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# Title VII and Religious Liberty

*Kent Greenawalt\**

## I. INTRODUCTION

Title VII of the 1964 Civil Rights Act, which forbids religious discrimination in employment, raises in microcosm some extremely thorny questions about religious liberty; questions more familiar to most of us in constitutional settings. In focusing on these questions in their Title VII context, I am more interested in fundamental conceptual issues than in the precise details of what that law should be taken to provide.

Among the questions are: What is discrimination because of religion? How should religion be “defined”? How far should employers accommodate the religious exercise of workers? Under the First Amendment, how much accommodation can the federal government require of private employers? What are an employer’s rights to religious exercise? Has an employer any greater, or lesser, right to engage in religious speech than other speech? What amounts to harassment on religious grounds? How far do workers’ rights of religious speech and other speech affect what should count as religious harassment?

## II. THE THREE FACES OF TITLE VII: (1) ORDINARY DISCRIMINATION, (2) ACCOMMODATION, AND (3) HARASSMENT

As one part of the Civil Rights Act of 1964, Congress adopted Title VII to restrict employment discrimination.<sup>1</sup> The Act applies to employers of fifteen or more persons whose business affects interstate commerce.<sup>2</sup> An employer cannot discharge, fail to hire, or otherwise discriminate in terms of employment, against anyone “because of such

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1. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16 (1994 & Supp. 2000).

2. *Id.* § 2000e(b).

individual's race, color, religion, sex, or national origin"; an employer cannot segregate or classify his workers in a way that would tend to deprive someone of employment opportunities "because of . . . religion. . . ."<sup>3</sup> Similar restrictions apply to labor unions and to training and apprenticeship programs.<sup>4</sup> Employers may hire on the basis of religion (and sex and national origin, but not race or color) when that is a bona fide occupational qualification.<sup>5</sup> By now, virtually all states have similar fair employment laws, which reach smaller employers than does the Civil Rights Act.<sup>6</sup>

Discrimination obviously occurs when an employer intentionally treats a worker disadvantageously because of the worker's religion. But a purpose to discriminate is not essential for a statutory violation. Early on, the Supreme Court adopted a partially objective test of what constitutes discrimination under Title VII.<sup>7</sup> If an employer uses a test or other standard for employment that disproportionately favors members of one race (or gender or religion) over another, reliance on the test constitutes discrimination unless the employer can show that the test is required by business necessity.<sup>8</sup> In 1989, the Supreme Court significantly restricted opportunities for recovery under this theory;<sup>9</sup> Congress responded by adopting a statute that brought the law back to its pre-1989 posture.<sup>10</sup>

Well after passage of the Act, courts accepted the theory that harassment constituted a form of discrimination.<sup>11</sup> If the working

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3. *Id.* §§ 2000e-2(a)(1) to (2).

4. *Id.* §§ 2000e-2(c) to (d).

5. *Id.* § 2000e-2(e).

6. As in the Federal Act, the basic statutory language covering religious discrimination is the same as that applying to discrimination by race, sex, and national origin.

7. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that the "Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race").

8. *Id.* at 431.

9. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that the proper comparison to be made in the employment context is "between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market").

10. 42 U.S.C. § 2000e-2(k)(1)(C). These developments are discussed in Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 735-38 (1996). He points out that establishing a statistical imbalance is much more complicated for religion than for race and gender, because of numbers of subgroups of major religions and the presence of sects so small it will be impossible to say what a natural proportion of members in the work force would be. *Id.* at 794-95.

11. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding that a "claim of 'hostile environment' sexual harassment is a form of sex discrimination that is actionable under Title VII").

environment becomes seriously compromised because of one's race, gender, or religion, that can amount to discrimination in "terms of employment." Even if a worker shows no other deprivation of employment opportunities, she has a statutory claim if she suffers harassment for which her employer has become responsible.<sup>12</sup>

Another post-1964 development was in the statutory language itself. In 1970, the Sixth Circuit Court of Appeals held that an employer could meet his obligations under the statute by treating workers similarly, without respect to their religion.<sup>13</sup> The Supreme Court affirmed by an equally divided court.<sup>14</sup> Congress responded in 1972 with a new subsection, formulated as a definitional section, which provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."<sup>15</sup> This language is confusing in suggesting that whether an observance or practice *is religious* (under the Act) depends on its being able to be reasonably accommodated.<sup>16</sup> That would certainly be an inadequate approach to the problem of what *counts* as religious; a practice is no less religious because the employer cannot accommodate it. But the practical thrust is clear enough. Unless the employer makes a required accommodation, he has discriminated under the statute.

Thus, Title VII forbids what I shall call simple, or ordinary, discrimination, failures to accommodate, and harassment. (This threefold distinction is drawn for analytical purposes and because the necessary elements for recovery may differ, *not* to suggest doubt that harassment qualifies as discrimination as defined by the statute.)

In some instances, disentangling these threads is not easy, but the basic ideas are straightforward. When a person is denied an employment opportunity because an employer or supervisor makes a

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12. Because Title VII does not directly regulate the activities of fellow workers, workplace harassment becomes a wrong under the Act only where the employer bears responsibility for it in some way. 42 U.S.C. § 2000e-2(a).

13. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970). See Jamar, *supra* note 10, at 741-42.

14. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971). An affirmance by an equally divided court has no precedential value.

15. 42 U.S.C. § 2000e(j). The statute adopted the approach of the Equal Employment Opportunity Commission toward accommodation. See Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 CATH. LAW. 289, 293 (1991).

16. Justice Rehnquist described the language as awkwardly drafted in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 63 n.1 (1986).

negative judgment based on her religion, she has suffered ordinary discrimination. A worker seeks an accommodation if she asks for an exemption from a standard practice that the employer has developed without respect to religious considerations. The worker may be an Orthodox Jew who wants Saturday off, or a Muslim who wants a brief time to pray when other workers are busy. Finally, if Christian workers taunt a Jewish colleague, making working conditions very unpleasant, the victimized worker has suffered harassment. If, after she has complained, supervisors do nothing to stop the abuse, the statute has been violated.

*EEOC v. Townley Engineering & Manufacturing Co.*<sup>17</sup> is a case in which the threads of ordinary discrimination, accommodation, and harassment intertwine. A married couple who founded and (mostly) owned the Townley Engineering and Manufacturing Company wanted to operate “a Christian, faith-operated business.”<sup>18</sup> All workers were required to attend weekly devotional services at which some business matters were discussed.<sup>19</sup> Pelvas, an atheist, asked to be excused.<sup>20</sup> His supervisor said attendance was mandatory, but told Pelvas he could sleep or read a newspaper during the services.<sup>21</sup> One might view mandatory worship services themselves as discriminating against nonbelievers. One might think such services would harass *some* nonbelievers. One might believe that the company should accommodate those nonbelievers who objected to attending by excusing them. I shall return to this important case.<sup>22</sup>

### III. WHAT IS DISCRIMINATION BECAUSE OF RELIGION: A FIRST PASS

The statute bars discrimination “because of [an] individual’s religion.”<sup>23</sup> The question of what amounts to such discrimination can arise for ordinary discrimination, accommodation, and harassment. I assume here that we are not in doubt about what constitutes religious beliefs and practices; that fundamental problem is tackled later. I assume that discrimination against Jews is “religious,” although those engaging in such discrimination may not care about the individual

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17. *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

18. *Id.* at 610-12.

19. *Id.* at 612.

20. *Id.*

21. *Id.*

22. See *infra* notes 34-38, 106-21, 142-46 and accompanying text (discussing the difficult questions of discrimination and accommodation in the *Townley* case).

23. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994).

religious views of their victims. I also assume that atheists can be victims under the statute if their failure to embrace religion, or a particular religion, is the source of discrimination. Finally, I assume more generally that a worker may be a victim of discrimination because she does not *accept* a particular religion, even if the employer is otherwise indifferent about her religion.<sup>24</sup>

The two subjects I address are: (1) the relationship among the speaker's selection of his audience, the content of his speech, and the nature of the listener's response;<sup>25</sup> and (2) the relation of an employer's or worker's religious convictions to her moral responses.<sup>26</sup> In approaching these topics, I concentrate more on what activities should be restricted than exactly how a literalist would parse the statutory phrase "because of [an] individual's religion."

#### A. *Selection, Content, and Response*

Title VII discrimination can involve a "tangible adverse employment action" or the creation of a "hostile environment."<sup>27</sup> One familiar form of adverse employment action is the carrying out of a quid pro quo threat, familiar from the law of gender discrimination. A boss says to a worker, "I will promote you, but only if you have sex with me." This form of harassment can also occur in the context of religion.<sup>28</sup> The boss says, "I will promote you, but only if you leave your church and join mine." The most interesting problems about discrimination because of religion do not involve quid pro quo threats, but speech by an employer or fellow worker that creates a difficult working environment. I focus on that.

When employers (or fellow workers) perform actions that offend workers, religion may figure in three different ways: An employer's practice or speech may be religious; it may be directed at a worker because of her religion;<sup>29</sup> it may cause her offense on religious

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24. See *Venters v. City of Delphi*, 123 F.3d 956, 971-72 (7th Cir. 1997) (holding that a Title VII claim can be made when the situation involves someone subjecting an employee to lectures about prospects for salvation, inquiring into her private life, and telling her that she has led a sinful life).

25. See *infra* notes 27-43 and accompanying text.

26. See *infra* notes 45-59 and accompanying text.

27. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 753-54 (1998).

28. See *Venters*, 123 F.3d at 956; Eileen B. Goldsmith, Note, *God's House, or the Law's*, 108 YALE L.J. 1433 (1999) (discussing the recent trend for the court to "overcome the formalistic barriers between sexual harassment and other forms of harassment, as well as those between Title VII harassment and disparate treatment doctrines").

29. A remark is "directed" in this sense if it is made to a more general audience, but with the aim of reaching those of a particular religion.

grounds.<sup>30</sup> The three ways may be combined; in that event, if other requisites are satisfied, ordinary religious discrimination or religious harassment undoubtedly is involved. If religion is not involved in any of the three ways, religious discrimination has not occurred. What if religion is involved in only one or two of the ways? In exploring this question, I shall assume for the most part that the offending speech or other action is the employer's, and I initially put aside his own free speech and free exercise claims. I concentrate on what makes the best sense for the category of religious discrimination; I do not undertake the close examination of how comparable circumstances are treated in the law of gender and racial discrimination that would be called for were a lawyer arguing about one of these situations before a court.

If an employer selects a worker for negative treatment based on her religion, the action is undoubtedly religious discrimination if the worker suffers tangible employment disadvantages. If harassment is included, selection on grounds of religion is discriminatory if either of the other two factors relating to religion is present. First, if an employer persistently proselytes a worker because of her religion and despite her expressed wish that he stop, the harassment is because of her religion, even if her disturbance at his hectoring does not arise from her religious convictions or identity.<sup>31</sup> Second, if an employer chooses a worker because of her religion, and she is deeply disturbed on religious grounds at his insistent advocacy, this constitutes religious harassment even though the content of the discourse is not explicitly religious. Thus, if an employer continually extols the virtues of gay marriage to a worker just because she is Roman Catholic,<sup>32</sup> and she is disturbed as a Catholic, he has engaged in religious harassment.<sup>33</sup>

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30. Offense on religious grounds need not involve a sense of violation of one's religious convictions. It is enough that one's identity as a member of a religion is offended.

31. In this respect, a claim for accommodation differs. That depends on a religious belief or practice of the claimant.

32. I mean here that the employer picks the worker out because she is Roman Catholic, not just that he wants to talk to likely opponents of gay marriage and assumes that she falls into that category because she is a Catholic.

33. What exactly it means to choose someone because of her religion can be somewhat complicated. In *Finnemore v. Bangor Hydro-Electric Co.*, a state decision interpreting language like that of the federal statute, a fundamentalist Christian worker sought a judgment that he had been harassed in a way that amounted to religious discrimination. *Finnemore v. Bangor Hydro-Elec. Co.*, 645 A.2d 15 (Me. 1994). Co-workers, he alleged, had made sexually explicit comments about each other's wives in his presence. *Id.* at 16. He had complained that such talk was offensive to his religion. *Id.* The co-workers responded by making his wife the target of their sexually explicit comments. *Id.* Finnemore complained to management, which failed to take action against his co-workers. *Id.* The trial court entered summary judgment on the ground that the co-workers' comments were not religious. *Id.* at 16 & n.2. The Maine Supreme Judicial

A somewhat harder case arises if the employer's selection is based on religion, but neither his speech nor the grounds of offense are religious. Suppose the employer urges support of gay marriage to a worker because she is Roman Catholic; she feels serious discomfort about advocacy of recognition for homosexual rights and complains, but she does not attach her discomfort to her religious convictions or identity. Selection on the basis of religion alone is definitely an adequate ground for concern if the worker reasonably understands that the employer is aiming to humiliate or embarrass, rather than persuade. I am inclined to think selection on the basis of religion can be sufficient to involve the statute even if an employer's motives are benign and the worker understands that.

We face more difficult issues when an employer has *not* selected his audience based on their religion. The employer has a religious message he wants conveyed both to co-believers and those of different views. A worker does not want to hear the religious messages that she rejects. Her ground of offense may derive from her own religious convictions or identity, or be substantially independent of those.

The status of such employer messages is sharply posed by mandatory religious meetings. The EEOC argued in *Townley* that having a requirement of mandatory attendance at religious services was discrimination under Title VII.<sup>34</sup> The firm argued that Title VII did not cover its policy and that to do so would violate the First Amendment.<sup>35</sup>

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Court reversed. *Id.* at 17. It said, "[a] test for determining whether a comment is of a religious nature is whether it occurred *because of* an individual's religious beliefs or would not have occurred *but for* the individual's religion." *Id.* Whether that standard was met was an issue of fact. The decision itself is clearly correct. If a worker is singled out because of his religion and suffers remarks that disturb him deeply because of his religion, that amounts to discrimination because of religion even if the remarks themselves lack religious content.

The decision is correct, but the exact "test" the court suggests is either imprecise or flawed. Suppose the fact finder, hearing testimony from the co-workers, reaches the following conclusion: They knew Finnemore was offended by their remarks and they knew his offense was religious because he said so, but they thought his whole attitude was ridiculous. They felt that real men indulge in crude humor, and anyone who complains about that is a pest who deserves to be ridden until he changes his attitude or gets off the job. The fact finder concludes that the men would have acted similarly toward Finnemore if he had objected on non-religious grounds. How does the court's test apply? The employer can argue that the co-workers would have made Finnemore's wife their target even if his religion was different, or he had no religion, so long as he had complained. Finnemore can argue that he would not have complained *but for* his religion, so the co-workers' remarks occurred because of his religion. The court's language could be taken to apply or not to apply. The important point is that religious harassment occurred if the co-workers' taunting was based on Finnemore's complaint, and they knew that his complaint had a religious basis. These conditions were clearly satisfied.

34. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 612 (9th Cir. 1988).

35. *Id.* at 613.



Whether or not the firm had to accommodate Pervas by excusing him, an issue I discuss below,<sup>36</sup> was the court of appeals right to conclude that the company did not have to end its mandatory services?

Because its analysis of the legality of a mandatory service was not consistently separate from its analysis of the worker's claim to be excused, the court's treatment of the requirement that workers attend the services is not entirely clear. The judges apparently believed that mandatory services *would have* constituted religious discrimination, except for the employer's free exercise claim.<sup>37</sup> However, under a compelling-interest-least-restrictive-means analysis, ending mandatory services was not necessary to accomplish the goals of Title VII. Therefore, the district court was mistaken in ordering the employer to end mandatory services.<sup>38</sup>

If those who object can be excused, the decision whether to permit mandatory services may seem to make no practical difference, but that would be a mistake. Workers can be required to attend legally permitted mandatory services if they have no objection based on their religion to doing so and if the services do not create a hostile environment for them. To be excused a worker must come forward and explain that attendance is at odds with her own religious beliefs or practices (the basis for an accommodation), or creates a hostile environment (the basis for relief from harassment). Some workers will be hesitant to assert either of these bases to be excused, so a court's allowing of mandatory services means that more workers will attend the services than if the services were voluntary.

The mandatory service issue is troubling. Laura Underkuffler has forcefully argued that a "valid claim of religious discrimination in employment should be limited to situations in which the *employee's religious status* (religious affiliation or identity, or lack thereof) is the reason for the employer's action."<sup>39</sup> The Townleys wanted all employees, regardless of their present beliefs and memberships, to attend their services, so they did not discriminate under the standard

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36. See *infra* notes 37-38, 106-21, 142-46 and accompanying text (discussing the difficult question of accommodation in the *Townley* case).

37. *Townley*, 859 F.2d at 613.

38. *Id.* at 621. One might view the opinion as declaring that the First Amendment bars what Title VII here requires—the ending of mandatory services—but the opinion can better be taken to say that, read in light of the First Amendment, Title VII does not require that mandatory services be stopped.

39. Laura S. Underkuffler, 'Discrimination' on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment, 30 WM. & MARY L. REV. 581, 613 (1989) (emphasis added).

Underkuffler proposes. Underkuffler attacks the myth of value neutrality and urges that the state cannot and should not choose between employment philosophies or policies based on their religious source.<sup>40</sup>

The strength of her argument is much greater for moral and business judgments based on religious premises than it is for explicit religious indoctrination. If the state forbids religious discrimination, it properly limits mandatory religious indoctrination.

Some examples illustrate the force of this point. Suppose an employer has about an even mix of Christian and Jewish workers, and he requires all workers to sit through a Christian service once a day. One might fairly say that constitutes discrimination in terms of employment against Jews, if they are required to sit through a Christian service and Christians are not required to sit through a Jewish service. To sharpen this, suppose two hours of each day are devoted to mandatory Roman Catholic services; would that not be discrimination against non-Catholics? It may well be that some non-Catholics will not mind such services and that some Catholics will be troubled by them, so complaints about the services will not be perfectly correlated with any set of religious beliefs and practices. Further, no one is treated according to his or her religious status. Still, the services seem to constitute an unfavorable condition of employment for those who do not practice Roman Catholicism. Part of the problem is that requiring workers to attend particular kinds of services may work as a device to assure that one hires practicing co-believers (since others will be put off and look elsewhere for work). But I do not mean to rely mainly on that concern.

If we put aside the force of the employer's own religious claims, the better view is that mandatory religious services do discriminate against those who reject the perspective of the services; forcing workers to listen to one religion is discriminatory against those of other religious views. An employer definitely cannot insist that workers attend Sunday services of his favorite church, even if workers are also free to go to other services. If the employer made attendance at his church a condition of employment, he would definitely be discriminating against members of other religions. It should not matter that the employer sponsors the services during business hours.<sup>41</sup>

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40. *Id.* at 599-610.

41. Does it matter that he is paying workers during business hours? I think not. If one conceives of a salary as paid for fulfilling a set of obligations, the employer who insists that workers attend his church on Sunday must set his salary high enough to cover that time away from business hours. Indeed, one way to perceive a difference in terms of employment is to think

This conclusion is strengthened if we think of analogous cases regarding gender and race. If an employer calls regular meetings at which his representative engages in persistent racist or sexist expression, that should amount to simple discrimination against the members of the races or gender that are "put down."

What difference does it make whether mandatory services are viewed as involving simple discrimination in conditions of employment or as creating a hostile environment that sustains a finding of harassment? Both the theory of a challenge and the appropriate remedy may be affected. If mandatory services constitute ordinary discrimination, a nonbeliever can object whatever his own psychological reaction to having to attend.<sup>42</sup> Her objection need not involve severe distress nor relate to her own religion. She may feel simply that the employer's mandatory meetings fail to show due respect for workers. A harassment claim requires that a victim subjectively perceives the environment that is created as pervasively hostile,<sup>43</sup> and perhaps that feeling must relate to her religious identity (if the employer has not selected her on the basis of religion).

The remedy for simple discrimination is to stop the practice. One possible remedy for a hostile environment violation that does not involve intentional abuse may be to change circumstances for the victim so she is no longer subjected to what disturbs her. That is, if a practice would otherwise be acceptable, but for the victim's feelings of being harassed, a court might decide that the practice can continue if the victim is no longer exposed to it and suffers no disadvantage.

The conclusion I have reached, that mandatory religious meetings discriminate is a tentative one. One *might* concede everything I have said thus far, but claim that an employer's interest in the free exercise of religion is strong enough to warrant mandatory services. My argument here has been that an employer may discriminate because of religion even if he does not select his audience on the basis of religion.

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of the effective salary as being higher for workers who would attend the employer's church in any event. They need no extra compensation, and so are receiving a kind of windfall.

42. Some writers have assumed that, for atheists, prayer services are only a waste of time, not an offense to their religious views. See, e.g., David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119, 139 (1995). I think this misses the way in which an atheist could be offended in conscience by forced attendance at ceremonies she thinks have no ground in reality; but even the "waste of time" objection would be sufficient for challenging ordinary discrimination.

43. According to *Harris v. Forklift Systems, Inc.*, conduct constitutes harassment only if it creates an environment a reasonable person would find hostile or abusive, and the victim subjectively perceives the working environment in that way. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

A final variation on the theme of non-selectivity involves an employer who engages in non-religious speech that is directed at all workers and a worker who is offended on religious grounds. Although the employer's concern is not related to his religion and the basis for selecting his audience has nothing to do with religion, nevertheless, some workers are offended because of their religious convictions or identity. For example, an employer might strongly urge his workers to eat pork because that would be good for the state's economy; that might disturb workers who are Orthodox Jews or Muslims. Alternatively, an employer's strong advocacy of abortion rights might offend a Roman Catholic.

If religiously grounded offense is essentially fortuitous from the employer's point of view (and reasonable workers would understand this), he has not engaged in ordinary discrimination; and I am inclined to think that he has not engaged in harassment because of religion, whatever accommodation rights a victim might have. However, these conclusions may be altered if the employer's non-religious speech is of a sort that would predictably cause religious offense to a substantial proportion of his work force.

I shall return to the crucial question of the employer's interests in free exercise and free speech,<sup>44</sup> but now I turn to my second question about discrimination because of religion: the complexities of moral judgments that relate to religious convictions. An actual case helps to pose the central issue. Ms. Turic, a single woman, had become pregnant.<sup>45</sup> Other members of a "very Christian" restaurant staff were offended by discussions about whether she should have an abortion.<sup>46</sup> The restaurant manager and her assistant were concerned that gossip about the situation was disruptive.<sup>47</sup> They told Turic not to discuss her consideration of an abortion at work and said she would be terminated if she did discuss the topic.<sup>48</sup> She was subsequently fired, at least in part because of the abortion controversy.<sup>49</sup> She won her claim that her firing violated the Pregnancy Discrimination Act of 1978.<sup>50</sup>

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44. See *infra* notes 146-71 and accompanying text.

45. *Turic v. Holland Hospitality, Inc.*, 849 F. Supp. 544, 546 (W.D. Mich. 1994), *aff'd in part, rev'd in part*, 85 F.3d 1211 (6th Cir. 1996).

46. *Id.*

47. *Id.* at 547.

48. *Id.*

49. *Id.*

50. *Id.* at 550, 556.

Turic also argued that she had suffered religious discrimination under Title VII because her firing was "to protect the religious sensibilities of the rest of the staff," thereby forcing their religion on her.<sup>51</sup> The court indicated that a Title VII claim can succeed if someone is fired, not because of the nature of her own religious views, but because she does not share the religious views of the employer or other workers.<sup>52</sup> The court found inadequate evidence that the feelings of others on the staff were connected to religious doctrine.<sup>53</sup>

The interesting question is whether Title VII should apply if the firing had been responsive to the religiously informed sensibilities of the employer or other workers. Let us imagine that Turic had engaged in legally permitted acts, not themselves protected under any anti-discrimination law—say, she frequently became drunk in public away from work. The rest of the staff became offended because they regarded this behavior as sinful from a religious point of view.

We can take the analysis in two steps, asking first about employer offense and then about offense to other workers. Suppose the non-religious behavior was directly offensive to the employer's own religiously based moral sentiments. Our imaginary Turic would not be fired because of her religious practices or beliefs, or even because her religious beliefs failed to conform with the employer's beliefs. The employer could argue that Turic was being fired for a reason that had nothing to do with what *she* regarded as religious beliefs and practices. Still, she would be fired because her sense of appropriate practices revealed itself to be different from the employer's, and this difference connected to their differing religious understandings. On a conceptual level, whether this should count as religious discrimination is reasonably arguable, but when one considers what an employer can undoubtedly do, he has the better of the argument.

In most states, employers can fire workers because they find continual drunkenness to be immoral or disgusting from a non-religious point of view.<sup>54</sup> Suppose this employer thinks drunkenness is immoral,

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51. *Id.* at 551.

52. *Id.* The court relied on *Blalock v. Metal Trades, Inc.*, in which the plaintiff was fired partly because his religious views came to differ from those of his employer. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 705-06 (6th Cir. 1985), *aff'd*, 833 F.2d 1011 (6th Cir. 1987).

53. *Turic*, 849 F. Supp. at 556.

54. One might think that employers should not fire people because of their private lives, even that the government should forbid them from doing so; and some states statutes and common law doctrines protecting privacy give a measure of protection. My comments assume a regime in which employers are free legally to condition employment on workers satisfying moral standards outside work.

but his judgment happens to rest on a religious base. The employer's latitude to invoke his sense of moral appropriateness should not be limited because the sense happens to derive from religious conviction.

This is the force of Laura Underkuffler's argument that the state should not choose between employment philosophies because they happen to be based on religion.<sup>55</sup> The point is most obvious if one focuses on conditions *at work* or behavior outside of work that bears directly on how a worker performs her job. An employer who has religious reasons for insisting on cheerfulness and discipline among his workers should be as able to fire a surly or irresponsible worker as an employer whose reasons for wanting cheerful, disciplined workers have nothing to do with religion.<sup>56</sup> But, the employer's ability to act on religiously informed judgments should also extend to behavior outside work that does not directly affect job performance so long as other employers might find the behavior morally objectionable on non-religious grounds.

The conclusion that an employer may fire a worker who frequently becomes drunk away from work finds further support from the employer's power to fire a worker who shares his religious beliefs and acknowledges that drunkenness is deeply sinful, but cannot resist the temptation to drink.<sup>57</sup> The employer's grounds for firing treat employees equally, independent of their own religious views.

Whatever conclusion one reaches about the employer acting on his own religious sentiments should apply to an employer who responds to the sentiments of his workers.<sup>58</sup> Suppose Turic had been fired because her fellow workers regarded her life outside work as immoral. In most states, that itself would not be a forbidden ground of termination (though perhaps it should be). Whether or not the co-workers' basis for moral judgment happens to be a religious one that Turic does not share should not be crucial.

The issue becomes more complicated if the moral judgment is one that virtually no one would make except on religious grounds. If a strict Christian employer is offended because a worker played baseball on Sunday, and the worker is fired in consequence, that would seem to amount to discrimination because of religion. This moral judgment

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55. Underkuffler, *supra* note 39, at 588-89.

56. *See id.* at 605.

57. I have not addressed the situation in which the worker's practice is demanded or encouraged by her religion. That worker has a stronger argument that she is being dismissed because of her religion, or that at least she should be accommodated.

58. *See Turic*, 849 F. Supp. at 546.

operates strongly to the disadvantage of those who happen not to share the employer's religious convictions, and reliance on it could well be a means to remove employees of different faiths. On reflection, this case turns out to be analogous to an employer compelling all his workers to listen to his religious message. Here, the employer insists that his religiously based, rather idiosyncratic, standards of proper behavior be followed.

Perhaps the right criterion for determining whether a religiously based moral judgment should be conceived as underlying impermissible religious discrimination is whether in our culture, other employers might react similarly on non-religious grounds. If they would not, the employer who takes a negative action toward a worker would be taken to have discriminated on the basis of religion.<sup>59</sup>

I should acknowledge that this proposal has serious difficulties and an important ambiguity, but I now see no preferable resolution.

One difficulty involves the line between outright religious criteria of judgment and moral judgments based on religion; another concerns the possible interference with religious diversity that the proposal permits. The ambiguity is whether the basis for assessing employers' judgments is their rationale or the behavior they reach in particular instances.

An employer cannot fire a worker because the worker fails to conform with the requirements of the employer's religion, for example, for failing to attend church on Sunday or to keep a kosher household. Such a firing would constitute religious discrimination, even if some other employers might regard similar behavior as immoral from a non-religious point of view.

My proposal, thus, implicitly distinguishes direct religious criteria of judgment (not permitted) from religiously based moral judgments (permitted, but only if other employers might make similar moral judgments on non-religious grounds). Moral judgments would include sentiments about how people act toward each other and care for their own persons. Although distinguishing direct judgments about compliance with religious obligations from moral judgments is a daunting task, this line has limited practical importance for my proposal. An employer can act only if other employers would make similar judgments on non-religious grounds, and this will usually not be

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59. By this criterion, firing someone who drinks a slight amount of alcohol socially probably amounts to religious discrimination. Even though people might believe on non-religious grounds that total abstinence is desirable, few people condemn a slight drinking of alcohol as morally abhorrent, except on religious grounds, and few employers, without religious grounds, would seek to fire anyone who engages in modest social drinking.

the case for straightforward employer judgments that a worker has failed to satisfy religious obligations.

Of greater practical concern is the fate of religious diversity. If an employer can fire a worker who exhibits some moral failing, one that would trouble some other employers on non-religious grounds, employers may end up without workers who fail to conform to their religiously grounded moral beliefs. This will reduce religious diversity in those workplaces. Perhaps attaining religious diversity in workplaces is not a direct goal of Title VII, but it is at least an important side benefit.

My approach requires a difficult determination about how many other employers would need to make similar judgments on non-religious grounds in order for an employer to hire or fire according to his religiously grounded moral sense. If a judge need only conceive that some other employer might make such a non-religious judgment, an employer could, for example, fire workers for any social drinking of alcohol. This would give religious employers great latitude to fire on the basis of religiously informed moral judgments and would correlatively curb the freedom of some workers to live outside work as they see fit. To meet this problem, I would say that in order for an employer to fire on the basis of religiously based morality, it must be the case that other employers would make similar moral judgments on non-religious moral grounds with some frequency. This would preclude firing for modest social drinking.

This leads us to the crucial ambiguity—whether the employer's liberty is to be based on his rationale or on the worker behavior that the rationale happens to reach in that instance. For example, *W* becomes drunk frequently outside of work. *E* learns of this and fires *W*, but *E* explains that he would fire any worker who drinks at all socially, that frequency and degree of intoxication are irrelevant to him. Other employers might find *W*'s behavior morally offensive on non-religious grounds, but, I am assuming, they would not fire workers for all social drinking. In favor of concentrating on *W*'s behavior, it may be said that *E* should be able to respond to the same behavior employers not relying on religious grounds would find morally offensive. Further, discerning *E*'s exact reasons for acting will be difficult, so it is better for the law to focus on *W*'s behavior.

On the other hand, if *E* acts on unacceptable reasons, that sends a message that *E* is using grounds for a decision that one would not find among non-religious employers. I believe that an employer should be able to act only if: (1) a worker's behavior is such that other employers



would find it objectionable on non-religious grounds; *and* (2) the employer has a reason for acting that, apart from its religious base, other employers might share. In the instance of frequent drunken behavior, most employers who find all drinking unacceptable could probably say honestly that they find excessive drinking and drunken behavior to be particularly objectionable. On this basis, the employer where judgment about drinking is religiously informed could fire the worker who is frequently drunk.

#### IV. ACCOMMODATION: APPROPRIATE DEGREE AND CONSTITUTIONAL JUSTIFICATION

I shall return to difficult questions about ordinary discrimination and harassment raised by the interests of employers and workers in the free exercise of religion and in free speech. But let us first take a look at accommodation.

In *Wilson v. U.S. West Communications*,<sup>60</sup> a woman wore an anti-abortion button at work; the button had a color photograph of an eighteen to twenty-week-old fetus.<sup>61</sup> Ms. Wilson's wearing of the button was an exercise of her religion. The button was not religious on its face, and someone might have worn it for other than religious reasons. But Wilson was a Roman Catholic who had made a religious vow to wear the button "until there was an end to abortion or until [she] could no longer fight the fight."<sup>62</sup> "Wilson chose this particular button because . . . [s]he believed that the Virgin Mary would have chosen this particular button."<sup>63</sup> Wilson "wanted to be an instrument of God like the Virgin Mary."<sup>64</sup>

The button caused disruption at work. Some co-workers found the button disturbing for personal reasons, such as infertility problems, miscarriage, and death of a premature infant.<sup>65</sup> Some threatened to walk off the job.<sup>66</sup> (No workers, apparently, claimed that they felt harassed because of their religious beliefs.) Supervisors offered Wilson the options of: (1) wearing the button only in her cubicle; (2) covering the button; or (3) wearing a "button with the same message but without

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60. *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995).

61. *Id.* at 1339.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

the photograph.”<sup>67</sup> She refused all the options and was dismissed.<sup>68</sup> Wilson argued that the co-workers should have been instructed to either ignore or tolerate the button.<sup>69</sup>

The court of appeals decided that U.S. West had offered a reasonable accommodation, and that was all it was required to do.<sup>70</sup> Part of the decision that U.S. West had offered a “reasonable accommodation” was based on the district court’s conclusion that Wilson’s views did not require her to be a living witness.<sup>71</sup> Had this issue been resolved in favor of Wilson, the supervisors’ offers might all have been unreasonable because none of them allowed her to witness at work, outside her cubicle, with this button. I believe the court of appeals was mistaken in its treatment of reasonable accommodation, but that its final conclusion was correct because of “undue hardship.”

A preliminary question is the state of affairs against which one evaluates an offer of accommodation. The behavior of the supervisors must be judged according to what they could reasonably understand, not on the basis of a worker’s uncommunicated feelings. But an accommodation should not count as reasonable if supervisors should not have supposed it would resolve a worker’s religious conflict, given all the facts that the supervisors learned during their conversations with the worker.

The court of appeals’ handling of the “living witness” issue was unsatisfactory on two counts. The central question was not, as the judges suggested, whether the district court *clearly erred*,<sup>72</sup> but whether the district court’s finding was appropriate given the limited scope of inquiry courts should make about a complainant’s religious understanding. In cases such as these, courts must be ready to make some determinations about sincerity, but they should not declare a claim to be insincere if that is in serious doubt. Wilson’s understanding of her vow should have been accepted unless it was obviously insincere.<sup>73</sup> By

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1342.

71. *Id.* at 1341.

72. *Id.* at 1340.

73. The parties had stipulated that Wilson was sincere, but the district court said that the stipulation did not cover the details of her vow. *Id.* at 1341. If Wilson had clearly indicated on other occasions that her vow did not include a particular element, a judge could decide that it lacked that element even if she claimed that it included that element at the time of suit. However, any uncertainties should have been resolved in Wilson’s favor.

that standard, the district court erred because it did not give Wilson the benefit of the doubt.<sup>74</sup>

The second unsatisfactory aspect of the court of appeals disposition was its emphasis on the exact content of Wilson's initial vow. Suppose that when she made that vow Wilson had not focused on whether she needed merely to wear the button or to have it exposed to view. When the supervisors offered her the button-covering option, she realized that she felt compelled to keep the button exposed. If she then communicated that to her supervisors, the supervisors should have taken her religious practice as wearing this particular button, exposed, in the entire workplace.<sup>75</sup>

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74. Both courts did refer to what Wilson had said on other occasions, but those statements did not decisively resolve whether her oath included being a living witness. *See id.* at 1340-41.

75. If Wilson's communications to her supervisors had been unclear, and they reasonably thought that neither her vow nor her present sentiments required an exposed button, their proposed accommodations may have been reasonable, even if her actual sentiments rendered them inadequate. But conversations between Wilson and her supervisors definitely revealed her claim that the button had to be exposed. *Id.* at 1339.

In *Chalmers v. Tulon Co.*, a divided court resolved the issue of when a worker must inform an employer about the need for accommodation. *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1020 (4th Cir. 1996). Motivated by religious concerns, an evangelical Christian worker wrote to her immediate supervisor, LaMantia, at his home, suggesting that he was doing something in his life that God was not pleased with. *Id.* at 1015. Chalmers had in mind that LaMantia had given customers false information about the turn-around time for jobs. *Id.* The supervisor's wife opened and read the letter, and concluded that her husband was committing adultery. *Id.* Chalmers was subsequently fired, not because of her religious views, but because the letter had caused her boss anguish and put a strain on his marriage. *Id.* at 1017. The court affirmed a summary judgment for the company, concluding that Chalmers had not been dismissed because of her religion, that she had no claim for an accommodation because she had not asked for one prior to sending the letter, and that, in any event, the employer could not be expected to accommodate to the sending of disturbing personal letters. *Id.* at 1021.

As Judge Niemeyer's dissent points out, the majority's approach on the question of notice is too rigid. *Id.* at 1025-26 (Niemeyer, J., dissenting). Only when her letter caused such turmoil did Chalmers realize that what she was doing was at odds with what the company wanted. That was the appropriate time to see if an accommodation could be reached. Although she was moved to send the letter (and at least one other) by a religious impulse, she never indicated that she felt a religious obligation to mail letters to the homes of fellow employees. She might have limited herself to conversations and notes at work, if told to do so. The employer could have taken the occasion to warn her and to see if she would accept a reasonable accommodation that would fit with its business needs. Its firing her without exploring that option should have been regarded as a failure to accommodate.

But the case had a special feature. What Chalmers had already done had caused a very serious breach between her and her immediate supervisor. The company could not have avoided that, because it had no prior warning she would send such a letter. The company could reasonably take the view that no future course of action by Chalmers would be likely to repair the breach with her supervisor. For that reason, Chalmers was an unsuitable employee, and the employer did not need to figure out whether future religious communications by her were capable of being accommodated. The court does remark that had the company accommodated Chalmers, it might have faced religious harassment claims by employees receiving her letters. *Id.* at 1021. As

The crucial issue in *Wilson* was whether her proposed accommodation would have involved undue hardship. Before I address that concept as it applies to the facts of *Wilson*, we need to survey how “undue hardship” has been understood and might be understood.

The Supreme Court has not demanded much in respect to undue hardship. The Court addressed Title VII accommodation in *Trans World Airlines v. Hardison*.<sup>76</sup> Hardison had converted to the Worldwide Church of God, whose members would not work on Saturday. When he was shifted to a new building, Hardison had insufficient seniority to avoid Saturday work. Trans World Airlines (TWA) encouraged the union to work out some arrangement for him. The union was unwilling to violate the seniority system. TWA would not let Hardison work only four days, with the consequence that it would have some work positions unmanned on Saturday or would have to pay overtime wages. The Supreme Court said that TWA had taken steps to reasonably accommodate Hardison, but that it would constitute undue hardship for TWA to leave a position vacant on Saturday or to pay overtime wages.<sup>77</sup> TWA could not be expected to breach its employment contract with the union.<sup>78</sup>

We can roughly distinguish among very slight inconvenience to the employer, significant cost that is less than serious, and serious cost. Although applying these general categories to specific circumstances is not always simple, the Court’s opinion in *Hardison* states that an employer need not “bear more than a de minimis cost.”<sup>79</sup>

*Hardison* implies another point of some importance. The statutory provision is cast in terms of hardship on the employer’s business; the Court assumes that it includes undue hardship on fellow workers. In *Hardison*, TWA was not required to breach its seniority agreement with the union.<sup>80</sup>

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Thomas Berg has noted, it is a difficult question whether such letters could be treated as harassment, given free speech considerations, but I do not understand the employer to have relied on this rationale, and I do not think it is central to the court’s decision. Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL’Y 959, 984 (1999).

76. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

77. *Id.* at 77.

78. *Id.* at 79.

79. *Id.* at 65.

80. Title VII applies to unions as well as employers. If a collective bargaining agreement insisted that an employer not make a required accommodation, the agreement would be illegal in that respect. Thus, the fact that an agreement forbids an accommodation cannot itself be conclusive. The Court may have supposed that maintaining standard seniority practices was of enough value that breaching them would constitute undue hardship, even if an employer

After *Hardison*, in *Ansonia Board of Education v. Philbrook*, the Supreme Court indicated that if the employer must make some accommodation, he need only offer a reasonable accommodation, not necessarily the precise accommodation that the worker seeks.<sup>81</sup> Philbrook wanted to take paid days of personal leave to observe religious holy days.<sup>82</sup> In allowing unpaid leave, the employer had made a reasonable accommodation that allowed Philbrook the time off he needed; that was sufficient, whether or not his proposed accommodation would have involved undue hardship.<sup>83</sup>

A study by Karen Engle shows that judges have generally been very resistant to claims of accommodation and hesitant to require employers to deviate from neutral rules of general application.<sup>84</sup> A major exception has been that courts have sustained claims not to join unions, with a requirement that the equivalent of union dues be given to charity.<sup>85</sup>

Courts have continued to employ the *Hardison* standard of undue hardship, although that case lies in some tension with other apparently applicable legal standards. The most severe surface discontinuity exists with respect to the Religious Freedom Restoration Act (RFRA),<sup>86</sup> whose application to the federal government may be valid although the Supreme Court has held the Act unconstitutional as it applies to states and localities.<sup>87</sup> The Act declares that if the government imposes a

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established the rules on his own. But the Court may also have concluded that an agreement between management and labor increases the importance of adhering to procedures that have been agreed to. A number of courts have given great weight to what collective bargaining agreements say in concluding that an accommodation would involve undue hardship. See Mark A. Spognardi & Staci L. Ketay, *In the Lion's Den: Religious Accommodation and Harassment in the Workplace*, 25 EMPLOYEE REL. L.J. 7, 15-16 (2000). One may reasonably think that an agreement with a union could increase the degree of hardship of an accommodation at odds with the terms of the agreement. Particularly if one is thinking of what an employer should understand that he should do, as contrasted with what a court might order, one could not expect the employer to breach an agreement in doubtful instances. See, e.g., *Getz v. Pa. Dep't of Pub. Welfare*, 802 F.2d 72, 74 (3d Cir. 1986).

81. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

82. *Id.*

83. *Id.* at 68.

84. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 392-406 (1997).

85. E.g., *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978). For a discussion on the sorts of circumstances in which courts have required accommodation, see Spognardi & Ketay, *supra* note 80, at 13-19.

86. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994), amended by Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7, 114 Stat. 806 (2000).

87. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

substantial burden on someone's exercise of religion, it may do so only if it has a compelling interest that cannot be accomplished by less restrictive means. This language applies to the government as employer and appears to impose a test that is more demanding than that of Title VII,<sup>88</sup> although legislative history suggests that RFRA was not intended to affect accommodation under Title VII.<sup>89</sup> A similar test appeared to apply under the Free Exercise Clause, prior to the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources v. Smith*.<sup>90</sup>

Courts, largely untroubled by earlier free exercise jurisprudence or by RFRA, have assumed that government agencies need to accommodate no further than Title VII requires.<sup>91</sup> The compelling interest test in free exercise exemption cases has never been as stringent as the compelling interest test in equal protection and free speech cases. That is as it should be. Still, that test has been *more stringent* than the Title VII accommodation test that has been developed.

I believe too little has been required of employers under Title VII. A more appropriate standard would be that incorporated into a bill called the Workplace Religious Freedom Act of 1999.<sup>92</sup> It defined "undue hardship" as an "accommodation requiring significant difficulty or expense."<sup>93</sup> Among factors to be considered would be the cost of the accommodation, the cost of lost productivity, and the cost of retraining, hiring, or transferring other employees, in relation to the employer's size and operating cost.<sup>94</sup>

My conclusion that Title VII, as interpreted, demands too little depends on judgments about the limited reach of the Establishment

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88. However, avoiding violations under the Establishment Clause is one compelling interest. If, in fact, a government employer's sustaining anything more than "de minimis" cost would violate the Establishment Clause, the government would have a compelling reason not to accommodate.

89. See Vikram David Amar, *State RFRA's and the Workplace*, 32 U.C. DAVIS L. REV. 513, 526 n.52 (1999); Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2526-27 (1996). Rosenzweig points out that RFRA could affect an employer's use of a collective bargaining agreement or a statutory requirement as a defense to an accommodation claim, even if it does not alter the basic "de minimis" standard. *Id.* at 2527-28, 2533-35.

90. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

91. This puzzle is explored in Amar, *supra* note 89, at 521-24, who remarks on "the judicial carelessness that characterizes much of the religion case law." *Id.* at 523.

92. See Spognardi & Ketay, *supra* note 80, at 23.

93. *Id.* (discussing the Workplace Religious Freedom Act of 1999).

94. *Id.* The Act also limits the extent to which a seniority system provides a defense against a claim for accommodation. *Id.* Similar bills had been introduced in previous sessions of Congress.

Clause and about permissible accommodation to religion under the Constitution. The Supreme Court left open in *Hardison* whether even the imposition of minimal cost would violate the Establishment Clause. The basic argument against such accommodation is this: if the government favors religion, it violates the Establishment Clause. Enough cases have been decided since *Hardison* to give us reasonable assurance that requiring minimal cost accommodation is constitutionally permissible. But, that conclusion leaves open the issue of whether requiring more costly accommodations might violate the Establishment Clause. Were it to do so, any tension between Title VII and RFRA would be neatly resolved. RFRA allows impairment of religious exercise if the government is serving a compelling interest. Avoiding Establishment Clause violations is undoubtedly a compelling interest. If the imposition of more than minimal cost violates the Establishment Clause, RFRA does not require any accommodation that goes beyond minimal cost.

The subject of constitutional accommodation to religion is complicated,<sup>95</sup> but I assume that the government as an employer *is permitted* to engage in more than minimal cost accommodation. Supreme Court opinions presuming that legislatures may make choices to accommodate religion have never suggested that when laws lift burdens on religion they may impose no more than de minimis costs on the government.

The more difficult question is whether laws may similarly impose costs beyond minimal ones on private entities, including private employers. Some opinions may be understood as suggesting that an accommodation to religion is acceptable only when the government lifts burdens that the government itself has imposed.<sup>96</sup> On this view, a legislature *could decide* to grant an exemption from criminal laws against using peyote for groups that use that substance in worship services, but it could not require that private universities allow students to use peyote in worship services.<sup>97</sup>

One might believe that the government has no business adjusting burdens connected with religion within the private sector, thereby imposing on private employers. Indeed, the Court did strike down a

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95. My own view of some of the complexities is in Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 380-88.

96. See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 712 (1992).

97. It could not, barring some argument that public laws against peyote underlie the universities' restrictions.

Connecticut scheme that required employers to grant workers their Sabbath off.<sup>98</sup> That scheme, the Court believed, imposed absolutely and unreasonably on private employers.

If government cannot accommodate by imposing burdens on private employers, how can even the minimal accommodation requirements under Title VII be justified? I shall examine one standard response, and then provide a more satisfactory answer. The standard justification is that Title VII is an anti-discrimination law, and the government can require accommodation as an aspect of forbidding religious discrimination. In the Connecticut case, Justice O'Connor commented on its implications for accommodation under Title VII. She wrote that "a statute outlawing employment discrimination . . . has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society."<sup>99</sup> No doubt some failures to provide accommodations could be so egregious one might easily consider them to constitute outright discrimination—an intentional, or at least highly reckless, disregard for someone else's religious faith and practice. Such failures to accommodate would thwart equal opportunity. But the language of Title VII goes beyond failures to accommodate that can easily be labeled discriminatory; it may go beyond failures to accommodate that interfere with equal opportunity. And Title VII requires more accommodation of religious practices than it does of practices strongly connected with race, gender, or national origin.<sup>100</sup> I

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98. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

99. *Id.* at 712 (O'Connor, J., concurring).

100. However, accommodation for mental and physical disabilities, under the Americans with Disabilities Act (ADA), has gone *beyond* that required for religion. See Jamar, *supra* note 10, at 800-01.

Although some relevant provisions of the ADA are similar linguistically to Title VII, for example, requiring employers to make a "reasonable accommodation," 42 U.S.C. § 12111(9) (1994), unless this imposes "undue hardship," *id.* § 12111(10), makes the defense much harder to assert. Whereas the Supreme Court in *Hardison* equates more than a de minimis cost with undue hardship under Title VII, that approach is expressly rejected in the legislative history for the ADA. H.R. REP. NO. 101-485, pt. 3, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 463. And the ADA itself defines "undue hardship" as actions requiring "*significant difficulty or expense*" in light of several factors including, but not limited to, (1) "the nature and cost of the accommodation," (2) the type of operations of the covered entity, (3) the number of employees of the entity, and, most importantly, (4) "the overall financial resources of the facility." 42 U.S.C. § 12111(10). Accordingly, if the cost of an accommodation, although a large sum, constitutes only a small fraction of the covered entity's entire budget, the employer cannot claim undue hardship on that ground alone. H.R. REP. NO. 101-485, pt. 3, at 41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 464. Additionally, the history specifically rejects a proposed "safe harbor" provision that costs in excess of ten percent of an individual's salary would, as a matter of law, constitute an undue hardship. *Id.* Rather, what constitutes "undue hardship" under the ADA must be determined on a "case-by-case analysis" that carefully analyzes the factors provided in § 12111(10) (emphasis added). *Olmstead v. Zimring*, 527 U.S. 581, 606 n.16 (1999); S. REP. NO.



do not believe the language of Title VII's accommodation section, or even that section's stingy application by the Supreme Court, can be justified as a simple anti-discrimination law. The law requires accommodation that extends somewhat beyond an absence of discrimination.

For me, this leaves the question of whether legislatures can impose at all on private citizens in requiring accommodation, beyond protecting against discrimination. I do not see why not. Many impairments of fundamental liberties can come from the private sector and private employers enjoy the success they do from a fabric of supporting laws and government practices. So long as the federal government otherwise has jurisdiction to regulate behavior, say under the Commerce Clause, the protection of religious liberty should be a permissible aim of regulation.<sup>101</sup> State legislatures, under their general police powers, should have a similar ability to regulate private enterprises. If governments can require some private accommodations to the religions

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101-116, at 32 (1990). A court's determination of undue hardship under the ADA is not subject to hard and fast rules; nevertheless, unlike accommodation under Title VII, the clear tenor of the ADA's provisions, when read in light of the legislative history, is that an employer *may* be expected to incur more than just a de minimis cost in order to fulfill his duty under the Act.

The case law, albeit sparse, bears out this approach and indicates that employers must take fairly substantial steps to accommodate disabled employees in order to avoid liability. See, e.g., *Harmer v. Va. Elec. & Power Co.*, 831 F. Supp. 1300 (E.D. Va. 1993) (providing fans, smokeless ashtrays, and air purifiers, while separating smokers from nonsmokers in the workplace, for employee with pulmonary disability held "reasonable"); *Davis v. York Int'l, Inc.*, 2 A.D. Cases (BNA) 1810 (D. Md. 1993) (installing extra phone line and computer at home, while lessening work responsibilities for employee with multiple sclerosis held "reasonable"); *Bombrys v. City of Toledo*, 849 F. Supp. 1210 (N.D. Ohio 1993) (excluding insulin-dependent diabetic from police force held "unreasonable" where providing food, glucose, and injection kit in patrol car would not be an "undue hardship"). At the other end of the spectrum, accommodation costs that are "clearly disproportionate" to the benefits produced, or costs that would jeopardize the financial stability of the employer are "undue." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995). See generally Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 320-40 (2001) (reviewing attempts by the Supreme Court "to define defensible and administrable boundaries for disability accommodation claims"); Lawrence P. Postol & David D. Kadue, *An Employer's Guide to the Americans with Disabilities Act: From Job Qualifications to Reasonable Accommodations*, 24 J. MARSHALL L. REV. 693, 712-18 (1991) (describing different methods for employers to make reasonable accommodations); Sue Krennek, Note, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969, 1986-88 (1993) (analyzing the reasonable accommodation standard set forth in the ADA).

101. I am, to be clear, not suggesting that the First or Fourteenth Amendment confers such regulatory power on the federal government; I am assuming *they* concern only interferences with rights that come from the government itself. I am also assuming that neither the Establishment Clause nor the Equal Protection Clause bar all protections of religious exercise against private actors.

of private workers, they should be able to require a greater accommodation than what *Hardison* demands.

This brings us back to the *Wilson* case.<sup>102</sup> The court's result in that case was correct whether one applies the Supreme Court's relaxed standard of undue hardship or a more demanding, and more appropriate, standard.

If the cause of disturbance had been the *substance* of the anti-abortion message, U.S. West should have had to accommodate. If religious messages and messages motivated by religious conviction are to be accommodated, the need for accommodation should usually not depend on the congeniality of the message for co-workers.<sup>103</sup> But the sticking point with Wilson's button was the photograph.

Some photos are deeply disturbing: an anti-alcohol button might show a vomiting drunk, or an anti-war button might show a row of corpses or a family being burned by napalm. Workers who sympathize with the basic message could be put off, even deeply troubled. We need to see such photographs from time to time, but we do not want or need constant exposure to them at work. Whatever their success in achieving it, most people want a comfortable working environment and they are more productive when they get it.

For the sake of his workers' serenity and productivity, an employer is justified in forbidding deeply disturbing photographs from the common working environment. The evidence suggested that Wilson's photo was one of these, that other workers were deeply disturbed, that productivity declined, and that some workers were inclined to stay home if Ms. Wilson continued to wear the button.<sup>104</sup> The option of counseling workers to ignore the photo disregards human psychology. People do not easily avert their eyes when a horrible sight comes within range, and it would have been very difficult to look at Wilson without seeing the

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102. See *supra* notes 60-74 and accompanying text (describing the context and analysis of *Wilson v. West Communications*, 58 F.3d 1337 (8th Cir. 1995)).

103. However, an employer should be able to say sometimes that certain kinds of messages are so fraught with controversy that speech about those subjects will not be tolerated at work. If an employer makes such a decision, banning, for example, all electoral buttons at work, he should not have to make an exception for non-religious electoral buttons, whose wearing happens to be motivated by religious conviction. Some other messages may be so outrageous in general opinion, for example, that parents should have the discretion to kill any child of theirs until the child is one-year old, that an employer who bans them would not need to make an exception for a religiously motivated statement of this sort.

104. *Wilson*, 58 F.3d at 1339.

photo. The main accommodation that Wilson offered did involve undue hardship.<sup>105</sup>

The *Townley* case presented a difficult question about accommodation.<sup>106</sup> Townley Co., you will remember, required all employees to attend religious meetings. Pelvas, an atheist, asked to be excused. Of course, *if* mandatory religious meetings are discriminatory in themselves or constitute harassment against a worker of a different religion, the objecting worker cannot be expected to attend. But if the meetings do not constitute simple discrimination and do not make a worker feel he is in a hostile environment, should an exemption be granted to someone whose religious convictions make attendance objectionable?<sup>107</sup>

Pelvas's supervisor said he could read or sleep, and could wear ear plugs during the services, but would not be excused. The accommodation issue was critical because the court (mistakenly in my view) decided that mandatory services did not in themselves discriminate against those who did not share the religious perspective of the services.<sup>108</sup>

The court concluded that Townley Co. had made no effort to accommodate Pelvas's objections to the services, and that the central question was whether excusing Pelvas would have caused "undue hardship."<sup>109</sup> The court acknowledged the possibility of "spiritual costs," but said that the statute requires connecting spiritual costs to an adverse impact on the conduct of business, involving disruption of work

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105. The district court reached this conclusion. The court of appeals, having found (mistakenly in my view) that U.S. West offered a reasonable accommodation, did not have to consider the issue of undue hardship; but it remarked that "the district court did not err" in reaching its conclusion on that score. *Id.* Some scholars believe *Wilson* was wrongly decided. See, e.g., Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 602-08 (1997); Berg, *supra* note 75, at 978-83. I am not sure how far my difference with them depends on a conflicting appraisal of the degree of unavoidable disturbance, rather than a different sense of how costly a required accommodation might be.

I should note that I do not regard this as like a situation in which customers, or co-workers, are directly disturbed by a worker's race, gender, or religion. I assume that any concession to such feelings violates the statute.

106. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

107. This sentence assumes that someone might have an objection in conscience to attending without necessarily feeling that forced attendance creates a hostile environment. This conjunction of attitudes might be rare, but it is conceivable. The accommodation issue becomes obviously more central if it is assumed either that the employer's non-selectiveness about audience or his free exercise interests entail that the meetings do not amount to ordinary discrimination *or* religious harassment.

108. *Townley*, 859 F.2d at 615.

109. *Id.* at 615-16.

routine or imposition on co-workers.<sup>110</sup> By these standards, excusing Pelvas from the meetings would not have caused undue hardship.<sup>111</sup> Because Townley Co. did not qualify for a special exemption created for religious institutions, it had to excuse Pelvas from the meetings.<sup>112</sup>

John Noonan, a prominent scholar and judge, dissented.<sup>113</sup> He thought the supervisor's proposal that Pelvas could wear earplugs and read or sleep was an offer of a reasonable accommodation.<sup>114</sup> Judge Noonan also believed that Townley Co. should be allowed to reject any sharp dichotomy between secular and religious activity.<sup>115</sup>

All the judges agreed on a point that deserves brief reiteration here. Whatever may be the status of atheism under the Free Exercise Clause, atheists can make claims under Title VII. Not only can an atheist suffer outright discrimination because of his religious belief that no God exists, an atheist may need accommodation. The statutory language requires accommodation of religious "belief" as well as "observance and practice."<sup>116</sup> Although typical atheists have no observances and practices of the sort meant, they undoubtedly have beliefs about religion which may lead them to feel deep offense if they are consistently forced to listen to religious doctrines they reject.<sup>117</sup>

Once that is conceded, Pelvas has the better of the argument on accommodation. What Townley Co. offered was not a reasonable accommodation, and the accommodation of excusing Pelvas did not impose undue hardship. Pelvas finds it unpalatable to sit through religious services of a faith he rejects. Is it an adequate answer that he can wear earplugs and read newspapers? I think not. Few earplugs keep out all noise, and, even if they did, forced attendance could feel objectionable. Earplugs and newspapers should not be regarded as a

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110. *Id.* at 615.

111. *Id.*

112. *Id.* at 616. Because the case was decided in 1988, two years before *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the court considered the employer's free exercise claim under the old approach of *Sherbert v. Verner*, 374 U.S. 398 (1963). It said the impact on the owner's religious practices of excusing those with religious objections would not be great, and that the government's interest in ending religious discrimination was a strong one. *Townley*, 859 F.2d at 616.

113. *Townley*, 859 F.2d at 662 (Noonan, J., dissenting).

114. *Id.* (Noonan, J., dissenting).

115. *Id.* (Noonan, J., dissenting).

116. Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1994).

117. Thus, one should not conclude that, "[f]or committed atheists, prayer is a silly waste of time." Gregory, *supra* note 42, at 140. Compulsory prayer may strike an atheist as a waste of time, but it may also be offensive to her conscience.

reasonable accommodation to an atheist's sense that he should not have to attend.

The employer must accommodate Pelvas unless to do so would cause "undue hardship." Here, perceiving even de minimis costs is hard.<sup>118</sup> The employer should be able to point to some positive difference that the presence of someone sitting with a newspaper and earplugs will make. Common experience is that having participants who are indifferent and inattentive, and are seen to be so by everyone present, is more destructive of fruitful meetings than having the same persons absent.<sup>119</sup> Even if the court mistakenly underrates the significance of "spiritual costs," how could completely inattentive presence be better than non-attendance?<sup>120</sup> Judges could reach the conclusion that inattentive presence may be preferred only if they determine that an employer may say what counts as spiritual costs, and that judges cannot evaluate these. Without a doubt, the idea of courts evaluating spiritual costs is troublesome, but if courts simply accept all assertions of spiritual cost that are not evidently insincere, the result would be to eliminate the accommodation benefit for workers when employers offer

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118. I adopt the court's supposition that the amount of business discussion carried on at these meetings was not in itself sufficient to require Pelvas's presence or to make the meetings other than worship services.

In 1992, the Supreme Judicial Court of Massachusetts considered a worker's claim that her employer had improperly conditioned her employment on continuing to attend a week-long seminar in which Scriptural references were used to reinforce teachings, and a video presentation indicated that wives should be subordinate to husbands. *Kolodziej v. Smith*, 588 N.E.2d 634 (Mass. 1992). Plaintiff had failed to make a Title VII claim, so the court was limited to deciding whether the employer had interfered with her state "constitutional right to believe and profess the religious doctrine of her choice." *Id.* at 637. (A state statute forbade private interference with constitutional rights. The quote in the text represents the court's paraphrase of the right of free exercise.) Plaintiff argued that both the view taught at the seminar, that husbands have authority over wives, and her competing view were religious. *Id.* Noting the difficulty of distinguishing secular from religious beliefs, the court accepted this contention of the plaintiff; it followed that she would have a right not to attend the seminar if it was a religious activity. *Id.* at 638. But the court concluded that the seminar was not a religious activity. *Id.* Had the court directly faced Title VII issues, it would have had to decide if her religious objection to participating in a seminar would have entitled her to an accommodation of being excused. One guesses the court would have said that the seminar, dealing with matters like interpersonal conflicts, bore sufficient relation to legitimate business concerns of the employer so he would not have had to make that accommodation.

119. If the supervisor had a rational basis for his compromise, it may have been that few employees would have the gall to be so openly disrespectful; whereas, more employees might seek to be excused.

120. The employer might respond that he just wants to force people to be there to hear the true word, but *this* aim, if achieved, constitutes religious discrimination against those who object.

their own competing claims of religious exercise. The court, rightly, does not go down that road.<sup>121</sup>

#### V. HARASSMENT: SOME BASIC PRINCIPLES

Before we tackle troublesome questions about religious harassment in employment, we need a sense of basic harassment law as developed by the Supreme Court.

As I have mentioned, religious harassment could result from quid pro quo threats (or offers) that a worker's employment status will depend on her religious affirmations or activities; more commonly, harassment because of religion involves other conduct that is so "severe or pervasive" it creates an atmosphere at work that is so hostile that one can say it alters the terms or conditions of employment.<sup>122</sup>

Title VII addresses only employers and unions, it does not directly regulate the activities of fellow workers.<sup>123</sup> Thus, the hostile remarks and other activities of fellow workers become actionable harassment under Title VII only when they can be attributed to the employer. If someone in a supervisory position makes an employment decision that discriminates against a worker, say he fires a worker because she is Jewish, he is taken to act for the employer. If workers continually make remarks that are offensive to a co-worker, the employer's liability arises only when the employer knows or should know what is happening and fails to take adequate steps to stop the abuse.

In 1998, the Supreme Court addressed the responsibility of employers for harassing behavior of supervisors that does not involve a tangible employment action, such as a firing or a demotion.<sup>124</sup> To oversimplify, the Court had to decide whether an employer is liable only for his negligence or is vicariously liable for the actions of the supervisors he employs. Drawing from the general law of agency and the policies of Title VII, the Court held that the employer is vicariously liable, but that he has an affirmative defense if he exercised reasonable care to prevent and correct harassing behavior and if the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities.<sup>125</sup> In its

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121. I do not address here the serious question of whether some employers in ordinary businesses may be so religious they should have the rights to discriminate on religious grounds of religious organizations. I presently believe that such an extension of those rights would be a mistake, but that approach would be preferable to acceptance of all claims about spiritual costs. See *infra* notes 150-53 and accompanying text.

122. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998).

123. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16 (1994 & Supp. 2000).

124. *Id.* §§ 2000e to 2000e-16j; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

125. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

approach, the Court declined to draw as sharp a distinction between quid pro quo and hostile environment harassment as earlier cases had suggested. Behavior by a supervisor that might amount to an unfilled quid pro quo threat was treated as raising hostile environment issues, not as constituting a tangible employment action.<sup>126</sup>

At an initial glance, this treatment of unfulfilled supervisor threats seems incongruous with the employer's liability for simple discrimination by a supervisor. If the employer, despite energetic efforts to stop discrimination, is liable for a supervisor's firing of a worker because of her religion, why should a supervisor's quid pro quo threats be treated differently? Quid pro quo threats made by those with power to affect a worker's opportunities already discriminate, because they strongly encourage the worker to act in the way that will cause the discriminating result. If the worker submits to a sexual act or reforms her apparent religion in order to receive a promotion she otherwise deserves, she has suffered a wrong. When a supervisor has the ability to cause the discriminating result, his serious quid pro quo threat itself alters the worker's terms of employment; and that should lead to the employer's liability, on the same theory that a supervisor's act of firing or demotion would be attributed to the employer.

Despite the logic of this analysis, the Court's approach is at least defensible. Many remarks suggest that a quid pro quo threat may be less than explicit or not obviously serious. For administrative bodies and courts, discerning the exact content of asserted threats and their degree of seriousness is elusive. Further, workers should be encouraged to go over the heads of abusive supervisors. The Court leaves open whether a single serious threat could itself "constitute discrimination in the terms or conditions of employment."<sup>127</sup> Taking all this into account, the Court's refusal to conclude that all quid pro quo remarks by supervisors should be attributed to employers represents one reasonable approach.

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126. Part of the Court's concern was the difficulty of drawing the line between quid pro quo and other harassment, and the incentive that line created for the plaintiff's lawyers to characterize comments as quid pro quo. *Ellerth*, 524 U.S. at 752-53.

127. *Id.* at 754. Berg is critical of the Court's treatment of unfulfilled quid pro quo threats, but suggests that a single serious threat might be sufficient to create a hostile environment. Berg, *supra* note 75, at 968-69. Were the Court so to hold, the practical effect of *Ellerth* for supervisor threats might be slight, but its conceptual approach would remain less than satisfactory. To make out a hostile environment claim a plaintiff must establish that she felt the work atmosphere was seriously hostile. One can advance a straightforward claim of discrimination without assertion about one's subjective feelings. In theory, a worker might yield to some quid pro quo threat without feeling the work environment was seriously hostile.

Under Title VII, abusive remarks about a worker's religious identification are like similar remarks about race or gender. In an early case, a supervisor referred to a worker as "the Jew-boy," "the kike," "the Christ-killer," and the "God-damn Jew."<sup>128</sup> Such abusive remarks spring from a hostile animus, and they are indisputably unwelcome to the listener. Treating them as the basis for a harassment claim presents no serious issue.<sup>129</sup> The same is true if the abusive speech (or other conduct) does not refer to the plaintiff's religion, but is designed to offend her and is a response to her religious convictions. In one state case, co-workers made salacious comments about a worker's wife, after he had expressed a religiously based objection to their crude sexual talk.<sup>130</sup> In an another case, co-workers rubbed their genitals in a worker's presence because they knew that, as a religious person, he found that behavior offensive.<sup>131</sup>

The main complications about religious harassment arise over the communication of serious ideas. Remarks may be highly critical of a worker's religion without being intended to be personally abusive—"I like you a lot. I am very sorry you are a Roman Catholic. The Pope is the Antichrist and all Catholics who do not convert are doomed to Hell." Although the speaker does not mean to be abusive, the listener may perceive such comments as putting her in a second class or inferior status.<sup>132</sup> A somewhat different kind of problem involves proselytizing that is not directly critical of anyone's religion, but is so persistent it becomes deeply unsettling. Such remarks, if pervasive enough, can create a hostile work environment.

Disturbing theological assertions and insistent proselytizing raise special problems of hostile environment harassment that is based on religion. Free speech problems can arise with harassment based on gender, race, and national origin. But with religion, much more than with these other categories, the speech that a listener finds deeply offensive is offered out of the speaker's most sacred responsibilities and

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128. *Compton v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976).

129. One might have a very expansive notion of speech the First Amendment protects that would cover such remarks in the working context, but one would then object to virtually any notion of hostile environment harassment based on speech.

130. *Finnemore v. Bangor Hydro-Elec. Co.*, 645 A.2d 15 (Me. 1994); *see also supra* note 33 (describing the facts and holding of *Finnemore*).

131. *Golden v. G.B. Goldman Paper Co.*, No. 91-3162, 1991 WL 157385 (E.D. Pa. Aug. 8, 1991).

132. I was struck at a conference on the place of religion in public life by a Jewish writer's intense feeling that remarks that Jews cannot be saved (unless they convert) demeaned her and other Jews. Awareness that the typical theological position of those making the statements is that no one except Christians (in their sense of Christians) can be saved did not assuage the feelings.



his concern for his listener's welfare. Further, the speaker may himself have a statutory accommodation claim under Title VII. His speech is not only speech, but a religious practice that may warrant accommodation. Thus, the listener's claim not to be harassed, or to be accommodated by being relieved of the speech to which he objects, may be countered by a speaker's claim of rights to express his views. Trying to sort out these threads is a major challenge. And I shall turn to it shortly. But, first we need to have a sense of just what counts as "religious" under the statute.

#### VI. WHAT IS RELIGION FOR PURPOSES OF TITLE VII?

The question of what counts as "religious" under Title VII arises for ordinary discrimination, accommodation, and harassment; but the difficulties are most complex in respect to hostile environment harassment based on disturbing speech. We have already examined what relations of speaker's selection of audience, content of speech, and nature of listener's offense are needed for an employer to discriminate or harass *because of* a worker's religion. We have also examined whether adverse treatment grounded in a moral judgment about ordinary behavior amounts to religious discrimination if the basis for the moral judgment lies in religious conviction. Here I consider the question of what practices and beliefs are religious.

This question has mainly come up under the accommodation provision of Title VII. Before *Hardison* was decided, the question seemed to have considerable practical significance. It matters less now because the employer's burden is so slight, even when the belief or practice that the worker wants accommodated is religious.

Prior to 1980, courts split over what kinds of claims employers had to accommodate.<sup>133</sup> Some assumed that claims had to be based on institutional religion and that observance had to fit the accepted tenets of that faith. Others, drawing on *United States v. Seeger*<sup>134</sup> and *Welsh v. United States*,<sup>135</sup> cases construing the statutory exemption from military duty for conscientious objectors, ruled that sincerely held beliefs that were religious within one's own "scheme of things" were sufficient.<sup>136</sup>

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133. See Engle, *supra* note 84, at 373-81.

134. *United States v. Seeger*, 380 U.S. 163 (1965).

135. *Welsh v. United States*, 398 U.S. 333 (1970).

136. *Seeger*, 380 U.S. at 185.

In 1980, the EEOC issued Guidelines on Discrimination Because of Religion<sup>137</sup> that decisively adopted the broader view of what counts as religious. The introduction says:

The Guidelines do not confine the definition of religious practices to theistic concepts or to traditional religious beliefs. The definition also includes moral and ethical beliefs. Under the Guidelines, a belief is religious not because a religious group professes that belief, but because the individual sincerely holds that belief with the strength of traditional religious views.<sup>138</sup>

Under this interpretation, religion in Title VII is treated as is religion under the Selective Service Act, according to the *Seeger* and *Welsh* cases.

The EEOC approach may appear liberal and enlightened, but it is troubling in some important respects. The first concerns what amounts to a qualifying moral or ethical belief. What I have in mind particularly is whether a worker must have a conscientious belief that he cannot, or must, perform a particular action, or whether a strong sense of ethical responsibility is enough for a belief to be like a traditional religious one. In one Supreme Court case on unemployment compensation, a religious pacifist refused to work on armaments.<sup>139</sup> A non-religious pacifist might take a similar stance and seek a transfer to another department. If the accommodation could be accomplished easily, the employer would have to make it under the EEOC Guidelines.

But what of a strong ethical sense that does not amount to a conscientious objection? A worker, required often to travel, feels a powerful responsibility to spend time with her family. She requests “an accommodation” of being shifted to another department whose workers need not travel. Is the statute relevant here? Virtually every request based on family needs is an ethical one in a broad sense. Treating as “religious” all requests based on a strong ethical sense would make the statute potentially applicable in too many instances and would make administrative and judicial decision extremely difficult. The practical concern about this consequence would increase greatly if the *Hardison* duty to accommodate were made more demanding.

Another troubling aspect of the EEOC Guidelines concerns speech. Probably few workers will make non-religious demands, in the traditional sense, for special conditions at work such as having

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137. Guidelines on Discrimination Because of Religion, 45 Fed. Reg. 72,610 (Oct. 31, 1980) (codified as revised at 29 C.F.R. § 1605 (1996)).

138. *Id.*

139. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

Saturdays off or keeping a beard; but many workers may feel, as a matter of conscience, that they should speak to co-workers on subjects of concern. If a sense of ethical compulsion to speak qualifies for accommodation under Title VII, much speech might be protected that is neither explicitly religious nor motivated by a traditional religious belief. Thus, someone whose overriding concern is saving the environment might have a claim to have his environmental advocacy accommodated.

This extension creates problems. If a worker wants to talk about subjects of deep personal or public concern, is statutory protection to depend on whether she feels conscientiously compelled to do so? That would be a hard line to draw, and it would reward rigid ideologues (who are likely to feel compelled) over people with more nuanced views of life. If protection extended to all those who think their speech is highly desirable from an ethical point of view, the standard would become virtually unadministrable.

One's reaction to this possibility may depend somewhat on one's attitude about an employer's present ability to respond to most speech by workers. Perhaps workers should have general rights of free speech vis-à-vis private employers, and a very broad notion of religious speech could constitute a long step in that direction. But within a regime that requires accommodation of religious speech, but not other speech, an extension of religious speech to all speech demanded by conscience, or to all speech recommended by an ethical sense, seems undesirable and perhaps untenable. In any event, these broad implications of a generously expansive view of religion seem not to have been recognized by the EEOC.<sup>140</sup>

The question of what counts as religion arises, as previously indicated, in respect to harassment and ordinary discrimination, as well as accommodation. I am not certain that the EEOC Guidelines were designed to apply to ordinary discrimination and harassment, but that is their apparent coverage. This application would create still further difficulties.

Imagine that a recent college graduate decides to see what it would be like to work in the logging industry. She quickly reveals to her logging

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140. In *Van Kuten v. Family Health Management*, the court cited the EEOC Guidelines approvingly, but discerned no evidence that the plaintiff had been fired because he held "Wicca" beliefs or had expressed some of them in the workplace. *Van Kuten v. Family Health Mgmt.*, 955 F. Supp. 898, 902 (N.D. Ill. 1997). In *Seshardi v. Kasrain*, without trying to conceptualize the outer limits of protected beliefs, Chief Judge Posner made clear that religious beliefs need not be orthodox. *Seshardi v. Kasrain*, 130 F.3d 798, 800 (7th Cir. 1997).

companions that she thinks natural forests should be kept pristine. This opinion proves to be politically incorrect within the logging community, and supervisors and co-workers ridicule her for her environmental views.

Must they try to figure out if environmentalism is a cause for which she feels a religious-like commitment? If the graduate complains of her abusive treatment, must the employer's representative decide on the quality of her commitment, recognizing that the application of Title VII will depend on it? When one considers harassment because of religion, a very broad definition of religion renders the statute much too amorphous. Such a broad definition is more strikingly mistaken for harassment than it is for accommodation.

One can finally reject the EEOC approach only if one thinks there is a preferable alternative. I am confident that more than one alternative would be preferable. This is not the occasion to defend my own position that courts should use an analogical approach to conceptualizing religion, one that asks judges to start from the characteristics of undoubted and paradigm instances of religion and to decide how closely arguable instances of religion resemble these.<sup>141</sup> Under this approach, many conscientious ethical stances and expressions do not count as religious.

#### VII. RELIGIOUS SPEECH OF EMPLOYERS AND CO-WORKERS THAT DISTURBS SOME WORKERS

It is time now to face the most daunting problem of Title VII discrimination law as it pertains to religion. How should courts regard the religiously based speech of employers and co-workers when that speech proves disturbing to some workers? Ways in which the interest in such speech could make a difference are illustrated by the *Townley* case.<sup>142</sup>

The majority in the court of appeals assumed that mandatory religious meetings would constitute religious discrimination were that problem analyzed apart from the employer's interest in religious expression; but, in light of that interest, mandatory services did not violate the Act.

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141. See Kent Greenawalt, *Five Questions About Religion Judges Are Afraid to Ask*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 196, 206-24 (Nancy L. Rosenblum ed., 2000); Kent Greenawalt, *The Constitutional Concept of Religion*, 72 CAL. L. REV. 753 (1984).

142. See *supra* notes 34-43, 106-21 and accompanying text (discussing the legality and concerns posed by mandatory religious meetings in the workplace).

In dissenting from the court's conclusion that the company had to accommodate Pervas by excusing him (since the accommodation did not involve "undue hardship"), Judge Noonan urged that the court had paid insufficient attention to the employers' religious understanding of their workplace, to their "spiritual costs."<sup>143</sup> Because Judge Noonan regarded the supervisor's offer to Pervas to use ear plugs and read a newspaper during services as a reasonable accommodation,<sup>144</sup> we cannot be certain what he would have said about undue hardship had he disregarded the employers' claim to express their religious understanding. But, given the failure of the employers to assert that ordinary business needs required the attendance of every employee, we can suppose that Judge Noonan would have concluded that excusing Pervas was not an undue hardship, absent the employers' spiritual costs. Thus, what would not be an "undue hardship" could become one because of the employers' interest in expressing their religious understanding.<sup>145</sup>

When fellow workers are involved, we can see easily that one worker's interest in religious expression and his possible right to have the expression accommodated, can come into conflict with the interest other workers have in not being disturbed by religious messages that make the environment hostile or in gaining the accommodation of being free of messages at odds with their own religious understandings.

For both employers and fellow workers, we need to identify the sources of protection of religious expression, to ask how the degree of protection of religious expression should relate to the protection of non-religious expression, and to inquire how conflicts with the interests of unreceptive workers should be resolved. I shall begin with employer speech and then turn to that of co-workers.

#### *A. Religious Expression of Employers*

As the mandatory meetings of *Townley*<sup>146</sup> show, employer expression of religious views might constitute ordinary discrimination or harassment, or it might give rise to a required accommodation. A number of appellate courts have not permitted employers to engage in

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143. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 624 (9th Cir. 1988) (Noonan, J., dissenting).

144. *Id.* at 622 (Noonan, J., dissenting).

145. I suspect Judge Noonan would also have viewed the reasonableness of the supervisor's proposed accommodation differently if he had disregarded the employers' religious mission.

146. *Townley*, 859 F.2d at 610.

religious expression to the degree that they chose,<sup>147</sup> and some commentators have concluded that the judges are insufficiently sympathetic with the employers' sense of religious mission. One has remarked that "judicial intolerance has created an 'unjustified hostility toward religion in the work place.'"<sup>148</sup>

An employer may believe that his business should be tintured to varying degrees by religious practices. One employer may wish only to send Christmas cards for the firm with an explicit message about the birth of Christ.<sup>149</sup> Another may want his business to be deeply reflective of religious precepts and practices, regarding his "secular" company as a vehicle to live out a religious understanding in something like the way the Salvation Army considers its charitable activities as a way to embody and spread its religious understanding.

There is a substantial argument that an employer whose business understanding is deeply religious should be able to engage in outright religious discrimination, hiring only co-believers as supervisors and requiring that ordinary workers be at least sympathetic with the employer's religious mission.<sup>150</sup> A different section of Title VII allows religious organizations to engage in religious discrimination,<sup>151</sup> and the Supreme Court has said that this section does not violate the Establishment Clause for nonprofit activities of religious organizations, even in the permission it grants to employers to discriminate for jobs that have no religious importance.<sup>152</sup>

Should some ordinary businesses have a similar privilege if the employers conceive of their missions as predominantly religious? The argument in favor is that people should not lose their capacity to carry out a religious vision simply because they want to do so in commercial affairs. Most business employers have no such mission so job opportunities overall would be little affected. And were such

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147. See, e.g., *id.* at 610; *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985).

148. Brierton, *supra* note 15, at 290, 294-96, 303-05. Relatedly, two co-authors have discerned a "preference for religious claims by non-religious employees over those of religious employees." Beiner & DiPippa, *supra* note 105, at 580.

149. In *Kentucky Commission on Human Rights v. Lesco Manufacturing & Design Co.*, the employer wanted his worker to answer the telephone during the Christmas season with "Merry Christmas." *Ky. Comm'n on Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361 (Ky. Ct. App. 1987). The worker was a Jehovah's Witness who believed in the principle that people should not celebrate Christmas. *Id.* at 363.

150. See *Sports & Health Club, Inc.*, 370 N.W.2d at 844. Thomas Berg has a thoughtful discussion of this possibility. Berg, *supra* note 75, at 1003-04.

151. Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (1994).

152. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

discrimination allowed, workers who themselves wish a religious environment at work could find one.

I think that the line-drawing problems for such a privilege would be too great. Large employers, such as major companies, should almost certainly not have such a privilege, but legislative categorization by size could not do all the work. Judges would have to say which employers in the commercial marketplace are religious enough to qualify to discriminate, and this would be an undesirable task to assign to courts. Such businesses do not have a privilege under the present statute,<sup>153</sup> and extending the statutory privilege that now exists would be unadvisable.

Whether I am right or wrong about this, the rest of my discussion assumes that commercial employers should not be able to engage in outright, simple religious discrimination in hiring and promotions. It assumes further that whether or not an employer's religious expression should be protected should not depend on *the degree* of his religiosity. Administrators and judges can inquire whether various forms of expression are pretexts to harass or get rid of non-believers, but, once they conclude that an employer has a sincere desire to express religious views, they should not calibrate his degree of privilege to his degree of religious commitment. In other words, mandatory services, and other religious practices, should be treated the same for all employers who have some sincere sense of a religious mission for their businesses.

The questions that remain are how far an employer's religious expression should be protected and whether that protection should be greater, lesser, or the same as the protection of other employer speech.

Among the sources of protection of an employer's religious speech is the Free Speech Clause, which gives him the right to engage in a broad range of expression. In general, the government cannot restrict the speech of private individuals or companies unless it has a compelling interest in doing so that cannot be served by less restrictive means. The Free Exercise Clause covers religious expression as well as belief, but, for the most part, it gives no more protection to religious expression than does the Free Speech Clause.

Does the government's compelling interest in avoiding religious discrimination mean that, in fact, religious speech by employers is peculiarly unprotected (because the government can come up with a compelling interest to suppress it)? Not exactly. We have seen that non-religious speech, speech that is neither religious in content nor

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153. The defendant in *State v. Sports & Health Club, Inc.* argued unsuccessfully to the contrary. *Sports & Health Club, Inc.*, 370 N.W.2d at 844.

religiously motivated, could constitute religious harassment (if the employer selects his audience on religious grounds). Non-religious speech could also require an accommodation (if the speech offends a worker's religious convictions or identity). Although religious speech may be restricted more often than most non-religious speech, the compelling interest that supports restraining some religious speech also reaches some non-religious speech.

Someone might argue that if religious discrimination is forbidden, an employer's religious speech should receive *much less* protection than types of speech that have no connection to modes of forbidden discrimination. Some speech favors racism and sexism or other "isms" that are against public policy. Even if employers cannot themselves engage in racism or sexism, their free public approval of these practices may undermine to some extent their own adherence of non-discriminatory behavior and may contribute to attitudes that lead to discrimination.<sup>154</sup> People are free in public to express beliefs that are strongly at odds with public policy, but perhaps employers should not be able in the workplace to try to persuade workers that norms of non-discrimination are ill-founded. An analogous problem could easily arise with religious speech that puts members of other religions down and hints that their status in society should be diminished.

However, much religious speech differs from much racist and sexist speech in this respect. *Unless* religious speech advocates religious discrimination or explicitly or implicitly denigrates non-believers, a positive message that certain religious beliefs and practices are true or good need not be in tension with a norm of non-discrimination. An employer can consistently say that hiring should not be based on religious grounds, *and* that all people would benefit from recognizing the truth of his particular religious view. Thus, we must be careful not to conflate most religious speech with most racist and sexist speech in resolving conflicts between an employer's free speech and his worker's comfort. Further, whereas most racist and sexist speech reinforces dominance of whites and males,<sup>155</sup> much, perhaps most, religious speech in the American workplace does not reinforce some dominant

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154. This could be the case, even though a person might accept a norm of non-discrimination in employment and believe in some form of racism or sexism.

155. See J. M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2308, 2315 (1999) (arguing that because employers control the workplace culture and because they are able to prevent a hostile environment, vicarious liability for employee speech is justified).



religious perspective.<sup>156</sup> Thus, no good reason exists to disfavor much religious speech as compared with other speech in which an employer might engage.

Two state harassment cases provide examples of an employer's religious speech; they can help us examine the appropriate degree of protection and to compare further religious speech with speech based on other kinds of missions. In *Meltebeke v. Bureau of Labor & Industries*, the sole proprietor of a small painting business continually witnessed to his Christian faith, encouraged his worker to go to church, and chastised him for sinful activities.<sup>157</sup> The worker, after having been fired, said his boss had engaged in religious harassment.<sup>158</sup>

According to regulations of the Bureau of Labor and Industries, harassment on the basis of religion includes verbal conduct of a religious nature that creates a hostile or offensive working environment.<sup>159</sup> The Oregon Supreme Court rightly determined that the rule, in general, was appropriate and that it covered the circumstances of the case.<sup>160</sup>

In *Brown Transport Corp. v. Commonwealth*,<sup>161</sup> a lower state court indicated that Bible verses on paychecks and Christian religious content in some articles in a company newsletter were sufficient to sustain a finding of the Human Relations Commission that the employer had harassed a Jewish worker.<sup>162</sup> Soffer, the worker, had testified that these religious messages led him to worry about his job security and to

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156. This assertion depends on two debatable classifications. I count proselytization by evangelical Christians as not reflecting the dominant perspective among Christians. Such proselytizing does, of course, reflect the dominant Christian religion as compared with non-Christian religions. I am also not considering narrow localities. In some locales, most workplace religious speech may reinforce the religious view that predominates in that locale.

157. *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d. 351 (Or. 1995).

158. *Id.*

159. *Id.* at 355.

160. *Id.* at 357. According to the court, it did not matter that the employee had a lack of religious beliefs; he was entitled to be protected against discrimination because he did not share the employer's religious beliefs. *Id.* at 358. Considering the rule and its application under the provisions of the Oregon Constitution dealing with free exercise, the court concluded that the regulation could not be applied unless the employer was aware that his actions were having a harmful effect. *Id.* at 362. This condition was not met in the case; Meltebeke's worker did not tell him that the continual preaching disturbed him and Meltebeke did not realize it. *Id.* at 363. Requiring that the employer know, or be told (he might be told but disbelieve), that his religious proselytizing is having such a negative effect is an appropriate condition on liability. *See id.*

161. *Brown Transp. Corp. v. Commonwealth*, 578 A.2d 555 (Pa. Commw. Ct. 1990).

162. *Id.* at 562. One might characterize this conclusion as dictum. The court also concluded that Soffer should have been accommodated, and that he was fired as a consequence of his complaining about the paychecks and articles. *Id.*

believe that a worker would need to be Christian to be promoted into upper management.<sup>163</sup>

When an employer promotes a Christian message in these ways, a non-Christian understandably is concerned about his job prospects. But stopping the message is hardly the way to assure that the employer will not discriminate in hiring and promotions.<sup>164</sup> Should an employer choose to engage in religious speech, he should state very clearly that religious factors will not figure in employment decisions. But if such fears about discriminatory actions, independent of actual hiring and promotion decisions and independent of what the employer says about his employment policies, are taken as enough to stop religious messages, that would be too sharp a restriction of an employer's religious speech. Employers would be able to convey all sorts of controversial non-religious ideas (except racist, sexist, and xenophobic ideas), but not religious ones. The court in *Brown Transport* was right to conclude that a pattern of general messages to all workers *could* amount to religious harassment, but the expressions in that case should not have been taken as sufficient to cause a reasonable worker to feel that the working environment was hostile or abusive.<sup>165</sup> Otherwise, any employer's religious speech could be taken to have that effect.<sup>166</sup>

Should an employer's religious speech and mission be treated differently from other speech and missions? Let us imagine that the employer has deeply felt opinions about important social issues: he prints appeals to contribute to charities for the poor on his paychecks, or he prints posters expressing approval of the country's involvement in a war, or he requires employees to attend meetings at which they are

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163. *Id.*

164. Perhaps we need to pause over this conclusion, if an employer has voluntary religious meetings that most workers attend, and employment decisions are made by lower supervisors or by groups of team members of equal status at those meetings, is it not possible that the attendees will develop a bond that excludes those who do not attend? Their sense that the non-attendee is an outsider may affect their evaluation; so also may their sense that the non-attendee is at odds with the employer on religious matters, even though the employer has said that employment decisions should not be made on the basis of religion. This worry is far from fanciful, but it should not be enough to shut down an employer's religious expression. See Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 669-73 (1998).

165. By comparison, this was a much milder form of religious expression than mandatory religious meetings, which the *Townley* court did not think were barred by Title VII. (Of course, that court did not consider a claim of harassment, although an atheist's request for an accommodation to be excused came close to an assertion that he felt harassed.)

166. Perhaps Soffer should have been entitled to some accommodation, such as getting a special paycheck without the religious message, and *Brown Transport* may have been at fault for firing Soffer because he complained; but the finding of harassment reached too far.

informed of the shortage of local blood supplies and are urged to give blood. Workers might object to these messages on various grounds, but a religious pacifist might find the approval of war objectionable on religious grounds, and a Jehovah's Witness, opposed by religious conviction to blood transfusions, might object to being forced to listen to a plea to give blood. When we think about such non-religious speech, it is not easy to conclude that religious speech should be more or less privileged. Employers should be free to join various causes or missions to their commercial operations. One would not conclude that they are specially privileged to pursue religious missions in a domain where such missions are not common, but one would also not conclude that they should be less privileged to pursue religious missions than other missions. In the examples I have chosen, the other "missions" may be more temporary than religious missions, but an employer could have a long run aim to help the poor or protect the environment. Various "non-business" missions should be accorded equal status by the law.

The analysis, thus far, does not quite dispose of the mandatory meeting problem. Rights of free speech rarely, if ever, give someone a right to compel people to listen. Having religious meetings may be an aspect of an employer's free speech, but compelling attendance as a condition of employment involves using the employer's economic power to coerce attention to religious messages.<sup>167</sup> We might conclude that the Free Speech Clause gives the employer little or no protection for making attendance compulsory. In that event, it could matter greatly whether some special privilege arises for mandatory religious meetings. Such a privilege might come from a constitutional right of free exercise, from RFRA, or from the implications of Title VII.

The *Townley* case was decided in 1988 and the court there assumed, under the then prevailing constitutional approach of *Sherbert v. Verner*,<sup>168</sup> that the government could not impair anyone's interest in free exercise without showing a compelling interest. That particular approach was apparently blocked by *Employment Division, Department of Human Resources v. Smith*,<sup>169</sup> which holds that religious claimants have no constitutional privileges of exemption from valid general

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167. Alternatively, one might say that compelling his workers to attend as a condition of employment does involve the free speech of the employer, but that protection of that aspect of his speech is not as great as protection of his right to express himself.

168. *Sherbert v. Verner*, 374 U.S. 398 (1963).

169. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

laws.<sup>170</sup> But RFRA, as I have indicated, probably applies to actions of the federal government, including restrictions imposed under Title VII. Thus, an employer can argue that the federal government cannot substantially burden his religious practices without a compelling interest. He might also argue that his own religious interests should be taken into account whenever religious discrimination is considered. That is to say, if Title VII is designed to protect religious freedom and diversity, an employer's interest in religious exercise should figure in what counts as discrimination by him.

The issue about mandatory religious meetings becomes difficult if one takes account of the employer's religious exercise. However, we know that an employer cannot refuse to hire workers because of their religion, and a requirement that workers attend regular services of a specific denomination would definitely be impermissible. I think mandatory services, involving an employer's use of economic coercion, are too close to required church attendance to be allowed. Title VII itself does not *help* the employer; it is about equal employment and worker's rights, not employer privileges. The language of RFRA is a greater obstacle to my conclusion.<sup>171</sup> To avoid the compelling interest analysis that RFRA involves and that the court employs in *Townley*, I would say that an employer does not suffer a "substantial burden" on his exercise of religion (the predicate for application of RFRA) if he is not allowed to dictate to all his workers what religious services they must attend.

### *B. Protecting the Religious Speech of Employees*

As we have seen, the Title VII provision on accommodation gives some protection to the religious speech of workers. Claims about freedom to speak can also figure when other workers complain of harassment. Does religious speech in this connection receive more protection than other speech and, if so, is that defensible?

We need here to distinguish government from private employers. Workers for private employers have limited free speech rights against their employers, including speech that concerns the process of collective bargaining or is safeguarded by agreements reached under collective

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170. However, in states that continue to use a compelling interest approach for their state free exercise clause, the constitutional privilege could be invoked against state statutes and regulations.

171. However, courts have assumed that RFRA and the earlier free exercise compelling interest clause require no greater accommodation to religious claims of workers than does Title VII. See *supra* notes 88-91 and accompanying text. A weak protection of worker claims to religious expression would fit with a weak protection of employer expression.

bargaining, and speech that informs others about illegal or wasteful activity.<sup>172</sup> As far as federal law is concerned, an employer may fire a worker because he does not like her expressed opinions about farm subsidies or intervention in Kosovo.

Government workers have more extensive rights to free speech than do private workers.<sup>173</sup> Government officials “enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary” when workers’ speech does not relate to any “political, social, or other concern” of the community.<sup>174</sup> However, worker communications about matters of public concern and about how the workplace is operating cannot be restricted unless the interest in speech is outweighed by the government’s interest “in promoting the efficiency of the public services it performs through its employees.”<sup>175</sup>

Could one argue that religious speech is not of “public concern” in the sense that the Supreme Court means? The Court has not addressed this question, but religious speech (and other speech about general ideas) should count as being of public concern, if any such line is to be drawn. That the Free Exercise Clause protects religious expression, as well as other religious practice, strongly supports this conclusion. To restrict religious speech, the government must ordinarily make at least the showing required when it restricts speech about job-related and political concerns.<sup>176</sup>

One might believe that the law accords more protection for the religious speech of government workers than it does for non-religious speech. The two relevant statutory provisions are the accommodation section of Title VII<sup>177</sup> and RFRA.<sup>178</sup> We have seen that the Supreme

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172. See Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 114-19 (1995).

173. See *id.* at 115-16.

174. *Connick v. Myers*, 461 U.S. 138, 146 (1983). In general, I do not think expression about personal matters should be less protected than speech about broader concerns. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 44-46, 83-84 (1989).

175. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *Rankin v. McPherson*, 483 U.S. 378 (1987) (holding that a public employee’s comment approving of an assassination attempt on the President was speech on a matter of public concern and protected because the comment did not disrupt the function of the public employer); *Connick*, 461 U.S. at 138 (holding that an attorney’s speech on office morale and office policy was not a matter of public concern and therefore unprotected).

176. However, if the speech is thought to suggest a government endorsement of religion or is regarded as harassing another worker, it can be restricted even though the reason would not be well phrased as “promoting the efficiency of the public services.” The government, of course, unlike a private employer, cannot itself make theological assertions.

177. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16 (1994 & Supp. 2000).

Court has interpreted the accommodation section not to demand much of employers.<sup>179</sup> If the government has sufficient reason to restrict religious speech under the standard free speech test, it could refuse to accommodate. According to RFRA, if the government places a substantial burden on someone's free exercise, it must have a compelling interest.<sup>180</sup> The language of this standard is more protective of religious practice than either Title VII's accommodation provision or the standard free speech test; but we have seen that courts, with support from the Act's legislative history, have assumed that RFRA is not more demanding than Title VII.<sup>181</sup> Insofar as we can summarize an unclear existing law, religious speech of government workers enjoys the same degree of protection as other speech about public concerns.

Some scholars have urged that religious speech *should* receive special protection, that it is uniquely important or uniquely safeguarded in our constitutional scheme, or both.<sup>182</sup> Much might be said about this, but in recent decades the Supreme Court has generally assumed that religious speech does not enjoy a special degree of protection under the Constitution. I think this is the right approach, and it should be applied to speech of government workers.<sup>183</sup>

Rights of religious speech by government employees were sharply raised by *Brown v. Polk County*.<sup>184</sup> The Eighth Circuit Court of Appeals, en banc, considered the firing of a director of a county department who had engaged in various religious activities with respect to his workers.<sup>185</sup> Brown claimed religious (as well as racial) discrimination.<sup>186</sup> The basic issue in the case turned out to be which religious activities the county should have accepted and which it

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178. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994), amended by Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7, 114 Stat. 806 (2000).

179. See *supra* notes 60-121 and accompanying text (discussing how employers must make an accommodation unless they can show that they would suffer "undue hardship").

180. 42 U.S.C. §§ 2000bb-1 to 2000bb-4. Not all restrictions of religious speech would constitute a substantial burden on someone's exercise of religion.

181. See *supra* notes 89-91 and accompanying text (discussing how courts have not required any more accommodation than Title VII requires, even after the passage of RFRA).

182. See Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 NOTRE DAME L. REV. 953, 989 (1996); Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace After Ellerth and Faragher*, 42 HOW. L.J. 327, 344 (1999).

183. That is, I do not believe either Title VII or RFRA should be construed to give religious speech a special degree of protection in this context.

184. *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (en banc).

185. *Id.*

186. *Id.* at 653.

reasonably had told Brown to stop.<sup>187</sup> The court treated the case as one involving required accommodation, with both constitutional and statutory dimensions.<sup>188</sup> It said that the First Amendment protected at least as much religious activity as did the accommodation section of Title VII.<sup>189</sup>

The court determined that Brown had properly been told not to direct his secretary to type Bible study notes and not to have workers gather in his office to say prayers before the start of the workday.<sup>190</sup> However, the county had erred in forbidding Brown from having occasional prayers and references to Christianity in his office during the workday and in directing him to remove all items with a religious connotation from his office.<sup>191</sup>

The county's instruction that Brown not have his secretary type notes of Bible study involved no substantial interference with his religious exercise. Brown had no right to open his office for prayers before the working day because an employer need not open offices during that period for non-working affairs. The court held that the county could take the position that workspaces were meant for work, not the carrying on of personal business.<sup>192</sup>

This particular conclusion of the court is highly questionable. My working experience, limited as it is but including three different jobs with the federal government, is that one can go to one's office before the working day begins and chat about trivia with co-workers if one chooses. Whatever the county's formal policy, it strains credulity to suppose that it would have reacted negatively if the meetings in Brown's office had been about most other subjects. If, in fact, the county would not have responded negatively to other kinds of regular meetings on non-work subjects, a general policy of workspaces for work should not have sustained this restriction.

The court decided that restricting Brown from having religious items in his office and making occasional religious statements during the working day did substantially interfere with his religious practices, practices which did not significantly disturb co-workers.<sup>193</sup> Evidence did not bear out any worry that Brown's religious communications

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187. *Id.* at 655-56.

188. *Id.* at 654, 657-58.

189. *Id.* at 658.

190. *Id.* at 655-56.

191. *Id.* at 656-57, 659.

192. *Id.* at 656.

193. *Id.* at 656-57.

might divide the office between Christians and non-Christians. Thus, the county could have accommodated these aspects of Brown's religious practice without undue hardship. Its failure to do so violated both Title VII and the Free Exercise Clause. The court explicitly analogized the case to ones involving non-religious speech by government employees and saw "no essential relevant differences" between free speech and free exercise rights.<sup>194</sup>

Four dissenters were concerned with the effect of Brown's activities on workers beneath him.<sup>195</sup> They believed that he had failed to show a substantial interference with his religious exercise and that, in a balance of interests, the county should have prevailed.<sup>196</sup>

People can disagree about exactly which of Brown's activities should have been protected, but the court undertook the right kind of inquiry, assuming that public workers may communicate their religious opinions unless the consequence is disruption of work or serious disturbance of other employees.<sup>197</sup> It is critical, however, that if supervisors like Brown are engaging in religious speech, they make clear that advancement in the workplace does not depend on workers "going along with their religious views."

In 1997, the Executive Branch issued the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace.<sup>198</sup> According to the Guidelines, individual federal workers are free to express religious ideas unless it creates the appearance of government endorsement, intrudes on the "efficient provision of public services," or "intrudes upon the legitimate rights of other employees."<sup>199</sup> Religious speech is to be treated like other speech, including ideological speech on politics.<sup>200</sup> Supervisors, as well as workers, can express personal religious views if they make clear they are personal views.<sup>201</sup> In crucial language, the Guidelines say:

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194. *Id.* at 658 (referring to *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

195. *Id.* at 660 (Fagg, J., dissenting).

196. *Id.* (Fagg, J., dissenting).

197. A different issue is religious speech that seems to represent the government itself. That would be a critical concern for a school teacher or a chief executive. I am assuming that Brown was not in a position for that to be a problem.

198. White House Office of the Press Secretary, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997), reprinted in Stephen S. Kao, *The President's Guidelines on Religious Exercise and Religious Expression in the Federal Workplace: A Restatement or Reinterpretation of Law?*, 8 B.U. PUB. INT. L.J. 251, 268-79 (1999).

199. *Id.* at 268.

200. *Id.* at 269.

201. *Id.* at 272-73.



Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion . . . . But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome.<sup>202</sup>

In appraising the Guidelines, we need to understand that some people are insistent about pressing their religious views onto others. On their understanding, the speakers offer listeners a hope of salvation, and nothing could be more important. Regrettably, these messages of help are especially disturbing to many listeners. Some workers may be cowed and disinclined to express their discomfort with such expressions, particularly if they come from supervisors, even supervisors who are careful to distinguish their personal views from office responsibilities.

This reality creates the basis for an argument that religious speech should be discouraged more than most other speech, but the approach of the Guidelines is preferable. People should be told that they need not listen to religious speech that is directed to them if they do not want to hear it. If listeners feel harassed by it, they need to say so. This is not a perfect balance of speaker's and listener's rights, but it is about the best this subject allows.

The Guidelines have been criticized for being too vague and for not adequately protecting the religious speech of government workers.<sup>203</sup> This subject permits only a certain degree of precision. No doubt, particular formulations may be improved, but the general tenor of the Guidelines is sound.

What of workers of private employers? The law does not afford them broad protection against employers who freely choose to restrict their speech. The accommodation section of Title VII safeguards some religious speech. Is this special protection proper? I believe that other speech should be protected along with religious speech, that laws should forbid employment discrimination on the basis of any opinions workers express that are not related to work and that do not disturb work activities. *However*, in a legal regime in which worker speech, *in general*, is not protected, safeguarding their religious speech is

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202. *Id.* at 270.

203. *Id.* at 252. Kao also argues that the Guidelines exceed the President's authority in covering employees not in the executive branch, and that their issuance improperly avoided public scrutiny of their content. *Id.* at 252-53.

appropriate as an aspect of forbidding religious discrimination and protecting religious liberty.

A distinction between religious and other speech involves a form of content discrimination, something that requires a substantial justification if it is to pass constitutional muster. In general, principles of free speech do not permit favoring some kinds of speech over others, but the law already has well entrenched categories of protected worker speech, including speech about collective bargaining and “whistle blowing.”<sup>204</sup> If the law is to combat discrimination on grounds of religion and attempt to create equal opportunity for members of different religions, religious speech needs protection. Part of the problem is that an employer who really dislikes a worker’s religion may take the occasion of her religious speech to fire her.<sup>205</sup> Even if the employer has no such view, but fires the worker because fellow workers do not approve of her religious speech, permitting the firing detracts from an equal opportunity workplace. Those with conventional religious views and attitudes are unlikely to cause a stir, and religious dissidents and strident evangelists will find their speech becoming the occasion for unfavorable treatment. Under all these circumstances, this degree of content discrimination is definitely appropriate.

The hardest problems about religious speech are created by the law of religious harassment. If a worker’s speech seriously disturbs co-workers, does that alter conclusions about what speech is protected?

I have said that the law does not broadly protect a worker who engages in speech that disturbs an employer or her co-workers. But when harassment, in the statutory sense, is at issue, the situation is different. If an employer disciplines or fires a worker who engages in religious harassment, he is doing so because the law, Title VII, tells him he must. Once the government enters the picture, it cannot make a statutory wrong out of speech protected by the First Amendment. Thus, worker speech of all sorts, religious or not, has some claim not to be treated as forbidden harassment. A worker’s non-religious speech is protected against government regulation by the Free Speech Clause; her religious speech is similarly protected, but is also covered under the

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204. See Estlund, *supra* note 172, at 116-19. Professor Estlund has suggested in conversation that when the government protects certain kinds of speech from private interference, the usual suspicion about content distinctions may be unwarranted.

205. I assume that were an employer to fire a worker because he disagrees with the content of the worker’s religious speech, that would be outright discrimination, illegal apart from any requirement of accommodation.

Free Exercise Clause, the accommodation provision of Title VII, and RFRA.

As I have remarked about employer speech, the speech that disturbs other workers because of their religion may or may not be religious speech, and religious speech that disturbs workers may or may not do so because of their religion.<sup>206</sup> The court in *Wilson* rightly considered her religiously motivated wearing of an anti-abortion button as a form of religious speech, but it said that the reasons why other workers were disturbed did not have to do with their religious convictions.<sup>207</sup> When co-workers engaged in crude sexual talk about a worker's wife, their speech was not religious, but they were harassing him because of his religion.<sup>208</sup> Although religious speech that offends does not perfectly match with speech that offends because of religion, a significant proportion of speech that offends because of religion will be religious speech.

Speech that harasses because of religion may be dominantly abusive and meant to humiliate a co-worker. This speech closely resembles much racist and sexist speech and has little to recommend it. Even if some implicit theological propositions may be lurking in the background—some of those hurling epithets at Jews may suppose that God has condemned them for their role in Christ's death<sup>209</sup>—such speech does not deserve protection in the workplace setting.<sup>210</sup> I think this is true even if a speaker is mainly addressing others, so long as she is aware that those she abuses will be among her listeners.

The difficult problems arise when the speaker has a sincere religious message but one that some workers find to be offensive. The general principles should be those applicable to other serious speech by workers. By "serious speech," I mean speech that sincerely expresses a person's convictions in a non-abusive way, though I will not pause here to defend an approach that gives such serious speech more protection than overtly abusive speech or sexually salacious speech.

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206. See *supra* notes 31-33 and accompanying text (describing an example of religious harassment where a woman is disturbed as a Catholic though the conversation was not religious).

207. See *supra* notes 62-70 and accompanying text (describing the reasons why the workers were disturbed for personal reasons such as infertility or miscarriage).

208. See *supra* note 33 (describing a case in which a religious co-worker was subjected to explicit comments because of his religion).

209. According to New Testament accounts, Jesus was put to death by the Romans, but with the encouragement of some Jewish leaders.

210. For a contrary view by the scholar who has most powerfully defended the importance of free speech protections in the workplace, see Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1812-14 (1992).

With co-worker speech that is directed at an individual, the key to religious speech, as well as other speech, is that the listener should be able to stop unwanted speech.<sup>211</sup> The speaker may sincerely want to save her listener, or she may wish to annoy him, but if the listener is deeply offended, or highly annoyed, whether or not on religious grounds, he should be able to prevent future speech of that sort that is directed at him. Someone who has clearly indicated that he does not wish to hear religious messages that offend his religious convictions may be protected against such messages being directed at him.<sup>212</sup>

Non-directed employee speech presents greater difficulties. Under these circumstances, a worker engages in speech that is not directed at any particular co-workers, as with Wilson's anti-abortion button, or she speaks directly to co-workers who do not object and is overheard by other workers who do object, or she directs her speech at a group of workers only some of whom object.<sup>213</sup> The speaker is not seeking to cause offense and is not aiming her remarks at those with particular religious views, but what she says is predictably offensive to some who see or hear.<sup>214</sup>

In general, workers should be free to display what they want in the way of photographs and sayings in their own private work spaces, at

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211. See, e.g., KENT GREENAWALT, *FIGHTING WORDS* 86-91 (1995); Berg, *supra* note 75, at 985-86; Volokh, *supra* note 210, at 1863-67.

212. I do not mean that the present law gives the worker the right to stop such speech if it is not connected to a statutory category of discrimination. I mean only that the employer may provide this protection and that if a law required the employer to do so, it would not violate the First Amendment.

213. Another possibility is that although the speech is general, say a button or a flyer in a general work space, the very aim of the speech is to reach people with religious views that vary from those of the speaker. And a considerable percentage of *those* recipients do object. For example, the workplace has eighty-eight Christian and twelve Jewish workers; someone posts a notice by Jews for Jesus that is directed at the twelve Jews and is offensive to most of them. Such speech is directed at that subgroup of workers, and if most of them object, it should be treated as unwelcome speech, particularly if it is feasible to reach the Jews who do not object by some other means.

Speech also counts as directed if it is made to a group, but the very aim is to irritate some individual with particular religious views. Thus, three co-workers may use crude expressions in their conversations just because they want to provoke a fourth whose religious beliefs make such speech deeply offensive to him. *Finnemore v. Bangor Hydro-Elec. Co.*, 645 A.2d 15 (Me. 1994).

214. Sometimes a distinction is made between "passive" religious speech, in which workers may engage, and "hostile" speech, in which they may not engage. See Dunkum, *supra* note 182, at 987-88. This distinction is helpful in emphasizing the difference between affirmations of one's own religion, say by wearing religious jewelry, and attacks on other workers' religion; but the terminology suggests a sharpness of division that the subject does not allow. Various factors can pull what would otherwise be "passive" into the "hostile" category. See *id.* at 988.

least if those workplaces are not areas to which others are constantly exposed.

A different example involves speech to some people bound to be overheard by others. Suppose five workers in a telephone repair crew travel in a van together to and from jobs they must do. Four are evangelical Christians who belong to the same church. The fifth is an atheist. The four like to talk about their church, including occasionally, their belief that those who are not born again are damned. The atheist is offended by such talk and feels excluded, and he tells the other workers this. Yet their conversation on this topic would be precisely the same were he not there. By and large, people should have to tolerate conversations they are bound to overhear. Even if the atheist's objection is considered to relate to his religious views, the law should not block free conversations that he cannot avoid overhearing.

However, workers should have to observe minimal standards of politeness, not saying things of marginal importance that they know will deeply upset people who cannot avoid overhearing them.<sup>215</sup> When speakers do not observe such standards, officials might infer that they meant to direct their comments at the person who will be sure to be offended, or officials might say that a failure to satisfy minimal standards of politeness counts as directing their remarks, whatever the actual intentions of the speakers.

Among the hardest issues about employee speech are those involving common work areas. Some employees wish to speak in a way that offends a proportion of their fellows. The speech is not directed exclusively at those willing to hear, with some others overhearing (as in the van example). Rather the speech is directed at all who share the space, as with the anti-abortion button or a typical flyer on the bulletin board.

Some who have written about workplace harassment have emphasized that workers are "captives" in their workplace, unable to avoid offending speech. The thrust of this argument is that people should not be forced to endure speech they abhor. But it is also true that speakers are captives during working hours. The only people to whom

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215. I am, thus, suggesting a standard with two features: the predictable degree of upset and the degree of centrality for the speaker of what he is saying. The four Christians in the van would not, we may suppose, have a deep need to say continually that atheists are damned. But if the atheist is highly upset by *any talk* about religious beliefs and practices, avoiding his upset could cut off what his four co-workers most want to discuss. They should not be so restricted. Eugene Volokh raises the question whether the law can distinguish "genuinely rude" behavior from "not really rude" behavior. Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 647-48 (1999).

they can communicate are fellow workers.<sup>216</sup> And communications among co-workers are among the most important interchanges in a society in which the workplace tends to be more diverse than most other social groupings.<sup>217</sup> These are reasons in favor of freedom to communicate.

The general resolution of these competing considerations is that people should be allowed to communicate their sincere opinions in common areas, but they may reasonably be restrained by conventions of polite and respectful speech—not the conventions of a highly literate class, but the conventions of those who are involved.<sup>218</sup>

A complicated problem is raised by communications which singly may be constitutionally protected but which together create a seriously hostile environment. To use an illustration of Thomas Berg's, one sign that "Jesus Saves" may have little effect on non-Christians, but if such signs were all over the workplace, the reaction may be different.<sup>219</sup> When comments that alone would be protected yield evidence about unprotected behavior or add to the force of a significant amount of unprotected behavior, I assume they may count in a finding of a hostile environment.<sup>220</sup> But what if the main basis for finding a hostile environment is individual acts of expression each of which would itself be protected?

One cannot argue that since an employer by himself can freely restrict the speech of workers, none of these individual acts of expression warrants protection. Once the government prohibition figures in the employer's response to expression, the Constitution is involved.

The position most favorable to speech is that individually protected acts cannot be cumulated into an unprotected combination,<sup>221</sup> but I believe that approach is also mistaken. Whether acts are protected depends partly on the strength of the government's interest in restriction

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216. See GREENAWALT, *supra* note 211, at 86-87.

217. See Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 720-33 (1997).

218. An employer may, as *Wilson* shows, be able to choose to restrict disturbing speech, that is, not provide an accommodation for it, on some occasions when he would not be justified in treating the speech as constituting religious harassment. That is, weaker (or different) effects may warrant a refusal to accommodate than a decision that speech harasses because of religion. However, if the employer fires someone who has engaged in religious speech specifically to satisfy religious sensibilities of other workers who do not feel harassed, that would amount to a form of religious discrimination.

219. Berg, *supra* note 75, at 991.

220. GREENAWALT, *supra* note 211, at 95-96.

221. See Volokh, *supra* note 210, at 1811-16.

and that interest can increase as the acts multiply. If the acts together have effects that are harmful enough, they may lose protection that they would otherwise have.

This point is easiest to make when an individual, or the same group of individuals, engages in repeated acts that offend. If the four Christians in the van continually talk among themselves about how atheists are damned, after their atheist colleague has explained that this bothers him, they are failing to exhibit adequate sensitivity to his feelings. The character of their remarks to each other has altered somewhat. What was initially insensitive has become rude and unfeeling. Officials might employ some standard of minimal politeness to determine whether remarks are protected.

The cumulation problem is greater if unconnected individuals act in similar ways,<sup>222</sup> but I am still inclined to think cumulation could be appropriate. One reason is that, typically, the individual workers are aware of what other workers are doing, so the nature of the acts of each is affected by each individual's knowledge of what the others do. More importantly, the remedy for harassment is future restriction, not punishment. The workers whose comments cause distress are not being penalized for what they have done; they are being told not to continue it in light of the harm it is causing.

Although I have concluded that otherwise protected expression may become unprotected because a number of similar expressions cause serious distress, I also believe administrators and judges should be very hesitant to reach the conclusion that otherwise protected comments should be restricted. The values of free religious expression should not be lightly disregarded.

My combination of positions opens me up to the following attack:

Whatever you say about protecting expression, judges and administrators will find harassment too easily and will impose remedies that are much too sweeping. Indeed, if the harm is caused by fifteen independent comments, those fashioning a remedy will have no way to determine what to allow and what to restrict, other than restricting everything. Further, employers worried about harassment claims will comfortably forbid all expressions that *might* in combination harass. The end result of your flexible approach will be a drastic over-restriction of religious speech. Therefore, the only

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222. See Berg, *supra* note 75, at 991-93 (distinguishing accumulation by the same individual from that of several unconnected workers).

sensible approach is the strict one of never allowing otherwise protected expressions to cumulate into violations of Title VII.<sup>223</sup>

This defense of a strict approach is grounded on the realities of decisions by employers, administrators, and judges. Whether one should conclude that this approach is finally persuasive depends on a closer acquaintance than I have with behavior that is not reflected in appellate opinions, but I am hesitant to embrace the conclusion that multiple instances of otherwise protected expression can overwhelm those with a different religious view or identity and leave them with no recourse.<sup>224</sup>

### VIII. CONCLUSION

Our study has shown that in the complex intertwining of ordinary discrimination because of religion, accommodation to religion, and religious harassment, the law faces deep problems about religious liberty, diversity, and equality, and about whether workplace speech should be less robust than wide open speech in public places, which unwilling listeners can avoid. Questions every bit as troubling as those that arise under the Religion Clauses of the First Amendment are generated by Title VII's prohibition of religious discrimination.

In the course of the discussion, I have made the following more specific claims.

(1) Religion under Title VII should not be taken in the very broad sense adopted by the *Seeger* and *Welsh* cases for the Selective Service Act.

(2) Discrimination *can* be "*because of religion*" even when selection is not on grounds of religion. Mandatory religious meetings provide a notable example.

(3) Employers who make decisions on moral grounds should be able to rely on religious grounded moral judgments, *if* other employers would make similar moral judgments on non-religious grounds.

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223. These are my words, but I believe they capture part of Professor Volokh's basis for his position. See, e.g., Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 310-12 (1996); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 638-46 (1997); see also Volokh, *supra* note 210, at 1809-12.

224. My position here represents a modest shift from my previous view that "a finding of a hostile working environment cannot be based exclusively or dominantly on protected remarks." GREENAWALT, *supra* note 211, at 95. At that time, without explicitly addressing the possibility that remarks that might individually be protected could become unprotected in combination, I apparently rejected that idea.



(4) Workers should have greater rights to have religious practices accommodated than the Supreme Court has offered. The government can impose more than minimal costs on private employers without violating the Establishment Clause. However, employers should not have to accept expressive behavior that deeply disturbs other workers for reasons other than the content of views. Thus, the court in *Wilson* rightly decided that U.S. West did not have to allow the wearing of the anti-abortion button with a photo of a fetus.

(5) Employers should have substantial rights to engage in religious expression. These rights should parallel their other free speech rights. They do not extend to mandatory religious services.

(6) The law may appropriately *protect* religious speech of workers more than most other speech against a private employer's *free decision* to respond negatively to speech.

(7) Government workers have rights of religious speech that parallel their other rights of free speech.

(8) In so far as the law *requires* private employers to silence harassing speech, workers' religious speech should be treated like other worker speech.

(9) Neither employers nor workers should be privileged to *direct* speech at unwilling listeners. Rights of speech are substantially greater when directed at an audience that is mostly receptive or indifferent, but some restraints may still be imposed on behalf of listeners who predictably will be offended.