers are encouraged to study the Robinson court's more comprehensive discussion of the historical facts, the sordid details of which span 760 F. Supp. at 1491-1502 and 1510-1521.

to apply because Robinson's Title VII theory continues to rely on the harmful impact of bigoted messages.[102]

Frankly, at this point of the analysis, I become as suspicious of R.A.V. as the many commentators who have determined that its rule against content-based regulation of bigoted speech, as applied in the workplace, needs qualification. However, I am also suspicious of the segmented approach that many commentators take when advancing largely brand new First Amendment inroads for the various categories of "speech" — directed, mix-directed, and undirected — illustrated above with Robinson's story. The next subsection outlines this segmented approach to constitutional reconciliation and concludes that it is fundamentally flawed.

C. The Contours of Scholarly Efforts to Resolve Title VII's Tension with the First Amendment

In a case such as Robinson's, many commentators would attempt to salvage Title VII's application, in piecemeal fashion, with two types of new First Amendment inroads. The first tends to be a relatively narrow inroad, variously defined and defended, for *individually directed* workplace activities of the "boola boola" variety and perhaps the mixed-aim pornography variety.[103] Many of the

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[102] One commentator, Professor Calleros, argues that Title VII is content neutral in a targeted verbal abuse situation because the harassment theory here applies regardless of the content of the harasser's words. Charles R. Calleros, Title VII and Free Speech: The First Amendment is not Hostile to a Content-Neutral Hostile-Environment Theory, 1996 Utah L. Rev. 227, 246-47 (1996). *Cf.* R.A.V., 505 U.S. at 392 (suggesting that "a prohibition of fighting words that are directed at certain persons or groups" might be valid). Professor Calleros correctly observes that harassing words of any content, sexist or otherwise, are actionable under Title VII if the victim is selected on the basis of her sex. *See* Calleros, *supra* this note, at 257-58; *see also infra* text accompanying notes 203-205. As explained below, however, the harassing *potential* of certain words, such as "boola boola," is most definitely *enhanced* by the sexist content — indeed, even the sexist viewpoint — of the words. *See infra* notes 139-141, 200-203 and accompanying text.

[103] *See, e.g.*, Estlund, *supra* note 7, at 695 (offering an exception that "[a]dmittedly . . . would not be constitutional in the public forum" for "speech that is *directed* at a listener whom the speaker knows to be offended") (emphasis added); Calleros, *supra* note 102, at 248 (offering an exception for "low-value speech . . . on the basis of the defendant's *targeting* of victims") (emphasis added); Ellen R. Peirce, Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace, 4 Va. J. Soc. Pol'y & L. 127, 216 (1996) (offering an exception for unavoidable and harmful "speech . . . *directed* to women . . . in particular" if the speech is severe or pervasive and the employer has notice) (emphasis added); Greenawalt, *supra* note 22, at 90 (extending a rationale of situation-altering utterances to "abusive comments *directed* at an employee and intended to intimidate her, to drive her from her job, or to make her acutely uncomfortable") (emphasis added); Marcy Strauss, Sexist Speech in the Workplace, 25 Harv. C.R.-C.L. L. Rev. 1, 43 (1990) (offering categorical exceptions for individually directed speech that demands or requests sexual relations, is sexually explicit, or is degrading).

very same commentators also assert a second type of inroad, again variously defined and defended, for *undirected* activities, such as abstractly pornographic wall decor that disproportionately offends members of one sex.[104] The latter inroad tends to scrap R.A.V. altogether in the workplace.[105]

Some commentators vigorously defend the First Amendment against these new inroads. The defense has been led by Professors Browne and Volokh. Professor Browne maintains that Title VII harassment liability must be limited to incidents involving unwanted physical touching or verbal importations of the *quid pro quo* variety.[106] To this short list, Professor Volokh would add a very narrow category of targeted expressive-looking activity: specifically, offensive verbal and pictorial activity that the harasser consciously directs at a particular victim because of the victim's race, sex, religion, or national origin.[107]

These severe categorical limitations, to be sure, have drawn heated rejoinder from commentators at the opposite end of a growing spectrum that grapples with a seemingly extraordinary collision between civil liberties and civil rights.[108] And between the two extremes is a continuum of carefully crafted

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[104] *See, e.g.*, Charles R. Calleros, Title VII and the First Amendment: Content Neutral Regulation, Disparate Impact, and the "Reasonable Person," 58 Ohio St. L.J. 1217, 1225-26 (1997) (offering a theory of disparate-impact harassment for "undirected expression," taking into account whether "participation in a vigorous exchange of ideas is beyond the employee's job description," whether "the speech tends toward low value," and whether the employee is "an unwilling and captive audience"); Estlund, *supra* note 7, at 695 (offering an exception for "speech the manner of which is manifestly offensive on the basis of race, sex, or religion — independent of the viewpoint expressed — and that is uttered at a time and place that could not reasonably be avoided by listeners who are thus offended"); Peirce, *supra* note 103, at 216 (1996) (offering an exception for unavoidable and harmful speech that "is non-directed but is disproportionately more offensive to women than to men" if the speech is severe or pervasive and the employer has notice); Greenawalt, *supra* note 22, at 90, 95 (suggesting that some generalized speech, e.g., "nude calenders," is regulable under Title VII as "low value" speech that may "seriously disturb women"); Strauss, *supra* note 103, at 48 (suggesting case-by-case First Amendment balancing for "sexually explicit or degrading speech or expression that is not directed at the woman, but which she overhears or sees").

[105] The purported need to scrap R.A.V. is candidly conceded by Professor Greenawalt in connection with his assertion that First Amendment scrutiny may be relaxed for a content-based application of Title VII to "low value" undirected speech, such as a nude calender posted in a workplace setting. Greenawalt *supra* note 22, at 64, 90, 92.

[106] *See* Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St. L.J. 481, 485, 544 (1991).

[107] *See* Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1800, 1866-68 (1992).

[108] *See, e.g.*, Suzanne Sangree, Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, 47 Rutgers L. Rev. 461 (1995)

categorical inroads to directed and undirected workplace "speech," as summarized above,[109] offered by those who seek a more moderated balance between expressive freedom and workplace equality.[110]

Amidst this heated and largely categorical debate, which has raged since the beginning of this decade,[111] the courts have remained remarkably quiet about the First Amendment while continuing to entertain Title VII harassment claims founded at least in part on ostensibly expressive workplace activity.[112] Indeed, very shortly after deciding R.A.V., the Supreme Court remanded for trial a sexual harassment claim founded almost exclusively on verbal activity;[113] notably, the Court expounded upon the proper standards for hostile-environment claims, but said nothing about the First Amendment despite being briefed on the issue.[114] Lower courts likewise either ignore the issue[115] or avoid it by finding that the ostensibly expressive activity was not harassing enough to be actionable under Title VII.[116] Rarely do the lower courts directly address the First Amendment

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(challenging the limited parameters offered by Professors Browne and Volokh).

[109] *See supra* notes 103-104 and accompanying text.

[110] *See generally* Estlund, *supra* note 7, at 693 & nn.22-24 (explaining the continuum of scholarly perspectives on the issue); Deborah Epstein, Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech, 84 Geo. L.J. 399, 450-51 (1996).

[111] The heated nature of this debate is illustrated by a flurry of articles rallying the issue back and forth between Professors Brown and Sangree. *See* Browne, *supra* note 106; Sangree, *supra* note 108; Kingsley R. Browne, Workplace Censorship: A Response to Professor Sangree, 47 Rutgers L. Rev. 579 (1995); Suzanne Sangree, A Reply to Professors Volokh and Browne, 47 Rutgers L. Rev. 595 (1995).

[112] Throughout the 1990's, Professor Volokh has relentlessly exposed the ongoing willingness of courts and administrative tribunals to recognize harassment claims founded partly on verbal activity, without regard for the First Amendment. *See* Estlund, *supra* note 7, at 691 n.14 (cataloguing Professor Volokh's "tireless" investigative efforts).

[113] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (discussed *infra* Part II).

[114] *See infra* Part II.

[115] *See, e.g.*, Stair v. Lehigh Valley Carpenters Local Union No. 600, 66 Fair Empl. Prac. Cas. (BNA) 1473 (E.D. Pa. 1993) (enjoining workplace displays of pornographic calendars without mentioning the First Amendment), *aff'd*, 43 F.3d 1463 (3rd Cir. 1994); Sanchez v. City of Miami Beach, 720 F. Supp. 974 (S.D. Fla. 1989) (enjoining a wide range of ostensibly expressive activities, including abstract pornographic displays and sexist verbal commentary, without mentioning the First Amendment).

[116] *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 592, 595-97

concern allegedly presented by truly harassing activity that also purports to be expressively motivated speech. And when lower courts do grapple with this seeming contradiction in terms, they occasionally explain that the activity is not speech at all.[117]

I submit that the courts' collective reaction to the issue, marked as it is with disinterest, speaks loudly, especially when juxtaposed with the collective categorical clamor among commentators. The contrast, in my view, highlights a fundamental error inherent in developing brand new First Amendment inroads for categorical elements of expressive-looking workplace activities, whether they be of the directed, undirected, or mix-directed variety. Many commentators erroneously view verbal and pictorial harassment analysis as requiring a threshold Title VII harassment determination, followed by segmented constitutional analyses of categorical fragments of the harassing activity, followed further still by reevaluation of Title VII's application in the event of segmented First Amendment displacement.

One commentator, Professor Greenawalt, attempts to avoid the prospect of segmented First Amendment displacement by suggesting that Title VII's application to some "protected speech" represents a legitimate legislative compromise. According to Professor Greenawalt:

> Congress could forbid all unprotected harassing speech, but it has (implicitly) chosen to intervene only when a hostile environment is created. If such an environment does exist, even one produced *partly* by protected speech, imposing consequences for unprotected behavior is appropriate, as is restricting any future unprotected behavior. On this view, incidents of protected speech could count as contributing to a hostile environment.[118]

(5th Cir. 1995) (concluding that sexist "jibes" in a workplace newsletter did not create a sexually hostile working environment). *Cf.* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994) (firefighter's private possession of Playboy magazines unrelated to the creation of a sexually hostile working environment).

[117] *See, e.g.*, Robinson, 760 F. Supp. at 1535 (pervasive patterns of workplace pornography and sexualized verbal commentary "indistinguishable from . . . threats of violence or blackmail" for First Amendment purposes); Bowman v. Heller, 66 Fair Empl. Prac. Cas. (BNA) 194 (Mass. Super. 1993) (following Robinson as to less pervasive pattern of pornography upon which pictures of plaintiff's face had been superimposed), *aff'd on other grounds*, 651 N.E.2d 369 (Mass. 1995).

[118] Greenawalt, *supra* note 22, at 96.

The compromise that Professor Greenawalt suggests, however, contravenes not only the rule of R.A.V. — which applies to *both* protected- and unprotected-speech regulation[119] — but also the more fundamental and well-established principle of constitutional supremacy over congressional acts.[120] By what authority can Congress legislatively compromise away constitutionally "protected speech" with a statute that happens to permit some unprotected speech? The problem, again, is one of segmented perspective among commentators whose constitutional analysis splices any given harassment scenario into episodic fragments of individually expressive-looking activities.[121]

Indeed, the Robinson court refused to segment its analysis this way when considering the various elements of directed, mixed-directed, and undirected sexist assault described above in Part I.B. For purposes of Title VII, the Robinson court made *one* indivisible harassment determination based on *all* of the sexist activities, even though some of the activities, in abstract isolation, may have seemed less harmful than others. As the court explained, "[A] holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes."[122] Conversely, for First Amendment purposes, the Robinson court held[123] that the totality of the successive episodes, regardless of segmented categorical appearance, was so dominantly oppressive of women that, in total, the pattern of activity retained no constitutionally significant element of speech.[124] Notably, this holistic approach is entirely consistent with the decisions of many other courts

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[119] *See supra* note 78 and accompanying text.

[120] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803).

[121] For further discussion of this segmented perspective among commentators, see *infra* notes 158-166 and accompanying text.

[122] Robinson, 760 F. Supp. at 1524.

[123] The Robinson court papered its conclusions of law with many grounds of First Amendment reconciliation, *see id.* at 1534-37, only one of which was truly necessary, *see infra* next note and accompanying text.

[124] The court held that the pervasive pattern of directed, mix-directed, and undirected verbal and pictorial activity was, in total, "indistinguishable" from other forms of verbal conduct that lies beyond the pale of the First Amendment, such as "threats of violence or blackmail." Robinson, 760 F. Supp. at 1535. This conclusion followed, in part, from expert testimony establishing that the entirety of the working environment imposed upon women an extortionary command that they either quit their jobs or "subvert their identities to the sexual stereotypes prevalent in that environment." *Id.* at 1523.

that have applied Title VII to combined elements of abstract pornography and more directed verbal or physical activity when making an indivisible harassment determination.[125] As one court has explained, "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."[126]

This holistic perspective of the analysis, for purposes of both Title VII and the First Amendment, is developed further in the remaining two sections of this article, as is a theory of mutual exclusion between competing holistic characterizations: Title VII discriminatory "abuse" versus First Amendment "speech." In other words, I will explain why the same contextualized realities that drive a holistic Title VII abuse determination in a case like Robinson also attenuate a holistic First Amendment speech characterization. For present purposes, however, the context-driven basis for the thesis offers a way to distinguish R.A.V. from Title VII cases like Robinson.

The ordinance invalidated in R.A.V., unlike Title VII's harassment prohibition, was plainly acontextual in scope. It applied without qualification to "[w]hoever places" something like a burning cross "on public or private property."[127] Given this unqualified regulatory scope, the R.A.V. Court could properly *assume* that cross-burning necessarily involves an appreciable element of speech.[128] This speech assumption arguably was even defensible on the egregious facts of R.A.V. The R.A.V. Court went out of its way to note that the cross burners were a group of neighborhood "teenagers," not adult-aged white supremacists; that their cross had been "crudely" constructed "by taping together broken chair legs"; and that they burned their cross in the yard "across the street," which apparently was not a remote curtilage visible only from the victimized

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[125] *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1472-75, 1481-86 (3rd Cir. 1990) (taking into account *both* individually abusive conduct and abstractly pornographic conduct); Waltman v. Int'l Paper Co., 875 F.2d 468, 470-72, 477-78 (5th Cir. 1989); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 879-80, 887-89 (D. Minn. 1993); Sanchez v. City of Miami Beach, 720 F. Supp. 974, 977-79, 982 (S.D. Fla. 1989); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 570-71, 572-73 (W.D.N.Y. 1987). *See also* Mary Becker, How Free is Speech at Work?, 29 U.C. Davis L. Rev. 815, 866 (1996) (noting that any distinction between individually directed epithets and undirected pornography is blurred in a case like Robinson when both activities concur).

[126] Andrews, 895 F.2d at 1484.

[127] *See supra* note 76.

[128] *See* 505 U.S. at 383-384 (explaining the issue in terms of "expression" and "speech," albeit unprotected, "not . . . entirely invisible to the Constitution").

family's house.[129] Indeed, the teens in R.A.V. apparently would have been subject to the ordinance even if they had burned their crudely constructed cross on *their* side of the street.

The R.A.V. ordinance thus applied to ostensibly expressive juvenile antics without regard to context — that is, without regard to the presence or absence of any indicia of discernible abuse or threat of harm to particular persons. Notably, other cross-burning prohibitions challenged since R.A.V. have been upheld precisely because of limitations in scope to contextually defined indicia of abuse or threat of harm.[130]

As explained in the next section, the same sort of contextualized limitations apply to the scope of Title VII's prohibition of hostile-environment sexual harassment.

II. TITLE VII'S HOLISTIC CONCEPT OF DISCRIMINATORY "ABUSE"

This section reviews the holistic essence of hostile-environment sexual harassment, as defined by the Supreme Court in Harris v. Forklift Systems, Inc.[131] Also reiterated in this section is the potential of Title VII's harassment prohibition to take heightened aim at expressive-looking workplace activities of sexist content. Indeed, the facts of Harris itself provide an excellent illustration of Title VII's heightened aim at sexist remarks in the workplace. The case also suggests a remarkable judicial indifference to that content-regulatory potential. The next section will offer an explanation for that apparent indifference.

Harris presented a claim of hostile-environment sexual harassment based on mostly verbal remarks made by the corporate defendant's president, Mr. Charles Hardy, to a female subordinate, Ms. Teresa Harris. The predominance of verbal activity is perhaps best related by a full account of the story, told by the Court as follows:

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[129] *See id.* at 379.

[130] *See, e.g.*, State v. Talley, 858 P.2d 217, 221-23 (Wash. 1993) (en banc) (upholding as a regulation of "conduct" a prohibition of cross-burning aimed at victims selected because of race where cross-burning, in context, places victims in reasonable fear of harm); In re Steven S., 31 Cal. Rptr. 2d 644, 646, 649-51 (Cal. Ct. App. 1994) (upholding a statute limited in scope to prohibiting cross burning "'on the private property of another . . . for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property'") (citation omitted).

[131] 510 U.S. 17 (1993).

> Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing.
>
> In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy . . . some [sex] Saturday night?" On October 1, Harris collected her paycheck and quit.[132]

Describing these facts as presenting "'a close case'" of sexual harassment, the trial court dismissed the case because the employer's conduct, though offensive, was not "'so severe as to be expected to seriously affect [Harris'] psychological well-being.'"[133] The Supreme Court ultimately rejected this standard and reversed and remanded the case with instructions about the proper standards to be applied to claims of hostile-environment sexual harassment.

The Harris Court took "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[134] The Court defined this middle path in terms of a threshold of *discriminatory abuse*: specifically, "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[135] The question of abuse, in turn, involves a two-pronged inquiry: (1) whether the victim

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[132] *Id.* at 19 (citations omitted) (alterations in original).

[133] *Id.* at 19-20 (alteration in original).

[134] *Id.* at 21.

[135] *Id.* (internal quotation marks and citations omitted).

subjectively perceives the work environment to be abusive; and (2) whether the environment is "objectively . . . abusive" to a "reasonable person."[136] This test, according to the Court, "is not . . . mathematically precise."[137] It hinges on "all the circumstances" of the case, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[138]

To be sure, the Court's discriminatory-abuse standard contemplates a highly context-specific analysis when attempting to quantify discriminatory intimidation, ridicule, and insult. One of the many factors that can add to the force of such insult, no doubt, is the bigoted content inherent in the sort of remarks suffered by the plaintiff in Harris. As one commentator persuasively argues, "the statement, 'We need a man as rental manager,' may contribute to harassment liability, while the statement, 'A woman will do just fine as a rental manager,' cannot."[139]

Even within the sexist viewpoint, the Harris formulation seems to invite the very kind of content-based speech regulation that was previously struck down by the Court, only two years earlier, in R.A.V. The harsh sexist content of the phrase "dumb ass woman," for example, inevitably has more capacity to intimidate, ridicule, and insult than does the phrase "very unintelligent woman," which means that the prior blast of three words, because of its harsher content, is more likely to make the employer's conduct cross the threshold from nonabusive to abusive. It is unrealistic to suggest that both of these three-word insults are perfectly functional equivalents for purposes of assessing liability and damages for hostile-environment sexual harassment.[140] And, again, it is folly to

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[136] *Id.* at 21-22.

[137] *Id.* at 22.

[138] *Id.* at 23.

[139] Estlund, *supra* note 7, at 698.

[140] In response to this point, Professor Calleros has offered several hypothetical illustrations of innocuous-seeming words that he suggests could create a sexually hostile environment, including one hypothetical illustration involving a workplace supervisor who likes to "chat" with women about "movies, sports, politics, or his favorite restaurant." *See* Calleros, *supra* note 102, at 258. Perhaps "[o]ne can imagine" that, *see id.*, but can one really imagine attributing to the three-word blast "good movie, huh?" the *exact same harassing force* as would be occasioned in identical circumstances by the three-word blast "dumb ass woman"?

suggest that a positive three-word expression, such as "very smart woman," could serve as yet another functional equivalent.[141]

The Harris Court thus announced a discriminatory-abuse formulation that seemingly invited a jury on remand to engage in both viewpoint- and content-based speech regulation — and the Harris Court did so without mentioning R.A.V., without mentioning the First Amendment, and without mentioning why it disregarded briefing on the First Amendment issue.[142] The next section suggests that the Court's silence speaks loudly.

III. TITLE VII'S CONTENT-NEUTRAL REGULATION OF SPEECH INCIDENT TO ABUSE

On remand, the issue in Harris might be described as "he says, she says." As explained in the previous section, the employer says that his sexist remarks and behaviors served the expressive purpose of "joking" around, whereas the insulted employee says that she was "abused" by those remarks and behaviors. In this section, I say that no matter which characterization pertains, there can be no appreciable element of the other. In other words, I conceive of First Amendment "speech" and Title VII "abuse" as occupying opposite sides of a sort of yin-yang continuum. These characterizations account, in mutually exclusive fashion, for all allegedly harassing workplace scenarios. There is no overlap, and thus no conflict, between First Amendment "speech" and Title VII "abuse." That is how the Court's silence in Harris is explained next, in Part III.A. Directly supportive dicta from the Supreme Court is then examined in Part III.B.

A. The Yin and Yang of Title VII and the First Amendment

No doubt aware of the First Amendment issue it disregarded, the Harris Court announced a hostile-environment harassment analysis of appreciable threshold, albeit not severe psychological trauma, that seems to suggest a speech-conduct juxtaposition between the First Amendment and Title VII's hostile-environment harassment prohibition. Based on the Court's discriminatory-abuse formulation, as explained above, there must indeed be a discernible victim or victims who suffer a severe or pervasive pattern of discriminatory intimidation, ridicule, and insult that alters working conditions. And these victims, as Justice Scalia's concurrence further noted, may well recover money damages.[143] That the

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[141] This is another one that seriously challenges the imagination. *See supra* note 140.

[142] Both of the parties and several amici had briefed the First Amendment issue. *See* Fallon, *supra* note 22, at 9 & nn.44-46.

[143] *See* Harris, 510 U.S. at 24 (Scalia, J., concurring).

Court was thinking in some sense of "true" abuse is further reflected in its caution against recovery for "a mere offensive utterance," and further still in its reliance on an objective test, which is also the Court's test for "true" threats[144] — a conduct-laden verbal category beyond the pale of the First Amendment.[145]

A speech-conduct juxtaposition is even further reflected by the Harris Court's highly contextualized definition of discriminatory abuse for Title VII purposes. As explained in the previous section, the Court's instructions on remand required consideration of "all the circumstances," which the Court further elaborated upon in nonexhaustive multi-factored fashion. The entire formulation is thus very reminiscent of Justice Holmes' famous pronouncement, quoted at the beginning of this article, about the potential for a contextualized brigading of action that can give "words . . . . all the effect of force" and thus strip them of First Amendment significance.[146] The effect of force for Title VII purposes apparently is captured by the Court's reference to "discriminatory intimidation, ridicule, and insult."

Perhaps the most telling sign of a speech-conduct juxtaposition is in the *indivisible* nature of the abuse determination that the Harris formulation contemplates. This in turn requires that the trier of fact consider the *total effect* of such *facially* varied imperatives as the targeted remark "dumb ass woman," the targeted remark "we need a man as rental manager," and even verbal and gestural activities directed at women other than Ms. Harris.[147] On remand of Harris, the trier of fact was instructed to consider all such episodes, in total, and to make one holistic abuse determination, if any — not a dozen, give or take a few.[148] In other words, the employer's repeated "joking" around in Harris may have simply gone too far and ceased being a joke.

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[144] *See* Watts v. United States, 394 U.S. 705, 707-08 (1969) (defining "true threats" in terms of an objective test based on total "context").

[145] *See infra* note 152 (explaining Professor Greenawalt's conception of threats, among other communications, as being "situation-altering utterances").

[146] *See supra* note 14.

[147] The relevant facts in Harris, as fully quoted in the previous section, did indeed include many verbal activities directed at *other* women. And as to occasions when Ms. Harris herself was the target, the Court seemed to find special relevance to the "presence of other employees." *See supra* text accompanying note 132.

[148] The same holistic approach was likewise applied in Robinson. *See supra* text accompanying notes 121-126. *See also* Vance v. Southern Bell Tel., 863 F.2d 1503, 1511 (11th Cir. 1989) (noting that "[a] hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits").

This holistic abuse analysis strongly suggests a First Amendment theory of contextualized attenuation, which in fact had already been applied by some lower courts when Harris was decided.[149] Under this theory of attenuation, ostensibly expressive elements of harassing activity, such as the rental-manager remark in Harris, are stripped of their "speech" status because of their integral contribution to an indivisible harm, i.e., discriminatory abuse. This theory of attenuation, however, cuts both ways. For example, on remand of Harris, if the evidence bears out the employer's assertion that his allegedly harassing activities, on the whole, were dominantly jokes or dominantly served some other expressive end, then the trier of fact should reject the claim for want of Title VII abuse. The First Amendment thus need never enter the picture because Title VII's abuse threshold itself provides an inverse outlet for constitutionally cognizable speech — i.e., yin and yang at Title VII's abuse threshold.[150]

The sort of speech-conduct model suggested by this analysis differs from speech-conduct models generally advanced or assumed by commentators who write in this area. Commentators generally advance or assume models that follow either of two polarized extremes. At one extreme are commentators who tend to liberally impute the effect of force to entire categories of activity, such as pornography, regardless of workplace context.[151] Under this liberal model, a *conduct* characterization apparently applies across the board to all workplace pornography, whether it is displayed in an industrial shipyard where woman workers routinely suffer individualized mistreatment, or is displayed during a

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[149] Contextualized attenuation of speech was an underpinning of the Robinson court's First Amendment analysis. *See supra* note 124 and accompanying text. *See also, e.g.*, Bowman v. Heller, 66 Fair Empl. Prac. Cas. (BNA) 194 (Mass. Super. 1993) (following Robinson as to less pervasive pattern of pornography upon which pictures of plaintiff's face had been superimposed), *aff'd on other grounds*, 651 N.E.2d 369 (Mass. 1995).

[150] The same type of yin-yang threshold may well exist outside the Title VII context, for the tort of intentional infliction of emotional distress. Consider, for example, a claim of this tort based on a cartoon depicting Reverend Falwell engaged in a drunken and incestuous rendezvous with his mother in an outhouse. That cartoon may well be predominantly speech if disseminated publicly as an advertisement parody in an edition of Hustler magazine, *see* Hustler Magazine v. Falwell, 485 U.S. 46, 48, 54-55 (1988), but it may well be predominantly outrageous conduct if a blown up version is visibly posted next to the cross on the altar of the Reverend's workplace, his church, moments before he and his congregation enter for Sunday service. *Cf.* Linebaugh v. Sheraton Michigan Corp., 497 N.W.2d 585, 587-89 (Mich. Ct. App. 1993) (upholding claim of intentional infliction of emotional distress based on a workplace display of a hand-drawn cartoon depicting plaintiff in a sexual act with a coworker); Bowman, 651 N.E.2d at 372, 376 (finding that trial court erred in dismissing claim of intentional infliction of emotional distress based on the workplace circulation of pornographic pictures that superimposed pictures of plaintiff's face).

[151] *See, e.g.*, MacKinnon, *supra* note 7, at 22, 55, 58 (1993) (characterizing pornography as an act of discrimination itself and thus nonspeech).

pornographers' convention at a convention center that is staffed and managed equally by men and women who have no history of any sexual misconduct. At the other extreme are commentators who tend to conservatively assume the weakened imperative of entire categories of activity, such as pornography, focusing instead on utterance-specific imperatives of facially forceful appearance.[152] Under this conservative model, a *speech* characterization apparently is assumed unless a specific worker is directly victimized with a remark like "sleep with me if you want a raise."[153]

The courts' speech-conduct perspective, as suggested by cases like Robinson and Harris, seems to fall somewhere between these polarized models. The courts' analysis seems to suggest a *contextualized* speech-conduct *continuum*. Along that continuum, there is a mathematically imprecise point where, in context, "speech" cognizable to the First Amendment yields to the critical mass of a mounting holistic imperative of sexual subordination; at critical mass, the mounting imperative simultaneously establishes the starting point of Title VII "abuse."[154]

The blurry mathematical imprecision of this line, as observed in Harris,[155] occurs because every workplace is its own unique social milieu, and the speech-versus-abuse characterization is based on a holistic analysis of that unique milieu to determine which characterization predominates. This holistic analysis eschews acontextualized focus on isolated workplace events that may be expressive in appearance. As mentioned above in Part I.C., any given episode of allegedly harassing activity, whether expressive in appearance or not, can only be understood within a total and varied workplace context, just as a given scene from

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[152] *See, e.g.*, Greenawalt, *supra* note 22, at 6, 78-79, 90 (defining "situation-altering utterances" in terms of orders, commands, contract offers, invitations, threats, extortion, etc., and extending the underlying reduced-speech rationale to "abusive comments directed at an employee and intended to intimidate her, to drive her from her job, or to make her acutely uncomfortable"); *see also id.* at 90 (advancing an alternative First Amendment rationale for undirected speech of "low value," e.g., "nude calendars").

[153] Professor Greenawalt apparently extends his view of verbal conduct *slightly* beyond extortionary utterances, to face-to-face verbal abuses. *See id.* at 90 (suggesting that "speech *mainly* designed to humiliate has slight expressive value and should be placed in the category of speech that 'does' rather than 'says'") (emphasis in original). Many other commentators, however, seem to confine their view of verbal conduct to extortionary utterances of the *quid pro quo* variety. *See* sources cited *infra* note 191.

[154] The subordinating imperative can result from a synergistic interplay of sexist verbal activity and specific workplace milieus marked by numerical and supervisorial predominance of men over women. *See supra* note 20.

[155] *See supra* text accompanying note 137.

a play is best understood not by isolated observation of the scene but instead by holistic analysis of the scene within the entirety of the performance.[156] The analysis, as depicted in Harris and an even more recent Supreme Court opinion, seems to be of this holistic essence for purposes of both Title VII and the First Amendment.[157]

The analysis thus does not seem to contemplate "abusive speech" — an oxymoronic conception that many commentators apply when advancing largely brand new First Amendment inroads for variously defined categories of directed and undirected verbal and pictorial workplace activities.[158] According to Professor Greenawalt, for example,

> we must understand that (1) some protected speech could seriously disturb women, *and* (2) that in some cases everything *but* protected speech might fall short of making the environment sufficiently hostile, while everything including protected speech might make the environment sufficiently hostile.[159]

Again, this sort of bifurcation is *not* how the Supreme Court seems to understand the analysis. As explained above, the Court's Title VII analysis contemplates holistic action, i.e., abuse, that apparently attenuates any *acontextually perceived* elements of "protected speech." Granted, this abuse analysis thus contemplates the potential for *seemingly harmless* words — e.g., "we need a man as rental manager" — to contribute to an abusive environment. But that, indeed, is the question: whether or not, in context, the words were integral to an indivisible harm. If they were, the words should not be conceived of as "protected speech" that "could seriously disturb women," but instead as an inseverable component of a larger pattern of activity that has the effect of force, i.e., Title VII discriminatory abuse. Conversely, the question itself is whether the seemingly harmless remark was, in full context, indeed part of some "innocuous"

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[156] *See supra* text accompanying notes 121-126.

[157] A mutually exclusive and indivisible view of the speech-versus-abuse characterization seems to be implied by the Court's recent decision in Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998). In Faragher, the Court accepted a trial court's holistic finding of sexual harassment predicated on a mix of offensive touching and offensive remarks, including "vulgar references to women and sexual matters" that were made "[w]ithin earshot" of women employees. *See id.* at 2281.

[158] *See supra* Part I.C.

[159] Greenawalt, *supra* note 22, at 95 (emphasis in original). *See also* Fallon, *supra* note 22, at 13-14 (suggesting that some of the harassing remarks in *Harris* — e.g., "You're a woman, what do you know?" — were elements of protected speech).

pattern of activity for Title VII purposes,[160] and thus predominantly expressive for First Amendment purposes. In other words, for purposes of Title VII and First Amendment interplay, context is everything. The same contextual realities that implicate Title VII concerns also attenuate First Amendment concerns, and vice versa.

Professor Volokh, for example, thus commits an error of acontextualized abstraction with an illustration of a trial judge who, according to Professor Volokh, once "mentioned" that "job titles such as 'foreman' and 'draftsman' . . may constitute harassment."[161] Any mention of harassment in the case, however, can only be understood in the full workplace context presented, which in fact also included prominent displays of photographs of nude and seminude women in sexually provocative poses, whistling and catcalls directed individually at the plaintiff, and a persistent pattern of gender-based language among coworkers.[162] Granted, had the trial judge not ultimately rejected the harassment claim,[163] the case may have presented a question as to whether enjoining the "foreman" and "draftsman" designations was necessary to bring the overall scenario beneath Title VII's abuse threshold.[164] But that is a question of Title VII remedy, which should not be confused with the initial question of liability: given "all the circumstances," was the abuse threshold indeed crossed?[165] And I submit that

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[160] The abuse characterization is not influenced by "innocuous differences in the ways men and women routinely interact with members of the same and of the opposite sex." Oncale, 118 S. Ct. at 1003. Innocuous activity, for this purpose, includes "'simple teasing,' . . . offhand comments, and isolated incidents (unless extremely serious)." Faragher, 118 S. Ct. at 2283 (citation omitted).

[161] *See* Volokh, *supra* note 24, at 564-65 & n.5 (citing Tunis v. Corning Glass Works, 747 F. Supp. 951 (S.D.N.Y. 1990), *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991)). Professor Fallon commits a similar error on the facts of Harris itself. Under Professor Fallon's analysis, all of the verbal episodes in Harris should be separately "arrayed along a spectrum" for purposes of multiple, episodic speech-conduct characterizations. *See* Fallon, *supra* note 22, at 14 (describing as a mere "rhetorical question" the remark "You're a woman, what do you know?").

[162] *See* Tunis, 747 F. Supp. at 954-55, 958.

[163] The claim was ultimately rejected because the employer had taken prompt remedial action. *See id.* at 959.

[164] Robinson presented a similar question, that is, whether it was proper for the court's ultimate order to go so far as to enjoin in the workplace even privately possessed girlie magazines and the like. *See* Robinson, 760 F. Supp. at 1542. This part of the order probably went too far. *See* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994) (firefighter's private possession of Playboy magazines unrelated to the creation of a sexually hostile working environment).

[165] *See* Sangree, *supra* note 108, at 468 (cautioning against "conflation of standards for

sexist job designations can indeed add to a larger pattern of holistic harassing force occasioned, in addition, by pornographic wall decor, cat calling and whistling, and a managerial staff that condones such activity.

At bottom, some commentators apply wholesale speech assumptions to fragments of workplace activities based on acontextualized notions about the weakness of the abusive imperative. This is indeed a suspect brand of formalism. We should never assume the label "speech" based on preconceived notions about ostensibly "harmless" sexist activity, such as the remark "we need a man as rental manager" or the workplace display of Playboy pinups "merely" happened upon by a woman. Harmlessness is indeed the pivotal question. And that question is not satisfactorily answered by divorcing isolated events from the entire tapestry of the workplace milieu and then labeling some or all of the acontextualized events "speech."

Some commentators, including Professors Volokh and Estlund, express a related First Amendment concern about Title VII's purported potential to create an "incentive" for employers to suppress virtually any increment of bigoted speech among employees.[166] This concern is driven largely by the specter of risk-averse employers who might overzealously censor obviously expressive workplace activity, such as an employee's isolated work-station display of a picture of his own wife in a bikini.[167] Seemingly forgotten by this suggestion of a parade of horribles, however, is the concept of a speech-abuse continuum that cuts both ways. Theories of Title VII abuse can be and indeed have been shattered by contextual realities that can bring within the First Amendment's radar even harsh sexist communications[168] — let alone an isolated picture of a loved one at the beach. That some commentators underestimate the diluting effects of context is vividly demonstrated by one commentator's recent suggestion that a charge of sexual harassment could be based on sexist comments made by customers to dancers in sleazy strip joints.[169] These are workplaces in which even extremely

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liability with those for remedy").

[166] *See* Volokh, *supra* note 107, at 1809-1812. *See also* Cynthia L. Estlund, The Architecture of the First Amendment and the Case of Workplace Harassment, 72 Notre Dame L. Rev. 1361, 1367 (1997) (arguing that Title VII "induces" employers to limit speech).

[167] *See* Volokh, *supra* note 24, at 566-67 & n.14 (expressing concern about censorship of such a picture).

[168] *See, e.g.*, DeAngelis, 51 F.3d at 595-97 (repeated sexist jokes and jibes in a workplace newsletter, also described by the court as "speech," held not to create a sexually hostile working environment).

[169] *See* Sandra L. Snaden, Baring It All at the Workplace: Who Bears the Responsibility?, 28 Conn. L. Rev. 1225, 1254 (1996).

harsh sexist commentary, fired directly at individual women workers, remains on the First Amendment side of the speech-abuse continuum.[170]

Furthermore, the specter of risk-averse employers is based solely on a perceived *incentive* associated with Title VII, for Title VII by no means *requires* censorship of all bigoted workplace speech.[171] Indeed, the only support Professor Volokh has mustered on the issue is non-Title VII precedent involving legislation that plainly *required* of employers action violative of the Constitution if done by the state.[172] Title VII, however, *requires* employer intervention only when the totality of the episodes crosses the abuse threshold, and that statutory requirement violates no provision of the Constitution. As Professor Estlund concedes, "The totality of episodes could rarely be defended on free speech grounds."[173] In other words, Title VII's harassment prohibition, as interpreted in Harris, applies to a threshold of abuse that, in Professor Estlund's own words, raises no serious First Amendment issue.

There is one final, most troubling problem with Professors Volokh and Estlund's argument about the risk-averse employer: its potential to thwart Title VII's fundamental antidiscrimination principle, even as applied to tangible denials of job benefits based on sex. As explained above in Part I.A., discriminatory intent for purposes of demonstrating tangibly discriminatory acts, such as denying a woman a promotion because of her sex, can be proven circumstantially with evidence of an employer's dissemination of sexist commentary in the workplace.[174] In other words, a woman denied a promotion can offer as proof of discriminatory intent the employer's history of using sexist language or the employer's history of permitting sexist language among employees. So whatever risk-averse incentive Title VII may create for purposes of reducing exposure to harassment claims is also present for purposes of reducing exposure to claims of tangibly discriminatory employment actions. And the specter of that risk-averse incentive in the latter context, to be sure, cannot

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[170] *Cf.* Patti A. Giuffre & Christine L. Williams, Boundary Lines: Labeling Sexual Harassment in Restaurants, 8 Gender & Soc'y 378, 398 (1994) (finding among employees who work in sexualized working environments more innocuous perceptions of sexist remarks and even unwelcome physical touching and grabbing).

[171] *See* Volokh, *supra* note 107, at 1810 (arguing only that Title VII creates an "incentive" for employers to limit speech). *See also* Estlund, *supra* note 166, at 1367 (arguing only that Title VII "induces" employers to limit speech).

[172] *See* Volokh, *supra* note 107, at 1817-18.

[173] *See* Estlund, *supra* note 166, at 1367.

[174] *See supra* notes 31-35 and accompanying text.

provide constitutional grounds to undermine an entire evidentiary avenue of Title VII liability. Indeed, the Supreme Court has unequivocally stated, "The First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent."[175]

Apparently, Professors Volokh and Estlund's fear about risk-averse employers rests exclusively on the imprecision of navigating the context-based boundary between speech and harassing conduct.[176] But the same type of unremarkable imprecision[177] applies to other speech-conduct continuums. Consider, for example, the inherent imprecision in determining how menacing words must become, in context, before political hyperbole *reasonably appears* to cross a threshold into regulable presidential threats;[178] or how far sexual banter can go before a jury might *reasonably infer* that the boss is making an extortionary "*quid pro quo*" demand of a subordinate;[179] or how far a joke can be taken before a jury may *reasonably infer* a binding contract;[180] or for that matter, how loudly the word "fire" must be said and how crowded the theater must be with persons not in on the joke before the word is treated as a regulable disturbance.[181] The point here, which also applies beyond speech-conduct

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[175] *See supra* note 32.

[176] *See* Volokh, *supra* note 24, at 568 (arguing that "[t]he law's uncertain meaning requires people to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked") (internal quotation marks and citations omitted). *See also* Browne, *supra* note 111, at 580 (same).

[177] The Supreme Court apparently does not discern an overbreadth or vagueness problem. *See infra* text accompanying note 187 and accompanying text. *See also* Greenawalt, *supra* note 22, at 92 (refuting concerns that Title VII's hostile-environment prohibition is vague or overbroad).

[178] *See* Watts, 394 U.S. at 708 (applying objective test based on total "context," including "the reaction of the listeners," to determine whether statements made at a political rally constituted a presidential threat).

[179] Virtually every commentator to consider the issue, even Professors Browne and Volokh, seems to agree that *quid pro quo* threats are beneath the First Amendment's radar. *See infra* note 191 and accompanying text. But seldom do they acknowledge the uncertainty of this characterization. As explained below, the difference between *quid pro quo* and hostile-environment harassment is not always clear; indeed, cases can involve mixed and even shifting elements of both. *See infra* notes 191-197 and accompanying text.

[180] *See, e.g.*, Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954).

[181] *See supra* note 14.

continuums,[182] is largely driven by an "objective" analysis of "reasonable inference" that pervades a legal landscape upon which spoken words may often be at uncertain risk.

Title VII, as construed in Harris, incorporates the same thread. Look again at the Court's threshold for regulable harm under Title VII: that the conduct (e.g., words), considering "all the circumstances," must "reasonably be perceived . . . as . . . abusive."[183] We ask the jury to answer that question the same way we do elsewhere when words are close to the line. And the circumstances relevant to the jury's Title VII abuse analysis, I submit, are coextensive with circumstances that attenuate any expressive agenda, creating instead a reasonable inference of a predominant design to intimidate, ridicule, and insult, or at least a reasonable inference of "gross indifference"[184] to that harm — which itself is inevitable on the facts of cases like Harris and Robinson.

Again, the Harris Court properly conceded that the jury's job is "not mathematically precise."[185] And perhaps Justice Scalia, in his concurrence, was even correct to bemoan the imprecision inherent in allowing "virtually unguided juries" to determine when Title VII's abuse threshold has been crossed.[186] But still, neither the Court's opinion nor Justice Scalia's concurrence so much as mentioned a vagueness, overbreadth, or First Amendment concern, even though the Court had been briefed on the issue by both parties and several amici.[187] Why was it tolerable for the Court to unanimously ignore R.A.V., which it decided less than two years before? Because there was no First Amendment issue in Harris. On remand, a finding of abuse would be tantamount to a finding of no appreciable element of speech in the employer's overall pattern of words and behaviors. On the other hand, a finding of no abuse would be tantamount to a

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[182] Defamatory utterances, for example, are a regulable form of "unprotected speech," *see supra* note 75, even though this category of speech is defined from the amorphous perspective of "'any considerable and respectable segment in the community.'" *See* Draghetti v. Chmielewski, 626 N.E.2d 862, 866 (Mass. 1994) (citation omitted). Obscenity, another category of regulable "unprotected speech," *see supra* note 75, is likewise defined by varying community standards on what materials appeal to "prurient interests" and are "patently offensive." *See* Miller, 413 U.S. at 30.

[183] *See* Harris, 510 U.S. at 22, 23. *See also supra* text accompanying note 136.

[184] *See* Greenawalt, *supra* note 22, at 90-91 (extending rationale of situation altering communications to hurtful utterances made with "gross indifference").

[185] *See supra* text accompanying note 137.

[186] Harris, 510 U.S. at 24 (Scalia, J., concurring).

[187] *See supra* note 142.

finding of an appreciable speech element, which in turn would result in the failure of Ms. Harris's claim of harassment.

To be sure, similar reconciliations of Title VII and the First Amendment have already been criticized by some commentators as "simple"[188] and "formalistic."[189] "Calling speech conduct," so they say, "does not make it so."[190] These same commentators, however, are often quick to say that "speech" in the form of *quid pro quo* harassment — as opposed to hostile-environment harassment — is indeed "conduct" beneath the First Amendment's radar. Only the *quid pro quo* form of harassment, so they say, is as "'*obviously*' outside the ambit of First Amendment concern as words used to utter a threat or solicit a prostitute."[191]

The "obvious" line these commentators attempt to draw, however, might also be criticized as simple and formalistic. In the real world of *quid pro quo* harassment, sexually predatory workplace supervisors do not necessarily come right out with simple utterance-specific imperatives like "sleep with me if you want a raise." Many cases, instead, involve at best a murky distinction between *quid pro quo* and hostile-environment harassment.[192] Indeed, virtually any hostile-environment situation, if attributable to the employer,[193] has a strong

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[188] *See* Fallon, *supra* note 22 and accompanying text.

[189] *See* Greenawalt, *supra* note 22 and accompanying text.

[190] *See* Fowles, *supra* text accompanying note 23.

[191] *See* Fallon, *supra* note 22, at 13 (emphasis added). *See also* Greenawalt, *supra* note 22, at 78-79 (characterizing *quid pro quo* threats as "situation-altering utterances" undeserving of First Amendment protection); Fowles, *supra* note 23, at 473 (characterizing *quid pro quo* threats as "extortion" undeserving of First Amendment protection); Volokh, *supra* note 107, at 1800 (same); Browne, *supra* note 106, at 485 (also exempting *quid pro quo* from the First Amendment's purview).

[192] One source of uncertainty obtains when an employee complains about a supervisor's sexual conduct, verbal or physical, and the supervisor retaliates with an adverse employment decision. The situation can be analyzed as a hostile-environment case or a *quid pro quo* case, or both, depending on whether the adverse employment decision constituted a "tangible job detriment." *Compare* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186-87 (6th Cir. 1992) (issue of fact as to whether *quid pro quo* harassment occurred where employee was assigned to more difficult work after objecting to her supervisor's sexual advances), *with* Burlington, 118 S. Ct. at 2265 (plaintiff's claim of "unfulfilled" *quid pro quo* threats "categorized as a hostile work environment claim").

[193] An employer can be held liable for harassment under negligence theory if the employer knew or should have known of the harassing conduct and failed to take adequate remedial action. *See supra* note 71. Even absent notice, employer responsibility is possible. *See id.*

element of *quid pro quo*. In effect, the employer is imposing upon the employee a choice between either submitting to the hostile environment or quitting the job. As one commentator has explained, there is no material difference between a supervisor who talks dirty to a subordinate and a supervisor who says that listening to the dirty talk will assure continued employment or advancement.[194]

Moreover, "conduct" that begins as a *quid pro quo* threat may in fact be actionable solely as "conduct" contributing to a hostile environment. As explained in Burlington Industries, Inc. v. Ellerth,[195] a recent Supreme Court opinion, a claim involving "unfulfilled" *quid pro quo* threats "should be categorized as a hostile work environment claim."[196] In other words, *quid pro quo* threats actually present a hostile-environment situation if the subordinate refuses to submit and if the supervisor never follows up with a tangibly adverse employment decision. I submit that the fortuity of the employee's resistance and the supervisor's indecision does not suddenly switch the supervisor's extortionary *words* from "conduct" back to "speech." The words, in full context, are swept into one category or the other, and that contextualized characterization is not dependent on collateral *nonoccurrences* that may convert the situation from *quid pro quo* to hostile environment. Accordingly, commentators critical of my brand of formalism should not, after Ellerth, continue to rely on a formalistic distinction between hostile-environment harassment and *quid pro quo* harassment.

Calling hostile-environment harassment "speech" does not make it so.

B. Directly Supportive Dicta From the Supreme Court

The brand of formalism that this article may be accused of is also very consistent with what the Supreme Court has in fact already said, twice, about Title VII's hostile-environment harassment prohibition being a "permissible content-neutral regulation of conduct."[197] The Court, to be sure, has never fully explained its theory of content neutrality. Dictum from the Court's decision in R.A.V. suggests that Title VII's harassment prohibition is content neutral based on an incidental-effects analysis as developed earlier by the Court in United States v. O'Brien.[198] The notion, according to the R.A.V. dictum, seems to be that

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[194] J. Hoult Verkerke, Notice Liability in Employment Discrimination Law, 81 Va. L. Rev. 273, 275 (1995).

[195] 118 S. Ct. 2257 (1998).

[196] *Id.* at 2265.

[197] *See* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (citing with approval prior dictum along the same lines from R.A.V., 505 U.S. at 389-90).

[198] 391 U.S. 367 (1968).

expressively motivated but sexually derogatory words can be "swept up incidentally" within Title VII's harassment prohibition, the same way that expressively motivated draft-card burning, as occurred in O'Brien, can be swept up incidentally within a prohibition of draft-card destruction.[199]

There is a problem, however, with this O'Brien-type incidental-effects analysis.[200] As explained above, Title VII harassment analysis undoubtedly attributes to certain verbal or physical conduct a greater harassing force if the conduct is of insulting sexist *content*.[201] And indeed, the sexist content of certain verbal or physical conduct may be a *primary* reason the conduct even has harassing force. Consider, for example, a male employer or coworker who, without invitation or solicitation, sniffs the airspace directly behind a female employee's buttocks and then gives of a sigh of mocking sexual satisfaction.[202] Attributing harassing force to this verbal or physical conduct (take your pick) is driven largely by the sexist message communicated to the employee. It is difficult to see how, in this situation, Title VII's application is truly "incidental" to the expressive agenda.[203]

Perhaps an incidental-effects analysis might be salvaged if the R.A.V. dictum is construed as addressing Title VII's grand regulatory scheme. The argument here might be that Title VII does not *exclusively* target bigoted abuse the way the ordinance in R.A.V. exclusively targeted bigoted fighting words.

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[199] *See* R.A.V., 505 U.S. at 389 (citing O'Brien, 391 U.S. at 376-77).

[200] The R.A.V. dictum has been criticized as "offhand" and "unilluminating," DeAngelis, 51 F.3d at 597; "elliptical," Greenawalt, *supra* note 22, at 82; and "logically troublesome," Volokh, *supra* note 107, at 1830. *See also* Fowles, *supra* note 23, at 497 (criticizing the R.A.V. dictum); Fallon, *supra* note 22, at 14-16 (same); Jeffrey A. Steele, Fighting the Devil with a Double-Edged Sword: Is the Speech-Invoked Hostile Work Environment Hostile to O'Brien?, 72 U. Det. Mercy L. Rev. 83, 90 n.36, 139 (1994).

[201] *See supra* text accompanying notes 138-141.

[202] This hypothetical situation is based on an actual incident reported in Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1500 (M.D. Fla. 1991).

[203] *See* Greenawalt, *supra* note 22, at 82 (arguing that Title VII's restriction of harassing comments is "far from incidental" to the "disturbing message"); *accord* Fallon, *supra* note 22, at 14-15. Note, however, that this criticism of the R.A.V. dictum is not capable of principled limitation to harassing words — or even marginally verbal activity, such as sexist sniffing followed with a mocking sigh and laughter. Suppose, for example, that a victimized employee suffers harassing sexual touching, but no physical harm, that also communicates a degrading sexist message. As to this activity, Title VII's application to the degrading message is also far from incidental. *Cf.* Sangree, *supra* note 108, at 465 (suggesting that even Title VII's application to an employer's "refusal to promote a woman because she is a woman" tends to suppress the "message . . . that women are inferior workers").

Imagine, for example, that an employer or coworker is a cowardly bully who picks on women rather than men because he fears retaliation from men. And when he picks on women, imagine that his abuse consists of nonsexual shoving and nonsexist remarks, such as "dumb ass Chicago Bulls fan." Title VII applies here too.[204] In other words, Title VII's grand regulatory focus is on abusive conduct, whether bigoted or not. And in this big-picture sense, bigoted abuse arguably is, in the words of the R.A.V. dictum, "swept up incidentally within the reach of a statute directed at conduct [i.e., any form of abuse] rather than speech."[205]

However, there is an even better way to explain the Court's dictum about the content neutrality of Title VII's harassment prohibition — an explanation that apparently garnered the unanimous consensus of the Court in Wisconsin v. Mitchell.[206] In Mitchell, the Court upheld a penalty-enhancement provision for criminal acts (e.g., assault) targeting victims based on their race or sex. In so many words, the Court held that the First Amendment is not implicated if a racially expressive criminal suffers an enhanced penalty for assaulting a victim selected on the basis of race, even if by doing so the criminal was trying to tell the world something about his views on race.[207]

Notably, the brand of "content neutrality" applied in Mitchell[208] had nothing to do with the O'Brien incidental-effects theory. In fact, the Mitchell Court expressly rejected that theory,[209] and then offered an alternative theory of

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[204] *See* Calleros, *supra* note 102, at 257-58 (identifying various non-bigoted forms of sexual harassment). Commentators who reject an incidental-effects analysis apparently assume that Title VII's hostile-environment prohibition, as applied to verbal activity, is singularly focused on sexually bigoted activity and thus cannot be regarded as "incidental" in its regulation of such activity. *See* Fallon, *supra* note 22, at 15-16; Greenawalt, *supra* note 22, at 82; Fowles, *supra* note 23, at 496-97; Volokh, *supra* note 107, at 1831-32.

[205] *See* R.A.V., 505 U.S. at 389.

[206] 508 U.S. 476 (1993).

[207] This sort of content-specific restriction on racially "bias-inspired" crimes is justified, in part, because such crimes can "inflict distinct emotional harms on their victims." *Id.* at 487-488. These distinct emotional harms, I submit, are far from incidental to the racist message, yet the Court construed the penalty enhancement provision as "content neutral." *Id.* at 487. This result strongly suggests that the Court does not share the view of commentators concerned about the "far-from-incidental" regulation of thought incident to Title VII's regulation of bias-inspired harassing activity. *See supra* note 203.

[208] *See* 508 U.S. at 487 (upholding the penalty-enhancement provision as a "content-neutral" regulation of "conduct").

[209] *See id.* at 484-85 (holding that O'Brien analysis is inapposite because the penalty-enhancement provision targeted racially biased motivation).

content neutrality based on a Title VII analogy. Citing the dictum from R.A.V. (and thus perhaps revising it), the Mitchell Court reiterated its view of "Title VII . . . as an example of permissible *content-neutral* regulation of *conduct*."[210] In the Title VII context, in other words, the First Amendment does not shield from regulation race- or sex-specific abuse, verbal or physical, even if by doing so the harasser is trying to tell the world something about his views on race or sex.

This brand of content neutrality apparently is premised on the yin-yang attenuation principle explained in the previous subsection. The notion apparently is that regulation of expression is permissible if the expression occurs *incident to* conduct, i.e., race- or gender-specific workplace abuse or criminal assault. Conversely, this brand of content neutrality has nothing to do with the O'Brien-type of *incidental* regulation of expressive activity that can occur in connection with a regulation of conduct, such as a prohibition of draft-card destruction that incidentally reaches predominantly expressive draft-card burning.[211] Of critical importance here is the difference, albeit subtle, between expression that is regulated as a negligible "incident to" conduct, versus dominantly expressive activity that is "incidentally" regulated by a statute aimed at conduct.[212] The former theory (i.e., the "incident to" theory), as applied in Mitchell, is invariably overlooked by commentators who criticize the Court's dictum as unsupportable under the latter theory,[213] which, again, was expressly rejected in Mitchell. Also noteworthy was the unanimity of the Mitchell Court in the former explanation of Title VII's "content-neutral" focus on "conduct."

In other words, abusing draft cards for expressive purposes may well be dominantly "speech," but abusing human beings for expressive purposes is not.[214]

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[210] *Id.* at 487 (emphasis added).

[211] *See supra* text accompanying notes 198-199.

[212] A helpful discussion of the distinction between "incident to" and "incidentally" is provided by Bryan A. Garner, A Dictionary of Modern Legal Usage 430 (2d ed. 1995).

[213] *See* sources cited *supra* notes 200, 203.

[214] This is also my response to those who might suggest that there is no principled stopping point to the Mitchell Court's brand of content neutrality. For example, one commentator suggests that the Mitchell analysis could conceivably apply in virtually any situation where the government is concerned about distinct harms associated with symbolic activity — e.g., situations involving civil-rights protests advanced by criminal violations of trespassing or parade-permit ordinances. *See* Steven G. Gey, What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes, 65 Geo. Wash. L. Rev. 1014, 1064-65 (1997). In my view, however, the Mitchell analysis can and perhaps should be contextually sensitive to the difference between expression incident to abuse of persons (e.g., the underlying assault that occurred in Mitchell) versus abuse of proprietary interests (e.g., the burning of government-issued draft cards, as occurred in O'Brien).

That, I submit, is the combined import of the Court's unanimous decisions in Harris and Mitchell.

CONCLUSION

The Court is right about this one. Sometimes a bigoted joke can cease being a joke; sometimes pornographic displays can cease being "mere" displays; and never can First Amendment speech live in the same realm as Title VII discriminatory abuse. In other words, there are in fact two distinct realms that make up the whole of the universe of workplace bigotry. There is yin, and there is yang.

The distinguishing question is thus one of degree: in any given workplace setting, when do bigoted jokes, remarks, pictures and the like leave the realm of speech and cross into the realm of discriminatory abuse? Where does yin end, and yang begin? An approach to answering this question is offered in a companion article to this one.[215] The point of this article is to pose the question itself, for it must be asked in every case. In every case, the characterization involves mutual exclusion, not collision. There is no such thing as "abusive speech."

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[215] The companion article offers an approach to both this question and the question whether Title VII intervention is possible even if the bigoted activity remains in the expressive realm of yin. *See* John H. Marks, Title VII's Flight Within First Amendment Radar: The Outer Cosmos of Employer Liability for Workplace Harassment Absent a Tangibly Discriminatory Employment Action, __ U. Dayton L. Rev. __ (2000).

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