Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person"

CHARLES R. CALLEROS*

The author posits a contextual analysis of harassing speech in the private workplace to balance the possible conflicting interests of the First Amendment with Title VII. Relevant factors include the extent to which (1) an employee has consented to a vigorous exchange of ideas by accepting a particular job, (2) the speech tends towards low value speech as contrasted with core political speech, and (3) the employee is a captive audience. A hostile environment theory of liability can be applied in a content-neutral manner to speech that is selectively directed to employees because of their membership in a protected class. More difficult constitutional questions arise when liability rests on the disparate impact of undirected speech, because such liability must be based on the content of the speech.

I. INTRODUCTION: TITLE VII AS A CONTENT-NEUTRAL REGULATION

In a previous article, I argued that Title VII's "hostile environment" theory of liability—if properly defined and applied—regulates speech and conduct in a largely content-neutral fashion.[1] As so defined, Title VII of the Civil Rights Act of 1964[2] imposes liability not on the basis of the content of harassing speech, but on the basis of a harasser's selectively targeting one or more members of a protected class for harassment.[3]

---

* © Charles R. Calleros 1996. Professor of Law, Arizona State University. The author thanks Karen Gillen, Monica Nagelbush, and Marlon Young for their research assistance.

[1] 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 [hereinafter Calleros, *Title VII and Free Speech*].

[2] Title VII makes it "an unlawful employment practice 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." 42 U.S.C. § 2000e-2(a)(1) (1994).

[3] *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 252–62. A brief summary of the analysis begins with Supreme Court dictum that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices," a regulation of speech that the Court apparently would view as incidental to that statute's focus on discriminatory conduct. R.A.V. v. City of St. Paul, 505 U.S. 377, 389–90 (1992). This quoted language is best read in conjunction with later dictum regarding the targeting of victims based on their membership in a protected class: "[A] prohibition of fighting words that are directed at certain persons or groups . . . would be *facially* valid if it met the requirements of the Equal Protection Clause." *Id.* at 392; *see also*

For example, an employer can violate Title VII if its agent selectively subjects his female subordinates to unwelcome and seriously disruptive speech at their work stations, regardless whether the speech conveys sexual propositions, personal hostility, pro-feminist views, anti-feminist views, or sports trivia. Because the agent targets only his female employees for such distraction and allows his male subordinates to work unmolested, the agent discriminates on the basis of each affected individual's sex, engaging in the kind of disparate treatment that Title VII is designed to address.[4] Moreover, so long as the agent's unwelcome speech is sufficiently distracting or intimidating that it makes the subordinate's work substantially more difficult,[5] the speech satisfies the statutory requirement that the discrimination adversely affects "terms, conditions, or privileges of employment."[6]

When the hostile environment theory is defined and applied in such a

---

Wisconsin v. Mitchell, 508 U.S. 476, 482, 490 (1993) (stating that the First Amendment does not bar an enhanced penalty for battery when the defendant selected his victim on the basis of race). Thus, the First Amendment might not bar Title VII's selective regulation of sexually derogatory fighting words if Title VII prohibits such speech not because of the sexual content of the speech, but because the harasser directs the speech toward a female employee on the basis of her gender and would not direct such speech toward a male employee.

Properly interpreted and applied, Title VII finds speech and conduct to be intentionally discriminatory precisely on this basis. *See, e.g.*, Calleros, *Title VII and Free Speech*, *supra* note 1, at 252–61; Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55 (1995) [hereinafter Calleros, *Homosexual and Bisexual Harrassment*]. Such discriminatory speech or conduct amounts to unlawful harassment if, at a minimum, it makes it substantially more difficult for the targeted employee to perform her job. *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 258. The remaining challenge for this Article is to address the constitutionality of Title VII's regulating discriminatory workplace speech that (1) unlike threats or fighting words, would not be generally subject to regulation outside the workplace, or (2) is discriminatory only because of its disparate impact, which necessarily is partly a function of the content of the speech.

[4] *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 257–58 (discussing this example in greater detail); *see also* Curde v. Xytel Corp., 912 F. Supp. 335 (N.D. Ill. 1995) (stating in dictum that a work environment may be sexually hostile because of gender-related discrimination that is not sexual in nature); BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 174 n.51 (1992) (citing to other cases recognizing same theory); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 493 n.134 (1995) (same).

[5] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (describing conduct that made it "more difficult to do the job") (quoting Davis v. Monsanto Chem. Co. 858 F.2d 345, 349 (6th Cir. 1988)); Calleros, *Title VII and Free Speech*, *supra* note 1, at 258 (adding the qualifier "substantially").

[6] 42 U.S.C. § 2000e-2(a)(1) (1994).

content-neutral fashion, at least low value speech—such as fighting words or threats of harm, which are generally subject to regulation in public areas[7]—can constitutionally be made the basis for more selective regulation as well. Such a theory of liability does not selectively regulate a subset of threats or fighting words on the basis of its content;[8] instead, it selectively applies to threats or fighting words of any content that are discriminatorily directed to persons because of their membership in a protected class.[9]

If the hostile environment theory were limited to such low value speech, however, it would cover only a very narrow range of harassing speech in the workplace.[10] Thus, many victims of harassment will secure redress only if they can justify greater regulation of speech in the workplace than may be permissible in public areas of society at large.

If the workplace can be distinguished from such public areas, then the First Amendment should permit content-neutral regulation under Title VII to reach a substantial range of "other words" in addition to discriminatorily conveyed "fighting words."[11] Whether such a distinction should be made, and how great a distinction is warranted, are matters of continuing debate among commentators. They question whether a workplace should be viewed as a forum for "public discourse," what speech that "lies at the heart of democratic self-governance, and [whose] protection constitutes an important theme of First Amendment jurisprudence."[12]

Robert C. Post, a distinguished First Amendment scholar, broadly has defined "public discourse" as "encompassing the communicative processes necessary for the formation of public opinion,"[13] but he concludes that speech

---

[7] *See, e.g.*, Watts v. United States, 394 U.S. 705 (1969) (per curiam) (threats against the President); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); *cf.* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 514 (1991) (interpreting labor law restrictions on election speech to be constitutional because they are limited to threatening or coercive speech).

[8] It was selective, content-oriented regulation of bigoted fighting words that ran afoul of the First Amendment in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

[9] *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 245–48, 251–61.

[10] *See, e.g.*, KENT GREENAWALT, FIGHTING WORDS 52 (arguing for revision of *Chaplinsky* test because "probably no words now cause the average listener to respond with violence").

[11] *R.A.V.*, 505 U.S. at 389 (stating that "sexually derogatory 'fighting words,' among other words," may violate Title VII).

[12] Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 684 (1991) [hereinafter Post, *Public Discourse*].

[13] Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 288 (1990) [hereinafter Post, *Racist Speech*].

in the workplace generally fails to meet that standard: "an image of dialogue among autonomous self-governing citizens would be patently out of place" in the workplace.[14] Post also concludes, however, that "there can be no final account of the boundaries of the domain of public discourse,"[15] and he denies any implication "that all speech within the workplace is excluded from public discourse."[16]

A more aggressive advocate of free speech in the workplace, Kingsley R. Browne, asserts that "for most citizens—who are not political activists—the great bulk of their discussion of political and social issues probably occurs in the home and workplace."[17] Browne argues that the First Amendment thus generally bars evidence of expression to establish a hostile work environment.[18]

Moreover, Post admits the possibility that even "nonpublic" workplace speech may warrant First Amendment protection "on the basis of constitutional values other than democratic self-governance"[19]—values such as protection of the autonomy of individual speakers as they seek self-realization through self-

---

[14] *Id.* at 289. Professor Post speaks of the "paradox of public discourse," in which both uninhibited "critical interaction" and more civil "rational deliberation" are necessary for democratic self-governance. ROBERT C. POST, CONSTITUTIONAL DOMAINS 134–50 (1995). Professor Cynthia Estlund believes that the workplace is at least a limited forum for public discourse, to which this paradox applies:

> The workplace functions ideally as a kind of laboratory of diversity in which the laws of democratic engagement can be learned and practiced. Because of this unusual convergence of diversity and close, ongoing, purposive interaction under an antidiscrimination norm, freedom of expression within the workplace can make a unique contribution to public discourse.
>
> At the same time, unconstrained speech among coworkers who are forced into daily proximity could destroy the possibility of constructive engagement.

Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 694 (1997).

[15] Post, *Public Discourse*, *supra* note 12, at 683.

[16] Post, *Racist Speech*, *supra* note 13, at 289 n.112.

[17] Browne, *supra* note 7, at 515; *see also* Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Audience*, 83 CAL. L. REV. 637, 649 (1995) ("For [many] people, interchange while on the job may be the only 'political' speech in which they engage.").

[18] *See* Browne, *supra* note 7, at 544. Browne concedes that the First Amendment permits evidence of expression to establish discriminatory *motive*, but only if the jury is given a limiting instruction and the court carefully determines under Federal Rule of Evidence 403 whether the evidence should be excluded on the ground that its prejudicial effect exceeds its probative value. *See id.* at 545.

[19] Post, *Racist Speech*, *supra* note 13, at 289 n.113.

expression.[20] While the possibility of "captive audiences" in the workplace has commanded attention,[21] employees may also be "captive speakers" in the sense that their forum for self-expression is necessarily confined to their workplace during a substantial number of hours each week.[22] True, most employees must temper their expectations for autonomous self-expression in the workplace, because they are subject to their employers' control.[23] Nonetheless, "they remain at a basic level autonomous citizens,"[24] and both employees and their employers have been accorded at least limited constitutional protection against state interference with workplace speech.[25]

Accordingly, in recognition of the public discourse and attempts at autonomous self-expression that inevitably find their way to the workplace, this Article rejects categorical arguments that the First Amendment has no application to government regulation of speech in private workplaces. On the other hand, for reasons explored in greater detail below, it also rejects the simplistic notion that every site within a workplace is indistinguishable from public areas in society at large. Instead, protection of employees' interests ought to fall somewhere between the high level of protection of speech in a public forum and the great protection of privacy in the home.

Moreover, this Article advances an interpretation of Title VII that promotes both the remedial policies of that statute and the core values of the First Amendment by limiting the reach of Title VII on the basis of the context in which allegedly harassing speech occurs in particular workplace settings.[26]

---

[20] *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970).

[21] *See, e.g.*, Karner, *supra* note 17, at 678–86 (arguing for qualified extension of captive audience doctrine to workplace).

[22] GREENAWALT, *supra* note 10, at 86.

[23] Karner, *supra* note 17, at 646–47.

[24] *Id.* at 647.

[25] *See id.* at 650–52 (reviewing limited First Amendment protection in workplaces recognized by judicial interpretation of labor laws and of the authority of government employers to control their employees' speech).

[26] *See* Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After* R.A.V. v. City of St. Paul*: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 UTAH L. REV. 1205, 1216 n.44 [hereinafter Calleros, *Reconciliation*] (summarizing the concept of such contextual approach in the workplace); 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, 420–29 (1996) (discussing "The Importance of Context"); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757, 765–66 (1992) (discussing such a contextual approach); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 416–32 (1992) (Stevens, J., concurring) (describing the

Such a contextual approach works well in analyzing state regulation of hateful speech on college campuses,[27] and it may apply nearly as well in the narrower setting of a workplace.[28]

So long as regulation under Title VII is content-neutral and is not justified on the basis of a desire to suppress speech, First Amendment values should be satisfied if Title VII's restrictions are reasonably narrowly tailored to serve a significant or substantial government interest.[29] Part of that standard should be easily satisfied, assuming that the government's interest in eradicating

---

Court's First Amendment jurisprudence as one that has flexibly considered a variety of factors and has appreciated the significance of context).

[27] *See, e.g.*, Calleros, *Reconciliation*, *supra* note 26, app. B at 1319–33 (describing guidelines interpreting A.S.U.'s anti-harassment policy which frequently focus on context to honor First Amendment limitations); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991); *cf.* Epstein, *supra* note 26, at 425–26 (stating that university codes which are not sensitive to context have been struck down).

Indeed, the Department of Education should revise its guidelines on racial harassment to make it clearer that standards for a "racially hostile environment" on campus do not apply well to every forum and context on campus. *See* Notice, Racial Incidents and Harassment Against Students at Education Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (1994). These guidelines are off to a good start by refraining from regulating a merely "offensive" environment and by addressing at least one example of context: "The effect of a racial incident in the private and personal environment of an individual's dormitory room may differ from the effect of the same incident in a student center or dormitory lounge." *Id.*

[28] In a previous article, I argued that "[p]roperly limited, the 'hostile environment' standard may work reasonably well in the workplace in most circumstances," but that it is "not equally well adapted to the general university context, which often thrives on a vigorous exchange of views, sometimes in public forums without captive audiences." Calleros, *Reconciliation*, *supra* note 26, at 1216–17. I continue to believe that First Amendment obstacles to application of the hostile environment theory are much less substantial in the workplace than in public areas of a college campus. Nonetheless, I conclude in this Article that the First Amendment does impose some limitations on government regulation of speech in private workplaces, creating the challenge of describing more precisely those circumstances in which the hostile environment standard does indeed work reasonably well.

[29] *See generally* Ward v. Rock Against Racism, 491 U.S. 781, 796–802 (1989) (stating that in regulation of time, place, and manner of speech, requirement that regulation be narrowly tailored does not require a perfect fit, but only one that is not substantially broader than necessary); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293–94, 298 (1984) (discussing First Amendment standards for regulation of time, place, and manner of speech and for regulation of conduct that incidentally affects speech); GERALD GUNTHER, CONSTITUTIONAL LAW 1345–56 (12th ed. 1991) (interpreting Supreme Court case law to allow flexibility in the requirement that the regulation be narrowly tailored to serve the governmental interest).

workplace discrimination is at least substantial, if not compelling.[30]

The primary remaining challenge, then, is to identify standards for the workplace that are reasonably narrowly tailored to the government's interest in eradicating employment discrimination and that are not justified on the basis of a desire to suppress unpopular views. This challenge is addressed in Part II of this Article.

Part III addresses more difficult First Amendment questions that arise when undirected speech allegedly creates a hostile environment because of its disparate impact, which in turn arguably is based on the content of the undirected speech and which requires analysis of the "reasonable person" standard for evaluating the effect of the speech on workplace conditions. Finally, Part IV addresses First Amendment objections based on the chilling effect of vague regulations of workplace speech.

As in the previous article in which I developed the premise of content-neutrality,[31] I limit the scope of the inquiry in this Article by adopting several premises and assumptions. First, this Article does not analyze the First Amendment limitations on a government agency when it acts as an employer to restrict the speech of its own employees;[32] it addresses only the presumably more demanding First Amendment restrictions on external government regulation of speech in workplaces.[33] Second, the illustrations in this Article

---

[30] Title VII prohibits workplace discrimination on the basis of an "individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1994). Government has a compelling interest in addressing race and gender discrimination, and perhaps other kinds of discrimination addressed by Title VII as well. *See, e.g.*, *R.A.V.*, 505 U.S. at 395 (in case addressing racial bigotry, stating that the Court did "not doubt" that city had a compelling interest in securing "the basic human rights of members of groups that have historically been subjected to discrimination"); Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (recognizing that the state has a "compelling interest in eliminating discrimination against women"); EEOC v. Mississippi College, 626 F.2d 477, 488-89 (5th Cir. 1980) (finding that the government has a compelling interest in "eradicating discrimination in all forms," such as those forms addressed by Title VII, and "racial discrimination in particular"); McClure v. Sports and Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985) (finding a compelling state interest in eliminating discrimination based on "sex, race, marital status, or religion"). At the least, one may assume that government has a very substantial interest in eradicating any of the kinds of invidious discrimination addressed by Title VII.

[31] Calleros, *Title VII and Free Speech*, *supra* note 1.

[32] *See, e.g.*, Waters v. Churchill, 511 U.S. 661 (1994) (addressing doctrine of *Connick v. Meyers*, 461 U.S. 138, 146 (1983) (stating that "[w]hen an employee's expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices" without First Amendment concerns).

[33] The First Amendment imposes greater limits on statutory restrictions on speech in a workplace than on a public employer's own voluntary policies designed to promote harmony

assume that government officials have engaged in state action by attempting to regulate speech in private workplaces through judicial or administrative enforcement of Title VII.[34] Third, this Article assumes that the employers in its illustrations are potentially liable under agency theory for the harassing actions of their supervisors or other employees, perhaps because a harassing supervisor or manager directly represents the employer or because the employer has condoned the misconduct of a lower-level employee.[35] Fourth, it adopts the legal premise that employers who are potentially liable under Title VII for the harassing speech of their employees have standing to assert the speech interests of those employees as a constitutional defense.[36]

---

in the workplace. *See, e.g.*, Karner, *supra* note 17, at 652 ("If the government as employer cannot completely regulate speech, how much less power should the government have when it is operating not as an employer, but simply as a government?"); Sangree, *supra* note 4, at 508–09.

[34] *See, e.g.*, GREENAWALT, *supra* note 10, at 81 (discussing state action in enforcement of laws that compel private employers to regulate speech of their employees); Sangree, *supra* note 4, at 508–09 n. 205 (agreeing with and citing to other commentators that find state action in enforcement of Title VII).

[35] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69–73 (1986) (finding that agency principles apply to the issue of employer liability for the harassing actions of a supervisor); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c)–(e) (1996) (discussing an employer's potential liability for the acts of its supervisory employees, nonsupervisory employees, or nonemployees). Typically, an employer will be liable for the actions of a direct representative or alter ego, such as a sole proprietor, managing partner, or chief executive officer, or of a victim's nonsupervisory coworkers when the employer has notice of the actions and fails to respond adequately to them. *See Meritor Sav. Bank*, 477 U.S. at 69–73; 29 C.F.R. § 1604.11(e); Calleros, *Title VII and Free Speech*, *supra* note 1, at 230 n.14. An employer may be liable for the harassing actions of a supervisor on the same basis as it would be liable for harassment by a nonsupervisory employee. Additionally, in some circumstances it may be vicariously liable for the actions of a supervisor, regardless of actual or constructive notice to the employer. *See, e.g.*, Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997) (en banc) (limiting such vicarious liability to cases in which the harassing supervisor is acting within his scope of employment or is aided in his harassment by the agency relationship with the employer), *cert. granted*, 66 U.S.L.W. 3157 (U.S. Nov. 14, 1997) (No. 97-282); Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1446–47 (10th Cir. 1997) (listing four ways in which an employer may be liable under agency principles for the actions of its supervisor); *cf.* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 493–95 (7th Cir. 1997) (holding that employer is strictly liable only for its supervisory employee's quid pro quo harassment).

[36] *See, e.g.*, James H. Fowles, III, Note, *Hostile Environments and The First Amendment: What Now After* Harris *and* St. Paul*?*, 46 S.C. L. REV. 471, 480–83 (1995). Of course, if an individual employer, such as a partner or sole proprietor, is held personally liable for his own harassing speech, he will have standing to assert his own First Amendment interests. The same would be true for a supervisor or lower-level employee charged with

This Article acknowledges that many private employers may appropriately and voluntarily curb the potentially harassing speech of their employees, not in response to concerns about liability under Title VII, but in furtherance of company policies designed to enhance the efficiency, productivity, and loyalty of employees. Although employers, employees, and labor unions may reasonably disagree about the level of voluntary workplace censorship that produces the best mix of efficiency, job satisfaction, and workplace justice,[37] that debate does not directly raise First Amendment concerns when it takes place in a nongovernment workplace.[38] This Article thus addresses only the problems that arise when government officials threaten an employer with enforcement of Title VII.[39]

II. WORKPLACE SPEECH IN CONTEXT—DIRECTED SPEECH

In *Harris v. Forklift Systems, Inc.*, the Supreme Court identified several factors relevant to determining whether discriminatory actions create a hostile work environment: "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."[40] A contextual analysis more specifically directed to First Amendment concerns, however, should expand on these factors and include additional ones, such as the extent to which (1) participation in a vigorous exchange of ideas is beyond the employee's job description, (2) the speech tends toward low value speech, such as threats, rather than toward core political

---

harassment, provided that the court construed Title VII to impose liability on a harassing individual who was not also the employer. *See generally* Williams v. Banning, 72 F.3d 552, 554 n.2 (7th Cir. 1995) (rejecting individual liability for non-employer supervisor, and reviewing law of other circuits); Ming K. Ayvas, Note, *The Circuit Split on Title VII Personal Supervisor Liability*, 23 FORDHAM URB. L.J. 797 (1996).

[37] It will be interesting to note whether such matters increasingly become the topic of collective bargaining or company policy manuals in the coming years.

[38] Because private employers are not state actors to whom the First Amendment applies, they are free to adopt their own policies restricting workplace speech. *See, e.g.*, Sangree, *supra* note 4, at 509.

[39] The precise line between state action and voluntary private workplace censorship could be the subject of a separate article. This Article expresses no opinion about the presence or absence of state action, for example, in an employer's restricting workplace speech in the absence of threatened enforcement but simply on the advice of legal counsel as a means of minimizing the risk of future Title VII liability. To squarely raise First Amendment issues, this Article will assume the presence of some coercive action, or the threat of such action, by government officials.

[40] 510 U.S. 17, 23 (1993).

speech, and (3) the target of the speech is an unwilling and captive audience. As will become evident from the discussion below regarding discriminatorily directed speech, many of these factors relevant to the First Amendment constitutional analysis overlap with one another and with the factors identified in *Harris* as relevant to the statutory requirement that discrimination adversely affect or alter the conditions of employment. Part III discusses how the constitutional factors take on further significance in the analysis of undirected expression that allegedly creates a discriminatory work environment through disparate impact on members of a protected class.

In identifying these factors as relevant to a First Amendment analysis of the workplace, I am not suggesting that any one of them necessarily acts by itself to eliminate First Amendment objections to the application of Title VII to speech. For example, the state interest in protecting captive audiences from intrusive speech is strongest when the audience is seeking refuge in its own home; once we leave "the sanctuary of the home," "we are often 'captives' . . . and subject to objectionable speech."[41] Nonetheless, even adopting the reasonable assumption that the captive audience doctrine does not apply with full force to the workplace,[42] the extent to which an employee is unable to escape intrusive speech except at the cost of losing her job should be a factor that can be considered along with others in the First Amendment analysis.[43]

In the same manner, all relevant factors should be considered in the effort to paint an accurate picture of the setting within which the values of Title VII and the First Amendment are brought to bear. In applying a test that considers these factors, close questions should be resolved in favor of protecting speech and limiting the reach of Title VII, to avoid a "chilling effect" on protected speech.[44]

---

[41] Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970).

[42] *Compare* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1832–33 (1992) [hereinafter Volokh, *Freedom of Speech and Workplace Harassment*] ("[T]he Court has . . . never found that employees in the workplace are 'captive,' and there are good reasons for it not to do so.") *with* Karner, *supra* note 17, at 678–86 (arguing for qualified extension of captive audience doctrine to workplace).

[43] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 416–32 (1992) (Stevens, J., concurring) (describing the Court's First Amendment jurisprudence as one that has flexibly considered a variety of factors, appreciating the significance of context); Epstein, *supra* note 26, at 422–29 (arguing that although the captive audience doctrine may apply with the greatest force in the home, it should apply to at least limited contexts within the workplace); Karner, *supra* note 17, at 678–86 (arguing for qualified extension of captive audience doctrine to workplace); Sangree, *supra* note 4, at 516–17 (citing to cases supporting a flexible application of the captive audience doctrine outside the home).

[44] *See, e.g.*, Calleros, *Reconciliation*, *supra* note 26, app. B at 1320 (explaining a

Current limitations on the hostile environment theory provide some protective buffer for free speech by excluding merely offensive speech as a basis for liability[45] and by employing an objective test to determine whether discriminatory actions have so degraded the work environment as to adversely alter terms or conditions of employment. Although a work environment need not be "psychologically injurious" to trigger liability, the harassment must be "sufficiently severe or pervasive" to create "an environment that a reasonable person would find hostile or abusive," as well as one that the victim subjectively perceives to be hostile or abusive.[46] Further interplay between Title VII and the First Amendment can best be explored in relation to the contextual factors that I have proposed. The first such factor develops a theory of consent consistent with existing doctrine that harassing speech or conduct cannot create a discriminatory work environment unless it is "unwelcome."[47]

A. *Exchange of Ideas as an Element of Job Performance*

In some cases, an employee may effectively consent to a vigorous exchange of provocative expression by accepting a position that requires

---

campus policy designed to be construed in manner that would avoid chilling effect); Browne, *supra* note 7, at 502–03 (arguing that to avoid liability under a vaguely defined hostile environment theory, careful employers will tend to overregulate the speech of their employees).

[45] "'[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to a sufficiently significant degree to violate Title VII." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). The Court repeated this limitation in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

[46] *Harris*, 510 U.S. at 21–22; *see also* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 S. CT. REV. 1, 45 (1994) ("In cases alleging purely verbal sexual harassment, the prevailing objective standard should be viewed, not as a measure of remediable harm, but as a constitutionally mandated limitation on the statutory prohibition."); *see also infra* Part III (C) (2) (b).

[47] *Meritor Sav. Bank*, 477 U.S. at 68; EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1996). Some kinds of harassment, such as degrading racial epithets, may be presumed to be unwelcome. *See* L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 588 n.106 (1995). The same presumption ought to apply to unambiguously degrading or threatening sexual advances. *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 237 n.52 and accompanying text. In such cases, the issue of unwelcomeness need not arise unless the defendant points to evidence that the plaintiff displayed unusual tolerance or desire for the degrading behavior. In many cases, however, romantic advances may be made in such form that a test of "unwelcomeness" is necessary to distinguish consensual social interaction from harassment based on repetition of uninvited, intrusive behavior.

participation in, or exposure to, such an exchange. For example, a corporate marketing executive might be expected to participate in "brainstorming" sessions in which members of a marketing team discuss such matters as the extent to which advertising should use sex or ethnicity to sell a product.[48] In the ensuing discussion, the group might single out the marketing executive because of her membership in a protected class and press her to reveal her perspective:

> Susan, I'd like your candid reaction, as a woman, to this footage panning the prone body of the bikini-clad model. Does it offend you? Is it intimidating? Or does it make you want to buy our product so that you can be more like the model?

Conversely, team members might discount the opinion of the marketing executive because of her membership in a protected class:

> I appreciate that Susan is turned off by the shot of the alluring model stroking the hood of the car. But she's a woman, and our surveys show that 80% of the purchasers of this car are men. I think that they'll react differently.

The female marketing executive, perhaps the first woman to break into the ranks of the marketing team, might resent the implication that she would analyze the advertising plan any differently than male team members or consumers, or that she would have any interest in emulating the model. Nonetheless, an executive in her position would be expected to field a wide range of provocative questions and comments and to express her own views candidly and forcefully, because an uninhibited exchange of opinions is essential to the success of the marketing program. In this way, the marketing discussions share some of the qualities of a speaker's forum or classroom on a college campus, where a robust exchange of ideas is essential to the educational mission of the campus.[49]

Accordingly, a vigorous exchange of ideas relevant to marketing would be part of the legitimate job description of the marketing executive and would not be an "unwelcome" intrusion into the working conditions of one who accepted the position. Any contrary application of Title VII would not be reasonably tailored to the governmental purpose of eradicating discrimination. Indeed, a

---

[48] *See generally* Strossen, *supra* note 26, at 775–77 (analyzing suit against Stroh's Brewery that alleged, among other things, that an advertising campaign featuring sexy, bikini-clad models contributed to a sexually hostile work environment).

[49] *See, e.g.*, Calleros, *Reconciliation*, *supra* note 26, at 1269–82 (academic freedom in the classroom); Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249 (1995) (free speech in public forums on campus).

statute that shielded the new executive from the full force of legitimate business discussions arguably would promote an anti-equalitarian notion that she is not fully capable of tackling the tough issues faced by those who rise to the highest corporate ranks.[50] Moreover, a statute that selectively protected the female marketing executive from sexually oriented comments or questions about marketing strategy, and no other expression, would be particularly objectionable on First Amendment grounds as a form of content or viewpoint discrimination.[51] This analysis should apply to any position that fundamentally requires participation in an exchange of ideas or information concerning provocative topics.[52]

Most lower-level employees, however, work in positions that require little discussion beyond receiving instructions for relatively ministerial tasks and producing or reporting the results of their work. For example, the job description of a factory machine mechanic or an office clerical worker would not normally include participation in broad-ranging political or social discussions, and such an employee would not be assumed to consent to such participation by simply accepting such a position. To be sure, any employee may voluntarily indicate that she welcomes such participation, and she may even decide that it is in her best professional interest to do so. Nonetheless, a mechanic or clerical worker who finds such non-job-related discussion to be disruptive would be free to minimize it by indicating that she does not welcome it.

For example, suppose a member of the corporate marketing team passed

---

[50] *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995) ("[A] less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence."); Sangree, *supra* note 4, at 473–74 (describing argument of an amicus brief filed by the Feminist Anti-Censorship Task Force); Strossen, *supra* note 26, at 777–82 (arguing that overly broad restrictions on workplace sexual harassment do not effectively advance, and could well undermine, gender equality).

[51] *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that a Chicago city ordinance was unconstitutional for prohibiting some peaceful picketing on the basis of its subject matter).

[52] Another good example is a position in a bookstore requiring its incumbent to answer questions about all manner of books, some of which may address sensitive topics or express outrageous views. *See* Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1853 (expressing concern that harassment laws could apply to expression in such a context); *cf.* Feminist Women's Health Ctr. v. Superior Court, 61 Cal. Rptr. 2d 187, 195–96 (Cal. Ct. App. 1997) (holding that employee had no claim for wrongful discharge in violation of state constitutional guarantees of privacy, because she voluntarily accepted a position with a health center that required her to demonstrate cervical self-examination to female employees and clients).

by the desk of a busy word-processor on the way to his office after a marketing meeting and showed her a photo of a bikini-clad model posing on a car, asking "How do you react to this image? Here, look at it. I really want your reaction." Unless the word processor had an unusual job description that included responding to such queries from the marketing department in addition to keeping up with a steady flow of typing and related clerical work, persistent inquiries of that kind could seriously disrupt her work. If the member of the marketing team targeted the clerical worker for such attention because of her gender, his actions would be discriminatory. Moreover, if Title VII is correctly applied to regulate persistent disruptions of any content outside the reasonable bounds of the employee's job description, whether they relate to sports, politics, or sexual images, the regulation would not discriminate on the basis of content of the expression.

True, if the clerical worker enjoyed such discussions and voluntarily assumed the risk that her participation in such discussions would benefit her more than would her keeping up with her clerical work, she could welcome the intrusions, undermining the basis for Title VII regulation and strengthening the interests in the exchange of these ideas in the workplace. However, such consent would not be assumed from her acceptance of the clerical position, as it presumably would be in the case of the marketing executive.

Of course, the same legal standard applies to both employees; the job description of one of them simply calls for participation in a wider range of discussion. Indeed, the same standard would apply with a variety of results to any position with a reasonably well-defined job description.

Even the marketing executive, however, has not consented in advance to abusive speech or conduct unnecessary to an effective exchange of ideas related to marketing proposals. Suppose, for example, that a member of the marketing team treated other male team members with respect but created intolerable working conditions for the single female member of the team by persistently and discriminatorily directing hostile and exclusionary epithets to her[53] or by subjecting her to unwelcome sexual advances.[54] Title VII obviously would not

---

[53] As discussed earlier in the text, in addition to being discriminatorily directed on the basis of membership in a protected class, such hostile speech must be more than merely offensive to satisfy both statutory and constitutional standards. One can imagine, however, an intolerable barrage of abuse that could effectively disrupt the female executive's performance of her work if repeated with sufficient frequency and intensity: "I'm sorry to interrupt, but we've had enough of your special brand of bullshit. This is what happens when we let the 'bitch' factor into the marketing team. Of course you don't like this marketing concept. A blimp like you couldn't even fit into the model's bikini. Do us a favor and let us deal with this."

[54] It would be one thing for a member of the marketing team to ask the female executive's reaction to a sexy advertising campaign and quite another for him to repeatedly

offend First Amendment values by prohibiting the employer from condoning such discriminatory behavior.

B. *"Low value" Speech and Core Political Speech*

In prohibiting discriminatory harassment, Title VII may incidentally regulate speech across the entire spectrum of speech, from "low value" speech to "core" speech, including political opinion in the proper circumstances.[55] Nonetheless, consistent with First Amendment values, some kinds of abusive, disruptive, or intrusive speech may amount to Title VII violations at a lower level of pervasiveness than others.

For example, a supervisor might create a discriminatory work environment on a single occasion by discriminatorily subjecting an employee to credible threats of harm, laced with vicious racial or sexual epithets.[56] Especially because it comes from one who wields power and authority in the workplace,[57] such speech could be sufficiently intimidating—even terrifying—to alter the

---

make unwelcome requests that she act out the sexual fantasies promoted by the advertising: "I bet you'd look great in this bikini. How about modeling it for me tonight at my place? I can picture it now."

[55] As succinctly stated by one commentator:

> [A]n exception to Title VII liability ought to be recognized for any speech or expressive conduct that is "reasonably designed or intended to contribute to reasoned debate on issues of public concern.". . . On the other hand, prohibitions could be enforced under this standard . . . against individually targeted harassment, even about political matters, that is so persistent or patently harassing that it could not be reasonably designed to contribute to reasoned debate.

Fallon, *supra* note 46, at 47 (quoting from the draft Guidelines Concerning Sexual Harassment developed by the Harvard Law School Committee on Sexual Harassment Guidelines, chaired by Professor Fallon); *see also* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 23–26, 46 (1990); Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1801–07, 1865–66. Under my approach, for example, a supervisor might alter the working conditions of a subordinate by imposing his views about a congressional tax proposal on the subordinate, day after day, for hours each day, so distracting the subordinate that he fell behind in his work, hurting his chances for advancement and for pay raises.

[56] This is the kind of "psychologically injurious" discriminatory behavior that goes beyond the minimum necessary to establish a hostile environment under Title VII. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

[57] *Cf.* RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (positing that a superior's position of authority over a subordinate can enhance the superior's ability to inflict severe emotional distress on the subordinate).

employee's terms and conditions of employment on a single occurrence.[58]

A supervisor's unwelcome and disruptive imposition of his nonthreatening political or social views on a busy subordinate, however, normally would affect the subordinate's working conditions in a less profound manner. If distracting but unintimidating, such disruptive speech ordinarily would adversely affect terms and conditions of employment only if it is discriminatorily imposed on a relatively captive employee[59] so repeatedly that the employee's work is made substantially more difficult.[60]

Of course, such an approach at least indirectly treats categories of "low value" speech, such as threats and fighting words, differently than it does nonthreatening speech closer to the core of First Amendment values, such as political opinion or general conversation about current events. However, such categorical treatment does not offend First Amendment values so long as the tool of regulation does not discriminate between different incidents of speech within a category on the basis of their political content.[61] Under a reasonable reading of *R.A.V. v. City of St. Paul*, for example, government can impose liability for fighting words in circumstances in which it could not regulate casual conversation about sports or politics, so long as it does not distinguish between different fighting words on the basis of their political content.[62]

Moreover, under this approach, Title VII distinguishes between categories of low value speech and speech nearer to the core of First Amendment protections only by recognizing that some kinds of speech can affect the work environment more immediately and acutely than others. A harasser who targets his victims on the basis of their membership in a protected class may use any kind of speech as a tool to further the discrimination; however, less threatening or intrusive kinds of speech may alter conditions of employment only if imposed on a captive listener with relatively great persistence.

In this fashion, Title VII's provisions could be triggered more slowly or quickly on the basis of subtler distinctions than the difference between extortionate threats and expressions of political opinion. For example, a supervisor's unwelcome and disruptive inquiries or comments to an unwilling subordinate generally will be more intrusive if they relate to such personal and emotionally charged matters as the subordinate's sexual activities than if they

---

[58] *Cf.* Nadeau v. Rainbow Rugs, Inc., 675 A.2d 973, 975 (Me. 1996) (stating that an employer could be liable under state anti-discrimination statute for supervisor's unwelcome verbal romantic advances, which created a hostile environment on a single day).

[59] For a discussion of varying degrees of "captive status" in the workplace, see *infra* Part II (C).

[60] *See supra* note 5.

[61] *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[62] *See id.*

concerned her interests in sports or first-run movies. Accordingly, using an objective test, even nonthreatening comments or inquiries that invade a reasonable subordinate's sense of privacy, such as those relating to her sexual activities, could alter working conditions at a lesser level of repetition and pervasiveness than would comments or inquiries about less intrusive matters.[63] Similarly, a supervisor's imposition of his political or social views on an unwilling subordinate would more quickly degrade the working environment if, rather than arguing her points abstractly, she intrusively referred to the subordinate's race or other personal characteristics and insisted that those personal characteristics lie at the root of political or social problems.

Because such an approach simply responds to varying levels of intrusiveness and invasion of privacy, it does not discriminate on the basis of content or viewpoint in a way that offends First Amendment values.[64] It should survive First Amendment scrutiny if liability is based on the discriminatory targeting of the victim and the objective effect of the harassment on working conditions, rather than a desire by government to suppress politically unpopular views.[65]

C. *Captive Audience*

The level of intrusiveness of disruptive speech is also a function of the "captive" status of its audience. As stated in the text before Part II (A), I do not argue that employees are captives in the workplace in a way that generates the same interests in privacy and in protection from intrusion as held by residents in their homes.[66] Nonetheless, an employee's inability to escape workplace speech

---

[63] *See, e.g.*, Epstein, *supra* note 26, at 402–08 (describing the tangible harm of sexually harassing speech and conduct in the workplace).

[64] *See* United States v. J.H.H., 22 F.3d 821, 824–26 (8th Cir. 1994). By selectively prohibiting threats of violence and intimidation, federal civil rights and fair housing statutes make content distinctions, if any, that pose "no significant danger of idea or viewpoint discrimination." *Id.* at 826 (quoting *R.A.V.*, 112 S. Ct. at 2545); *cf.* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211–12 (1975) (stating that restriction of movies depicting nudity on drive-in theater screens was not necessary to prevent "significant intrusions on privacy" because offended viewers could avert their eyes); Cohen v. California, 403 U.S. 15, 21 (1971) (suggesting in dictum that regulation is constitutional if "substantial privacy interests are being invaded in an essentially intolerable manner").

[65] Thus, some kinds of distinctions between different forms of speech, though based in some way on the content of the speech, present "no significant danger of idea or viewpoint discrimination," because "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 378, 390.

[66] *See, e.g.*, Strossen, *supra* note 26, at 758–62 (contrasting public and private forums and summarizing captive audience doctrine).

except at the cost of neglecting her work and risking her job may contribute to a discriminatory work environment in a way that can be considered in the application of Title VII without offending First Amendment values.[67]

An employee's "captive" status is strongest when he or she is compelled by job description to remain at a work station, or to report on demand to the work station of a supervisor or coworker, and to cooperate with a supervisor or coworker. If the supervisor or coworker subjects the captive employee to disruptive, non-work-related speech, the captive employee normally should make some effort to communicate the unwelcomeness of the interruption and her need to return to her work.[68] If the speaker persists, however, and if the captive employee has no effective recourse within the organization, she may have no options except to suffer the distracting speech, quit her job, or engage in insubordination, retaliation, or noncooperation that could place her position in jeopardy.

As explained in an earlier example, persistent, unwelcome, and disruptive speech or conduct in such circumstances can alter working conditions, regardless of whether it expresses the speaker's interests in sex, sports, movies, or politics.[69] Title VII would regulate such an alteration of working conditions if the victim of the disruptive behavior was discriminatorily targeted because of her membership in a protected class. Moreover, the captive status of the employee can combine with the other factors discussed in these subsections to keep such regulation within First Amendment limits. At the least, the captive status of the employee would help answer a specific First Amendment challenge based on the argument that the employee could have engaged in the equivalent of "averting her eyes" to objectionable expression in a public space.[70]

No such response to a First Amendment challenge would be available to an employee whose duties allowed her to easily avoid disruptive speech directed to her by a fellow employee. Title VII would be on even less firm constitutional footing if it sought to regulate speech directed only to willing listeners and objected to by an employee who is aware of it only because of her own curiosity.[71]

For example, some employees might want to privately view *Playboy* magazine during their breaks, display militant Black Nationalist posters on the

---

[67] *See, e.g.*, Fallon, *supra* note 46, at 43–44; Karner, *supra* note 17, at 678–88; Sangree, *supra* note 4, at 485, 515–20.

[68] *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 236–37.

[69] *See supra* notes 3–9 and accompanying text.

[70] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975); Cohen v. California, 403 U.S. 15, 21 (1971).

[71] *See generally* Strauss, *supra* note 55, at 36–37 (arguing workers bear some responsibility for avoiding [offensive] speech).

inside of their personal lockers, or share provocative views with friends over lunch in the employee cafeteria. So long as employees who might object to such expression can easily avoid it, they are not captives to the expression in any constitutionally meaningful sense simply because they must later work in the same building with the employees who hold views that they find objectionable.[72] In the case of the private viewing of the *Playboy* magazine, for instance, coworkers who learn of this activity may be adamantly opposed to the sexual objectification of women in such magazines, and they may reasonably fear that an employee who views pornography during his breaks will be more inclined to discriminatorily direct sexually harassing speech or conduct toward female employees once his break is over. However, the First Amendment limits Title VII to regulating discriminatory actions that may spring from such thoughts, and not the thoughts themselves.[73] If the audience for workplace speech is limited to those who willingly receive it on their own time, the First Amendment generally will bar Title VII from regulating the speech on behalf of coworkers who disagree with the speech and wish that others did not find it persuasive or entertaining.[74]

This analysis should apply even if the employer provides an efficient outlet for provocative employee speech, so long as the employer provides a forum that can be limited to voluntary audiences. For example, an employer might voluntarily adopt a company policy that justifies limitations on expression

---

[72] *See generally id.* at 47; Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1848 (arguing it is "unacceptable" to demand that employers refuse to hire people who publically hold offensive points of view).

[73] *See* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1439–40 (C.D. Cal. 1994) (stating that such regulation of thought is outside the control of Title VII); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (finding that government may not subject individual beliefs to coercion); *cf.* Wisconsin v. Mitchell, 508 U.S. 476, 484–86 (1993) (holding that the enhanced penalty for biased-motivated battery did not impose unconstitutional burden on personal beliefs).

[74] *See Johnson*, 865 F. Supp. at 1430 (holding that First Amendment barred enforcement of content-oriented policy of government employer that prohibited firefighter from privately viewing *Playboy* magazine during his breaks); GREENAWALT, *supra* note 10, at 94 (stating that captive audience analysis does not apply to willing listeners). Of course, the speech interests of a reader of *Playboy* or the owner of a poster on the inside door of a locker would be weaker if he held up the *Playboy* centerfold or swung the locker door open to reveal a poster inside every time a member of a particular protected class walked by. *Cf.* Andrews v. City of Philadelphia, 895 F.2d 1469, 1472 (3d Cir. 1990) (involving "evidence of pornographic pictures of women displayed in the locker room on the inside of a locker which most often was kept open"). The unwilling listener would be more or less captive in such a situation depending upon her ability to avoid the display in light of her proximity and other factors.

within work areas partly by providing a "free speech" platform adjacent to the parking lot, available to interested employees during their breaks or before and after their shifts. So long as other employees can easily avoid this area, or can walk away when offended by a speaker, the employer should not be liable under Title VII if some employees use this platform as a forum for outrageous speech. The employer could be liable if its agent translated the outrageous speech from the platform into discriminatory conduct in the workplace, but not simply for providing a forum for consensual dialogue.

In sum, an employee's inability to escape workplace expression is a factor that can help justify application of Title VII to discriminatory behavior. At the other extreme, Title VII cannot constitutionally come to the aid of an employee who complains of thoughts or activities to which he or she is not exposed or can easily avoid. Between these extremes are cases in which employees are generally exposed to workplace speech that is not specifically directed at them and that they need not confront in the same way that they must abide by an intrusive supervisor. This category of cases raises especially difficult questions that warrant separate treatment.

III. THE SPECIAL CHALLENGES OF UNDIRECTED SPEECH

Professor Eugene Volokh has argued that, even though he interprets Title VII to regulate speech on the basis of its content and viewpoint,[75] and even though such regulation does not fall within existing First Amendment exceptions for content-based regulations, a carefully defined claim for harassment based on speech is justified by balancing First Amendment values against state interests in eradicating workplace discrimination.[76] In his view, these competing values and interests can be accommodated through a relatively bright-line test that permits regulation of harassment directed to an individual but bars regulation of undirected speech.[77] Although he does not stress this point, he appears to define directed harassment not simply as harassment that is directed to any individual, but as harassment directed to a person because of his or her membership in a protected class.[78] Moreover, he interprets Title VII to impose liability only if the harassment conveys content related to membership

---

[75] *See* Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1826, 1828, 1842, 1856.

[76] *See id.* at 1843–46.

[77] *See id.* at 1846–72; *see also* Strauss, *supra* note 55, at 44–49 (distinguishing directed from undirected speech).

[78] *See* Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1846, 1867, 1871.

in a protected class.[79]

I agree with Professor Volokh that Title VII requires some form of selective direction of harassment to members of a protected class, although I view it as a fundamental statutory requirement stemming from the history and nature of Title VII, rather than a constitutional limitation on a content-oriented regulation of speech. Indeed, I would avoid constitutional problems of such content-orientation by interpreting Title VII to regulate any harassment, regardless of its subject matter or viewpoint, that is directed at a member of a protected class and that alters conditions of employment.[80]

Ironically, my approach permits a more relaxed level of constitutional scrutiny because it contemplates regulation of a broader range of speech. Title VII does so by refraining from selectively restricting speech because of its content or viewpoint,[81] except to the extent of recognizing that relatively intrusive or intimidating forms of speech may affect the work environment more quickly than others.[82]

Because he has assumed the burden of justifying what he interprets to be a regulation of speech on the basis of its content or viewpoint, Professor Volokh appropriately defines prohibited harassment cautiously. For example, he argues that speech is "directed" and thus subject to regulation only if it is "consciously targeted at an employee, not merely unavoidably within the employee's sight or hearing."[83] He concedes that this standard may fail to protect employees "from some rather nasty forms of harassment,"[84] but he believes that it represents a necessary constitutional constraint on the reach of Title VII.

In this way, Professor Volokh's approach departs from more liberal interpretations of Title VII that would find discriminatory targeting of victims of harassment on the basis of either (1) the harasser's conscious targeting of a person because of his or her membership in a protected class, or (2) the disproportionate impact of harassment on members of a protected class.[85] Because I proceed on the basis of greater constitutional flexibility stemming

---

[79] *See id.*

[80] *See supra* notes 1–9 and accompanying text.

[81] *See id.*

[82] *See supra* Part II (B). Interestingly, Professor Volokh takes a step toward this approach by arguing that regulation of undirected speech, which he would not permit, poses the greatest problems of content-discrimination; however, he admits that his proposal would still "tolerate viewpoint discrimination for directed speech." Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1847.

[83] Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1868.

[84] *Id.* at 1870.

[85] *See, e.g.*, LINDEMANN & KADUE, *supra* note 4, at 187–88; Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 437 (1991).

from my interpretation of Title VII as content-neutral, I am tempted to adopt this more liberal standard as a means of dealing with some forms of undirected speech. I cannot do so lightly, however, because a claim of discriminatory harassment based solely on the impact that workplace expression has on certain listeners arguably imposes liability solely on the basis of the content of the expression.[86]

These considerations regarding regulation of content of speech come to the fore in cases at the margin, where harassing messages are arguably directed at members of a particular protected class, not through personal delivery or specific language identifying the targets, but because the message arguably has a disproportionate adverse impact on such members. Before addressing those troublesome cases, however, useful parameters can be defined by examining cases with more obvious results.

A. *Clearly Directed or Undirected Speech*

The extreme cases are easy to analyze under principles outlined in Parts I and II above. Consider, for example, a supervisory agent of the employer who allows most of her employees to work in peace but who persistently directs unwelcome and disruptive non-work-related communications to African-American employees, solely because of their race, in face-to-face encounters from which the employees cannot unilaterally withdraw. In engaging in such clear "directed harassment," the supervisor both selects the employees for adverse treatment on the basis of their race and subjects the employees to a particularly immediate, intrusive, and potentially intimidating mode of expression.[87] Assuming that this adverse treatment substantially interferes with the employees' work or otherwise alters terms or conditions of employment, the sharply directed nature of the harassment would both satisfy the statutory test

---

[86] If so, my argument of content-neutrality could be undermined in the following circular sequence of arguments: liability for harassment is content-neutral because it is based not on the content of harassing expression but on the selective targeting of victims because of their membership in a protected class. In turn, content-neutrality gives courts greater constitutional leeway to define broadly the ways in which victims can be discriminatorily targeted for exposure to a hostile environment. An overly expansive definition of discriminatory targeting of victims, however, may rely in some cases on the content of the expression to find the discrimination. Accordingly, my interpretation of the statutory requirement of selective targeting of victims must be sensitive to the need to avoid undermining the principle of content-neutrality.

[87] *See* Fallon, *supra* note 46, at 42 ("[I]ndividually targeted, face-to-face speech is especially likely to have the purpose of being, and to be experienced as, invasive, threatening, or coercive.") (footnote omitted).

for prohibited discrimination[88] and help to justify the incidental regulation of the speech through which the discrimination was accomplished.[89]

Title VII should apply similarly to a supervisor who selectively disrupts the work of women in the workplace by persistently placing pictures of female nudity under their noses and asking them whether they would look as good undressed. It ought to apply as well to a supervisor who sends unwelcome sexual advances via computer e-mail to an employee who is bound by her job description to read the supervisor's messages and parse them for job-related information necessary for her to accomplish her assigned tasks.[90]

At the other extreme, consider again the employee who reads *Playboy* magazine during his break, either at his desk or at some other workplace location that affords him some degree of privacy. A coworker who happens by and momentarily glances over his shoulder, either inadvertently or out of curiosity, might be distressed to see the nude pictorials and to realize that another employee is spending his break in that manner. Nonetheless, even if the employer knows of and condones his behavior, unless the employee mischievously chose a time and place for his break calculated to expose a member of a particular protected class to objectionable material, his actions do not satisfy the statutory requirement of discriminating on the basis of a protected classification. Assuming that he sought to maximize his privacy and minimize the intrusion of others into his break, he can hardly be said to have selectively targeted anyone else for harassment. Moreover, regulation of his activity would substantially burden First Amendment interests, because a passerby could easily avoid more than momentary exposure to the pictures, and because any further objection to the employee's use of his break time would be based on a coworker's disdain for the employee's thoughts and attitude rather than on any discriminatory behavior directed toward the coworker or others.[91]

---

[88] *See supra* note 2 and accompanying text.

[89] *See, e.g.*, Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1863 ("Restrictions on directed speech . . . only prevent people from communicating their opinions to coworkers who do not want to listen."); Fallon, *supra* note 46, at 42 ("Narrowly targeted, face-to-face expression . . . is less likely to have public or political value than speech directed to larger audiences.").

[90] *See generally* David K. McGraw, Note, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-mail*, 21 RUTGERS COMPUTER & TECH. L.J. 491 (1995). Of course, I do not mean to imply by these examples that the harassment must be *sexual* in nature, or otherwise relate in content to membership in the protected class; it is enough that the victim is singled out for disruptive communications because of her membership in a protected class. *See supra* notes 3–9 and accompanying text. Nonetheless, discriminatorily directed harassment the content of which is sexual in nature is sufficiently intrusive, and unfortunately common, that it provides apt examples.

[91] *See supra* notes 71–74 and accompanying text.

Although slightly less obvious, interests in freedom of speech and thought would be similarly implicated in an employee's general posting of non-work-related expression on an office computer bulletin board or e-mail system, so long as the expression was posted under a suitable heading, such as "more sexist jokes," that warned potential readers of its subject matter. A coworker who sought to avoid the expression would have no employment obligation to gain access to such a message and could simply delete it.[92] Such a coworker might be distressed to think that the author of the message is composing sexist jokes and that others may be reading them, but that does not distinguish this example in any meaningful way from that of the reader of *Playboy* magazine.

True, in this case the author of the message is making the objectionable expression available to others, but he has not violated Title VII because he has not selectively directed the expression to members of a particular protected class. One might strain to find that the heading "more sexist jokes" conveys a message of unwelcomeness that is directed particularly to female employees. However, it would be difficult for a computer user to receive such a message of unwelcomeness with much force without going beyond the heading, affirmatively gaining access to the file under the heading, and finding clearer messages of exclusion within. Moreover, aside from the problem of satisfying statutory requisites, a statute that sought to regulate such communication would substantially burden First Amendment interests of willing participants in a conversation that others would not be forced to overhear. The same analysis should apply to an oral conversation among willing participants that unwilling listeners are easily able to avoid once they discern the objectionable content of the conversation.[93]

A different problem is posed by messages visible to all workers, but unambiguously directed to a person or persons because of their membership in a protected class. For example, suppose an e-mail heading itself directs a message selectively to members of a protected class in an immediately harassing way. The outrageous heading "All Colored Workers get out of JC!" associated with a file in all e-mail users' mailboxes at JC Co. would not be directed to employees of color as sharply and exclusively as would the harassing conduct of the supervisor who singled out such employees for selective, face-to-face abuse. However, the heading directs an especially intimidating message of hatred and exclusion to employees of color in

---

[92] *See generally* McGraw, *supra* note 90, at 497.

[93] In the example in the text, of course, one would hope that an enlightened employer would voluntarily put a stop to an offensive and wasteful practice of using office time and office equipment to exchange sexist or racist jokes. "But there is a vast difference between allowing an employer to restrict workplace speech and allowing the government to do so." Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1853–54.

particular, even though the message was delivered to all e-mail users. It does more than simply identify a file that contains racist jokes or a political argument for racial segregation; the plain terms of the heading appear to command employees of color to leave the workplace. True, an e-mail user could quickly delete the file without ever reading more than the heading. However, the burden of first reading and having to erase persistent headings or other messages of that type could eventually alter conditions of employment, at least for members of the protected class to whom the message is directed.[94] Assuming employer responsibility for the messages, statutory regulation of such discriminatory treatment would not offend First Amendment values.[95]

A similar example of directed speech would be a poster displayed in a common area of the workplace that singles out one or more persons for their membership in a protected class.[96] Even though such a poster would be displayed in view of all passersby, rather than selectively thrust before members of a particular class, its terms might direct its message in a special way to members of the class. Moreover, the *public* display of the *selectively directed* message would expand the audience, thus increasing the humiliation felt by the targets of the message and further degrading their working conditions.

Imagine, for example, a crude sketch of a female mechanic with exaggerated make-up and body curves, posing over the caption: "If you look like this, you should get out of the shop and into the sack!" If the cartoon character bore the label "Janice," the name of the only female employee in the mechanic's shop, the intended target of the expression would be clear.

True, the poster would be up for all to see, and men as well as women might react with outrage. Nonetheless, its message of exclusion is directed primarily at the female mechanic, and secondarily to other female employees. Under an objective interpretation, it tells female employees and Janice in particular: "As a woman, you are not appreciated or welcome here as an employee. You're a sex object, and your place is in the bedroom."[97] Assuming

---

[94] *Cf.* McGraw, *supra* note 90, at 499 (stating that some messages are inevitably read before they can be deleted).

[95] *See generally* Calleros, *Reconciliation*, *supra* note 26, at 1253–55 (analyzing incident on university campus in which student violated campus policies by placing unwanted Nazi symbols on the message board of another student, who was compelled to repeatedly erase the offending messages).

[96] *See, e.g.*, Sanchez v. City of Miami Beach, 720 F. Supp. 974, 977 n.9 (S.D. Fla. 1989) (pictures from *Playboy*, *Penthouse*, and other publications posted in the police station); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 782–83 (E.D. Wisc. 1984) (pictures and captions depicting a naked woman with employee's initials on it); Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 934 (D.N.J. 1978) (caricature of identifiable employee).

[97] According to one commentator, typical workplace pornography that is coupled with references to particular employees is intended to portray the targeted employees as "castrator,

that the employer is responsible for this and similar posters under agency principles, prolonged and pervasive display of such a selectively directed message could again trigger liability under Title VII without offending First Amendment values.

B. *Cases at the Margin*

But what of a generally displayed poster that does not use language to direct a hostile message to members of a particular protected class? The most common example is a calendar or other pin-up picturing a nude or scantily clad woman, sometimes in a sexually suggestive or submissive pose.[98] These cases potentially pose the greatest difficulty for those seeking to draw a principled line between directed and undirected speech, for purposes both of satisfying the statutory requirement of discriminatory targeting and giving due constitutional consideration to speech interests.

If the display of such posters is combined with remarks or other circumstances relating the posters to particular women in the workplace because of their gender, they may be directed to those women just as surely as though their names were inscribed on the posters.[99] In the absence of such

---

whore, and dyke." Dorchen Leidholdt, *Pornography in the Workplace: Sexual Harassment Litigation Under Title VII*, *in* THE PRICE WE PAY 216, 217 (Laura J. Lederer & Richard Delgado, eds., 1995).

Shortly before this Article went to print, a federal jury awarded damages to a female airline pilot against Continental Airlines for its condoning, among other things, male pilots' practice of leaving pornography in the female pilot's cockpit, some of which had her name scrawled on it. *See Continental Pilot Wins Award in Sex-Bias Case Workplace,* L.A. TIMES, Oct. 17, 1997, at D6 (reporting jury verdict of Oct. 16, 1997 and allegations that male pilots wrote female pilot's name on graphic photos); *see also* Blakely v. Continental, Civ. No. 93-2194 (WGB), 1995 Westlaw 464477, at *1 (D. N. J. June 16, 1995) (referring, in denial of motion to dismiss, to allegation that pornographic materials left in female pilot's cockpit eventually "contained handwritten comments directed specifically towards" her).

[98] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1495-98 (M.D. Fla. 1991); Stair v. LeHigh Valley Carpenters Local Union No. 600, 62 Empl. Prac. Dec. (CCH) ¶ 42,602 at 77,251, ¶ 42,602 at 77,267 (E.D. Pa. June 28, 1993).

[99] *See Robinson*, 760 F. Supp. at 1496 (discussing a blonde, female employee who worked with a welding tool known as a "whip" and who felt "particularly targeted" when a coworker waved around a picture of a nude blonde woman in high heels and a whip); *cf.* Fallon, *supra* note 46, at 42 (stating that "[t]he forced, ongoing intimacy of the workplace" can create associations between anonymous posters and the physical presence of harassers). Indeed, even if a coworker displayed the poster with no such intention to direct it to members of a particular protected class, such targeting might occur if a supervisor, hearing of complaints from such members, encouraged continued display of the poster for the specific purpose of driving members of that class from the workplace. *See generally* LINDEMANN &

circumstances, however, a male employee might display a nude female pin-up simply because he enjoys viewing it during the course of his work and not because he wishes to direct its message to anyone else.[100]

That such gender roles may occasionally be reversed is illustrated by the experience of my brother-in-law, who in 1992 was employed as a library assistant in the cataloguing department of the main library of a public university. At that time he was the only male among more than a dozen employees in the department, which was separated from view of the public rooms of the library. When he asked where he could find paper for the copy machine, a senior female employee smirked slightly and pointed to a cabinet below the sink. He soon discovered that the inside of the cabinet was lined with pictures of male nudes, with a bit of Velcro covering the genitalia of the only one depicting full frontal nudity. Although on further reflection he realized that one or more of his coworkers was simply following the example of men who have frequently displayed pictures of female nudity in other workplaces, he admits that he was initially taken aback. He was momentarily offended by the photos, which he viewed as inappropriate to the workplace.[101]

Had the owner of the pictures posted them shortly after my brother-in-law's arrival, and had she drawn a depiction of a knife or pair of scissors next to the genitals of the frontal nude, rather than covering it up, the pictures could have been interpreted as a symbolic "castration" threat directed to him because of his gender: "We've gotten along fine in this department for years without men; stay in your place or we'll make you miserable and professionally impotent in this department." Similarly, the first female employee in the mechanic's shop might derive an analogous symbolic "rape" message from a newly posted picture of a women in a sexually submissive position: "We will continue to dominate this shop; stay in your place or we'll put you in your place."

However, the pictures in the library cataloguing department were not explicitly or by circumstances directed to my brother-in-law. They obviously were displayed for the entertainment of one or more female employees: they predated the arrival of the first male employee, they were posted in a place designed to keep them from the view of employees outside the originally all-female department, and no one directed my brother-in-law's attention to them until he asked about the location of copy paper. Similarly, assuming that male employees sometimes post pictures of nude females solely for their own

---

KADUE, *supra* note 4, at 187–88.

[100] I thus reject as overinclusive the dictum of one court that "intent to discriminate on the basis of sex in cases involving . . . pornographic materials . . . thus should be recognized as a matter of course." Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).

[101] Conversation with Christopher G. Driggs in Verdi, Nevada, July 1995.

entertainment while they work and not for any other reason, some kinds of generally posted pornography or other expression simply are not consciously directed toward other employees because of their membership in a protected class.

In such a case, the pin-up is displayed on substantially equal terms to anyone passing by. If so, the only theory on which to rest statutory liability would be the possible disparate impact of the display. Under that theory, a facially neutral policy may discriminate on the basis of a protected class if it has a disproportionate, adverse impact on members of that class and is not supported by a job-related business necessity.[102]

Disparate impact analysis is most easily applied to barriers to entry, such as entrance exams or height and weight requirements that disproportionately exclude members of a protected class from even gaining access to a position.[103] In such cases, the impact of a challenged policy is unlawfully disparate if "the challenged practice excludes members of a protected group in numbers disproportionate to their incidence in the pool of potential employees."[104] By analogy, as applied to conditions of employment, an unlawful disparate impact would be established if nondirected workplace expression for which the employer is responsible alters working conditions for members of a protected class in numbers disproportionate to their numbers in the total workforce that is

---

[102] *See* 42 U.S.C. § 2000e-2(k)(1) (1994); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (providing a judicial precursor to specific statutory provision regarding disparate impact). Under the statutory provision most relevant to this analysis:

> An unlawful employment practice based on disparate impact is established under this title only if —
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

[103] *See* Dothard v. Rawlinson, 433 U.S. 321, 323-32 (1977) (height and weight requirement for prison guards); *Griggs*, 401 U.S. at 427-28 (high school diploma or intelligence test as a condition of employment); Blake v. City of Los Angeles Police Dep't, 595 F.2d 1367, 1371 (9th Cir. 1979) (height requirment and physical abilities test for police officers).

[104] New York City Transit Auth. v. Beazer, 440 U.S. 568, 598 (1979) (White, J., dissenting); *see also* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) ("[A] proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.").

exposed to the expression.

One might argue that a provocative display, such as one depicting female nudity, will rarely satisfy the statutory standard of disproportionately affecting members of a particular protected class in any substantial way. Conceivably, each passerby will react to such a poster with pleasure, disinterest, or disdain on the basis of his or her personal values and proclivities regarding public nudity or sexuality and with minimal correlation to his or her gender, race, religion, or other protected status.[105] If so, the poster fails to satisfy the statutory requisites for liability, because no one has either consciously targeted members of a particular protected class for adverse treatment or taken action that has such an effect. Adverse reactions in the workplace may lower morale generally, but only in a way that is broadly distributed among employees, cutting across gender, racial, religious, and other lines. Indeed, the argument goes, any assumption that the work of female employees will be affected disproportionately and adversely by such displays reflects a paternalistic view that women are fragile and must be protected in the workplace from displays and attitudes that pervade our society outside the workplace.[106]

Many courts and commentators have argued, however, that pornography, even if dispersed generally in the workplace, frequently singles out women in the workplace for adverse treatment because it affects them differently, or at

---

[105] Interestingly, as I prepare my first draft of this Article, a published letter to the advice columnist Abigail Van Buren supports this argument with respect to gender but may undermine it with respect to religion:

> Dear Abby:
>
> . . . .
>
> My husband works for the city in a 24-hour plant that is manned by all males in a situation where work space is shared by all. Some of the men have taken the liberty of hanging calendars that feature scantily clad or partially nude young women. My husband finds this very offensive and against his religious beliefs, as do I. One of the other men has the same values, and he took one of the calendars down and threw it away. . . .

Abigail Van Buren, *Girlie Calendars Offend Man's Wife*, CHI. TRIB., July 20, 1996, at 27; *see also* Lambert v. Condor Mfg., Inc., 768 F. Supp. 600, 602 (E.D. Mich. 1991) (ruling that Title VII required employer to accommodate religious beliefs of male employee by ordering coworkers to remove photos of nude women from the workplace).

[106] *See, e.g.*, Strossen, *supra* note 26, at 778–79 (noting that such protectionist views 'reinforce a patronizing, paternalistic view of women's sexuality that is inconsistent with women's full equality"); Horton, *supra* note 85, at 444–47 (summarizing arguments that women do not uniformly view sexual images in the workplace as harmful to them and that stereotyped perceptions of such harm will encourage exclusionary and paternalistic policies).

least more strongly, than it does men. For example, although my brother-in-law was temporarily disturbed by the pictures of nude males in his workplace, he did not feel any threat of sexual assault from the female owner of the pictures. In contrast, one court has noted that "women are disproportionately victims of rape and sexual assault" and therefore "have a stronger incentive to be concerned with sexual behavior."[107] Accordingly, "[a]lthough men may find [pornography] harmless and innocent, it is highly possible that women may feel otherwise."[108]

These considerations presumably apply with particular force if the pornography is limited to depicting women as sexual objects. However, some argue that even sexual expression that depicts both men and women in sexual situations or as sex objects operates primarily to the detriment of women in the workplace: "The sexual aspect of the male sex role does not interfere with the perception of men as serious, professional workers"; however, a "woman cannot be an analytical, rational leader and a sex object at the same time."[109] Conversely, some kinds of undirected sexual expression might be disproportionately intimidating or disturbing to male employees, perhaps because it questions male sexual prowess,[110] challenges their sexual identity,[111]

---

[107] Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); *cf.* Jordan v. Gardner, 986 F.2d 1521, 1525–26 (9th Cir. 1993) (en banc) (noting that for purposes of determining whether body searches of female inmates by male guards violate the Eighth Amendment, women, particularly those who have been sexually abused, suffer more than do men from unwanted cross-gender touching).

[108] Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990) (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984)).

[109] Barbara A. Gutek, SEX AND THE WORKPLACE 166–67 (1985). According to another commentator: "[T]he underlying message [of workplace pornography] is the same: women are not self-determining human beings, the equals of men, but instead are sexual objects who are, by their very nature, unconditionally available for any sexual treatment men choose to impose on them." Leidholt, *supra* note 97, at 229.

[110] *See, e.g.*, Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1335, 1337 (D. Wyo. 1993) (apparently finding that a supervisor verbally abused men not by suggesting any inclination to have sexual relations with them, but by boasting of his own sexual prowess and denigrating theirs). Even though such conduct theoretically could be equally denigrating to men as sexual advances are to women, each could still be viewed separately as discrimination on the basis of gender if they constituted different kinds of adverse treatment. *See id.* at 1337; Calleros, *Homosexual and Bisexual Harassment*, *supra* note 3, at 70–77.

[111] *See generally* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1504 (M.D. Fla. 1991) (discussing expert testimony that about half the men in a study and in the general population "are oriented to their masculinity and their sexuality as an important part of their self-concept").

or otherwise triggers male homophobia.[112]

In many cases, the particularly strong impact of sexualization of the workplace on women may be explained partly by the low number of female employees in relation to male coworkers and supervisors. If the gender imbalance is severe, those in the minority may "capture the attention of the members of the majority group, providing fodder for their rumors and constantly receiving their scrutiny," and making those in the minority "far more likely to become the victim of stereotyping than a member of the majority group."[113] Perhaps this phenomenon partly explains the initial discomfort my brother-in-law felt as the only male in a department among female coworkers and superiors who displayed pictures of nude males in their supply cabinet. In a similar manner, a severe imbalance in the workforce corresponding to other protected classifications, such as race, could increase the impact of allegedly harassing, though undirected speech.

As I have summarized them above, the arguments in this debate may serve to outline some of the factual issues that can be explored in a disparate impact analysis that focuses on a particular workforce. They are less enlightening, however, to the extent that they are invoked to categorically apply or exclude disparate impact analysis with abstract formulations of perceived universal truths.

In my view, a majority of a three-member panel of the Ninth Circuit committed an analogous error in *DeSantis v. Pacific Telephone and Telegraph Co., Inc.*, concluding that disparate impact analysis was not available to employees who sought to show that an employer's policy against homosexuals had an unlawfully disparate impact on men and thus constituted gender discrimination.[114] Rather than rejecting the claim of disparate impact on the facts, the majority found the theory to be inapplicable on the ground that it represented an "artifice to 'bootstrap'" an unprotected classification, sexual orientation, into the protection of Title VII.[115] In contrast, Judge Sneed

---

[112] *See, e.g., id.* at 1494 (discussing a male employee's response that "he would think the 'son of a bitch' to be 'queer'" if a vendor offered him a pin-up of a nude male); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1174–75 nn. 5–6 (D. Nev. 1995).

[113] *See Jacksonville Shipyards, Inc.*, 760 F. Supp. at 1503 (discussing expert testimony regarding workplaces in which "an individual's group comprises fifteen to twenty percent or less of the work force in the relevant work environment").

[114] 608 F.2d 327, 330–31 (9th Cir. 1979).

[115] *Id.* at 330. As I explained in a previous article:

> The majority may have been unduly influenced . . . by a subconscious reaction to social controversy surrounding gay and lesbian rights. After all, the courts have had no trouble recognizing sex discrimination in the height and weight requirements, even though Title VII does not directly prohibit discrimination on the basis of height or

observed in partial dissent—correctly in my view—that the disparate impact theory was theoretically available to support such a claim; the plaintiffs' main obstacle was in establishing the unlikely factual basis for such a claim.[116] Similarly, reserving constitutional objections for the moment, no principle of statutory policy or construction justifies categorically rejecting disparate impact theory as a means of establishing the unlawfully discriminatory effect of generally displayed posters.

In *Griggs v. Duke Power Co.*,[117] the Supreme Court first explained the justification for applying a disparate impact analysis to facially neutral policies that operated to disqualify in disproportionately high numbers African-American applicants for jobs formerly filled only by white employees:

> The objective of Congress in the enactment of Title VII. . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[118]

Although an allegedly racist or sexist poster may not exclude members of a protected class as starkly as do entrance requirements, it could prevent those who make inroads on formerly white-male workplaces from enjoying an equal

---

> weight. They did not regard it as "bootstrapping" to recognize that minimum height and weight requirements could unlawfully burden female applicants disproportionately.

Calleros, *Homosexual and Bisexual Harassment*, *supra* note 3, at 60 (citing to Dothard v. Rawlinson, 433 U.S. 321, 323-32 (1977) (height and weight requirement for prison guards); *see also* Blake v. City of Los Angeles Police Dep't, 595 F.2d 1367 (9th Cir. 1979) (height and physical abilities test for police officers).

[116] *DeSantis*, 608 F.2d at 333-34 (Sneed, J., dissenting). As my previous article explains:

> For example, if half of an employer's work force were male and most of those male employees were known to the employer to be gay, and if only a small percentage of the female employees were known to the employer to be lesbian, a policy against all identifiable homosexual employees, though otherwise neutral on its face, could disproportionately burden male employees. In this hypothetical, the employer might target sixty percent of the male workforce for discharge while targeting only ten percent of the female workforce.

Calleros, *Homosexual and Bisexual Harassment*, *supra* note 3, at 59.

[117] 401 U.S. 424 (1971).

[118] *Id.* at 429-30.

opportunity to perform their work capably or even to survive the pressures of the workplace.[119] Moreover, when Congress codified the disparate impact theory in the Civil Rights Act of 1991[120] in response to Supreme Court case law restricting application of the theory,[121] it defined the unlawful practice broadly as "a particular employment practice that causes a disparate impact" on the basis of a protected classification and is not justified by job-related business necessity.[122] So long as the employer is responsible for expression under agency principles,[123] egregiously disturbing or distracting expression could constitute "a particular employment practice." As in *DeSantis*, the main obstacle to relief ought to be in establishing the disparate impact as a factual matter[124] rather than in confirming disparate impact analysis as a generally available theory of relief.

On the other hand, Title VII liability based solely on the disparate impact of pure speech raises more serious First Amendment concerns than does liability

---

[119] *See, e.g.*, Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 560–61 (8th Cir. 1992) (employee quit); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1519–20 (1991) (employee missed approximately 140 days of work in five years).

[120] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[121] 137 CONG. REC. S15273, 15276 (daily ed. Oct. 25, 1991).

[122] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

[123] *See supra* note 35 and accompanying text.

[124] Under Title VII, the disparity in impact must be significant to trigger liability. The Code of Federal Regulations describes the necessary level of impact as follows:

> "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."

29 C.F.R. § 1607.4(D) (1996); *see also, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 598–99 (1979) (White, J., dissenting) (stating that plaintiffs "made out a sufficient, though not strong prima facie case" with evidence tending to show that "blacks and Hispanics suffer three times as much from the operation of the challenged [employer policy] as one would expect from a neutral practice"); Frazier v. Garrison I.S.D., 980 F.2d 1514, 1524 (5th Cir. 1993) (asserting that 4.5 percentage points difference between minority and nonminority pass rates reflected "no significant statistical discrepancy"); Association of Mexican-American Educators v. California, 927 F. Supp. 1397, 1407 (N.D. Cal. 1996) (applying 4/5 rule). In a case in which 3.7% of recently hired teachers were African-American, a charge of illegal pattern or practice of discrimination may be reinforced by proof that 15.4% of qualified teachers in the labor pool were African-American, but might be weakened by proof that only 5.7% of qualified teachers in the labor pool were African-American. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310 (1977).

for harassing speech that is specifically directed to employees because of their membership in a protected class. Such a disparate impact theory of liability could be content-neutral at a general level, in the sense that it could apply to a full range of expression and variety of viewpoints; however, the conclusion of discrimination is inescapably based on the content of the expression to the extent that it relies on the disparate primary effect of the expression on viewers or listeners, rather than on the speaker's act of selectively targeting members of a protected class.[125] Accordingly, if such a theory of liability is recognized at all, its content-orientation should be recognized as well and its reach accordingly circumscribed.

C. *Free Speech and Disparate Impact*

In cases in which the purveyor of allegedly harassing speech has specifically targeted members of a protected class for selective reception of the speech, I have argued in this Article and its predecessor that a content-neutral regulation of such discriminatory targeting is consistent with First Amendment values. However, when not only the alteration of conditions of employment, but also the discriminatory nature of undirected expression spring from its impact on viewers rather than on selective reception of the expression, the content of the expression necessarily plays a greater role in the regulation, placing the content-neutrality of the regulation in doubt. Thus, the First Amendment implications of such a disparate impact theory should begin with an analysis of the extent to which it would regulate speech on the basis of content or viewpoint.

This threshold issue of content-neutrality is explored in Part III (C) (1) below. Part III (C) (2) examines necessary limitations on application of a disparate impact theory to protect First Amendment values.

1. *Disparate Impact and Content-Neutrality*

If Title VII is interpreted and applied in the manner that I have advocated,[126] hostile environment liability based on the disparate impact of expression would not discriminate against workplace expression on the basis of its viewpoint. For example, such a theory of liability would not operate to regulate anti-feminist and white supremacist expression while leaving anti-male or intimidating Latino militant expression unregulated. Instead, it would stand

---

[125] *See, e.g.*, Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1847 (excluding Title VII regulation of undirected speech would avoid or minimize content-discrimination and viewpoint-discrimination).

[126] *See supra* notes 1–8 and accompanying text.

ready to regulate any perspective that selectively degraded the conditions of employment of members of a protected class through its disparate impact. It might be a rare case in which a workplace is dominated by women whose expression has a selectively adverse impact on male coworkers. However, Title VII would stand ready to apply to such a case, and the experience of my brother-in-law[127] suggests that such a case is not purely hypothetical.

On the other hand, regulation based on disparate impact would not be as indifferent to general content as would regulation of harassing speech that is specifically directed to one or more persons because of their membership in a protected class. In the latter case, First Amendment concerns are minimized because discrimination is found in the harasser's selective targeting of his victims rather than in the content of his expression.[128] In such a case, the content of the speech is unimportant to Title VII's theory of regulation. The unlawful speech could address anything from sports or the arts to politics or sexual relations, so long as it sufficiently distracted or disturbed the targeted employee to make it substantially more difficult for her to perform her work.[129]

In contrast, when expression is not selectively directed to members of a protected class but is found to be discriminatory only because of the impact of its message, regulation on that basis necessarily has a stronger relationship to the content of the expression. True, at a general level, such a theory of liability will apply broadly to any form of expression, ranging from displays of pornographic materials[130] to the style in which a manager gives direction or provides criticism,[131] so long as it disproportionately alters conditions of employment for members of a protected class despite the absence of a conscious intention to do so. Nonetheless, compared to regulation of selectively directed speech, regulation based on disparate impact cannot be said to be

---

[127] *See supra* note 101 and accompanying text.

[128] *See* Wisconsin v. Mitchell, 508 U.S. 476, 480, 490 (1993) (positing that the First Amendment does not bar an enhanced penalty for battery when the defendant selected his victim on the basis of race); R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (stating in dictum that a "prohibition of fighting words that are directed at certain persons or groups . . . would be *facially* valid if it met the requirements of the Equal Protection Clause").

[129] *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 257–59.

[130] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) ("The pictures . . . did not originate with the intent of offending women in the workplace . . . but clearly [have] a disproportionately demeaning impact on the women . . . .").

[131] *See* Cross v. Alabama, 49 F.3d 1490, 1504–05 (11th Cir. 1995) (finding that in a hostile environment case, the district court properly questioned whether the supervisor's style, although directed in equal terms to male and female subordinates, may have been more offensive to female than to male employees).

indifferent to whether harassing speech addresses sports, movies, politics, or racial and sexual relations.

For example, suppose that an agent for the employer[132] uses his authority to impose his views about politics, religion, and popular culture selectively on female subordinates, distracting them from their work and causing them to fall behind their male counterparts in productivity and earnings. Although the content of the agent's expression might affect the rapidity with which his unwelcome expression degrades the work environment of the female employees,[133] as long as the expression had the requisite effect on conditions of employment, Title VII's regulation of the agent's discriminatory conduct should be otherwise indifferent to the content of his expression.[134]

In contrast, suppose that a supervisor or coworker for whose actions the employer is responsible displays posters in a common area of the workplace, not intending to direct the expression to any other person or group, but simply displaying ideas for his own consumption and for that of any other employee who cares to take notice. Because Title VII is concerned only with discriminatory speech or conduct,[135] it simply would not apply to the undirected display of posters in the absence of a disparate impact on members of a protected class. Moreover, assuming that employees of all classes have general access to the posters,[136] any disparate impact necessarily must be based on the content of the posters.

For example, suppose the posters displayed the agent's favorite stars in the National Basketball Association: Michael Jordan, Charles Barkley, and Shaquille O'Neil. Although all the depicted stars are African-American, it is unlikely in the extreme that employees would find the posters to be differentially distracting according to the race of the viewers. Similarly, although some might speculate that such depictions of sports stars would benignly distract men to a greater degree than women, such speculation would be based on outdated stereotypes that are belied by the substantial number of female fans who attend NBA games.[137]

---

[132] *See supra* note 35 and accompanying text.

[133] *See supra* Part II (B).

[134] *See supra* notes 1–8 and accompanying text.

[135] *See* Calleros, *Homosexual and Bisexual Harassment*, *supra* note 3, at 70–77.

[136] If the posters were displayed immediately outside the women's restroom, they might have a disparate impact on female employees simply because they likely would be viewed more frequently by female employees even though all employees would have general access to them. On the other hand, one probably could infer that posters displayed in such a location are intentionally directed to female employees. Circumstances apart from a poster can associate the poster with specific persons or groups within the workplace and thus direct its message to those persons or groups. *See supra* note 99 and accompanying text.

[137] Interestingly, as I write the first draft of this subsection, Julie Foudy, member of the

On the other hand, suppose that a viciously racist supervisor or coworker entertains himself by generally displaying a poster at his worksite glorifying Ku Klux Klan lynchings of African-Americans under the caption: "America's Final Solution." Although other employees of all backgrounds presumably would be greatly offended by such an outrageous display, one can imagine that African-American employees would be affected to a different degree than would other employees. It is conceivable, for example, that African-Americans would make up 80% of the employees who were so scandalized by the poster that they found working conditions intolerable, even though only 20% of the employees exposed to the poster were African-American.[138] An outrageous display glorifying Nazi persecution of Jews or the sexual abuse of women might have a similarly disparate impact on employees on the basis of protected classifications such as race, religion, and gender.

These examples illustrate that the content of the expression is crucial to the disparate impact analysis: liability under Title VII on a disparate impact theory for undirected speech is more likely to be triggered by neo-Nazi, violently misogynist, or Ku Klux Klan propaganda than by NBA posters. The content-

---

1996 Summer Olympics gold-medal winning U.S. Women's Soccer Team, has stated in an interview that she was a Los Angeles Lakers fan as a youth and displayed a poster of Kareem Abduhl Jabar in her room. *Talk Back Live* (CNN television broadcast, Aug. 2, 1996).

[138] It may be regrettable that members of our society might not be equally outraged by such a racist display and that "race . . . is so incendiary an issue, [but] until the Nation matures beyond that condition," our history of discrimination and violence may cause members of the group addressed by the bigoted expression to feel the sting more sharply than would even the least bigoted members of other groups. R.A.V. v. City of St. Paul, 505 U.S. 377, 433 n.9 (1992) (Stevens, J., concurring) (commenting on the likelihood that racist fighting words could present a particularly great danger of injury or violence).

For example, in a recent article I explained how African-American students reacted more strongly to racist internet speech introduced in an English class for good-faith pedagogic purposes:

> They also explained why the handout of racist speech was particularly harmful to African-American students. Already under a spotlight because they are so few in number in most classes, African-American students would feel particularly painful scrutiny when the class is asked to address horrible racist speech directed almost entirely at their race. What might be a challenging or provocative assignment for other students might be nearly unbearable for African-American students in those circumstances. The "jokes" struck the students as particularly pernicious classroom material, because they masqueraded as harmless jest and thus might actually be accepted and repeated by insensitive students outside of class.

Charles R. Calleros, *Conflict, Apology, and Reconciliation at Arizona State University: A Second Case Study in Hateful Speech*, 27 CUMBERLAND L. REV. 91, 110 (1997).

orientation of such regulation presumably threatens First Amendment values to a greater degree than would the largely content-neutral regulation of speech that is intentionally and selectively directed to members of a protected class.[139]

One could attempt to avoid heightened constitutional scrutiny for public workplace displays by finding an intent to selectively target members of a protected class for intimidation, perhaps by inferring such an intent from the simple act of displaying bigoted expression such as neo-Nazi, Ku Klux Klan, or violently misogynist propaganda. In the discussion below, however, I assume that liability is based on a content-oriented disparate impact theory, and I discuss First Amendment limitations on such regulation.

2. *Content-Oriented Regulation*

Even outrageously hurtful speech, such as Nazi propoganda or the hypothetical Ku Klux Klan poster described in discussion above, arguably expresses social or political views,[140] however misguided, and generally would be constitutionally protected if expressed in a public forum.[141] Assuming that the disparate impact theory described above regulates such speech on the basis of its content, it is "presumptively invalid."[142] Compared to the more relaxed scrutiny of Title VII's content-neutral regulation, such disparate impact liability normally should satisfy First Amendment concerns only if it is more narrowly tailored to satisfy a compelling government interest.[143]

---

[139] *See, e.g.*, *R.A.V.*, 505 U.S. at 377. In *R.A.V.*, selective regulation of bigoted fighting words presumably would not have been saved by the argument that fighting words of such content had a disparate impact on minorities and thus that the regulation was a form of protecting potential victims against selective targeting. In dictum, the Court referred to the facial validity of a law that selectively regulated fighting words of any content that are directed to persons because of their membership in a properly defined protected class; however, it did not mention the possibility that such discriminatory targeting could be found in the disparate impact of the expression. *See id.* at 392.

[140] *See, e.g.*, Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 796, 813–15 (1993). Sunstein argues that racially bigoted speech is more deserving of constitutional protection than is simple pornography, because much of it is part of social deliberation. *See id.* at 813.

[141] *See, e.g.*, Collin v. Smith, 447 F. Supp. 67 (N.D. Ill. 1978), *aff'd in part*, 578 F.2d 1197 (7th Cir. 1978), *stay denied sub nom.*, Smith v. Collin, 436 U.S. 953 (1978); Village of Skokie v. National Socialist Party, 373 N.E.2d 21 (Ill. 1978).

[142] *R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid."). *But cf.* Fallon, *supra* note 46, at 21–35 (describing weaknesses in the justification for a general commitment to a rule of content neutrality).

[143] *See* Burson v. Freeman, 504 U.S. 191, 197 (1992); Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 106 (1991); *see also R.A.V.*, 505 U.S. at 395 (analyzing the city's contention that its ordinance "is narrowly tailored to serve compelling

The workplace, however, is a forum in which interests in protecting public discourse and the speakers' autonomy and dignity should be moderated in recognition of government interests in equal employment opportunities,[144] and in protecting the autonomy and dignity of unwilling listeners[145] who cannot retreat into their homes during working hours.[146] In this context, the presumption of invalidity of the content-oriented regulation should be more easily rebutted than in the case of content-oriented regulation of speech in a public forum. At least with respect to the classifications protected by Title VII for which the government has a compelling interest in eradicating discrimination,[147] workplace expression that has a discriminatory impact should be constitutionally proscribable under carefully crafted rules, rules that are narrowly tailored to the objective of ensuring working conditions that do not discriminatorily drive employees from their jobs or make their work substantially more difficult.

Although the First Amendment will require a close fit between content-oriented regulation of workplace speech and the government goal of preserving equal employment opportunity, it should not demand the "most exacting scrutiny" reserved for regulation of the content of political speech in a public forum.[148] The same factors discussed in Part II above regarding regulation of selectively directed speech can apply to regulation based on disparate impact. Nonetheless, constitutional values demand that a content-oriented hostile environment theory based on disparate impact be significantly more narrowly circumscribed than a content-neutral regulation based on selectively directed speech. Accordingly, liability for the disparate impact of pure speech in the workplace should be limited to cases in which discrimination through disparate impact is clearly shown, a substantial adverse effect of the speech on working conditions is established under a properly formulated objective standard, implied consent is clearly absent, and recipients of the speech are captive in the sense that they have no feasible way to "avert their eyes." Even then, the resulting standard must withstand special scrutiny for vagueness problems, partly grounded in the due process requirement of notice, as discussed in Part IV below.

---

state interests").

144 *See supra* notes 10–30 and accompanying text.

145 *See* Karner, *supra* note 17, at 675–76.

146 *See supra* notes 41–43 and accompanying text.

147 *See supra* note 30 and accompanying text. This Article assumes such a compelling interest at least for the classifications of race and sex, which probably define the groups most commonly disproportionately affected by outrageous posters in the workplace.

148 Burson v. Freeman, 504 U.S. 191, 198 (1992) ("exacting scrutiny"); Boos v. Barry, 485 U.S. 312, 321 (1988) ("the most exacting scrutiny").

a. *Discrimination Through Disparate Impact*

The difficulty of establishing disparate impact from undirected expression should not be underestimated. When the discriminatory environment is based primarily on the disparate impact of pure speech, the First Amendment should restrict the regulation to that which is absolutely necessary to achieve the governmental interest in remedying workplace discrimination. Consistent with those values and with equity principles underlying Title VII, a showing of such disparate impact should be based not on stereotyped assumptions about the sensibilities of members of a protected group, but rather on a particularized factual showing in each case.

It is one thing to establish objective, physically verifiable facts about the relative proportions of male and female members of a labor pool who can meet a height requirement.[149] It is quite another matter to establish with objective facts that members of a worksite reacted differently to a generally displayed poster or similar expression largely on the basis of their membership in a protected class,[150] rather than on the basis of personal tastes and attitudes that cut across protected class lines.[151]

---

[149] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 323–32 (1977) (height and weight requirement for prison guards); Blake v. City of Los Angeles Police Dep't, 595 F.2d 1367, 1371 (9th Cir. 1979) (height requirement and physical abilities test for police officers).

[150] Accepting such a disparate impact theory to establish a discriminatory work environment arguably lends support to an objective standard of harassment based on the perceptions of a reasonable member of the protected class suffering the discrimination. *Compare supra* note 46 and accompanying text ("reasonable person standard") *with infra* note 157 (discussing the split in authority on question of whether "reasonable person" should be defined with respect to reasonable persons in the group complaining of discrimination).

[151] For example, suppose that two women at a worksite feel harassed by a generally displayed poster of a scantily clad woman posed in a sexual manner. They have no strong religious beliefs, but they are seriously distracted by the poster because it makes them feel like objects of sexual desire rather than fully respected employees. Accordingly, they seek to establish that the poster, although posted purely for entertainment purposes and not selectively directed to female employees, has a disparate impact on female employees and thus discriminates against them because of their sex.

The plaintiffs find that three other women are strongly disturbed and distracted by the poster, largely because their shared religion frowns on public displays of nudity and sexuality. The remaining four of the nine female employees, however, find the posters to be relatively uninteresting and inoffensive. Two of these four find it unremarkable for their male counterparts to display an interest in scantily clad women; the other two have posters of their favorite male Hollywood "studs" in their own lockers, and they are not distracted by the more public display of the female pin-ups. Conversely, of the ten men at the worksite, five find the publicly displayed pin-up to distract them from their work for various reasons. Four of them find that the poster offends their religious beliefs. *Cf. supra* note 105 (discussing examples of

This burden of proving the disparate impact with highly specific evidence of reactions within the relevant population is not an unfair one. The relevant population should be viewed as the group of employees who actually were exposed to the workplace speech, obviating the need for approximations, estimates, or extrapolations based on surrogate populations or on samples of a larger population, such as a local labor pool or more general population.[152]

b. *Altering Working Conditions as Viewed by the "Reasonable Person"*

The charging party not only must show that the impact of the expression was disparate, as in the case of directed speech, she must also establish that the impact on the relatively severely affected group was sufficient to alter working conditions. As with directed speech, mere offense is not sufficient, and the expression must be "sufficiently severe or pervasive" to create "an environment that a reasonable person would find hostile or abusive," as well as one that the victim subjectively perceives to be hostile or abusive.[153]

As discussed above, the disparate nature of the impact should be established through a cumulative analysis of the subjective reactions of individuals exposed to the speech, and disparity should not be established unless members of a protected class in fact subjectively experienced adverse reactions

---

male employees who objected to a workplace pin-up on religious grounds). The other finds the poster to be sexually stimulating, creating what he believes to be an inappropriate distraction from his work.

In sum, at least with respect to this particular workforce, the evidence shows no significant disparate impact on the basis of gender, because nearly the same percentage of men as women find the poster to be distracting. Evidence of disparate impact of similar posters on women within a larger population might be excluded as irrelevant if reliable evidence of impact on actual members of the affected workforce is available. The facts of this hypothetical example raise an interesting question whether members of a particular religion could establish a disparate impact against them.

[152] *Cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 598–600 (1979) (White, J., dissenting) (outlining disagreement between dissent and majority about probative value of statistical analysis based on the racial composition of methadone users in the general city population in the absence of statistical analysis based on methadone users who, among other things, "worked for or sought to work for" the employer); *Dothard*, 433 U.S. at 330 (accepting a showing of disproportionate impact based on "generalized national statistics" and noting the difficulty in some contexts of identifying "the actual potential applicant pool"); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 & n.13 (1977) (expressing how the liability for pattern and practice of discrimination could be based on disproportionate impact on qualified members of a protected class in the relevant labor market, although data on actual applicant pool, if available, would be highly relevant).

[153] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); *see also supra* notes 45 and 46 and accompanying text.

in disproportion to their numbers in the workforce. Moreover, unlike in cases in which the impact of a challenged policy is complete exclusion from the workforce,[154] liability for a discriminatory work environment must rest on a further finding that the complainant's working conditions have degraded to a certain degree.[155] This requires a showing both that the complainant was one of those who subjectively felt the requisite adverse impact and that a "reasonable person" would have felt similarly.

Some courts and commentators have concluded that the Supreme Court has not clearly foreclosed the question of the breadth of the population with reference to which the "reasonable person" should be defined:[156] (1) the general population, or (2) members of the protected class that was targeted for directed speech or conduct, or that suffered disproportionately from undirected speech or conduct.[157] A narrowly objective test based on a reasonable member of the protected class whose members suffer a relatively great impact presumably would lead to liability in a greater number of cases.[158]

The Supreme Court, however, referred to an objective test based on a "reasonable person," rather than a "reasonable woman" or other member of a protected class.[159] If formulated properly, such a test provides the best tool with

---

[154] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971) (analyzing high school diploma and standardized intelligence test scores as entrance requirements to power plant).

[155] Discrimination and alteration of conditions of employment are cumulative requisites of Title VII liability that form distinct issues. *See, e.g.*, Calleros, *Title VII and Free Speech*, *supra* note 1, at 229 and nn.19-20.

[156] *See, e.g.*, GREENAWALT, *supra* note 10, at 79; Karner, *supra* note 17, at 643.

[157] *See* Karner, *supra* note 17, at 643 (reviewing split in federal appellate courts in sex discrimination cases over whether to use an objective test based on a "reasonable woman" or on a "reasonable person" without regard to gender); *Agency Rulings, EEOC Harassment Guidelines Refer to Reasonable Person*, 62 U.S.L.W. 2061, 2061-62 (Aug. 3, 1993) (summarizing the conflict); *see also* Duplessis v. Training & Dev. Corp., 835 F. Supp. 671, 677 (D. Me. 1993) (adopting "reasonable Franco-American" test for national origin harassment). Commentators are similarly split. *Compare, e.g.*, Walter Christopher Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503, 539 (1993) *with* Fallon, *supra* note 46, at 46 (advocating the reasonable woman test and concluding that it "should survive First Amendment scrutiny").

[158] Still, liability would not follow automatically from every differential effect. For example, a complainant might show that a poster negatively affected the working conditions of 33% of female employees exposed to the poster but only 2% of male employees similarly exposed; nonetheless, 67% of female employees did not suffer an impact sufficiently great to alter their working conditions, suggesting that a "reasonable woman," as well as a "reasonable person," might not feel alteration of workplace conditions.

[159] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

which to constrain a content-oriented disparate impact theory within the limits demanded by the First Amendment while still promoting the policies of Title VII. Accordingly, this Article will proceed on the assumption that a discriminatory work environment theory of liability includes an objective element based on the sensibilities of a "reasonable person" in the general population.

Such a broadly objective test still leaves open substantial questions about its precise formulation. For example, in a society almost equally divided between men and women, what perspective would be held by a "reasonable person" on a matter about which men and women typically have had vastly different experiences?[160] The relative merits of alternative formulations of such a standard may be clearer after exploring the possible differences between an objective standard based on a reasonable person in the general population and one based on a reasonable member of a protected class.

Regardless of how it is formulated, even a broadly objective standard will permit liability for a discriminatory work environment based on disparate impact in at least two kinds of cases. First, disparate impact will be found in those cases in which a "reasonable person" in the population as a whole would find an alteration of conditions of employment, even though a majority of employees in the workplace are bigoted or insensitive and feel that their working conditions are unaffected.[161] Second, it will be found in those cases in which conditions of employment have been altered for all employees but to a much greater degree for members of a protected class.[162]

---

[160] Of course, one should not underestimate the comparable difficulties of arriving at the perspective of a "reasonable woman" in a diverse population of women who concededly share some experiences, but who are sufficiently independent-minded and have a wide range of views and values on topics ranging from abortion to pornography.

[161] In such a case, a "reasonable person" in the general population would find the work environment to be hostile, supporting a finding that conditions of employment were altered. Moreover, because a majority of the employees at the actual worksite did not find their conditions of employment to be adversely altered, the adverse effect on members of a minority group in the workplace may be disproportionate.

[162] For example, the poster described in the text glorifying Ku Klux Klan lynchings of African-Americans might disturb almost all employees so as to make it substantially harder for them to perform their work. However, African-Americans might be disproportionately represented in the group of employees who are so profoundly affected that they feel compelled to quit their jobs when the employer refuses their requests to remove the poster. In such a case, African-Americans would be the victims of discrimination in the form of disparate impact, because they are affected to a greater degree in disproportionate numbers. Moreover, to the extent that the majority of employees at the worksite are an accurate indicator of the sensibilities of a "reasonable person" in the general population, the broadly objective standard for hostile environment harassment would be satisfied.

In other contexts, however, depending on how a "reasonable person" standard is formulated and applied, it could foreclose liability even though expression has a disparate impact on employees. In some cases the impact will be disparate precisely because a majority of employees are able to function normally in the face of speech or conduct that a protected minority finds to be greatly disturbing.[163] In such cases, if the sensibilities of the majority of employees reflect those of the majority of the population as a whole, a broadly objective standard based on such majority sensibilities would preclude liability. Members of the protected minority group would suffer the disparate impact, but a majority-based objective standard would lead to a finding that the disparate impact did not degrade the working environment to the requisite degree.[164] This could occur in a workplace when the values or perspectives of members of a protected class, such as a minority racial group, reflect different sensibilities about the expression in question than would a "reasonable person" holding majority sensibilities.

To some extent, such a limitation on liability is sensible. Unless spitefully and discriminatorily directed to certain employees, a supervisor's display of a still-life painting featuring a luscious bunch of grapes should not implicate Title VII even though Mexican-American clerical employees have fervently united behind a movement to boycott grapes in support of Mexican and Mexican-American farmworkers and strongly object to a display that seems to encourage others to be attracted to grapes. Even in the unlikely event that the boycott has raised tensions on the topic to such a high degree that the Mexican-American clerical workers subjectively feel a degradation of their working environment, and even if such feelings are broadly shared in the Mexican-American community, Title VII should not be triggered. Liability should not be imposed on the basis of reactions that are typical or "reasonable" within the discrete group, particularly when those reactions have been cultivated within a political

---

[163] Some may rebel at such a notion and may maintain that various reactions to outrageous speech normally will be spread evenly across the lines of protected classes. I make no claim, however, about the frequency of such disparate reactions. I simply explore the argument that plaintiffs should have the opportunity to prove such disparate impact, no matter how difficult that burden. *See supra* notes 114–24 and accompanying text.

[164] Suppose, for example, that the racist poster described *supra* note 162 was sufficiently disturbing to alter working conditions for a large percentage of African-American employees, but that it altered working conditions for only a small percentage of non-African-American employees. It is not entirely clear how a "reasonable person" in the general population would be defined in a pluralistic society; however, the definition presumably would be heavily influenced by the majority population. Assuming that a "reasonable person" in that population would be offended by the racist poster but would not be so disturbed that his ability to work would be hampered, a broadly objective standard would preclude a finding of a hostile work environment.

or social movement.

On the other hand, a court would obviously defeat the remedial goals of Title VII by applying a broadly objective standard that incorporates majority prejudice toward a minority within a protected classification. For example, when the country is gripped with rampant nativist resentment toward immigration from Mexico, the "average" person in the general population might condone scurrilous expressions about Mexican-Americans that employees of Mexican origin would find to be seriously disturbing. Accordingly, even a broadly objective standard based on a "reasonable person" must give a meaning to "reasonable" that does more than reflect the average sensibilities within a bigoted population.

Instead, the "reasonable person" under Title VII should be defined as an ideal: a fictional person without race, gender, or other characteristics relating to protected classifications. Such a "reasonable person" would behave in a manner consistent with the terms and goals of Title VII and thus would not be inclined to discriminate intentionally against employees. Indeed, this person would be inclined to cease a facially neutral practice, including speech, once it became known that the practice adversely and disproportionately affected a protected class. Such a person would not necessarily share the experiences and special sensitivities of members of a particular protected class, but would be aware of those experiences and the context of alleged harassment. In other words, the "reasonable person" would directly represent neither members of the class victimized by the alleged harassment (such as Mexican-American employees who have mobilized behind a grape boycott) nor the majority of workers or persons generally (such as a population gripped with fear and bigotry concerning immigration from Mexico). Instead, this idealized "reasonable person" would represent a reasonably intelligent, well-informed, non-bigoted person who is aware of the context of the alleged harassment.

Although such a hypothetical person would not direct a racial epithet at another employee or maintain a poster that disproportionately scandalized members of a protected class, neither would this "reasonable person" automatically jump to the conclusion that every such incident necessarily affected terms or conditions of employment to a sufficient degree to violate Title VII.[165] Whether applied by judge or jury,[166] the "reasonable person" standard would not represent any actual person or group so much as it would act as a policy limitation on liability. Recognizing the inevitable and irreducible frictions in a workplace, this standard would exclude liability when the

---

[165] *See* Williams v. Prince Georges County Hosp. Ctr., 932 F. Supp. 687, 690 (D. Md. 1996) (finding bad faith in attorney's bringing Title VII action based on single racial remark).

[166] The Civil Rights Act of 1991 extended the right to a jury trial in Title VII actions for claims for damages under the Act. 42 U.S.C. § 1981a(c) (1991).

subjective reactions of a victim of alleged harassment are out of balance with a reasonable accommodation of the remedial goals of Title VII.

This idealized standard seems consistent with the apparent objective of the EEOC to strike a middle ground between a "reasonable person" who might share majoritarian prejudices, on the one hand, and a standard based on members of a protected class who may have been organized or conditioned to react in a way that exaggerates the differential experiences of members of different classes. For example, the EEOC has instructed its agents that the "reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior," and that it should be applied with sensitivity to context rather than in a "vacuum."[167]

More recently, the EEOC proposed and then withdrew a test for harassment that would define the "reasonable person standard" partly with reference to "the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability."[168] Because such a standard incorporates general knowledge of the special experiences of members of a protected class, it may come close to merging with a standard based on a reasonable member of the victimized class. However, it still contemplates a neutral, critical, culturally informed judgment, rather than a simple empirical analysis of the average reactions of members of a particular class. If such an informed judgment is all that is meant by those who advocate a standard based on a reasonable member of the victimized class, then perhaps the "reasonable person" and "reasonable member of the victimized class" standards in fact merge at the margins and can be interpreted to be consistent with the other.

Regardless of how such an interpretation of the "reasonable person" standard would relate to other formulations, practical questions obviously would arise about how it would be conveyed in any meaningful way to a jury and how the standard would apply in particular cases. Nonetheless, it seems clear that the standard would permit a finding that certain kinds of outrageous, although undirected, displays had a disparate impact on members of a protected class and altered their conditions of employment.

For example, consider once again the hypothetical Ku Klux Klan poster glorifying the lynching of African-Americans as "America's Final Solution," and suppose that it were displayed by a racist supervisor for his own

---

[167] *EEOC Policy Guidance on Sexual Harassment*, Daily Lab. Rep. (BNA) No. 201, at E-4 (Oct. 18, 1988); *EEOC Policy Guidance on Current Issues of Sexual Harassment*, EEOC Compl. Man. (BNA) No. 4031 at 4045 (Mar. 19, 1990) (*quoted in* EEOC v. West, App. Nos. 01942699, 93-11-0116, 1996 WL 106723, at *5 (E.E.O.C.) (Mar. 7, 1996)).

[168] EEOC Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 29 C.F.R. § 1609.1(b)(1), (c), *proposed*, 58 Fed. Reg. 51,266 (Oct. 1, 1993), *withdrawn*, 59 Fed. Reg. 51,396 (1994).

entertainment in a workplace in which African-American employees were vastly outnumbered by others. Assume also that the poster's message had a disparate impact on the African-American employees: although it greatly offended almost all workers, African-American employees were disproportionately among those who were so subjectively disturbed that it adversely affected their ability to work or their emotional well-being on the job. An objective analysis ought to confirm the reasonableness of the subjective reactions of the affected African-American employees without incorporating anti-black bigotry that is inimical to the goals of Title VII and which may be present within the general population. The idealized "reasonable person," aware of the employment context and the history of racial violence in this country, might well judge such a display to violate Title VII.

c. *Absence of Consent*

As with liability for directed speech, liability for maintenance of a discriminatory work environment based on the disparate impact of undirected expression must be based on unwelcome, nonconsensual expression. Such a limitation excludes liability for the impact of expression that is predictably part of the legitimate job description. For example, one who voluntarily accepts a job as a museum guard can hardly base a Title VII complaint on the impact of predictably displayed paintings of nudes or historical photographs of Ku Klux Klan lynchings or Nazi persecution.[169] Similarly, a secretary who agrees to assume the task of taking meeting notes for a marketing executive cannot base a Title VII complaint on the impact of provocative speech between marketing executives in an uninhibited discussion of racially or sexually oriented marketing programs.[170]

On the other hand, by taking a position as a mechanic, an employee should not be viewed as automatically consenting to an outrageous poster, unrelated to work, displayed on a common tool box. The high incidence of outrageous expression and images in more public forums, or in places to which access is more clearly voluntary, should not raise inferences of consent to such expression in the workplace, where employees are compelled to spend many of their waking hours for their economic survival.[171] Implied consent must be tied

---

[169] *See generally* Fallon, *supra* note 46, at 50 (stating that a distributor of pornographic materials cannot claim a hostile work environment); Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1861 (stating that an employee of an art gallery or bookstore cannot claim that sexually explicit materials are creating a hostile work environment).

[170] *See supra* Part II (A).

[171] *See, e.g.*, Leidholdt, *supra* note 97, at 224–25 (criticizing reasoning of Rabidue v.

to legitimate job requirements.[172]

d. *Captive Audience of Undirected Speech*

Perhaps more than any other contextual factor, the extent to which an employee is unable to escape the disparate impact of undirected speech will help determine whether Title VII can impose content-oriented regulation consistent with the First Amendment. By its very nature, undirected speech is less intrusive than is speech of the same content that is thrust upon a targeted employee. Although undirected speech may nonetheless be so pervasive or intense that members of the disproportionately affected class cannot ignore it, the burden of establishing such an inability to avert one's eyes will be substantial. Moreover, if Title VII imposed content-oriented regulation in the absence of such a showing, it would not be serving a compelling governmental interest in the least restrictive manner.

Suppose, for example, that a supervisor displays on the wall of his office a calendar picturing a nude or scantily clad woman, and that he has placed on his desk a photo of his wife in a bikini and in an alluring pose. Suppose also that employees who enter the supervisor's office in the normal course of their work are not compelled to look at either display, although some find themselves drawn to the displays, and the peripheral vision of others simply reminds them that the displays exist. An employee who raised a Title VII claim in such circumstances would bear the significant burdens of showing not only that the displays had a disparate impact on a protected class,[173] but also that they were held captive to the speech and unable to escape it in a reasonable manner.

Here, the only employees who focus their attention on the displays may be those who are voluntarily drawn to them, perhaps because they find the displays attractive or because they feel a desire to view the displays so that they can pass judgment on the supervisor or otherwise register their disgust. Other employees might be generally reminded of the existence of the displays when they enter the office, but their sense of offense or disapproval would be similar to that of the mechanic who disapproved of her coworker's habit of viewing *Playboy* magazine during his break. Although a glance in the coworker's direction would remind her that her coworker enjoyed viewing photos that presented women as sex objects, she would have little basis for complaining of a Title VII violation unless the coworker, with the employer's acquiescence,

---

Osceola Refining Co., 805 F.2d 611, 618 (6th Cir. 1986)).

[172] *Cf.* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("If an employment practice which operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited.") (alteration in the original).

[173] *See supra* note 124 and *supra* Part III (C) (2) (a).

forced his displays upon her because of her gender or acted differently towards her once the break was over and he returned to work. Similarly, an apparently undirected display would not hold an employee captive to its message unless it were displayed so pervasively or so strategically that an employee would be compelled to view it to perform her required tasks. Such compulsion might be shown if the supervisor had every wall and surface of his office papered with outrageous displays, if the supervisor displayed an objectionable poster prominently on the wall directly behind his desk so that an employee would find it difficult to speak to the supervisor without also focusing on the poster, or if the supervisor prohibited the employee from turning a desk photo away while she was assigned to work at his desk. In some of these instances, of course, a factfinder might infer that the supervisor is specifically directing the expression to the employee.[174] Disparate impact analysis would be unnecessary if the supervisor directed the expression in a manner that discriminatorily targeted members of a protected class.[175]

The discriminatory impact analysis might take on greater significance in the case of aural expression, because it may be impossible for a captive employee to shut out audible expression, even though not directed to him, and even though he could avert his eyes from some undirected visual displays. For example, a supervisor might invoke outrageous and intimidating anti-black racial epithets in conversations with fellow white supervisors that are unavoidably overheard by other employees, including African-American employees, who are required to remain at a nearby work station and who have no reasonable means of "shutting out" the speech. In some cases, African-American employees might be able to establish that the supervisor in fact was directing the epithets to them, rather than to the other supervisors, as a means of intimidating them. Even in the absence of such an intent to discriminatorily direct the speech, however, the African-American employees should have the opportunity to establish the discriminatory impact of the speech and to show that they were captives to the speech rather than consensual participants.

In sum, unless the manner of the oppressive expression permits an

---

[174] *See generally* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (1990) (finding that discriminatory intent may be implicit in the act of posting pornographic pictures).

[175] For example, the supervisor may know that the only employee who must regularly enter his office to speak with him is his female secretary and he might display a sexually provocative poster directly behind his desk so that the secretary will be forced to view it. Perhaps he wants to sexually intimidate her or perhaps he foolishly thinks that the sexual display will stimulate her to be sexually receptive to him. In such circumstances, if he would not have displayed the poster in such a manner had the employee who regularly visited him been male, then he has directed the expression to his secretary on the basis of her gender.

inference of intentional discriminatory targeting of the victims[176] discrimination must be based on disparate impact, which necessarily is grounded in the content of the speech.[177] Government regulation of speech in this manner must be more carefully circumscribed than content-neutral regulation of selectively directed speech, but characteristics of some workplace tasks and locations should permit some degree of regulation within the bounds of the First Amendment. Nonetheless, any government regulation of workplace speech must address potential objections about vagueness and overbreadth, and such objections may be more difficult to overcome in the case of undirected speech.

IV. VAGUENESS AND OVERBREADTH

This Article has advocated content-neutral regulation of directed speech with rules that are reasonably and narrowly tailored to the substantial, if not compelling, governmental interests in eradicating various forms of invidious workplace discrimination. It has also advocated content-oriented regulation of undirected speech with rules that represent the least restrictive means of serving the compelling interest. Assuming that this Article's accommodation of the values of Title VII and the First Amendment is constitutionally sound, these proposed standards for liability under Title VII still must be carefully expressed in the law to avoid problems of overbreadth. Specifically, standards for liability under Title VII must be narrowly defined so that they do not impose liability for a substantial amount of constitutionally protected speech along with constitutionally proscribable harassing speech.[178]

The difficulty of precisely defining the line between proscribable harassing speech and constitutionally protected speech inevitably raises additional concerns of vagueness. Excessive vagueness in the standards for regulation may deny employers due process[179] by providing them with inadequate notice of conduct that will invite enforcement and liability.[180] The danger of unpredictability and arbitrariness is underscored if vague standards invest

---

[176] *See supra* notes 96–97, 174 and accompanying texts.

[177] *See supra* notes 128–39 and accompanying text.

[178] *See* Broadrick v. Oklahoma, 413 U.S. 601, 612–13 (1973).

[179] *See* Smith v. Goguen, 415 U.S. 566, 572 (1974) (stating that the vagueness doctrine rests primarily on the due process requirement of notice).

[180] *See Broadrick*, 413 U.S. at 607 (ruling that a statute is vague if "men of common intelligence must necessarily guess at its meaning") (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (stating that laws must provide a person with "a reasonable opportunity to know what is prohibited so that he may act accordingly"); Jordan v. DeGeorge, 341 U.S. 223, 231–32 (1951) (stating similarly that laws must provide "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices").

individual judges, juries, and EEOC enforcement officers with excessive discretion to shape the standards according to highly variable personal values.[181] Vague standards for regulation of speech may create a "chilling effect"[182] on protected speech by making speakers guess what kinds of speech will trigger enforcement and thus inhibiting their expression of protected speech.[183]

Kingsley Browne has argued that such impermissible vagueness infects Title VII standards for liability for speech that creates a discriminatory work environment.[184] Browne and Eugene Volokh are particularly concerned that unpredictability in the enforcement of the discriminatory environment theory will cause rational employers to overregulate the speech of their employees to avoid costly lawsuits.[185]

As discussed earlier, Browne and Volokh prescribe different remedies against the vagueness that they perceive in the standards for discriminatory work environment as applied to workplace speech. Volokh would restrict application of the theory to directed speech, while Browne would exclude speech entirely as a basis for demonstrating degradation of working conditions.[186]

I conclude that Volokh is closer to the mark. Although undirected speech raises special problems of vagueness and overbreadth, the challenges of defining liability for directed speech with adequate precision are not insurmountable. Furthermore, I conclude that even Volokh's bright line is unnecessary and that Title VII can be constitutionally interpreted to apply to a narrowly defined class of undirected harassing speech, as well as a more broadly defined class of directed speech. To resolve the twin problems of vagueness and overbreadth, this Article will embark on two final endeavors. First, to address vagueness problems, the Article will further refine the standards for liability. Second, it will discuss ways in which a precisely conceived standard for liability can be expressed and applied in a way that will

---

[181] *See Grayned*, 408 U.S. at 108.

[182] Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) ("When one must guess what . . . utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone. . . .'") (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[183] *See* Cramp v. Board of Pub. Instructions, 368 U.S. 278, 287 (1961).

[184] Browne, *supra* note 7, at 501–10; *see also* Karner, *supra* note 17, at 657–59 (current Title VII standards are vague and overly broad); Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 809–11 (1995).

[185] *See* Browne, *supra* note 7, at 504–10; Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 42, at 1808.

[186] *See supra* notes 18, 77 and accompanying text.

address problems of both vagueness and overbreadth.

A. *Refining the Standards*

The challenge of confronting constitutional objections based on vagueness can best be met by re-examining current Title VII standards and underscoring necessary refinements. In *Harris v. Forklift Systems, Inc.*, the Supreme Court reaffirmed its earlier decision that Title VII is violated "[w]hen the workplace is permeated with '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.'"[187] It explained that this standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[188]

The *Harris* majority conceded that this test "is not, and by its nature cannot be, a mathematically precise test"[189] and "that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."[190] The majority did provide some more concrete guidance, however, by identifying several factors that a court might consider in determining whether discriminatory harassment has altered conditions of employment: "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."[191]

In his concurring opinion, Justice Scalia expressed doubt mixed with resignation:

> "Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person['s]" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness,. . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious

---

187 510 U.S. 17, 21 (1993) (footnotes omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

188 *Id.*

189 *Id.* at 22.

190 *Id.* at 23.

191 *Id.*

> enough to warrant an award of damages. . . .
>
> Be that as it may, I know of no alternative to the course the Court today has taken. One of the factors mentioned in the Court's nonexhaustive list—whether the conduct unreasonably interferes with an employee's work performance—would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute. Accepting *Meritor*'s interpretation of the term "conditions of employment" as the law, the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered. I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts. For these reasons, I join the opinion of the Court.[192]

Justice Scalia may be right that Title VII's reference to "conditions . . . of employment" does not clearly require interference with work performance as a determinative factor. Nonetheless, a similar requirement may be constitutionally compelled as a necessary means both of limiting the reach of Title VII's regulation of speech to satisfy fundamental First Amendment concerns, and of providing a concrete anchor to the regulatory test to minimize problems of vagueness.

Justice Ginsburg strengthened the majority's multi-faceted test by emphasizing interference with work as the dominant inquiry.[193] An even more useful anchor to the harassment test, however, is Justice Ginsburg's reference to harassment that increases the difficulty of performing the job:

> To show such interference, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.". . . It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to "ma[k]e it more difficult to do the job."[194]

Although Justice Ginsburg apparently viewed such speech or conduct as an example of interference with work, and although the majority regarded none of its factors as mandatory,[195] I would elevate the factor of "enhanced difficulty" to the status of a necessary component of the test for a discriminatory work environment. Accordingly, I argued in the predecessor to this Article that the "hostile or abusive work environment" test should be replaced with a "discriminatory work environment" test that focuses on whether harassment

---

[192] *Id.* at 24–25 (Scalia, J., concurring) (internal reference omitted).

[193] *Id.* at 25 (Ginsberg, J., concurring).

[194] *Id.* at 25 (Ginsberg, J., concurring) (citations and footnote omitted) (quoting Davis v. Monsanto Chem., 858 F.2d 345, 349 (6th Cir. 1988)).

[195] *See id.* at 22.

makes it "substantially more difficult" for an employee to perform her work.[196] Such a standard is more descriptive of my content-neutral theory of regulation of directed speech, because I have argued that such speech need not have a hostile or abusive content to alter working conditions.[197]

Moreover, such a standard helps achieve the certainty advocated by Justice Scalia within the framework adopted by the majority in *Harris*. Under my test, the nonexhaustive factors listed by the majority are simply factors relevant to the fairly narrow and precise question of whether harassing speech made it substantially more difficult for an employee to perform her work. It might do so by distracting or disturbing the employee to such a degree that it directly interferes with her work, causing her productivity to decline. Or the harassment might simply render the workplace so profoundly unpleasant by increasing the physical and emotional burdens of reporting to work, maintaining a working relationship with the harasser, and completing assignments on time.

Such an interpretation of the opinions in *Harris* certainly does not convert the test for harassment into one of "mathematical certainty." Mathematical certainty, however, is not required.[198] If it were, the federal statute that criminalizes threats to the President would be struck down on the ground that the statutory line between a proscribed threat and a permissible statement of blunt political criticism is inevitably uncertain.[199] As noted by the First Circuit in the context of discipline of an employee by a state school:

> Of course, while we acknowledge a First Amendment right of public school teachers to know what conduct is proscribed, we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers . . . . The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?[200]

The question under Title VII is whether standards of liability for harassment can be communicated to employers through EEOC regulations and judicial interpretations[201] with sufficient clarity that employers can reasonably be expected to recognize unlawful practices. The courts and the EEOC have

---

196 Calleros, *Title VII and Free Speech*, *supra* note 1, at 257–58.

197 *See id.* at 258.

198 *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

199 *See generally* Watts v. United States, 394 U.S. 705, 708 (1969) (holding law prohibiting threats against the President is constitutional but did not apply to woman's statement of wishing that the President were dead).

200 Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993).

201 *See infra* Part IV (B).

made substantial progress in this process by (1) applying an objective, as well as a subjective, test for alteration of conditions of employment, (2) ruling out mere offensiveness as a basis for liability, (3) requiring proof of unwelcomeness of harassing speech and conduct, and (4) imposing liability on employers for alteration of working conditions only when the harassing party is an agent to whom the employer has delegated substantial responsibility or when the employer has notice of the harassment or the potential for harassment and has not reacted appropriately.[202]

As a means of protecting First Amendment interests when proof of a discriminatory environment is based primarily on harassing speech, courts should add the following factors developed in this Article to the limitations and factors advanced in *Harris*: the extent to which (1) participation in a vigorous exchange of ideas is beyond the employee's job description, (2) the speech tends toward low value speech, such as threats, rather than toward core political speech, and (3) the target of the speech is an unwilling and captive audience.[203] Of course, even as these factors limit the reach of Title VII to guard against overbreadth, they arguably add to vagueness concerns by underscoring the flexible, contextual nature of the inquiry. Accordingly, I address the vagueness problem more specifically below in separate analyses of directed speech and undirected speech.

First, however, a quick response is in order to some commentators who have complained that an individual harasser may lack an adequate basis for recognizing that his actions are combining with those of others to create a cumulative effect that alters conditions of employment.[204] This complaint carries little weight. In the event that a court imposes personal liability on an individual harasser,[205] it presumably will do so only if that individual's actions were independently sufficient to alter working conditions, if he acted jointly with other harassers, or if he at least had notice of other harassment and thus was aware that his personal contribution to a degrading environment could push it past permissible limits. In the more likely event that the employer is held liable for the combined actions of its supervisors or for the combined actions of lower-level employees of which it had notice, the employer has little reason to complain of unfairness. It is not unreasonable for an employer to take responsibility for the combined actions of its supervisors, to whom it has

---

[202] *See supra* notes 35, 45–47 and accompanying texts.

[203] *See supra* Part II.

[204] *See, e.g.*, Robbins, *supra* note 184, at 810 ("[A] hostile work environment comes from cumulative expressions, some of which may be unknown to the present speaker."); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 638–46 (1997) (analyzing "The Law's Effect on Individual Statements").

[205] *See supra* note 36.

delegated authority and whom it may require to attend training programs and follow policies. Moreover, whenever the employer receives notice that any employee has begun to degrade the environment of a coworker, it is not unreasonable to expect the employer to reiterate its policies to all who might be in a position to further degrade the working environment. In any event, even after cumulative acts of harassment have altered conditions of employment, an employer can still avoid liability in many cases by promptly taking appropriate remedial steps.[206]

1. *Directed Speech*

Problems of vagueness are minimal in the content-neutral regulation of directed speech that I have advocated in the predecessor to this Article and in Parts I and II of this Article. The primary basis for such liability is the harassing party's selection of one or more victims on the basis of their membership in a protected class.[207] Although questions about whether the harassing conduct is sufficiently severe to alter conditions of employment may lead to uncertainty in close cases, such uncertainty can easily be avoided by one who refrains from intentionally targeting employees for abuse on the basis of protected classifications.

Thus, if a supervisor singles out a female employee for verbal flirtation because of her gender, and if he receives notice that the flirtations are unwelcome, it should not be constitutionally unreasonable to expect the supervisor to cease the discriminatory behavior, regardless of whether the line between trivial distractions and alteration of working conditions is crystal clear. The discriminatory and unwelcome nature of the speech will not be in doubt, and minor "overregulation" by employers will not implicate important First Amendment values.

For example, suppose that an employer who is anxious to avoid liability instructs its supervisors to avoid invidious discrimination when addressing employees, and in particular, to cease nontrivial and selectively targeted communications if the employee recipient objects. Whether such communications in fact violate Title VII and lie outside the protection of the First Amendment will depend on the contextual factors discussed in this Article, including the degree of captivity of the audience and the intrusiveness or intimidating nature of the speech. The employer's policy, however, is designed to steer clear of liability. Therefore, its expansive prohibition of discriminatory and unwelcome speech that is "nontrivial" might cause a supervisor to cease

---

[206] *See, e.g.*, Epstein, *supra* note 26, at 412; *see also supra* note 35 and accompanying text.

[207] *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 255.

making unwelcome remarks about the dress and physical appearance of an employee because of her gender, even though a reasonable person might not find the comments sufficiently objectionable to alter working conditions.

The chilling effect caused by indeterminacy in this facet of the standard for liability, however, would not be significant in light of the certainty about the discriminatory and unwelcome nature of the speech. Even relatively harmless speech directed to a relatively noncaptive employee does not further First Amendment interests when imposed on an unwilling listener in a discriminatory fashion. The goals of promoting democratic self-government and the search for truth[208] can be furthered adequately by speech that is directed to willing listeners without regard to their membership in protected classes. True, a supervisor might view it as an exercise in autonomy[209] to voice his views to selectively targeted, unwilling listeners; however, his interest in individual autonomy and dignity is no greater than the listener's interest in preserving her own autonomy and dignity from attack by unwelcome remarks directed toward her because of her race or sex.

In sum, once an employee engages in the act of selectively targeting another employee on the basis of a protected classification, and once he learns that his selectively directed communications are unwelcome, repetition of this behavior will in most cases warrant regulation on the basis of these factors alone. Nonetheless, some selectively targeted and subjectively unwelcome speech will merit constitutional protection, underscoring the need for precise articulation of the relevant factors, as discussed below. Finally, if inevitable indeterminacy in cases at the margin causes some employers to instruct supervisors to avoid the gray edges of the factors that are less certain than selective targeting and unwelcomeness, the effect on protected expression should be insufficient to void the statute for vagueness. The same ideas can be freely expressed to willing listeners, or at least to listeners who have not been discriminatorily selected because of their membership in a protected class.

2. *Undirected Speech*

Undirected speech, such as posters displayed for the owner's own entertainment or conversations among willing speakers that are overheard by others, presents a much more serious problem of vagueness. As discussed in

---

208 *See, e.g.*, EMERSON, *supra* note 20, at 6–7 ("[F]reedom of expression is an essential process for advancing knowledge and discovering truth [and] . . . is essential to provide for participation in decision making by all members of society.") (alteration in original).

209 *See id.* at 6 ("[F]reedom of expression is essential as a means of assuring individual self-fulfillment [and] suppression of . . . expression is an affront to the dignity of man . . . .").

Part III, liability for such speech under Title VII must rest on the disparate impact of the undirected speech, normally based largely on the content of the speech. Although the plaintiff's burden of proving the disparate impact and the inability to avert her eyes will be heavy, so too will a speaker bear the difficult burden of predicting which content in undirected speech will alter conditions of employment on the basis of its disparate impact.

In contrast to the case of directed speech, the speaker here is not put to the alternatives of risking triggering liability or simply eliminating the discriminatory targeting of his audiences. Instead, in close cases he faces the alternatives of risking liability or removing his speech from public view altogether. Although some employees might safely enjoy their expression of choice by posting it in some private space, such as a locker or desk drawer, others will not have that option.

Thus, even though I have proposed standards in Part III that preliminarily define constitutionally permissible regulation of undirected speech, indeterminacy in those standards will have a more direct effect on fundamental First Amendment values than does uncertainty in the standards of liability for directed speech. Speakers who are confused about their rights and duties will be forced to make judgments about the content of their speech rather than simply about their act of intentionally targeting audiences in a discriminatory fashion.

For these reasons, Title VII should be interpreted to reach only that undirected speech which is obviously discriminatory, severely disturbing, and unavoidably and pervasively within the view of unwilling audiences. Although such a strict standard still does not eliminate close cases, at least it ensures that all speech at the margin of the standard is speech that clearly could be constitutionally proscribed, and it allows ample breathing space for all but the most outrageous forms of expression.

For example, such a standard normally would not impose liability for nonobscene and nonviolent depictions of nudity because of the difficulty of predicting the discriminatory nature of the impact and its effect on working conditions. On the other hand, a poster graphically glorifying Hitler's "final solution," Ku Klux Klan lynchings of African-Americans, or the violent murder-rape of women might justify imposing liability. Assuming that nonconsensual viewers are not in a position to avert their eyes, no rational person could fail to predict that such outrageous speech could disproportionately affect members of the group victimized in the posters and that the speech could so disturb or distract such employees as to affect their ability to perform their jobs.[210] Although such displays might in some

---

[210] *Cf.* Wilson v. U.S. West Communications, Inc., 860 F. Supp. 665 (D. Neb. 1994). The *Wilson* court found that an employer could discharge an employee who insisted on wearing a button depicting a fetus and the words "Stop Abortion" in the workplace. *See id.* at

circumstances be viewed as political speech that would warrant substantial protection in a public forum, it warrants no such status among captive audiences who are trying to perform their jobs.

The questions of whether such speech satisfies this demanding standard of outrageousness may be nearly as uncertain as the question of whether a stomach-turning photograph is obscene and therefore loses First Amendment protection under the *Miller* standards.[211] Nonetheless, the Court has lived with such vagueness in obscenity cases,[212] and the steps outlined below are bound to make the disparate impact standard substantially more definite than the obscenity standard. Moreover, under this cautious standard for disparate impact liability, even if employers are left guessing at the boundaries of regulation in cases at the margin, any speech that is suppressed by an employer's over-regulation likely would be speech that would not warrant First Amendment protection among captive workers in any event.

B. *Expressing the Standards*

Assuming that I have successfully defined standards that accommodate the goals of Title VII and the First Amendment, these standards must be stated with sufficient authority, precision, and consistency to provide employers with reasonable notice of their content[213] and to minimize the risk that juries, trial judges, and EEOC enforcement officers will apply them too broadly.[214] Absent

676. The issue was not whether Title VII required the employer to stop the offending speech, but whether the employer had failed to reasonably accommodate the employee's Roman Catholic religious beliefs. *See id.* at 674–75. Nonetheless, the facts are instructive because the button so distressed coworkers that it caused their productivity to decline. *See id.* at 669. If the distressed coworkers complained that the button discriminatorily altered their working conditions, my standards likely would not impose liability. Assuming that the button was not selectively targeted at coworkers because of their membership in a protected class, and thus constituted undirected speech, it is unlikely that it would have a significant disproportionate impact on a protected class. Reactions to the button likely would be related to social and political beliefs that largely cut across class lines. In the rare event that a disparate impact could be shown in these circumstances, such proof would be surprising and difficult for an employer to predict. Accordingly, to minimize problems of vagueness and lack of notice, my approach would call for a restrictive statutory interpretation and application that would lead to a finding of no Title VII violation in such circumstances.

211 *See* Miller v. California, 413 U.S. 15, 24 (1973) (obscenity standards).

212 *See, e.g.*, Denver Area Educ. Telecom. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2389–90 (1996); *cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting) (concluding that the "concept of 'obscenity' cannot be defined with sufficient specificity and clarity").

213 *See supra* note 180.

214 *See supra* note 178 and accompanying text.

the unlikely event of a statutory amendment that specifically addresses liability for maintenance of a discriminatory environment, the best vehicles for conveying specific standards to lower courts and to employers' counsel are EEOC regulations and appellate judicial opinions.

To squarely address the constitutional limitations on regulation of speech in the workplace, the EEOC should adopt guidelines that clearly explain that directed harassing speech is discriminatory not on the basis of its content, but on the basis of the speaker's selectively targeting the victims of his harassment because of their membership in a protected class.[215] The EEOC guidelines should also interpret Title VII to leave undirected speech unregulated except in the clearest cases of outrageous expression which disproportionately and profoundly affect members of a protected class.

To convey these standards as precisely as possible, the EEOC should carefully draft a series of examples and illustrations for publication in its regulations or policy manuals. Although the illustrations obviously cannot address every potential borderline case and provide guidance about its resolution under Title VII, they can help add flesh to the abstract skeleton of a multi-faceted test that is sensitive to context. Such an approach has worked well to help campus administrators and others at Arizona State University understand the interplay between the First Amendment and the University's anti-harassment policies,[216] and they should be equally helpful in administering Title VII if carefully drafted.[217]

Appellate courts can help reduce the vagueness of general standards in three ways. First, appellate courts can give judicial imprimatur to the EEOC guidelines and illustrations that they find worthy of judicial adoption. Second, they can add further definition to their general judicial standards for liability based on maintenance of a discriminatory work environment. Third, appellate courts can incrementally add predictability and consistency to applications of the standard by reviewing individual lower court dispositions in Title VII litigation.[218]

---

[215] *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at 261 nn. 200–01 and accompanying text.

[216] *See, e.g.*, Calleros, *Reconciliation*, *supra* note 26, app. B at 1319–33 (discussing First Amendment guidelines which interpret A.S.U.'s anti-harassment policy and include illustrations to provide more concrete definition to the policy).

[217] The drafting of suggested EEOC regulations and illustrations is a task best left to a future article.

[218] The process of adding clarity to a statutory standard through judicial interpretation of otherwise vague statutory language was recently reaffirmed in *United States v. Lanier*, 117 S. Ct. 1219 (1997). In *Lanier*, the Sixth Circuit, sitting en banc, had reversed a state official's criminal conviction under 18 U.S.C. § 242 for depriving women of their liberty interests without due process by sexually assaulting them. *See*

The Supreme Court can continue the process of refining its test for alteration of working conditions by adopting the label "discriminatory work environment" to emphasize that liability is based more on discriminatory targeting than on the hostile or abusive content of speech.[219] It also should synthesize the majority and the two concurring opinions in *Harris* by requiring proof, on the basis of the *Harris* factors and other contextual facts, that harassment has altered conditions of employment by making it more difficult for the victim to perform her job.[220]

Unfortunately, a major obstacle potentially lies in the way of judicial refinement of the standard of liability through appellate review of ultimate dispositions in individual cases. Federal Rule of Civil Procedure 52(a) provides that a federal trial court's findings of fact in a nonjury trial "shall not be set aside unless clearly erroneous,"[221] and the Supreme Court held in *Pullman Standard v. Swint* that a trial judge's finding of the presence or absence of discriminatory intent in a Title VII suit is "a pure question of fact, subject to Rule 52's clearly erroneous standard."[222] Moreover, appellate review of jury

---

United States v. Lanier, 73 F. 3d 1380 (6th Cir. 1995). The Court of Appeals held that the defendant had not received adequate notice that his conduct violated any constitutional right incorporated into the federal criminal statute because the Supreme Court had not previously defined the asserted due process right "in a factual situation fundamentally similar to the one at bar." *Id.* at 1393.

On appeal, the Supreme Court vacated and remanded to allow the Court of Appeals to apply a less stringent standard for finding that a defendant had fair warning that vague statutory language prohibited particular conduct. *See* 117 S. Ct. at 1228. Specifically, the Supreme Court held that fair warning under the criminal statute could be satisfied under the standards that applied to its civil counterpart, qualified immunity for state officials under 42 U.S.C. § 1983: the right said to be violated must have been "clearly established" by precedent either of the Supreme Court or other courts, and not necessarily on "fundamentally similar" facts. *Id.* at 1226–27. Even "general statements of the law" in precedent may suffice if their application to the conduct in the case at bar is obvious. *Id.* at 1227–28. Similarly, pronouncements by the EEOC and the federal courts of appeal could clearly establish parameters of Title VII liability for discriminatory work environments, thus providing adequate notice to employers, at least with respect to the contexts addressed by the pronouncements or to the conduct so extreme as to obviously trigger liability.

219 *See* Calleros, *Title VII and Free Speech*, *supra* note 1, at nn. 189–95 and accompanying text.

220 *See supra* notes 186–98 and accompanying text.

221 "In all actions tried upon the facts without a jury or with an advisory jury, . . . [f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a).

222 456 U.S. 273, 287–88 (1982).

findings in a Title VII suit[223] are subject to review only for confirmation that the findings are supported by substantial evidence[224] or that the findings could be found by a reasonable jury[225]—a standard of review that is even more restrictive than the clearly erroneous standard.[226]

In *Swint*, however, the Supreme Court expressly reserved the question whether Rule 52(a) restricts review of a trial court's resolution of a "mixed question of law and fact," which requires the application of a legal rule to facts.[227] In a previous article, I argued that trial court resolutions of such questions, if defined as follows, should be freely reviewable on appeal:

> A mixed finding of law and fact should be defined as a finding that requires the refinement or interpretation of a legal rule in the application of that rule to findings of fact. That characteristic is presented if the historical facts are clear, and if the rule of law, although "undisputed" in its abstract formulation, is technical, uncertain, or bound up with sensitive matters of social or political policy. Appellate courts are competent to review such findings broadly, and broad review will further the appellate courts' institutional function as well as their corrective function. Those findings should be reviewed free of the restrictions of Rule 52(a).[228]

I concluded that a "trial court's application of its legal definition of discriminatory intent to the facts should be characterized as a mixed question of law and fact" that is freely reviewable on appeal[229] if the legal definition addresses a novel issue and "may lack definiteness or may require particular sensitivity to broad social values in its application to historical facts."[230] Under this approach, for example, a "trial judge's ultimate determination whether the plaintiff has established a prima facie case, or whether the defendant has rebutted the presumption created by a prima facie case," should be freely reviewable as a mixed question of law and fact because it "often requires the

---

[223] Amendments to Title VII added by the Civil Rights Act of 1991 authorize jury trials. *See* 42 U.S.C. § 1981a(c).

[224] *See, e.g.*, Aetna Life Ins. Co. v. Kepler, 116 F.2d 1, 4 & n.1 (8th Cir. 1941).

[225] *See, e.g.*, MacArthur v. University of Tex. Health Ctr., 45 F.3d 890, 896 (5th Cir. 1995).

[226] *See* Charles Richard Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of* Pullman-Standard v. Swint, 58 TUL. L. REV. 403, 411 n.40 (1983) [hereinafter Calleros, *Title VII and Rule 52(a)*] (citing to cases and other authorities).

[227] *Swint*, 456 U.S. at 289 & n.19.

[228] Calleros, *Title VII and Rule 52(a)*, *supra* note 226, at 425 (footnotes omitted).

[229] *Id.* at 437–38.

[230] *Id.* at 437.

application of technical legal standards to the findings of historical fact."[231]

Professor Volokh has carried this approach further by arguing persuasively that a disposition of an employer's First Amendment defense in a Title VII case should be treated as a mixed finding of fact and law that is freely reviewable on appeal.[232] Specifically, Volokh asserted that "[w]hen a factfinder concludes that someone's speech has created a hostile environment, an *appellate court is constitutionally bound to exercise its independent judgment on this point.*"[233]

To trigger unrestricted appellate review, defense attorneys should raise a First Amendment defense[234] by motion to the judge, who should rule on the defense without the jury as a mixed question of fact and law that is freely reviewable on appeal. Alternatively, appellate courts can review special verdicts of juries that reveal the application of legal standards implicating First Amendment values.[235] In this way, appellate courts can enhance consistency in lower court evaluations of some claims of discriminatory work environments, adding to predictability and minimizing problems of vagueness.

V. CONCLUSION

This Article and its predecessor have steered a middle course between fully invoking the First Amendment to gut Title VII's discriminatory work environment theory and cavalierly denying any significant First Amendment interests in the workplace. The result is a contextual approach that permits substantial regulation of directed harassing speech and greatly restrained regulation of undirected speech. Problems of vagueness are nontrivial but can be adequately addressed with some cautious refinements of the legal standards and with procedures that permit the EEOC and appellate courts to add concrete definition to the framework of the legal standards.

---

231 *Id.* at 440–41.

232 *See* Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 N.W. UNIV. L. REV. 1009, 1018–31 (1996).

233 *Id.* at 1010.

234 *See id.* at 1029–30 ("Defense lawyers in harassment cases involving speech *must* begin to raise a free speech defense because such a defense will trigger independent judgment review, and thus give the defendant a second chance on appeal.") (footnotes omitted).

235 *See id.* at 1028–29.