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"Because the Constitution Requires It and Because Justice Demands It": Specific Speech Injunctive Relief for Title VII Hostile Work Environment Claims

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“BECAUSE THE CONSTITUTION REQUIRES IT AND BECAUSE JUSTICE DEMANDS IT”:[†] SPECIFIC SPEECH INJUNCTIVE RELIEF FOR TITLE VII HOSTILE WORK ENVIRONMENT CLAIMS

Cecilee Price-Huish*

Abusive speech often is used effectively by harassers in the workplace to intimidate, terrorize, objectify, and humiliate their intended victims, thus helping to secure and maintain social inequality in the workforce, especially among racial and gender minority employees. Pursuant to the adoption of Title VII of the Civil Rights Act of 1964, the United States Supreme Court, in Meritor Savings Bank v. Vinson, interpreted the statute’s anti-employment discrimination mandate as imposing liability for conduct or words in the workplace that have the purpose or effect of interfering with an employee’s work performance or of creating an intimidating or hostile work environment. This Article argues that in order to rectify and prevent socio-economic inequality often imposed by employers and co-workers through hateful harmful words, speech that creates a hostile or abusive work environment should be subject to specific speech injunctions that are restricted to the workplace. Such prohibitions on the workplace use of specific words and phrases found to contribute significantly to the creation of an abusive environment are justified by the remedial requirements of Title VII and, thus, would offer the best remedy when used as a preventative and reparative tool to address both future and past abuse.

* * *

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[†] CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE 178 (1985) (quoting President Lyndon B. Johnson, speaking in support of passage of the Civil Rights Act of 1964).

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INTRODUCTION AND BACKGROUND

A primary "function of free speech . . . is to invite dispute[,] . . . induce[] . . . unrest, create[] dissatisfaction, . . . or even stir[] people to anger."¹ Despite the laudability of a constitutional guarantee designed to protect dispute-inciting, emotion-charged, or even highly offensive speech, some courts have indicated that the promise of free speech may not be absolute with respect to harmful, discriminatory speech in the workplace. Perhaps drawing on the Supreme Court's language in *Hishon v. King & Spalding*,² in which the Court stated, "[i]nvidious private discrimination . . . has never been afforded affirmative constitutional protections,"³ some lower courts have issued speech-prohibiting injunctions pursuant to finding that sexist or racist speech resulted in an abusive or hostile workplace.⁴ The willingness

¹ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

² 467 U.S. 69 (1984).

³ *Id.* at 78 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

⁴ See, e.g., *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1527 (D. Me. 1991), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991). After finding a hostile work environment existed, the court in *Harris* ordered an injunction directing the employer to "[cease] . . . any policy . . . or activity which perpetuates [or] condones . . . racial harassment . . . including . . . any and all offensive conduct and speech implicating considerations of race." *Id.* See also *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989). In *Davis*, the court took speech limiting measures by ordering Monsanto to

of some courts to issue speech-restricting injunctive relief, juxtaposed with the constitutional guarantee of free speech, reflects a growing consensus that the law of equality and the right to unlimited free speech are on a collision course.⁵

In light of this potential collision, the question arises as to the reason courts should ever restrict speech. The answer is simple: because of their contextual import and emotive impact, *words have power*. Words alone have the power to intimidate, terrorize, objectify, humiliate, ridicule, and marginalize their intended victims without leaving so much as a scratch. Throughout history, words have been used effectively as weapons to secure and maintain social inequality.⁶ This may be especially true in the context of race or gender discrimination in the workplace. One commentator has suggested that “[s]ocial inequality is substantially created and enforced—that is, *done*—through *words* and images. . . . Elevation and denigration are all accomplished through meaningful symbols and communicative acts in which *saying it is doing it*.”⁷

With respect to constitutional guarantees, however, it would be difficult to find a protected freedom that Americans guard more fiercely than the right to speak freely the words of their choosing as promised in the First Amendment.⁸ Indeed, the Supreme Court has asserted that, “we may and do assume that freedom of speech . . . which [is] protected by the First Amendment from abridgment by Congress . . . [is] among the fundamental personal rights and ‘liberties.’”⁹ Although there may be disagreement as to the scope and meaning of free speech, its preeminence in the American psyche arises from notions of self-fulfillment, determinism, and individual autonomy.¹⁰ While free speech is fundamental to the American experience, there are situations in which individuals abuse the unchecked use of this freedom. Speech or expression that is designed specifically to produce harmful effects on the listener or viewer is evidence of such abuse that not only harms the intended victim, but also harms democratic society as a whole.¹¹

“take prompt action to prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers.” *Id.*

⁵ See CATHARINE A. MACKINNON, *ONLY WORDS* 71 (1993).

[T]he First Amendment has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of free speech—as if the upheaval that produced the Reconstruction Amendments did not move the ground under the expressive freedom, setting new limits and mandating new extensions

Id.

⁶ *Id.* at 13.

⁷ *Id.* (second and third emphases added).

⁸ See U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” *Id.* (emphasis added).

⁹ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹⁰ See FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 6-7 (1981).

¹¹ See Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS

Nowhere is this harm more evident than in the workplace. In an increasingly diversified and integrated society, many workplaces are comprised of a mix of people representing different races, religions, genders, and cultural backgrounds, who may leverage their differences to coerce, intimidate, and terrorize minority status co-workers by using harassing or abusive speech.¹² Speech that necessarily infringes on

L. REV. 287, 307 (1990).

If a principle of free speech *assumes* that the people are hardy or *aims* to help them become so, perhaps coarse and even hurtful comments should be protected in the rough and tumble of vigorous dialogue. But group epithets and slurs designed to wound listeners are another matter. Being impervious to epithets when one is a member of a privileged majority is much easier than when one belongs to a reviled minority, and a general encouragement of civic courage may be more likely if targeted racial and religious abuse is not allowed. Even "courageous citizens" should not be expected to swallow such abuse without deep hurt, and being the victim of such abuse may not contribute to hardiness in ways that count positively for a democratic society.

Id. (emphasis added). One noted critic of workplace harassment law acknowledges that the right of free speech is not absolute; yet, he fears that limitations on speech in the workplace will lead to more impermissibly extensive, far-reaching limitations. See Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 312 (1996) ("Any time one recognizes a new exception to free speech protection, one strengthens the argument that a future proposed exception 'should not be seen as breaking new ground.'") (quoting David Benjamin Oppenheimer, *Workplace Harassment and the First Amendment*, 17 BERKELEY J. EMP. & LAB. L. 321, 323 (1996)).

¹² See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (granting injunctive relief for a female employee at a shipyard when male co-workers and supervisors made remarks demeaning to women and posted in the workplace pictures of women in sexually suggestive or submissive poses); *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, *cert. granted*, 921 P.2d 602 (Cal. 1996) (granting injunctive relief to Hispanic drivers at a rental car agency when managers routinely called the drivers derogatory names and continually demeaned them on the basis of their race and national origin); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (advocating legal sanctions against racist speech based on the effects of such speech upon the victims); Oppenheimer, *supra* note 11, at 323-24 (arguing that Title VII law, prohibiting much workplace harassment, is consistent with First Amendment free speech protections); Suzanne Sangree, *A Reply to Professors Volokh and Browne*, 47 RUTGERS L. REV. 595 (1995) (refuting claims that Title VII protections might have a chilling effect on workplace speech and contending that there is a compelling need to prohibit sexual harassment in the workplace); see also Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-49 (1982) (noting that individual harm from hateful, spiteful, threatening, or coercive words may be manifest in humiliation, isolation, and self-hatred); Donald Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 672-74 (1985) (discussing the constitutionality of a tort action for racial insult and a more general tort action for emotional distress for the intentional use of speech to inflict a mental injury). In the employment context, when there is little freedom to leave the situation or fight against an

the rights and well-being of others, however, is not an absolute right, as evidenced by the unprotected status of defamation,¹³ fighting words,¹⁴ and obscenity.¹⁵ In the employment context, the Supreme Court has been reluctant to carve out an equally broad, generally applicable exception for discriminatory speech in the workplace. This reluctance exists despite the uniqueness of the work environment and the existence of federal statutes prohibiting workplace harassment, which are inclusive of harassing speech that leads to abusive, intolerable working conditions.¹⁶ As one commentator observed, it seems that "the law of employment discrimination has been developed outside the mainstream of ordinary free speech jurisprudence."¹⁷

Perhaps the most significant recent development in employment discrimination law has been the adoption of Title VII of the Civil Rights Act of 1964,¹⁸ which states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁹ The Supreme Court has interpreted this language to mean that employers may be liable for speech that creates an abusive work environment²⁰ or, more specifically, for words that have the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."²¹ It is important to note that the Court has recognized that *words alone* may lead to a discriminatory hostile work environment,²² if the offending words pervade the workplace and are so severe that their continued utterance makes it extremely burdensome or impossible for the intended victim to continue under the terms and conditions of his or her employment.²³ It is against this statutory and interpretive backdrop that the Court has seen fit to put restrictions on free speech in order to prevent employees from being subjected to a hostile work environment.

First, it must be noted that Title VII specifically provides for injunctive relief, pursuant to a finding of a hostile work environment, if such an order is necessary to prohibit continued abuse.²⁴ Some courts have gone so far as to find that the judiciary

abusive supervisor, a speaker consciously may try to hurt, humiliate, or intimidate the victim with little fear of reprisal. Certainly, such injury to an employee is likely to affect his or her morale, performance, and productivity.

¹³ See *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

¹⁴ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

¹⁵ See *Roth v. United States*, 354 U.S. 476, 485 (1957).

¹⁶ See *infra* notes 18-19 and accompanying text.

¹⁷ KENT GREENAWALT, *FIGHTING WORDS* 77 (1995).

¹⁸ 42 U.S.C. § 2000e-2 (1994).

¹⁹ *Id.* § 2000e-2(a)(1).

²⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

²¹ *Id.* at 65 (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)).

²² See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18-22 (1993) (citing *Meritor*, 477 U.S. at 64, 67).

²³ See *id.* at 21 (quoting *Meritor*, 477 U.S. at 65, 67).

²⁴ See 42 U.S.C. § 2000e-5(g)(1) (1994); see also *Amirmokri v. Baltimore Gas & Elec.*

has a *duty* to render relief that will eliminate past discriminatory effects, while preventing similar discrimination from occurring in the future.²⁵ Under this mandate, injunctive relief, in many circumstances, may offer the best remedy when used as a preventative and reparative tool against racist, sexist speech that creates a hostile work environment.²⁶ Additionally, the potential efficacy and conduct-deterrent effect of injunctive relief should quell any constitutional concerns with regard to an irreparable injury requirement and the doctrine of prior restraints,²⁷ because Title VII injunctive relief is designed to prevent past wrongs from recurring while attempting to eliminate past discriminatory effects. Title VII thus should be compared to liability rules because, like other forms of civil relief, injunctions simply control conduct, namely discrimination-based harassment, through deterrence.²⁸

This Article will argue that, in order to promote the remedial certainty required by Title VII and to rectify the social inequality often imposed in the workplace through hateful, harmful words, speech creating a hostile or abusive work environment should be subject to specific speech injunctions. These injunctions would prohibit workplace use of specific words and phrases found to contribute significantly to the creation of an abusive environment. Part I of the Article discusses the reasons employees in the workplace warrant special speech-limiting protection. Part II analyzes hostile work environment claims and the mechanisms through which to categorize challenged workplace speech as severe or pervasive enough to be deemed abusive. A flexible "objective person" standard that would allow for subjective analysis based on gender or racial status should govern those determinations. Part III considers the efficacy and desirability of specific speech injunctive relief. This Section also resolves any conflict between such relief, the First

Co., 60 F.3d 1126, 1132 (4th Cir. 1995) ("The equitable relief available in Title VII workplace harassment cases is an injunction prohibiting further harassment.").

²⁵ See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1216 (D.D.C. 1990), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

²⁶ See *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, 614 (1996), *cert. granted*, 921 P.2d 602 (Cal. 1996). The court in *Aguilar* used the following example to illustrate the need for and usefulness of an injunction:

[Consider] for example, . . . a black laborer whose supervisor repeatedly calls him a "nigger" at work. What can the employee do? Our colleague would tell him: "Yes, your boss is being rude and impolite, but don't be so middle class; remember that you are working in the vigorously physical, more frank and less euphemistic workaday world. But if you insist on being culturally parochial and doing something about it, short of punching him in the nose and getting yourself fired, you can sue him. After a few years of litigation and thousands of dollars in legal fees, you might recover some money. Just don't expect us to tell him he can't call you a nigger at work anymore. We can make him pay, but we can't make him stop. But don't worry: if he continues to call you a nigger, *you can sue him again!*"

Id.

²⁷ See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 6 (1978).

²⁸ See *id.* at 8-12.

Amendment, and the prior restraints doctrine by applying the secondary effects doctrine, which validates speech injunctions aimed at restricting illegal conduct such as employment discrimination. Finally, Part IV contemplates the reconciliation of hostile work environment claims and constitutional considerations to justify further the issuance of specific speech injunctions.

I. WHY THE WORKPLACE WARRANTS SPECIAL PROTECTION

A. *Captive Audience*

In the employment context, unabridged free speech poses interesting problems due to the unique nature of the workplace—namely, that employees are members of a captive audience. A captive audience is essentially a group, or a member of a group, that is unable reasonably to avoid exposure to harmful, offensive speech. In *Resident Advisory Board v. Rizzo*,²⁹ the court held that plaintiff employees were a captive audience because they were “powerless to avoid bombardment by derisive speech and noise”³⁰ short of walking off the jobsite.³¹ Justice White, in his concurring opinion in *R.A.V. v. City of St. Paul*,³² not only supported the notion of captive audiences, but argued that when the target of hateful, harmful speech is a member of a captive audience, proper regulations may restrict the speech to protect the listener.³³ “Although the First Amendment protects offensive speech, it does not require us to be subjected to such expression at all times, in all settings. We have held that such expression may be proscribed when it intrudes upon a ‘captive audience.’”³⁴ When an employee is forced to make a choice between (1) being subjected to a continuous barrage of racist or sexist epithets, or risking the loss of her job by walking out, retaliating, or (2) protesting against such speech, she is a member of a captive audience for whom courts may proscribe speech.

Assuming that employees are members of a captive audience, the solution to racist or sexist discrimination in the workplace cannot possibly be the “do nothing” approach, which Molly Ivins has advocated.³⁵ Certainly, the cure for the abusive uses and harms of free speech in the workplace cannot be more unregulated use of hateful, harmful, and destructive speech.³⁶ The “do nothing” approach may be appropriate

²⁹ 503 F. Supp. 383 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3d Cir. 1977), and *cert. denied*, 435 U.S. 908 (1978).

³⁰ *Id.* at 402.

³¹ *See id.*

³² 505 U.S. 377 (1992).

³³ *See id.* at 414 n.13 (White, J., concurring).

³⁴ *Id.* (citation omitted).

³⁵ *See* Molly Ivins, *Havin' Fun Fightin' for Freedom*, Address at The Sex Panic: A Conference on Women, Censorship and “Pornography,” New York Law School (May 7-8, 1993).

³⁶ *See id.*

I need the First Amendment so that I'll be able to say to people who say things I do not agree with, “Look, you yellow-bellied son of a bitch—you run on all

for the general societal context in which a person can respond to sexist or racist insults by either walking away or launching counter-insults or verbal attacks of their own. The workplace, however, is not part of the naturally occurring world in which people are completely free to associate with whom they please. Rather, it is an unnatural construct in which very different types of people are required to work side by side, simply in order to make a living or feed their families. Indeed, the workplace is different.

B. *Insufficiency of the Chaplinsky Fighting Words Doctrine in the Workplace*

Many commentators point to the existence of the fighting words exception to the right to free speech as adequate protection for victims of severe racist and sexist speech in the workplace.³⁷ The fighting words rule established in *Chaplinsky v. New Hampshire*,³⁸ however, is not sufficient in the workplace because it requires the use of such words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"³⁹ before any substantive speech restrictions are put in place. The odd result of this doctrine is that it only protects those who are likely to react with violence, while it abandons those who are either unable or too scared to fight back. As Kent Greenawalt rightly points out, it is highly improbable today that any words would cause the average listener to respond with immediate violence,⁴⁰ especially in the workplace where the fear of dismissal for a violent act is a powerful restraint. Professor Mari Matsuda supports this conclusion by advocating that racist and sexist speech be treated as a *sui generis* category,⁴¹ one which "present[s] an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond"⁴² that it should fall outside the realm of protected discourse.

fours, you molest small children, you have the mind of an adolescent tyrant." I need to . . . be able to answer them back.

Id., quoted in NADINE STROSSEN, DEFENDING PORNOGRAPHY 14 (1995). It is hard to believe that this approach could really be the answer. Jan Douglas, director of the Community Relations Commission for Atlanta has commented, "[i]f blacks and Jews and other minorities were similarly organized for harassment of and violence to whites, the nation would be turning upside down." Jan Douglas, Comments at the Open Meeting on Racial and Religious Bigotry and Violence, Atlanta, Ga. (Sept. 24, 1981), quoted in Matsuda, *supra* note 12, at 2375 n.268.

³⁷ See, e.g., Ivins, *supra* note 35.

³⁸ 315 U.S. 568 (1952).

³⁹ *Id.* at 572.

⁴⁰ See Greenawalt, *supra* note 11, at 297-99. "Suppose women, or members of a particular ethnic group, are much less likely to fight than are men, or members of other ethnic groups. That does not mean the listeners are less hurt when insulted." *Id.* at 299.

⁴¹ See Matsuda, *supra* note 12, at 2357.

⁴² *Id.*

II. TITLE VII AND FINDING A HOSTILE WORK ENVIRONMENT

Perhaps due to the “captivity” of workers and the inadequacy of the fighting words doctrine (or any other meaningful workplace protection for racial minorities), Congress enacted Title VII of the Civil Rights Act of 1964.⁴³ Title VII states that it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁴⁴

A. *What Is a Hostile Work Environment?*

Despite the seemingly clear mandate of Title VII’s language, the Supreme Court took more than twenty years to recognize harassment-based hostile work environment claims. In the landmark case of *Meritor Savings Bank v. Vinson*,⁴⁵ the Supreme Court held that employers could be held liable for speech that creates a hostile work environment under Title VII.⁴⁶ In *Meritor*, the Court defined actionable speech as “[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁴⁷ Since *Meritor*, courts have gone one step further and will now issue injunctions against actionable workplace speech.⁴⁸

B. *The Sufficiently Severe or Pervasive Perplex*

Following the *Meritor* majority’s lead, the majority in *Harris v. Forklift Systems, Inc.*⁴⁹ attempted to give more substance and form to hostile work environment claims.⁵⁰ The Court in *Harris* held that a workplace permeated with discriminatory behavior that is “sufficiently severe or pervasive” to create a discriminatory hostile or abusive working environment violates Title VII.⁵¹ The Court reaffirmed its

⁴³ 42 U.S.C. § 2000e-2 (1994).

⁴⁴ *Id.* § 2000e-2(a)(1).

⁴⁵ 477 U.S. 57 (1986).

⁴⁶ See *id.* at 64-65 (“The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ [and racial minorities] in employment.”) (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁴⁷ *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)) (emphasis added).

⁴⁸ See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599 (1996), *cert. granted*, 921 P.2d 602 (Cal. 1996).

⁴⁹ 510 U.S. 17 (1993).

⁵⁰ See *id.* at 17-19.

⁵¹ *Id.* at 21-22 (citing *Meritor*, 477 U.S. at 64, 67).

position in *Meritor* by requiring that a complainant demonstrate a hostile work environment by showing “discriminatory intimidation, ridicule, and insult, . . . sufficiently severe or pervasive to alter the conditions of the victim’s employment”⁵² permeates the workplace.

In its unanimous holding, the Court gave some definition to the words “sufficiently severe or pervasive” by refusing to limit the discrimination-prohibiting language of Title VII⁵³ to a finding of economic or tangible discrimination or harm.⁵⁴ The Court also emphasized that factfinders do not need to focus their attention upon finding that the alleged victim suffered “concrete psychological harm,” because Title VII does not require proof of such harm:⁵⁵

Title VII comes into play before the harassing conduct leads to a nervous breakdown. . . . Certainly Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being, but the statute is not limited to such conduct. So long as the environment would *reasonably be perceived, and is perceived*, as hostile or abusive, there is no need for it also to be psychologically injurious.⁵⁶

Despite this additional guidance, the Court’s continued adherence to the “sufficiently severe or pervasive” standard has attracted criticism for being overly broad and vague and, thus, leaving too much discretion in the hands of juries.⁵⁷ The Court, however, did not leave juries in an abyss but, rather, provided a non-exhaustive list of factors

⁵² *Id.* at 21 (quoting *Meritor*, 477 U.S. at 65, 67) (citation omitted).

⁵³ It is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (1994).

⁵⁴ *See Harris*, 510 U.S. at 22-23.

⁵⁵ *See id.* at 22.

⁵⁶ *Id.* (emphasis added) (citation omitted).

⁵⁷ *See id.* at 24 (Scalia, J., concurring) (“As a practical matter, today’s holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.”). Yet, in his concurrence, Justice Scalia admits that “what constitutes ‘negligence’ (a traditional jury question) is not much more clear and certain than what constitutes ‘abusiveness.’” *Id.*; *see also* Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 568 (1995) (“How can you predict whether a jury (perhaps a jury that’s not that keen on Gauduin nudes, for reasons entirely unrelated to sex discrimination) will indeed find the speech to be ‘severe’ or ‘pervasive,’ or the environment ‘hostile’ or ‘abusive?’”). Volokh argues that the vague “severe and pervasive” standard has caused a chilling effect among employers who now take all possible steps to make sure that they never engage in potentially actionable speech. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1812 (1992). Such self-policing is not judicially required, nor is it cause for alarm. It is not suggested that employers and potentially-offending employees be barred from using hateful, abusive, insulting, or racially and sexually derogatory speech on their own time. At most, employers and employees would be prevented from using such hateful and abusive speech during the mere 40 to 60 hour work week.

that may contribute to, or be evidence of, “sufficiently severe or pervasive” abuse or hostility in the workplace.⁵⁸ In *Harris*, the Court found that a discriminatory abusive work environment will often: (1) detract from employees’ job performances; (2) discourage employees from remaining on the job; or (3) keep them from advancing in their careers.⁵⁹ The Court should expound upon these factors, mentioned only as dicta in *Harris* to formulate a more concrete test for the “sufficiently severe and pervasive” standard. Doubts as to whether a jury could evaluate the alleged violative conduct as “sufficiently severe or pervasive,” using a test based on the above mentioned factors coupled with findings as to “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating . . . ; and whether it unreasonably interferes with an employee’s work performance,”⁶⁰ ignore the reality that the judicial system entrusts juries to decide what constitutes negligence, while armed with a standard that offers no more clarity than the proposed tri-factor abusiveness standard from *Harris*.⁶¹ Even Justice Scalia has conceded this glaring truth.⁶²

C. A Tri-Factor “Sufficiently Severe or Pervasive” Test

In the interest of advancing a more consistent application and fairer results, courts should adopt the *Harris* dicta as a tri-factor test for determining whether the “sufficiently severe or pervasive” standard has been satisfied. In order to meet the standard, the complainant would be required to demonstrate one or more of the following factors: (1) hampered job performance, evidenced by lowered productivity or unsatisfactory evaluations; (2) suppressed advancement opportunities, evidenced by promotion stagnation or non-consideration; or (3) job dissatisfaction, evidenced by lowered self-esteem, feelings of fear and intimidation in the workplace, or a desire to quit or seek employment elsewhere because of the alleged harassment. Due to the difficulty of divining job dissatisfaction, courts should measure the third factor by an objective/subjective standard.

D. The Objective/Subjective Person

Unfortunately, in *Harris*, the Court adhered to the objective employee standard elucidated in *Meritor* as a mechanism for preventing conduct that is “merely offensive” from becoming actionable under Title VII.⁶³ A more accurate standard for

⁵⁸ See *Harris*, 510 U.S. at 23.

⁵⁹ See *id.* at 22.

⁶⁰ *Id.* at 23.

⁶¹ See *id.* at 24 (Scalia, J., concurring).

⁶² See *id.* Justice Scalia stated that, if not for the language of the statute, he would favor an absolute test to determine whether conduct is “sufficiently severe or pervasive” to create a hostile or abusive environment: “whether the conduct unreasonably interferes with an employee’s work performance.” *Id.*

⁶³ See *id.* at 21 (O’Connor, J.).

Conduct that is not severe or pervasive enough to create an objectively hostile

ascertaining the impact of alleged harassment and determining whether the harassment caused job dissatisfaction, workplace fear, intimidation, or hampered performance, however, would be the objective/subjective person standard adopted by the Sixth and Seventh Circuits.⁶⁴ In *Brooms v. Regal Tube Co.*, the Seventh Circuit directed district courts to

employ a dual standard when evaluating a Title VII sexual harassment claim, considering the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being, as well as the actual effect upon the particular plaintiff bringing the claim.⁶⁵

The Seventh Circuit reaffirmed the utility of an objective/subjective standard in *Daniels v. Essex Group, Inc.*⁶⁶ when it held that frequent racist invectives must create both an objectively and subjectively abusive work environment to be found actionable under Title VII.⁶⁷ This standard provides a safeguard that would prevent courts from catering to frivolous or hypersensitive claims, while recognizing the subjective element of language and conduct aimed at a member of a minority or under-represented group. Following the Seventh Circuit's admonition, the court in *Robinson v. Jacksonville Shipyards, Inc.*⁶⁸ held that, in order for workplace speech to be found to have created a hostile work environment under Title VII, a claimant must satisfy the objective prong by showing pervasive or salient conditions of discrimination in the work environment.⁶⁹ Once a complainant satisfies the objective prong, the *Robinson* court held that, under the subjective prong, the complainant must show that she was "at least as affected as the reasonable person *under like circumstances*."⁷⁰ The court's inclusion of "under like circumstances" seems to envision a standard in which the "reasonable person" would share the complainant's racial or gender status.⁷¹

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

Id. at 21-22.

⁶⁴ See *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

⁶⁵ *Brooms*, 881 F.2d at 419.

⁶⁶ 937 F.2d 1264 (7th Cir. 1991).

⁶⁷ See *id.* at 1273-74.

⁶⁸ 760 F. Supp. 1486 (M.D. Fla. 1991).

⁶⁹ See *id.* at 1524. The court's language demonstrates the need for a clear standard to determine whether the alleged conditions indeed are severe or pervasive enough to satisfy objective harassment criteria. See *supra* text accompanying notes 59-61 (proposing a three factor test for the "sufficiently severe or pervasive" standard).

⁷⁰ *Robinson*, 760 F. Supp. at 1524 (emphasis added).

⁷¹ See *id.*

The Seventh Circuit's objective/subjective interpretation of the standard set forth in *Harris* recognized that reality and fairness demand a subjective analysis be used in tandem with the application of objective criteria. Otherwise, the standard for determining whether the alleged conduct is "sufficiently severe or pervasive" would be a sham, because the "reasonable person" in a workplace is unlikely to be working under the same circumstances as racial or gender minority employees who are often the targets of discriminatory invective. Although the Seventh Circuit used the objective/subjective standard, the Fifth Circuit rejected this standard in *DeAngelis v. El Paso Municipal Police Officers Ass'n*.⁷² The split between the circuits as to what standard to apply is evidence that the *Harris* standard was too vague and did not provide sufficient guidance to lower courts.

In *DeAngelis*, the court reviewed the hostile work environment claims of a number of female police officers.⁷³ Instead of viewing the speech and conduct from the perspective of a reasonable woman in like circumstances, the Fifth Circuit advocated a *purely objective* standard to determine the severity and pervasiveness of the alleged wrongdoing.⁷⁴ Commenting on the choice of this standard, the court in *DeAngelis* stated that "[t]he test is an objective one, *not* a standard of offense to a 'reasonable woman.'"⁷⁵ Unfortunately, adherence to this type of rigid, reality-blind, purely objective standard will severely stunt progress toward gender and racial equality in the workplace. The objective/subjective standard set forth by the *Robinson* court is both fairer and more equitable and will better serve the purpose of Title VII, namely, the elimination of workplace discrimination.

III. INJUNCTIVE RELIEF

Assuming a Title VII complainant is able to clear the hurdles of showing that alleged workplace speech is severe or pervasive enough to create an abusive or hostile work environment, the question remains, under both the proposed tri-factor test and an objective/subjective person standard, as to what type of relief is most appropriate. One option, the injunction, was the primary remedy in the early days of civil rights litigation.⁷⁶ Courts presented with tasks such as desegregating schools, used injunctions because other remedies could not address the problems as well.⁷⁷

⁷² 51 F.3d 591, 594 (5th Cir. 1995).

⁷³ See *id.* at 594.

⁷⁴ See *id.*

⁷⁵ *Id.* (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)) (second emphasis added).

⁷⁶ See FISS, *supra* note 27, at 87-89. Fiss claims that *Brown v. Board of Education*, 347 U.S. 483 (1954), gave injunctive relief special prominence in the fight against discrimination: "School desegregation not only gave the injunction a greater currency, it also presented the injunction with new challenges, in terms of both the enormity and the kinds of tasks it was assigned." *Id.* at 4. The injunction was the tool with which courts were to restructure educational systems around the country. *Id.* The following argument validated the use of this tool: if the use of injunctive relief was denied then the mandate of *Brown* would also be denied—an impermissible result. *Id.* at 5.

⁷⁷ See *id.* at 87-88.

Prospective injunctions were an ideal solution because they accommodated the group nature of civil rights claims, provided specificity, and offered continued supervision.⁷⁸ These same reasons justify the usefulness of the injunction as a remedy for hostile work environment claims under Title VII. When considering enforcement and remedies, monetary damages may not always be the most appropriate form of relief under civil rights legislation, including Title VII.⁷⁹ In support of more liberal use of injunctive relief in the civil rights legislative arena, Professor Owen Fiss advances three reasons why monetary damages may not be an adequate remedy: first, there is very little deterrent effect on the very wealthy or the judgment-proof; second, it arguably is impossible to place a monetary value on all injuries; and third, it is impossible to compensate adequately prospective victims for their fears.⁸⁰

A. *Desirability of Injunctive Relief for Title VII Claims*

Once a claimant shows the existence of a hostile work environment, Title VII clearly allows for injunctive relief as a necessary tool to prohibit further harassment.⁸¹ In successful Title VII actions, courts have gone so far as to say that the court has a *duty* to render relief that will eliminate, as far as possible, the discriminatory effects of the past and prevent similar discrimination from occurring in the future.⁸² Furthermore, judicial precedent leaves no question as to the validity of injunctive relief as a proper remedy for racial or sexual discrimination that causes a hostile work environment under Title VII.⁸³ Injunctive relief is not only valid, under some circumstances, it is the best, most efficacious form of relief because it serves as a preventative and reparative tool against actionable racist, sexist speech.⁸⁴ Professor

⁷⁸ *See id.*

⁷⁹ *See id.* at 75 ("My conceptual world has been shaped in large part by the civil rights experience, and at the core of that experience is a conception of rights that denies their reducibility to a series of propositions assuring the payment of money to the victims.").

⁸⁰ *Id.* at 75-77.

⁸¹ *See* 42 U.S.C. § 2000e-5(g)(1) (1994); *see also* Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1132 (4th Cir. 1995).

⁸² *See* Hopkins v. Price Waterhouse, 737 F. Supp. 1202 (D.D.C. 1990), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

⁸³ *See* EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1070 (11th Cir. 1990) (granting injunctive relief to black employees for racist statements made by managers and coworkers); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1518-19 (9th Cir. 1989) (granting injunctive relief for persistent, sexually offensive remarks, which created a hostile work environment); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534 (M.D. Fla. 1991) (granting injunctive relief for frequent and continuous sexist speech that constituted sexual harassment); Snell v. Suffolk County, 611 F. Supp. 521, 532 (D.C.N.Y. 1985) (issuing a specific speech injunction that prohibited employees from using certain racial and ethnic epithets), *aff'd*, 783 F.2d 1094 (2d Cir. 1986).

⁸⁴ In a recent hostile work environment case, currently awaiting appeal to the California Supreme Court, the California Court of Appeals remanded, and ordered the trial court to

Fiss argues that there is no reason why courts should disfavor or subject the injunction to restrictions such as the irreparable injury requirement and the doctrine of prior restraints because courts do not apply such restrictions to other remedies.⁸⁵ Reparative injunctions—those designed to prevent a past wrong from recurring while attempting to eliminate past effects—are not comparable to damage awards or criminal convictions, but rather to liability rules because injunctions influence conduct through deterrence.⁸⁶

B. *Necessity of Specific Speech Injunctions*

While the reparative and preventative functions of injunctions are fairly established, there is an additional advantage to using specific speech injunctive relief; namely, that such injunctions minimize the risks of over-breadth and vagueness that can plague non-specific injunctive relief. Specific speech injunctions differ from other more generic equitable relief. They explicitly list and prohibit the workplace use of speech found to create a hostile work environment. Such injunctions may be particularly effective because they put all relevant parties on notice of specific speech that constitutes proscribable employment discrimination and, thus, serve as bright guidelines for future speech and conduct. Specific speech injunctive relief, however, is in no way meant to discourage the use of commonly used or commonly understood words in the injunction such as “derogatory,” “racial,” “ethnic,” “epithets,” “sexist,” “uninvited,” “intentional,” and “touching.”⁸⁷ As one court stated, these are “not words of art, are not technical or arcane, and are hardly obscure.”⁸⁸ Additionally, the proposed use of specific word exemplary lists should not be misunderstood to imply exclusivity of terms, nor should judges be expected to anticipate every harmful, derogatory term that might evoke a hostile work environment. A judge should include, however, a list of those terms found actionable in a given case as exemplary of prohibited speech. Although a defendant may attempt to circumvent the injunction by using or creating new, impact-similar terms and phrases, the list will offer context to both defendants and judges by which to measure the potential discriminatory impact of subsequent speech.

Injunctions that provide exemplary lists of prohibited words not only offer context to guide subsequent speech, they force society to acknowledge the harmfulness of the violative words. They do not allow courts to hide behind a veil

issue a specific speech injunction against the defendants. *See Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, 610-11 (1996), *cert. granted*, 921 P.2d 602 (Cal. 1996).

⁸⁵ *See FISS*, *supra* note 27, at 6.

⁸⁶ *See id.* at 8-9.

⁸⁷ *Aguilar*, 53 Cal. Rptr. 2d at 610.

⁸⁸ *Id.* Recognizing the limitations of words, the Supreme Court has stated, “[i]t will always be true that the fertile legal ‘imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in . . . question,’” however, “[c]ondemned to the use of words, we can never expect mathematical certainty from our language.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 & n.15 (1972) (quoting *American Communications Ass’n v. Douds*, 339 U.S. 382, 412 (1950)).

of injunctive vagueness or inadequate relief and, thus, injunctions give sharper teeth to the relief granted. Courts should not pat themselves on the back for issuing “appropriate” injunctive relief to remedy hostile work environments while hiding behind vague, meaningless language that, in effect, says no more than, “do good, avoid evil.” The victims of severe and harmful abusive speech in the workplace deserve more than the type of injunction issued in *Harris v. International Paper Co.*⁸⁹ The injunction in *Harris* simply directed the employer to “[cease] . . . any policy . . . or activity which perpetuates [or] condones . . . racial harassment[,] . . . including . . . any and all offensive conduct and speech implicating considerations of race.”⁹⁰ Courts must demonstrate a willingness to use, and thus defuse, the abusive, ugly words they intend to restrict. The explicit, frank, and specific restriction of words such as “nigger” and “cunt” in injunctive orders, when appropriate, will offer not only unprecedented clarity; it will rob such words of some of their power, thus making the relief much more meaningful to both victims and perpetrators.

On the other hand, critics argue that specific speech injunctions will result in nothing more than meaningless restrictions on speech because the creative mind will always find substitutions for words and phrases that are “off limits.” An answer to this criticism, however, may be the fact that specific speech injunctions need not abandon the general language courts currently use, but simply augment that language by offering non-exclusive lists of prohibited words. Those lists must state clearly that courts intend the prohibited words to provide a context for determining whether other words or phrases would violate the order. Admittedly, prejudice, hate, and ignorance are attitudinal, rather than lexicological, character flaws. While neither Title VII, nor injunctive relief allowed under the statute, can reform the attitudes of bigoted, sexist individuals, Title VII can ensure that such individuals do not create hostile workplaces for their intended victims by expressing those attitudes through abusive, intimidating workplace speech.

C. *Individuation of Injunctive Relief*

In order for specific speech injunctive relief to pass constitutional muster and affect the intended consequence of workplace equality, courts must individuate the injunction.⁹¹ Three factors determine individuation: first, the injunction must address a clearly identified individual; second, the injunction must describe the prohibited conduct with specificity; and third, the injunction must identify the beneficiaries specifically.⁹² The benefit of individuation is that it gives rise to more narrowly tailored injunctions that, in turn, decrease the threat to due process by clearly identifying the parties involved and providing adequate and clear notice of what constitutes a violation. Narrowly tailored injunctions also disallow rote reliance on

⁸⁹ 765 F. Supp. 1509 (D. Me. 1991), *amended by* 765 F. Supp. 1529 (D. Me. 1991).

⁹⁰ *Id.* at 1527.

⁹¹ *See* FISS, *supra* note 27, at 12-13.

⁹² *See id.* at 12.

broad statutory prohibitions such as “don’t discriminate on the basis of race or gender.”⁹³ As a result, use of these injunctions helps to avoid the unintended consequence of courts proffering generalized decrees that will “not effectively change the status quo.”⁹⁴ Issuance of specific speech injunctions, pursuant to a finding of a hostile work environment, would achieve the goals of individuation: first, courts would direct the injunctions to the person or persons who are found liable for the actionable speech; second, courts would define the prohibited speech with specificity and limit such prohibitions to the workplace; and third, the relief would benefit specifically the victims of the actionable speech. One potential downside of narrowly worded injunctions, however, is that individuals may evade them more easily than broad commands.⁹⁵

D. *Potential Hurdles for Specific Speech Injunctive Relief*

In addition to individuation, the irreparable injury requirement poses potentially invalidating hurdles for specific speech injunctions.⁹⁶ Professor Fiss, however, criticizes reliance on the irreparable injury doctrine as a basis for determining when injunctive relief is appropriate.⁹⁷ The doctrine requires that, before courts may grant injunctive relief, the plaintiff must show that no alternative remedy will repair adequately the alleged injury.⁹⁸ The problem with this standard is that it is riddled with ambiguities. As Fiss states, “[i]t is not clear how inadequate—whether greatly or slightly—the alternative remedy must be before an entitlement to an injunction is established.”⁹⁹ Additional inadequacies of this standard include the retrospective nature of a damage action, the interposition of an unpredictable jury, and, possibly, the future financial unresponsiveness of a defendant in cases in which monetary damages are awarded.¹⁰⁰

The prior restraints doctrine also has handicapped unfairly the use of injunctions that place limitations on speech.¹⁰¹ This doctrine does not prevent the issuance of injunctive relief aimed at speech but, instead, places a higher burden on restrictive injunctions; namely, that the restricted speech must be unprotected in a *dramatic, clear, and special* way.¹⁰² However, this strict burden does not hamper other types of relief such as liability rules and criminal prohibitions that are aimed actually or constructively at speech.¹⁰³ As Fiss argues, injunctions are no different, in effect, from liability rules and criminal prohibitions. They all may have a chilling or

⁹³ *Id.* at 13.

⁹⁴ *Id.* at 13-14.

⁹⁵ *See id.*

⁹⁶ *See id.* at 38.

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 39.

¹⁰¹ *See id.* at 40.

¹⁰² *See id.*

¹⁰³ *See id.*

deterrent effect on speech or conduct¹⁰⁴ and, thus, courts should not subject injunctions to a higher burden.¹⁰⁵ To achieve greater parity in relief, courts should lower the standard for limiting speech through injunctive relief in order to eliminate discrimination-based harassment because such relief will be granted only when there is evidence of prior misconduct.¹⁰⁶

E. *The Secondary Effects Rule*

Despite the desirability, necessity, and statutory authority for court-ordered specific speech injunctions to remedy hostile work environments, many courts still are reluctant to issue such relief.¹⁰⁷ As previously discussed, concerns over individuation and irreparable injury may not provide a sound basis for invalidation of specific speech injunctive relief.¹⁰⁸ There may be lingering doubts, however, as to the prior restraints doctrine. Yet, in *Arcara v. Cloud Books, Inc.*,¹⁰⁹ the Supreme Court leveled a major blow against the prior restraints doctrine with respect to speech-limiting injunctions.¹¹⁰ In *Arcara*, the Court held that a speech restriction does not constitute an invalidating prior restraint if first, it is not directed at the expressive content of the speech; and second, it does not eliminate substantially other opportunities for such expression.¹¹¹ Additionally, in *Roberts v. United States*

¹⁰⁴ See *id.* at 40, 69 (discussing the similarity between injunctions, liability rules, and criminal prohibitions). Fiss states:

these instruments may induce silence just as effectively as an injunction. . . . But the similarity between injunctions, liability rules, and criminal prohibitions, that they all have a "chilling effect," seems to be lost when the Court turns to the prior restraint doctrine and holds injunctions to a much more rigorous substantive standard than the other prior restraints.

Id. at 69-70.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 68-70.

The mere fact that the injunction is a restraint on the defendant's liberty . . . cannot count against it; for from one view of the case . . . the defendant either is about to or has already engaged in conduct that is both illegal and harmful. The very purpose of the injunction is to stop that conduct or to correct its effects.

Id. at 68; see also Sangree, *supra* note 12, at 600. Although it has not been adopted by a majority of the Court, at least one U.S. Supreme Court Justice has expressed his opinion that "injunctive relief should be judged by a more lenient standard than legislation . . . [because] injunctions apply solely to an individual or a limited group of individuals who [have engaged in] illegal conduct." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 788 (1994) (Stevens, J., dissenting)).

¹⁰⁷ See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (granting an injunction that did not specify the prohibited speech).

¹⁰⁸ See *supra* notes 91-100 and accompanying text.

¹⁰⁹ 478 U.S. 697 (1986).

¹¹⁰ See *id.* at 707.

¹¹¹ See *id.*

Jaycees,¹¹² the Court stated that “potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.”¹¹³

Roberts and *Arcara* were just a prelude to the final blow to the prior restraints doctrine being used as an invalidating factor against specific speech injunctions as remedies for hostile work environments. In short, the Supreme Court’s explicit recognition of the secondary effects rule in *R.A.V. v. City of St. Paul*¹¹⁴ should ameliorate concern over invalid prior restraints. Stated succinctly, the secondary effects rule “permits, as content-neutral regulation, a prohibition of conduct that is not targeted on the basis of its expressive content.”¹¹⁵ Thus, under *R.A.V.*, courts may circumscribe speech or expression if the restriction is based on the secondary effects of the speech rather than the content.¹¹⁶ “[S]ince words can in some circumstances violate laws directed not against speech but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”¹¹⁷

It seems that, in *R.A.V.*, the Court gave the green light to the idea that racist or sexist speech, which is severe and pervasive enough to create a hostile work environment,¹¹⁸ is tantamount to “discriminatory conduct” as proscribed by the employment discrimination provisions in Title VII.¹¹⁹ Once they classify it as conduct, courts may enjoin the speech as constituting illegal conduct.¹²⁰ When insults and epithets are hurled at an employee, such abusive remarks may thus amount to conduct-based, situation-altering utterances.¹²¹ While the language of both Title VII¹²² and the *Harris*¹²³ opinion focus on prohibiting behavior and conduct that

¹¹² 468 U.S. 609 (1984).

¹¹³ *Id.* at 628 (citing *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976)). This language is the basis for much of the hate speech theory propounded by Richard Delgado. *See generally* Delgado, *supra* note 12 (proposing a tort action for hate speech based on the psychological, sociological, and political effects of the speech).

¹¹⁴ 505 U.S. 377 (1992).

¹¹⁵ *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, 608 (1996), *cert. denied*, 921 P.2d 602 (Cal. 1996). “Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V.*, 505 U.S. at 390.

¹¹⁶ *See R.A.V.*, 505 U.S. at 390.

¹¹⁷ *Id.* at 389.

¹¹⁸ *See id.* at 382-87.

¹¹⁹ *See Aguilar*, 53 Cal. Rptr. 2d at 606-09 (accepting the distinction between conduct and content). *But see* *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596-97 (5th Cir. 1995) (rejecting the distinction between conduct and content, and denouncing the application of Title VII’s language in *R.A.V.* as unilluminating, offhand pronouncements).

¹²⁰ *See Aguilar*, 53 Cal. Rptr. 2d at 606-09, 612.

¹²¹ *See Greenawalt*, *supra* note 11, at 292 (arguing that the situation-altering aspect of speech is more important than the message conveyed about the qualities or attributes of the person who is being verbally attacked); *see also supra* notes 6-7 and accompanying text (discussing the ability of words to be vehicles of discriminatory conduct).

¹²² It is “an unlawful employment practice for an employer . . . to discriminate against any

amount to discrimination, *R.A.V.* paved the way, with the secondary effects doctrine, for courts to recast abusive speech as discriminatory conduct that may be subjected to proscriptive speech restrictions.¹²⁴

The Court in *R.A.V.* even seems to have anticipated specific speech injunctive relief under Title VII, a statute directed at prohibiting certain *conduct*, namely, employment discrimination on the basis of race, gender, etc.¹²⁵ Speaking for the majority, Justice Scalia stated, “for example, sexually derogatory ‘fighting words,’ *among other words*, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.”¹²⁶ By including the phrase “among other words,” the Court seemingly expanded the secondary effects rule to encompass “any speech that creates an abusive work environment in violation of the law of employment discrimination.”¹²⁷ The Court’s discussion of the severe and pervasive use of sexist epithets constituting employment discrimination that “can be swept up incidentally within the reach of a statute directed at conduct rather than speech” applies with equal force to the use of racist invective in the workplace.¹²⁸

The secondary effects rule should have a substantial impact on the type of relief granted for hostile work environment claims. In fact, Justice White’s concurring opinion in *R.A.V.* implied that the Court specifically intended the secondary effects rule to preserve hostile work environment claims.¹²⁹ The California Court of Appeals used the secondary effects rule to validate the imposition of a specific speech injunction in the ground-breaking case, *Aguilar v. Avis Rent-A-Car System, Inc.*¹³⁰ In *Aguilar*, the court stated, “although racist epithets ‘express a discriminatory idea or philosophy,’ that of racial supremacy, their pervasive use in the workplace is not shielded from regulation under Title VII . . . because the target of the regulation is the *secondary effect* of such conduct—employment discrimination—not its expressive content.”¹³¹ Although the defendant in *Aguilar* argued that the “‘emotive impact of speech on its audience is not a ‘secondary effect,’”¹³² the court looked at

individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (1994).

¹²³ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19-22 (1993) (discussing the way words may lead to a discriminatory, hostile work environment and, thus, violate the Title VII prohibition of discriminatory conduct).

¹²⁴ *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (discussing the secondary effects of harmful speech).

¹²⁵ *See id.*

¹²⁶ *Id.* (emphasis added).

¹²⁷ *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, 608 (1996), *cert. granted*, 921 P.2d 602 (Cal. 1996).

¹²⁸ *Id.* at 606 (quoting *R.A.V.*, 505 U.S. at 389).

¹²⁹ *See R.A.V.*, 505 U.S. at 409-10 (White, J., concurring).

¹³⁰ 53 Cal. Rptr. 2d at 606-08.

¹³¹ *Id.* at 607 (citation omitted).

¹³² *Id.* (citing *R.A.V.*, 505 U.S. at 394 (quoting *Boos v. Barry*, 485 U.S. 312 (1988))).

the speech through more expansive lenses.¹³³ “Such speech has more than an emotive impact. By altering the conditions of employment, as adult motion picture theaters alter the conditions of a neighborhood, such speech crosses the line between constitutionally protected expression and proscribable discriminatory conduct.”¹³⁴

In *Aguilar*, the plaintiffs were a group of seventeen Hispanic drivers at Avis’ San Francisco airport location.¹³⁵ The plaintiffs sued Avis on hostile work environment grounds, claiming that the managers subjected them to “‘discriminatory intimidation, ridicule, and insult’ . . . that [was] ‘sufficiently severe or pervasive to alter the conditions of [their] employment.’”¹³⁶ The plaintiff’s complaint alleged that Avis managers at the San Francisco location routinely called the plaintiffs derogatory names and continually demeaned them on the basis of their race and national origin.¹³⁷ In response to a jury finding that the defendants’ conduct was sufficiently severe and pervasive to alter the conditions of employment, the trial judge granted an injunction ordering the defendants to “‘cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis . . . [and to] further refrain from any uninvited intentional touching of said Hispanic/Latino employees.’”¹³⁸

A problematic feature of the trial judge’s injunction, however, was that it restricted the defendants’ speech beyond the workplace. Nevertheless, on appeal, the court upheld the injunction based on a finding that the defendants did indeed subject a number of the plaintiffs to a “continual barrage of opprobrious racist invective”¹³⁹ that resulted in a hostile work environment.¹⁴⁰ The Court of Appeals, however, declined to modify the injunction directly, but reversed and remanded the injunctive portion of the judgment, directing the trial judge to: (1) redraft the injunction, limiting its scope to the workplace; and (2) add an exemplary list of prohibited derogatory racial epithets, specifying those previously used in the workplace by the defendants.¹⁴¹ The court pointed to *Snell v. Suffolk County*¹⁴² as an example of how to fashion specific speech injunctive relief.¹⁴³ In *Snell*, the court issued an injunction specifically requiring a jail warden to forbid the use of the following words by corrections officers in the workplace: “‘nigger,’ ‘polack,’ ‘kike,’ ‘spic,’ ‘guinea,’ ‘honky,’ ‘mick,’ ‘coon,’ and ‘black bitch’ (all of which [had] been used on the job by correction officers in recent years).”¹⁴⁴ The injunction also forbade the posting or

¹³³ See *id.*

¹³⁴ *Id.*

¹³⁵ See *id.* at 602.

¹³⁶ *Id.* at 602 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

¹³⁷ See *id.*

¹³⁸ *Id.* at 603.

¹³⁹ *Id.* at 604.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 614.

¹⁴² 611 F. Supp. 521 (E.D.N.Y. 1985), *aff’d*, 782 F.2d 1094 (2d Cir. 1986).

¹⁴³ See *Aguilar*, 53 Cal. Rptr. 2d at 605-06.

¹⁴⁴ See *Snell*, 611 F. Supp. at 532.

distribution of derogatory bulletins, cartoons, and other written material, as well as any racial, ethnic, or religious slurs.¹⁴⁵

The *Aguilar* court's focus on the secondary effects of severe or pervasive racist speech as discriminatory conduct that altered the conditions of the victim's employment¹⁴⁶ recognized the socio-economic realities of employment discrimination. Discriminatory conduct, when evidenced by proscribable speech, affects more than the listener's ego or feelings. Ultimately, the results of continuously abusive, harmful speech will be demonstrated by decreased job performance, inability to advance, employment stagnation, and attrition of minority race and gender status employees.¹⁴⁷ Once employment discrimination has been identified correctly, however, the secondary effects rule can restrict such speech. If an ensuing specific speech injunction, designed to remedy hostile work environment, is limited to the workplace, and the provisions of the injunction are narrow and specific, as evidenced by an exemplary list of prohibited words, it is likely courts will find that the injunction "burden[s] no more speech than necessary to serve the significant government interest in proscribing employment discrimination."¹⁴⁸

F. *A Model Specific Speech Injunction Based on Robinson v. Jacksonville Shipyards, Inc.*¹⁴⁹

In *Robinson v. Jacksonville Shipyards, Inc.*,¹⁵⁰ the court found that Jacksonville Shipyards violated Title VII by maintaining and subjecting six female skilled craftworkers to a sexually hostile work environment.¹⁵¹ The court found that some male employees subjected female employees to daily attacks of visual sexual harassment during which the men hung pictures of women with exposed genitals or breasts, some engaged in sexual acts or masturbation, in work areas or community locker rooms.¹⁵² Often the women were also targets of verbal abuse, including such statements as "[h]ey pussycat, come here and give me a whiff,"¹⁵³ and "[t]he more you lick it, the harder it gets."¹⁵⁴ At the shipyard, it was also commonplace for sexually explicit graffiti, like the phrase "lick me you whore dog bitch,"¹⁵⁵ to appear on the walls of women's work areas. Due to the egregious nature of the conduct at Jacksonville Shipyards, the court found it necessary to fashion both negative and

¹⁴⁵ See *id.*

¹⁴⁶ See *Aguilar*, 53 Cal. Rptr. 2d at 606-08.

¹⁴⁷ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

¹⁴⁸ *Aguilar*, 53 Cal. Rptr. 2d at 612 (citing *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994)).

¹⁴⁹ *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1540.

¹⁵² *Id.* at 1494-99.

¹⁵³ *Id.* at 1498.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1499.

affirmative relief.¹⁵⁶ While the injunctive relief granted was a step in the right direction, the *Robinson* injunction was too vague—specifically the Court did not delineate the prohibited speech,¹⁵⁷ as the court in *Aguilar* proposed.¹⁵⁸

Borrowing from the record in *Robinson*, the following injunction is a model specific speech injunction that would offer more appropriate, meaningful, and contextual relief to the victims in that case:

Jacksonville Shipyards is ordered immediately to cease any policy, activity, or omission that allows, perpetuates, or condones sexual harassment. Furthermore, Jacksonville Shipyards, and all employees thereof, are ordered immediately to refrain from using any abusive, hostile, or harmful speech that is directed toward female employees or is spoken in the presence of female employees that implicates considerations of sex or gender in the workplace. Any workplace use of, or reference to, the following words, through speech or any other form of verbal or non-verbal communication, will be considered violative of this order: cunt, whore, bitch, dick. This list is a non-exclusive list that is meant to provide guidance and context in determining whether other words are violative of this order. This injunction also prohibits the workplace use of any other words, through speech or any other form of verbal or non-verbal communication, that a reasonable person could reasonably understand to invoke or incite similar meaning, communicative import or emotive impact as the explicitly prohibited words.

G. *Inadequacy of Alternative Approaches*

On the opposite end of the spectrum, Eugene Volokh proposes a solution very different from specific speech injunctions that would limit workplace speech restrictions to only those situations involving one-to-one speech.¹⁵⁹ Volokh suggests that speech may be restricted without interfering with a speaker's ability to reach other willing listeners "[w]hen the *only* listener is one who doesn't want to hear."¹⁶⁰ Volokh, thus, would shield from harassment law speech restrictions all workplace communications, including posters, newsletters, and conversations that take place in group areas or group settings in which the listeners are either mere members of a larger listening group, or are presumptively "willing listeners."¹⁶¹ There are practical obstacles, however, with Volokh's proposal. It is possible that statements made to

¹⁵⁶ See *id.* at 1534-39 (enjoining the defendant from engaging in or permitting further sexually harassing behavior and affirmatively enjoining the defendant to adopt a sexual harassment policy).

¹⁵⁷ See *id.* at 1541.

¹⁵⁸ See *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, 610-11 (1996), *cert. granted*, 921 P.2d 602 (Cal. 1996).

¹⁵⁹ Volokh, *supra* note 11, at 311.

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ *Id.*

a group constructively may be one-to-one communication in fact if the intent of the speaker is to send a message to a particular person in the group, as was the case in *Robinson*.¹⁶²

In *Robinson*, male workers continually subjected female shopworkers to sexually derogatory and threatening statements made in large groups of people that consisted primarily of male co-workers.¹⁶³ In one such instance, the record stated, "Hawkins [male] humiliated Banks [female] by stating in front of a large group of male coworkers, 'if you fell into a barrel of dicks, you'd come up sucking your thumb.'"¹⁶⁴ Another group attack occurred when a male co-worker sniffed a plaintiff's behind in front of a group of male co-workers as she walked up a gangway.¹⁶⁵ Because these events took place in group settings, Volokh would oppose proscribing such comments and behavior through injunctive relief. It seems, if courts adopt Volokh's one-to-one proposal, female employees such as those in the *Robinson* case, would be expected either to: (1) endure abusive and intimidating comments and behavior regardless of their severity or pervasiveness; or (2) anticipate such comments and effectively remove themselves from the harassing situation—not a very realistic option in the workplace.

IV. RECONCILIATION OF HARASSMENT LAW AND CONSTITUTIONAL CONSIDERATIONS JUSTIFY SPECIFIC SPEECH INJUNCTIONS

A. *Harassment Law Promotes Democracy and Serves the Interests of the First Amendment*

As previously discussed, workplace harassment law has developed outside "the mainstream of ordinary free speech jurisprudence."¹⁶⁶ Yet, as one commentator suggests, the commitment to equality through the adoption of civil rights legislation necessarily may have some implications for speech law and may require the setting of new limits or new extensions.¹⁶⁷ This Article contends that specific speech injunctions are precisely the type of new limit on free speech that courts should permit in order to effectuate the purposes of Title VII. One commentator has advanced a novel argument as to how specific speech injunctions and the First Amendment may be reconciled. Suzanne Sangree suggests that, rather than harming

¹⁶² See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1500 (M.D. Fla. 1991). Indeed, insulting or intimidating discriminatory speech merely gains more power and venom when delivered to the intended victim in front of her co-workers. See Delgado, *supra* note 12, at 143.

¹⁶³ See *Robinson*, 760 F. Supp. at 1491-1501.

¹⁶⁴ *Id.* at 1500.

¹⁶⁵ See *id.*

¹⁶⁶ GREENAWALT, *supra* note 17, at 77; see also MACKINNON, *supra* note 5, at 71.

¹⁶⁷ GREENAWALT, *supra* note 17, at 77.

or infringing upon free speech protections, hostile work environment relief, including injunctions, serves the interests of a free democracy.¹⁶⁸ She states,

the First Amendment interest in promoting citizens' participation in the polity is served by enabling women [and other minorities] to participate on more equal terms in the economy. Just as equality is the foundation of a free economy, so is equality the foundation of democracy. . . . Speech which effectuates discrimination in employment undermines First Amendment interests by imposing economic coercion which disadvantages women solely on the basis of gender.¹⁶⁹

This argument seems to suggest that, in order to be a participant in democratic self-governance, racial and gender minorities must be granted a place at the economic opportunity table—a place that only can be reserved absent a discriminatory hostile work environment.¹⁷⁰

B. *The Right to Gainful Employment is a Protected Liberty Interest*

By validating that the right to earn a living is an essential liberty interest, the Supreme Court has substantiated further the pluralistic, economic equality justification for specific speech injunctions. Sangree adroitly points out that the “law compels [a person] to starve if [s]he has no wages, and compels [her] to go without wages unless [s]he obeys the behests of some employer,”¹⁷¹ which obedience may include endurance of hostile or abusive speech. Commenting on the right to work, the Court stated in *Hampton v. Mow Sun Wong*¹⁷² that the “right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”¹⁷³ It would be hard to find a more powerful argument equating the right to work unhampered by discrimination as a protected liberty interest—one that affords individuals the freedom and opportunity to partake of all their constitutionally-protected freedoms. One commentator has equated the right to earn a living with the right to free speech:

¹⁶⁸ See Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment & the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 558-60 (1995).

¹⁶⁹ Sangree, *supra* note 168, at 559-60 (citation omitted). A differing view is that speech restriction “neither treats citizens as autonomous and rational nor accords them the dignity and equal status they warrant under a democratic government.” Greenawalt, *supra* note 11, at 289.

¹⁷⁰ See Sangree, *supra* note 168, at 558-60.

¹⁷¹ *Id.* at 485 (quoting Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923)).

¹⁷² 426 U.S. 88 (1976).

¹⁷³ *Id.* at 102 n.23 (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

It is not surprising that [judges and professors] would view freedom of expression as primary to the free play of their personalities. But most men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their mind.¹⁷⁴

This economic right to freedom of occupation can only exist absent harassing workplace discrimination and intimidation.

C. *Economic Interests of States Validate Specific Speech Restrictions*

Limitations on speech that creates a hostile work environment should not be viewed as pet projects of legal scholars and judges. In addition to Supreme Court recognition of the right to gainful employment as a protected liberty interest,¹⁷⁵ and society's interest in fostering an inclusive democracy and participatory equality in the workplace, which collectively demand placing some speech limiting restrictions in the workplace where necessary, states' interests in economic growth and productivity also weigh in favor of limitations. Permitting unabridged free speech in the workplace that has the potential to create a hostile work environment does not promote the societal goal of a productive working class. The reality is that those who face the extreme conditions posed by a hostile work environment ultimately will find their employment intolerable and will leave in order to escape the infliction of further psychological harm or intimidation. The result of such workplace departures could lead to lower productivity and higher welfare and unemployment rolls. As the entitlement payor, therefore, the state has an economic interest in promoting non-hostile employment conditions.

D. *Substantive Due Process Considerations*

Narrowly circumscribed restrictions on hostile, abusive speech in the workplace also will safeguard the constitutional "right to be let alone," which at least one Supreme Court Justice has stated as being the "right most valued by civilized men."¹⁷⁶ The privacy right to be left alone is one that must extend beyond bodily integrity to the spheres of emotional and psychological integrity. The fact that Congress adopted Title VII, with its promise of appropriately applied relief to remedy the abusive effects of workplace discrimination,¹⁷⁷ gives rise to an expectation interest.¹⁷⁸ Through this statutory scheme, the government must ensure that

¹⁷⁴ See Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46 (1986).

¹⁷⁵ See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (holding that "liberty" as intended by the Fourteenth Amendment includes an individual's right to live and work where he or she will).

¹⁷⁶ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹⁷⁷ See 42 U.S.C. § 2000e-5 (1994).

¹⁷⁸ See *Sherbert v. Verner*, 374 U.S. 398 (1963) (ordering the state of South Carolina to pay Adell Sherbert, a member of the Seventh Day Adventist Church, unemployment benefits

employees retain the "right to be [psychologically] left alone."¹⁷⁹ In the employment context, courts must weigh the combined effects of (1) an individual's liberty interest in earning a living, (2) the desire to maintain personal dignity, and (3) the fundamental right to be free from the psychological harms of discriminatory harassment against the interests of other employees to engage in free, albeit hostile or abusive speech.¹⁸⁰

Substantive due process demands the achievement of equality for racial and gender minorities in the employment context.¹⁸¹ Inequality, fostered by the existence of an unremedied hostile work environment, is simply unjust and counterintuitive to the normative notions upon which the Constitution is premised. Owen Fiss has argued that injunctive relief in the context of civil rights legislation, "permits us to look at the injunction through a different substantive lens—a belief that the underlying claim—to achieve equality for the racial [gender] minority—is just. It invites us to imagine that the substantive claim could be just."¹⁸²

The Court juxtaposed substantive due process concerns with the captive audience doctrine¹⁸³ in *Erznoznik v. City of Jacksonville*¹⁸⁴ and held that in order to protect the

after she was fired for refusing to work on her Saturday Sabbath). The Court in *Sherbert* found that there was a compelling interest that justified the extension of state benefits to protect Ms. Sherbert. *Id.* It would be hard to imagine that the Court would mandate extension of state guaranteed benefits in *Sherbert*, but then refuse to intervene or offer protection under Title VII to an employee whose gender or racial status provides the impetus for speech that creates an intolerable work environment. Title VII, at the very least, is a statute that provides a framework under which freedom from a hostile work environment has become a state guaranteed entitlement.

¹⁷⁹ See Delgado, *supra* note 12, at 143.

Immediate mental or emotional distress is the most obvious direct harm caused by a racial insult. Without question, mere words, whether racial or otherwise, can cause mental, emotional or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority.

Id. (citations omitted).

¹⁸⁰ In analyzing a Fourteenth Amendment substantive due process claim, an individual must assert an interest in life, liberty, or property. Both the right to earn a living and the right to be left alone are recognized liberty interests. These interests, however, must be balanced against the state's interest in maintaining a free and democratic society, which in this context, includes the uncircumscribed use of free speech in the workplace. See Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 102 (1996) (citing *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982)).

¹⁸¹ See generally FISS, *supra* note 27 (noting that courts have viewed the injunction as an "extraordinary" remedy because, in part, of its past use against labor and Progressivism, and arguing that, because the goal of achieving equality for racial minorities is just, the civil rights injunction should not be subordinate to other remedies).

¹⁸² *Id.* at 6 (emphasis omitted).

¹⁸³ See *supra* notes 29-36 and accompanying text.

¹⁸⁴ 422 U.S. 205, 209 (1975).

privacy rights of unwilling recipients of certain intrusively offensive speech, the government selectively may "shield the public from some kinds of speech on the ground that they are more offensive than others . . . [when] the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."¹⁸⁵ The Court in *Erznoznik* invalidated a city ordinance that prohibited the screening of movies containing nudity at drive-in theaters because the ordinance sought to keep the films from being shown in places where offended viewers readily could avert their eyes.¹⁸⁶ The Court found "[i]n short, the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'"¹⁸⁷ This is not the case in the workplace where an employee assigned to a certain task, or station, or working under an offending supervisor cannot readily remove her ears from the harassing situation.

In upholding speech restrictions on substantive due process grounds, the Court has relied upon a narrowly-tailored compelling interest test. In *Burson v. Freeman*,¹⁸⁸ the Court upheld an election day prohibition of political speech within 100 feet of polling stations on the basis that the government had a compelling interest in protecting the constitutional right to vote.¹⁸⁹ The prohibition was limited in its scope, and in no way limited political participants' abilities or rights to engage in political speech at other times and in other contexts. This is not so different from a workplace specific speech injunction in which the government has a compelling interest in guaranteeing that its citizens have the opportunity to take advantage of the liberty interest of engaging in gainful employment, free from the debilitating effects of a discriminatory hostile work environment. Specific speech injunctions would offer necessary relief to remedy past discriminatory practices, while working to achieve racial and gender equality in the workplace. Yet, like the prohibition in *Burson*, they would be limited in scope by being restricted to the workplace and by providing, with specificity, an exemplary list of actionable words.

E. *Trivialization of Hostile Work Environment Claims Is Unfair to Victims*

Finally, detractors of harassment law attempt to minimize important issues that the recognition and remedy of hostile work environment claims promote, such as, workplace equality, advancement opportunity, economic freedom, and freedom from severe psychological harm or intimidation.¹⁹⁰ Instead, they attempt to skew the debate by focusing on extreme cases and independent employer-mandated, non-

¹⁸⁵ *Id.* (citations omitted). See also Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637, 679 (1995) (noting that the government has the ability "to shut off discourse" in response to the privacy rights of unwilling recipients of the speech) (quoting *Erznoznik*, 422 U.S. at 210).

¹⁸⁶ See *Erznoznik*, 422 U.S. at 212.

¹⁸⁷ *Id.* (quoting *Redrup v. New York*, 386 U.S. 767, 769 (1967)).

¹⁸⁸ 504 U.S. 191 (1992).

¹⁸⁹ See *id.* at 211.

¹⁹⁰ See, e.g., Volokh, *supra* note 57, at 564-66.

judicial decisions.¹⁹¹ While extreme examples do exist, they are probably more representative of the growing pains of an evolving area of the law, rather than evidence of a definitive trend. The fact that the same bad actors make recurring appearances in the scholarship of harassment law critics reinforces this conclusion. Unfortunately, the critics' backlash against harassment law progress adds insult to injury for the victims of severe and pervasive discrimination, such as the parties in the *Robinson*, *Aguilar*, and *Turner* cases.¹⁹² In short, the detractors seem quite alarmed by perceived judicial activism that simply does not exist in the discrimination law context.

CONCLUSION

Racist or sexist speech that is sufficiently severe or pervasive to alter the conditions of a victim's employment, when evidenced by satisfying an element of the proposed tri-factor test,¹⁹³ creates a hostile work environment and, as such, the offending speech should be subject to a specific speech limiting injunction. The secondary effects doctrine, as explained in *R.A.V. v. City of St. Paul*,¹⁹⁴ lends support for this proposition by providing for conduct-based speech restrictions, thus, ameliorating concerns regarding prior restraints. The Court in *R.A.V.* actually seemed to anticipate application of the secondary effects doctrine to remedy hostile work environments when it included a workplace sexual harassment hypothetical in

¹⁹¹ See *id.* Professor Volokh cites *Brown Transp. Corp. v. Commonwealth*, 578 A.2d 555, 562 (Pa. Commw. Ct. 1990), in which the state court found that an employer who put religious articles in the employee newsletter and Bible verses on employee paychecks was liable for religious harassment. *Id.* at 564 n.3. Another one of Volokh's favorite examples is a situation that did not even involve a lawsuit or judicial intervention, but involved a Kentucky human rights agency that prompted a company to change its "Men Working" signs by alleging that the signs perpetuated a discriminatory work environment. See Volokh, *supra* note 57, at 565 (citing Andrew Wolfson, *All Worked Up . . . Phone Company Called to Task Over Gender-Based Signs*, LOUISVILLE COURIER J., Mar. 3, 1994, at 1B). Finally, there is the oft-cited situation in which an employer ordered a graduate student who had a photo of his wife in a bikini on his desk to remove the photo. Again, this situation did not involve a lawsuit or any judicial intervention. See *id.* at 566-67 (citing Nat Hentoff, *A "Pinup" of His Wife*, WASH. POST, June 5, 1993, at A21).

¹⁹² Volokh ignores, or mentions only in passing, egregious cases in which extremely harmful, hateful speech is used in the workplace against those in minority positions, for example: (1) the continued and pervasive use of words such as "cunt," "whore," and "bitch," directed at female plaintiffs in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1497-98 (M.D. Fla. 1991); (2) the sustained use of racial epithets in Spanish, as well as use of the words "wetbacks" and "motherfuckers" by a manager to Hispanic employees in *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, 606-08 (1996), *cert. granted*, 921 P.2d 602 (Cal. 1996); and (3) the persistent use of anti-Semitic comments and holocaust jokes made by a supervisor to a Jewish employee in *Turner v. Barr*, 806 F. Supp. 1025, 1028 (D.D.C. 1992). See Volokh *supra* note 57, at 564-69.

¹⁹³ See *supra* Part II. C.

¹⁹⁴ 505 U.S. 377 (1992).

the text of the opinion.¹⁹⁵ Additionally, because courts would be required to individuate the proposed specific speech injunctive relief, such inclusion should quell any concerns regarding due process or vagueness because such relief would: (1) specifically target those whose conduct is to be restricted; (2) specifically delineate the proscribable conduct by listing words that are “off limits” in the workplace; and (3) specifically identify the class of employees that the injunction is meant to protect. Finally, listing prohibited words in an injunction would provide contextual guidelines with which to determine the actionability of future speech, while defusing some of the power of those words by sending a message that certain words, good or bad, may not be co-opted by bigoted, sexist individuals to use as their own exclusive weapons of subordination. While it is true that free speech may help teach a healthy tolerance of differences,¹⁹⁶ specific speech injunctions would not be aimed at curbing thought, attitudes, or even speech outside the limited forty to sixty hour-a-week, artificial construct known as the workplace.

¹⁹⁵ See *id.* at 389-90 (“Thus, for example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.” (citation omitted)).

¹⁹⁶ See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1243-44 (1989).