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The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment

Jules B. Gerard[*]

Civil suits by women charging that sexual harassment in the workplace created such intolerably hostile environments that they were unable to perform effectively have multiplied in the past decade. In every case, incidents involving speech were alleged or found to have contributed to the hostile environment. Remarkably, however, defendants almost never claimed that the singled out speech was constitutionally protected. On those few occasions when they did raise that issue, their claims were rejected virtually out of hand.[1]

The United States Supreme Court might be partly to blame for this casual disregard of free speech interests. When the Court first interpreted and upheld the federal law that bans sexual discrimination in employment practices, it made no point of the fact that the law plainly implicates First Amendment values.[2] Some courts relied on that failure to reject the few speech claims that were made.[3] Last year, in *R.A.V. v. City of St. Paul*,[4] the Court struck down a "bias-motivated crime" ordinance that bore many similarities to the anti-harassment law examined here. The nine Justices were bitterly divided about the reasons the ordinance was unconstitutional. Nevertheless, each Justice joined one of two opinions that hinted that the federal law forbidding sexual harass-

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* Professor of Law, Washington University. Lisa Gitelson, Washington University class of 1994, provided valuable research assistance.

1 See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991), for an encyclopedic survey of the cases. This Article has a different focus than Browne's. It does not review the cases to determine whether they are consistent with First Amendment doctrine. Instead, its purpose is to offer a preliminary survey of the free speech principles that are relevant to assessing whether the kinds of speech that typically are put at issue in hostile environment cases are protected. I have relied on Professor Browne's article for descriptions of these kinds of speech. Although our conclusions are similar in many respects, they are not identical, nor are the emphases we give to various First Amendment doctrines.

2 Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

3 *See* Browne, *supra* note 1, at 512 n.191.

4 112 S. Ct. 2538 (1992).

ment, unlike the ordinance they were overturning, would survive First Amendment scrutiny.[5]

On the one hand, then, the absence of free speech claims in the cases and the implications that might be drawn from the Supreme Court's behavior suggest that the governing federal law would pass constitutional muster. On the other hand, one can forcefully argue that under established First Amendment principles, the federal law is invalid on its face. The law seemingly discriminates on the basis of content, contrary to free speech doctrine frequently repeated by the Court and emphasized just last year in *R.A.V.*[6] If it exists, this discrimination does not fit easily into any of the established categories of allowable content discrimination.[7] Quite the contrary. Many of the incidents that were used to support claims of hostile environment appear to involve varieties of speech that the Court, at one time or another, has specifically held to be protected by the Constitution. Moreover, the federal law appears to run afoul of First Amendment principles of vagueness and overbreadth.[8] Nor do there appear to be any escape hatches through which the law might slip to elude these indications of invalidity.[9]

Observing how the Supreme Court resolves these apparent contradictions, which it will have to do before long,[10] should prove interesting.

I. BACKGROUND

A. The Federal Law

Title VII of the Civil Rights Act of 1964[11] made it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

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5 *See id.* at 2546 ("sexually derogatory 'fighting words'") (majority opinion); *id.* at 2557, 2560 n.13 (captive audience) (concurring opinion).

6 *See infra* Part II.

7 *See infra* Part III.

8 *See infra* Part IV.

9 *See infra* Part V.

10 The Supreme Court recently granted certiorari to a hostile-environment case that involved the use of foul and suggestive language. Harris v. Forklift Sys., Inc., 113 S. Ct. 1382 (1993). No First Amendment claim was raised before the lower courts, however. Harris v. Forklift Sys., Inc., No. 3-89-0557, 1991 U.S. Dist. LEXIS 20940 (M.D. Tenn. Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992) (per curiam).

11 42 U.S.C. § 2000e (1988).

individual's race, color, religion, sex, or national origin."[12] Title VII was amended by the Civil Rights Act of 1991,[13] which authorized compensatory and punitive damages and shifted the burden of proof to the defendant in some situations.[14]

These statutes have been interpreted to forbid two different kinds of sexual harassment: "quid pro quo" and "hostile-environment."[15] Quid pro quo harassment takes the form of demands for sexual favors in exchange for job benefits. Hostile-environment harassment takes the form of making sexual antagonism so pervasive that it alters the "terms and conditions of employment" within the meaning of the statute.

The free speech problems in the hostile-environment cases arise not so much from the statutes themselves, but from the guidelines[16] that the Equal Employment Opportunity Commission ("EEOC") promulgated to implement those statutes. These guidelines provide that "sexual harassment" is one form of the sex discrimination forbidden by the terms of the statute. The guidelines define "sexual harassment" as "verbal or physical conduct of a sexual nature" where the "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[17] The guidelines thus cover not only pure speech ("verbal conduct"), but "physical conduct" that is intended to communicate a message—so-called symbolic conduct.[18] The Supreme Court has treated these guidelines as authoritative. Indeed, the Court even said that they afford employees "the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[19] The implication that people may be protected from "ridicule and insult" was especially dubious, given established First Amendment principles.

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12 *Id.* § 2000e-2(a)(1).

13 Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C. (Supp. III 1992)).

14 42 U.S.C. §§ 1981a, 2000e-2(k) (Supp. III 1992).

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

16 29 C.F.R. § 1604 (1992).

17 *Id.* § 1604.11(a).

18 Constitutional scholars call the problem addressed here "symbolic conduct" or "symbolic speech." *See generally* JOHN E. NOWAK, & RONALD ROTUNDA, CONSTITUTIONAL LAW §§ 16.48-.49 (4th ed. 1991).

19 *Vinson*, 477 U.S. at 65.

B. Preliminary Issues

A few matters may be disposed of summarily. In his encyclopedic survey of the hostile-environment cases, Professor Browne found only one decision that was based entirely on verbal conduct.[20] The remaining cases embraced collections of incidents, only some of which included speech. That fact is of no importance. The speech issue remains crucial because the Supreme Court has held that sanctions may not be imposed on an individual if there is a chance that they were predicated on protected speech.[21] Under these precedents, it would be unconstitutional to impose liability if there were even a possibility that protected speech was used to support the finding of a hostile environment.[22]

Quid pro quo harassment, a demand for sexual favors in exchange for job benefits, is a species of extortion, a speech-related crime that no one ever supposed was protected by the First Amendment. That form of harassment therefore is of no relevance to this discussion.

Many hostile-environment cases are based on physical conduct that has no significant speech component, such as an employee awaking from a nap to find a supervisor's hand on her crotch,[23] or being ordered to leave the door open when she used the bathroom,[24] or having her supervisor urinate in front of her.[25] Physical conduct that legitimately may be made a crime is not protected by the First Amendment,[26] even when it conveys a mes-

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20 Browne, *supra* note 1, at 483 n.16. The lone case was Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). *See* Nell J. Medlin, Note, *Expanding the Law of Sexual Harassment to Include Workplace Pornography:* Robinson v. Jacksonville Shipyards, Inc., 21 STETSON L. REV. 655 (1992).

21 *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Street v. New York, 394 U.S. 576 (1969); *cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). Reasoning by analogy to discharge cases, if the plaintiff can prove that the hostile environment existed without reference to the protected speech, a finding of harassment might be justified even though protected speech was part of the factual matrix of the trial. *See Mt. Healthy*, 429 U.S. at 575. Note, however, that the burden is on the plaintiff to prove that there was no reliance on protected speech. *Id.*

22 As a tactical matter, defendants should argue that incidents of protected speech must be excluded from evidence because of the grave risk that substantial First Amendment values otherwise will be impaired.

23 Bohen v. City of E. Chicago, 799 F.2d 1180 (7th Cir. 1986).

24 *Id.*

25 Mitchell v. OsAir, Inc., 629 F. Supp. 636 (N.D. Ohio 1986).

26 *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding

sage, as when an employee's male co-workers "moon" her.[27] Hence these incidents are of no relevance either.

II. THE SUPREME COURT AND FREE SPEECH

The Supreme Court has developed two distinct approaches to the resolution of free speech claims. The approach used depends on whether the government's interest (1) focuses on the communicative impact and the content of the speech, such as a regulation of obscenity, or (2) focuses on some other effect of the speech that has nothing to do with its content, such as a regulation of the number of billboards.[28] In one form or another, the Court has said repeatedly, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[29]

Under established First Amendment principles, a regulation of speech based on its content or its communicative impact is unconstitutional unless it falls within one of a limited number of exceptions to the rule that government may not prohibit speech because it does not like the message. A primary purpose of the First Amendment was to deny government the power to censor speech. Requiring governmental restrictions on speech to be content neutral directly advances that purpose. If government could regulate speech because of its content, officials could outlaw all speech on whatever topics they chose and could suppress information they would rather conceal or points of view with which they disagree.

The seminal cases from which the requirement of content neutrality was derived illustrate how this concern over potential government censorship provided the foundation for its development. *Niemotko v. Maryland*[30] is representative of these cases. In

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sanctions imposed on a prohibited form of labor picketing); *cf.* Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) (closing bookstore where customers engaged in illicit sexual activity raises no free speech issue); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir.) ("'[Speech] is not protected . . . when it is the very vehicle of the crime itself.'") (quoting United States v. Varani, 435 F.2d 758 (6th Cir. 1970)), *cert. denied*, 498 U.S. 828 (1990).

27 Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988).

28 *See infra* Part V-A; *see, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 791-92 (2d ed. 1988).

29 Texas v. Johnson, 491 U.S. 397, 414 (1989) (holding a flag desecration statute unconstitutional).

30 340 U.S. 268 (1951).

Niemotko, Jehovah's Witnesses were denied a permit to use a public park. The record established that other religious organizations routinely were granted permits and that the official who denied this permit was more interested in the Witnesses' ideas than in the use they planned to make of the park. The Court concluded that the permit had been denied because the government objected to the ideas the Witnesses planned to express and, therefore, held the denial unconstitutional.[31]

This was an obvious case of censorship of ideas. *Niemotko* and other seminal cases involved governmental attempts to suppress certain points of view. But the requirement the Supreme Court derived from them was stated in terms of "content" rather than "viewpoint" neutrality. Although the definition of "content" includes the viewpoint being expressed, it clearly includes other things, such as the subject matter of the speech.[32] A requirement of subject matter neutrality differs significantly from one of viewpoint neutrality. If, for example, the park regulation in *Niemotko* had denied permits to all religious organizations but not to secular ones, it would have discriminated on the basis of the *content* of the speech (religion), but not on the basis of the *viewpoint* of the speakers. The Witnesses still would have been denied a permit. The Supreme Court might still have held the denial unconstitutional, but the reasons for overturning the denial in that hypothetical situation would had to have been different from those the Court offered in the actual case. As it was, the permit denial was an example of viewpoint discrimination—this religious organization was denied a permit because of its views while other organizations with more traditional religious views were granted permits.

The difficulty here is that the Court has been inconsistent in its willingness to distinguish "viewpoint" from "content" based regulations. The Court has also been inconsistent in reserving the application of its stringent standard of constitutionality for viewpoint based regulations.[33] For instance, the Court overturned a billboard ordinance that was viewpoint, but not content, neutral without attempting to explain why viewpoint neutrality was not enough under the circumstances or what free speech values were

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31 *Id.* at 273.

32 *See* Geoffrey R. Stone, *Restrictions on Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

33 *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

undercut by the ordinance's content-based classifications.[34] Nevertheless, the Court regularly has upheld laws that were viewpoint but not content neutral.[35]

In principle, then, the Court continues to insist that the requirement is one of content neutrality. In practice, however, the Court sometimes will accept a viewpoint-neutral law as satisfying that requirement.

That was the situation last year when the Court decided *R.A.V. v. City of St. Paul*.[36] The ordinance at issue provided:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct . . . ."[37]

The Minnesota Supreme Court upheld the ordinance by interpreting it to forbid only "fighting words," a category of speech the Supreme Court has held is not protected by the First Amendment.[38] The Supreme Court reversed. The Court was unanimous in declaring the ordinance unconstitutional, but split five to four over the rationale.

Justice Scalia's majority opinion rejected the "fighting words" justification for two reasons. First, the ordinance outlawed only those fighting words that were based on the topics of "race, color, creed, religion or gender," but not those that were based, for example, on the topics of politics or homosexuality. This content discrimination against certain topics raised the specter of government censorship of ideas and was thus invalid. Second, the ordinance permitted viewpoint discrimination because it apparently would allow those speaking in favor of tolerance for "race, color," etc., but not those speaking in opposition, to use fighting words

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34 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

35 *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (regulation of selling and soliciting on fairgrounds); FCC v. Pacifica Found., 438 U.S. 726, 729 (1978) (regulation of "indecent but not obscene" speech on radio); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (regulation of lewd gestures made to students); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (regulation of political advertising on public buses).

36 112 S. Ct. 2538 (1992).

37 *Id.* at 2541 (quoting MINN. STAT. § 292.02 (1990)).

38 See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), discussed at length *infra* Part III-A. *See generally* NOWAK & ROTUNDA, *supra* note 18, § 16.37.

without limitation. And, of course, viewpoint discrimination is never permitted.

Justice White's concurring opinion disagreed completely. White stated that "fighting words," a classification defined by content, was an unprotected category of speech because the Court previously had concluded that all speech of that content was evil and had no significant value. It therefore made no sense, White argued, for the majority to agree that the entire category was unprotected, but then to hold that treating subsets within the category differently from each other (that is, banning fighting words based on race but not those based on politics) violated the First Amendment. All speech within that category was worthless by definition and hence unworthy of protection. The concurring opinion agreed, however, that the ordinance was invalid. It reached that result on the basis that the ordinance, as interpreted by the state supreme court, made criminal "expressive conduct that causes only hurt feelings," and thus was impermissibly overbroad.

Whether the federal hostile-environment laws suffer from the kind of content discrimination the *R.A.V.* majority condemned is difficult to say.[39] That they discriminate on the basis of viewpoint, which is invariably fatal, however, is not in doubt. The government's interest in the hostile-environment cases is entirely one of suppressing offensive or disagreeable ideas—"the right to work in an environment free from . . . ridicule, and insult."[40] The question thus becomes whether the speech can be said to fall within one of the categories that are exceptions to the prohibition against content discrimination.

III. PERMISSIBLE CONTENT REGULATION

There are four categories of permissible content regulation:[41] (1) the advocacy of unlawful conduct, a category composed of

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39 There is an elusive quality about Justice Scalia's opinion in *R.A.V.* He applies the content neutrality command to the category of fighting words. It seems impossible to say with confidence that one has grasped his meaning. For discussion, see Ronald Rotunda, *A Brief Comment on Politically Incorrect Speech in the Wake of* R.A.V., 46 SMU L. REV. (forthcoming 1993).

40 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

41 That is, four categories of content regulation that permit speech to be suppressed. Another category, commercial speech, was created for the purpose of according some protection to speech that previously had received none at all. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

cases that created two legends—the clear and present danger test, and the aphorism about falsely crying "Fire!" in a crowded theater;[42] (2) libel and its relatives;[43] (3) obscenity;[44] and (4) "fighting words."[45] The first category, advocacy of unlawful conduct, has absolutely nothing to do with hostile work environments and can be eliminated from the discussion without further ado. Whether any particular utterance fits into one of the remaining three specific categories depends entirely on the nature of that utterance. It thus becomes necessary to classify the kinds of speech typically found in hostile-environment cases.

For purposes of convenient analysis, they can be divided into four classes:[46] (1) profane, vulgar words; (2) messages of hostility, dislike, etc., aimed either at a particular person or at the whole gender;[47] (3) sexually suggestive messages, that can be either (a) aimed at a particular person and range over a spectrum from outright sexual propositions to lascivious leers or (b) undirected, generalized messages of interest in sex and sexual activities (pinups or dirty jokes, for example); and (4) totally innocuous messages, like "[e]ven male chauvinist pigs need love," that at least one judge thought were actionable![48]

A. Profane or Vulger Words[49]

The leading case dealing with the public utterance of offensive expletives is *Cohen v. California*.[50] Cohen wore a jacket emblazoned with the words "Fuck the Draft" into a courthouse where others were present. He was convicted of violating a statute that prohibited "'maliciously and willfully disturb[ing] the peace or

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42 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Schenck v. United States, 249 U.S. 47 (1919).

43 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 255 (1964).

44 *See* Miller v. California, 413 U.S. 15 (1973).

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

46 Browne, *supra* note 1, at 491-92, suggests two categories, "hostility message" and "sexuality message," that I have incorporated.

47 An example of this would be, "Women should be kept barefoot, pregnant, and at home."

48 *See* Rabidue v. Osceola Refining Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987).

49 This section is drawn from Jules B. Gerard, *May Society Preserve a Modicum of Decorum in Public Discourse?*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 94 (E. Hickock, Jr. ed., 1991).

50 403 U.S. 15 (1971).

quiet of any neighborhood or person . . . by . . . offensive conduct.'"[51] In a five to four decision written by Justice Harlan, the Supreme Court reversed.

Harlan began by observing that the conviction rested on the words Cohen used, not on the underlying message. Focusing on the words, he rejected three arguments the state offered to justify regulating offensive language. Preserving "an appropriately decorous atmosphere in the courthouse"[52] was inadequate because the statute was not limited to certain designated places, but was applicable everywhere. Nor did the case fall within the relatively few categories, such as "fighting words" and obscenity, in which the Supreme Court had previously approved bans on certain forms of speech. Finally, the conviction could not be upheld on the ground that those who were offended by the words were a captive audience because they "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[53]

A year later, the Court decided *Gooding v. Wilson*,[54] another case involving the use of profane words. When police attempted to stop Wilson from blocking the entrance to a government building, he said to them, "White son of a bitch, I'll kill you;" "You son of a bitch, I'll choke you to death;" and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."[55] He was convicted of violating a statute that made it a crime for anyone without provocation to "use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace."[56] In an opinion written by Justice Brennan, the Court held that the statute, as construed by the state courts, was unconstitutionally overbroad because it was not limited to "fighting words" and was susceptible to being applied to protected speech. As a result, the Court affirmed a judgment overturning Wilson's conviction.[57]

A few months later, the Court vacated and remanded three cases. Two of them, *Rosenfeld v. New Jersey*[58] and *Brown v. Oklaho-*

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51 *Id.* at 16 (quoting CAL. PENAL CODE § 415 (1968)).
52 *Cohen*, 403 U.S. at 19.
53 *Id.* at 21.
54 405 U.S. 518 (1972).
55 *Id.* at 520.
56 *Id.* at 519.
57 *Id.* at 520.
58 408 U.S. 901 (1972).

ma,[59] were to be reconsidered in light of both *Cohen* and *Gooding*. The other, *Lewis v. City of New Orleans*,[60] was returned for reconsideration in light of *Gooding* only. In *Rosenfeld*, the defendant had spoken at a public school board meeting attended by approximately 150 people, twenty-five of whom were women and forty of whom were children. During his speech, he used the adjective "motherfucking" four times, variously describing the teachers, the school system, the school board, the town, the county, and the country.[61] The *Brown* defendant had spoken before a college audience of both genders in a chapel. During a question and answer period, he twice referred to some police officers as "motherfucking fascist pig cops." Lewis was arrested after she called police officers who were arresting her son "God damned motherfucking police."[62] She was convicted of violating a city ordinance reading, "It shall be unlawful . . . for any person wantonly to curse or revile or to use obscene or opprobrious language toward . . . any member of the city police while in the actual performance of his duty."[63]

The *Lewis* case returned to the Court two years later.[64] On remand, the Louisiana Supreme Court construed the ordinance to be limited to the category of "fighting words" and reaffirmed its earlier judgment sustaining Lewis' conviction.[65] In an opinion by Justice Brennan, the Supreme Court reversed on the basis that the statute was unconstitutionally overbroad, despite the state court's attempt to narrow it.[66] Even though the state court had said the ordinance was limited to "fighting words" and could be used only against them, it had not given a limiting definition to the adjective "opprobrious" in the ordinance. Because not all "opprobrious" words were "fighting words," it was possible to apply the statute to protected speech.

The only reasonable conclusion to be drawn from these cases is that it violates the First Amendment to base a finding of a hostile environment on the use of expletives. This is unfortunate because *Cohen* and its progeny are especially unpersuasive exercises

59 408 U.S. 914 (1972).
60 408 U.S. 913 (1972).
61 *Id.*
62 *Id.*
63 *Id.*
64 Lewis v. City of New Orleans, 415 U.S. 130 (1974).
65 *Id.* at 130.
66 *Id.* at 134.

in constitutional interpretation. The fundamental issue they raise is whether government, in order to foster an environment of decency and civility, to promote the orderly administration of public affairs, and to protect the sensibilities of citizens from unprovoked and despicable abuse, may regulate the public utterance of words universally regarded as offensive; or whether instead the First Amendment forbids any such governmental activity.

The usual rule, Harlan said in *Cohen*, was that "governmental bodies may not prescribe the form or the content of individual expression."[67] A regulation of speech aimed at certain words is, on its face at least, one based on "content" as that word is normally understood. However, as pointed out earlier,[68] the Court's antipathy for "content" regulations was originally designed to block governments from censoring ideas or "viewpoints." The First Amendment was intended, in other words, to prevent governments from favoring one side of an argument by suppressing the other side(s). In this sense, a regulation of the use of certain words arguably is not a "content" regulation at all because it regulates all points of view evenhandedly and is thus "viewpoint neutral."[69]

Central to Harlan's thesis in *Cohen* was the argument that the words prohibited by the California statute did not fall within any of the "established categories" of permissible content regulation. He mentioned two such categories: obscenity and "fighting words."[70] The words prohibited by the statute clearly were not "obscene" as the Supreme Court has defined that term.[71] The other category requires closer examination.

The notion that "fighting words" may be banned stems from *Chaplinsky v. New Hampshire*,[72] a case decided in 1942. Chaplinsky was a Jehovah's Witness who was distributing literature and denouncing organized religion as a racket. Citizens complained to

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

68 *See supra* text accompanying notes 30-34.

69 *See generally* Stone, *supra* note 32.

The Court has been erratic, to put it mildly, in its willingness to distinguish "viewpoint" from "content" based regulations and to reserve the application of its stringent standard for the former. *Compare* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (stringent standard applied to overturn a viewpoint neutral regulation of billboards with certain content) *with* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (stringent standard *not* applied to viewpoint neutral regulation of solicitation—manifestly a content-based classification—on state fairgrounds). *See* Stone, *supra* note 32.

70 *Cohen*, 403 U.S. at 20.

71 *See* Miller v. California, 413 U.S. 15 (1973); *see also infra* Part III-C.

72 315 U.S. 568 (1942).

the city marshall, Bowering, who told them Chaplinsky was within his rights, but also warned Chaplinsky that the crowd was getting restless. A disturbance occurred later and a traffic officer on the scene began escorting Chaplinsky to the police station, although he apparently had not arrested him. On the way they met Bowering, who had been told a riot was in progress. Chaplinsky admitted saying to Bowering (except he denied invoking the Deity), "'You are a God damned racketeer,'" and "'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'"[73] Chaplinsky was convicted of violating a statute that provided,

> "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[74]

In affirming Chaplinsky's conviction, the New Hampshire Supreme Court said,

> "The word 'offensive' [in the statute] is not to be defined in terms of what a particular addressee thinks . . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile . . . . The statute . . . does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee."[75]

The United States Supreme Court held the statute constitutional as so construed. Up to this point Harlan's opinion in *Cohen* is again correct. The words on Cohen's jacket were not addressed to anyone in particular, nor were they uttered in a face-to-face situation; hence they were not the kind of "fighting words" that were at issue in *Chaplinsky*. But that is not the whole story.

The issue, as Harlan himself defined it, was not whether Cohen's utterance was "fighting words," but whether it fell into *any* "established category" of speech that could be banned because

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73 *Id.* at 568.
74 *Id.* at 569.
75 *Id.* at 573 (quoting State v. Chaplinsky, 18 A.2d 754, 758 (N.H. 1941)).

of the words used. On that point, the *Chaplinsky* opinion, which was written by Justice Murphy, a known champion of the First Amendment,[76] delivers a message quite different from the one Harlan drew from it. Before analyzing the terms of the New Hampshire statute, Murphy said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the *lewd* and obscene, the *profane*, the libelous, and the insulting or "fighting" words—*those which by their very utterance inflict injury* or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[77]

Murphy plainly said that among the categories of public speech that may be punished without raising constitutional problems are the lewd and the profane, "those which by their very utterance inflict injury." That he used the disjunctive in his summary—"those which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace"—proves that he was speaking of more than just "fighting words."[78] Harlan simply ignored the obvious meaning of Murphy's statement.

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76 *See, e.g.*, CATHERINE A. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES 115 (1978).

77 *Chaplinsky*, 315 U.S. at 571-72 (emphasis added). The last sentence is a quotation from Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

78 I recognize, of course, that Murphy may have been using "lewd" and "obscene" as synonyms to cover only one category. But the Court's first effort to define obscenity came more than fifteen years after Murphy's opinion in *Chaplinsky*. Roth v. United States, 354 U.S. 476 (1957). It was only with Harlan's opinion in Cohen v. California, 403 U.S. 15 (1971), itself that the gloss on the Court's definition—that obscenity "must be, in some significant way, erotic"—was added. *Id.* at 20. Thus it is arguable that, at the time Murphy wrote, the public utterance of simple sexual expletives could be punished even if they did not meet the Court's subsequently announced criteria for obscenity. I believe this to be the more persuasive reading of *Chaplinsky*, and justifies the textual statement that lewd words constitute a distinct category. *Accord* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1233 (2d ed. 1991).

Nor can it be doubted that Murphy's conclusion—that the public utterance of lewd and profane words may constitutionally be punished—was correct at the time he stated it. When the First Amendment was proposed and ratified, and when the Fourteenth Amendment was ratified, laws forbidding such public utterances were common.[79] Indeed, until *Cohen*, no one seems to have doubted society's authority to ban them. Uncharacteristically, Harlan made no investigation of this historical background.

Harlan then moved to the three "particularized considerations" that he argued required the reversal of Cohen's conviction. The first of these was the "stopping point" argument. "[N]o readily ascertainable general principle exists," Harlan argued, by which to distinguish one offensive word from another.[80] "How is one to distinguish this from any other offensive word?"[81] he asked rhetorically. One answer is to point out that the comedian George Carlin, in his "Filthy Words" monologue, seemed to have little trouble identifying "the cuss words and the words that you can't say."[82] When I was growing up, the word "fuck" was not in even the unabridged dictionary. The editors of that work apparently did not find it impossible to distinguish that word from others. If comedians and dictionary editors can distinguish the unspeakable from the merely offensive, surely judges and lawyers can too. "Even a dog distinguishes between being stumbled over and being kicked," Justice Holmes once remarked.[83]

At this point Harlan used language that has become a virtual First Amendment proverb as well as his epitaph:[84] "[I]t is nevertheless often true that one man's vulgarity is another's lyric."[85] I

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79 *See Roth*, 354 U.S. 482-83:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection to every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" . . . . Thus, profanity and obscenity were related offenses.

Id. (footnotes and citation omitted).

80 *Cohen*, 403 U.S. at 25.

81 *Id.*

82 As quoted in FCC v. Pacifica Found., 438 U.S. 726, 751 (1978).

83 OLIVER W. HOLMES, THE COMMON LAW 3 (1881).

84 Even short biographical sketches of Harlan include it. *See, e.g.*, STONE ET AL., *supra* note 78, at xiii.

85 *Cohen*, 403 U.S. at 25.

have been puzzling over that sentence for more then twenty years, and still am uncertain what Harlan meant by it. Assuming he intended it to be taken literally, it is meaningless. With equal force and equivalent grace, one might say, "One man's *obscenity* is another's lyric." It has been known for some time that many people find obscenity attractive and stimulating, but that surely should not be accepted as a legitimate reason for invalidating obscenity regulations. As an explanation for overturning regulations of offensive speech in public, Harlan's beguiling epigram is a nullity.

Perhaps he meant only that some people are unaware that others regard certain words as profane. That is true. As a teenager, I worked on a railroad section gang that employed a father and his son who were recent immigrants from West Virginia. I remember laughing uproariously when the father once ordered his son to "stop that shitten cussing." Later, after reading Chaucer in college, I discovered that "shitten" is a Middle English word that meant "dirty" or "filthy."[86] I also learned that scholars believe that long-time residents of isolated rural and mountainous areas, like this father and son, retain aspects of Elizabethan or earlier English in their speech.[87] But if that is all he meant, Harlan could have waited for a case in which the speaker was genuinely surprised that others considered his words to be offensive.

Harlan's second "particularized consideration" was that the Constitution protects the emotive as well as the cognitive element of speech. "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."[88] Here again Harlan overstated the case.[89] The issue was not whether the Constitution "has

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86 In modern translation, lines 503-04 of the "Prologue" to the *Canterbury Tales* read:

> And shame it is to see—let priests take stock—
> A shitten shepherd and a snowy flock.

GEOFFREY CHAUCER, THE CANTERBURY TALES 38 (Nevill Coghill trans., 1951).

In the original, they appear:

> And shame it is, if a prest take keep,
> A shiten shepherde and a clene sheep.

GEOFFREY CHAUCER, THE POETICAL WORKS OF CHAUCER 24 (Fred N. Robinson ed., 1933).

87 *See* H.L. MENCKEN, THE AMERICAN LANGUAGE 124-29 (4th ed. 1947); THOMAS PYLES, WORDS AND WAYS OF AMERICAN ENGLISH 22-28 (1952).

88 *Cohen*, 403 U.S. at 26.

89 "Surely the State has no right to cleanse public debate to the point where it is

little or no regard" for the emotive element of speech. The issue rather was whether society must tolerate being confronted by words deliberately chosen for their offensiveness just because Cohen found that to be a convenient way to communicate his emotions.

Harlan tells us in *Cohen* that, absent more particularized and compelling reasons than that the audience is captive and contains women and children, "the simple public display . . . of this four-letter expletive" may not be made a crime.[90] This statement must mean that "Fuck the Draft" could also be displayed on bumper stickers, placards carried on sidewalks, and even on billboards. Inevitably, it must mean that the word "fuck," and others like it, can be used in the workplace.

Harlan's final "particularized consideration" addressed the point of suppressing ideas under the guise of regulating offensive language. "[G]overnments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views,"[91] he suggested. Of course it is theoretically possible that allowing government to forbid the public utterance of a few specific words might result in suppressing ideas. Banning the display of the swastika, for example, would make it harder to communicate all the evil messages associated with that hated symbol.[92] Like the swastika, words are only symbols. But it will take more than unsupported assertions, even from someone as revered as Harlan, to persuade me that the danger is more than trivial. I grew up, as did Harlan, in a generation in which those words were never used in public and were rarely used in print. I cannot think of a single idea to which I was denied access by the fact that these words were not used. Nor can I think of a single idea I have learned since, my understanding of which depended on, or was even facilitated by, the use of offensive language.

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grammatically palatable to the most squeamish among us." *Id.* at 25. But *Cohen* obviously had nothing to do with grammatical squeamishness.

If society had the power to regulate on the basis of grammatical squeamishness, radio and television sports programs would be abolished completely because of the atrocities they regularly perpetrate on the English language. My current favorite example comes from KMOX radio in St. Louis: "Stay tuned for Mike and I's sports open line."

90 *Id.* at 26.

91 *Id.*

92 *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). For compelling commentary on the Skokie Controversy, see Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397 (1989); Lee C. Bollinger, *Defending my Enemy*, 80 MICH. L. REV. 617 (1982) (book review).

An example from another medium may make the point more effectively. Consider the episode of what some feminists today would call marital rape from *Gone With The Wind*. Clark Gable seizes Vivien Leigh and carries her in his arms up the huge staircase, two steps at a time. The next scene is the following morning and shows Leigh in bed—alone. If that sequence were remade today, I have no doubt we would be offered all of the sounds and most of the sights of orgasmic copulation. But the movie would not be one wit more comprehensible if the scene I have suggested were to be added to it.[93]

Of course it is possible, as Harlan suggested, that the ideological content of a message might be jeopardized by an impermissibly expansive view of what language is offensive. But there will be time enough for the Court to decide that case when—and if—it arises.

In contrast to *Cohen*, which is merely unpersuasive, the Court's opinions in *Gooding v. Wilson*[94] and the cases relying on it are indefensible. Whether one compares the words used or the legislation involved in *Chaplinsky* with the same feature of the later cases, the resulting differences are either trivial or non-existent, and all of them cut in favor of sustaining the convictions rather than reversing them. The later decisions amount simply to a covert overruling of *Chaplinsky*. They do not address the issues discussed in *Chaplinsky* or attempt to explain why that unanimous opinion by a known advocate of free speech values was defective.

By deciding *Cohen* and its progeny differently, the Supreme Court could have laid a foundation on which to build a prohibition against the use of scatologically abusive words in the workplace. Such a ban would not have put the government on one side of a contentious issue. In other words, this type of ban would not have violated the principle of viewpoint neutrality because it would not have materially hindered the communication of any messages or put legitimate free speech values at significant risk. But the *Cohen-Gooding* line of cases remains on the books. There is no way to avoid the conclusion that basing a finding of a hostile environment on the use of profane words violates the First

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93 Perhaps I should add, for the benefit of younger readers, that the movie did cause something of a scandal when it was released in 1939. That was because of Gable's final bit of dialogue: "Frankly, my dear, I don't give a damn." "Damn" was a word one just did not then use in public. There was at least one exception, based, not surprisingly, on patriotism: "Damn the torpedoes; full speed ahead."

94 405 U.S. 518 (1972).

Amendment, unless women for some reason are entitled to greater protection against foul language in the workplace than they are on the streets, in courthouses, in college chapels, or at school board meetings.[95] Moreover, unless *Cohen* is overruled, the only reason for protecting women, but not men, from foul language in the workplace would be an assumption that women are—what? more sensitive? offended? But isn't that the kind of stereotypical thinking these laws were supposed to overcome?

B. Messages of Hostility

Messages of hostility may be directed at a particular person (*e.g.*, "You lousy bitch.") or at a larger group, including an entire gender (*e.g.*, "All women are whores."). The *Cohen* gloss on the obscenity standard[96] makes it clear that neither variety of hostile message falls within that category of permissible content regulation, since neither would be erotic.

It may be necessary to distinguish between aiming at the individual and aiming at the gender when considering the significance of the libel category. The Supreme Court's landmark decision in *New York Times Co. v. Sullivan*[97] makes it doubtful that the First Amendment will permit actions for group libel, although technically this question is still open.[98] Hence, statements such as "all women are whores" probably would be protected and could not be used as evidence of a hostile environment.

Messages of hostility that take the form of making false statements of fact about an individual (*e.g.*, "She puts out to everybody."), however, are a different matter.[99] "[T]here is thus no constitutional value in false statements of fact," the Court has said.[100] So there appears to be no objection to using such statements in a hostile-environment case. Nor is there any reason to be distracted by the complex set of *New York Times* rules about public figures and actual malice. The only issue is whether the false state-

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95 *See infra* Part V-D.

96 The speech "must be, in some significant way, erotic." *Cohen*, 403 U.S. at 20.

97 376 U.S. 254 (1964).

98 For discussion, see NOWAK & ROTUNDA, *supra* note 18, at 1036 n.9.

99 *See also* Mitchell v. OsAir, Inc., 629 F. Supp. 636, 638 (N.D. Ohio 1986) (male supervisor told a representative from another company that plaintiff "gave good service" and suggested that the representative call plaintiff and make sexual advances); *cf.* Arnett v. Kennedy, 416 U.S. 134 (1974) (dismissal upheld of civil service employee who falsely accused fellow workers of accepting bribes).

100 Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

ment may be used as evidence of a hostile environment. Resolving that issue should not depend on whether the plaintiff is in some sense a "public figure" or whether the speaker knew the statement was false when he uttered it.[101]

The fighting words category clearly does require a distinction to be drawn between statements made about an individual and those made of a group. The concept includes two key elements: (1) The words must constitute a personal insult of a kind that "tend[s] to incite an immediate breach of the peace,"[102] and (2) the insult must be "directed to the person of the hearer" rather than to some person not present.[103] The latter element requires that the words be addressed to an individual. The former element poses some serious conceptual difficulties. How is the potential of the words to incite an immediate breach of the peace to be measured? By the standard of a reasonable person? Many people believe that no conceivable set of words would ever cause a reasonable person to start a brawl with a speaker. The problem with this conclusion is that it seems to contradict the Supreme Court's decision in *Chaplinsky* that "fascist" is a term that would cause some people to fight. Abandoning the reasonable person standard would mean that any set of words might qualify as fighting words. Some courts and commentators have argued in favor of using a "reasonable woman," rather than a reasonable person, standard in hostile-environment cases.[104] What set of words would cause a reasonable woman to start a brawl with a male speaker?

There is finally the difficulty of whether the category still exists. As was pointed out earlier, *Gooding* and the cases following it can be viewed as covertly overruling *Chaplinsky*.[105] On the other hand, the Minnesota courts construed the bias crime ordinance at issue in *R.A.V. v. City of St. Paul*[106] to be limited to fighting words. The Supreme Court rejected the state court's conclusion that the ordinance could be limited to fighting words, but gave no indication that the category had disappeared. Indeed, Justice Scalia's majority opinion hinted rather ambiguously that the fight-

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101 *See generally* NOWAK & ROTUNDA, *supra* note 18, §§ 16.33-.35.

102 *See supra* text accompanying notes 72-79.

103 *See* Cohen v. California, 403 U.S. 15 (1971); Cantwell v. Connecticut, 310 U.S. 296 (1940).

104 *See, e.g.*, Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and The Case for Subjectivity*, 16 VT. L. REV. 1005 (1992).

105 *See supra* Part III-A.

106 112 S. Ct. 2538 (1992).

ing words concept might be employed to uphold the validity of the hostile-environment laws.[107]

In sum, whether hostile messages directed at a particular person may be viewed as unprotected fighting words and therefore competent as evidence of a hostile environment is debatable. Taken literally, the requirement that the words tend to incite an immediate altercation would seem to exclude that possibility. But a less rigorous definition would make the standard so elastic that judges would have virtually unlimited discretion to accept or reject the claim as they saw fit. That possibility may justify, by analogy to the principle against overbreadth,[108] a refusal to relax the literal definition.

C. Sexually Suggestive Messages

Sexually suggestive messages can be conveyed in a variety of ways. The most blatant, of course, is the outright sexual solicitation or proposition. This would be an example of quid pro quo harassment if the speaker is in a position of authority. Moreover, it is a kind of speech that may be made a crime. In either event, solicitations of sex are of no concern here because no argument can be made that they are a protected form of speech.

The category of permissible content regulation that immediately comes to mind with respect to sexually suggestive messages is obscenity. The test for obscenity laid down in *Miller v. California*[109] is:

> (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 . . . ; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[110]

Moreover, the words "must be, in some significant way, erotic."[111] The Court went on to provide "a few plain examples" of what could be considered to be obscene: "(a) Patently offensive repre-

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107 "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." *Id.* at 2546.

108 *See infra* Part IV.

109 413 U.S. 15 (1973).

110 *Id.* at 24 (citations omitted).

111 Cohen v. California, 403 U.S. 15, 20 (1971).

sentations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[112]

Many hostile-environment cases have concerned the use of terms like "honey" and "dearie" when addressing women. Such terms are obviously not obscene under *Miller*, are not libelous (defamatory), and are not fighting words. The same conclusions must be drawn regarding unsolicited compliments about a woman's appearance, whether expressed verbally or symbolically (such as whistles or leers[113]), and about dirty jokes (not obscene because not erotic). To be sure, many women consider communications like these to be demeaning. But many women consider at least equally demeaning the use in their presence of words like motherfucker and cocksucker, and yet *Cohen* forbids sanctioning their use. Indeed, it is impossible to imagine how any brief combination of words, sentences, or even paragraphs uttered by one worker to another in the workplace could ever be obscene under the test laid down in *Miller*. There is, in short, no category of permissible content regulation into which these objectionable terms, some innocuous and some not, can be squeezed. It follows that evidence of their use should not be admitted in hostile-environment cases.

Not so with pictures, however. They can range from the ubiquitous and clearly not obscene pinups to graphic displays that would be obscene under almost anybody's interpretation of the *Miller* standards.[114] The pictures either will or will not be obscene. If they are, their display is not protected, and they may be used to support a finding of a hostile environment.

The obscenity category was expanded slightly in *New York v. Ferber*[115] to cover all material that graphically portrays juveniles engaging in sex acts. But the focus of the Court was on protecting the juveniles who were being exploited, not on suppressing the offensive message the materials conveyed. Arguing that women in

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112 *Miller*, 413 U.S. at 25.

113 Professor MacKinnon argues that such gestures create a hostile environment by making a woman perpetually aware of her body. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 40 (1979).

114 *See* Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (supervisor showed black woman employee a photograph depicting an interracial act of sodomy and photocopies of pictures involving bestiality).

115 458 U.S. 747 (1982).

the workplace need the same kind of protection as juveniles would seem to be inconsistent with the goal of securing equality.[116]

In the end, of course, the objection to all of these sexually suggestive communications is that they do indeed convey a message and a point of view. Professor MacKinnon and others have argued that the message is one of degradation and subjugation.[117] But it is precisely because they convey messages and points of view that they are protected.[118] The fact that many, even most, people find the messages offensive is no excuse, under established First Amendment principles, for suppressing them.

D. Innocuous Messages

It is impossible to imagine a theory under which innocuous messages (*e.g.*, "Even male chauvinist pigs need love.")[119] could ever legitimately be suppressed because of their content.

IV. VAGUENESS AND OVERBREADTH

Apart from content neutrality, the other First Amendment principles that cast doubt on the validity of the EEOC hostile-environment guidelines are those of vagueness and overbreadth. Vagueness and overbreadth doctrines are not peculiar to the First Amendment, but they have an especially pronounced effect on free speech litigation.

The vagueness concept grows out of the procedural due process requirement of notice. It focuses on any uncertainty or ambiguity in the language of the regulation. A statute is unconstitutionally vague if it fails to make clear to a person of normal intelligence what is required or forbidden. In the due process context, the vagueness doctrine normally applies only to criminal statutes; a vague civil statute is corrected by judicial interpretation clarifying the ambiguities. But in free speech litigation, the challenge of vagueness is available against civil statutes because civil penalties

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116 *See* Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce in* American Booksellers Association v. Hudnut, 21 U. MICH. J.L. REF. 69, 109 (1987).

117 Andrea Dworkin, *Against the male* [sic] *Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

118 American Booksellers' Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

119 *But see supra* note 48.

may also effectively discourage protected speech. Despite this special concern for precision, however, the Supreme Court has recognized that some uncertainty is inherent in the use of language. Mathematical precision is not required even in a regulation of speech.[120]

As its name suggests, overbreadth comes into play when a regulation sweeps too broadly, including within its coverage not only speech that legitimately may be prohibited but speech that is constitutionally protected as well. Overbreadth focuses on the regulation's potential for punishing or discouraging speech that is protected. In the First Amendment context, the point is usually made by saying that the regulation must be "narrowly tailored" to limit its operation to legitimate spheres.

If the meaning of a regulation is uncertain, it is always susceptible of being applied to protected speech. Hence an unconstitutionally vague statute is inevitably unconstitutionally overbroad as well. The converse is not true, however. A statute can be unconstitutionally overbroad without being the least bit vague.[121]

Because of the dramatic consequences that result from finding a regulation unconstitutionally overbroad or vague on its face,[122] the Supreme Court has begun pruning back the reach of that doctrine. The landmark case is *Broadrick v. Oklahoma*,[123] which upheld state laws that prohibited civil service employees from engaging in political fund raising, becoming candidates for paid political office, and similar activities. The Court emphasized two points. First, the statute's overbreadth must be "real" and "substantial" to make it vulnerable to invalidation.[124] Second, the argu-

120 *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

121 For example, the ordinance declared unconstitutional in Shelton v. Tucker, 364 U.S. 479 (1960), required all school teachers to file an annual affidavit listing all organizations to which they belonged or contributed money in the last five years. The ordinance was overbroad, but there was no vagueness about it.

122 Three serious consequences ensue when a regulation is unconstitutionally vague or overbroad on its face. First, normal rules are relaxed to permit the regulation to be challenged by litigants who otherwise would have no standing to do so. Second, the overbroad regulation may not be applied to anyone, even someone whose speech legitimately could have been restricted under a more precisely drawn regulation. Third, if a regulation requiring a license is facially vague or overbroad, a person may ignore the requirement, speak in violation of the regulation, and then defend against prosecution by challenging the constitutionality of the regulation. *See generally* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

123 413 U.S. 601 (1973).

124 *Id.* at 622.

ment for overturning legislation on overbreadth grounds is weaker in cases involving conduct rather than pure speech.[125]

In a later case, the Court elaborated on the real and substantial requirement, saying that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."[126]

The speech-conduct distinction in the *Broadrick* analysis involves two separate but related considerations. The first is whether the law explicitly regulates speech in terms or rather regulates some aspect of conduct, like camping in a park, but is applied to a speech-related activity such as a demonstration for example.[127] If the law does not in terms regulate speech, the second consideration comes into play. When the claim is that the law is unconstitutionally vague, the tendency appears to be to resist holding the law vague on its face and to look chiefly to the question of whether the law is vague in its application to the conduct at issue. When the claim is that the law is unconstitutionally overbroad, the Court appears to examine how closely related the claimant's conduct is to protected speech. The closer that relationship is, the more likely the Court will be to disregard *Broadrick* and invoke traditional overbreadth doctrine.[128]

The EEOC guidelines governing hostile environments provide that "sexual harassment" is a form of sex discrimination forbidden by the statute. The guidelines then define "sexual harassment" as "verbal or physical conduct of a sexual nature" where the conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."[129] The Supreme Court has treated these guidelines as authoritative and has said that they afford employees "the right to work in an environment free from . . . ridicule, and insult."[130]

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125 *Id.* at 629.

126 Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

127 Even if the law does in terms regulate speech, the Court may still invoke the real and substantial requirement of *Broadrick* to preserve it. New York v. Ferber, 458 U.S. 747 (1982).

128 *See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

129 29 C.F.R. § 1604.11(a) (1992).

130 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

Using the overbreadth principles to evaluate the EEOC guidelines is relatively easy.[131] First, the guidelines specifically apply to speech (*i.e.*, "verbal conduct"). Not only that, they apply, in terms and as authoritatively interpreted by the Court, to speech defined by its content (*e.g.*, "offensive") and prohibited because of the messages it conveys (*e.g.*, "ridicule and insult"). In holding the bias-crime ordinance in *R.A.V.* unconstitutional, the concurring Justices observed that the ordinance, as interpreted by the state supreme court, made criminal "expressive conduct that causes only hurt feelings, offense or resentment" and thus was impermissibly overbroad.[132] Precisely the same criticism may be levelled at the hostile-environment law.

Second, except for false allegations of fact and obscene pictures, which were rare occurrences in the cases, almost all the varieties of speech that have been found to contribute to hostile environments have also been held to be protected by the First Amendment. This not only meets *Broadrick's* substantial overbreadth requirement, but it is overbreadth run amok.

V. THE ESCAPE HATCHES

The issue that remains to be determined is whether any escape hatches exist that might permit the guidelines to survive despite their apparent vulnerability to content discrimination and overbreadth charges. Four possibilities suggest themselves: (1) the guidelines are simply regulations of the time, place, or manner of the speech, which are subject to a less stringent constitutional standard; (2) congressional power under section 5 of the Fourteenth Amendment to enforce the guarantees of the equal protection clause legitimatize the guidelines; (3) the "captive audience" doctrine permits the kind of speech at issue in the typical hostile-environment case to be controlled; and (4) the workplace is a special environment that is not subject to the full panoply of free speech principles.

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131 Professor Browne argues that the guidelines are unconstitutionally vague. Browne, *supra* note 1, at 502-10. His argument is reasonable, but not, in my view, especially compelling. Since the guidelines clearly transgress the overbreadth principles, as detailed in the text following this note, I have ignored the vagueness issue.

132 R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2560 (1992).

A. Time, Place, or Manner Regulation

Traditional constitutional analysis divides the universe of speech regulations into two distinct classes: (1) those that regulate speech because of its content, such as regulations of obscenity, and (2) those that regulate activities in order to protect governmental interests that are unrelated to the content of any speech that may fall within their purview, such as a traffic regulation that might be applied to parades. In an early case upholding the constitutionality of an ordinance that required a permit and the payment of a fee to hold a parade, the Supreme Court described the latter class as "time, place, and manner" regulations,[133] the title by which they are still known.

The possibility that the EEOC guidelines might be upheld as a time, place, or manner regulation is virtually nil. Such regulations are required to be content,[134] or at least viewpoint,[135] neutral. These guidelines are anything but neutral.

B. Congressional Power to Enforce

Katzenbach v. Morgan,[136] one of the more controversial decisions the Court has rendered, dealt with a challenge to a federal law that in essence provided that no person who had completed the sixth grade in a Spanish-language school in Puerto Rico could be denied the right to vote in a state election on the ground of illiteracy in English. The Court previously had rejected a constitutional challenge to a state literacy requirement.[137] Therefore, the issue in *Morgan* was whether Congress could force a state to give up its constitutionally permissible literacy requirement. The Court held that section 5 of the Fourteenth Amendment gave Congress the power to do so.[138]

The majority offered two theories to support its decision. Under its first theory, the Court suggested that Congress could redefine the substantive content of the Fourteenth

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133 Cox v. New Hampshire, 312 U.S. 569 (1941).

134 United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981).

135 *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

136 384 U.S. 641 (1966).

137 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

138 *Morgan*, 384 U.S. at 646-47.

Amendment,[139] regardless of how the judiciary previously defined it, and then legislate to enforce the rights it had created by its own redefinition. Under this theory, as Justice Harlan's dissent pointed out, it was theoretically possible for Congress to contract as well as to expand constitutional rights.[140] Replying in a footnote, the majority denied that Congress would have the power to contract rights.[141] The majority claimed that since Congress' power was to *enforce* the amendment, it could not reduce any rights previously declared by the Court.[142] That footnote became law in *Mississippi University for Women v. Hogan.*[143] *Hogan* rejected an argument that Congress could authorize a form of sex discrimination that the Court earlier had determined to be unconstitutional.[144]

Through the restrictions in Title VII, Congress would be substantially diminishing free speech rights that the Court over decades has found to be protected by the First Amendment. *Hogan* seems to preclude that possibility.

C. *Captive Audience*

The captive audience doctrine acts as a separate and distinct justification for regulating speech.[145] These regulations are promulgated to cover situations in which an unwilling listener cannot avoid another's speech. The concept of captive audience was recognized by the Court in the 1940s. The Court upheld a regulation of sound trucks that emitted loud and raucous noise, partly because people in their homes were "practically helpless" to escape the intrusion.[146]

Although the concept is an old one, it has been employed

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139 Technically, the free speech guarantees of the First Amendment are imposed on the states by reason of their "incorporation" in the due process clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652 (1925). *See generally* NOWAK & ROTUNDA, *supra* note 18, §§ 10.2, 11.6. Arguably, therefore, by purporting to enforce the due process clause, Congress could re-interpret the free speech guarantees.

140 *Morgan*, 384 U.S. at 667-68.

141 *Id.* at 651 n.10.

142 *Id.*

143 458 U.S. 718 (1982).

144 *Id.* at 732.

145 The most extensive textual treatment of the captive audience concept is that of MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02(F) (1984).

146 Kovacs v. Cooper, 336 U.S. 77 (1949).

infrequently and then only under severe restrictions. Rejecting a captive audience argument in *Cohen v. California*,[147] Justice Harlan said:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that *substantial privacy interests are being invaded in an essentially intolerable manner.* Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.[148]

In a later case, the Court added that an audience is captive "only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[149]

The Court's practice has been consistent with these statements. The captive audience concept has been employed to sustain restrictions of speech only when the speech somehow intruded into the home.[150] A workplace is not a home.

The Court has yet to discover a situation outside the home in which it was "impractical" for unwilling persons to avoid exposure to offensive speech. Rather it has contented itself with smugly—and fatuously—advising people to "avert their eyes" if they are offended.[151]

Even if the Court were inclined to fashion a different captive audience rule for the workplace, the present hostile-environment

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147 403 U.S. 15 (1971).

148 *Id.* at 21 (emphasis added).

149 Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (citations omitted).

150 Frisby v. Schultz, 487 U.S. 474 (1988); FCC v. Pacifica Found., 438 U.S. 726 (1978); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). Moreover, the Court has rejected captive audience arguments even when the speech did intrude into the home if it found that less restrictive measures were available to protect the homeowner. *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301 (1965); Martin v. City of Struthers, 319 U.S. 141 (1943).

151 *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15, 21 (1971).

Hostile environment cases can involve either visual or aural speech. The Court has come full circle in its reaction to them. It began with the notion that people could shut out noise but not visual stimuli. Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) ("radio can be turned off, but not so the billboard or street car placard"). It ended at the opposite pole. FCC v. Pacifica Found., 438 U.S. 726 (1978) ("indecent" speech may be banned from daytime radio); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ("avert the eyes" case); Cohen v. California, 403 U.S. 15 (1971) (same); Kovacs v. Cooper, 336 U.S. 77 (1940) (sound trucks may be banned).

law would not survive because it discriminates on the basis of viewpoint. The Court has insisted that speech restrictions based on the captive audience concept be viewpoint neutral.[152]

An ongoing dispute in the hostile-environment cases is whether a female plaintiff may legitimately claim to be discriminated against when the environment she finds offensive existed at the time she began work.[153] It seems unlikely that the Supreme Court will permit current captive audience doctrine, with its dogmatic insistence that the unavoidable be avoided, to be invoked on behalf of a woman who thrusts herself into harm's way.[154] Still, the four concurring Justices in *R.A.V.* suggested that the captive audience concept might be used to support the federal hostile-environment law.[155]

D. Workplace as Special Environment

A number of cases have focused on the legitimacy of speech restrictions in situations in which there was some special relationship, such as employer-employee, between the regulator and the speaker. This adds an element to the free speech calculus that operates in ways that are not entirely predictable.[156]

On the one hand, it is clear that employees have a First Amendment right to speak their minds in the workplace, at least some of the time. *Rankin v. McPherson*[157] dramatically demonstrates this idea. McPherson was a probationary deputy constable in a sheriff's office. While at work, she heard of the attempt to assassinate President Reagan to which she said to a co-worker, "'If they go for him again, I hope they get him.'"[158] Questioned about her statement by the sheriff, she said it was not hyperbole, but that she had meant it. The sheriff then fired her. The Court held that the firing violated her right of free speech. A probationary law enforcement officer has a First Amendment right to ex-

152 *See* Frisby v. Schultz, 487 U.S. 474 (1988); FCC v. Pacifica Found., 438 U.S. 726 (1978).

153 For example, see the debate between the majority and the dissent in Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

154 The sexual and militaristic overtones of the textual statement did not pass unnoticed.

155 R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2560 n.13 (1992).

156 To make the analogy to the hostile environment problem as close as possible, the cases discussed here are those in which the speech was confined to the workplace and was not intended for public consumption.

157 483 U.S. 378 (1987).

158 *Id.* at 380.

press a hope that the President will be assassinated! In other cases, the Court held that a school teacher had a right to complain to her superiors, but not to be insubordinate[159] and that an attorney who "rudely and discourteously" complained to a court clerk could not be disciplined for that single incident.[160]

On the other hand, it is equally clear that workers in the workplace do not have the same latitude they have outside it. In *Connick v. Myers*,[161] respondent assistant district attorney was transferred from one job to another. After protesting without success, Myers prepared a fourteen-item questionnaire that she circulated to other assistants at work. She was fired for insubordination. The Court rejected her claim that her dismissal violated her right to free speech. The majority viewed the matter as one of internal office routine, with no First Amendment ramifications, rather than as a "matter of public concern."[162] In other cases, the Court upheld the dismissal of an employee who made false accusations of bribery against his co-workers[163] and upheld the court martial of an officer who advised troops to disobey an order to report for combat duty.[164]

These cases may establish two propositions. First, the First Amendment does not forbid the government, as an employer rather than as a legislature, to make special rules regulating employees that it could not impose on citizens generally. Second, governments may authorize employers to make special rules that restrict the speech of their employees. The precise extent to which speech may be restricted in either situation, however, remains uncertain.

VI. CONCLUSION

The foregoing analysis suggests that the EEOC guidelines which were promulgated to implement Title VII's prohibition against sexual discrimination in the workplace are probably facially unconstitutional because they violate the First Amendment's taboo

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159 Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979).

160 *In re* Snyder, 472 U.S. 634 (1985). This holding was based on the Court's supervisory authority over lower courts. But since the matter was one of "public concern" (see the discussion in the next paragraph of the text), I believe the result would have been the same under the First Amendment.

161 461 U.S. 138 (1983).

162 *Id.* at 147.

163 Arnett v. Kennedy, 416 U.S. 134 (1974).

164 Parker v. Levy, 417 U.S. 733 (1974).

against substantial overbreadth. Apart from the problem of overbreadth, the analysis also suggests that the guidelines have been applied unconstitutionally in many cases because they have been used to approve findings of hostile environments that were based on speech that is entitled to protection under the guarantees of the First Amendment. These conclusions do not mean, however, that free speech guarantees effectively foreclose the elimination of all of the abuses that have contributed to finding hostile environments.

The First Amendment offers no shelter to many kinds of abusive behavior. Conduct that has no significant communicative component (*e.g.*, urinating in plain view of a female employee) and conduct that legitimately may be made criminal (*e.g.*, fondling a person of the opposite gender) are not protected, even when the conduct conveys a message (*e.g.*, mooning a fellow employee).[165] Various forms of pure speech are also unprotected: the sexual solicitation, the false and defamatory statement of fact, and the display of obscene graphics. These are some of the worst abuses and can be eliminated without hindrance.

At the opposite pole are examples of speech that fall well within the general rule of the First Amendment, namely, that government may not suppress speech merely because it finds the message offensive. Illustrations are using terms like "honey" and "dearie," complimenting another's appearance, displaying sexually provocative but nonobscene pinups, and telling dirty jokes. It is at least arguable that *employers*, including the government *qua* employer, could forbid any or all of these things in the workplaces under their control. It is clear, however, that giving the government *qua* lawmaker the authority to suppress these sorts of messages seriously harms important free speech values.

Finally, debatable issues remain. One is with respect to fighting words, a category of speech the Supreme Court continues to say still exists. But *Chaplinsky*, the case which announced the discovery of the category, is the one and only instance of fighting words the Court has ever recognized. Leaving that difficulty aside, it is unclear how one would draft a regulation prohibiting the use of fighting words that would not be vulnerable to a charge of

165 The examples in parentheses are meant to be representative illustrations, not exhaustive catalogs.

unconstitutional vagueness. This is especially problematic if the "reasonable woman" standard continues to spread.

Another debatable issue concerns profane and vulgar words, the use of which is a frequent cause of complaint. The Court's opinion in *Cohen*, which shielded profane and vulgar words from attack, is one of its least convincing exercises in constitutional exegesis. Hostile-environment cases offer an attractive vehicle in which to pursue an argument that *Cohen* should be overruled. Eliminating these expletives from the workplace almost certainly would lessen the chances that women would find the environment hostile.

Even if the federal government eliminated all the behaviors that it clearly may and all of those mentioned above as debatable, there remains a large residuum of protected speech that many find objectionable and offensive. The First Amendment prohibits governments, federal or state, from regulating the speech in that residuum. If these varieties of speech are believed to make the work environment intolerable, the solution would appear to be to persuade employers to make their own regulations governing their workplaces. Although it is unclear exactly how far employers can regulate the speech of their employees, they plainly can regulate more than governments *qua* lawmakers. In any event, the Supreme Court's treatment of the First Amendment raises serious concerns for the enforcement of hostile-environment sexual harassment litigation.