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Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses

David M. Jaffe

Note

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> It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values.[1]

Sylvia DeAngelis, an officer with the El Paso Police Department,[2] filed a sexual harassment suit pursuant to Title VII of the Civil Rights Act of 1964[3] against the El Paso Municipal Police Officers Association. DeAngelis based her claim on the contents of several columns appearing in the Association's newsletter that satirized DeAngelis and other women officers.[4] DeAngelis claimed that the columns, written by an anonymous author,[5]

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1. Doe v. University of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989).

2. DeAngelis became El Paso's first female sergeant in October 1987, after six years as a patrol officer and detective. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 592 (5th Cir.), *cert. denied*, 116 S. Ct. 473 (1995).

3. 42 U.S.C. § 2000e-2 (1988); *see infra* note 55 (quoting statute and describing Title VII).

4. Four columns referred specifically to DeAngelis, while the other columns in question referred to women officers in general. *DeAngelis*, 51 F.3d at 595. In one column the author comments that he "remember[s] the good ol' days when finding the criminal was more important to the patrolmen [than] keeping [their] hair in place!" *Id.* at 594. In another the author asks, "Do you remember when there were no women workin' the streets? (Ah yes, those were the good days!)." *Id.*

5. "The author's [pen name] was R.U. Withmi. He wrote as a patrol officer with nearly 20 years' experience 'combatin' crime.'" *Id.* at 592. Each column by the author bore this disclaimer: "R.U. Withmi is a senior level patrol officer whose article appears monthly. It does not represent the official position of the EPMPOA, but presents a humorous satirical view by the author." *Id.* at 594.

amounted to sexual harassment. The jury agreed with DeAngelis[6] and found that the articles created a hostile and sexually abusive working environment.[7] The United States Court of Appeals for the Fifth Circuit, however, reversed,[8] finding insufficient evidence of sexual harassment to uphold DeAngelis's claim or to allow her to recover damages.[9]

The *DeAngelis* case involved a claim of sexual harassment predicated on written expression that allegedly created a hostile working environment.[10] Although the Fifth Circuit's holding centered on the insufficient evidence supporting DeAngelis's claim, the court also examined the tension between the Constitution's First Amendment freedom of speech guarantee and Title VII.[11] Indeed, with the dramatic increase in sexual harassment claims[12] filed with the Equal Employment Opportunity

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6. The jury awarded DeAngelis $10,000 in compensatory damages and $50,000 in punitive damages. *Id.* at 593.

7. *See infra* notes 85-89 and accompanying text (defining and describing the elements necessary to establish hostile environment sexual harassment).

8. *DeAngelis*, 51 F.3d at 597.

9. The court concluded the columns were not severe or pervasive enough to constitute an objectively hostile or abusive work environment. *Id.* at 596; *see also infra* note 81 and accompanying text (describing the objective test in a hostile environment sexual harassment action). The court also noted that, considering the totality of the circumstances, the facts of this case failed to be compelling compared to other reported Title VII hostile environment sexual harassment claims. *DeAngelis*, 51 F.3d at 596; *see also infra* note 84 and accompanying text (describing the totality of the circumstances test).

10. For another example of a hostile environment sexual harassment case where sexually explicit expression served as the basis of a Title VII claim see Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

11. U.S. CONST. amend. I. The *DeAngelis* court stated:

> Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

DeAngelis, 51 F.3d at 596-97.

12. Sexual harassment claims have more than doubled since 1990. Judith Waldrop, *Sex, Laws, and Video Training*, AM. DEMOGRAPHICS, Apr. 1994, at 14, 14. Complaints filed with the EEOC grew from 6,100 in 1990 to about 12,500 in 1993. *Id.* Anita Hill's accusations of sexual harassment against Clarence Thomas during his Supreme Court confirmation hearings publicized the issue of sexual harassment and encouraged more women to report harassment directed toward them. *See* Jeffrey P. Englander, *Handling Sexual Harassment in the Workplace*, CPA J., Feb. 1992, at 14, 14 ("[N]ot since passage of the Civil Rights Act of 1964 has the nation's consciousness regarding sexual harassment in the workplace been so abruptly and pervasively raised."); Kara Swisher, *Laying Down the Law on Harassment: Court Rulings Spur Firms to Take Preventive Tack*, WASH. POST, Feb. 6, 1994, at H1 (stating that Hill's accu-

Commission (EEOC),[13] commentators note increasing conflicts between the First Amendment and Title VII.[14] In essence, these conflicts force courts to walk a constitutional tightrope between free speech and sexual equality.

This Note addresses the tension between the First Amendment freedom of speech guarantee and Title VII hostile environment sexual harassment claims. Part I reviews relevant First Amendment freedom of speech principles and the development of the cause of action for hostile environment sexual harassment under Title VII. Part II describes prior attempts to reconcile the First Amendment rights of free association and free speech with the government's equally important goal of eliminating sexual discrimination and harassment. Part III proposes a flexible balancing test for courts to use when weighing a public employee's[15] hostile environment sexual harassment claim against free speech defenses. Part III also suggests some of the factors that a court should balance under this test. This Note concludes that maximum judicial discretion is needed to apply the proposed balancing test to the fact-specific nature of sexual harassment claims.

I. THE FIRST AMENDMENT AND HOSTILE ENVIRONMENT SEXUAL HARASSMENT

Several bodies of law interact whenever a court balances freedom of speech with hostile environment sexual harassment

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sations "acted as a lightning rod for the anger millions of women had felt about the problem, but had rarely dared to express").

13. The EEOC is the administrative agency that interprets and enforces the Civil Rights Act of 1964 and subsequent equal employment legislation. *See* 42 U.S.C. § 2000e-4 (1988) (containing the enabling legislation for the EEOC). The agency investigates written charges of discrimination filed by persons who claim to be subject to such discrimination. *See* Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (currently 42 U.S.C. § 2000e-17 (1988)) (detailing congressional delegation to agency); *see also* WILLIAM F. PEPPER & FLORYNCE R. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT: AN ANALYSIS AND GUIDE FOR PRACTITIONER AND STUDENT 89-96 (1981) (discussing EEOC evolution, enforcement power, and investigative scope).

14. *See generally* Marshall H. Tanick, *Sexual Harassment and Free Speech*, BENCH & B. MINN., Sept. 1995, at 25-28 (discussing the conflict between Title VII and the First Amendment); *infra* note 120 and accompanying text (describing other commentators' viewpoints on the issue).

15. This Note concentrates on the public employment context because speech receives increased First Amendment protection in this area and an increased likelihood of conflict with Title VII therefore exists.

claims. Freedom of speech is rooted in the First Amendment.[16] United States Supreme Court precedent establishes clear parameters defining this right.[17] Conversely, Title VII is a recent congressional enactment designed to eliminate discrimination and achieve equality in the American workplace.[18] In the thirty years since Title VII's enactment, courts have struggled to define the extent of its prohibitions.[19]

A. HISTORY AND DEVELOPMENT OF THE FIRST AMENDMENT FREEDOM OF SPEECH GUARANTEE

1. Freedom of Speech: Strong but Not Absolute

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[20] The Supreme Court has determined that the First Amendment does not protect certain speech because the speech is considered worthless or socially harmful.[21] Generally, however, the language of the First Amend-

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16. U.S. CONST. amend. I.

17. *See infra* Part I.A.1.-3. (describing some of the limits the Supreme Court has imposed on free speech rights).

18. *See* 110 CONG. REC. 2577-84 (1964) (containing floor statements concerning the inclusion of gender in the list of classifications the 1964 Civil Rights Act prohibits).

19. *See infra* Part I.B.1.-2. (describing the initial judicial recognition of a cause of action for sexual harassment and subsequent Supreme Court expansion).

20. U.S. CONST. amend. I.

21. The Supreme Court has developed several categories of unprotected speech: obscenity, *see* Miller v. California, 413 U.S. 15, 24 (1973) (establishing a three-part test for identifying material that may be banned as obscene); illegal advocacy, *see* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding the constitutional guarantee of free speech does not apply where a speaker's words are used to incite or produce imminent lawless action); libel, *see* New York Times v. Sullivan, 376 U.S. 254, 279 (1964) (holding the First Amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his official misconduct unless he or she proves that the statement was made with actual malice); hostile audience speech, *see* Feiner v. New York, 340 U.S. 315, 320 (1951) (holding that, if a speaker's words are likely to lead to imminent violence, police may arrest the speaker if he or she refuses to stop); or fighting words, *see* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding the First Amendment does not protect face-to-face epithets directed at an individual that are likely to provoke violence or lead to injury).

In R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992), the Supreme Court discusses "sexually derogatory 'fighting words'" while briefly considering the constitutionality of Title VII. *See infra* note 105 (providing a summary of the *R.A.V.* Court's discussion of Title VII). Whether this language creates a "safe harbor" for regulating some sexual harassment without concern for the First

ment prohibits the government from regulating the expression of an idea simply because society finds the idea disagreeable or offensive.[22] Thus, if expression does not fall into an unprotected category,[23] courts can uphold a regulation prohibiting speech only if the government's reasons for prohibiting the speech or expressive conduct[24] are unrelated to the content of the speech.[25]

Although the language of the First Amendment appears to bar all government regulation of speech,[26] the Supreme Court traditionally has balanced the right to free speech against other important interests that may infringe on this right.[27] When conduct contains both speech and nonspeech elements, for example, a sufficiently important government interest in regulating the nonspeech element can justify limiting the accompanying speech.[28] Furthermore, individuals do not have absolute freedom

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Amendment in a manner analogous to the fighting words doctrine is an open question.

22. Texas v. Johnson, 491 U.S. 397, 414 (1989). In *Johnson*, the Court ruled a Texas statute prohibiting flag desecration was unconstitutionally based on content because it prohibited particular conduct only if the behavior seriously offended an onlooker. *Id.* at 414-18. A statute not based on content would have protected the physical integrity of the flag in all circumstances, not just when the destruction of the flag causes serious offense to others. *Id.* at 411.

23. *See supra* note 21 (listing the types of speech that receive no First Amendment protection).

24. The Supreme Court first recognized that speech may be nonverbal in 1931. *See* Stromberg v. California, 283 U.S. 359, 369-70 (1931) (holding the First Amendment protects certain forms of symbolic expression).

25. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (upholding the conviction of a defendant who burned his draft card because the state's interests in regulating the behavior went beyond preventing expression). The Court in *O'Brien* promulgated a four-part test to aid analysis when speech and nonspeech behavior occurs in the same course of conduct:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

26. "An absolute right, by definition, is not subject to balancing [with other constitutional interests]." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 994 (1995).

27. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 50-51 (1961) (discussing the need to weigh the government's interest in passing a general regulatory statute with any incidental limits on unfettered expression).

28. Texas v. Johnson, 491 U.S. 397, 414 (1989). The Court refuses to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express

to speak whenever or wherever they please or to use any form of communication in any circumstance.[29] A regulation may limit the time, place, or manner of speech[30] if the regulation is content-neutral,[31] fulfills a significant state interest, and provides alternative channels of communication.[32] The government cannot use a time, place, or manner regulation, however, as a pretext for suppressing language or expression that is offensive.[33]

The Supreme Court has recognized an exception to the content-neutrality requirement for a time, place, or manner restriction when the restriction is designed to combat the secondary effects of speech.[34] Thus, the government may regulate certain topics of speech that have negative secondary effects so long as the regulations further a substantial government interest and do not unreasonably limit alternative avenues of communi-

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an idea." *O'Brien*, 391 U.S. at 376.

29. Cohen v. California, 403 U.S. 15, 19 (1971).

30. A time, place, or manner regulation limits when, where, or how speech activity is conducted. A time regulation, for example, might limit expressive activity to daylight hours. A place regulation may prohibit expressive activity in a certain location. *See, e.g.*, United States v. Grace, 461 U.S. 171, 182 (1983) (holding that a ban on carrying signs and banners on public sidewalks surrounding the Supreme Court building is an improper restriction on speech).

31. A content-neutral regulation limits speech on all topics. A content-neutral time, place, or manner regulation, for example, might prohibit all speech in a public park, and not simply speech on selected topics in the park. "The principal inquiry in determining content[-]neutrality . . . is whether the government has adopted a regulation of speech . . . 'without reference to the content of the regulated speech.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)); *see also* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523-24 (1994) (defining content-neutrality in terms of the government's purpose in regulating speech and adopting a broad definition of content-neutrality).

32. *Ward*, 491 U.S. at 791.

33. *See Cohen*, 403 U.S. at 26 (overturning conviction of defendant for disturbing the peace based on his walking through a courthouse corridor wearing a jacket bearing the words "Fuck the Draft"). The *Cohen* Court noted that "[t]he conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public." *Id.* at 18 (emphasis added).

34. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54 (1986) (holding that cities can ban adult movie theaters within certain areas in an attempt to control the secondary effects of adult theaters such as crime and prostitution); Young v. American Mini Theaters, Inc., 427 U.S. 50, 72-73 (1976) (holding that a city's zoning ordinance prohibiting adult theaters in certain locations did not violate the First and Fourteenth amendments).

cation.[35] In addition, the regulation cannot merely regulate the primary effects of speech.[36] The key question courts must address in such cases is whether the predominant intent of the authority promulgating the regulation is truly content-neutral.[37]

The Supreme Court also has limited free speech through the "captive audience" doctrine. Under this doctrine, the state may regulate speech that others cannot avoid. Although courts frequently invoke the captive audience rationale to protect listeners in their homes,[38] courts also consider audiences in other locations to be captive and offer them protection as well.[39] In general, the government's ability to restrict speech to protect others from hearing it depends "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[40]

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35. For example, in *Playtime Theaters*, 475 U.S. at 54, and *American Mini Theaters*, 427 U.S. at 62-63, the Court concluded that enough locations existed outside of the restricted zones so as to provide adequate alternative avenues of communication.

36. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (holding that listener's reactions to speech are a primary effect of speech, and not the type of secondary effects the *Playtime Theaters* Court had in mind).

37. A regulation is constitutional only if its purpose is unrelated to the suppression of free speech. For example, the stated purpose of the ordinance in *Playtime Theaters* was to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" *Playtime Theaters*, 475 U.S. at 48 (quoting App. to Juris. Statement 90a). The ordinance was not designed to suppress the expression of unpopular views. *Id.*

38. *See* Frisby v. Schultz, 487 U.S. 474, 484, 487-88 (1988) (upholding a ban on focused picketing outside a residence to preserve the well-being, tranquility, and privacy of occupants inside the home, and stating "[a]lthough in many locations, we expect individuals simply to avoid speech they do not want to hear, . . . the home is different") (citations omitted).

39. *See* FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (holding that broadcasting has a special ability to reach into the home and therefore allowing the FCC to consider the ease of such intrusion when prohibiting speech in certain circumstances).

40. Cohen v. California, 403 U.S. 15, 21 (1971).

In general, if a listener is outside the home, the Court is unlikely to recognize a captive audience argument. *See Frisby*, 487 U.S. at 487 (noting that the target of focused picketing is "captive" because he or she is trapped within the home and cannot avoid the unwanted speech); Pro-Choice Network v. Schenck, 67 F.3d 377, 405 (2d Cir. 1995) ("The Supreme Court has principally limited application of the captive audience doctrine . . . to those cases in which the speaker intrudes on the privacy of the home or its environs."). The Court in *Cohen* took a narrow view of what constitutes a true captive audience and noted "'[w]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech.'" *Cohen*, 403 U.S. at 21 (quoting Rowan v. United

2. The Forum Distinction

The government's ability to place restrictions on speech also depends upon where the speech takes place. In a public forum,[41] only content-neutral time, place, or manner restrictions on speech are valid.[42] In a limited-purpose public forum[43] or nonpublic forum,[44] however, the State's ability to limit speech increases.[45]

States Post Office Dep't, 397 U.S. 728, 738 (1970)).

Outside of the home, the First Amendment interests of an offending speaker often outweigh the interests of the unwilling, offended listener, and thus the First Amendment provides the listener with no protection against such speech. *Pacifica Found.*, 438 U.S. at 749 n.27.

41. Public forums are places "which by long tradition or by government fiat have been devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Examples include parks, streets, and sidewalks, "which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939)).

42. *See supra* notes 30-33 and accompanying text (describing requirements of a valid time, place, or manner restriction on speech). Courts use a two-step analysis when the government promulgates time, place, or manner restrictions on speech. NOWAK & ROTUNDA, *supra* note 26, § 16.47, at 1143. First, courts seek to determine whether the regulation is an "attempt to suppress speech based on its message." *Id.* A content-based restriction will be upheld only if the court can find that the content is unprotected by the First Amendment or the "regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that goal." *Id.* If no content discrimination is involved, the court will go on to determine whether the speaker's interest in the speech is "outweighed by the promotion of significant governmental interests." *Id.*

43. A limited purpose public forum is "public property which the state has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n*, 460 U.S. at 45.

44. A nonpublic forum is public property "which is not by tradition or designation a forum for public communication." *Id.* at 46.

45. In a limited purpose public forum, so long as the state retains the public character of a facility or place, the same standards apply as to a public forum and the government may impose only content-neutral time, place, or manner restrictions. *Id.*; *see* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a university, having made its facilities generally available for registered student groups, could not discriminate among those groups on the basis of the content of their speech without a compelling justification). The state, however, may close the forum altogether to public expression if it chooses. *Perry Educ. Ass'n*, 460 U.S. at 46. In a nonpublic forum, the government, in addition to time, place, or manner restrictions, "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*; *see* Cornelius v. NAACP, 473 U.S. 788, 808 (1985) (holding that a charity drive is a nonpublic forum and therefore exclusion of the NAACP from the charity drive is constitutional); *see*

In a nonpublic forum, the government can impose any reasonable regulation, including content discrimination, as long as it avoids discrimination on the basis of viewpoint.[46]

3. Limited Protection for Workplace Speech

The Supreme Court has formulated a two-part test to determine whether the First Amendment protects speech of public employees during the course of employment.[47] Under the two-part test, the speech must address a matter of public concern,[48] and the employee's interest in self-expression must outweigh the injury the speech causes to the interests of the government as an

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also NOWAK & ROTUNDA, *supra* note 26, § 16.47, at 1145-56 (explaining the distinctions between forums and applying the rules to various situations).

46. *Perry Educ. Ass'n*, 460 U.S. at 46 (stating that public officials' opposition to speaker's views is an insufficient justification for suppressing expression).

47. The Supreme Court's two-part test evolved through a series of cases. *See* Rankin v. McPherson, 483 U.S. 378, 381, 388, 392 (1987) (holding a statement made upon hearing of the assassination attempt on President Reagan's life addressed a matter of public concern and finding the employee's interest in making the statement greater than the interest of the employer in efficient public service); Connick v. Myers, 461 U.S. 138, 146-49 (1983) (holding a questionnaire did not constitute a matter of public concern and therefore avoiding close judicial scrutiny of the employment practices of the government official who dismissed the employee); Pickering v. Board of Educ., 391 U.S. 563, 568, 574 (1968) (recognizing workplace speech could be most effectively protected by balancing the interests of the employee in commenting upon matters of public concern and the interest of the State as employer in promoting the efficient performance of its services, and holding a teacher's First Amendment right to speak on matters of public importance may not furnish the basis for his dismissal).

Before *Pickering*, courts held that a public employee had no right to object to conditions placed upon the terms of employment, including restrictions on freedom of speech. Waters v. Churchill, 114 S. Ct. 1878, 1884 (1994). As Justice Holmes stated, a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (1892).

48. Matters of public concern are at the core of the First Amendment's Free Speech Clause. *Pickering*, 391 U.S. at 573. Such matters include political and social issues and other matters of concern or interest to the community. *Connick*, 461 U.S. at 146. *Compare Rankin*, 483 U.S. at 381, 388 (finding the statement, "[I]f they go for him again, I hope they get him," made by a Deputy Constable upon hearing of the assassination attempt on President Reagan's life a matter of public concern) *and Pickering*, 391 U.S. at 568 (finding a letter written by a teacher to a local newspaper criticizing school-board policy was a matter of public concern) *with Connick*, 461 U.S. at 148-49 (holding that most questions in a questionnaire concerning office policy circulated throughout an office by a disgruntled employee did not constitute a matter of public concern).

employer.[49] Courts determine whether an employee's speech addresses a matter of public concern by examining the content, form, and context of the statement in question.[50] When the employee's speech does not relate to a matter of public concern, the government as employer enjoys wide latitude in managing the workplace without judicial oversight.[51] Conversely, when the employee's speech relates to a matter of public concern, the employer faces heightened scrutiny in justifying the employee's reprimand or dismissal.[52] Ultimately, the state's burden in justifying a discharge depends on the nature of the employee's expression.[53]

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49. As a public employer, the state's primary interest is promoting the efficiency of the public service its employees perform. *Waters*, 114 S. Ct. at 1884. In efficiently and effectively fulfilling its responsibilities to the public, the government as employer must have wide discretion over the management and control of its personnel and internal affairs. *Connick*, 461 U.S. at 150-51. But a strong government interest often is not enough to justify infringement of a public employee's speech rights. *See Rankin*, 483 U.S. at 390-91 (finding an employee's right to comment upon an attempt on President Reagan's life outweighed the employer's responsibility to provide efficient public service).

50. *Connick*, 461 U.S. at 147-48. The various circuits have given different interpretations of what constitutes a matter of public concern. In general, courts use a broad reading of the term. *See, e.g.*, Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989) (holding that a fire fighter's criticism of other fire fighters is a matter of public concern); Johnson v. County of Los Angeles Fire Dept., 865 F. Supp. 1430, 1436 (C.D. Cal. 1994) (finding that reading Playboy magazine was expression relating to matters of public concern and citing cases from other circuits in which the courts interpreted "public concern" broadly as support for its holding). However, these broad readings are inconsistent with the Supreme Court's earlier position in *Connick*:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints . . . .

461 U.S. at 149.

51. *Id.* at 146. Although dismissing a public employee for exercising free speech rights of any sort may be unfair, if the subject of the expression is not a matter of public concern, a court rarely will proceed to the balancing prong of the test. *Id.* at 147.

52. *See supra* notes 47-49 and accompanying text (discussing the balancing test courts use when the speech of a public employee relates to a matter of public concern).

53. *Connick*, 461 U.S. at 150; *see* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils on an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 37 (1990) (arguing that *Connick* seems to require that, to comprise speech on a matter of public concern, a grievance may not contain any trace of self-interest and must be a generalized political or social commentary or demand for reform). Estlund points out that lower courts aggressively have

B. EVOLUTION OF THE HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIM

1. Development of the Sexual Harassment Cause of Action Under Title VII

Congress enacted Title VII[54] as part of the Civil Rights Act of 1964. Title VII prohibits employment discrimination based upon an individual's race, color, religion, gender, or national origin.[55] Congress passed Title VII primarily to remove historical barriers to employment and achieve equal employment opportunities for all workers.[56] Ironically, opponents of Title VII added gender to the group of protected classes in an attempt to defeat the Bill.[57] The Bill passed despite this attempt, however, and Title VII has become a powerful vehicle through which workers can address unequal employment conditions.[58]

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used this element to rid their dockets of public employee speech cases, and she concludes that the *Connick* version of the public concern test explicitly discounts the importance, and undermines the claim to constitutional status, of speech based on the everyday experience of average people. *Id.* at 37 n.18.

54. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2 (1988)).

55. Title VII makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Title VII does not refer to sexual harassment, but instead to discrimination based on sex. The cause of action for sexual harassment results from the need to label the phenomenon women experience in the workplace when discriminatory behavior affects the conditions in which women work. Professor Carolyn Chalmers, Address at the University of Minnesota Law School (Oct. 30, 1995).

Many states have passed civil rights statutes modeled after Title VII. In Minnesota, for example, "[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice . . . [f]or an employer, because of race, color, creed, religion, national origin, [or] sex . . . to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03 (West Supp. 1996).

56. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

57. The addition occurred without any prior legislative hearings or debate, and was proposed by a Virginia congressman who opposed the entire bill, who voted against the bill, and who proposed the addition in an attempt to stir up additional opposition to the bill as a whole. WILLIAM F. PEPPER & FLORENCE R. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT 18 (1981); *see* 110 CONG. REC. 2577-84 (1964) (containing the pertinent floor statements).

58. *See supra* note 12 and accompanying text (providing statistics on the growing number of sexual harassment suits filed with the EEOC).

In the first eight years after Congress enacted Title VII, courts struggled to define a cause of action for sexual harassment.[59] Many district courts initially held sexual harassment not to be a cause of action under Title VII.[60] By passing the Equal Opportunity Act in 1972,[61] Congress acknowledged that eliminating sexual discrimination in the workplace was in the national interest.[62] Thereafter, courts began to recognize sexual harassment claims under Title VII.[63]

As part of the Equal Opportunity Act of 1972, Congress broadened the definition of "employer" to bring federal, state, and

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59. Because the House included "sex" in Title VII just one day before it passed the Act, little legislative history exists to help guide the courts. *See, e.g.*, Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir. 1971) (describing this limitation and the concomitant difficulty courts face in applying Title VII's gender provision), *cert. denied*, 404 U.S. 950 (1971).

60. *See* Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D. N.J. 1976) (holding sexual harassment and sexually motivated assault do not constitute sex discrimination under discriminatory employment practice provisions of Civil Rights Act of 1964), *rev'd*, 568 F.2d 1044 (3rd Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (holding Congress never intended courts to hold an employer liable for an employee's isolated and unauthorized sexual misconduct toward another employee), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *see also* PEPPER & KENNEDY, *supra* note 57, at 18, (describing the reticence of district courts in recognizing a cause of action for sexual harassment).

61. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000 (1988)) (amending Title VII of the Civil Rights Act of 1964).

62. A senator discussing the 1972 act noted that "discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct." S. REP. No. 415, 92d Cong., 1st Sess. 7 (1971). The Committee on Labor and Public Welfare reported that despite efforts by the courts and the EEOC, discrimination against women in 1971 remained widespread. *Id.* at 8.

63. In Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *vacated by* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), a federal district court "held for the first time that sexual harassment was discriminatory treatment within the meaning of Title VII." 1 ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE § 2.1 (2d ed. 1994). In *Williams*, the plaintiff alleged she had been denied equal employment opportunities in the Department of Justice because of her sex. *Williams*, 413 F. Supp. at 655. She claimed that after she refused a sexual advance of her supervisor, he engaged in a continuing pattern and practice of harassment and humiliation of her, including unwarranted reprimands and a refusal to consider her proposals and recommendations. *Id.* at 655-56. The court noted there was ample evidence Congress intended to construe Title VII broadly, and held the actions of the supervisor constituted sex discrimination. *Id.* at 658.

local governmental agencies within the scope of Title VII.[64] By extending the reach of Title VII, Congress intended the same principles to apply to governmental and private employers alike.[65]

Before the 1980s, most sexual discrimination cases involved only quid pro quo harassment, or the demand for sexual favors in exchange for job benefits,[66] and courts were reluctant to entertain Title VII claims not involving the loss of tangible economic benefits.[67] In response to this reluctance, the EEOC on November 10, 1980 published guidelines on sexual harassment that eliminated the requirement that the sexual conduct threaten tangible job benefits, thereby expanding the cause of action beyond quid pro quo.[68] In 1981, the Court of Appeals for the D.C. Circuit became

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64. 42 U.S.C. § 2000e; *see* 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 5.05[1] (1995) (discussing the extension of liability to governmental entities).

65. *See,* Dothard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977) (discussing the extension of Title VII coverage to federal, state, and local governmental agencies); *see also* H.R. REP. No. 238, 92d Cong., 1st Sess. 17 (1971) (explaining that state and local government employees have access to the remedies available under Title VII); S. REP. No. 415, 92d Cong., 1st Sess. 10-11 (1971) (describing reasons for including state and local government employees within the jurisdiction of Title VII).

66. Commentator Alba Conte defines quid pro quo harassment as "the exchange of employment benefits by a supervisor or employer for sexual favors from a subordinate employee." 1 CONTE, *supra* note 63, § 2.2; *see also* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-40 (1979) (discussing quid pro quo sexual harassment). Quid pro quo harassment is not protected by the First Amendment because it is analogous to a "speech-related crime." Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech*, 68 NOTRE DAME L. REV. 1003, 1006 (1993). This Note, therefore, does not discuss quid pro quo harassment claims.

67. Typical is the reasoning in Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). The court reasoned that allowing sexual harassment claims predicated upon noneconomic or intangible losses would result in "a potential federal lawsuit every time an employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual." *Id.* at 163-64.

68. The Final Guidelines on Sexual Harassment in the Workplace, 45 Fed. Reg. 74,676-74,677 (1980) (codified at 29 C.F.R. § 1604.11(a)-(f)). The regulations provide:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfer-

the first court to recognize a cause of action for hostile environment sexual harassment[69] in the absence of the loss of a tangible job benefit or forced resignation.[70]

2. Supreme Court Expansion

The Supreme Court first considered a hostile environment sexual harassment claim in the 1986 case of *Meritor Savings Bank v. Vinson*.[71] In ruling that Title VII is not limited to "economic"

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ing with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id. (footnote omitted). As of 1995, the guidelines have remained virtually unchanged. *See* 29 C.F.R. § 1604.11(a) (1995). The Supreme Court has held that the EEOC guidelines, though not law, are "entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

69. Hostile environment sexual harassment involves behavior that "simply makes the work environment unbearable." MACKINNON, *supra* note 66, at 40. An example of such behavior includes visually undressing and staring at a fellow employee. In such circumstances, quid pro quo harassment need not be present. *Id.*

70. Bundy v. Jackson, 641 F.2d 934, 939 (D.C. Cir. 1981). The plaintiff in *Bundy* suffered continual sexual advances and propositions by her superiors and endured sexual intimidation as a "normal condition of employment." *Id.* When the plaintiff objected, a supervisor dismissed her complaints, telling her that "any man in his right mind would want to rape you," and proceeding himself to request that she begin a sexual relationship with him. *Id.* at 940. The Court of Appeals for the D.C. Circuit held that sexual harassment discriminates in the terms, conditions, or privileges of employment when an employer creates or condones a substantially discriminatory work environment, regardless of whether the complainant lost any tangible job benefits as a result of the discrimination. *Id.* at 943-44. The court further commented that unless courts extended the sexual discrimination cause of action beyond quid pro quo cases, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance." *Id.* at 945.

71. 477 U.S. 57 (1986). The plaintiff, Michelle Vinson, claimed that during her four years of employment at Meritor Savings Bank she constantly had been subjected to sexual harassment by Sidney Taylor, her supervisor, in violation of Title VII. *Id.* at 60. She estimated that over several years she had intercourse with Taylor 40 or 50 times, and that he fondled her in front of others, followed her into the women's rest room when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. *Id.* The district court denied relief, finding that if Vinson and Taylor engaged in a sexual relationship during Vinson's time of employment at the bank, that relationship was voluntary and had nothing to do with Vinson's continued employment at the bank. *Id.* at 61. The Court of Appeals for the District of Columbia reversed, Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), but the Supreme Court remanded the case to the district court for further consideration. *Meritor*, 477 U.S. at 73.

or "tangible" harassment,[72] the Court followed the 1980 EEOC guidelines[73] and found the claim actionable.[74] Since *Meritor*, employers violate Title VII when discriminatory behavior permeates the workplace with such severity or pervasiveness as to create a hostile or abusive working environment.[75] The *Meritor* Court did, however, set some limits to Title VII hostile environment claims.[76] To constitute an actionable claim, sexual harassment must be severe enough to alter the conditions of employment and create an abusive working environment.[77]

The severity of harassment required to sustain a hostile environment sexual harassment claim under *Meritor* remained unclear until the Supreme Court revisited the issue seven years later in *Harris v. Forklift Systems, Inc.*[78] In *Harris*, the Court

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72. *Meritor*, 477 U.S. at 64. The Court noted that the phrase "terms, conditions, or privileges of employment" in the Civil Rights Act of 1964 indicates congressional intent "to strike at the entire spectrum of disparate treatment of men and women." *Id.* (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

73. "In concluding that so-called 'hostile environment' harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65; *see supra* note 68 (detailing EEOC guidelines on hostile environment sexual harassment).

74. *Meritor*, 477 U.S. at 73. In recognizing the hostile environment sexual harassment claim, the Court noted that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Id.* at 67. The Supreme Court thus remanded the case for a determination of whether Vinson's accusations were sufficient to establish a claim of hostile environment sex discrimination. *Id.*

75. *Id.* at 64-65.

76. *Id.* at 67. In support of limiting the cause of action for Title VII hostile environment claims, the Court referred to Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). *Rogers* was the first case to recognize a cause of action based upon a discriminatory work environment. *Id.* at 237-38. Even the *Rogers* court, however, concluded that "an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not be severe enough to fall within the ambit of Title VII. *Id.*

77. *Meritor*, 477 U.S. at 67. An actionable claim of harassment, however, does not exist if no "term, condition, or privilege" of employment within the meaning of Title VII is affected by the harassment. *Id.*; *see, e.g.*, Scott v. Sears, Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986) (holding a mechanic subjected to harassment had no actionable hostile environment claim); Christoforou v. Ryder Truck Rental, Inc., 668 F. Supp. 294, 304 (S.D.N.Y. 1987) (holding evidence of sexual harassment failed to constitute an actionable claim).

78. 114 S. Ct. 367 (1993).

determined the extent of injury required[79] before courts could entertain a Title VII claim.[80] In promulgating objective[81] and subjective[82] components of the hostile environment cause of action recognized in *Meritor*, the *Harris* Court held that Title VII does not require a showing of psychological injury.[83] The Court noted that courts must examine the totality of the circumstances

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79. The Court determined whether conduct must seriously affect an employee's psychological well-being or lead the employee to suffer injury to be actionable as abusive work environment harassment. *Id.* at 370.

80. *Id.* In *Harris*, Teresa Harris's employer, Charles Hardy, made sexually derogatory comments and suggested at one point that he and Harris "go to the Holiday Inn to negotiate [Harris's] raise." *Id.* at 369. Hardy also asked Harris and other female employees to retrieve coins from his front pants pocket and he threw objects on the ground and asked Harris to pick the objects up. *Id.* When Harris complained to Hardy about his behavior, he apologized and promised to stop. *Id.* However, when Harris was arranging a deal with one of Forklift's customers several weeks later, Hardy asked her, in front of the customer, "What did you do, promise the guy . . . some [sex] Saturday night?" *Id.* Harris quit and sued Forklift, claiming that Hardy's conduct had created an abusive work environment because of her gender. *Id.* The district court held, despite finding that Hardy's comments offended Harris and would offend a reasonable woman, the comments were not "so severe as to be expected to affect [Harris's] psychological well-being." Harris v. Forklift Systems, Inc., No. 3-89-0557, 1991 WL 487444, at *7 (M.D. Tenn. Feb. 4, 1991). The court held that "[a] reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance." *Id.* The court, therefore, concluded that Hardy's conduct did not create an abusive work environment. *Id.* In focusing on the employee's psychological well-being, the district court followed circuit precedent, and the Sixth Circuit affirmed. Harris v. Forklift Systems, Inc., 976 F.2d 733 (6th Cir. 1992). The Supreme Court granted certiorari to resolve the question of the necessity of psychological impairment as a prerequisite to the cause of action. *Harris*, 113 S. Ct. 1382 (1993).

81. The environment must be sufficiently severe or pervasive so as to create an objectively hostile or abusive work environment, one that a reasonable person would find hostile or abusive. *Harris*, 114 S. Ct. at 370.

82. The victim must subjectively perceive the environment to be abusive, or a court will not find that the conduct actually has altered the conditions of the victim's employment. *Id.*

83. *Id.* at 371. The Court reasoned that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing their own careers." *Id.* at 370-71. The Court noted that while *Meritor* was an extreme example of appalling conduct which gave rise to a Title VII violation, that case does not "mark the boundary of what is acceptable." *Id.* The Court concluded that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious." *Id.*

to determine whether an environment is "hostile" or "abusive."[84]

3. Elements of Hostile Environment Cause of Action

An employee proceeding with a claim of hostile environment sexual harassment under Title VII must satisfy several elements.[85] As an initial matter, the employee must belong to a protected class.[86] In addition, the employee must endure unwelcome sexual harassment, the alleged harassment must be sexual in nature, and the harassment must affect a term, condition, or privilege of employment.[87] Success on a hostile environ-

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84. *Id.*; *see* 29 C.F.R. § 1604.11(b) (1995) ("In determining whether alleged conduct constitutes sexual harassment, the [EEOC] will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."). The *Harris* Court set out several factors to consider in the EEOC's totality of the circumstances approach: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 114 S. Ct. at 371. The Court noted that while courts may take psychological harm into account, no single factor is required. *Id.*

85. *See* Jana H. Carey & Theresa C. Mannion, *New Developments in the Law of Sexual Harassment from* Meritor *to* Harris, Karibian *and* Steiner, *in* SEXUAL HARASSMENT LITIGATION 1995, at 23-36 (PLI Litig. & Admin. Practice Course Handbook Series No. H-524, 1995) (listing elements of hostile work environment harassment and discussing some of the issues that arise in sexual harassment litigation).

86. Both males and females may bring charges of sexual harassment provided the harassment is based on sex. Carey & Mannion, *supra* note 85, at 25. Federal courts have split, however, on the existence of sexual harassment of men by men or women by women. Jill Hodges, *Same-sex Harassing: Judges Struggling with Issue as Iowa Case is Pending in Appeals Court*, STAR TRIB. (Minneapolis), Dec. 13, 1995, at D1. Some federal courts have found that same-sex harassment is not covered by Title VII because the Act is intended to protect against gender discrimination and a person cannot discriminate against someone of his or her own gender. *See, e.g.*, McWilliams v. Fairfax County Supervisors, No. 94-1607, 1996 WL 10280, at *3 (4th Cir. Jan. 9, 1996) (holding that Title VII does not cover male-to-male heterosexual sexual harassment). Other federal courts have determined that it is illegal, regardless of the sex of the harasser, if a person is subject to offensive treatment because of his or her gender. *See, e.g.*, Roe v. Kmart Corp., No. 93-2372, 1995 WL 316783, at *2 (D.S.C. Mar. 28, 1995) (holding that Title VII does cover male-to-male harassment).

87. Proving that harassment affects a term, condition, or privilege of employment is often the most challenging element for Title VII plaintiffs. RALPH H. BAXTER, JR. & LYNNE C. HERMLE, SEXUAL HARASSMENT IN THE WORKPLACE 37 (3d ed. 1989). The following factors may affect the EEOC's determination: whether the conduct was verbal, physical, or both; how frequently it was repeated; whether the conduct was hostile and patently offensive; whether the alleged harasser was a co-worker or supervisor; whether

ment claim requires proof that a workplace was permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[88] Finally, the complainant must establish a nexus between the employer and the offensive conduct.[89]

II. PRIOR ATTEMPTS TO BALANCE THE FIRST AMENDMENT WITH SEXUAL EQUALITY

Conflicts often force the Supreme Court to address tension

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others joined in perpetrating the harassment; and whether the harassment was directed at more than one individual. *Id.* at 38. When the alleged harassment consists of verbal conduct unaccompanied by physical action, pertinent factors include: whether the alleged harasser singled out the complaining employee; the relationship between the employee and the alleged harasser; and the frequency and nature of the remarks. *Id.*

88. *Harris*, 114 S. Ct. at 370 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)).

89. In many respects the nexus element of a hostile environment sexual harassment claim is analogous to tort law's "respondeat superior" doctrine. When a supervisory-type employee possesses a great deal of authority, a court is more likely to find that the supervisor speaks for and binds the employer by his or her acts. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984) (discussing tort law's vicarious liability doctrine). Based on this premise, in the sexual harassment context, a supervisor's acts may bind an employer more readily than the acts of a victim's non-supervisory co-workers. *See* Englander, *supra* note 12, at 14 (discussing employer liability).

The EEOC guidelines promulgate standards for employers concerned about vicarious liability. *See* 29 C.F.R. § 1604.11(c)-(f) (1980) (discussing employer liability for supervisors' acts). When a supervisor or other agent of the employer is the harasser, the employer is responsible for his or her acts "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c). If there is doubt whether an individual acts as a supervisor or agent, the EEOC, in evaluating a claim, will look at the circumstances of the particular employment relationship and the responsibility and job functions of the individual. 29 C.F.R. § 1604.11(c)-(f). When the harasser is a fellow employee of the complainant and does not hold a supervisory position, an employer is responsible when the employer "knows or should have known of the conduct, unless it can be shown that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). The EEOC suggests prevention is the best tool for the elimination of sexual harassment, and suggests an employer take steps to prevent harassment. 29 C.F.R. § 1604.11(f). Such steps include affirmatively raising the subject to increase awareness of the problem, expressing disapproval of such conduct, developing sanctions for egregious conduct, and informing employees of their right to raise the issue and how to go about doing so. 29 C.F.R. § 1604.11(f).

between First Amendment rights and various other state interests. For example, the Court in *Roberts v. United States Jaycees*[90] utilized a balancing test to subordinate weak freedom of association rights to the compelling interest of gender equality.[91] The Court, however, has not yet provided a method for analyzing the extent to which a state's interest in eliminating sexual harassment allows it to abridge speech rights. The Court, in deciding both *Meritor* and *Harris*, determined the bounds of sexual harassment within the framework of Title VII and did not address the First Amendment rights of the alleged harassers. Lower courts therefore lack Supreme Court direction in dealing with this potential conflict.

A. FREEDOM OF ASSOCIATION AND SEXUAL DISCRIMINATION

In addressing a similar conflict between Title VII and First Amendment rights, the Supreme Court in *Roberts v. United States Jaycees* addressed the conflict between eliminating sex discrimination and the right to freedom of association.[92] In *Roberts*, the United States Jaycees[93] challenged the application of a Minnesota law[94] that effectively forced local chapters of the organization to admit women.[95] The national organization claimed the Minneso-

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90. 468 U.S. 609 (1984).

91. *Id.* at 623-24.

92. 468 U.S. 609, 612 (1984). Freedom of association is the "freedom to engage in association for the advancement of beliefs and ideas [and] is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." NOWAK & ROTUNDA, *supra* note 26, at 1118. Although freedom of association is not explicitly mentioned in the Constitution, the Supreme Court's decisions indicate that this right is an indispensable means of preserving other explicitly protected individual liberties such as freedom of speech and religion. *Roberts*, 468 U.S. at 618.

93. At the time of the Supreme Court's decision in *Roberts*, the Jaycees limited regular membership in the organization to young men between the ages of 18 and 35. *Id.* at 613. Individuals or groups ineligible for regular membership (mostly women and older men) participated in the Jaycees as associate members. *Id.* Associate members could not vote, hold local or national office, or participate in certain leadership training and awards programs. *Id.*

94. The Minnesota Human Rights Act stated that "It is an unfair discriminatory practice . . . to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex . . . ." MINN. STAT. § 363.03, subd. 3 (1994)).

95. *Roberts*, 468 U.S. at 614. The Minneapolis and St. Paul chapters of the Jaycees began admitting women as regular members in 1974 and 1975, respectively, when the Minnesota Department of Human Rights ordered them

ta law violated the Jaycees' right to freedom of association.[96] The Supreme Court, however, held that Minnesota's compelling state interest in gender equality outweighed the Jaycees' association rights.[97]

The Court considered several factors when balancing the Jaycees' association rights with the state's interest in eliminating sexual discrimination.[98] In measuring the strength of the group's association rights, the Court examined such attributes as the size of the organization, the organization's degree of selectivity in admitting new members, and the organization's exclusion of non-members from critical aspects of the relationship.[99] Based upon these factors, the Court determined the Jaycees fell outside of the category of relationships worthy of strict protection.[100]

After determining the strength of the Jaycees' association rights, the Court turned to the state's interest in eradicating sex discrimination.[101] Finding the state's interest in this case com-

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to do so. *Id.* at 614. When the president of the national association advised both chapters that they were in danger of losing their charters for such practices, the local chapters filed charges of discrimination with the Minnesota Department of Human Rights, alleging that the requirement of the national organization that the local chapters exclude women from full membership violated the Minnesota Human Rights Act. *Id.*

96. *Id.* at 615.

97. *Id.* at 623.

98. *Id.* at 619-21.

99. *Id.* at 621; *see also* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) (reaffirming the relevant factors of size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship).

100. *Roberts*, 468 U.S. at 623. The Court determined that the Jaycees are a large and unselective group because neither the national organization nor the local chapters employ any criteria for judging applicants for membership. *Id.* at 621. In addition, women affiliated with the Jaycees attend various meetings, participate in projects, and engage in many of the organization's social functions. *Id.* The Court concluded much of the activity central to the formation and maintenance of the Jaycees involves the participation of associate members. *Id.* The Court stated that determining a State's power to limit association rights "entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620. The Court noted the dissimilarity between the Jaycees and an intimate relationship worthy of strict constitutional protection and determined that the Jaycees therefore enjoyed relatively weak association rights. *Id.*; *accord Rotary Club of Duarte*, 481 U.S. at 546-47 (holding the relationship among Rotary members is not the kind of intimate or private relation that warrants constitutional protection).

101. *Roberts*, 468 U.S. at 623-24.

pelling,[102] the Court determined that the goal of eliminating sex discrimination outweighed the Jaycees' association rights.[103] Because of the weak association rights involved in this case, the Court's balancing was not difficult. The Court reasoned that regulations serving compelling state interests that are unrelated to the suppression of ideas and that cannot be achieved through less restrictive means justify infringements on association rights.[104]

B. FREEDOM OF SPEECH AND SEXUAL HARASSMENT

Although mention of the potential conflict between freedom of speech and Title VII appears in one Supreme Court decision,[105] *Robinson v. Jacksonville Shipyards*[106] is the only federal case to date that addresses the conflict in any significant detail.[107] In

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102. The Court noted that the Minnesota Human Rights Act "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Id.* at 624. The Court held the Minnesota Legislature's goal is "unrelated to the suppression of expression," and "plainly serves compelling state interests of the highest order." *Id.*

103. *Id.* at 623.

104. *Id.*

105. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In *R.A.V.*, the Court commented that "since words can in some circumstances violate laws directed not against speech but against conduct ... a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *Id.* at 389. The Court in *R.A.V.* specifically noted that governments may regulate sexually harassing workplace speech based on its inseparability from illegal discriminatory conduct:

> [S]exually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. ... Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

Id. at 388-90.

106. 760 F. Supp. 1486 (M.D. Fla. 1991).

107. *See generally* Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995) (discussing whether Title VII hostile environment litigation is on a collision course with the First Amendment).

The Supreme Court never has decided a case presenting a conflict between the States' interests in freedom of speech and elimination of sexual harassment. In *Harris*, the Supreme Court's most recent hostile environment case, the Court chose not to discuss the First Amendment issue, even though Forklift Systems explicitly raised the issue. Respondent's Brief at 31, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168). Forklift Systems, citing Texas v.

Robinson, Lois Robinson claimed that her employer[108] created and encouraged a sexually hostile and intimidating workplace.[109] Robinson supported her claim with evidence of extensive posting of pictures of nude women throughout the workplace[110] and testimony concerning sexually derogatory comments directed toward her.[111] Based on extensive evidence,[112] the court found Robinson fulfilled her burden in proving all of the elements of a hostile environment claim.[113]

The *Robinson* court attempted to explain why the First Amendment does not impede injunctive relief for a Title VII plaintiff.[114] The court first stated that pictures and verbal harassment are not protected speech because they are equivalent to discriminatory conduct giving rise to a hostile work environ-

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Johnson, 491 U.S. 397 (1989), and FCC v. Pacifica Found., 438 U.S. 726 (1978), argued that the broad reading of Title VII favored by Harris would punish speech merely because a plaintiff found the speech offensive, a result forbidden by Supreme Court precedent. Respondent's Brief at 31, *Harris* (No. 92-1168). Forklift Systems further argued that Congress may not prohibit speech as a secondary effect of Title VII's prohibition against discriminatory employment practices unless the speech is closely connected with conduct and has an impact on a plaintiff's employment opportunities. *Id.* at 32-33. The Court ignored these arguments in reaching its decision.

108. Jacksonville Shipyards ran several shipyards engaged in repair work for the Department of the Navy. *Robinson*, 760 F. Supp. at 1491.

109. *Id.* at 1490. From 1980 to 1987 women formed less than five percent of the skilled craft positions at the shipyard, which in the words of its employees was "a boys club" and "more or less a man's world." *Id.* at 1493.

110. *Id.* at 1493. The district court found that pictures of nude women appeared throughout the shipyard in the form of magazines, plaques on the wall, photographs torn from magazines and affixed to the wall, and calendars. *Id.* These photos depicted women in various stages of undress and in sexually submissive or suggestive poses. *Id.* at 1494. Foremen of the shipyards condoned these displays and often displayed their own pictures. *Id.* at 1493-94.

111. Robinson testified as to some of the comments directed towards her during her tenure at the shipyard. *Id.* at 1498. Some of the more egregious examples included: "Hey pussycat, come over here and give me a whiff," "I'd like to have some of that," and "The more you lick it, the harder it gets." *Id.* Male co-workers also addressed Robinson as "honey," "dear," "baby," "sugar," and "momma" on innumerable occasions in place of her real name. *Id.*

112. The court's opinion summarizes the offensive behavior occurring in the workplace, the testimony of expert witnesses as to the effect of this behavior on women employees, and the responses of the shipyard to sexual harassment complaints, making over 125 findings of fact. *Id.* at 1486-1521.

113. *See supra* notes 85-89 and accompanying text (providing the elements of a hostile environment claim).

114. *Robinson*, 760 F. Supp. at 1534.

ment.[115] The court next claimed that regulation of discriminatory speech in the workplace is nothing more than a time, place, and manner regulation of speech.[116] Finally, the court noted that workers are a captive audience in relation to the speech that creates the hostile work environment.[117] The court concluded that the compelling governmental interest in eliminating discrimination in the workplace outweighed an individual's interest in free speech.[118] Therefore, even if the speech is otherwise fully protected by the First Amendment, regulation under Title VII is

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115. *Id.* at 1535. The *Robinson* court commented that "the speech at issue is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail, of which there can be no doubt of the authority of a state to punish." *Id.* at 1535. In support of this proposition, the court cited Rankin v. McPherson, 483 U.S. 378, 386-87 (1987) (stating that the First Amendment did not protect a threat to kill the President, but that commenting upon someone else's attempt to do so is protected) and United States v. Shoulberg, 895 F.2d 882, 886 (2nd Cir. 1980) (holding that threats to intimidate witnesses were not protected). The Supreme Court later promulgated the same argument in dicta in R.A.V. v. City of St. Paul, 505 U.S. 377, 388-90 (1992). *See supra* note 105 (detailing arguments of the Court in that case).

116. *Robinson*, 760 F. Supp. at 1535. The court noted in connection with this theory that the State must predicate a time, place, or manner regulation on a legitimate governmental interest unrelated to the suppression of speech, that the regulation must be content neutral, and that the means of accomplishing this interest must be narrowly tailored. *Id.*; *see also supra* notes 30-32 and accompanying text (discussing time, place, or manner regulations). Two of the three requirements for a valid time, place, or manner regulation are easily satisfied in *Robinson*. Eradication of workplace discrimination is more than simply a legitimate government interest, and the method of regulation at issue in the case is narrowly tailored to remedy the discrimination problem. The court's reasoning in finding content neutrality, however, seems more tenuous. The court held "[t]o the extent that the regulation here does not seem entirely content neutral, the distinction based on the sexually explicit nature of the pictures and other speech does not offend constitutional principles." *Robinson*, 760 F. Supp. at 1535.

117. *Id.* The *Robinson* court noted "[f]ew audiences are more captive than the average worker . . . ." *Id.* (citing J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423-24); *see supra* notes 38-40 and accompanying text (discussing First Amendment restrictions designed to protect captive audiences).

118. *Robinson*, 760 F. Supp. at 1536. The court noted that other First Amendment rights, such as freedom of association and freedom of religion, have given way to narrowly tailored remedies designed to advance the compelling governmental interest in eradicating discrimination. *Id.* The court also noted that an employer, without violating the First Amendment, can require some employees to curtail their expression in the workplace in order to remedy the demonstrated harm inflicted on other employees. *Id.*; *see supra* notes 47-53 and accompanying text (outlining cases in which public employees have challenged public employers on First Amendment grounds).

permissible.[119]

Although the court in *Robinson* thoroughly discussed the First Amendment implications of Title VII, the discussion was not central to the court's holding. *Robinson* involved harassing conduct in addition to offensive expression. The court, therefore, could have found an actionable Title VII claim even if it had determined that the First Amendment prevents the remedy of injunctive relief. Only if the basis of the harassment claim was pure expression would the discussion of First Amendment issues have been determinative.

III. A PROPOSED TEST TO BALANCE FREE SPEECH RIGHTS AND TITLE VII HOSTILE ENVIRONMENT CLAIMS

While many commentators focus on the potential conflict between eliminating sexual harassment and the right to free speech,[120] none has proposed a definitive test to harmonize the two interests. Courts can create a suitable framework for balancing free speech rights with Title VII claims by adapting the Supreme Court's analysis in *Roberts v. United States Jaycees*.[121] Although the Supreme Court in *Roberts* balanced association rights with sexual equality, courts just as easily can balance free speech rights with the goal of eliminating sexual harassment.

In analyzing conflicts between a hostile environment sexual harassment claim and the alleged harasser's defense that his or her statements were a legitimate exercise of First Amendment rights, a court should use the following analysis. First, the court should evaluate the allegedly harassing speech according to a number of criteria, including whether Title VII is a valid time,

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119. *Robinson*, 760 F. Supp. at 1536.

120. *Compare* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 491-510 (1987) (arguing that the courts' adoption of a broad definition of "hostile work environment" in harassment cases establishes a content-based or even viewpoint-based restriction of speech that is inconsistent with the First Amendment) *and* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819-43, 1849-62 (1992) (arguing that harassment law does not fit within any First Amendment exceptions and advocating First Amendment protection for speech that is not directed at any particular employee despite its offensiveness) *with* Sangree, *supra* note 107, at 503-58 (taking issue with views of Browne and Volokh and arguing that First Amendment law is well-suited to the task of distinguishing between constitutionally protected speech from speech constituting unlawful discrimination).

121. *See supra* notes 93-104 and accompanying text (describing the facts, holding, and reasoning of *Roberts*).

place, or manner restriction on the speech; whether the regulation of the speech falls under an exception to the time, place, or manner requirements; whether the audience is "captive," thereby reducing the speech's First Amendment protection; and whether the First Amendment protects the speech as a matter of public concern. Second, the court should evaluate the government's interest in cleansing the work environment of sexual harassment by examining the environment in which the harassment occurred and the ability of the claimant to escape the objectionable speech. Separately determining the interests of both the speaker and state will allow the court to conduct a fact-specific balancing test in each individual case.

A. THE FREE SPEECH CALCULUS

The first prong of the proposed test involves evaluating the strength of the harasser's speech interest. Courts have found speech to be the basis for Title VII violations.[122] Many free speech advocates disagree with this result,[123] fearing that the unclear boundaries of the cause of action[124] will lead to abridgment[125] or chilling[126] of speech rights. The First Amendment should not always prevail in the balance between free speech and sexual harassment claims. Courts can judge the value of a harasser's speech rights by using a number of criteria to analyze the speech. Courts can then place the allegedly harassing speech

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122. *Robinson v. Jacksonville Shipyards* provides the best example of speech serving as the basis for a Title VII violation. *See supra* notes 110-11 and accompanying text (describing the pictures of naked women and sexually derogatory comments that formed the basis for a hostile environment claim). *Robinson* also contains the clearest rationale proffered by a court for upholding Title VII claims in the face of First Amendment defenses. *See supra* notes 112-117 and accompanying text (describing the *Robinson* court's rationale).

123. *See, e.g.*, Browne, *supra* note 120, at 501-10 (discussing the ways in which Title VII abridges First Amendment rights); Volokh, *supra* note 120, at 1809-18 (same).

124. One commentator asserts that the boundaries of the hostile environment cause of action are "fuzzy" due to the fact-specific nature of each claim. Professor Carolyn Chalmers, Address at the University of Minnesota Law School (Oct. 30, 1995). Because each fact situation is different, no clear line exists to separate meritorious from nonmeritorious claims. *Id.*

125. A court could abridge free speech rights by holding that the expression of a certain word or idea constituted harassment.

126. Chilling occurs when a potential speaker does not speak or express an idea because of a fear or uncertainty that the speech will constitute harassment. When authorities have too much enforcement discretion, which is arguably the case in Title VII claims because of the unclear boundaries of the cause of action, speakers will not express their ideas out of fear of prosecution or suit.

on a spectrum from highly protected to unprotected, with the amount of protection accorded that speech commensurate with the placement of the speech along the spectrum.[127]

1. Content-Neutrality, Conduct, and Secondary Effects

Government can legitimately abridge free speech rights by establishing time, place, or manner restrictions.[128] Title VII satisfies two of the requirements for these restrictions because it fulfills a significant state interest and does not regulate alternate avenues of communication.[129] Title VII prohibitions on speech, however, are not content-neutral. The *Robinson* court dealt with this problem by discounting any distinction based on the sexually explicit nature of pictures and other speech.[130] Contrary to the court's reasoning, however, prohibiting only offensive or discriminatory speech is content regulation.[131]

The Supreme Court has attempted to distinguish Title VII from invalid content-based speech restrictions, holding that, while not content-neutral, Title VII may still be valid under the First Amendment if it is designed to regulate conduct rather than

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127. *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 14 (1994) ("[T]he set of speech acts that might plausibly be thought to constitute sexual harassment can be arrayed along a spectrum, not all of which could reasonably be thought to lie completely beyond First Amendment concern . . . ."); *see also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 165-238 (1989) (discussing the differing protection accorded various types of speech).

128. *See supra* notes 30-32 and accompanying text (reviewing the requirements of a valid time, place, or manner regulation: content neutrality, significant state interest, and the availability of alternative avenues of communication).

129. The elimination of sexual harassment seems not just a significant state interest, but, in fact, a compelling state interest. Plaintiffs can also easily show that a harasser could have expressed his or her self through alternative avenues of communication outside the workplace. The harasser, for example, could have expressed views in such locations as a public park or on a street corner.

130. *See supra* note 116 and accompanying text (detailing this finding of the *Robinson* court).

131. While the *Robinson* court found a calendar with naked women sufficient to constitute harassment, presumably a calendar with pictures of Ronald Reagan or the Dallas Cowboys would not be harassment. Title VII prohibitions are therefore not content neutral. In addition, the Supreme Court has held that language or expression that is offensive cannot be suppressed under the guise of regulating the time, place, or manner of the speech. *See supra* note 33 and accompanying text (detailing Court's holdings in this area).

speech.[132] The amount of protection afforded harassing speech or expression should, therefore, partially depend upon whether the speech is tied to harassing conduct.[133] General expression in the workplace that is not directed at any one individual and not tied to harassing conduct should receive greater protection. Conversely, offensive speech that is intentionally directed at one individual by the harasser should receive less protection.[134] Although the *Robinson* court held sexually explicit expression itself involves sufficient conduct to avoid the content-neutrality requirement of a time, place, or manner regulation,[135] the above distinction is more consistent with the existing legal framework for First Amendment law, partly because it closely parallels the common law action for intentional infliction of emotional distress.[136] Only when sexually explicit speech is aimed at an individual, can a court find sufficient conduct to avoid the content-neutrality requirement of a time, place, or manner regulation.[137]

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132. *See* supra note 105 and accompanying text (detailing Supreme Court's comments on Title VII in *R.A.V. v. City of St. Paul*). In *R.A.V.*, the majority dismissed any application of its holding to Title VII cases, arguing Title VII is directed at conduct and not speech, and is also constitutional under the "secondary effects" doctrine. R.A.V. v. City of St. Paul, 505 U.S. 377, 388-90 (1992); Jeffrey M. Laurence, Comment, *Minnesota Burning:* R.A.V. v. City of St. Paul *and First Amendment Precedent*, 21 HASTINGS CONST. L.Q. 1117, 1143-44 (1994); *see also* Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J.L. & SOC. PROBS. 519, 535 (1995) (arguing that Title VII is not a valid time, place, or manner restriction because speech, rather than conduct, triggers application of the statute).

133. *See* Volokh, *supra* note 120, at 1843-70 (advocating that the line between undirected and directed speech should serve as the distinction between speech that is and is not afforded First Amendment protection).

134. *Id.* Undirected speech occurs, for example, when a harasser states generally to no one in particular that women are mere sex objects and do not belong in the workplace. Directed speech, conversely, occurs when the harasser accosts one particular woman and says to her directly that she is a sex object and does not belong in the workplace.

135. *See supra* note 115 and accompanying text (describing the *Robinson* court's view that harassing speech is indistinguishable from criminal speech).

136. Under the tort law doctrine of intentional infliction of emotional distress, persons are liable for conduct that they intentionally design to cause, and that does cause, very serious mental distress to targeted individuals. *See* KEETON ET AL., *supra* note 89, at 54-66 (describing the common law cause of action for intentional infliction of emotional distress). Despite the technical requirement that the actor intend to inflict emotional distress, most if not all jurisdictions have chosen to impose civil liability where the conduct in question is sufficiently outrageous regardless of the actor's intent. Hustler Magazine v. Falwell, 485 U.S. 46, 52-53 (1988).

137. Hanging a calendar on the wall, for example, would not be "significant action" under this test. By examining whether expression is directed at an

Title VII also can qualify for an exception to the content-neutrality requirement of a time, place, or manner regulation if the intent of the regulation is to control the secondary effects of the speech.[138] The primary consideration for determining the protection afforded speech under this exception is the primary and secondary effects of the speech. The emotive impact of harassing speech on a victim is a primary, not a secondary effect.[139] If the only effect of the harassment on the victim is emotional unrest, therefore, the exception should not apply. If, alternatively, the harassment leads to impaired work performance, a nonemotional repercussion, the harassment arguably has controllable secondary effects. The greater the non-emotive effects, the less protection courts should afford the harassing speech or expression. While emotional unrest alone may intrinsically impact job performance, the Supreme Court has allowed governmental control over only secondary effects, and not the emotive impact of speech. The reach of the secondary effects doctrine in preventing sexually harassing speech is therefore limited.[140]

2. Captive Audience Considerations

Courts have upheld speech regulations when an audience is "captive," and unable to escape the objectionable speech.[141] The *Robinson* court, for example, concluded that employees at the shipyard were a captive audience because their job forced them to remain at the site of the harassment.[142] While some commenta-

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individual, on the other hand, a court can ensure that conduct will be sufficiently egregious to invoke the exception to the content-neutrality requirement of a time, place, or manner regulation. Singling out one individual and harassing only that person surely involves significant action.

138. *See supra* notes 34-37 and accompanying text (describing the secondary effects exception to the content-neutrality requirement of a time, place, or manner regulation).

139. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 393-94 (1992) (determining that an ordinance proscribing certain types of hate speech was not directed to secondary effects within the meaning of *Renton*); Boos v. Barry, 485 U.S. 312, 321 (1988) ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*.").

140. *See* Fallon, *supra* note 127, at 17-18 (arguing that harassment law cannot qualify for the "secondary effects" exception to the content-neutrality principle because harassment law focuses on the direct impact of speech on its audience).

141. *See supra* notes 38-40 and accompanying text (detailing the captive audience doctrine).

142. Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

tors doubt whether this doctrine should shield individuals from speech when they are outside of their homes,[143] the inability of employees to avoid objectionable speech in the workplace is analogous to their inability to avoid such speech at home, rendering them a captive audience. In assessing the protection speech should receive, therefore, the less an employee is able to escape harassing speech, the less protection courts should afford that speech.[144] Captive audience arguments should at least be a factor, even if not determinative, in assessing the speech rights of a harasser.

3. The Public Concern Test

Speech considered harassment under Title VII may in fact be a comment upon a matter of public concern.[145] This is especially true in light of courts' broad interpretation of "public concern."[146] Many hostile environment sexual harassment plaintiffs, for example, base their claims upon male co-workers' comments about the appropriateness of women in the workplace or the suitability of women to perform a particular job.[147] While these comments may have a harassing effect on female workers, the fact that they touch upon issues of public concern[148] should afford them a certain degree of First Amendment protection. Although an employer's interest in an efficient workplace ultimately can outweigh the employee's speech rights,[149] courts should consider

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143. *Compare* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (1990) (arguing that few audiences are more captive than the average worker) *with* Volokh, *supra* note 120, at 1832-33 (arguing that the Supreme Court should not find that employees in the workplace are "captive").

144. Whether workers are "captive" at their place of employment is also an element of the second part of the proposed test, assessing the strength of the government's interest in eliminating harassment in a particular case. *See infra* Part III.B.2. (proposing an analysis akin to the captive audience doctrine).

145. *See supra* notes 47-53 and accompanying text (detailing the public concern test).

146. *See supra* note 50 (describing the broad reading given to the term "public concern" by lower courts).

147. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d. 591, 595 (5th Cir.) ("Physically, the police broads just don't got it!"), *cert. denied*, 116 S. Ct. 473 (1995); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1498 (M.D. Fla. 1991) ("[T]here's nothing worse than having to work around women.").

148. For example, the question of whether women belong in the work force or are physically fit to perform a certain job are issues of public concern.

149. *See supra* note 48-49 and accompanying text (describing the balancing test courts use when a public employee's speech touches upon a matter of public

whether the speech addresses a matter of public concern.

B. STRENGTH OF THE GOVERNMENT INTEREST IN REGULATING HARASSING SPEECH

The second part of the proposed test involves measuring the strength of the government interest in eradicating sexual harassment. In fulfilling this task, the court should use a two-step analysis. The court first should examine whether the harassment occurred in an employment, scholastic, or other environment. Then, within such an environment, the court should examine the ability of the claimant to escape the objectionable speech by using a captive audience analysis. Such a case-specific analysis will allow a court to determine the strength of the government interest in censuring the questioned speech.

1. The Location of Sexually Harassing Speech or Expression

The state's interest in eradicating sexual harassment is most compelling when harassing speech occurs in the workplace.[150] Over the past twenty-five years the number of women in the work force has roughly doubled[151] and an increasing number of women workers are the sole income earners in their household.[152] If the victim loses or leaves her job, and the victim is the sole wage earner in the household, the income needed to support dependents is no longer available. Sexual harassment in the workplace thus endangers the livelihood of not only the victim, but those dependent on the victim as well.[153]

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concern).

150. The government's interest in eliminating harassment in the workplace is compelling because of the large number of women now in the work force and the increased responsibility of many of these women as the heads of single family households to provide for dependents. *See infra* notes 151-52 and accompanying text (providing statistics of the number of women in the work force).

151. The number of females in the civilian labor force has increased from 31,543,000 in 1970 to 58,407,000 in 1993. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 398 (1994).

152. While the number of married women in the work force increased 73% from 1970 to 1993 (from 18,475,000 to 31,978,000), the number of widowed, separated, or divorced women increased over 100% (from 5,804,000 to 11,805,000) over the same period. *Id.* at 401. Thus, an increasing percentage of women in the work force are responsible for providing for dependents.

153. In enacting Title VII, Congress intended to remove barriers to employment based on race or sex. Andrews v. City of Phila., 895 F.2d 1469, 1483 (3rd Cir. 1990). In *Andrews*, the court held that Congress's objective "can only be achieved if women are allowed to work without being harassed. Women

In contrast, the equality interest at stake when sexual harassment occurs in non-workplace environments is not as compelling, as no threat to the livelihood of the wage earner or dependents occurs. The college campus is a ready example. One purpose of a university, unlike the workplace, is to foster the free exchange of ideas that may be controversial or even offensive.[154] University sexual harassment codes prohibiting offensive speech ignore this fundamental difference between the workplace and campus environment.[155] Sexual harassment can occur in other situations as well, such as those involving public transportation and public sidewalks. In both locations, the public nature of the forum lessens the state's interest in avoiding harassment. In each case, the court should consider the relative importance of eliminating harassment in that particular location.

2. The Ability to Escape the Sexually Harassing Speech or Expression

While a victim of sexual harassment in many situations is able to avoid harassment altogether,[156] in the case of the workplace the victim is often unable to escape the objectionable conduct or expression.[157] Because the harasser may control the conditions of the victim's employment, the victim is forced to endure sexual harassment in order to keep his or her job.

Not all employment relationships, however, are equally

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who know that they will be subject to harassment will be deterred from joining the work force or accepting certain jobs." *Id.*

154. *See* Doe v. University of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) (holding that tolerating offensive speech acquires "a special significance in the University setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.").

155. In *Doe*, the court struck down the University of Michigan's speech code because it regulated purely expressive behavior and speech unrelated to conduct. *Id.* at 863-64. The court further held that the code was overbroad and vague. *Id.* at 866-67.

156. If, for example, a victim is subject to harassment while walking down a particular street or while shopping in a particular store, in the future that person is free to choose an alternate route or a different store.

157. It is much more difficult for a victim of sexual harassment to quit a job and find a new position in order to escape harassment than to choose a new walking route or store. The harasser may be the victim's supervisor, who holds power over the victim both during the term of employment and even after employment is terminated if the victim needs a reference to obtain new employment. *See generally* MACKINNON, *supra* note 66, at 25-55 (describing the impact that quid pro quo and hostile environment sexual harassment can have on working women).

susceptible to sexually harassing speech or expression. In determining susceptibility, and concomitantly the strength of the equality interest in a particular case, courts should use an analysis akin to the captive audience doctrine. Under that doctrine, courts provide less protection to speech rights when the speech is directed toward a captive audience.[158] Courts should determine the strength of the State's interest in eliminating sexual harassment in a particular case by examining the captivity of the target of harassment.[159] When the employee is unable to escape the harassing behavior, the State's interest is most compelling.[160] If the employee has the ability to escape the harassing speech,[161] however, the interests of the government become less compelling.

C. APPLYING THE PROPOSED BALANCING TEST TO *DEANGELIS*

The Fifth Circuit Court of Appeals dismissed DeAngelis's claim because of insufficient evidence of sexual harassment.[162] If the court had reached the merits of the sexual harassment-free speech conflict, however, application of the proposed balancing test would have lead to a similar result. In determining the strength of the speech interest in that case, the interest of the Association in printing its newspaper was strong. Because no harassing conduct accompanied the speech, Title VII in that case could not be a valid time, place, or manner regulation of conduct. While DeAngelis claimed emotional disturbance from the newsletter, she did not present evidence of secondary effects from the articles such as deterioration in job performance. In addition, the newspaper

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158. *See supra* notes 38-40 and accompanying text (describing the Supreme Court's captive audience doctrine).

159. Captive audience considerations are also a factor in the first prong of the proposed test, determining the strength of the harasser's First Amendment interests in making the harassing statements. *See supra* Part III.A.2. (discussing captive audience considerations).

160. An employee is a "captive audience," for example, when he or she is desk-bound and unable to complete his or her work outside of the location in which the harassing behavior occurs. *See, e.g.*, Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1490-94 (M.D. Fla. 1991) (providing an example of an employee unable to complete her work outside of the location in which the harassing behavior occurs).

161. An employee can escape harassing speech when the employee is able to complete her work at home just as easily as at the place where the objectionable speech occurs. An employee is clearly not a captive audience if she is able to choose not to come to the site of the harassment without negatively impacting her work or her career. In actuality, very few such employment situations exist.

162. *See supra* notes 2-9 and accompanying text (detailing the facts and holding of *DeAngelis*).

columns focused on a matter of public concern, the presence of women on the El Paso police force.

Conversely, the strength of the government's interest in eradicating sex harassment in this situation was weak. While the speech occurred in a workplace forum, DeAngelis had the ability to escape the harassing speech or expression by simply avoiding the Association's newspaper, thereby making her a non-captive audience. Weighing the relative interests in this case, therefore, compels the conclusion that the Association's First Amendment interest in printing its newspaper outweighed the government's interest in eliminating the newspaper's sexually harassing speech.

CONCLUSION

The fact-specific nature of Title VII hostile environment claims presents difficult challenges for the courts. Fortunately, the conflict between the First Amendment and Title VII implicates only a relatively narrow class of harassment claims, where pure expression is the basis for the complaint. As the cause of action expands, however, the basis of a growing number of harassment claims is likely to include speech or expressive activity.

The refusal of the Supreme Court to address the First Amendment issue indicates that the Court will not find that the First Amendment prohibits the imposition of Title VII liability altogether when speech is both expressive and sexually harassing. The prior holdings of the Court dealing with content neutrality, captive audiences, secondary effects, and public employment, however, indicate that some harassing speech deserves First Amendment protection, even though listeners may find it offensive.

As Title VII liability has expanded, courts have been slow to address the types of speech that deserve protection and whether the First Amendment should serve as a meritorious defense to a hostile environment sexual harassment claim. This Note proposes a structured balancing test to determine the relative importance of free speech and equality rights when a Title VII hostile environment claim is met with a First Amendment defense. This test weighs the interest of a speaker in self-expression against the strength of the government interest in eliminating sexual harassment in a particular context. Because of the nature of the speech involved in such a case, this test is more efficient than trying to strictly classify the speech as protected or unprotected. This approach allows courts to utilize discretion in weighing all of

the interests at stake and insures the proper balance between Title VII and the First Amendment right to free speech.