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THE ARCHITECTURE OF THE FIRST AMENDMENT AND THE CASE OF WORKPLACE HARASSMENT

*Cynthia L. Estlund**

I can think of no better metaphor for Professor Schauer's chief contribution to free speech methodology than he has, at least on one occasion, chosen for himself: he has called upon us to consider the "architecture" of the First Amendment.[1] It is an apt metaphor that situates a significant strain of Professor Schauer's work just where legal scholarship can often be most helpful.[2]

Architects design structures in which people live and work. They are concerned with artistic considerations of beauty, balance, and symmetry. But a great architect does not exalt the aesthetic purity of a structure over the needs of its future occupants. Architects must also be concerned, like engineers, with the load-bearing properties and the durability of materials; they must think about where the heating ducts and the vents will go. But the architect must fit these details into a livable and workable whole.

A good deal of First Amendment scholarship can perhaps fairly be described as more akin to art or to engineering—both noble callings—than to architecture. We might (contentiously) denominate as "art" those works of free speech theory that are philosophically inspired and guided by norms of conceptual purity and consistency.[3]

* Leroy G. Denman, Jr., Regents Professor of Law, University of Texas School of Law. I want to thank Sam Issachasoff and Scot Powe for their comments on an earlier draft.

1 Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988) [hereinafter Schauer, *Architecture*]. For another exploration—slightly more literal—of the relation of architecture to law, see Daniel A. Farber, *The Dead Hand of the Architect*, 19 HARV. J.L. & PUB. POL'Y 245 (1995).

2 Professor Schauer had the good judgment not to overtax the metaphor of architecture. I risk doing so here.

3 For example, some scholars seek to elucidate the single primary value underlying the freedom of speech and the First Amendment. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–17 (1948) (advancing informed democratic self-governance); MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 47–48 (1984) (advocating self-realization); C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–1009

We might then denominate as "engineering" the very large body of scholarly work that seeks to elucidate one or more of the many particularized segments of First Amendment doctrine.[4]

But much of Professor Schauer's free speech scholarship is a model of a different sort. His work systematically directs our attention to the overall design and structure of free speech law, and to the ways in which particular doctrines affect that overall structure, in light of the strengths and weaknesses of the actors and institutions that live and work within it. In his words:

> We would hardly think it appropriate to design a building by deciding beam by beam, pillar by pillar, and brick by brick, as we went along, what the building was to look like. Instead the building's structural integrity depends on a design at the beginning, a design that looks to the full shape of the completed structure.
>
> Naturally, common law development, as apt a characterization as any for what the courts do with respect to the first amendment, cannot design the edifice in advance. Nevertheless, it can, and should, consider at each turn what a proposed incremental change will do to the structure as a whole, and consider at each turn whether a particular doctrinal expansion that seems inconsequential when taken in isolation, would, if matched by equivalently inconsequential expansions in different directions, or at different times in the future, in the aggregate so alter the shape of the edifice that it might lose its structural integrity.[5]

(1978) (stressing personal liberty); David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 83–90 (1974) (discussing equal liberty); Timothy Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (promoting individual autonomy in decisionmaking).

Professor Schauer is a major "artist" of the First Amendment. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982) [hereinafter SCHAUER, FREE SPEECH]. But he has been skeptical of the many attempts to reduce the justification for free speech to a single "core value." *Id.* at 13–14; Schauer, *Architecture*, *supra* note 1, at 1185–86. He has also explained why the extraction of one or more core values underlying the freedom of speech does not enable us to decide cases directly in accordance with those core values. *See* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989). Rather, we need "rules" that will necessarily be both underinclusive and overinclusive in relation to the values underlying those rules. *Id.* Architects enter to design the rules, and the system of rules, that protect free speech values.

4 Examples of this sort of work—some of it excellent—abound. Most of the articles cited *infra* notes 9–11 would be examples of First Amendment "engineering" as defined here.

5 Schauer, *Architecture*, *supra* note 1, at 1202.

Professor Schauer thus urges us, as we take up any particular question of free speech doctrine, to aim for a sound and usable First Amendment, one in which "form follows function."

Professor Schauer once wrote, in commenting on John Hart Ely's work, that "[w]e honor the enduring nature of Ely's contributions . . . not by retreading familiar ground, but rather by continuously finding new uses for those contributions."[6] That is what I propose to do here, briefly, with what I have found to be some of Professor Schauer's most helpful contributions in the arena of free speech theory and doctrine—that is, his systematic attention to how these doctrines fit into the overall structure of the First Amendment.

There is a lively debate within First Amendment scholarship over the constitutional status of discriminatory verbal harassment, particularly in the workplace.[7] A number of decisions finding harassment liability under Title VII have turned in whole or in part on what we would ordinarily recognize as "speech"; yet few courts have seriously considered the relevance of the First Amendment in this regard.[8] The commentators have stepped into the judicial vacuum with gusto. Some commentators have argued that Title VII's harassment law, as applied to nearly all speech, abridges the freedom of speech protected by the First Amendment.[9] Others have defended harassment law as both necessary to workplace equality and entirely consistent with free speech principles and doctrine.[10] Still others situate them-

6 Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 654 (1991).

7 For my own contribution to this debate, summarized very briefly below, *infra* note 87, see Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997). What follows is taken in part from that more extended treatment of the subject. But part of that article, in turn, was a product of my close attention, stimulated by the present occasion, to the Schaueresque principles of First Amendment architecture.

8 There are exceptions. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596 (5th Cir. 1995) (suggesting in dicta the possibility of a First Amendment defense to a harassment claim based on "pure expression" in the form of newsletter columns following the court's rejection of the harassment claim on statutory grounds); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534–37 (M.D. Fla. 1991) (considering and rejecting a First Amendment defense to an injunction against verbal and graphic sexual materials as a remedy for sexual harassment); Meltebeke v. Bureau of Labor & Indus., 903 P.2d 351, 355 (Or. 1995) (mentioning a limited First Amendment defense against religious harassment claims).

9 Professor Browne stakes out one end of the spectrum, arguing that virtually all regulation of verbal harassment violates the First Amendment. *See* Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579, 580–82 (1995).

10 *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 45–68 (1993); Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996).

selves at some point in the middle and advocate some restrictions on the application of Title VII to speech.[11]

While the workplace context puts a unique spin on the issue, the problem of discriminatory harassment raises many of the classic architectural problems that Professor Schauer urges us to consider: does it make sense to think of discriminatory harassment (or the incidents that may contribute to a hostile environment) as "speech"—as conduct to which the First Amendment is relevant? What will it do to First Amendment doctrine as a whole to include within its purview, or to exclude from it, some of what might be discriminatory harassment? Does all or most of what may contribute to a harassment claim fit into one or more of the existing categories of unprotected speech? If not, should we afford "full protection" to this speech, or should we instead recognize a new category of unprotected or less protected speech? How might we define such a category so as to minimize the dangers of both errors of application and of further fragmentation and excessive complexity within the structure of free speech law?

I propose to take up some of these questions briefly here as a way of testing the usefulness of, and, frankly, paying homage to, some of Professor Schauer's contributions in the free speech arena.

I

One form of employment discrimination prohibited by Title VII is the creation of an abusive or hostile work environment through discriminatory harassment. As the Supreme Court recently reaffirmed in *Harris v. Forklift Systems, Inc.*,[12] to establish a Title VII violation, an employee must show that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[13]

11 *See, e.g.*, KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 77–96 (1995); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 40–41; Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 49, 49–51 (1990); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757, 782 (1992); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L.J. 563, 576 (1995) [hereinafter Volokh, *How Harassment Law*]; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1863–67 (1992) [hereinafter Volokh, Comment]. This middle group itself encompasses widely varying stances.

12 510 U.S. 17 (1993).

13 *Id.* at 21 (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

Workplace harassment law seeks to induce employers, largely through the threat of liability, to institute and enforce policies prohibiting forms of discriminatory harassment that burden the worklives of and hinder the advancement of women and minorities in some workplaces. Yet the law's transformative objective, and its partial success, has been accompanied by emerging concerns about freedom of speech.[14] For some of the workplace conduct that can contribute to harassment liability consists of speech: the display of pornography, use of offensive epithets, statements of hostility or condescension toward women or minorities in the occupation or the workplace, or other verbal or graphic expression.[15]

Consider *Harris* itself. As the Supreme Court summarized the findings below, much of the complained-of harassment was verbal:

> [T]hroughout Harris' time at Forklift, Hardy [the company president] often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing.
> [After Harris complained and Hardy promised to stop,] Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy . . . some [sex] Saturday night?"[16]

Most of the offending conduct in the case was "speech" by any ordinary language definition.[17] At least some of the speech was of a sort that the state could not freely prohibit on the basis of its content if it took place outside the workplace: "sexual innuendos," the statement that "[w]e need a man as the rental manager,"[18] even some of the taunts, however offensive, do not appear to fall into any of the estab-

14 *See supra* notes 7–11 and accompanying text.

15 For a further description of some of this case law, see Volokh, Comment, *supra* note 11.

16 *Harris*, 510 U.S. at 18–19.

17 That does not, of course, mean that these utterances are protected or even necessarily covered by the First Amendment. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 269–272 (1981) [hereinafter Schauer, *Categories*].

18 *See infra* note 36 and accompanying text.

lished categories of wholly unprotected speech. Yet Title VII makes this speech actionable as part of a hostile environment claim.[19] Indeed, it does so on the basis of the content, and at least arguably the viewpoint expressed; such applications of Title VII thus seem to raise a difficult constitutional issue.

The constitutional concerns were raised by the defendant and briefed by both parties in *Harris* itself (though not in the court below); yet they were not mentioned in the *Harris* opinions. Professor Fallon aptly describes *Harris* as "the jurisprudential equivalent of the dog that didn't bark—a clue (but no more than that) to some of the First Amendment mysteries surrounding prohibition of sexually harassing speech."[20]

We have here a very nice problem in First Amendment law: does the First Amendment limit the scope of workplace harassment law? If so, how shall we define the nature of those First Amendment limitations? Should we recognize a category of unprotected or less protected speech—"discriminatory workplace harassment" (or perhaps more broadly, discriminatory harassment)—that goes beyond existing categories of unprotected or less protected speech?

The problem is one that can profitably be confronted in stages. Here we get a good deal of guidance from Professor Schauer. Once we have a handle on what sort of speech we are talking about, we have to ask first whether this conduct—the various acts and incidents that contribute to the creation of a discriminatory hostile environment—should be treated as "speech" within the meaning of the First Amendment at all. If so, then we should ask whether it should be entitled to the very high level of protection that prevails at the core of freedom of speech, or rather whether it should be relegated to the fringes by some further process of subcategorization. Finally, if we do decide to accord less protection to some subcategory of workplace harassment, how do we define that category and what rules or standards should define the scope of protection or permissible suppression?

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19 Title VII's harassment doctrine, of course, imposes liability on *employers* for failing to prevent or punish what is typically *employee* speech and conduct that creates a hostile work environment. This mismatch between the speaker and the liable party may account, more than anything, for the lack of judicial attention to the potential free speech issues. But on reflection it seems quite clear that the First Amendment must reach a law that deliberately seeks to force private employers, under threat of liability, to act as its agents for the purpose of speech suppression and punishment. *See* Volokh, *How Harassment Law*, *supra* note 11. This does not answer the question whether there is an actual conflict between the First Amendment and Title VII, but it does require us to confront the question head on.

20 Fallon, *supra* note 11, at 2.

Each of these questions turns out to be quite complicated, and I do not propose to provide a definitive answer here. But I want to see how much progress we might be able to make by following the architectural guidelines supplied by Professor Schauer in some of his First Amendment writings.

II

We need to define our terms before proceeding further. Let us use the term "verbal workplace harassment" to encompass speech that allegedly contributes to a hostile and discriminatory workplace environment. I say "allegedly" because we are aiming for a potential limitation on what acts judges may consider, and how such acts will be treated, as part of a harassment complaint.[21]

The term "verbal workplace harassment" tends to obscure two troublesome features of this sort of speech. The first problem is that the term tends to imply that each separate act or statement either is or isn't "harassment." In fact each act or utterance in a harassment complaint may not itself constitute actionable harassment; it is generally an accumulation of episodes that adds up to a hostile environment. The totality of episodes could rarely be defended on free speech grounds. But that is not a basis for deflecting First Amendment concerns, for the statute intentionally induces liability-averse employers to suppress individual acts that might *contribute* to liability.[22] So the question ought to be whether some of the speech that employers are reasonably induced to ban or punish should be constitutionally protected. Let us use the term "verbal workplace harassment" to describe such speech.

The term may also obscure the extraordinary variety of speech it encompasses, including threats of sexual assault, sexual propositions, sexual innuendo and banter, profanity, racist and sexist epithets, displays of pornography, and statements disapproving of or disparaging women or minorities and their presence in the workplace, trade, or profession. But this variety does not disable us from considering verbal workplace harassment as a class of speech in the first instance; it simply warns us of complications down the road.[23]

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21 I am ignoring for present purposes the reasons for this aim.

22 *See* Volokh, *How Harassment Law, supra* note 11.

23 Similar complications arise as to "commercial speech," which is also a very diverse category. *See* Schauer, *Architecture, supra* note 1, at 1183; *see also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1213–14 (1983).

While cognizant of these complications, I will use the term "verbal workplace harassment" to stand for workplace speech that allegedly contributes to a discriminatory hostile environment.

III

The first question is whether verbal workplace harassment is "speech" within the meaning of the First Amendment. To say that speech is "speech"—that it is *covered* by the First Amendment—is not to conclude that it is *protected.* We are simply asking whether verbal workplace harassment—or, more precisely, *some* verbal workplace harassment—is the sort of conduct to which the First Amendment is relevant.

The problem here parallels in many ways the problems posed by defamation law before *New York Times Co. v. Sullivan*[24] and by commercial law before *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[25] Here as there, the conventional answer that the courts have supplied—in the case of Title VII, mainly by default—is that the First Amendment has nothing to do with workplace harassment complaints. Here as there, that answer is supported by the fact—which I will simply assert here—that *most* of what is included in the category at issue lies far from the core or cores of free speech.[26] Here as there, this resolution gives the state greater power to advance certain important interests—here, workplace equality. Yet here as there, at least some of what is at issue is clearly communicative in nature. Is it "speech" in the constitutional sense?

As Professor Schauer and others have pointed out, this question cannot be answered by consulting a dictionary.[27] The statement, "Give me your wallet or I'll kill you," or more to the point, "Have sex with me or I'll fire you," is obviously speech in the dictionary sense, and almost equally obviously not "speech" in the First Amendment sense.[28] Threats, criminal solicitation and conspiracy, perjury, fraud, blackmail, and extortion, for example, generally consist entirely of speech in the dictionary sense, yet lie outside the realm of the First Amendment. Similarly, commercial contracts, corporate proxy solici-

24 376 U.S. 254 (1964).

25 425 U.S. 748 (1976).

26 *See* Schauer, *Architecture, supra* note 1, 1185–86. For a more extended treatment of this question, see Estlund, *supra* note 7.

27 *See* Schauer, *Categories, supra* note 17, at 268–73.

28 That is not to say that the First Amendment does not stand guard against an attempt to expand the normal definition of threats to reach protected speech. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987).

tations, agreements in restraint of trade, and the rendering of professional advice are wholly verbal, yet are subject to regulation as commercial activity free from the constraints of the First Amendment.[29] Like the more contested categories of "unprotected speech," such as "obscenity" and "fighting words," they are constitutionally equivalent to "nonspeech."

This first-level categorization might allow us to narrow our inquiry. Some verbal workplace harassment takes the form of fighting words, obscenity, threats of assault or other illegal action, intentional infliction of emotional distress, offers of favorable job treatment or threats of adverse treatment to extract sexual compliance, and sexual

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29 Only some of this "nonspeech speech" is generally described as corresponding to an "exception" to the First Amendment. The language of "exception" fits only when some litigant or defendant has the creativity or the audacity to invoke the First Amendment where it has not been thought to play any role, and where some court takes the argument seriously enough to explicitly reject it. But once the issue of First Amendment coverage of some new class of communicative conduct is on the table, it ought rightly to be taken up in the form of an argument for or against an "exception" or an exclusion from the realm of coverage. We ought, in other words, to follow a "defining out" approach to the scope of the First Amendment, which proceeds from the "outside in": where speech falls within some broad definition of communicative conduct, the question is whether there is an adequate basis for excluding it from First Amendment coverage. Or so Professor Schauer argued in earlier days. *See* Schauer, *Categories*, *supra* note 17, at 279–82.

More recently Professor Schauer has expressed skepticism toward the notion that speech is generally covered by the First Amendment, and that non-coverage is the exception. *See* Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 696–97 (1997). It is true that, once we recognize just how much verbiage lies wholly outside the realm of the First Amendment, we might be tempted to conclude that the First Amendment itself creates only a rather narrow exception to the general power of the state to regulate and punish speech on the same terms as other conduct. *Id.* It is also true that some arguments for recognizing an exception to the First Amendment can be understood equally well as arguments for a narrower definition of the category of speech that is covered by the First Amendment in the first place. *See* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991) [hereinafter Schauer, *Exceptions*]; *see also infra* note 41. These insights might send us down a different road, toward an attempt to define the scope of the First Amendment from the "inside out": what qualifies communicative conduct for special protection? Yet one of Professor Schauer's important contributions to free speech methodology, in my view, is his explication of the superior virtues of the "defining out" approach to the scope of the First Amendment. I thus take Professor Schauer's apparent inversion of this formulation as a recognition of the possibility of proceeding from the inside out—a possibility that the deconstructionist trend has perhaps made more salient—but not as a repudiation of the architectural virtues of proceeding from the outside in.

propositions. Such conduct, while verbal in nature, is conventionally excluded from the realm of free speech entirely.[30]

The exclusion of certain utterances from the category of "speech" obviously allows for the advancement of competing values and interests—here, interests in economic equality and freedom from workplace discrimination—that are threatened by those utterances. But Professor Schauer would have us attend as well to the ways in which it also serves First Amendment values to exclude some utterances from the scope of the First Amendment entirely. The key to this rather paradoxical proposition lies in the dilemma that awaits us down the road if we decide that worthless and harmful utterances such as threats of violence and "fighting words" are within the scope of the First Amendment: shall we extend the very strict protections that apply at the core of free speech, and court the risk of "doctrinal dilution"?[31] Or shall we create a separate subcategory for the speech at issue, and contribute to a process of doctrinal fragmentation that poses structural threats of its own?[32] I want to return to these questions, after taking note of a problem with the distinction between First Amendment coverage and First Amendment protection. The problem is *R.A.V. v. St. Paul*.[33]

In *R.A.V.* the Court unanimously struck down a municipal hate speech ordinance that had been construed by the state court to reach only "fighting words." Even though the ordinance reached only speech that was "unprotected," it was held to be unconstitutional because it distinguished among unprotected utterances on the basis of the viewpoint they expressed. *R.A.V.* thus affords some First Amendment protection to "unprotected" speech and complicates the very first step of our architectural analysis.

The significance of *R.A.V.* for harassment law is a matter of some complexity. *R.A.V.* clearly signified that the First Amendment was relevant to harassment law; indeed, its reasoning threatened to vitiate harassment law as applied to verbal harassment. For even if Title VII were construed to reach only "unprotected" speech and physical conduct, like the St. Paul ordinance, it would ban only the unprotected speech that expressed contempt or bias toward an employee on the basis of her race, sex, ethnicity, or religion. The majority, apparently unwilling to take on the burden of invalidating much of workplace

30 That conventional proposition must be qualified after the decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *See infra* notes 33–36 and accompanying text.

31 *See infra* notes 64–72 and accompanying text.

32 *See infra* notes 55–63 and accompanying text.

33 505 U.S. 377 (1992).

harassment law, sought to reassure its proponents that *R.A.V.* did not sound the deathknell of harassment law:

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct . . . , a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech . . . . Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.[34]

The grounds upon which the majority distinguished Title VII from the St. Paul ordinance raised questions of its own, to which I will return below.[35]

But this purported vindication of harassment doctrine also threatened to drastically limit the scope of the doctrine by restricting it to the narrow conventional categories of "unprotected" speech and conduct. For much of what is part of a typical harassment complaint—i.e., most sexual innuendo, profanity, racist and sexist epithets, the display of non-obscene pornography, and disparagement of women or minorities and their presence in the workplace, trade, or profession—falls outside the conventional categories of non-speech speech.[36] If the *R.A.V.* dictum were the last word on the constitu-

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34 *Id.* at 389 (citations omitted).

35 *See infra* notes 68–70 and accompanying text.

36 That should not be surprising. For good architectural reasons, the unprotected categories are quite tightly circumscribed, and the nature of the categories place the "burden of proof" on those seeking to deny protection. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53–56 (1988) (noting the traditional definition of intentional infliction of emotional distress as outrageous statements that are intended to inflict emotional distress and that actually cause emotional distress, but adding the additional requirement of actual malice in the case of public figures); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (defining unprotected threats of violence or unlawful activity as distinct from threats of "social disapproval" or ostracism so as not to swallow up protection of picketing in support of civil rights boycott); Miller v. California, 413 U.S. 15, 24 (1973) (defining unprotected obscenity by three-part test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (citations omitted)); Gooding v. Wilson, 405 U.S. 518, 524 (1972) (implying that fighting words—defined in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—must be directed at a particular individual to be unprotected).

tional status of verbal workplace harassment, it would drastically change the face of harassment law.

There is good reason to believe that *R.A.V.* is not the last word, however, because much of what was at issue in *Harris v. Forklift Industries*,[37] decided one term later, fell well outside the boundaries suggested by *R.A.V.* *Harris* seems to suggest that some broader class of verbal workplace harassment—not limited to the traditional unprotected categories of speech—is subject to either less First Amendment protection or none.[38] So we are back to the first step in our architectural analysis: should verbal workplace harassment be excluded from the realm of constitutional "speech"?

This formulation of the question presupposes an important structural feature of First Amendment doctrine. In defining the coverage of the First Amendment—the meaning of "speech"—we are generally committed to what Professor Schauer has called the "defining out" approach: once an act falls within some very broad class of communicative conduct, it is presumptively "speech" unless we can justify its exclusion.[39] This is in contrast to a "defining in" approach, in which we would start from the core values of freedom of speech and design a category of coverage that advances those values. As Professor Schauer explains:

> In a perfect world the "defining in" and "defining out" methods would yield identical results. . . . The world, however, is not perfect. Human beings make mistakes, and the entire apparatus of presumption and burden of proof, in any area of law, is designed to reflect an ordering of values in an imperfect world. When we use presumptions and allocate the burden of proof, we attempt to ensure that decisions under uncertainty will be biased away from restriction of those values we hold to be of greatest importance. . . . [W]e can avoid more errors of underinclusion by defining out rather than defining in.[40]

The "defining out" approach thus reflects a substantive constitutional commitment: "When the first amendment is at issue, the dangers of

37 510 U.S. 17 (1993).

38 *Harris* must be read with caution on this point. All the Court held was that the courts below had erred in holding that plaintiff must establish serious emotional distress in order to make out a hostile environment claim. Based on this holding, the Court remanded for further proceedings on the merits. The Court did not hold that the facts were sufficient to establish a hostile environment.

39 Schauer, *Categories*, *supra* note 17, at 279–81.

40 *Id.* at 280–81.

mistaken exclusion from the first amendment must be considered to be greater than the dangers of mistaken inclusion."[41]

Under the "defining out" approach, then, we should ask not why verbal workplace harassment (that part of it that lies outside the existing categories of nonspeech) should be covered, but why should it

41 Schauer, *Architecture*, *supra* note 1, at 1190. I am not sure whether Professor Schauer remains committed to this view. In Schauer, *Exceptions*, *supra* note 29, he maintains that some arguments for creating an exception to the First Amendment can be understood equally as arguments for a narrower primary definition of the category of covered or protected speech. For example, Justice Rehnquist's dissenting opinion in *Texas v. Johnson*, 491 U.S. 397 (1989), can be seen as an argument for defining political speech as something like "political speech other than flag burning" rather than an argument for an exception from the protection of political speech. Schauer, *Exceptions*, *supra* note 29, at 882. Similarly, arguments for the unprotected status of racist hate speech and some pornography, such as that embodied in the Indianapolis anti-pornography ordinance, can be seen not as arguments for exceptions to the protections against viewpoint discrimination but as arguments for redefining the primary category as "viewpoints other than the viewpoint that women are appropriate objects of sexual violence." *Id.* at 890. In either case, the lack of an economical term for the proposed narrower category "merely reflect[s] the contingent linguistic and categorical apparatus with which we view" such laws. *Id.* at 898; *see also* Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865 (1993).

Perhaps this represents no substantive shift, for Professor Schauer does not appear to hold that the burden of justifying the narrowing of the primary category should be any lower than the burden of justifying an exception to the primary category. He says, "[n]ow that we know that exceptions are continuous with the rules they are exceptions to, however contingent that continuity may be, we can see that there is no difference between adding an exception to a rule and simply changing it." Schauer, *Exceptions*, *supra* note 29, at 893. Either move, I take it, must be justified by its proponents.

On the other hand, I detect a shift in emphasis and tone. In Schauer, *Categories*, *supra* note 17, at 281, the choice of a "defining out" approach, under which the primary definition of "speech" is broad, and exceptions must be strictly justified, was a crucial and salutory device for operationalizing our substantive commitment to freedom of expression. In *Exceptions*, however, it is the "archetypal First Amendment libertarian," a term that does not connote praise, who, "recognizing that the power to make exceptions is the power to change the rule, is wary of exceptions, although commonly unaware of the contingency of the linguistic and categorical underpinnings upon which this suspicion rests." Schauer, *Exceptions*, *supra* note 29, at 898. Of course, to be aware of the contingency of our categories of thought and legal analysis is not necessarily to reject them or even to question their functionality. I think Professor Schauer continues to believe that the nature of our legal and linguistic categories, however culturally contingent, may be important determinants of the "ruleness of a rule" and, in the case of the First Amendment, of the strength, soundness, and durability of constitutional protections of free speech.

not be covered?[42] We ask not whether this speech makes an affirmative contribution to the values underlying the First Amendment, but, to paraphrase the Supreme Court, "whether speech [that may contribute to a hostile workplace environment] . . . is so removed from any 'exposition of ideas, . . . and from '"truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,"' . . . that it lacks all protection."[43] So as we consider whether verbal workplace harassment is within the *coverage* of the First Amendment, we should put the burden of justification on the proponents of exclusion.

But Professor Schauer reminds us that the proponent of exclusion has "architectural" principles of her own to draw upon in dealing with a class of speech like verbal workplace harassment, most of which is far from the central concerns of the First Amendment. For we do not always strengthen the First Amendment by enlarging its scope.[44] Keeping this speech out of the realm of First Amendment consideration has the potential virtue of reducing clutter and complexity within the First Amendment house; for once we let workplace harassment into the house, there seems little doubt that we will have to build a separate room for it at the end of the hall.[45] The problem is not merely aesthetic; it is structural. A First Amendment that is complicated and cluttered may be a weaker and less effective shelter.

Further recommending the simple solution of exclusion is the relative ease with which the category of verbal workplace harassment can be identified, contained, and insulated from at least the core of discourse about public issues in the public forum.[46] Such speech is found, first of all, in the workplace; and it is normally identifiable, like defamation, by its inclusion in a particular kind of lawsuit.[47] The fact

42 The difference between these approaches is most apparent at the margins: the status of commercial speech, for example, may turn on whether we look to the proponents of inclusion or to the proponents of exclusion to carry the burden of justification. Schauer, *Categories*, *supra* note 17, at 281.

43 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (citations omitted).

44 *See* Schauer, *Architecture*, *supra* note 1, at 1194–95.

45 *See infra* notes 54–76 and accompanying text.

46 I agree with Professor Schauer that there is more than one "core" of freedom of speech and that there is no need to identify only one such core. *See* SCHAUER, FREE SPEECH, *supra* note 3, at 13–14. But all extant theories of free speech would protect discourse about public issues in the public forum.

47 In the private sector workplace, verbal harassment is a matter of First Amendment concern only where it is subject to state action in the form of Title VII. (Employer suppression of harassment or other offensive speech does not itself raise a constitutional issue except to the extent that it is the product of reasonable efforts to

that an individual complainant and not the government initially identifies the speech and seeks a legal remedy against it makes the legal remedy less akin to censorship, and removes it one step, along a different dimension, from the very most central concerns of the First Amendment. Still, the fact that we *could* identify a reasonably discrete category of utterances and exclude them from the realm of "speech" does not mean that we *should* do so.

The workplace context of alleged harassment is an obvious starting point for the proponent of exclusion. Does the workplace context of speech give us reason to deny that it is "speech" in the constitutional sense? As a general proposition, that is not only inconsistent with current doctrine (under which workplace speech is clearly less protected but not unprotected against government suppression and punishment),[48] but entirely implausible. To test this claim, we need only imagine a law that prohibited all employees, while at work, from discussing politics. While the example may seem farfetched, it makes the point quite well: to wholly exclude workplace speech from the realm of the First Amendment would immeasurably impoverish the freedom of expression in this society. For many people, there is no other time or place in their lives in which they can talk about public issues, personal problems, and spiritual concerns with individuals from diverse backgrounds and perspectives.[49]

But the argument for excluding workplace harassment from the realm of free speech could take another form. It might be argued that all speech that contributes to a hostile workplace environment is itself employment discrimination; that it is equivalent to a "keep out" sign at the workplace door.[50] The claim is that speech is not "speech" if it has the same harmful consequence as does some unprotected

avoid liability.) That makes "verbal workplace harassment" easily identifiable in the same sense in which defamation is easily identifiable. *See* Schauer, *Categories, supra* note 17, at 291 & n.123. And just as in the case of defamation, the identification of verbal workplace harassment becomes more difficult and more problematic where the state regulates it directly, rather than through the medium of a private cause of action, as it does in the public sector workplace. *Id.* at 291 & n.123. I want to put aside this more difficult question for present purposes, but I deal with it in Estlund, *supra* note 7, at 759–62.

48 *See* Estlund, *supra* note 7, at 708–10.

49 This proposition is developed at length in Estlund, *supra* note 7. Here I simply assert it.

50 *See, e.g.*, MACKINNON, *supra* note 10, at 45–68; Becker, *supra* note 10, at 849–50 (arguing that verbal sexual harassment of women is discrimination because it gives men an effective tool for managing the economic competition created by women's entry into the workforce); Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729, 730 (1995); *cf.* Strauss, *supra* note 11, at 15 (suggesting

conduct, and that regulation of speech does not implicate the First Amendment if it regulates speech for what it *does* rather than for what it *says.*

This argument essentially extends the *R.A.V.* dicta beyond the confines of ordinarily unprotected speech to encompass all utterances that might contribute to a discriminatory hostile environment. I believe that this sort of argument potentially threatens the core of freedom of speech.[51] By similar reasoning one might punish an anti-war speech to a group of prospective army enlistees under a law prohibiting "interference with military recruitment." In the context of workplace harassment, the argument is particularly unsatisfactory with respect to the small subset of alleged verbal workplace harassment that constitutes speech on public issues.[52] The small but growing number of harassment complaints, lawsuits, and judgments that target political, social, and religious commentary has embarrassed and probably doomed efforts to ignore or deny the existence of a First Amendment issue in workplace harassment law.

Complete exclusion of verbal workplace harassment from the realm of the First Amendment thus runs into objections similar to those that eventually prevailed in the areas of commercial speech and defamation: some of what the category contains, and some of what the law suppresses, is speech that matters—speech that "has *some* of the value that it is the purpose of the first amendment to protect."[53] In the case of workplace harassment, as in the cases of defamation and commercial speech, the simple solution of exclusion ultimately looks a bit too simple when we consider some of what the category encompasses. Here as in those cases, complete exclusion seems to sacrifice some speech that should be protected; the First Amendment enjoins us, at a minimum, to be very concerned about this sort of underprotection. Let us provisionally admit "verbal workplace harassment" into the realm of the First Amendment, and proceed to the next step of our analysis.

IV

Once we decide the question of coverage, we must consider the question of protection. Should we incorporate verbal workplace har-

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that some sexist speech should be regulated "not because of the ideology it espouses, but because it in fact discriminates").

51 *See* GREENAWALT, *supra* note 11, at 84–85, 91–92.

52 For a catalog of examples, see Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. NEED FULL CITE — NOT IN LIBRARY.

53 Schauer, *Architecture*, *supra* note 1, at 1193 (referring to commercial speech).

assment into the core of highly-protected speech or should we place it into a separate and less-protected subcategory of "speech"? And if we decide to recognize a subcategory of verbal workplace harassment, what rules should determine what speech is protected within that category?

The first question, in architectural terms, is whether to build a separate room for verbal workplace harassment, or rather to expand the central room that contains the core (or cores) of protected speech. This question, in turn, raises two sets of architectural concerns—concerns about the effect of this discrete doctrinal decision on the structure and strength of First Amendment law as a whole—that tend to cut in opposite directions. On the one hand are various dangers associated with the creation of subcategories within the First Amendment. On the other hand is the danger of "doctrinal dilution"—"the possibility that some existing first amendment rule would lose some of its strength because of the number of unacceptable applications it would generate when its new applications were added."[54]

Subcategorization follows from the rational impulse to treat different cases—or different kinds of speech—differently. [55] But Professor Schauer has stressed that the First Amendment can be said to afford special protection of speech only to the extent that it bars the use of many distinctions that would seem rational and justifiable.[56] The First Amendment, in a very profound sense, enjoins us to afford similar treatment to sharply dissimilar utterances. The creation of subcategories within the realm of the First Amendment tends to erode that commitment, and, furthermore, to "legitimat[e] the process of extreme subdivision."[57] Decisions to afford less protection to some "speech" must therefore meet a higher burden of justification than would ordinary regulation.[58]

Subcategorization also contributes to the increasing complexity of First Amendment doctrine: "[i]ncreased complexity increases the likelihood of mistakes" by courts and other officials charged with enforcing the law; and "first amendment mistakes are likely to be systematically skewed" against protection because of "a combination of unattractive litigants and unsympathetic utterances."[59] Complexity

54 *Id.* at 1194.

55 *See* Schauer, *Categories*, *supra* note 17, at 283–86.

56 Schauer, *Architecture*, *supra* note 1, at 1198–99.

57 *Id.* at 1199.

58 *Id.* at 1198–99.

59 *Id.* at 1199–200; *see also* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 376–77 (1985).

also threatens to erode the "ruleness" and the "learnability" of the First Amendment.[60]

These latter concerns are related, and require some elaboration. Professor Schauer reminds us that we depend on a wide range of societal actors to implement our system of freedom of expression.[61] Speech is dangerous and costly if it will get you arrested by the nearby police officer; this is true even if no resulting prosecution would be upheld by the courts. The more complex are the legal rules that protect freedom of expression, the more difficult it will be for these many actors to learn them and apply them properly. This is true at both a "global" and a "local" level.

Most globally, a highly reticulated system of freedom of expression—one with lots of subcategories of speech governed by different rules of protection—will be much less easily understood and assimilated by the many citizens who play a role in the system:

> Thus, any increase in doctrinal complexity increases as well the risk that the non-legally trained front line soldiers in the defense of the important first amendment will think and react initially in accordance with their personal preconvictions rather than in accordance with what the doctrine commands. The more complex the doctrine becomes, the more likely it is to be incomprehensible to people like this, and if it is incomprehensible it might as well not exist.[62]

Complexity in a particular doctrine also takes a toll. In the case of workplace harassment, the actual freedom of workplace speech depends not only on judges but on employers, lawyers for potential plaintiffs and defendants, and to some extent even individual complainants; it depends not only on the actual doctrine governing actionable harassment but on what each of these actors believes to be actionable harassment. If the constitutional restrictions on harassment law are complex (or vague) and hard to understand and apply, then complainants and their lawyers will bring lawsuits based on speech that should be protected, and employers and the lawyers who advise them will suppress speech that should be protected in order to avoid litigation as well as liability.

Subcategorization thus raises a variety of concerns, some of them grounded in the deep theory of the First Amendment and some of them "architectural" in nature. These concerns support the existence

60 *See* Schauer, *Categories*, *supra* note 17, at 305–07.

61 Schauer, *Architecture*, *supra* note 1, at 1200.

62 *Id.*

of "a presumption, albeit rebuttable, against the creation of subcategories within the first amendment."[63]

But *failing* to create a subcategory of speech that, for the most part, is far from the core (or cores) of the First Amendment poses architectural risks of its own. If we were to bring verbal workplace harassment into the general scope of freedom of expression, without placing it in a separate subcategory, such speech would then be subject to the rigorously protective rules applicable at the center of free speech doctrine, and in particular the hostility to content-based distinctions. *Cohen v. California*[64] would preclude consideration of the offensive manner of expression; *Brandenburg v. Ohio*[65] would protect the advocacy of violence or other harm unless it constituted incitement to imminent harmful conduct; obscenity doctrine would require the toleration of pervasive and disgusting displays of pornography that did not meet the strict test for obscenity; indeed, *R.A.V. v. St. Paul*[66] would arguably protect even incitement, threats, fighting words, and obscenity against selective punishment based on the discriminatory viewpoint expressed by these speech acts.[67] To insist on the application of these "hard core" free speech doctrines to workplace harassment would eviscerate harassment doctrine, allowing the most intransigently racist and sexist employers and employees to effectively exclude women or minorities from their workplaces, even without engaging in economic discrimination, by making them intolerable to women and minorities.

Perhaps this was what motivated the *R.A.V.* majority to reach out in dicta to "save" harassment doctrine from the otherwise fatal implications of the *R.A.V.* analysis. Recall that Title VII's harassment law was shielded from the effect of *R.A.V.* by a new rule: "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."[68] This dictum may serve to illustrate the risk of "doctrinal dilution" that may attend the failure to recognize discrete subcategories of speech that is, as a class, quite remote from the core concerns of the First Amendment. Let me explain.

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63 Schauer, *Categories*, *supra* note 17, at 296.

64 403 U.S. 15 (1971).

65 395 U.S. 444 (1969) (per curiam).

66 505 U.S. 377 (1992).

67 I say this, notwithstanding the dicta purporting to distinguish Title VII's harassment law from the ordinance struck down in *R.A.V.*, because the terse analysis put forward in that dicta has been roundly criticized, and appears inconsistent with much First Amendment doctrine. *See infra* notes 68–70 and accompanying text.

68 *R.A.V.*, 505 U.S. at 389.

The real harms and minimal value of most discriminatory verbal workplace harassment may have led the majority to look for a way to allow speech regulation in this context. Rather than recognize a discrete subcategory of workplace speech or verbal workplace harassment subject to different rules of protection, the majority articulated a general limitation on free speech protections—the permissibility of "incidental" restrictions on some speech under a statute proscribing conduct—that would permit regulation of some discriminatory verbal harassment under Title VII. Yet this limitation, if actually extended to First Amendment analysis generally, would overturn seemingly established protections at the core of free speech doctrine. For example, as Professor Fallon has pointed out, "[a]s a doctrinal matter, the argument that elevated First Amendment scrutiny should not apply to restrictions on expression arising from general prohibitions against harmful conduct is flatly rejected by one of the foundational cases of modern free speech doctrine, *United States v. O'Brien*."[69] *O'Brien* held that the application of such a general prohibition to expression triggered at least elevated if not "strict" scrutiny.[70]

It seems unlikely that the Court would accept the broader implications of the *R.A.V.* dicta. But the impulse that seems to have produced that dicta—the desire to permit regulation of speech that causes real and immediate harms—illustrates the risk of "doctrinal dilution" that may be posed by the attempt to avoid subcategorization. Subcategorization may sometimes be the architecturally-sound response to a class of speech, most of which is quite remote from the core concerns of the First Amendment and much of which poses a real threat—not speculative or diffuse, but immediate and particularized—to strong competing interests.

This brings us to a recurrent problem of free speech theory: when and how to consider competing interests. Even the most highly valued forms of political speech are subject to suppression in the face of sufficiently compelling governmental interests. On the other hand, any meaningful free speech principles will often require the sacrifice of real and legitimate competing interests; speech is often protected even where it causes real harm.[71] To determine whether and to what

69 Fallon, *supra* note 11, at 15.

70 United States v. O'Brien, 391 U.S. 367 (1968).

71 This does not mean that the harms caused by speech protection must necessarily be absorbed by the immediate victims of the harmful speech: "If free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech." Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992). Professor Schauer considers briefly what that might mean in the context of hate speech and pornography, the burden of which is borne very dispropor-

extent that is called for here would take us far beyond the realm of architectural principles.

But attention to architecture suggests a derivative consideration alongside the fundamental normative question: where the society is deeply enough committed to redressing or avoiding the harms caused by speech that is at the margins of free expression, there will be great pressure to accommodate the competing values and to allow the suppression of speech. That accommodation will require either the "dilution" of the protection afforded to core speech or the recognition of a discrete subcategory of speech within which regulation may be permitted under less exacting standards. Sometimes recognizing a less-protected subcategory of speech helps to maintain the integrity of the core.[72]

This is obviously a perilous line of argument. The First Amendment and the special constitutional status of speech would mean very little if the mere fact of societal condemnation of speech were enough to justify weaker protections for that speech. There must be some independent substantive judgment—one that is consistent with fundamental First Amendment principles—that a particular class of speech is sufficiently low in value and distant from the core or cores of freedom of expression to justify its relegation to a disfavored category.

I will simply assert here what I argue at length elsewhere:[73] a proper understanding of the role of the workplace in a democratic society and of workplace speech in public discourse militates in favor of allowing greater, but not unlimited, regulation of discriminatory workplace speech. In other words, such speech should be covered by the First Amendment, but not fully protected. Ideally that requires the creation of a discrete subcategory of speech that is within the scope but not the core of the First Amendment.

Architectural principles play only a very limited role in making that substantive judgment, though the structural preference for a "defining out" approach suggests that the burden of justification should be on the proponent of a separate subcategory. But the architectural perspective does teach that the substantive judgment in favor of less protection, while necessary, is not sufficient to justify the creation of a

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tionately by racial minorities and women, groups that bear their share of discriminatory burdens already. *Id.* at 1354–55. But apart from general references to "compensatory responses" and "creativity in thinking about appropriate responses" to speech of this sort, Professor Schauer does not elaborate much on how we might shift to the society as a whole the burdens imposed by constitutionally protected discriminatory speech.

72 Schauer, *Architecture*, *supra* note 1, at 1194–201.

73 *See* Estlund, *supra* note 7.

separate doctrinal subcategory. We must still ask whether it is possible to define a subcategory that does not create an unacceptable risk of error, and that is not too vague or complex for the relevant actors to apply in a reasonably predictable way.[74] We must also ask whether the creation of a subcategory in this particular corner of free speech doctrine will contribute to the increasing complexity of the First Amendment and the erosion of its "ruleness." And we must ask whether any structural concerns we have about subcategorization outweigh the competing structural threat of doctrinal dilution, given the societal pressure for regulation that we have now determined is substantively justified.

How do these architectural concerns play out in the realm of verbal workplace harassment? Recall some of the arguments that were considered in support of excluding workplace harassment from the realm of the First Amendment entirely: the relative ease with which the category of verbal workplace harassment can be identified, contained, and insulated from the core of public discourse, particularly in light of the physical location of such speech in the workplace. The idea that speech in the workplace is different and more restricted than speech in mass media or in the public square hardly needs to be taught, for it resonates with the widely-shared experience of ordinary people. Moreover, it is individual complainants and not the government that initially identify speech as harassment and seek legal sanctions against it.[75] This makes harassment law less like censorship and more like, for example, defamation law. Finally, the reasons for creating a subcategory of verbal workplace harassment—combating discrimination on the basis of race and sex in conditions of employment—are not inconsistent with the basic premises of the First Amendment.[76]

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74 *See* Schauer, *Categories*, *supra* note 17, at 295–96.

75 This is true to the extent that we are discussing harassment law and not the anti-harassment policies of government employers. Even in the latter case, it is injury or offense to individual employees that triggers application of these policies. This does not render the First Amendment irrelevant by any means, but it distinguishes regulation of harassment from regulation of speech based on its alleged harm to the government, to government officials, to the general public, or to public morality. The government ought to have—and I believe has—greater latitude to protect individuals from particularized harms than it has to protect itself or the public at large. This proposition raises a host of issues that I will leave unexamined in the present context.

76 That is not to say that some applications of harassment law are not inconsistent with those premises. But in this respect, harassment law is like defamation law: the basic goal of defamation law—the reason for treating "defamation" as a separate subcategory of speech—is not inconsistent with the premises of free speech protection; but some applications, such as that struck down in *New York Times Co. v. Sullivan*, 376

These considerations did not justify the complete exclusion of verbal workplace harassment from the realm of "speech"; they were outweighed by the value of some of the speech in question. But those same considerations do support the less extreme measure of placing verbal workplace harassment in a separate and less protected category within the realm of the First Amendment. For the remaining alternative to subcategorization—"full protection" of this speech—would force decisionmakers to choose between, on the one hand, sacrificing the very strong interests protected by this branch of antidiscrimination law, and, on the other hand, lowering the general barriers to speech regulation to accommodate those strong competing interests.

V

Once having decided to "build a separate room" within First Amendment law for verbal workplace harassment, we have to design the room itself: what must be shown to justify the suppression of verbal workplace harassment? More precisely, what must be shown to justify a court's relying in part on speech to establish the existence of a discriminatory hostile environment?[77] For in the private sector it is the judicial imposition of civil liability on the basis in part of workplace speech that constitutes state action and brings this issue into the purview of constitutional law. And it is the prospect of liability that leads plaintiffs to file lawsuits and contributes to employers' incentive to suppress the speech of their employees. (Fear of liability is not the only incentive to suppress discriminatory speech in the private sector workplace, but it is the only incentive that raises a constitutional issue.)

Again, we are faced with the question whether to "define in" or "define out": within the now-discrete subcategory of verbal workplace harassment—speech that allegedly contributes to a hostile environment—should we devise a standard that the opponents of regulation must meet to justify protection, or should we instead set a standard that proponents of regulation must meet to justify regulation? The stakes in this choice are lower here, where we are operating within a less-protected subcategory of speech, than they are in the fundamental choice of whether to exclude speech from the realm of the First

U.S. 254 (1964), are inconsistent with the First Amendment. The task of identifying which applications are permissible and which are not is left to the next stage of analysis: what are the rules or standards of protection within the subcategory?

77 I am putting aside the parallel but distinct question of what a government employer must show to support a workplace harassment policy that prohibits speech. *See supra* note 47.

Amendment altogether, or even in the secondary choice of whether to create a separate subcategory of less-protected speech. And indeed, the doctrine that governs within discrete categories of speech affords examples of both "defining in" and "defining out" approaches, as well as approaches that combine both.[78]

One can imagine a combined test in the harassment context. First, the defendant must show, for example, that some of the speech in question constitutes a statement of opinion or belief on a matter of public concern. Then the plaintiff, in order to rely on a statement of that nature as part of her hostile environment claim, would have to show that the statement was intentionally directed at her, with the knowledge that she was offended, on the basis of her sex or race; or that the statement was intended to drive the plaintiff from the workplace; or that it was grossly and knowingly offensive on the basis of race or sex and was uttered at a time, place, and manner that was not reasonably avoidable by employees who were thus offended. The standard would create a limited safe harbor for workplace speech in the harassment context: speech within a limited, highly-valued, content-based class would be subject to liability only if it was made in a manner that was deemed particularly likely to be harmful.

Every element of this hypothetical standard would have to be tested against the underlying substantive analysis of the harms and values of various kinds of alleged verbal workplace harassment. That is not my objective here. But I want to highlight some critical architectural aspects of this standard. First, the test puts enormous pressure on the decision whether a given utterance was on a "matter of public concern." This is an increasingly common formulation of the traditional core of free speech that contributes to democratic self-governance. Do we want a First Amendment standard that requires judges—and by extension lawyers, employers, prospective plaintiffs,

78 For example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in one stroke, brought defamation into the realm of the First Amendment, placed it in a separate subcategory, and set up a First Amendment standard the first step of which was the defendant's showing that the plaintiff, the subject of the alleged defamation, was a public official. As the doctrine now stands, alleged libel that is directed against public officials or other public figures, or that bears on matters of public concern, is protected unless the plaintiff goes on to show that the utterance was false and was made with knowledge of its falsity or reckless disregard for the truth. *See also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Within the subcategory of allegedly defamatory speech, then, the doctrine begins with a threshold "defining-in" requirement that the defendant, or opponent of regulation, must meet; within this "defined-in" class of alleged libel, liability turns on a "defining-out" standard that must be met by the plaintiff.

and other employees—to decide in case after case whether a particular matter is or is not of public concern? Such a standard seems to present a high risk of errors in judgment—errors that matter a great deal because they cut into the core of freedom of speech.[79] Indeed, entrusting courts with that judgment seems to invade the province of the public itself in a free society.[80] The "public concern" threshold poses in especially acute form the risks that attend the "defining-in" approach generally, though the risks are muted in the context of a discrete, less-protected subcategory.

Of course libel law and public employee speech doctrine pose these very same risks, for in each of those areas it is only speech on matters of public concern (and, in the case of libel, speech about public figures) that triggers any special First Amendment protections.[81] In both areas the public concern limitation is the doctrinal linchpin of an effort to balance free speech interests against competing interests that are thought normally to be more powerful. Is this device any less defensible in the workplace harassment context? Perhaps not.[82] But the comparison begs a prior question of whether the public concern limitation in these other areas is defensible. As that question would take me far afield, let me simply suggest that basic architectural principles should lead us to be extremely wary of any test that requires the speaker to demonstrate that her speech is on a matter of public concern.[83] We should look for another way to strike a fair balance among competing interests.

One obvious alternative is to remove the initial "defining-in" burden on the defendant and revert to a "defining-out" approach. We might require the plaintiff, whenever she seeks to rely on speech as

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79 I develop this argument, with heavy reliance on Professor Schauer's work, in Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of a New First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990) [hereinafter Estlund, *Public Concern*].

80 *See* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 1990).

81 *See* Connick v. Myers, 461 U.S. 138 (1983) (holding that public employee speech is only protected against employer action where it is on a matter of public concern); *see also Dun & Bradstreet*, 472 U.S. at 749; *Gertz*, 418 U.S. at 323.

82 On the other hand, the use of the public concern limitation in public employee speech doctrine should not be viewed as persuasive precedent for its use in this context; even if the limitation is justified in that context, its justification is not transportable to the workplace harassment context. The government's power as employer over the speech of its employees is based on its managerial interests in workplace efficiency; those interests do not support the government's power to regulate speech in private and public workplaces across the country. *See* Estlund, *supra* note 7, at 711–14.

83 I have explored that question in Estlund, *Public Concern*, *supra* note 79.

part of her hostile environment claim, to show either that the statement was of a traditionally unprotected type of speech; or that the speech was directed at her, with the knowledge that she was offended, on the basis of her sex or race; or that the speech was intended to drive her from the workplace; or that the manner of expression was grossly and knowingly offensive on the basis of race or sex and uttered at a time, place, and manner that the plaintiff could not reasonably avoid. A test of this sort would place no viewpoints and no subjects off limits, or entirely beyond the range of protection, in the workplace; it would instead impose civility constraints—in some respects content-based civility constraints—on the time, place, and manner of expression. Without purporting to review in detail the merits of each of these tests, I want to flag some common structural issues.

The primary virtue of this approach is its avoidance of the content-based threshold test; it would effectively protect speech on a broad range of topics—politics, social and moral issues, personal matters, religion—as long as such speech was not made in a particular injurious manner. This is a particularly significant virtue if one believes as I do that speech on this whole range of issues contributes importantly to workplace discourse and helps to make the workplace a particularly valuable forum for speech within the system of freedom of expression.[84] This approach would also avoid the unsettling spectacle of courts adjudicating the boundaries of legitimate public concern in case after case.

But this new test, and in fact any test that turns largely or wholly on the manner of expression, is also subject to serious objections. Tests like those suggested above, which require proof of knowledge or intent on the part of the speaker, would place a difficult burden on the plaintiff whose case turned importantly on speech, and especially undirected speech. In particular, a test that requires that speech be directed at a particular listener whom the speaker knows to be offended would allow the saturation of the workplace with grossly racist and sexist slogans, pornographic posters, and taunts, as long as they are not targeted at any individual.

Yet a test that turned entirely on "offensiveness," or the response of offended listeners, and that required no proof of knowledge or intent on the part of the speaker, would raise serious problems as well.[85]

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84 *See* Estlund, *supra* note 7, at 746–48.

85 The subcategory of "offensive" speech generally is one of those categories that Professor Schauer has most harshly criticized on grounds of vagueness, risk of error, and inconsistency with the theoretical premises of the First Amendment. *See* Schauer, *Categories*, *supra* note 17, at 292–95. Even if regulation turns on the offensiveness of the *manner* of expression rather than the ideas expressed, those objections remain

Such a test would likely lead the liability-averse employer to enforce broad harassment policies keyed to the most sensitive and easily-offended listener in the workplace. Whether or not such a test would advance workplace equality—and this is far from obvious—it would allow harassment doctrine to act as a powerful inducement to censorship in the workplace.

This is not the place to resolve the dilemma. That would require a deeper analysis of the nature of workplace harassment and the value of workplace speech in the system of freedom of expression.[86] But any such analysis should continue to attend to the architectural concerns elucidated by Professor Schauer.

VI

We have now seen the many perils that face us once we bring workplace harassment into the realm of the First Amendment. Most importantly, we cannot escape the dilemma posed by the competing risks of doctrinal dilution on the one hand and excessive subcategorization and complexity on the other. I have concluded that the best resolution of this dilemma is to create a subcategory of verbal workplace harassment within the realm of the First Amendment; I have argued that the risks that accompany any decision to subdivide speech are tolerable in this context. But the risks are still present. Do the gains for freedom of expression in the workplace justify these risks to the integrity of First Amendment doctrine?

These architectural risks are normally ignored in the analysis of workplace harassment law, as they are ignored in the analysis of innumerable other particular First Amendment problems, because they

very potent. *See id.* at 293–94. While I take those concerns very much to heart, I find (in my more extended treatment of the issue, Estlund, *supra* note 7, at 750–52) that offensiveness is an inescapable element of harassment law, and that the concerns underlying harassment law justify the reliance on the manifestly offensive manner of expression in some circumstances—that is, where the speech is uttered at a time and place that is not reasonably avoidable by a listener or viewer who is offended. This would be an extremely problematic limitation on speech protections in the core of public discourse. But the regulation of speech partly on the basis of its offensiveness *within* a soundly-defined subcategory of verbal workplace harassment is different, and less troubling, than the creation of a subcategory of offensive speech. The precise virtue of creating subcategories of speech—here, the less problematic subcategory of verbal workplace harassment—is to permit some distinctions that would be impermissible in the realm of "full protection." While I would not contend that "anything goes" within a well-conceived subcategory of speech, I do conclude that reliance on the offensive manner (and unavoidable time and place) of expression is constitutionally appropriate in the realm of workplace harassment.

86 *See infra* note 87.

take their toll not on the law of workplace harassment or even the law of workplace speech, but in the structural integrity of the First Amendment as a whole. In other words, too often First Amendment arguments proceed "beam by beam, pillar by pillar, and brick by brick," without sufficient attention to the overall shape and strength of the structure we are building.

With respect to the problem of verbal workplace harassment, I must again resort to bare assertion: I believe that the gains for workplace expression do outweigh the architectural risks, as well as the potential barriers to victims of harassment, that are posed by introducing the First Amendment into this arena. In part this judgment may be based on the seeming inevitability of both some form of First Amendment intervention (in light of *R.A.V.* and the flood of academic commentary) and a lower level of protection than exists in the core of free speech. Recognition of a less-protected subcategory of "verbal workplace harassment" seems, on balance, to be the architecturally sound response to this intensely difficult problem. But this resolution, inevitable or not, is also right: bringing the First Amendment into this area of law provides a much-needed affirmation that workplace speech is important enough to warrant constitutional attention and protection; yet the particular nature of the workplace requires us to calibrate the level of First Amendment protections of speech in that setting.[87]

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87 My basis for these assertions, which cannot be formulated in architectural terms, is explicated at (excessive) length in Estlund, *supra* note 7. In short, I outline a conception of the workplace as a "satellite domain" of public discourse—a domain that lies outside of the core of public discourse but that contributes to that discourse in unique and important ways. I begin by observing that the workplace is at the same time an object of societal governance and a self-governing institution with sometimes elaborate and sometimes participatory structures of internal governance. Freedom of expression at work can promote the ability of citizens to form and exchange opinions, beliefs, and information about how the workplace is regulated, and to gain experience with participation in governance. In addition, and most importantly in the context of workplace harassment, the workplace is a crucial intermediate institution in society—an institution in which individuals relate and cooperate with their fellow citizens outside the intimate bonds of family and friendship. The workplace is *not* the sort of voluntary association that mediates between the individual and society by affording a constitutionally-protected refuge from societal norms or a haven of shared values in a diverse society. Title VII, by prohibiting exclusion, segregation, and discrimination on the basis of race, sex, religion, nationality, and the like, constitutes the workplace as a different sort of intermediate institution in which unrelated individuals from diverse backgrounds interact and cooperate in support of shared instrumental ends, within the constraints of the antidiscrimination principle. The workplace functions ideally as a kind of laboratory of diversity in which the laws of democratic engagement can be learned and practiced.

Architectural principles alone do not lead us to this resolution or to another. Indeed, at times it may seem that for every architectural principle that points in one direction—for example, against subcategorization—there is an opposing architectural principle that points in another direction. But in the final analysis, I find that these architectural principles have real bite. They do not produce simple answers, but they direct our attention to a whole set of issues that are often ignored.

For me, Professor Schauer's architectural lessons have been among the most useful contributions to the whole sprawling body of First Amendment scholarship. For he has reminded us that, in constructing every wall, closet, nook, and cranny of free speech doctrine, we are also contributing to—or potentially weakening—the great edifice of the First Amendment.

Because of this unusual convergence of diversity and close, ongoing, purposive interaction under an antidiscrimination norm, freedom of expression within the workplace can make a unique contribution to public discourse. At the same time, however, unconstrained speech among coworkers who are forced into daily proximity could destroy the possibility of constructive engagement. What Professor Robert Post calls the "paradox of public discourse," *see* ROBERT C. POST, CONSTITUTIONAL DOMAINS 119–78 (1995), thus recurs within the workplace, but in a different form that calls for a different resolution. I argue that constraints on free expression in support of workplace equality can and should be given greater scope in the workplace than in the society at large because it is workplace diversity, as enforced by the equality norm, that renders the workplace a uniquely valuable forum for speech and an important satellite forum for public discourse. Reasonable civility constraints on employee freedom of expression are necessary to reinforce the norms of tolerance that hold together the workplace community within which a conversation is meaningful. An understanding of the nature of the workplace thus offers grounds for a principled compromise between the conflicting imperatives of freedom and constraint; a compromise that recognizes the unique capacity of workplace discourse to contribute to public discourse within a democracy.