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Title VII's Flight within First Amendment Radar: The Outer Cosmos of Employer Liability for Workplace Harassment Absent a Tangibly Discriminatory Employment Action

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ARTICLE

TITLE VII'S FLIGHT WITHIN FIRST AMENDMENT RADAR: THE OUTER COSMOS OF EMPLOYER LIABILITY FOR WORKPLACE HARASSMENT ABSENT A TANGIBLY DISCRIMINATORY EMPLOYMENT ACTION

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TABLE OF CONTENTS

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John H. Marks[*]

I. INTRODUCTION

This article and a companion article[1] address an apparent tension between the right of free speech under the First Amendment[2] and the right of equal employment opportunity under Title VII of the Civil Rights Act of 1964.[3] The apparent tension arises when Title VII's prohibition of hostile-environment harassment[4] is applied to expressive-looking workplace activities, such as the harassing antics of a workplace supervisor who repeatedly offends a subordinate employee with sexist jokes and gestures.[5]

For these kinds of harassment cases, which involve elements of verbal, pictorial, or gestural activities, this article and the companion article introduce a model of reconciliation based on a "yin-yang" relationship between the First Amendment and Title VII. The yang of the model, as explained further in the companion article, is coextensive with a

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[1] John Marks, *Title VII's Flight Beyond First Amendment Radar: A Yin-to-Yang Attenuation of "Speech" Incident to Discriminatory "Abuse" in the Workplace*, 9 COLUM. J. GENDER & L. 1 (1999).

[2] *See* U.S. CONST. amend. I (stating that "Congress shall make no law . . . abridging the freedom of speech").

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

[4] Implementing regulations have extended Title VII's ban against sex discrimination to two forms of "sexual harassment" in the workplace: (1) *quid pro quo* harassment, which involves efforts to extract sexual favors from an employee in exchange for employment benefits, *see* 29 C.F.R. § 1604.11(a)(1)-(2) (1998); and (2) hostile-environment harassment, which involves "[u]nwelcome . . . verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment." *Id.* § 1604.11(a)(3). The courts have also recognized hostile-environment harassment as an actionable form of discrimination because of race, color, religion, or national origin. *See* Venters v. City of Delphi, 123 F.3d 956, 975 (7th Cir. 1997).

[5] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (remanding for trial a hostile-environment claim based primarily on sexist jokes and gestures).

realm of *discriminatory abuse* that the Supreme Court, in *Harris v. Forklift Systems, Inc.*,[6] determined was violative of Title VII's hostile-environment prohibition. According to the *Harris* Court, the threshold to this realm of discriminatory abuse is crossed when, considering all the circumstances, verbal or physical workplace activities occasion a degree of "discriminatory intimidation, ridicule, and insult" that alters a discernible victim's conditions of employment.[7]

As explained in the companion article, any given workplace scenario within this yang-type realm of discriminatory abuse, no matter how verbal, is imbued so much more with action than expression that it falls beyond the pale of the First Amendment, the same way the word "fire" does when shouted in a crowded theater.[8] The yang side of the model thus explains, for example, the *Harris* Court's decision to vindicate a woman's Title VII right to be free of her workplace supervisor's repeated sexist "jokes."[9] And the Court did so without even mentioning a purportedly confounding First Amendment issue that had been briefed by both parties and several amici.[10] The Court's silence speaks plainly: the supervisor's repeated sexist "jokes" simply ceased being a joke. In other words, the verbal activity, in total, reached a threshold of injury at which it ceased being yin-type nonabusive speech, and became, instead, yang-type discriminatory abuse.[11]

This article switches focus to the other side of the yin-yang model – the yin side of it. By definition, the yin side of the model is a default realm of workplace activity that falls short of the Supreme Court's discriminatory-abuse threshold. In other words, the yin side of the model is coextensive with *nonabusive*, and thus potentially expressive, bigoted workplace activity. For this realm of potentially expressive workplace activity, this article offers an alternative basis to reconcile Title VII's harassment prohibition with the First Amendment.

This alternative basis of reconciliation applies the same doctrine of "secondary effects" that the Supreme Court has applied in the zoning context to uphold "time, place, and manner" restrictions on the location of

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[6] *Id.*

[7] *Id.* at 21.

[8] *See generally* Marks, *supra* note 1.

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

[10] *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 9 & nn.44-46 (1994) (discussing the Court's remarkable silence notwithstanding "clear notice" provided by the parties' briefs).

[11] *See generally* Marks, *supra* note 1.

adult movie theaters.[12] The underpinning of the doctrine is a regulatory aim *not* at the direct emotive impact of the speech, but instead at *prospective* harms *secondarily* associated with the speech.[13] In the zoning context, for example, regulations that relocate adult movie theaters away from residential areas can be justified *not* on the grounds of moral offense to residential dwellers, but instead on the grounds of increased criminal activities prospectively risked by such theaters.[14] A regulatory focus on the secondary criminal activity, according to the Court, makes the zoning regulations "content neutral" and thus permissible under the First Amendment.[15] This article argues that the same reasoning can occasionally support Title VII regulation of expressive workplace bigotry, such as workplace pornography, without violation of the First Amendment. However, this application of Title VII represents a very narrow range of harassment liability residing at the farthest reaches of Title VII's regulatory scope. Again, these expressive-bigotry cases, by definition, do not involve immediate discriminatory abuse of any victim, let alone a tangibly adverse employment action.

The key to Title VII's viability in this utterly intangible realm is a regulatory focus on *prospective* discriminatory harms that are *secondary* to the communicative impact of something like workplace pornography. In other words, the zoning analogy does not work if Title VII's regulatory focus is some harm mediated directly by the emotive impact of an abstractly bigoted message. It is this causal limitation to secondary-effects analysis that makes the zoning analogy most difficult.

Some commentators who have considered the analogy dismiss it summarily because they equate Title VII's harassment concept with an image of direct emotional assault upon an immediately discernible harassment victim.[16] That conception, however, really has no place in the

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[12] *See infra* notes 121-28 and accompanying text.

[13] *See infra* notes 296-301 and accompanying text.

[14] *See infra* note 301 and accompanying text.

[15] *See infra* notes 296-301 and accompanying text.

[16] The secondary-effects theory offered in this article is generally disfavored among commentators. They invariably reject this theory of Title VII's content neutrality because they conceive of the hostile-environment prohibition as singularly focused on a victim's *direct* reactions to the offensive *content* of various unwelcome verbal activity. *See, e.g.*, 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, 245 n.121 (1996) (rejecting secondary-effects analysis of hostile-environment cases involving verbal activity because the "direct impact of speech on its listeners is a primary, not a secondary, effect"); KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS,

realm of yin-type expressive bigotry, which by definition is a realm of *nonabusive* activity. It is simply incoherent to suggest that Title VII remedies hurt feelings *immediately* occasioned upon the communicative impact of *nonabusive* workplace bigotry. Title VII's regulatory aim, if any, must be on *prospective* workplace disadvantages when yin-type speech causes "mere offense."[17]

Moreover, the kinds of prospective discriminatory harms potentially linked to something like workplace pornography can indeed be very similar to harms that are "secondary" to placing a pornographic theater in a residential neighborhood. It is probably no accident, for example, that a pornographically decorated shipyard might suffer a pervasive history of sexual assault among employees,[18] just as it is probably no accident that placement of a pornographic theater in a residential neighborhood might be linked to a pattern of sex-related crimes in front of one's house.[19]

Some First Amendment proponents might argue that even these sorts of prospective problems in the shipyard are mediated communicatively: that workplace pornography can expressively stigmatize women as sexual objects and thus encourage sex-specific mistreatment.[20] However, another causal hypothesis is possible here, and indeed it is the same type of noncommunicative causal hypothesis relied on by the Supreme Court to reconcile zoning regulations with the First Amendment. According to the Court, the problem with placing an adult theater in a residential neighborhood is *not* the pornographic influence such theaters may exert on patrons who watch dirty movies and then commit sex-related crimes in front of one's house.[21] The real problem, according to the Court, is that these theaters can attract into the neighborhood persons who are predisposed to criminal activity, and that these persons might be inspired to

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COMMUNITIES, AND LIBERTIES OF SPEECH 85-86 (1995) (rejecting secondary-effects analysis, in part, because "restriction of workplace harassment is far from content neutral"); Fallon, *supra* note 10, at 17-18 (rejecting secondary-effects analysis because harassment law "focus[es] on the direct impact of speech on its audience") (citation omitted); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1826 (1992) (rejecting secondary-effects analysis because "harassment law is content-based, suppressing some kinds of speech (say, bigoted insults or pornography) and not others").

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

[18] *See infra* notes 92, 256, 270-74 and accompanying text.

[19] *See infra* note 301 and accompanying text.

[20] *See infra* notes 342-48 and accompanying text.

[21] *See infra* notes 310-11 and accompanying text.

act on that predisposition by the mere nudity in the movies, regardless of any pornographic content.[22]

Admittedly, the Court's secondary-effects doctrine applies a strange and unproven causal hypothesis. Nevertheless, that is what secondary-effects analysis boils down to: strange causal hypotheses explaining, for example, why sex-related crimes might be associated with placement of an adult theater in your residential neighborhood, or why similar harms might be associated with the placement of pornography in your workplace. Such cases raise inherently difficult causation questions because they involve "combined forces,"[23] i.e., elements of both expressively actuated harm and nonexpressive secondary effects. The main difficulty with combined-force cases is that they are not susceptible to traditional analytic tools for determining cause in fact. As one commentator explains, combined-force cases require us to "suspend our commitment to [an] analytical approach and use a term, 'substantial factor,' that incorporates no particular mental operation but appeals forthrightly to instinct."[24] Thus, the analogy in any given Title VII case ultimately turns on an instinctive assessment of the magnitude of various "effects" that the Court calls "secondary." And sometimes, depending on the particulars of the workplace in question, secondary-effects hypotheses have a great deal of instinctive appeal – even more appeal than in some zoning contexts.[25]

As applied in the Title VII context, the strange theory of secondary effects rests on four fundamental elements. The first element is a very large assumption about the character of expressive-looking workplace bigotry. This article assumes that such bigotry, when unaccompanied by physical assault or other tangibly adverse circumstances, is indeed yin-type First Amendment "speech" rather than yang-type Title VII "abuse." Part II of this article explains how this assumption, as applied to any given workplace scenario, potentially contravenes the Supreme Court's holistic concept of a speech-abuse continuum.[26] That concept plainly contemplates the potential for *intangible* discriminatory abuse, which is just as much beyond the pale of the First Amendment as is a tangibly bigoted physical

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[22] *See infra* note 310-11 and accompanying text.

[23] See *infra* notes 289-95 and accompanying text for a general explanation of combined-force causation. See *infra* notes 341-67 and accompanying text for an explanation of its specific application to secondary-effects analysis.

[24] DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 141 (2d ed. 1998).

[25] *See infra* Part V.B.

[26] *See infra* Part II.

assault or a tangibly bigoted job demotion. The speech assumption, therefore, should not be taken lightly.

Assuming the yin-type "speech" character of various workplace bigotry, Part III of this article addresses a second element critical to the secondary-effects thesis: Title VII's potential to remedy prospective harms associated with bigoted workplace speech.[27] This potential for prospective remediation is indeed the only Title VII application possible for yin-type workplace activities, which by definition inflict no immediate discriminatory abuse. Moreover, prospective application of Title VII represents a natural extension of recent Supreme Court precedent defining the scope of employer liability when the harassment victim suffers no tangible job detriment.[28] The Court's employer-liability standards in this area are driven by a theory of employer endorsement, or an appearance of employer endorsement, that can aggravate the potential for prospective discriminatory harms of a more tangible nature.[29] In other words, the Court has acknowledged that *intangibly abusive* workplace bigotry can create prospective risks of tangibly discriminatory employment action when an employer fails to take appropriate preventative measures. Building on this premise, this article submits that even *nonabusive*, and thus potentially expressive, workplace bigotry can sometimes have the same effect when actually or apparently endorsed by the employer.

Part IV of this article addresses a third element of the secondary-effects thesis by explaining how Title VII, like a zoning ordinance, functions as a "time, place, and manner" restriction when applied to prospectively problematic, but presumptively expressive, workplace bigotry.[30] Commentators in this area often seem to assume that the American workplace is a homogenous realm in which Title VII flatly bans pervasive patterns of highly provocative bigoted speech, such as pervasive patterns of pornography depicting women as sexual playthings.[31] But this simply is not the case. Every workplace is in fact a unique social milieu, and Title VII does not impose an outright ban on even pervasive patterns of highly provocative bigoted speech in all workplaces at all times. To test the point, one might visit a workplace that functions as an institutional player in our First Amendment scheme – say, a strip club or an adult

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[27] *See infra* Part III.

[28] *See* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

[29] *See* Faragher, 118 S. Ct. at 2284.

[30] *See infra* Part IV.

[31] *See infra* note 203 and accompanying text.

bookstore – and ask whether women workers in this environment can actually assert legitimate Title VII claims. When considering this question, bear in mind that Title VII expressly exempts from its purview discriminatory activities that are genuinely germane to the employer's business mission. This "business-necessity" exemption, as explained below, actually enlarges Title VII's free-speech zone well beyond petty annoyances.[32]

Part V of this article addresses the fourth element of the secondary-effects thesis by shifting attention to workplace milieus that generally function on the periphery of our First Amendment scheme – for example, an industrial shipyard.[33] In this part of the workplace neighborhood, this article advances a secondary-effects analogue to reconcile Title VII's potential to restrict something like pervasive patterns of pornography depicting women as sexual playthings. The analogue justifies Title VII's intervention as a form of content-neutral regulation of secondary discriminatory effects potentially associated with the pornography. Again, the underlying causal hypothesis is admittedly strange and untested, contemplating predisposed agents of harm who respond, in part, to stimuli unrelated to pornographic messages. However, it is a hypothesis accepted by the Supreme Court in the analogous zoning context.[34] Furthermore, it is a hypothesis that comports well with a coherent view of Title VII. This fundamental *anti-discrimination* provision cannot coherently be construed as advancing a protective agenda to redress the purported emotional vulnerability of one of the sexes to truly yin-type expressive activity – activity which by definition is itself *nonabusive*.

II. THE ENORMITY OF THE "SPEECH" ASSUMPTION

The predominant nature of workplace bigotry, such as a burning cross, depends *entirely* on *context*. A burning cross may be one thing if the workplace is the set for the movie "Mississippi Burning," but the same burning cross may be largely another thing if the workplace is an industrial shipyard that is dominantly staffed and managed by white persons; or is dominantly white and has a pervasive history of racially motivated mistreatment; or is all white and the first African-American employee is

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[32] *See infra* Part IV.A.2.

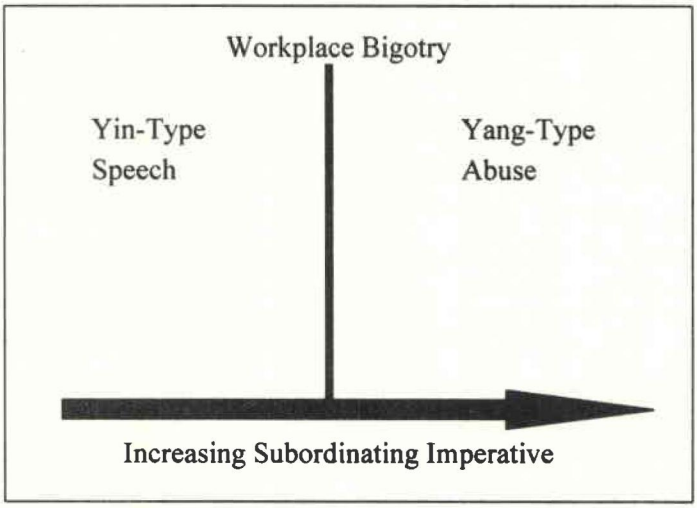
[33] *See infra* part V.

[34] *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

scheduled to arrive at the very moment the cross is ignited. *Somewhere* along the line, most people undoubtedly would agree that the expressive component of the burning cross is overwhelmed by an element of racial abuse. There may be some disagreement about the precise locus of the threshold, but there should be no disagreement about the characterization, "abuse" rather than "speech," once the threshold is crossed.[35]

This context-driven, speech-abuse dichotomy *is* the yin-yang model offered here and in a companion article[36] to explain the interaction of free-speech rights under the First Amendment and the Title VII right of employees to be free of discriminatory abuse. The model is premised on a continuum theory of class-specific subordination incident to workplace bigotry. The stronger the subordinating imperative, in context, the more likely the workplace bigotry will be characterized as discriminatory abuse; conversely, the weaker the subordinating imperative, in context, the more likely the workplace bigotry will be characterized as speech.[37] Here is a simple diagram of the continuum:

Diagram A



[35] I reject the limited view that a speech characterization necessarily applies to all abusive verbal activity other than "situation-altering utterances," the classic workplace example being a supervisor's "quid pro quo" threat (e.g., "I am going to fire you unless you make love to me."). *See, e.g.*, GREENAWALT, *supra* note 16, at 6-7, 78-80. *See also infra* note 79 and accompanying text. I also reject the expansive conception of those who, acontextually, view entire categories of ostensibly expressive activity, such as pornography, as an act of discrimination itself and thus nonspeech. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 22, 55, 58 (1993). See Marks, *supra* note 1 for a discussion of a middle-ground view.

[36] *See generally* Marks, *supra* note 1.

[37] *See generally* Marks, *supra* note 1.

The thorniest part of this simple diagram is the vertical line separating the realms of yin-type speech and yang-type discriminatory abuse. In *Harris v. Forklift Systems, Inc.*,[38] the Supreme Court explained that the threshold into the realm of discriminatory abuse "is not . . . mathematically precise."[39] It hinges on "all the circumstances"[40] of any given case – the entire workplace milieu surrounding something like a burning cross or the repeated sexist "jokes"[41] that, in *Harris*, presented a triable case of Title VII harassment.[42]

The uncertainty of the discriminatory-abuse threshold is compounded even further by the varied perspectives that "virtually unguided juries [and judges]" may bring to the inquiry.[43] When do bigoted verbal workplace activities – bigoted jokes, pictures, comments, and gestures – leave the realm of speech and enter the realm of discriminatory abuse? When is bigoted verbal workplace activity appreciably imbued with a class-specific subordinating imperative? Where does yin end, and yang begin?

Generalizations about the abuse threshold are difficult to make, but one important factor has emerged in recent commentary. Many commentators, even those who avidly support First Amendment displacement of Title VII, favor Title VII intervention when the bigoted verbal activity is targeted at a particular employee because of the employee's race, sex, or religion.[44] In other words, many commentators

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[38] 510 U.S. 17 (1993).

[39] *Id.* at 22. As explained in my companion article, similarly imprecise thresholds to nonspeech realms permeate our legal landscape. *See generally* Marks *supra* note 1 (discussing context-driven distinctions between political hyperbole versus presidential threats, sexual banter versus *quid pro quo* threats, and jokes versus offers to contract).

[40] *Harris*, 510 U.S. at 23.

[41] *Id.* at 19.

[42] *Id.*

[43] *Id.* at 24 (Scalia, J., concurring) (bemoaning, but accepting, Title VII's inherent imprecision).

[44] A most vocal First Amendment proponent, Professor Eugene Volokh, even accepts Title VII intervention for targeted vilification. *See* Volokh, *supra* note 16, at 1800, 1866-68 (accepting Title VII intervention if the harasser consciously directs an offensive verbal or pictorial form of workplace bigotry at a particular victim because of the victim's race, sex, religion, or national origin). Many other commentators agree, although conceptions of "targeted" vilification differ. *See, e.g.*, Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 695 (1997) (accepting Title VII regulation of "speech that is directed at a listener whom the speaker knows to be offended"); Calleros, *supra* note 16, at 248 (accepting Title VII regulation of "low-value speech . . . on the basis of the defendant's targeting of victims"); Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL'Y & L. 127, 216 (1996) (accepting Title VII regulation of unavoidable and harmful "speech . . . directed to women . . . in particular" if the speech is severe or pervasive and the employer has

favor Title VII intervention when the harassment claim is based on Title VII's "disparate-treatment" theory of discrimination.[45] The disparate-treatment theory would readily apply, for example, if a workplace supervisor targeted a particular employee, because of her sex, with remarks like, "Hey pussycat, come here and give me a whiff."[46] However, if the employee was, instead, an untargeted bystander who merely overheard such remarks, her harassment claim would necessarily be based on a theory of "disparate-impact" discrimination under Title VII.[47] In the latter situation, the employee's complaint would more debatably rest on the claim that she and other female bystanders, as a class, suffer greater insult than male bystanders who overhear such remarks.[48]

Targeted vilification is certainly an important factor when considering whether verbal activity contributes to an abusive working environment in any given case. But so too may be a myriad of other

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notice); GREENAWALT, *supra* note 16, at 90 (extending a rationale of situation-altering utterances to "abusive comments directed at an employee and intended to intimidate her, to drive her from her job, or to make her acutely uncomfortable"); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 43 (1990) (accepting Title VII regulation of individually directed speech that demands or requests sexual relations, is sexually explicit, or is degrading). *But see* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 485, 544 (1991) (advocating limited harassment liability for unwelcome physical touching and verbal *quid pro quo* demands).

[45] Disparate-treatment discrimination occurs when an "employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]." Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quoting Teamsters v. United States, 431 U.S. 324, 335-36, n.15 (1977)).

[46] *See* Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person"*, 58 OHIO ST. L.J. 1217, 1238-39 (1997) (describing targeted verbal and pictorial bigotry as presenting "extreme cases [that] are easy to analyze").

[47] *See* Calleros, *supra* note 46, at 1244 (stating that disparate impact is the only theory that can apply to undirected bigoted activity, such as an undirected nude pin-up). *See generally* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (defining the disparate-impact theory in terms of "practices that are fair in form, but discriminatory in operation"); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (stating that an employment practice is illegal when the practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity").

[48] The difficulty of this theory, as applied to untargeted workplace pornography, has been explained by Professor Calleros:

> 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.

Calleros, *supra* note 46, at 1245.

factors,[49] including the status of the alleged harasser and the employer's posture toward the alleged harassment. The importance of these additional factors was illustrated in the sexual harassment case that Paula Jones and President Clinton recently settled for a large sum of money,[50] after the trial court dismissed the case.[51]

Central to Jones' case was a single episode of targeted verbal and gestural conduct that allegedly occurred while Jones, a low-level state employee, and her employer, then Governor Clinton, were alone in a room at a hotel where official State business was being conducted. According to Jones, Clinton dropped his pants, displayed his penis, and asked Jones to "kiss it"[52] after she had told him that his advances were unwelcome.[53] Assuming the truth of these allegations, the trial court decided that Clinton's verbal and gestural conduct fell short of the discriminatory-abuse threshold.[54] In other words, the conduct purportedly fell within the yin side of Diagram A, above, and thus remained potentially expressive for First Amendment purposes.

The size of the subsequent Jones-Clinton settlement, however, seems to suggest at least some doubt among the President's undoubtedly talented attorneys about the trial court's abuse-threshold perspective.[55] Indeed, the trial court's ruling may have been at odds with sound precedent[56] and

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[49] The Supreme Court's formulation of the discriminatory-abuse threshold requires consideration of "all the circumstances," *see* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993), which the Court has further elaborated upon in nonexhaustive multi-factored fashion. Indeed, the *Harris* Court's recitation of facts in the case virtually guaranteed that, on remand, the plaintiff's evidence of discriminatory abuse would consist of a *mix* of sexist activities – some directed at her, and some not. *See id.* at 19 (factoring in sexist activities aimed at women other than the plaintiff).

[50] *See* Peter Baker, *$850,000 Settles Jones Case - Deal Ends Years of Legal Wrangling*, WASH. POST, Nov. 14, 1998, at A1.

[51] *See* Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998).

[52] *See id.* at 664 & n.6.

[53] *See id.* at 663-64.

[54] According to the *Jones* court, a single incident of alleged harassment does not rise to the level of discriminatory abuse absent an outright sexual assault. *See id.* at 675-76. The court also reasoned that regular raises and promotions received by Jones during her two-year tenure "clearly . . . dispel[led] the notion that she was subjected to a hostile work environment." *Id.* at 675.

[55] Some commentators found it an "anomalous fact . . . that Mr. Clinton ha[d] agreed to pay $850,000 to settle a suit he already won on summary judgment." *See* Editorial, *The Paula Jones Settlement*, WASH. POST, November 15, 1998, at C6. It is likely, however, that the President's attorneys saw merit in an appeal. *See infra* notes 56-57 and accompanying text.

[56] Contrary to the *Jones* court's rationale, *see supra* note 54 and accompanying text, outright sexual assault is *not* a prerequisite to even single-incident discriminatory abuse. *See* Radtke v. Everett, 501 N.W.2d 155, 159, 167-68 (Mich. 1993) (top manager's isolated effort to hold, caress, and kiss a

reason.[57] Perhaps the only factors supportive of the trial court's ruling were the singularity of the occurrence and Jones' apparent concession that Clinton's "kiss it" remark was a request, not a command.[58] These circumstances, if true, did have some tendency to weaken the sex-subordinating imperative allegedly suffered by Jones, thus making the court's yin-type characterization more defensible.[59] However, the *abstract* appearance of Clinton's alleged verbal activity, whether an isolated request or command, was just one of many circumstances the court should have considered. The totality of circumstances also allegedly included an

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subordinate was sufficiently severe to raise a jury question); *cf.* Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993) (holding that harassment liability does not require proof of "tangible psychological injury"). Nor is a tangible job detriment a prerequisite to discriminatory abuse. *See* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2271 (1998) (noting that although plaintiff had "not alleged . . . a tangible employment action" by her harasser, "this is not dispositive"); *Harris*, 510 U.S. at 24 (Scalia, J., concurring) (noting that Title VII hostile-environment claims, unlike negligence claims, do not require proof of actual harm); *Id.* at 25 (Ginsburg, J., concurring) (gauging hostile-environment harassment in terms of whether allegedly harassing conduct makes doing the job more difficult, even absent actual loss); Baty v. Willamette Indus., Inc., No. 96-2181-JWL, U.S. Dist. LEXIS 8031 at *21 (D. Kan. May 1, 1997) (hostile-environment claim not precluded merely because plaintiff "stayed with the company during the harassment, or accepted a promotion, or was able to tolerate and even succeed despite the hostile work environment"); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1533 (M.D. Fla. 1991) (awarding nominal damages "where actual loss is not proven or provable"); Sanchez v. City of Miami Beach, 720 F. Supp. 974, 981 (S.D. Fla. 1989) (absence of tangible job detriment "does not in itself preclude a hostile work environment claim"); *cf.* King v. Greyhound Lines, Inc., 656 P.2d 349 (Or. Ct. App. 1982) (public-accommodations plaintiff compensated for isolated racist remarks); Koire v. Metro Car Wash, 707 P.2d 195, 200 (1985) ("injury-free victim" can challenge discrimination violative of public-accommodations provision).

[57] Even if the *Jones* court was correct about the need for a "tangible job detriment," the court's conception of that requirement is open to considerable debate. When the boss commits or permits gender-targeted verbal abuses, including remarks like "kiss it," the tangible value of the woman's job has been reduced by at least as much as would occur if the boss had instead paid the woman one penny less per year than similarly employed men. "Triviality" in the latter situation is a matter of remedy, not liability, given Title VII's unqualified prohibition of discrimination "with respect to . . . compensation" because of sex. 42 U.S.C. § 2000e-2(a)(1) (1994). The same has been argued in Title VII hostile-environment cases, which are premised on Title VII's unqualified prohibition of discrimination "with respect to . . . conditions of employment." Miranda Oshige, Note, *What's Sex Got to do With It?*, 47 STAN. L. REV. 565 (1995) (reconfiguring harassment as simply a form of disparate treatment, with the degree of harm considered only for damages assessment); *see also* Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 468 (1995) (cautioning against "conflation of standards for liability with those for remedy"). *But see* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2284 (1998) (explaining that "conduct must be extreme to amount to a change in the terms and conditions of employment").

[58] *See* Jones v. Clinton, 990 F. Supp. 657, 664 & n.6 (E.D. Ark. 1998).

[59] GREENAWALT, *supra* note 16, at 6 (distinguishing "situation-altering . . . commands" from "requests and encouragements," the latter being "weak imperatives . . . that do not sharply alter the listener's normative environment").

enormous power disparity between Clinton and Jones,[60] Clinton's comments to Jones implying much about his authority over her direct supervisor,[61] and Jones' immediately prior efforts to repel Clinton's physical groping of her body.[62] Given the totality of the circumstances, as alleged by Jones, one might fairly question the trial court's decision to take the issue of discriminatory abuse away from the jury.

In any event, the point here is not to divine the precise locus of what will perhaps forever remain an uncertain threshold situated between the realms of bigoted speech and discriminatory abuse. For present purposes, this article assumes, as many writers do, the weakened imperative of both targeted and untargeted verbal workplace bigotry that, acontextually, appears to be First Amendment expression. This article assumes, for example, the weakened imperative, and thus yin-type speech status, of untargeted pornographic wall decor that uniformly demeans women in any workplace. This article even assumes the same "harmless" character of targeted verbal activity, such as repeated sexist epithets or repeated religious proselytization directed at particular employees because of their sex or religion. Indeed, this article will assume the yin-type speech status of any verbal, gestural, or pictorial form of workplace bigotry that is unaccompanied by tangibly adverse circumstances – even the sort of "unfulfilled" *quid pro quo* sexual request[63] that former Governor Clinton allegedly made of Paula Jones.

But this assumption about treating as speech anything that resembles speech should not be taken lightly. The rest of this section examines the enormity of this assumption, initially as applied to unfulfilled quid pro quo threats, and then as applied to some other forms of targeted and untargeted verbal and pictorial workplace bigotry.

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[60] *See Jones*, 990 F. Supp. at 663.

[61] *See id.* at 664.

[62] *See id.* at 664-65 & n.5.

[63] *See infra* notes 64-70 and accompanying text.

A. Unfulfilled Quid Pro Quo Threats

In addition to its prohibition of hostile-environment harassment, Title VII also prohibits a form of workplace harassment known as "*quid pro quo*" harassment.[64] *Quid pro quo* harassment paradigmatically involves a managerial employee who tries to extort sexual favors from a subordinate employee.[65] The manager, for example, might request a sexual favor from the subordinate and expressly or implicitly promise to put in a good or bad word with the subordinate's immediate supervisor, depending on whether or not the subordinate complies with the sexual proposition. President Clinton allegedly implied this sort of *quid pro quo* threat during the hotel-room encounter when he reminded Ms. Jones' of his authority over her immediate supervisor.[66]

This sort of *quid pro quo* threat undoubtedly violates Title VII if the employee refuses to submit and the threatening supervisor actually subjects the employee to a tangibly adverse employment action. In the *fulfilled quid pro quo* threat situation, "the [adverse] employment decision itself constitutes a [discriminatory] change in the terms and conditions of employment that is actionable under Title VII."[67] Conceivably, the adverse employment action could be of small magnitude, for example, a small salary reduction, and Title VII would still come into play.[68] Moreover, employer liability is automatic in the fulfilled *quid pro quo* threat situation; the employer is liable even if the harasser is merely a low- or mid-level supervisor and even if the employer neither knows nor should know about the supervisor's misconduct.[69]

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[64] *See supra* note 4 and accompanying text.

[65] *See supra* note 4 and accompanying text.

[66] According to Jones, former Governor Clinton's hotel room activity included a reference to Jones' supervisor, and "she 'understood that he [Clinton] was telling her that he had control over [the supervisor] and over her job, and that he [Clinton] was willing to use that power.'" *Jones*, 990 F. Supp. at 664.

[67] Burlington Indus., Inc. v. Ellerth 118 S. Ct. 2257, 2265 (1998).

[68] Title VII's express language does not incorporate a severity requirement. *See supra* note 57 and accompanying text. *But see Burlington*, 118 S. Ct. at 2268 (noting that "[a] tangible employment action constitutes a *significant* change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits") (emphasis added).

[69] *See Burlington*, 118 S. Ct. at 2268 (endorsing vicarious liability of the employer "when a supervisor takes a tangible employment action against the subordinate"); Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2284 (1998).

Unfulfilled quid pro quo threats are also actionable under Title VII, but liability is not as certain. Paula Jones' claim against President Clinton presented the thornier unfulfilled *quid pro quo* threat situation: Jones refused to "kiss it," yet she never suffered any tangibly adverse employment action.[70] In the unfulfilled-threat situation, there is no discrete employment action, such as a discharge or demotion, that tangibly alters the terms and conditions of employment. Therefore, Title VII liability is possible here only if the threatening conduct itself is sufficiently "severe or pervasive" to alter the conditions of employment by creating a hostile work environment.[71] In other words, what began as a *quid pro quo* request or demand, because it went unfulfilled, is actually best conceived of as potentially contributive to Title VII's other form of harassment, hostile-environment harassment.[72] Again, for this type of harassment, slight indignities and offenses do not suffice;[73] the conduct must be "severe or pervasive."[74]

Moreover, employer liability is *not* automatic in the unfulfilled *quid pro quo* threat situation, as is true of any hostile-environment claim under Title VII. For hostile-environment claims premised on intangibly abusive conduct, the Court has expressly accepted only two bases of employer liability, both of which require that the employer, in some sense be blameworthy.[75] The first basis of liability is negligence, which applies to co-worker and supervisory harassment that the employer knows or should know about, but fails to promptly remedy.[76] The second basis of liability, "vicarious liability," applies only to supervisory harassment.[77] Vicarious

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[70] *Jones*, 990 F. Supp. at 664.

[71] *Burlington*, 118 S. Ct. at 2265 (citing Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002-03 (1998); Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

[72] *Burlington*, 118 S. Ct. at 2265 (discussing limited utility of the *quid pro quo* and hostile environment nomenclature).

[73] A hostile environment cannot be created by "innocuous differences in the ways men and women routinely interact with members of the same and of the opposite sex." *Oncale*, 118 S. Ct. at 1003. Innocuous activities include "'simple teasing,' . . . offhand comments, and isolated incidents (unless extremely serious)." *Faragher*, 118 S. Ct. at 2283 (quoting *Oncale*, 118 S. Ct. at 1003).

[74] *See supra* note 71 and accompanying text.

[75] *Burlington*, 118 S. Ct. at 2267-70.

[76] *See id.* at 2267 (observing that "[n]egligence sets a minimum standard for employer liability under Title VII").

[77] *See id.* at 2270 (couching vicarious-liability standard in terms of "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee"); *Faragher*, 118 S. Ct. at 2292-93.

liability can be avoided if the employer proves: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[78] In other words, an employer can avoid vicarious liability if the employer can prove that it was not blameworthy, and that the employee was.

For First Amendment purposes, apparently it does not matter whether the *quid pro quo* threat is fulfilled or unfulfilled. Despite the purely verbal character of a *quid pro quo* threat, virtually every Title VII commentator on the subject seems to agree that such a threat, if it is indeed a threat, is no more "speech" for First Amendment purposes than is a robber's "situation-altering" demand, "your money or your life."[79] Such words, themselves, "change the normative environment," imposing upon the victim a coercive choice: yield to the threat, or risk adverse consequences.[80] Again, for purposes of this "verbal-conduct" characterization,[81] it matters not that the victim might refuse to comply and that the antagonist might abort the apparent plan, leaving the threat unfulfilled. A *real harm*, albeit intangible, occurs when the victim experiences the subordinating impact of the threat itself.[82] And that subordinating impact is likely to be exacerbated in those Title VII cases involving blameworthy employers – in other words, in virtually every Title VII case where the Court's employer-liability standards are met. When an employer knows of or should know of harassing conduct, or cannot prove that it neither knew nor had reason to know of such conduct, the employer's "inaction may be seen [by the victimized employee] . . . as the employer's adoption of the offending

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[78] *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

[79] *See* GREENAWALT, *supra* note 16, at 6, 78-79. *See also, e.g.*, Fallon, *supra* note 10, at 13 (arguing that only *quid pro quo* utterances are "'obviously' outside the ambit of First Amendment concern"); James H. Fowles, III, *Hostile Environment and the First Amendment: What Now After Harris and St. Paul?*, 46 S.C. L. REV. 471, 473 (1995) (characterizing *quid pro quo* threats as "extortion" undeserving of First Amendment protection); Volokh, *supra* note 16, at 1800; Browne, *supra* note 44, at 485 (also exempting *quid pro quo* utterances from the First Amendment's purview).

[80] *See* GREENAWALT, *supra* note 16 (emphasis omitted).

[81] For both forms of harassment, *quid pro quo* and hostile environment, the EEOC's regulations apply a "verbal . . . conduct" formulation. *See* 29 C.F.R. § 1604.11(a) (1999).

[82] The subordinating potential of unfulfilled *quid pro quo* threats was plainly recognized by the Supreme Court in *Burlington*. 118 S. Ct. at 2265 (expressly leaving open the possibility that even a single such threat might "constitute discrimination").

conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."[83]

Part III further discusses the aggravating potential of the blameworthy employer in connection with *prospective* harms that may flow from inaction on the part of an employer who endorses or appears to endorse workplace bigotry.[84] The point here is about an *immediate* harm, coercive subordination, that is aggravated by an employer who endorses or appears to endorse bigoted *quid pro quo* threats. This immediate harm is indeed so appreciable that the Court, while announcing standards of liability for blameworthy employers, expressly left open the question whether "a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment."[85] The suggestion seems to be that employer liability for a single threat becomes increasingly likely as the blameworthiness of the employer increases. The Jones-Clinton scenario may provide a paramount illustration, for that single-threat scenario involved the very highest official of the employer, the Governor, who not only had actual knowledge of the alleged threat, but was himself the perpetrator of it.

In context, therefore, the alleged "kiss it" remark may have been integral to a predominantly abusive workplace scenario. If that was in fact the case, apparently every commentator on the subject would agree that the "kiss it" remark necessarily lost any "speech" status acontextually associated with such words.[86] Many of the same commentators, however, largely reject even the possibility that the same attenuation of speech status can occur with forms of verbal activity other than threats, such as pornography and sexist remarks and jokes.[87] The next section explains the error of this broad speech assumption.

B. Other Forms of Workplace Bigotry

In context, virtually any ostensibly expressive activity is capable of making a predominantly nonexpressive contribution to an indivisibly

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[83] *See Faragher*, 118 S. Ct. at 2284.

[84] *See infra* notes 167-73 and accompanying text.

[85] *See Burlington*, 118 S. Ct. at 2265.

[86] *See supra* note 79 and accompanying text.

[87] *See supra* note 79 and accompanying text.

abusive workplace scenario, *especially if the employer actually or apparently endorses the activity.*[88] Consider, for example, an industrial shipyard that happens to employ mostly Christian employees, several of whom verbally proselytize the few non-Christian employees. If the targeted non-Christian employees reasonably perceive the proselytization as employer endorsed, then the proselytization may cause the same sort of situation-altering harm as may be caused by sexual *quid pro quo* threats. Just imagine that the proselytization is zealously relentless, and that the employer responds with stark disinterest to objections from non-Christian employees. From the targeted employees' perspectives, the endorsing employer is, in effect, imposing a coercive choice on those who most object to being proselytized: either suffer the humiliation of feigning a conversion to the proselytized faith, or quit the job.[89]

The most troubled victim really has no other choice, not if the victim truly wants the proselytization to cease and truly perceives the employer as endorsing it. Trying to talk one's way out of that choice may well feel as futile as trying to talk some sense into a supervisor who zealously pursues a sexual favor, or a robber who zealously pursues one's wallet. Of course, the proselytization victim, like the other victims, might refuse to submit without "injury." But even if that happens, the resistant proselytization victim, like the resistant victim of a sexual *quid pro quo* threat, experiences a *real harm* – a coercive submit-or-quit imperative that occurs upon the coercive impact of the extortionary words.

Consider another example, *Robinson v. Jacksonville Shipyards, Inc.*,[90] a case that purportedly "provides the best example of speech serving as the basis for a Title VII violation."[91] *Robinson* involved a male-dominated

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[88] *Cf.* GREENAWALT, *supra* note 16, at 93 (stating that the "special relationship of power between boss and subordinate" may justify treating "nothing that a boss says . . . as pure opinion"); *Id.* at 94 (stating further that "the [same] power rationale kicks in" when the employer's "inaction may seem to connote approval" of co-worker commentary).

[89] *See* Young v. Southwestern Sav. and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (holding that an atheist employee was constructively discharged in violation of Title VII upon quitting her job rather than attend mandatory workplace meetings commenced with religious observances that, in fact, *did not even target nonbelievers*); *see also* EEOC v. Towley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988) (holding that it is illegally discriminatory to require employee's attendance at religious demonstrations, even if employer allows employee to sleep or read a newspaper); *cf.* Gunning v. Runyon, 3 F. Supp. 2d 1423 (S.D. Fla. 1998) (holding that Title VII was not violated by employer who *refused* to play Christian music over public address system at the request of Christian employees).

[90] 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

[91] *See* David M. Jaffe, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses*, 80 MINN. L. REV. 979, 1003 n.122 (1996); *see also* Estlund, *supra* note 43, at 691 n.13 (noting that one strong First Amendment

industrial shipyard[92] that was permeated with sexist wall decor and verbal commentary, most of which depicted women pornographically as sexual objects.[93] Some, but certainly not all, of the sexist decor and commentary directly targeted a particular woman worker, who eventually complained to management about the situation.[94] However, management summarily dismissed the complaint, expressly condoning much of the sexist activity as an acceptable condition to working in a blue-collar "man's world."[95]

Out of context, no doubt, the sexist wall decor and verbal commentary appeared to be protected First Amendment speech. After all, the situation involved large elements of presumably nonobscene pornographic pictures and remarks.[96] Some speech proponents have thus severely criticized the *Robinson* court's decision that the case did not involve speech at all, but instead involved *conduct* that created a hostile environment violative of Title VII.[97] According to some speech proponents, "[c]alling speech conduct does not make it so."[98]

The same speech proponents, however, concede that Title VII's other form of harassment, *quid pro quo* harassment, *is* conduct beyond the First

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proponent has been able to "unearth" only *Robinson* to illustrate a finding of sexual harassment based "solely on . . . verbal conduct").

[92] *See Robinson*, 760 F. Supp. at 1493 (noting that women held less than five percent of the skilled jobs, and that no woman had ever held a substantial supervisory position).

[93] *See id.* at 1493-1501.

[94] *See id.* at 1513-17.

[95] *See id.* at 1515-16.

[96] *See id.*

[97] The *Robinson* court regarded the pervasive pattern of verbal and pictorial activity, in context, as "indistinguishable" from other forms of verbal conduct that fall beyond the pale of the First Amendment, such as "threats of violence or blackmail." *Id.* at 1535. The court reasoned that the entirety of the working environment imposed upon women an extortionary command that they either quit their jobs or "subvert their identities to the sexual stereotypes prevalent in that environment." *Id.* at 1523. This line of reasoning has been severely criticized by some commentators. *See, e.g.*, 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, 796-97 (1995) (characterizing as "specious" this line of reasoning from *Robinson*); Volokh, *supra* note 16, at 1832 n.185 (criticizing the *Robinson* court for "not explain[ing] how words or pictures, which are undoubtedly treated as 'speech' outside the workplace, stop being speech when they contribute to a hostile work environment").

[98] *See* Fowles, *supra* note 79, at 488. Other commentators similarly assert charges of formalism and simplicity against proposals of a contextualized speech-conduct interplay between the First Amendment and Title VII. *See, e.g.*, GREENAWALT, *supra* note 16, at 81-82; Fallon, *supra* note 10, at 12-13; Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 569-70 (1995).

Amendment's realm.[99] In other words, they draw a formalistic speech-conduct distinction between the two forms of harassment, as if there is some bright-line distinction between them. In fact, however, the line between the two types of harassment can be very foggy,[100] especially on the facts of a case like *Robinson*, which involved flagrant employer endorsement of the bigoted activity.[101] *In context*, the employer-endorsed bigotry in *Robinson* presented the same element of abusively subordinating coercion as an unfulfilled *quid pro quo* utterance. There truly is no difference between an employer who knowingly subjects objecting women to "dirty talk" and an employer who says to women that listening to "dirty talk" will ensure continued job benefits.[102] In either situation, the discriminatory abuse, albeit intangible, is created directly by the employer's express or implied imperative. In *Robinson*, for example, the employer's endorsement of "man's world" sexism effectively told the offended employee to look at and listen to demeaning sexist pictures and commentary from co-workers, or quit the job.

This intangible form of nonexpressive abuse is simply another variant of the same problem that the Supreme Court addressed in the landmark decision of *Brown v. Board of Education*.[103] Under the rule announced in *Brown*, a public school cannot post the *words* "colored" and "white" over separate water fountains on school premises, even if the water fountains are tangibly equal in every material respect (convenience of location, water pressure, and so forth).[104] The real injury here is an *intangible* one to the students' "hearts and minds";[105] it is the subordinating impact of a demeaning imperative foisted upon students of color, even those who would in any event bring their own bottled water to school, for compulsory

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[99] *See supra* note 79 and accompanying text.

[100] As the Supreme Court has explained, "[t]he terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a *rough demarcation* between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of *limited utility*." Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2264 (1998) (emphasis added).

[101] *See Robinson*, 760 F. Supp. at 1515-16.

[102] *See* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 275 (1995).

[103] 347 U.S. 483 (1954).

[104] *See id.* at 495 (concluding that "separate but equal" facilities are "inherently unequal").

[105] *Id.* at 494.

school-attendance laws would, in effect, require them to *look* at those "separate but equal" facilities.[106]

Likewise, the employer who actually or apparently endorses provocative patterns of workplace bigotry might, depending on the circumstances, create an environment appreciably imbued with a coercively subordinating imperative. Workplace attendance is, in a very practical sense, just as compulsory as school attendance. Additionally, employers, like school officials, are uniquely empowered over those in their charge to enforce subordinating imperatives.[107] Thus, it should come as no surprise that the courts find blameworthy employers at the root of virtually every successful Title VII harassment case premised on large elements of provocative sexist or racist verbal activity,[108] while rarely

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[106] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 821 (2d ed. 1988) (explaining *Brown* in terms of the "social *message* of black inferiority" communicated by segregation) (emphasis added). The same sort of class-specific subordination can occur when pornography is displayed in the workplace. *See* Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 812-13 (1991) (equating desegregation with banning pornography).

[107] The employer-endorsed pornography at Jacksonville Shipyards, for example, was an effective means to "enforce gender norms" against women who attempted nontraditional jobs. *See* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997). This "norm-based" form of discrimination occurs when an employer actually or apparently "sexualizes, maternalizes, or domesticizes a female . . . employee, or otherwise indicates that women do not belong in 'the marketplace and the world of ideas.'" *See* Linda B. Epstein, *What is a Gender Norm and Why Should We Care? Implementing a Theory in Sexual Harassment Law*, 51 STAN. L. REV. 161, 163-64 (1998) (footnote omitted).

[108] *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 19-20 (1993) (involving primarily verbal harassment by corporate employer's president); Andrews v. City of Philadelphia, 895 F.2d 1469, 1472 (3d Cir. 1990) (involving continuously pervasive patterns of verbal and pictorial sexism); Waltman v. International Paper Co., 875 F.2d 468, 470-71 (5th Cir. 1989) (involving a knowing indifference among employer's supervisory staff to pervasive patterns of verbal and pictorial sexism); Bennett v. Corroon & Black Corp., 845 F.2d 104, 105 (5th Cir. 1988) (involving obscene cartoons, some bearing plaintiff's name, posted for a week and not removed when seen by employer's chief executive officer); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988) (involving an inadequate supervisory response to pervasive patterns of verbal and physical abuses); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880 (D. Minn. 1993) (involving a male-dominated workplace where men, including foremen, were free to exhibit pervasive patterns of pornography and were free to verbally harass women workers); Stair v. Lehigh Valley Carpenters Local Union No. 600, 66 Fair Empl. Prac. Cas. (BNA) 1473 (E.D. Pa. 1993) (involving union-sponsored and employer-permitted pornographic calendars); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1515 (M.D. Fla. 1991) (involving employer condoned and sponsored pornography); Sanchez v. City of Miami Beach, 720 F. Supp. 974, 978 (S.D. Fla. 1989) (involving an employer's "practice, custom, and usage" of allowing pervasive patterns of verbal and pictorial sexism); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 570-71 (W.D.N.Y. 1987) (involving an employer who actively participated in and allowed the display of pornography). Indeed, the most recent Supreme Court harassment case that involved substantial elements of verbal activity was remanded for the very question of employer culpability. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2281 (1998) (noting trial court's finding of sexual

identifying any First Amendment tension.[109] The courts' message is simple: racist and sexist abuse occasioned by words and pictures is not speech; it is discriminatory abuse.

Of course, discriminatory abuse is a less likely characterization if the bigotry occurs infrequently and is generally aimed at large audiences.[110] But even *abstractly* "harmless" bigotry can, in some circumstances, involve an appreciable element of coercion. In the school context, for example, the Court has recognized the intolerably coercive impact of *school-endorsed* prayer at high school graduation ceremonies, even a short prayer spoken from a distant stage at a technically nonmandatory ceremony.[111] Lower courts have recognized the same sort of coercion in the workplace setting when, for example, the employer actually or apparently endorses the practice of beginning mandatory business meetings with a Christian prayer,[112] or actually or apparently endorses the posting of wall decor of a degrading racist or sexist theme.[113]

Again, the "discriminatory abuse" here has everything to do with the endorsing employer's *message*. However, the First Amendment is not implicated because the message itself inflicts the injury; the message itself *is* a coercive demand for submission. The employer's endorsement tells the employee, in so many words, "Look, I'm the boss here; so you can either subordinate yourself to this activity, or quit the job."

This is the same sort of "submit or quit" imperative underlying Title VII cases involving sex-specific employee dress and appearance

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harassment predicated on a mix of offensive touching and offensive remarks, including "vulgar references to women and sexual matters" that were made "[w]ithin earshot" of women employees).

[109] *See* cases cited *supra* note 108. The Supreme Court's silence in *Harris* was especially remarkable because the Court had been thoroughly briefed on the First Amendment issue. *See supra* note 10 and accompanying text. This is not to say that no court has ever mentioned any First Amendment tension. Indeed, a most forceful statement of First Amendment concern was once raised by the Court of Appeals for the Fifth Circuit. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 592 (5th Cir. 1995) (involving a claim of hostile environment "rife. . . with first amendment overtones" because the claim was based on sexist jibes generally circulated in police association newsletter). The *DeAngelis* court, however, turned around and rejected the case not on constitutional grounds, but for want of Title VII abuse. *Id.* at 595-97. The case, in other words, was one that remained in the realm of yin and thus could not be treated as involving yang-type abuse.

[110] *See, e.g.*, *DeAngelis*, 51 F.3d at 592, 595-97 (rejecting claim of hostile environment harassment based on sexist jibes generally circulated in police association newsletter).

[111] *See* Lee v. Weisman, 505 U.S. 577 (1992).

[112] *See* Young v. Southwestern Sav. and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (involving an atheist employee constructively discharged in violation of Title VII upon quitting her job rather than attend mandatory workplace meetings commenced with religious observances).

[113] *See supra* note 108 and accompanying text.

standards.[114] The nature of the imperative is vividly illustrated, for example, by a department store dress code that requires only women sales clerks to wear demeaning smocks, while permitting male clerks to wear ordinary business attire.[115] This smock-wearing requirement, which no doubt advances an expressive agenda about the inferior status of women,[116] foists upon women in that workplace a coercive choice: literally wear the endorsing employer's brand of inferiority, or quit the job.

Notably, a Title VII injunction against this smock-wearing requirement has *nothing* to do with a dress code that calls for tangible "disparate treatment" of men and women. The problem with the dress code is *not* that women suffer the tangible burden of wearing an added garment. If that were the problem, then Title VII should enjoin employee dress codes that require only men to wear ties. Yet Title VII imposes no such injunction.[117] The real problem with the smock-wearing requirement is that it imposes upon women a coercive choice that has no analogue in the *power*-tie situation: submit to the employer-endorsed stigma of sex-specific *inferiority*, or quit the job.

In short, employers, like school districts, are uniquely positioned to enforce discriminatory imperatives when they use the workplace as a platform to endorse provocative majoritarian views about matters of race, religion, and sex. Given their authority status, employers are capable of doing with words and pictures something the ordinary person generally cannot: transform expressive-appearing bigotry into predominantly abusive activity.

Again, this section is intended to explain a large assumption underlying the rest of this article: that a speech characterization necessarily applies to bigoted words, pictures, and gestures in the workplace if the activity is unaccompanied by some tangible job detriment. This assumption, which many commentators make, is as suspect as its corollary: that intangibly discriminatory workplace activities are

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[114] *See generally* Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992).

[115] *See* O'Donnel v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263 (S.D. Ohio 1987) (finding sex discrimination based on employer's practice of requiring female sales clerks to wear smocks while allowing male sales clerks to wear professional business attire).

[116] *See id.* at 266 (stating that smock-wearing requirement was "demeaning" to women).

[117] *See* Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977).

necessarily "de minimis."[118] The courts, however, largely reject such trivialization of intangibly discriminatory workplace activity.[119] In other words, the *Robinson* court correctly rejected a speech characterization of the flagrantly employer-endorsed bigotry presented in that case. In context, the case involved discriminatory abuse that was in no sense "de minimis," and thus could not be regarded as "speech" protected by the First Amendment.[120] For those who disagree, however, there is another way to reconcile Title VII intervention with the First Amendment. The rest of this article explains this alternative basis of reconciliation.

III. TITLE VII'S POTENTIAL TO REMEDY PROSPECTIVE HARMS RISKED BY BIGOTED SPEECH IN THE WORKPLACE

The alternative way to reconcile the tension between the right of free speech under the First Amendment and Title VII's harassment prohibition is based on the doctrine of "secondary effects," which was brought to life by the Supreme Court in *Renton v. Playtime Theaters*.[121] In *Renton*, the Court used the doctrine of secondary effects to uphold a zoning ordinance that relocated adult theaters away from particular areas of the City of Renton, such as residential neighborhoods and school areas.[122]

The *Renton* Court decided that the ordinance was a "content-neutral" time, place, and manner restriction on speech,[123] despite its content-specific aim at pornographic speech.[124] The focus of the ordinance, according to the Court, was not the pornographic messages communicated by adult movies; instead, the regulatory focus was various secondary effects, such as

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[118] *See generally* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

[119] Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

[120] *Cf.* O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L.J. 1, 19 (1996) (discussing a "harms analysis" under which "[s]ubstantial harms trump free speech").

[121] 475 U.S. 41 (1986).

[122] *See id.* at 50-52.

[123] *Id.* at 48.

[124] *See id.* at 47 (conceding that "the ordinance treat[ed] theaters that specialize in adult films differently from other kinds of theaters").

increased vice crimes and criminal assaults, purportedly associated with places of adult entertainment.[125]

The *Renton* Court's brand of content neutrality is very controversial because it is premised on a theory of delayed causation,[126] which is a substantial departure from the traditional "clear-and-present-danger" test.[127] Moreover, the Court allowed the City of Renton to assume various delayed secondary effects, such as prostitution, based on the experience that other cities allegedly had in the past with adult theaters.[128] In other words, the Court accepted a generalized correlation between adult theaters and prospective prostitution, without any context-specific evidence of that correlation.

Working with this controversial doctrine of secondary effects, the remainder of this article develops a series of parallels between the regulation of speech upheld in *Renton* and the occasional regulation of speech by Title VII's harassment prohibition. The first of these parallels is addressed next, in Part III.A., which explains how Title VII's regulation of speech occurs invariably within the same "low value" genre of speech as the pornography involved in *Renton*.

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[125] *See id.* at 48; *see also id.* at 59-60 & n.4 (Brennan, J., dissenting) (identifying precisely the secondary effects alleged by the City of Renton, including "increased levels of . . . prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses").

[126] Secondary-effects analysis is premised on a theory of a "presumed, generalized causal connection between the presence of [adult] theaters and neighborhood deterioration." Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 653 (1992).

[127] Secondary-effects analysis essentially avoids the narrow standard of causation – "clear and present danger" – that remains a central feature of the Court's First Amendment jurisprudence. *Id.* As first conceived, the clear-and-present-danger test required imminent harm. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); Abrams v. United States, 250 U.S. 616, 627-29 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 376-78 (1927) (Brandeis, J., concurring). The modern version of the test maintains a requirement of imminent harm. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

[128] *See* Renton v. Playtime Theaters, 475 U.S. 41, 51 (1986).

A. Low-Value Workplace Bigotry

When it adopted the controversial doctrine of secondary effects, the *Renton* Court expressly limited the doctrine to low-value speech, such as the "sexually explicit" pornography regulated by the Renton zoning ordinance.[129] According to the Court, the regulated pornography differed from core political speech because the pornography did not substantially advance fundamental First Amendment objectives.[130] These objectives include discovery of truth, accommodation of interests, and promotion of individual autonomy.[131]

The same "low-value" characterization applies to the vast majority of verbal workplace bigotry that has, in the last few decades, been regulated by Title VII's prohibition of hostile-environment harassment. The cases have typically involved women and minority workers complaining of verbal and pictorial bigotry that falls well outside the realm of core political speech.[132] For example, the cases have involved unwelcome sexist remarks and wall decor of demeaning pornographic content,[133] unwelcome

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[129] *See id.* at 49 & n.2.

[130] *See id.* Justice Stevens offered the same low-value speech rationale in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion), but it was rejected by a majority of the Court. Apparently, the rationale gained majority consensus for purposes of secondary-effects analysis. *See* Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 COOLEY L. REV. 1, 18 (1989) (discussing the strange turnabout). *See generally* Philip J. Prygoski, *Low-Value Speech: From Young to Fraser*, 32 ST. LOUIS U. L.J. 317 (1987).

[131] *See* GREENAWALT, *supra* note 16, at 3-5 (discussing reasons for free speech).

[132] Harris v. Forklift Sys., Inc., 510 U.S. 17, 19-20 (1993); Andrews v. City of Philadelphia, 895 F.2d 1469, 1472 (3d Cir. 1990); Waltman v. International paper Co., 875 F.2d 468, 470-71 (5th Cir. 1989).

[133] *See, e.g.*, *Harris*, 510 U.S. at 19-20 (involving primarily verbal harassment by corporate employer's president); *Andrews*, 895 F.2d at 1472 (involving continuously pervasive patterns of verbal and pictorial sexism); Waltman v. International Paper Co., 875 F.2d 468, 470-71 (5th Cir. 1989) (involving a knowing indifference among employer's supervisory staff to pervasive patterns of verbal and pictorial sexism); Bennett v. Corroon & Black Corp., 845 F.2d 104, 105 (5th Cir. 1988) (involving obscene cartoons, some bearing plaintiff's name, posted for a week and not removed when seen by employer's chief executive officer); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988) (involving an inadequate supervisory response to pervasive patterns of verbal and physical abuses); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880 (D. Minn. 1993) (involving a male-dominated workplace where men, including foremen, were free to exhibit pervasive patterns of pornography and were free to verbally harass women workers); Stair v. Lehigh Valley Carpenters Local Union No. 600, 66 Fair Empl. Prac. Cas. (BNA) 1473 (E.D. Pa. 1993) (involving union-sponsored and employer-permitted pornographic calendars); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1515 (M.D. Fla. 1991) (involving employer condoned and sponsored pornography); Sanchez v. City of Miami Beach, 720 F. Supp. 974, 978 (S.D. Fla. 1989) (involving an employer's "practice, custom, and usage" of allowing pervasive patterns of verbal and pictorial sexism); Barbetta v. Chemlawn Servs.

racist and sexist epithets,[134] and unwelcome religious proselytization relentless in its pursuit of conversion rather than creating any two-way dialogue about matters of spirituality.[135] The harassers in these cases virtually never seek any real exchange of ideas; their mission is not discovery of truth or accommodation of interests.[136] Indeed, any appearance of effort to express individual beliefs and feelings is often belied overwhelmingly by a more dominant agenda to hurt the feelings of others.[137]

Granted, there have been some harassment cases involving verbal activity that may have been closer to the core of our First Amendment values.[138] A Title VII plaintiff, for example, once sued her employer for permitting the publication of sexist commentary in a workplace newsletter.[139] A similar scenario was presented in another case by an employer who subjected employees to Bible verses printed on employee paychecks.[140] However, plaintiffs have not routinely prevailed in these closer cases.[141] When plaintiffs do prevail, the cases have invariably involved additional elements of individual victimization,[142] or employers

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Corp., 669 F. Supp. 569, 570-71 (W.D.N.Y. 1987) (involving an employer who actively participated in and allowed the display of pornography).

[134] "Between twenty and sixty percent of working women experience sexual comments or epithets . . . ." Strauss, *supra* note 44, at 11.

[135] *See generally* Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, 31 COLUM. J.L. & SOC. PROBS. 39, 53-55 (1997) (discussing leading proselytization cases).

[136] One commentator aptly explains the point this way:

> One may question . . . how effective a woman's denial that she is a "bitch" will be or whether explaining to her boss that the use of the words "honey" and "babe" are demeaning and insulting. The market place of ideas suggests that open debate is fundamental to a vital discourse; yet, what is there to debate about epithets?

Pierce, *supra* note 44, at 137-38.

[137] *See* GREENAWALT, *supra* note 16, at 90 (describing the "high percentage of . . . actual harassment cases" as involving "speech *mainly* designed to humiliate" and thus of "slight expressive value").

[138] DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 541 (5th Cir. 1995); Brown Transp. Corp. v. Commonwealth, 578 A.2d 555 (Pa. 1990).

[139] *See DeAngelis*, 51 F.3d at 591; *see also supra* note 109 and accompanying text.

[140] *See Brown*, 578 A.2d at 555.

[141] The plaintiff in *DeAngelis* was unable to show a prima facie violation of Title VII. *See supra* note 109.

[142] *See, e.g., Brown*, 578 A.2d at 560-61 (involving a plaintiff targeted with derogatory remarks after complaining about Bible verses printed on paychecks).

who knowingly permitted or even directly sponsored coercive patterns of bigoted activity.[143] As discussed above, knowing indifference and direct sponsorship are the most coercive forms of employer endorsement.[144] In some circumstances, these forms of employer endorsement actually remove verbal activity from the realm of speech altogether,[145] let alone reduce it to a low-value status.

Moreover, the secondary-effects thesis that this article develops flatly rejects Title VII application to a parade of closer cases involving core protected speech. Professor Cynthia Estlund identifies that parade of cases as follows:

> Imagine library or book store employees complaining, under the aegis of Title VII, of being required to examine, shelve, or sell offensive books; editorial or clerical employees in a publishing house, a newspaper, or a university complaining of being required to work on or discuss offensive manuscripts or articles; or museum employees complaining of sexually provocative works of art surrounding them at work. These are not imaginary incidents. According to journalist Mark Schapiro, as of 1994, "[i]n more than a dozen recent cases, allegations of sexual harassment have been used to force removal of artwork from classrooms, municipal buildings, and public art galleries."[146]

The First Amendment problem suggested by this parade of horribles, as explained below, is largely exaggerated because the concern about such cases completely overlooks a Title VII exemption for workplace activities that are germane to the employer's fundamental business mission.[147]

Putting aside for the moment the frivolity of this parade of horribles, the point here is about a low-value speech characterization that readily applies to the overwhelming bulk of *meritorious* verbal harassment cases of recent decades. Again, these cases have typically involved pervasive patterns of pornographic pictures or bigoted remarks that fall just as far outside the realm of core political speech as did the pornography permissibly regulated by the Renton zoning ordinance. The more typical

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[143] *See, e.g., id.* at 561 (noting boss' response to plaintiff's complaints about Bible verses printed on paychecks: "Be happy you have a job and are getting a paycheck").

[144] *See supra* notes 107-20 and accompanying text.

[145] *See supra* Part II.B.

[146] Estlund, *supra* note 44, at 770.

[147] *See infra* Part IV.A.

cases also present bigoted workplace scenarios that, if indeed expressive, cannot even be regulated by Title VII absent the sort of prospective risk of harm that was hypothesized by the Court in *Renton*. The latter parallel to *Renton* is addressed next, in Part III.B. The point about the frivolity of the parade of horribles is then explained in Part VI.

B. Title VII's Exclusively Prospective Focus on Bigoted Speech in the Workplace

Workplace discrimination often occurs in the present, with Title VII coming along later to remedy the situation retrospectively. For example, when an employee is denied a raise because of the employee's sex, the employee suffers an immediate loss of wages that Title VII later compensates with an award of back pay.[148] Similarly, when an employee is subjected to discriminatory abuse, the employee suffers immediate insult, intimidation, or ridicule that Title VII may later compensate with an award of monetary damages.[149]

Discrimination, however, can also be a prospective problem in a workplace. In fact, Title VII's "primary objective" is to guarantee equal employment opportunity by preventing workplace discrimination before it happens.[150] This forward-looking focus is especially central to the Court's concept of hostile-environment harassment. The Court has defined hostile-environment harassment as a non-tangible form of discrimination that occurs when the "victim" does *not* suffer any adverse employment action of economic consequence, such as an immediate demotion.[151] Indeed, actionable harassment can occur even if the victim does not experience severe psychological trauma.[152] In this realm of intangible discrimination, Title VII largely combats an appreciable risk of economic or psychological detriment before it happens.

This preventative focus was the underpinning of the Supreme Court's decision to make employers vicariously liable for intangibly abusive

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[148] *See generally* Margaret Shulenberger, Annotation, *Award of Back Pay in Suit Under Title VII of Civil Rights Act of 1964, As Amended by Equal Employment Opportunity Act of 1972 (42 U.S.C.A. §§ 2000e et seq.), For Discriminatory Employment Practices*, 21 A.L.R. FED. 472 (1974).

[149] *See* Harris v. Forklft Sys, Inc., 510 U.S. 17, 24 (1993) (Scalia, J., concurring).

[150] *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998) (citation omitted).

[151] *See Harris*, 510 U.S. at 21, 22.

[152] *See id.*

harassment committed by supervisory personnel.[153] In *Burlington Indus., Inc. v. Ellerth*[154] and *Faragher v. City of Boca Raton*,[155] the Court adopted vicarious-liability standards that allow an employer to escape liability for supervisory abuses if the employer can prove two things: first, that the employer had implemented reasonable safeguards, such as an anti-harassment policy and harassment complaint procedures; and second, that the victimized employee unreasonably failed to take advantage of those safeguards.[156] The idea, according to the Court, is to encourage employers to "take *all* steps necessary to prevent sexual harassment from occurring."[157]

Given this profound commitment to prevention, this article submits that Title VII is capable of remediating not only situations involving victims of discriminatory abuse, but also situations involving "victimless" employees who, though unable to prove any present compensable harm, can prove that their working environment creates an appreciable risk of prospective discriminatory harm. In other words, Title VII can occasionally remedy even nonabusive, and thus potentially expressive, workplace bigotry that resides in the realm of "yin" depicted above in Diagram A – just as the City of Renton regulated yin-type bigotry when the City adopted an ordinance restricting the location of adult theaters.

This victimless realm of yin-type bigotry, it should be emphasized, is *not* perfectly coextensive with a speech characterization. Imagine, for example, an employee who is a bystander to a pattern of outright sexual assaults against *other* women in her workplace.[158] This bystander employee may indeed be "injury-free" if she, herself, has never seen or been threatened with an assault, but the assaultive activity is in no sense speech. Therefore, this unusual Title VII claimant is not necessarily an employee who complains about something of expressive appearance, such as pictures of sexual assaults posted on her workplace walls.[159] The focus

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[153] Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257 (1998); *Faragher*, 118 S. Ct. at 2275 (1998).

[154] 118 S. Ct. at 2257.

[155] 118 S. Ct. at 2275.

[156] *See Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

[157] *See Faragher*, 118 S. Ct. at 2292 (quoting 29 C.F.R. § 1604.11(f) (1997)) (emphasis added).

[158] *See, e.g., Robinson* v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1499 (M.D. Fla. 1991) (taking into account outright abuses of women other than the plaintiff for purposes of harassment analysis).

[159] *See, e.g., id.* at 1493-99 (also taking into account pictorial depictions of abuses against women).

of this article, however, is on the more expressive-looking activity, for only in this context does a First Amendment issue potentially arise.

Another important qualification to the scope of victimless yin-type bigotry deserves reiteration: every workplace bystander to bigoted pictorial and verbal activities is not necessarily victimless,[160] although this characterization is perhaps most tempting in the case of a bystander employee. The complaints of bystanders tend to have a more yin-type appearance because, unlike a "victim" of targeted vilification, a bystander tends to complain about the more elusive "disparate impact" of something like pornographic wall decor at which all employees, men and women, must look.[161] As is true of claims of targeted vilification, however, the proper characterization of a bystander's claim is entirely a matter of context. In the entirety of some given workplace context, even bystanders may suffer an immediate form of discriminatory abuse.[162] If that is the situation, then the bystander employee is indeed a "victim" of immediate discriminatory abuse, not speech, just as most, but not all, employees targeted with bigoted words or conduct suffer immediate discriminatory abuse. But the assumption in this article, again, is that any expressive-looking workplace activity, whether targeted or untargeted, is speech.

One final qualification to Title VII's application in this realm of yin-type bigotry bears reiteration: whether the situation involves victimless nonspeech or victimless speech, the injury-free claimant's Title VII burden is exactly the same. The injury-free claimant must establish an appreciable risk of prospective harm to employees of the claimant's race, sex, or religion. There really is no basis, other than prospective remediation, for Title VII intervention if the "harassing" activity causes no immediately cognizable discriminatory harm. In this potentially expressive realm of yin-type bigotry, the aggrieved employee must, *for Title VII purposes*, prove an appreciable risk of prospective discriminatory harm. The employee cannot prevail if he or she is merely offended in the present.[163]

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[160] *See supra* Part II.B.

[161] *See supra* notes 47-48 and accompanying text.

[162] Courts generally conceive of the discrimination in this context as consisting of visual or auditory "assault" disproportionately borne in the present by bystanders of the victim's race, religion, or sex. *See, e.g.*, *Robinson*, 760 F. Supp. at 1495.

[163] Title VII is not implicated by conduct that is merely offensive. *See* Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993); *see also* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998) (noting that Title VII is not a "general civility code").

Thus, in the victimless-nonspeech situation, perhaps one involving a bystander to sexual assaults, Title VII requires of the bystander proof of prospective risk – as might be the case if the bystander is a woman with blond hair who was recently transferred to a department where women with blond hair have been repeatedly assaulted. Likewise, in the victimless-speech situation, a bystander's complaint about pornographic wall decor might have greater merit if some of the decor somehow resembles her – as might be the case, for example, if the decor includes a pornographic picture of a blond-haired woman holding a whip, and the bystander is a blond-haired woman who works with a welding tool known as a whip;[164] or as might be the case, for example, if one of the pornographic pictures superimposes a picture of the bystander's face.[165]

Of course, the presence of an appreciable risk of harm depends on the facts of the particular case, which need not involve a bystander who resembles prior victims or whose picture is superimposed onto pornographic materials. The main point here is that an employee who is merely offended by bigotry in the work environment must, for Title VII purposes, prove the very same thing that the City of Renton, for First Amendment purposes, had to prove about locating adult movie theaters near schools and residential areas: that the merely offensive activity creates an appreciable prospective risk of harm.[166] If the aggrieved employee cannot meet this element of proof, then Title VII is not even implicated, let alone the First Amendment. Here is a diagram depicting this critical element of proof:

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[164] This example is based on an actual incident reported in *Robinson*, 760 F. Supp. at 1496.

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

[166] See *supra* notes 121-28 and accompanying text for an explanation of the City of Renton's evidentiary burden.

Diagram B

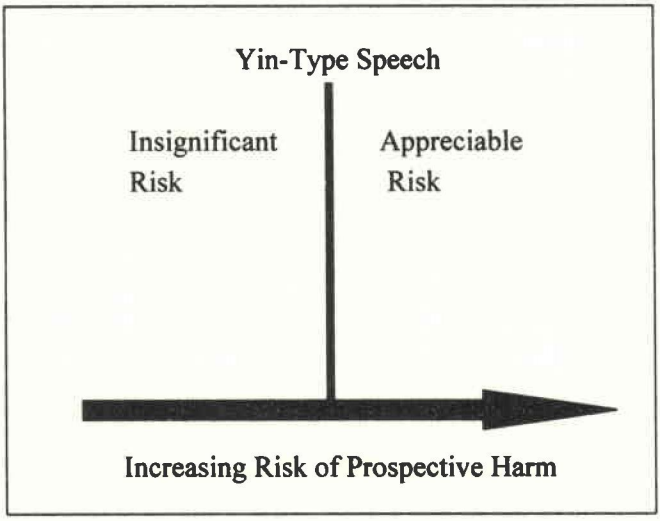

Diagram B expands upon Title VII's regulatory focus in the realm of yin-type workplace bigotry that was depicted in the left hemisphere of Diagram A. Again, that is a potentially expressive realm of "victimless" workplace activity because yin-type bigotry, by definition, falls short of Title VII's case-by-case threshold of immediate discriminatory abuse. To implicate Title VII, this nonabusive activity must create an appreciable risk of prospective discriminatory harm; otherwise, there is no basis for Title VII remediation.

As depicted by the vertical line in Diagram B, the appreciable-risk threshold is also a case-by-case criterion. The vertical line represents a threshold to specific workplace scenarios that, in total, present an appreciable risk of prospective discriminatory harm. Consider, for example, a situation involving a woman worker aggrieved as a bystander to abstract pornographic pictures permanently posted on the walls of the workplace.[167] Assuming that the overall situation is nonabusive, the question in this case is whether the working environment, in total, creates for the claimant an appreciable risk of prospective harm based on sex. If so, then the claimant should be entitled to Title VII injunctive relief aimed at reducing the risk of prospective harm.

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[167] *See, e.g., Robinson*, 760 F. Supp. at 1494-99.

Acontextual generalizations about the magnitude of the prospective risk are hard to make. A myriad of collateral factors could make pornographic wall decor prospectively problematic in one workplace but not in another. Perhaps the workplace concurrently suffers an underrepresentation of women, and the pornographic wall decor combines with that collateral circumstance to potentially cause prospective mistreatment of women.[168] Or, perhaps the workplace concurrently suffers inadequate anti-harassment policies and procedures, and the pornographic wall decor combines with that collateral circumstance to aggravate a prospective risk of sexual abuse.[169] Or, perhaps the workplace already concurrently suffers a pattern of sexual abuses, and the pornographic wall decor combines with that collateral circumstance to aggravate the risk of further abuses.[170] Or, perhaps the claimant's workplace presents many such factors, which combine synergistically with the pornographic wall decor to produce a prospective risk of harm that is greater than the sum of the individual factors.[171]

Although the prospective-risk criteria is multi-factored, two generalizations can be made: (1) any aggravating collateral circumstances themselves tend to be matters within the control of the employer, thus making only the inattentive employer more susceptible to injunctive relief under Title VII;[172] and (2) because any aggravating circumstances may indeed be collateral to the bigoted speech, effective injunctive relief under Title VII *might* be available without directly regulating the speech.[173] Without ever directly suppressing any pornographic wall decor, for example, an employer might be ordered to combat a collateral underrepresentation of women on the workforce with an injunction mandating hiring and promotion standards that better assure equal

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[168] *See id.* at 1503 (noting expert testimony about the aggravating effects of women's "rarity" or "solo status" in nontraditional work settings).

[169] *See id.* at 1510-19 (juxtaposing employer's woefully inadequate anti-harassment policies and procedures with pervasive patterns of workplace pornography and sexist remarks).

[170] *See id.* at 1504-05 (noting expert testimony about the aggravating effects of nonprofessional "ambience").

[171] *See id.* at 1505 (given all of the aggravating circumstances, expert's "testimony provided a sound, credible theoretical framework from which to conclude that the presence of pictures of nude and partially nude women, sexual comments, sexual joking, and other behaviors . . . create[d] and contribute[d] to a sexually hostile work environment").

[172] *See, e.g., id.* at 1534 (limiting relief to an injunction against the employer).

[173] *Cf. id.* (extending injunctive relief to many matters beyond removal of pornography, including affirmative development of "education, training, and . . . complaint procedures" to combat history of harassment).

opportunity without regard to gender. Alternatively, the employer might be ordered to combat a prospective risk of sexual abuse with an injunction mandating improved anti-harassment policies and complaint procedures. Finally, the employer might be ordered to combat an existing pattern of sexual abuses with an injunction mandating improved anti-harassment training and sensitivity programs.

Title VII injunctive relief along these lines represents a doctrinally sound extension of the Court's standards for employer liability. Those standards, as explained above,[174] are expressly aimed at culpable employers whose collateral inaction aggravates a prospective risk of discriminatory harm. Title VII relief aimed at the employer's collateral inaction may thus be a doctrinally viable means to remediate the prospective risk without ever implicating the First Amendment. In other words, Title VII's preventative aim might be met with an injunction that says nothing at all about removing bigoted wall decor and verbal commentary from the working environment.

The First Amendment is implicated only if Title VII mandates direct remediation of the expressive activity itself. Only then must we consider the remaining elements of the *Renton* secondary-effects analysis to reconcile Title VII's application with the First Amendment. The next two sections discuss those remaining elements.

IV. TITLE VII'S POTENTIAL TO FUNCTION AS A NARROWLY TAILORED TIME, PLACE, AND MANNER REGULATION OF EXPRESSIVE WORKPLACE BIGOTRY

The First Amendment was implicated in *Renton* because the City of Renton had adopted a zoning ordinance that expressly prohibited the location of adult movie theaters within 1,000 feet of any residential neighborhood, church, park, or school.[175] Under the ordinance, adult movies were defined in terms of sexually explicit prurience,[176] but movies subject to the ordinance did not have to be so sexually prurient as to be

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[174] *See supra* notes 153-57, 172-73 and accompanying text.

[175] Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46 (1986).

[176] The ordinance applied to "buildings 'used' for presenting sexually explicit films . . . in a manner which appeals to a prurient interest." *Id.* at 55 n.4.

unprotected obscenity.[177] The 1000-foot restriction thus specifically targeted constitutionally protected speech.[178]

The area left available for this protected speech constituted about five percent of the City's total land area.[179] Notably, much of this five percent land area was already occupied by other uses, and many of the remaining sites were "largely unsuited for use by movie theaters."[180] The ordinance thus produced a substantial exclusionary effect, in part, because of its timing: the ordinance was adopted after other land uses had become established and before anyone had ever attempted to open an adult theater in the City of Renton.[181] This timing also suggested that the ordinance was adopted before the City could have experienced any problems, such as increased prostitution, with locating adult theaters *anywhere* in town, let alone in any of the noncommercial neighborhoods buffered by the ordinance.[182]

To justify its use of secondary-effects analysis, the *Renton* Court initially had to determine whether the ordinance could be "properly analyzed as a form of time, place, and manner regulation."[183] The Court

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[177] *Id.* at 49 & n.2 (suggesting that the regulated speech was of lower value than core political speech, but not characterizing it as unprotected).

[178] The ordinance reached any "enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas . . . for observation by patrons therein." *Id.* at 44 (internal quotations omitted).

[179] The *Renton* majority said that the available land area was "520 acres, or *more* than five percent of the entire land area of Renton." *Id.* at 53 (emphasis added). The *Renton* dissent said that the available land area was "520 acres . . . [or] an area comprising *about* five percent of the city." *Id.* at 64 (Brennan, J., dissenting) (emphasis added).

[180] *Id.* at 64 (Brennan, J., dissenting) (agreeing with the court of appeals' review of the record). The *Renton* majority was much more deferential to a trial-court finding of "[a]mple, accessible real estate" even though the ordinance banned purveyors of pornography from ninety-five percent of that market. *Id.* at 53 & n.3.

[181] As Justice Brennan explained in his dissent, "at the time the ordinance was enacted, there was no evidence that any adult movie theaters were located in, or considering moving to, Renton." *Id.* at 58 n.2 (Brennan, J., dissenting). The *Renton* majority did not dispute this, nor did it provide a contradictory chronology of events. According to the majority, drafting of the ordinance began in May 1980, at a time when there was not any form of adult-entertainment uses in the City. *Id.* at 44. The ordinance was then enacted in April 1981. *See id.* However, the challenge to it did not arise until 1982, when the respondents acquired existing theaters with the intention of using them for adult movies. *Id.* at 45.

[182] To uphold the ordinance, the Court thus had to permit the City of Renton to "rely on the experiences of . . . other cities" that had previously dealt with empirically demonstrable problems with adult theaters. *Id.* at 51.

[183] *Id.* at 46. Until *Renton* was decided, the Court had confined time, place, and manner analysis to regulatory prohibitions defined in purely content-neutral terms. *See, e.g.*, Ward v. Rock Against

answered this threshold question perfunctorily. According to the Court, the ordinance was indeed a form of time, place, and manner regulation because it did "not ban adult theaters altogether"; it "merely" restricted their location.[184]

The *Renton* Court next had to determine whether this time, place, and manner regulation served a "substantial" governmental interest and provided "reasonable alternative avenues of communication" for adult movies.[185] These matters were also handled perfunctorily. According to the *Renton* Court, the City had a substantial interest in "attempting to preserve the quality of urban life" against such problems as the prostitution and urban blight purportedly associated with places of adult entertainment.[186] Notably, the substantiality of this interest was in no way diminished by the fact that the City's concerns about adult movie theaters were based entirely on the experience of *other* cities.[187] Nor was the substantiality of the City's interest diminished in any way by the fact that the City took no zoning action against other forms of adult entertainment.[188]

When addressing the question of whether the ordinance was properly tailored to the City's alleged aim of preserving the quality of urban life, the Court summarily rejected the respondents' argument that the ordinance left them with virtually nowhere in the City to do business.[189] The respondents had argued that, of the five percent land area left for them by the ordinance, "some of the land . . . [was] already occupied by existing businesses, that 'practically none' of the undeveloped land [was] currently for sale or lease, and that in general there [were] no 'commercially viable' adult theater sites . . . left . . . ."[190] The *Renton* Court did not seriously consider these factual assertions.[191] The Court instead summarily upheld the ordinance, explaining: "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees,

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Racism, 491 U.S. 781-82 (1989) (upholding a noise regulation intended to prevent musical performances, regardless of content, from disturbing nonparticipants).

[184] *Renton*, 475 U.S. at 46.

[185] *Id.* at 50.

[186] *Id.*

[187] *Id.* at 50-51. *But see id.* at 63-64 (Brennan, J., dissenting).

[188] *See id.* at 52-53. *But see id.* at 58 (Brennan, J., dissenting).

[189] *Id.* at 53-54.

[190] *Id.* at 53.

[191] *See supra* note 180 and accompanying text.

does not give rise to a First Amendment violation."[192] Of course, the respondents were in fact not on equal footing with "other" competitors for real estate. Unlike the respondents, these competitors were not banned from ninety-five percent of the City's land area.[193]

Admittedly, the Title VII analogue to this "time, place, and manner" analysis may require something a little more imaginative than the *Renton* Court's perfunctory analysis of the Renton zoning ordinance. That bit of imagination is provided next in Parts IV.A. and IV.B. The analogue will then be completed in Part V with a consideration of the final element of the *Renton* analysis: the secondary-effects element itself.

A. Title VII's Zone of Expressive Bigotry in the Workplace

There is no question that Title VII carves out a generous zone of permissible workplace bigotry. It is a zone of "mere offense"[194] that might occur, for example, when "library or book store employees [are] . . . required to examine, shelve, or sell offensive books," or when "editorial or clerical employees in a publishing house, a newspaper, or a university [are] . . . required to work on or discuss offensive manuscripts or articles," or when "museum employees [see] . . . sexually provocative works of art surrounding them at work,"[195] or, for that matter, when virtually any employee in any workplace encounters core speech of provocative content that is *not* endorsed by the employer, such as an item of religious jewelry or clothing worn by a co-worker.[196] Lest a parade of frivolous lawsuits be countenanced, there must be some reason to recognize a zone of tolerance in such situations. As explained in the next two subsections, that zone of tolerance, though perhaps driven in part by First Amendment values, has much more to do with the regulatory limits of Title VII itself.

Understanding Title VII's zone of tolerance will require either a great deal of imagination, or none at all. If one can actually imagine prima facie Title VII violations in the parade of horribles listed above,[197] then the

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[192] *Renton*, 475 U.S. at 54.

[193] *See id.* at 65 (Brennan, J., dissenting).

[194] Title VII is not implicated by "merely offensive" activity. *See supra* note 163 and accompanying text.

[195] Estlund, *supra* note 44, at 770.

[196] *See, e.g.*, Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995). *See also infra* note 239 and accompanying text.

[197] *See supra* notes 195-96 and accompanying text.

source of the zone of tolerance is a "business-necessity" exemption that Title VII provides when discriminatory practices cannot be eliminated without undermining the employer's business mission. If, on the other hand, one cannot imagine prima facie Title VII violations in these sorts of cases, then the source of the zone of tolerance is Title VII's prima facie threshold of liability. Either way, the scope of the zone is much more generous and much more economically feasible than the unusable five-percent land area of the City of Renton that was theoretically zoned for adult movie theaters.[198]

1. The Parade of Horribles

Imagine an ordinary evening at a raunchy business establishment of minimally adequate dining and drinking. The name of the establishment is "Actionville Stripyards," and its main attraction is a variety of provocative adult entertainment that pervades the environment. Throughout the evening, patrons and employees are bombarded with sexually explicit pictures, videos, and stage shows, all of which depict women as sexual playthings.

One employee at Actionville Stripyards is a scantily dressed waitress, Lois, who seems impervious to the pornographic environment. Lois even seems to shrug off nonchalantly the antics of patrons and a stage host who frequently directs sexually explicit jokes and remarks at the waitresses. On this particular evening, a group of male patrons are inspired by the stage host's antics. Members of this group repeatedly entertain themselves with sexist remarks made directly to Lois and other waitresses, such as, "Hey pussycat, come here and give me a whiff." Lois and the other waitresses do nothing to solicit or incite such antics other than dress scantily, as required by the boss. Of course, men working with patrons are not required to dress scantily; nor do these men ever endure sexually explicit remarks or jokes.

As the evening progresses, Lois discovers another group of patrons who just happen to be legal scholars with an interest in equal employment opportunity law. Lois decides to ask them for some free legal advice about her employment situation. Lois' story surprises the scholars. Despite outward appearances, she and several other waitresses are deeply offended

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[198] *See supra* note 190 and accompanying text.

by the surrounding pornography, the individually directed jokes and remarks, and the sexually provocative dress code. Lois explains that the onslaught of these demeaning sexist activities makes doing the job more difficult. She has even complained to the boss, but he has done nothing to redress the pornographic environment. "It's just part of the job," the boss has explained. Lois thus asks the scholars whether the law affords her any basis for compelling Actionville Stripyards to remediate the working environment.

The scholars begin filtering Lois' situation through TitleVII's two basic theories of discrimination. One theory is "disparate treatment," which involves an element of discriminatory targeting that occurs when a particular employee is treated adversely because of the employee's race, sex, or religion.[199] This theory would apply, for example, if Lois had ever been denied a tangible job benefit, such as a promotion, because she is a woman.[200] The other theory of discrimination is "disparate impact," which applies to untargeted employment practices that are discriminatory in effect.[201] Suppose, for example, that Actionville Stripyards has a practice of limiting bouncer positions to persons of great physical size and strength. These criteria might disproportionately exclude women from obtaining bouncer positions. Under Title VII, this sort of sex-specific disparate impact is illegally discriminatory, even absent any targeted discriminatory intent, unless the size- and strength-based criteria can be justified as a matter of business necessity.[202]

The scholars consider both theories of discrimination when evaluating Lois' situation at Actionville Stripyards. Elements of disparate treatment are presented because Lois' boss requires working women, but not men, to dress scantily and endure individually directed jokes and remarks, and these gender-targeted conditions arguably contribute to a sexually hostile environment. Additionally, Lois' situation presents elements of disparate impact to the extent that she, as a bystander, sees and overhears various abstract pornographic activity and various demeaning treatment of other

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[199] *See supra* note 45 and accompanying text.

[200] *See* HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 148 (1997).

[201] *See supra* note 47 and accompanying text.

[202] *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 380 (1988) (discussing strength and agility tests that "often may be shown through applicant flow data to adversely affect women"); *see also* Dothard v. Rawlinson, 433 U.S. 321, 328-31 (1977) (upholding trial court finding that minimum height and weight requirements disproportionately excluded women from counselor positions in the state prison system).

women around her. These generalized working conditions might also contribute to a sexually hostile environment by imposing greater burdens on women bystanders as opposed to male bystanders.

At this stage of the scholars' analysis, a pivotal question should arise: Do Lois' allegedly discriminatory circumstances rise to the level of discriminatory abuse, or is she merely offended by constitutionally protected speech? In other words, does Lois' situation fall into the yin or the yang side of Diagram A? Some of the scholars are willing to assume a yin-type speech characterization; to them, pornographic activity, in any context, is speech.[203] Other scholars are troubled by this assumption because they regard pornographic activity, in any context, as essentially discriminatory conduct, not speech.[204]

The initial premise of this article, however, is that the characterization, "abuse" versus "speech," is driven entirely by workplace context: Given Lois' *total situation*, can she *reasonably* attribute abusive force to the pornographic activity?[205] Applying this premise, Lois' situation most certainly involves predominantly nonabusive speech despite the severity and pervasiveness of the pornographic activity. Consider the overall workplace context: Actionville Stripyards, a place of business whose whole purpose is to function as a sexually provocative institutional player in our First Amendment scheme.[206] Also, consider the motivations of many women who work at Actionville Stripyards – women workers who, in fact, prefer a sexualized workplace because it provides a lawful means to sell their sex appeal.[207] Finally, consider the outright frivolity of

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[203] *See, e.g.*, GREENAWALT, *supra* note 16; *see also* Fowles, *supra* note 79, at 488 (arguing that a bigoted poster, in any workplace context, "is not conduct").

[204] *See, e.g.*, MACKINNON, *supra* note 35.

[205] The Supreme Court's discriminatory-abuse threshold, *see supra* note 7 and accompanying text, is an objective measure: the conduct (e.g., words and pictures), considering "all the circumstances," must "reasonably be perceived . . . as . . . abusive." *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993).

[206] Some commentators leap to the conclusion that pervasive patterns of pornography, in any workplace, necessarily violate Title VII; they thus feel the need to advance brand new First Amendment standards in a situation such as the one hypothetically presented at Actionville Stripyards. *See, e.g.*, Estlund *supra* note 44, at 771 (proposing "higher" First Amendment standards "[w]here the employing enterprise is an institutional actor within the system of freedom of expression or where the workplace is part of a public forum").

[207] *See* Kelly Ann Cahill, *Hooters: Should There be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1143-44 (1995) (advocating for a range of marketplace alternatives to women who would like to lawfully market their sex appeal).

accepting claims of discriminatory abuse in the parade of Title VII cases that lurk beyond the sort of case Lois contemplates. Is there really a credible allegation of discriminatory abuse when "library or book store employees complain[] . . . of being required to examine, shelve, or sell offensive books," or when "editorial or clerical employees in a publishing house, a newspaper, or a university complain[] of being required to work on or discuss offensive manuscripts or articles," or when "museum employees complain[] of sexually provocative works of art surrounding them at work"?[208] Really?[209]

Of course not, assuming the absence of any other context-specific indicia of abuse. Granted, Lois' case might be very different if patrons have been physically assaulting her, or if insulting words and dress requirements are imposed on her whenever she goes to the boss' office to collect her paycheck.[210] Assume, however, that these sorts of abuses have never been directed at Lois. The insulting antics Lois complains of involve no element of outright physical assault, and the insulting antics occur only when she serves tables on the floor of her employer's sleazy bar. In that particular context, a claim of discriminatory abuse is simply unreasonable.[211] Lois instead suffers mere offense at yin-type speech, as depicted in the left side of Diagram A.

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[208] *See supra* note 146 and accompanying text.

[209] The parade of horribles, to be sure, can go much further. One might imagine, for example, the editor of a law journal requiring a subordinate to read manuscripts of articles, like this one, which necessarily describe the graphic details of extremely bigoted workplace activities. One might also imagine senior lawyers similarly requiring law-office subordinates to wade through the graphic details of Title VII cases involving clients who have been racially or sexually victimized. But can you even begin to imagine a finding of Title VII discriminatory abuse in these situations?

[210] The contextual realities that drive harassment analysis can change dramatically when First Amendment players move off the field of play. As the Supreme Court has explained in a similar context:

> In . . . harassment cases, [the] inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field, even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998).

[211] Women who work in sexualized working environments tend not to regard as sexual harassment the sorts of sexist impositions that Lois endures. *See* Patti A. Giuffre & Christine L. Williams, *Boundary Lines: Labeling Sexual Harassment in Restaurants*, 8 GENDER & SOC'Y 378, 398 (1994).

Given this yin-type speech characterization, a Title VII analysis of Lois' situation should next turn to the question depicted in Diagram B: Does the pornographic speech create an appreciable risk of prospective harm to Lois and other women workers at Actionville Stripyards? Remember, absent immediate discriminatory abuse, Title VII intervention is possible only under a theory of delayed discriminatory harms prospectively risked by the allegedly harassing activity.[212] This means that Lois must prove the same sort of prospective risk that the City of Renton "proved" was associated with locating pornographic theaters in residential neighborhoods.[213] For some scholars, this element of proof may present no difficulty because they believe that the mere presence of pornographic activity, anywhere, can lead to various discriminatory harms, such as sexual assaults against women.[214] Others may want Lois to provide empirical studies that more specifically establish problems of this sort in places of adult entertainment,[215] but not necessarily validating studies on the prospective impact of pornography at Actionville Stripyards itself. After all, the City of Renton did not have to provide context-specific studies.[216]

Another premise of this article, however, is that Title VII requires context-specific evidence of the association; the risk of prospective harm must be particularized or there is simply no basis for Title VII remediation and, in turn, no First Amendment issue.[217] For present purposes, the reader is thus invited to factor in any variables deemed necessary to advance Lois' case on this particular element of proof. After all, every workplace is a unique social milieu of potentially limitless variability, so any number of collateral circumstances could conceivably make the pornographic environment prospectively more problematic at Actionville Stripyards than at some other bar. Perhaps Actionville Stripyards places its waitresses in isolated situations with patrons, and that contact combines with the

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[212] *See supra* Part III.B.

[213] *See supra* note 166 and accompanying text.

[214] *See generally* Peggy E. Brugman, *Beyond Pinups: Workplace Restrictions on the Private Consumption of Pornography*, 23 HASTINGS CONST. L.Q. 271, 289-90 (1995) (discussing "numerous studies" that "support a causal link between viewing pornography and violence against women").

[215] *See generally* Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 33, 54-56 (1993) (cataloguing extensive scope of violence against women in places of adult entertainment).

[216] *See supra* note 128 and accompanying text.

[217] *See supra* notes 166-71 and accompanying text.

pornographic environment to create a prospective risk of abuse. Or, perhaps Actionville Stripyards has never adopted any anti-harassment policies and procedures needed to safeguard against the potential for abuses by co-workers. Or, perhaps the pornographic environment at Actionville Stripyards factors into a glass ceiling of sorts that has never permitted a woman to advance beyond the worker-bee status of entertaining-to-look-at floor staff. Or, perhaps Lois can find an expert who will testify that many such factors combine synergistically with the pornographic environment to create a risk of prospective harm greater than that posed by the sum of the individual factors.[218]

The point here is to somehow discern an appreciable risk of harm that places Lois' situation in the right hemisphere of Diagram B, which represents the only conceivable realm where Title VII can be implicated by truly yin-type expressive activity. Only now does the analysis reach a question of potentially serious First Amendment consequence: Does Title VII necessarily require direct remediation of the pornographically expressive activity at Actionville Stripyards? The answer to that question, as explained in the next subsection, is an emphatic "NO," even if you accept the view of scholars who regard all pornography, regardless of context, as prospectively problematic.

2. The Scope of Title VII's Free-Speech Zone in Light of Title VII's Business-Necessity Defense

The discussion thus far has focused on Title VII's prima facie standards of liability for prospectively problematic speech, as depicted in the right hemisphere of Diagram B. There is, however, an important defense to liability that applies in this sphere. The key to the defense is business necessity.

Under conventional disparate-treatment analysis, business necessity has long been a basis to justify sex-specific hiring preferences when sex "is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of [the employer's] particular business or enterprise."[219] As traditionally conceived, the BFOQ defense applies to

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[218] Albeit hypothetical, this sort of context-specific analysis tracks the "credible theoretical framework" used in a leading case of pornographically based workplace harassment. *See supra* notes 168-71 and accompanying text.

[219] *See* 42 U.S.C. § 2000e-2(e)(1) (1994).

sex-specific hiring preferences dictated by "essential" job duties.[220] For example, an employer who runs an all-male prison might defend a male hiring preference for prison guard positions by showing that women as a class cannot safely and effectively supervise the male convicts.[221]

A similar defense, actually labeled "business necessity," is also available against claims of disparate-impact discrimination.[222] The defense is available to employers who, in light of "significant business purposes," can establish the "manifest" necessity of some facially neutral employment practice that incidentally disadvantages members of one sex.[223] In the prison situation, for example, suppose that the employer adopts various height, weight, and strength requirements for prison guards. If such standards disproportionately exclude women, the employer would have to show the manifest necessity of the requirements in light of some significant interest relating to the supervision of prison convicts.[224]

As traditionally conceived, the business-necessity principle applies to a narrow range of intentionally or incidentally discriminatory employment practices.[225] However, the Equal Employment Opportunity Commission ("EEOC") has indicated a willingness to "relax" the principle of necessity in light of "authenticity" concerns "where a primary job and business function is the projection of a sexually provocative display."[226] For example, a place of adult entertainment may be able to hire an exclusively female staff of topless waitresses. This accommodation of sexualized enterprises perhaps reflects the EEOC's understanding of the role played

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[220] *See* PLAYER, *supra* note 202, at 281, 282.

[221] *See id.* at 287. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 334-38 (1977) (applying BFOQ exception to male hiring preference in all-male maximum security prison that randomly housed sexual offenders and that had a history of inmate assaults directed against women).

[222] *See* PLAYER, *supra* note 202, at 282 (distinguishing BFOQ from "business necessity").

[223] *Id.* at 356.

[224] *Id.* at 380. *See, e.g.*, *Dothard*, 433 U.S. at 331-32 (rejecting employer's argument that minimum height and weight standards, which disproportionately disadvantaged women, were sufficiently related to purported need for correctional counselors of adequate strength).

[225] EEOC regulations caution that the BFOQ defense should be interpreted narrowly so as not to "deny employment opportunities unnecessarily to one sex or the other." 29 C.F.R. § 1604.2(a) (1999); *see also* Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (noting the Court's practice of reading the BFOQ defense "narrowly"). Similarly, the business-necessity defense contemplates a means-ends analysis of substantial rigor, *see* Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978) (describing the defense as "very narrow"), certainly more rigorous than a mere rationality standard, *see* PLAYER, *supra* note 202, at 368.

[226] *See* LEWIS, *supra* note 200, at 226 (citing 29 C.F.R. § 1604.2 (1979)).

by these enterprises in the First Amendment scheme.[227] This accommodation may also simply reflect the EEOC's understanding of the economic benefit conferred upon employees who seek a lawful means of selling their sex appeal.[228]

Whatever the reason for this accommodation, the result is a host of workplaces replete with sexualized activities that implicate Title VII's "second-generation"[229] prohibition of sexual harassment. The beneficiaries of these permissive sex-specific hiring preferences are often subject to sexually charged working environments, sexually provocative dress codes (or nudity codes), and sexually incited patrons who engage in various derogatory behavior.[230] The *quid pro quo* for the permissive hiring preference may well be an equally relaxed business-necessity defense to complaints about these potentially harassing activities. One second-generation *proponent* of Title VII intervention aptly explains the irony of this sliding-scale treatment of the defense: "[O]ddly enough, the more closely linked the central purpose of the business is to the sexualization or objectification of women, the more justified its discriminatory practices are likely to be."[231]

Another second-generation commentator takes this sliding-scale concept of business necessity even further.[232] She advocates a more relaxed business-necessity defense, under the label "assumption of risk," for employers with a secondary but "substantial" mission of sexual provocation.[233] The defense might apply, for example, to "Hooters," an employer that may well have a central purpose of selling food and drink,[234]

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[227] *See supra* note 206 and accompanying text.

[228] *See supra* note 207 and accompanying text.

[229] Title VII's initial task was to open up the doors of the workplace to historically disadvantaged groups; over time, the task has evolved to include remediation of the backlash among many majority-status personnel "unable to adjust gracefully to the new demographics of the workplace." *See supra* Calleros, note 16, at 252-53.

[230] *See generally* Sandra L. Snaden, *Baring It All at the Workplace: Who Bears the Responsibility?*, 28 CONN. L. REV. 1225 (1996); Cahill, *supra* note 206.

[231] *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2573 (1994).

[232] *See* Cahill, *supra* note 207, at 1143-44.

[233] *Id.*

[234] Hooters apparently sends mixed signals about its primary business mission. The restaurant denies that the name "Hooters" "is a double-entendre reference to women's breasts" and advertises itself as a "family" restaurant; at the same time, however, the restaurant requires waitresses to wear tight T-shirts and skimpy shorts, and it runs an unofficial slogan, "More Than a Mouthful," which apparently applies beyond items found on its "Kids' Menu." *See* Snaden, *supra* note 230, at 1249-50.

but who requires its waitresses, known as "Hooters girls," to dress scantily and to tolerate a highly sexualized environment that allegedly incites verbal and physical abuse from patrons.[235] This more relaxed defense is apparently intended to provide workers who knowingly "assume the risk" of harassment an opportunity to market their sex appeal in friendlier environments than those where sexual provocation is more germane, for example, in strip clubs.[236]

Two further points should be added to this evolving, sliding-scale concept of business necessity. First, the business-necessity analysis should take into account the *degree* of the risk incident to the expressively bigoted provocation: the greater the risk, the greater the business necessity should have to be to defend its imposition. That is, employers who sponsor prospectively problematic expressive bigotry should be strictly required to implement whatever collateral precautions are reasonably available to minimize the risk of the prospective abuses.[237]

Second, a sliding-scale business-necessity exemption should also apply to discriminatory practices driven not so much by the employer's business mission, but instead by *paramount* social values that *must* be accommodated in light of the employer's business mission. Consider, for example, a firefighting employer who requires its firefighters to work prolonged shifts at the firehouse. As a matter of business necessity, the employer may have to provide shower and locker room facilities; as a matter of social necessity, those facilities would probably have to be sex-segregated.[238] The paramount social value here is respect for the firefighters' privacy needs. Similarly, the same firefighters have paramount autonomy needs that may have to be respected during prolonged periods in the firehouse. For example, a firefighter who occasionally finds private reading to reduce daily stress must, as a matter of social necessity, be afforded some level of accommodation for that

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[235] *See* Cahill, *supra* note 207, at 1108; Snaden, *supra* note 230, at 1250.

[236] *See* Cahill, *supra* note 207, at 1143-44.

[237] *Cf.* Snaden, *supra* note 230, at 1254-55 (suggesting that individualized abuses incident to sexualized business missions "are not 'reasonably necessary to the normal operation' of the business").

[238] *See* 29 C.F.R. § 1604.2(b)(5) (1999) (permitting separate restroom facilities for male and female employees).

expressive activity, whether the reading be of a Holy Bible[239] or a Playboy magazine.[240]

So construed, Title VII does permit a large and discernible zone for expressively provocative bigotry in the workplace. The outer-limit of that zone is determined by the juxtaposition of the business-necessity defense against the realm of prospectively problematic bigotry represented in the right hemisphere of Diagram B. That juxtaposition completes Title VII's big picture, as follows:

Diagram C

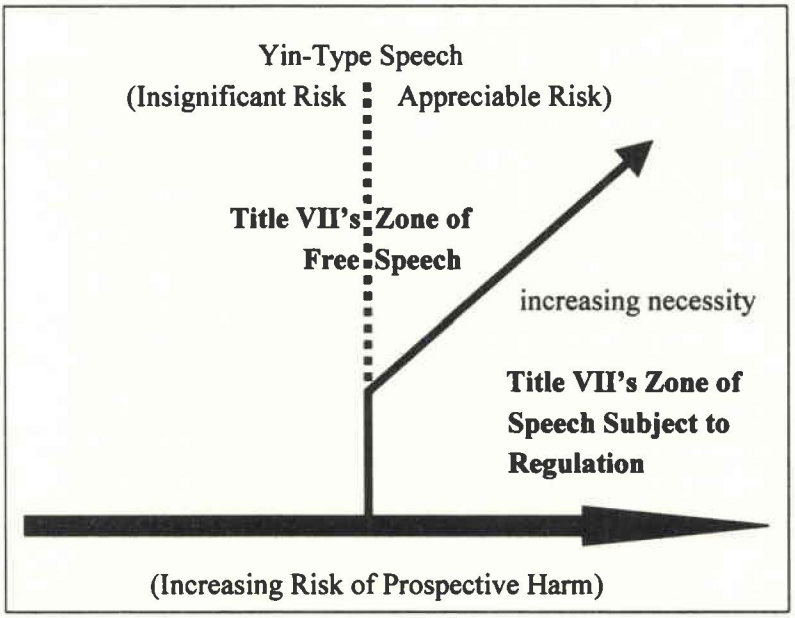

Diagram C depicts the full scope of Title VII's zone of permissible workplace bigotry. The zone includes: (1) workplace situations where the expressive bigotry, alone, presents no prima facie risk of prospective harm (as depicted to the left of the vertical line), and (2) workplace situations where, despite an unavoidable prima facie risk, the expressive bigotry is

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[239] *Cf.* Brown v. Polk County, 61 F.3d 650, 656-57 (8th Cir. 1995) (holding a discharge violative of Title VII if based on employee's spontaneous prayers, occasional Christian affirmations, and isolated references to Bible passages).

[240] *Cf.* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994) (holding that a firefighter's private possession of Playboy magazines is not subject to regulation as discriminatory harassment).

justified under Title VII's business-necessity defense (as depicted above the diagonal line). Thus, an employer need not clamp down on provocative speech if collateral safeguards reduce any prospective risk of harm beneath a prima facie level. Moreover, to the extent that collateral safeguards are ineffective, an employer may still permit the problematic speech if doing so is a matter of business necessity.

Lois' situation at Actionville Stripyards vividly illustrates both aspects of Title VII's zone for expressive workplace bigotry. Any risk of harm incident to the pornographic environment at Actionville Stripyards might be reduced beneath a prima facie level by various collateral precautions. Those precautions, as has already been suggested, might include provision of adequate security personnel to prevent customer abuse of waitresses, implementation of anti-harassment policies and procedures to prevent co-worker abuses, and various other affirmative measures to combat any glass-ceiling effects potentially incident to the pornographic environment.[241] And if a prima facie risk persists notwithstanding such measures, then Actionville Stripyards remains able to sustain the problematic speech under Title VII's business-necessity exemption. After all, a sleazy bar cannot be a sleazy bar without such activity. Thus, either way, the pornographic environment at Actionville Stripyards can remain. If Lois cannot tolerate that, she must leave. And the same is true of many other employees who, like Lois, might complain about provocative speech that is germane to the employer's business. The "library or book store employees . . . required to examine, shelve, or sell offensive books"; the "editorial or clerical employees in a publishing house, a newspaper, or a university . . . required to work on or discuss offensive manuscripts or articles"; and the "museum employees [who see] . . . sexually provocative works of art surrounding them at work"[242] – all of them must tolerate the provocative speech, or leave.

The same conclusion even obtains to a significant range of private speech among employees in more garden-variety blue- and white-collar settings. Very persuasive arguments have been made about the unavoidably necessary outlet for speech that the American workplace must provide employees, especially front-line employees, largely because the workplace trenches are a stressful but centrally important social milieu that

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[241] *See supra* notes 217-18 and accompanying text.

[242] *See* Estlund, *supra* note 44, at 770.

preoccupies a great deal of daily life.[243] Given this unavoidable social reality, an employer's business operations could be seriously undermined if it clamped down on every employee who might wear an item of clothing or other apparel expressing some personal view on matters of sex, race, or religion; or who might display on his or her desk a picture of a spouse or friend in a bathing suit; or who might vent entirely personal views on matters of race, sex, or religion in a workplace newspaper.[244] Even assuming an irreducibly problematic risk of prospective harm, which in any given case is unlikely, speech of this sort is at least arguably exempted from prosecution by Title VII's business-necessity defense (or some social-necessity analogue). Indeed, an employer who clamps down on an expressive employee may run the risk of violating the Title VII rights of the expressive employee.[245]

The expressive employer, on the other hand, may present a very different application of Title VII. That application is explained in the next subsection, which carries forward the central point being made here: that Title VII does not by any means apply an outright ban on even intensely provocative patterns of workplace speech. Title VII, instead, functions as a form of time, place, and manner restriction on such speech. Moreover, the scope of Title VII's zone permitting such speech is truly generous and evenhanded – much more generous and evenhanded than the City of Renton's five percent set-aside of unusable land for adult movie theaters.[246] If Lois does not like the provocative speech at Actionville Stripyards, she must leave. Conversely, any employer who enjoys problematic patterns of such speech must either forgo the speech when Lois starts working there, or establish itself as an institutional First Amendment player, as Actionville Stripyards has. Title VII does not take sides; it merely moves employer-endorsed speech around the workplace neighborhood.

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[243] *See* David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMPLOYMENT & LAB. L. 1 (1998); Estlund, *supra* note 44, at 727-29 & n.171.

[244] Some commentators contemplate a very different sort of business judgment made by risk-averse employers who fear harassment claims. Professor Volokh, for example, makes the point with several illustrations, including one involving a risk-averse employer who once required an employee to remove from his desk a picture of his wife in a bikini. *See* Volokh, *supra* note 98, at 567. Indeed, he goes so far as to suggest that it might be "malpractice" for a lawyer not to advise the employer to chill such speech. *Id.* at 568. I have refuted the point elsewhere, *see generally* Marks, *supra* note 1, and implicitly do so again here.

[245] *See supra* note 239 and accompanying text.

[246] *See supra* note 179 and accompanying text.

B. Beyond Title VII's Zone of Permissible Bigoted Speech

Imagine that Lois does indeed leave Actionville Stripyards, that she eventually finds new employment as a welder in a garden-variety industrial workplace, Jacksonville Shipyards, and that she has the very same experience as Ms. Robinson had while working as a welder at the shipyard described in *Robinson v. Jacksonville Shipyards, Inc.*[247] When Ms. Robinson arrived at Jacksonville Shipyards, she probably expected to encounter various sights and sounds relating to the employer's primary business mission, ship repair. But that is not all she encountered. Ms. Robinson also encountered a working environment no less pornographically charged than the one hypothetically depicted at Actionville Stripyards, complete with walls pervasively decorated with prurient pornographic depictions of nude and seminude women in sexually suggestive and submissive poses, an intense level of sexually prurient discourse among groups of predominantly male employees, various sexist insults and pornographic pictures targeting her directly, and an egregious pattern of physical abuses and sexual propositions suffered by women other than Ms. Robinson.[248] The biggest problem for Ms. Robinson, however, was not so much the abstract existence of a pornographic working environment, but instead the employer's flagrant endorsement of it.

1. An Extreme Example of Employer Endorsement

About the only thing management at Jacksonville Shipyards did not do to endorse a pornographic working environment was change the company's business mission to one of providing adult entertainment for a profit. While continuing to run a shipyard, members of management at Jacksonville Shipyards publicly displayed their own pornographic pictures,[249] they expressly condoned such displays by subordinates,[250] they

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[247] *See* 760 F. Supp. 1486 (M.D. Fla. 1991).

[248] This largely pornographic aspect of Lois' experience at Jacksonville Shipyards is discussed further in a companion article to this one, *see* Marks, *supra* note 1, and further still in a published opinion, *see* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (describing in lurid detail the experience of the actual plaintiff in the case, Ms. Lois Robinson).

[249] *See Robinson*, 760 F. Supp. at 1494 (noting that "[m]anagement employees from the very top down condoned [pornographic] displays; often they had their own pictures").

actively assisted in the distribution of the pornographic materials to subordinates,[251] and they even went so far as to expressly withhold permission of displays that were *not* of a demeaning pornographic content.[252] Furthermore, when Ms. Robinson complained about the situation, management told her, in no uncertain terms, to put up with it as a condition of working in a blue-collar "man's world," or to quit the job.[253]

Compounding this flagrant endorsement of workplace pornography was management's abysmal posture toward the whole issue of sexual harassment, even egregious events involving unwelcome sexual propositions and physically assaultive conduct.[254] The *Robinson* court's opinion in the case is replete with accounts of inadequate anti-harassment policies, inadequate harassment complaint procedures, inadequate dissemination of the inadequate policies and procedures, inadequate staff training on the inadequate policies and procedures, and inadequate responses to complaints of even the most egregious incidents of sexual harassment.[255]

Granted, Ms. Robinson apparently did not suffer from any of the more egregious forms of sexual harassment. She did not suffer from any of the unwelcome sexual propositions or physically assaultive conduct prevalent at Jacksonville Shipyards.[256] Nor did her situation ever culminate in any tangibly adverse employment action.[257] Her situation at Jacksonville Shipyards, in other words, centered exclusively on the same kind of intangible activities hypothetically depicted at Actionville Stripyards – various targeted and untargeted sexist activities of a purely verbal and pictorial nature. A potentially significant difference at Jacksonville Shipyards, however, was a stark set of collateral circumstances: a drastic

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[250] *See id.*

[251] *See id.* at 1493-94 (describing managerial practice of distributing to employees calendars that "feature[d] women in various stages of undress and in sexually suggestive or submissive poses").

[252] *See id.* at 1494 (explaining how "JSI management ha[d] denied employees' requests to post political materials, advertisements and commercial materials").

[253] *See id.* at 1515.

[254] *See id.* at 1510-19.

[255] The court's detailed recitation of the woeful inadequacies spans about ten pages. *See id.*

[256] *Compare id.* at 1494-99 (describing "visual [and auditory] assault" suffered by Ms. Robinson) *with id.* at 1499-1501 (describing harassment suffered by other women workers, including persistent sexual propositions and unwelcome touching, pinching, grabbing, and sniffing).

[257] *See id.* at 1532-34 (awarding nominal damages of one dollar because actual losses were "not proven or provable").

underrepresentation of women on the workforce;[258] an airtight glass ceiling in the workplace;[259] and, again, the employer's abysmal posture toward the issue of sexual harassment.[260]

2. The Title VII Analysis

The court in *Robinson* concluded that Title VII necessarily required injunctive remediation of the various verbal and pictorial workplace bigotry at Jacksonville Shipyards.[261] According to the *Robinson* court, the pervasive pattern of sexist remarks and pornographic wall decor combined with the collateral circumstances to create an indivisibly abusive environment.[262] In other words, the court characterized the situation, in total, as falling beyond the First Amendment pale of yin-type speech, and instead coming within the realm of yang-type discriminatory abuse, as depicted to the right of the vertical line in Diagram A.[263]

The *Robinson* court's conclusion was correct, but will not be defended again here.[264] Instead, the assumption here will be that the *Robinson* court was wrong – that the court should have treated the pervasive pattern of sexist remarks and pornographic wall decor as yin-type speech, as depicted to the left of the vertical line in Diagram A. This

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[258] Women at Jacksonville Shipyards held less than five percent of the skilled craftworker positions. *See id.* at 1493. This underrepresentation of women was two to three times as severe as the underrepresentation of women at other shipyards. *See id.* at 1509.

[259] No woman at Jacksonville Shipyards had ever achieved a position of substantial supervisory responsibility. *See id.* at 1493.

[260] *See supra* note 255 and accompanying text.

[261] *See Robinson*, 760 F. Supp. at 1542 (extending injunctive relief to various sexist displays and publications).

[262] *See id.* at 1524 (explaining that "a holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes").

[263] The court held that the pervasive pattern of sexist verbal and pictorial activity was, in context, "indistinguishable" from other forms of verbal conduct that lie beyond the pale of the First Amendment, such as "threats of violence or blackmail." *See id.* at 1535. This conclusion, again, was driven by the entirety of the working environment, which imposed upon women an extortionate command that they either quit their jobs or "subvert their identities to the sexual stereotypes prevalent in that environment." *Id.* at 1523.

[264] For a defense of the court's analysis, see Marks, *supra* note 1. *See also supra* Part II.B.

speech assumption (which so many commentators seem to make),[265] however, will not radically alter the result of the case.

The speech assumption moves the Title VII analysis forward to the question depicted above in Diagram B: whether the various pornographic and sexist speech at Jacksonville Shipyards created an appreciable risk of prospective harm. Recall that absent immediate discriminatory abuse, Title VII intervention is possible only under a theory of delayed discriminatory harms prospectively risked by the allegedly harassing activity.[266] Therefore, the pornographic speech at Jacksonville Shipyards was actionable under Title VII only if Ms. Robinson proved the sort of prospective risk that the City of Renton "proved" was associated with locating pornographic theaters in residential neighborhoods.[267]

This element of proof was actually well supported by both lay and expert testimony documented in the *Robinson* court's findings of fact.[268] Lay testimony in the case established an ongoing risk of outright sexual propositions and physical abuse coinciding with the various pornographic and sexist speech.[269] One egregiously victimized co-worker explained, for example, that she had learned to "steer[] clear of men who worked where [pornographic] pictures were displayed because she came to expect more harassment from those men."[270]

Expert testimony corroborated the same sort of prospective risk.[271] Testifying experts explained that a significant risk of outright abuse arises upon the mere presence of a female minority in nontraditional employment.[272] The experts also explained that this risk of minority abuse can be "prim[ed]" by the addition of pornographic wall decor and verbalized sexist speech that creates a "nonprofessional ambience," especially if the workplace further suffers a substantial absence of women in managerial positions.[273] Of course, all of these factors described exactly the environment at Jacksonville Shipyards.[274] Thus, there should be no

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[265] *See supra* notes 35, 79, 91 and accompanying text.

[266] *See supra* Part III.B.

[267] *See supra* note 166 and accompanying text.

[268] *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1499-1509 (M.D. Fla. 1991).

[269] *Id.* at 1499-1501.

[270] *Id.* at 1500.

[271] *Id.* at 1502-07.

[272] *See id.* at 1506.

[273] *See id.* at 1503-05.

[274] *See id.* at 1505, 1524-25.

serious doubt that Jacksonville Shipyards suffered an appreciable risk of prospective abuses, and that this risk was primed by the ambience-cluttering pornographic wall decor and sexist remarks permeating the working environment.

Given this risk, the Title VII analysis turns next to the two questions depicted in Diagram C. The first question is whether the risk of harm at Jacksonville Shipyards could have been reduced beneath a prima facie level without enjoining any of the speech. Remember, the whole point of this analysis is to determine whether Title VII necessarily requires regulation of any speech. If it does not, then there is no potential for conflict with the First Amendment.

In the case of Jacksonville Shipyards, however, the experts' testimony created serious doubts about the effectiveness of a Title VII injunction aimed solely at collateral circumstances. Even if the court had issued a collaterally aimed injunction that mandated a rigorous affirmative-action plan, it may have been a long time before women workers at Jacksonville Shipyards would have advanced beyond their extreme "solo" status.[275] Therefore, for some time to come, the priming influence of pornography and sexist commentary apparently was unavoidable.

That conclusion advances the analysis to the second question depicted in Diagram C: whether, despite an unavoidable prima facie risk, any of the pornography and sexist commentary at Jacksonville Shipyards could have been justified under Title VII's business-necessity defense. This question, this article submits, must be answered separately in terms of the expressive employees at Jacksonville Shipyards, on the one hand, and Jacksonville Shipyards itself, on the other hand. The Title VII business-necessity defense was available, if at all, only for some range of private employee speech.[276]

To be sure, discerning a zone of employee free speech in a case like this one requires a nontraditional approach to the business-necessity defense, such as the sliding-scale approach that was described in Part IV.A.2.[277] After all, Jacksonville Shipyards was not some sleazy strip club

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[275] *See id.* at 1503.

[276] The court's order in *Robinson* went so far as to enjoin in the workplace even the private possession of adult magazines, and the like, among employees. *See id.* at 1542. This part of the order probably went too far. *See* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994) (holding that firefighter's private possession of Playboy magazines was unrelated to the creation of a sexually hostile working environment).

[277] *See supra* Part IV.A.2.

whose primary business mission was directly threatened if its employees could not engage in sexually provocative antics. However, a less traditional social-necessity analogue[278] could have been advanced on behalf of front-line employees.

The nature of the company's business, ship repair, unavoidably required front-line employees to perform labor-intensive duties that imposed serious risks of injury. As the *Robinson* court noted, "'one slip' could lead to someone getting hurt."[279] Given these unavoidable working conditions, it is difficult to imagine an atmosphere entirely cleansed of "non-professional ambience"[280] among front-line employees. And the more difficult it is to imagine front-line ambiance cleansing in any given case, the more convincing the social-necessity analogue becomes – because the analogue, as applied here, vindicates a social value of no less magnitude than the entirely social value served by sex-segregated locker rooms and shower facilities that might be provided at an industrial shipyard.[281]

However, as the source of ambiance cluttering, in any given case, moves up the corporate ladder, away from front-line employees to supervisory employees, the case will tend to slip out of Title VII's free-speech zone for two reasons. First, ambiance cluttering by personnel of increasing supervisory responsibility, in any given case, probably becomes increasingly *less* necessary. Ambience cluttering, for example, is probably much less necessary for the supervisor who tends to watch others directly confront front-line stresses, and it is probably even less necessary for the supervisor who rides a desk in a remote office while subordinates confront front-line stresses. Certainly it was in no sense necessary for high-level management at Jacksonville Shipyards to allow permanent displays of pornography on the workplace walls, or to distribute pornographic pictures themselves, or to expressly withhold permission of displays that were *not* of pornographic content.[282] This sort of gratuitous ambiance cluttering by the employer's high-level policy makers inevitably will not fit an even nontraditional sliding-scale business-necessity defense – not as long as Jacksonville Shipyards remains Jacksonville Shipyards.

This conclusion leads to the second reason why Title VII's business-necessity defense can inevitably lose relevance as responsibility for

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[278] *See supra* notes 237-40 and accompanying text.

[279] *Robinson*, 760 F. Supp. at 1493.

[280] *See supra* note 273 and accompanying text.

[281] *See supra* note 238 and accompanying text.

[282] *See supra* notes 249-53 and accompanying text.

workplace bigotry moves up the corporate ladder. At some level of managerial action or inaction, a case eventually presents an *expressive-employer* situation. And Title VII, with its business-necessity defense, specifically gives to the expressive employer a direct way into Title VII's free-speech zone: the expressive employer is always free, under Title VII, to adopt a business mission consistent with the expression, thus creating a bona fide need for it. In other words, Title VII gives the expressive employer, such as Jacksonville Shipyards, a choice: either forgo the expression, or become an institutional First Amendment player, as Actionville Stripyards chose to do. Notably, this is the same kind of "choice" that Lois had to make about the central focus of her career path when she worked at Actionville Stripyards. Recall that she had to either endure the pornographic environment there, or quit the job and get a new one at a place like Jacksonville Shipyards. Title VII likewise creates the same choice for all of the other employees in the parade of workplaces where offensive speech is germane to the employer's business mission.[283]

Of course, these may not be simple choices – for employers or employees. But they are equal choices. And Jacksonville Shipyards' choice was by no means any less fair or any more difficult than the "choice" that the City of Renton gave to operators of adult theaters: either operate within a small and unusable area of the City, or buy land elsewhere in the City and put it to some other use.[284] The speech outlet created by Title VII is just as evenhanded and just as reasonable in scope, if not more so, than was the speech outlet created by the Renton zoning ordinance. Title VII, like the Renton ordinance, requires proponents of sexual provocation to either forgo the provocative speech, or "fend for themselves"[285] in a marketplace regulated by a stringent time, place, and manner restriction.

Granted, this sort of imposition on expressive freedom does not square with the First Amendment unless supported by a "substantial" regulatory purpose.[286] The Renton ordinance, recall, withstood this intermediate level of constitutional scrutiny because, according to the *Renton* Court, the City was "attempting to preserve the quality of urban life" against such problems as prostitution and urban blight purportedly

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[283] *See supra* notes 241-42 and accompanying text.

[284] *See supra* notes 179-80 and accompanying text.

[285] *See supra* note 192 and accompanying text.

[286] *See supra* note 185 and accompanying text.

associated with places of adult entertainment.[287] Title VII likewise is readily defensible under this prong of the *Renton* court's analysis. Title VII serves, at the very least, a "substantial" purpose when applied to remediate a working environment that threatens the inalienable civil right to equal employment opportunity without regard to race, sex, or religion. Indeed, this regulatory aim is probably better characterized as "compelling."[288]

Title VII's potential to restrict speech thus meets the traditional intermediate-level means-ends analysis that the Supreme Court applies to time, place, and manner restrictions on speech. In fact, as applied to a case like *Robinson*, Title VII's justification is better than that underlying many zoning ordinances, which themselves may be the only regulatory impediment to converting a workplace like Jacksonville Shipyards into Actionville Stripyards.

There remains just one more element to the *Renton* analogue: whether Title VII, like the *Renton* ordinance, combats "secondary" prospective risks as applied to something like pornographic speech. As explained in the next section, Title VII meets this element of the *Renton* analogue, perhaps even better in a case like *Robinson* than did the *Renton* zoning ordinance.

V. SECONDARY EFFECTS

Secondary-effects analysis presents a challenge of potentially far-reaching philosophical proportions, at least in part because the analysis delves into an entirely hypothetical inquiry: the question of cause in fact. Even outside the secondary-effects context, the simplest single-agent causation question necessarily requires a hypothetical "but for" analysis: Would the harm have been avoided if the agent had been removed from the scenario?[289] For example, if a horse rears up and throws its rider upon the passing of a noisy motorcycle, the "but-for" causation question would be framed hypothetically, as follows: Would the horse have remained steady if the noisy motorcycle had been removed from the scenario?

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[287] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986); *see supra* note 186 and accompanying text.

[288] *See* Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (holding that government has a "compelling interest in eliminating discrimination against women").

[289] *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265-66 (5th ed. 1984).

The challenge presented by this hypothetical inquiry becomes greater when the scenario involves possibly more than one causal agent. Suppose, for example, that the horse had reared up upon the passing of *two* noisy motorcycles.[290] For this sort of combined-force situation, the law has developed a "substantial factor" rule:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a "but for" cause of [an] event, and application of the "but for" rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.[291]

The substantial factor rule thus readily applies if the sound of either motorcycle, alone, would have been loud enough to cause the horse to rear up.[292] However, what if there is some question as to the hypothetically independent significance of one of the motorcycles? What if one of the noisy motorcycles was only half as loud as the other? What if it was only one-fourth as loud as the other? What if it was only one-eighth as loud as the other? "In that situation, we suspend our commitment to the analytical approach and use a term, 'substantial factor,' that incorporates no particular mental operation but appeals forthrightly to instinct."[293] That is, it is necessary to suspend analytical commitment to likelihood in fact and replace it with an instinctive "estimate of quantity":[294] was the quieter of the noisy motorcycles loud "enough" to warrant legal responsibility?[295]

As explained below, *Renton*-type secondary-effects analysis, by definition, raises this sort of instinct-driven combined-force question. By definition, *Renton*-type secondary-effects analysis probes instinctively into the relative magnitude of concurrent contributions to some indivisible harm associated with something like neighborhood or workplace pornography.

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[290] *See* Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 88-90 (1956).

[291] Rudeck v. Wright, 709 P.2d 621, 628 (Mont. 1985). For a classic discussion of the test, see Anderson v. Minneapolis, St. Paul & Sault St. Marie Ry. Co., 179 N.W. 45, 46 (Minn. 1920) (accepting application of a "material or substantial" factor test where multiple fires, only one started by the defendant, combined to burn the plaintiff's property). *See generally* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 186-88 (3d ed. 1997).

[292] *See* DOBBS, *supra* note 291 at 187-88 (identifying a simpler subset of combined-force cases that involve "duplicative" causes).

[293] ROBERTSON, *supra* note 24; *see also* DOBBS, *supra* note 291 at 188 (questioning whether substantial factor analysis in nonduplicative combined-force cases calls for "a neutral, factual judgment or a judgment about policy, justice, or principle").

[294] *See* Malone, *supra* note 290, at 89.

[295] *See id.* at 90.

The indivisible harm, for example, might be an increased risk of sexual abuse. And the concurrent contributions to that harm might be described as: (1) "primary," for those prospective assailants whose predisposition is such that they need the direct emotive influence of pornographic messages to inspire their misconduct; and (2) "secondary," for those prospective assailants whose predisposition is such that the pornographic messages per se are not necessary. Granted, the "secondary" contribution, in any given case, may not be as big as the "primary" contribution. But in cases like *Renton* and *Robinson*, it is big enough to warrant a regulatory focus on it.

A. Renton-*Type Secondary Effects*

The City of Renton's ordinance had a *facially* content-specific focus[296] that is characteristic of regulations subject to strict First Amendment scrutiny.[297] On its face, the ordinance banned only theaters specializing in pornographic movies from ninety-five percent of the city's land area.[298] The *Renton* Court, however, determined that the ordinance was a "content-neutral" time, place, and manner restriction on pornographic speech; thus, the ordinance was subject to lesser First Amendment scrutiny.[299] According to the Court, the regulatory focus of the ordinance was not suppression of pornography.[300] Instead, the "predominate" focus was certain "secondary effects" associated with pornographic theaters, such as increased prostitution and sexual assaults that purportedly occur near such theaters.[301]

In constructing this theory of content neutrality, the *Renton* Court essentially piled one controversial assumption upon another.[302] The Court

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[296] "Literally, the ordinance was content-based." Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 68 (1994).

[297] Content-based regulation of speech is "presumptively invalid" under the First Amendment. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). To overcome this presumption of invalidity, a content-based speech restriction "must be narrowly tailored to serve a compelling governmental interest." *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990); *see also* Carey v. Brown, 447 U.S. 455, 461-62 (1980).

[298] *See* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) (conceding that "the ordinance treat[ed] theaters that specialize in adult films differently from other kinds of theaters").

[299] *See id.* at 48.

[300] *Id.*

[301] *See id.*; *see also id.* at 59-60 & n.4 (Brennan, J., dissenting) (identifying precisely the secondary effects alleged by the City of Renton, including "increased levels of . . . prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses").

[302] *See infra* notes 303-04 and accompanying text.

first assumed that locating adult theaters in various Renton neighborhoods would appreciably risk increased incidence of various delayed harms, such as prostitution, simply because *other cities* have had that experience.[303] Second, the Court assumed, with little explanation, that the delayed harms would indeed be "secondary."[304] This characterization does not apply to effects that are mediated by the *direct* communicative impact of the regulated speech.[305] In other words, a viewer's reaction to the pornographic message of an adult movie cannot be regulated as a secondary effect.[306] Yet, the City of Renton was never required to refute in any way the rather obvious and direct communicative link between the pornographically promiscuous messages of adult movies and various antisocial sexual activities.[307]

Thus, it may be fair to say that the *Renton* Court did not explain the doctrine of secondary effects very well.[308] In a concurring opinion to a subsequent case, however, Justice Souter did attempt to explain the causal premise underlying the doctrine.[309] He suggested that the higher incidence of prostitution and sexual assaults near adult-entertainment locations does not necessarily result only from the communicative effect of such entertainment, but may also result "from the concentration of crowds of [people][310] predisposed to such activities, or from the simple viewing of

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[303] *See supra* note 128 and accompanying text; *see also* Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 653 (1992) (noting that secondary-effects analysis is premised on a theory of "presumed, generalized causal connection between the presence of [adult] theaters and neighborhood deterioration").

[304] Arguably, there is nothing at all "secondary" about the presumed connection between neighborhood crime and the pornographic content of the movies shown in adult theaters. But for the pornographic content of the movies, presumably the harms would not occur. *See* Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1267 (1995) (noting that the neighborhood crimes "would not have occurred if the movie theaters . . . had simply displayed white screens that conveyed no communicative content whatever").

[305] *See* Boos v. Barry, 485 U.S. 312, 321 (1988).

[306] *See id.*

[307] *See* Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 55 (1994) (suggesting a direct link between "the erotic arousal caused by the content of [adult] films" and "the sexual commerce that follows").

[308] The Court has not clarified the kinds of causal relationships that qualify as "secondary." *See* Post, *supra* note 304.

[309] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 586 (1991) (Souter, J., concurring).

[310] Justice Souter actually said "men" here, but his theory of predisposition seems equally applicable to the women on the reciprocal side of the illegal sexual commerce. *See id.* at 586.

nude bodies regardless of whether those bodies are engaged in expression or not."[311]

Justice Souter's formulation of secondary effects has been influential among the lower courts.[312] Perhaps that is because of his sharpened definition of "secondary" effects – only those effects that are *not* mediated *directly* by the communicative impact of the expressive activity.[313] However, even under this sharpened formulation, zoning boards may still "concoct"[314] strange theories of content neutrality based on pure speculation about adverse secondary effects purportedly associated with places of adult entertainment.[315]

Even accepting Justice Souter's more sharpened formulation of the secondary effects doctrine, the notion of "secondary" effects remains elusive. Under Justice Souter's formulation, the effects of adult entertainment remain secondary even though the "predisposed" agents of secondary harm presumably are drawn to the neighborhood directly by the pornographic content of the entertainment. Apparently, the direct content-based gravitational pull of adult entertainment is merely preliminary to the more immediate causal antecedent: the concentration of "bad apples" predisposed to various antisocial activities. Justice Souter no doubt is splitting a hair here, as he does again when he suggests that agents of harm who are inspired by "simple viewing of nude bodies" are not necessarily inspired by pornographic messages.[316] Notably, all of this hair-splitting

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[311] *See id.*

[312] Of the various opinions offered by the *Barnes* plurality, Justice Souter's opinion is the one "that lower courts have generally viewed either as the most instructive or as the holding of the Court." David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55, 69 (1997); *see also* Richard A. Seid, *A Requiem for O'Brien: On the Nature of Symbolic Speech*, 23 CUMB. L. REV. 563, 620 (1993) (noting that "Justice Souter's approach in *Barnes* is consistent with the majority view in *City of Renton*").

[313] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1224 n.224 (1996) (noting that Justice Souter's formulation "is less sweeping than the *Renton* formulation appears to be").

[314] Justice Brennan, a dissenter in *Renton*, later expressed concerns about speech regulations being justified with "concoct[ed]" legislative records that fit the secondary-effects theory. *See* Boos v. Barry, 485 U.S. 312, 335 (Brennan, J., concurring).

[315] Justice Souter's opinion in *Barnes* actually extends the *Renton* rationale that permits relocating adult land uses even absent any evidence of secondary harms. *See* Barnes v. Glen Theatre, 501 U.S. 560, 584 (1991) (Souter, J., concurring) (accepting secondary-effects analysis without evidence that government officials had even considered secondary harms when enacting an anti-nudity provision). As one commentator explains, "Justice Souter's extension of *Renton* in *Barnes*" permits "government officials . . . to pass an adult business zoning ordinance without conducting any studies or articulating any secondary effects caused by the adult businesses in their city." Hudson, *supra* note 312, at 70.

[316] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 586 (1991) (Souter, J., concurring).

occurs without a shred of empirical support for these strange causal hypotheses.

Another mysterious aspect of his causal hypotheses is revealed by a footnote in which Justice Souter refuses to extend the hypotheses to nonpornographic nudity, as might occur "in a production of 'Hair' or 'Equus' . . . in the absence of evidence that [this] expressive nudity . . . was correlated with . . . secondary effects."[317] Apparently, these more artistic displays of nudity, in Justice Souter's view, have no presumptive gravitational pull among persons of antisocial predisposition. Given this additional qualification to Justice Souter's empirically unproven causal hypotheses, it is not surprising that the causal hypotheses have in essence been criticized as half-baked conjecture.[318]

In addition to its empirical limitations, the doctrine of secondary effects can lead to strained conclusions about a "predominate" regulatory aim at the secondary effects, as opposed to direct communicative effects. In *Renton*, for example, there was some very plain indicia of the City's outright hostility toward purveyors of pornography.[319] The City's legislative record explicitly expressed concerns about the immoral pornographic content of adult movies.[320] Moreover, concerns about alleged secondary effects were not inserted into the legislative record until *after* the City was sued.[321] Again, the City never presented any context-specific evidence of the alleged secondary effects that purportedly served as the "predominate" motivation for the ordinance.[322]

The *Renton* Court summarily excused these indicia of viewpoint discrimination, explaining that the suspicious legislative record was nothing more than incidental speech-making by a few drafters of the ordinance.[323] However, the speech makers likely had a great deal of

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[317] *See id.* at 585 n.2 (Souter, J., concurring).

[318] *See, e.g.*, Blasi *supra* note 303, at 654-55 (criticizing Justice Souter's empirical oversights).

[319] *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 44-45 (1986).

[320] The City's written legislative record confessed many content-specific concerns, including the concern that "location of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality." *See id.* at 59 n.3 (Brennan, J., dissenting) (directly quoting the City's written findings in support of the ordinance). The *Renton* Court, however, disregarded such evidence as inconsequential speech making among a minority of the ordinance's drafters. *Id.* at 47-48.

[321] *Id.* at 58-59 (Brennan, J., dissenting).

[322] *See id.* at 48, 59-60.

[323] *See supra* note 320 and accompanying text.

legislative sway. Imagine how the drafters of the Renton ordinance must have felt about the prospect of a "Pussycat Theater" located next door to an elementary school. Imagine how they must have felt about the prospect of a school child, perhaps a cheerleader, passing on the street someone who had just watched "Debbie Does Dallas."

Thus, not only does the secondary-effects doctrine suffer from lack of empirical support, it is also aptly criticized as "highly susceptible to legislative manipulation."[324] That is precisely what the City of Renton did. In sum, the City waited until after a lawsuit was filed to create a legislative record that documented, acontextually, a risk of delayed harms purportedly caused by adult theaters in other cities.[325] The City then claimed, without much explanation, that these delayed harms were secondarily associated with adult theaters despite a rather obvious and direct link between pornographic messages and antisocial activities.[326] Then the City claimed a predominate regulatory focus on this secondary association, despite a prior legislative record explicitly expressing a viewpoint discriminatory animus toward adult movies.[327]

In fact, the only support for this largely contrived regulatory focus was the Court's initial characterization of the ordinance as a form of time, place, and manner regulation.[328] The notion, according to the Court, is that the City of Renton would have banned adult movie theaters altogether or restricted their number if the City truly sought to suppress this type of speech.[329] This is one thing the City did not do. Instead, it set aside for adult theaters a five-percent land area (which just happened to be commercially unsuitable for operating theaters).[330]

B. Title VII's Regulatory Aim at Renton*-Type Secondary Effects*

In applying the secondary-effects doctrine in the Title VII context, there certainly is reason for concern about manipulation. The concern is especially severe if the uncertain parameters of secondary-effects analysis,

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[324] *See* 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, 446 (1996).

[325] *See Renton*, 475 U.S. at 43-45.

[326] *See id.* at 47.

[327] *See id.*

[328] *See id.* at 46-54.

[329] *Id.* at 48.

[330] *See supra* note 179 and accompanying text.

as applied in the Title VII context, are presumed to extend to any discriminatory harm purportedly risked by bigoted speech, without competent proof of the risk and without a thoughtful assessment of the magnitude of any alleged "secondary" cause of that risk.[331] However, any manipulation here will be kept to a minimum – certainly much less than that tolerated by the Court in *Renton*. Indeed, in an extreme Title VII case, such as *Robinson*, use of a secondary-effects analysis will require virtually no manipulation at all. The analogue, as developed here, merely provides Title VII claimants such as Ms. Robinson with a default theory of limited availability in situations that present a *demonstrable* risk of discriminatory harm associated with employer-endorsed speech of a low-value content.

Initially, the Title VII analogue in a case like *Robinson* need *not* accept the large assumption that was made in *Renton* about various evils associated with abstract ambiance cluttering, pornographic or otherwise. In *Robinson*, there *was* context-specific evidence of this association.[332] Sexually demeaning pornography and remarks did in fact pervade the working environment at Jacksonville Shipyards,[333] and women did in fact suffer an egregious pattern of individualized abuses.[334] Furthermore, at least one eye-witness testified that the concurrence of these two patterns of activities was no accident.[335] Experts also testified that this concurrence was no accident,[336] an assessment that perhaps comports with common sense and experience.[337]

There remains the question of whether this apparent connection between the speech and the adverse treatment of women at Jacksonville Shipyards was at all "secondary" to the communicative impact of the sexist and pornographic *messages*. This question, to be sure, is very perplexing, notwithstanding Supreme Court dictum specifically identifying the

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[331] A much looser application of secondary-effects analysis apparently occurred in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). In *Robinson*, the court adopted a secondary-effects rationale to justify Title VII's application to workplace pornography, but failed to examine anything that resembled a truly "secondary" effect. *See id.* at 1535. The balance of this subsection, in effect, supplies that rationale.

[332] *See supra* notes 92-93, 270-73 and accompanying text.

[333] *See supra* notes 92-93 and accompanying text.

[334] *See supra* note 256 and accompanying text.

[335] *See supra* note 270 and accompanying text.

[336] *See supra* notes 271-73 and accompanying text.

[337] Causation "is a matter upon which lay opinion is quite as competent as that of the most experienced court." KEETON, *supra* note 289, § 41, at 264.

secondary-effects doctrine as a means to reconcile Title VII's harassment prohibition with the First Amendment.[338] Several lower courts have accepted the Supreme Court's invitation to extend secondary-effects analysis to Title VII cases involving harassing verbal activity of a bigoted nature.[339] Invariably, however, the lower courts' theory of "secondary" effects erroneously relies on discriminatory effects mediated directly by the communicative impact of bigoted verbal activity upon listeners.[340] In other words, a few courts have resorted to effects that are not "secondary" in the sense that Justice Souter defines that term.

The question, couched in Justice Souter's words, is whether the adverse treatment of women at Jacksonville Shipyards resulted, in at least appreciable part, "from the concentration of crowds of [workers] predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not."[341] Again, the *Renton* Court apparently assumed these sorts of secondary effects, without any examination of the magnitude to which these effects might have realistically contributed to a prospective harm.

A realistic assessment of the secondary causal contribution cannot occur without considering other combining forces, not the least of which, in a case like *Robinson*, may be the primary communicative impact of the allegedly problematic speech. Indeed, a testifying expert in *Robinson* expressly couched her opinion on the causation question in terms of the *direct communicative* effect of the *pornographic* environment at Jacksonville Shipyards on the attitudes and behaviors of men.[342] This sort of evidence cannot be ignored the way the *Renton* Court ignored it.

The expert's opinion in *Robinson* cannot be ignored because it was supported by empirically reliable scientific data.[343] The data was collected, in part, during an experiment done with college men.[344] During the experiment, some of the men viewed pornographic films, while others

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[338] *See* R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992).

[339] *See, e.g.*, Aguilar v. Avis Rent-A-Car Sys., Inc., 53 Cal. Rptr. 2d 599, 607 (Cal. Ct. App. 1996) (relying on secondary-effects analysis to uphold injunction of racially bigoted verbal activity). *But see* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1437 (C.D. Cal. 1994) (rejecting application of secondary-effects doctrine to discriminatory effects mediated by the emotive impact of Playboy magazines).

[340] *See* Hudson, *supra* note 312, at 81-84.

[341] *See supra* notes 310-11 and accompanying text.

[342] *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1502-04 (M.D. Fla. 1991).

[343] *See id.* at 1502.

[344] *See id.* at 1503-04.

viewed non-pornographic films.[345] Those who viewed pornographic films tended to forget much of what was said during a subsequent interview conducted by a woman – remembering instead more about the interviewer's physical appearance.[346] The expert attributed this result to stereotyping which, in turn, is the direct result of pornographic *messages* about women.[347] She also corroborated this result with other studies establishing a fifty-percent rate of sex stereotyping among men in the general population when exposed to pornographic messages.[348]

Again, this sort of evidence about the primary causal agent, the message, cannot be ignored – just as the volume of the louder motorcycle cannot be ignored when trying to apply the substantial factor rule to the situation described above involving two motorcycles that frighten a horse.[349] The question in combined-force cases is one of relative magnitude.[350] Therefore, in the Title VII context, one must ask whether the secondary effects, relative to the primary communicative effects, are great enough to warrant Title VII intervention.

Unfortunately, this is not a question that can be answered generally for all Title VII cases involving bigoted workplace speech. The American workplace, after all, is a social milieu of potentially limitless variability. Thus, anything is possible in any given workplace, including a finding of appreciable secondary effects associated with bigoted speech.

The point is perhaps best illustrated in the mixed-aim pornography cases, such as the classic cases involving a pornographic pinup upon which is superimposed a picture of some female employee's face.[351] Notably, the workplace at Jacksonville Shipyards suffered some of this type of mixed-aim pornographic activity.[352] Imagine something similar: perhaps a picture

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[345] *See id.*

[346] *See id.*

[347] *See id.*

[348] *See id.* at 1504.

[349] *See supra* notes 290-93 and accompanying text.

[350] *See supra* notes 293-95 and accompanying text.

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

[352] This sort of mixed-aim activity occurred, for example, on an occasion when a male co-worker, before a limited audience of six men and Robinson, waved around a picture of a nude woman with long blond hair holding a whip; Robinson also had long blond hair and also happened to work with a welding tool known as a whip. *See Robinson*, 760 F. Supp. at 1496.

of Ms. Robinson's face superimposed on a pornographic pinup that is prominently displayed on a wall right above the time clock that this male-dominated workforce punches once to begin the day and again to end the day. Justice Souter's causal hypotheses explain, to at least some appreciable extent, the prospective risk Ms. Robinson would face twice daily when she goes to punch the clock amidst co-workers with an already demonstrated predisposition for physically and verbally abusing women. Think about the plain potential for abuse by at least some of those co-workers who probably need no pornographic inspiration – co-workers whose abuse could be equally inspired by a nonpornographic picture of Ms. Robinson merely sun bathing in the nude.

Secondary effects also seemed to have played an appreciable role with respect to even the more abstract pornography and sexist commentary at Jacksonville Shipyards, for that social milieu included context-specific variables that greatly enhanced the magnitude of any secondary effects associated with such speech. Bear in mind that the workplace at Jacksonville Shipyards had an intense level of such abstract speech and that the workforce was severely skewed along a gender line – about ninety-five men to every five women.[353] Also, the workforce suffered a history of repeated and individualized abuses of women by men,[354] which suggested a strong context-specific predisposition for heterosexually motivated abuse.

Given this particular workplace milieu, a substantial secondary-effects theory might have been maintained even if Justice Souter's causal hypotheses accounted for only a small rate of prospective heterosexually motivated abuses. For example, even if Justice Souter's hypotheses accounted for only a one-percent rate of heterosexually motivated abuse, the speech at Jacksonville Shipyards would have been producing, secondarily, about one male harasser for every five women. Conversely there would have been about one female harasser for every 1900 men. Even if the rate is reduced to half of a percent, an enormously disproportionate rate of abuse against women was inevitable, resulting in about one male harasser per ten women, and about one female harasser per 3800 men. In fact, the estimated rate could be halved many more times before the ratio of male harassers to women would become as insignificant as the ratio of female harassers to men is already.[355]

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[353] *See supra* note 258 and accompanying text.

[354] *See supra* note 256 and accompanying text.

[355] This analysis is couched evenhandedly in terms of heterosexual harassers, male and female, in keeping with Title VII's normative philosophy. *See supra* note 364 and accompanying text.

Thus, if Justice Souter's secondary-effects hypotheses ring the least bit true, then there is a compelling basis for a claim of disparate-impact discrimination in a case like *Robinson*, let alone in any workplace context generally, as at least one commentator argues.[356] The "truth" of Justice Souter's secondary-effects hypotheses, however, apparently has never been tested. But the lack of testing does not mean that secondary effects are merely some figment of Justice Souter's imagination, for the reality of any hypothesis has nothing to do with tests.[357] The reality of any hypothesis is the individual and his or her instinct and intuition;[358] all one must do to *really* see Justice Souter's secondary-effects hypotheses is reflect on Ms. Robinson's case.

Reflect again on the intense level of employer-endorsed bigotry at Jacksonville Shipyards, against the context-specific backdrop of lopsided predisposition: a male-dominated workplace with a pervasive history of sexually derogatory name-calling, pinching, grabbing, sniffing, and the like. Reflect again on the observation, albeit unscientific, of Ms. Robinson's co-worker – that men gathered around various pornographic displays tended to harass passing women. Reflect again on the expert's study of *college* men. Might some small percentage of these young men crowd around a workplace display of pornography and then, emboldened by their numbers and shared predisposition, make abusive remarks to a passing woman? Remember, the disparate-impact theory, unlike the theory of harm in *Renton*, requires only a small percentage of "bad apples" when the social milieu is skewed along a gender line.

As one reflects on this combined-force question, which, again, measures the relative contributions of primary communicative impact

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[356] *See* Peggy E. Bruggman, *Beyond Pinups: Workplace Restrictions on the Private Consumption of Pornography*, 23 HASTINGS CONST. L.Q. 271, 305-06 (1995) (applying *acontextually* Justice Souter's causal hypotheses because workplace "pornography can be correlated with sexual harassment").

[357] As one writer has explained:

> The formation of hypotheses is the most mysterious of all the categories of scientific method. Where they come from, no one knows. A person is sitting somewhere, minding his own business, and suddenly – flash! – he understands something he didn't understand before. Until it's tested the hypothesis isn't truth. For the tests aren't its source. Its source is somewhere else.

ROBERT M. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE 99 (Bantam ed. 1975).

[358] On the subject of scientific method and its ultimate source, the hypothesis, Albert Einstein has been quoted as saying: "The supreme task . . . is to arrive at those universal elementary laws from which the cosmos can be built up by pure deduction. There is no logical path to these laws; only intuition, resting on sympathetic understanding of experience, can reach them . . . ." *Id.*

versus secondary effects, one should also bear in mind that the "proper adjustment" considers *both* "policy and fact."[359] And the policy side of that adjustment adds much to the relative magnitude of the secondary effects.

In terms of policy, the combined-force question is whether, in a case like *Robinson*, it is proper to impute to the Congress that enacted Title VII a "predominate" concern with Justice Souter's unproven secondary-effects hypotheses rather than a predominate concern with an expert's empirically reliable primary-effects hypothesis. The more skeptical reader, in other words, might ask, "How could Ms. Robinson have based her case on an abstractly negligible theory of secondary effects, which may account for a less-than one percent harassment rate, when the expert's study suggests a much larger potential for harassing conduct mediated directly by pornographic messages?" After all, the expert's studies had revealed a fifty percent rate of sex stereotyping among men in the "general population" when exposed to pornographic messages.[360]

Frankly, the skeptically framed question would be very difficult to answer if Title VII was encumbered by a suspiciously viewpoint-biased legislative record of the sort that the *Renton* Court excused as incidental speech-making.[361] However, Title VII's legislative record is not at all encumbered with suspiciously viewpoint-biased speech-making, incidental or otherwise, about the special vulnerability of men or women to the communicative influence of abstract sexist messages in the workplace. Indeed, what little legislative record there is underlying Title VII's prohibition of "sex" discrimination makes it most unusual to impute to the enacting Congress of 1964 an agenda to suppress directly the sorts of abstract sexism that the *Robinson* expert found so troubling. The sex-discrimination provision, according to the record, was added to Title VII as a last-minute afterthought by an opponent of Title VII who intended to *defeat* its passage.[362]

If anything, available indicia of Congressional intent contradict imputing to the Congress of 1964 concerns about sex-specific vulnerabilities, of men or women, when that Congress enacted Title VII's

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[359] Malone, *supra* note 290.

[360] *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1504 (M.D. Fla. 1991).

[361] *See supra* notes 320-24 and accompanying text.

[362] *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE 115-16 (1985) (explaining that the prohibition of "sex" discrimination was inserted as a last-minute poison pill by an opponent of Title VII who sought to defeat its passage); *see also* Calleros, *supra* note 16, at 252 (noting that this legislative history makes it "highly unlikely that Congress was primarily motivated by a desire to suppress bigoted speech in the workplace").

fundamental anti-discrimination provision. The very purpose of Title VII is to combat such sex-based generalizations, which have in the past tainted not only the workplace but our country's statute books.[363] In fact, this legislative aim against stereotypical generalizations is anchored in a normative philosophy that may well regard as a "dubious business" any effort to prove broad sociological propositions of the sort that the *Robinson* expert offered about sex-specific vulnerabilities to abstract sexist messages.[364]

Furthermore, Title VII shares the same element of viewpoint neutrality that the ordinance in *Renton* presumably had towards sexist speech. If the Congress that enacted Title VII truly sought to suppress sexist speech in the workplace, then it would have banned such workplace speech altogether. But that is not what Congress did. Instead, Congress provided a prima facie liability threshold and a business-necessity exemption that in fact permit in many workplaces (such as Actionville Stripyards) every bit of the sexist speech and pornography present at Jacksonville Shipyards.[365] Thus, the Congress that enacted Title VII should be credited with the same kind of disregard for *the message* that the City of Renton was credited with when the City opted not to ban adult theaters altogether, but instead merely restricted their location.[366]

In the combined-force scenario involving the two motorcycles,[367] it stands to reason that the significance of the quieter motorcycle increases if policy concerns diminish the significance of the louder motorcycle. The same rationale applies here when assessing the relative magnitude of secondary effects versus communicative impact incident to something like the pornography at Jacksonville Shipyards. Why not impute to Congress a

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[363] The Supreme Court has lambasted legislative schemes premised on stereotyped generalizations, whether about women, *see, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (severely criticizing 19th century "statute books . . . laden with gross, stereotyped distinctions between the sexes" that "in practical effect, put women, not on a pedestal, but in a cage"), or men, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (invalidating as violative of the equal protection clause a male-only prohibition of underage drinking that was based on stereotyped generalizations about irresponsible young men). *See also* Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment–Avoiding a Collision*, 37 VILL. L. REV. 757, 777 (1992) (noting that "measures designed to afford special 'protection' to women in the workforce have in fact undermined women's full and equal participation," and that "[a]ny overly broad restriction of sexually explicit speech in the workplace that is designed to 'protect' female workers would follow in this tradition").

[364] *See Craig*, 429 U.S. at 204.

[365] *See supra* Part IV.A.

[366] *See supra* notes 184, 329 and accompanying text.

[367] *See supra* notes 290-93 and accompanying text.

"predominate" concern with a secondary-effects hypothesis, albeit merely intuitive, when the empirically supported alternative hypothesis, as "primary" as it may be, is itself laden with sex-based generalizations of "dubious" import given Title VII's fundamental mission of equal opportunity? The experts' alternative hypothesis, in effect, imputes to the Congress that enacted Title VII a very confounding intent: to enact a fundamental *anti-discrimination* provision that advances a protective agenda of redressing an emotional susceptibility of one of the sexes to yin-type bigotry – activity which, by definition, is itself nonabusive. Granted, some degree of manipulation is being suggested here, but certainly no more than was permitted by the Court in *Renton*.

VI. CONCLUSION

Title VII's secondary-effects analogue journeys deeply into a largely theoretical and very distant cosmos of harassment liability absent a tangibly discriminatory employment action. The analogue is truly "out there," for it is not needed in any garden-variety case involving *immediate* discriminatory abuse. The garden-variety case reconciles readily with the First Amendment because immediate discriminatory abuse, even if intangible, is simply not speech. How could it be speech? How can yang also be yin? That is, how can any activity be described as "speech" if the activity is integral to an immediate, indivisible, and compensable violation of some discernible victim's fundamental right of equal employment opportunity?

The secondary-effects analogue is thus a largely theoretical alternative for the victimless employee – for the employee who has suffered no immediate discriminatory abuse. Central to the victimless employee's claim is competent proof of *prospective* discriminatory harms flowing, for example, from workplace displays of pornography in an industrial shipyard. In such cases, the most nagging question is one of *relative* causation: to what extent are the prospective harms "secondary" to the direct communicative impact of the pornographic messages?

No amount of reasoned analysis is capable of laying bare these "secondary" effects. They are visible only to "intuition" and "instinct," as is true of all hypotheses about matters of causation. The secondary-effects doctrine, in other words, is a ghost. Of course, this is true of direct causal

hypotheses too, even those as direct as the law of gravity,[368] and as direct as the communicative impact of bigoted speech. They are all "[g]hosts trying to find their place among the living."[369]

In any given shipyard, however, these ghost-like secondary effects may intuitively be very visible. If not, then perhaps the pornography is not prospectively problematic speech, but instead immediately harmful discriminatory abuse. This was probably true of the employer-endorsed pornography at Jacksonville Shipyards. How could that oppressive pattern of employer-endorsed pornography have been regarded as "speech"? How can yang also be yin?[370]

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[368] PIRSIG, *supra* note 357, at 30-32.

[369] *Id.*

[370] This, in essence, was the question I once unwittingly put to a classroom full of frustrated students who had the great misfortune of suffering through my first semester of law teaching. The course was Research & Writing. My main research assignment that semester centered on a hypothetical scenario that involved verbal and symbolic activity, much like the pornography at Jacksonville Shipyards. The totality of my hypothetical scenario resided squarely in a foggy realm of seemingly simultaneous yin-yang potential. Truth be told, I didn't then understand at all this dual-essence assumption I was making about my own assignment. If I had, I would not have been so stubbornly dismissive of the many students who asked, in effect, "It can't be both, can it?"