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Can a 'Dumb Ass Woman' Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech

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ARTICLES

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INTRODUCTION

Sandra Bundy may have guessed that her new job with the District of Columbia Department of Corrections would be a challenge. What she may not have expected was that she would have to meet the challenge under very different conditions than those faced by her male coworkers. Ms. Bundy's work was continually interrupted by one of her supervisors, who kept calling her into his office and forcing her to listen to his theories about how women ride horses to obtain sexual gratification.[1] He repeatedly asked Ms. Bundy to come home with him in order to view his collection of pictures and books on this topic. Another supervisor repeatedly propositioned her, asking her to come with him to a motel or on a trip to the Bahamas.

None of Ms. Bundy's male counterparts, in contrast, had to listen to their boss's sexual fantasies and proposals. When Ms. Bundy tried to remove this gender-based obstacle to her job performance by reporting it to a third supervisor and pleading for help, he only exacerbated the problem, telling her that "any man in his right mind would want to rape you," and asking her to have sex with him.[2]

Ms. Bundy successfully sued the Department of Corrections for sexual harassment in violation of Title VII,[3] the federal statute outlawing workplace discrimination. Title VII forbids sexual harassment when it creates a discriminatory hostile work environment, that is, when the harassment is sufficiently severe or pervasive that it adversely affects the terms or conditions of employment for workers of a single gender.[4] In Ms. Bundy's case, the court held that

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1. Bundy v. Jackson, 641 F.2d 934, 939, 940 n.2 (D.C. Cir. 1981).
2. *Id.* at 940.
3. 42 U.S.C. §§ 2000e-e-17 (1994).
4. *See, e.g.*, Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

her supervisors' repeated sexual comments and propositions met this standard, even though their harassment was entirely verbal.

The implicit holding of the *Bundy* case—that speech alone can create a discriminatory hostile work environment—went unquestioned for many years. Recently, however, defense attorneys have challenged the constitutionality of this principle, arguing that a prohibition on discriminatory workplace expression violates harassers' First Amendment rights.[5] At the heart of this challenge lies the conflict between two fundamental constitutional values: equality of opportunity and freedom of expression.

Thus far, only two federal district courts have ruled on this constitutional question.[6] Although both courts upheld the plaintiffs' hostile environment claims over free speech challenges, neither conducted a particularly rigorous First Amendment analysis. The federal appellate courts, in which one might expect a more thorough examination of the issue, have not yet addressed it directly.

A debate over this conflict has recently emerged among a handful of commentators. The primary advocate of the constitutionality of workplace harassment law, Professor Suzanne Sangree, argues that by removing obstacles to equality, harassment law actually "enhances First Amendment free speech principles." She also believes that if current regulations of harassing workplace speech must be struck down as unconstitutional, then all of employment discrimination law must fall with them.[7]

Several scholars take the opposite position and argue that most or all of Title VII's restrictions on harassing workplace speech run afoul of the First Amendment.[8] The two proponents of this view who have engaged in the most extensive analysis are Professors Kingsley Browne and Eugene Volokh. Professor Browne argues that free speech interests require a drastic reduction in the

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5. Ordinarily, the First Amendment does not apply to nongovernmental regulation of expression, and private sector employers may restrict their workers' speech in whatever way they choose. However, because the government has become involved in the process through judicial enforcement of hostile environment regulations, sufficient "state action" exists to trigger First Amendment protections. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the . . . courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech . . . .").

6. Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

7. Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995). Professor Marcy Strauss also presents persuasive arguments in support of the constitutionality of hostile environment harassment law, but her focus is a broader one: she addresses free speech issues raised by sexist speech in general, both in the workplace and beyond. *See* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990). Although this article addresses Professor Strauss's principal arguments relevant to workplace speech, it focuses primarily on those put forth by Professor Sangree.

8. *See generally* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

scope of hostile environment harassment law, limiting its reach to cases involving unwanted physical contact.[9] Professor Volokh also recommends narrowing the law to cover verbal harassment only when it is intentionally directed at a particular individual; undirected expressions of gender-based intolerance, he believes, should go unregulated.[10]

This article stakes out a middle ground between Sangree on the one hand and Browne and Volokh on the other, and it responds to the principal arguments they have marshalled. Unlike Professor Sangree, I believe that hostile environment harassment law generates a fundamental conflict between equality of opportunity and freedom of expression. But a thorough examination of the nature and weight of each of these fundamental interests, in the distinct context of the workplace, demonstrates that a balance can be struck.

Part I of this article focuses on the equal opportunity side of the scale by examining the harm inflicted when a woman[11] is subjected to harassing speech on the job. Sexual harassment has been called "one of the most ubiquitous and damaging barriers to women's [job] success and satisfaction,"[12] and a large portion of this problem stems from verbal harassment.[13] Abusive and harassing speech damages a female employee's psychological and physical health and often adversely affects her job performance, while her male counterparts remain free of such gender-based obstacles. As this discussion demonstrates, Professors Browne and Volokh's underestimation of the scope and gravity of this discriminatory harm has skewed their constitutional analysis.

Part II begins with an analysis of the elements of proof that must be met to support a hostile environment claim and reveals the fallacy of the often-repeated complaint, echoed by Browne and Volokh, that the law is so vague that no one really knows what is illegal. I then consider the argument, asserted by several commentators, that workplace harassment law is subject to unconstitutionally overbroad enforcement. The discussion places in perspective the few cases in which women have accused men of sexual harassment with scant grounds for doing so. Although a small number of such cases have succeeded at trial, a review of the law's ten-year enforcement record shows that a far greater number of women are denied relief after being subjected to substantial discriminatory abuse. Rather than enforcing harassment law too broadly and imposing liability when it is not justified, as Browne and Volokh suggest, the courts are doing the opposite—constructing the law too narrowly and failing to punish many serious harassers.

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9. Browne, *supra* note 8, at 544-45.

10. Volokh, *supra* note 8, at 1848-71.

11. The vast majority of gender-based workplace harassment cases involve male harassers and female targets. Although cases exist in which the gender roles are reversed, for the sake of convenience I will refer to harassers as male and targets as female.

12. Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 154 (1988).

13. *See infra* text accompanying notes 22-38.

I then address the question of whether hostile environment harassment law has a significant chilling effect on speech beyond its intended scope and argue that it does not. Even in a *conduct*-based sex discrimination case, a defendant's harassing statements are admissible to show that he acted with discriminatory intent. Accordingly, laws prohibiting discriminatory conduct already create an incentive for employers to censor their workers' gender-based abusive and harassing speech. A chilling effect therefore will persist even if a cause of action for verbal harassment is abolished.

Part III of this article focuses on the other side of the scale—the free speech rights of workplace harassers. It explores the context in which the regulated speech occurs and argues that both the physical restrictions of the job site, where employees are captive and typically unable to avoid harassing speech, and the power hierarchy of the workplace, which limits employees' ability to respond to such speech, operate to reduce the strength of harassers' First Amendment rights on the job. Context has long been a pivotal part of First Amendment jurisprudence, and Professors Browne and Volokh fail to devote sufficient attention to the unique nature of the workplace.

Part IV analyzes hostile environment harassment law under the First Amendment strict scrutiny test. The government's interest in prohibiting discriminatory workplace speech is of the highest order, because it is expressly based on Congress's duty to enforce the Fourteenth Amendment Equal Protection Clause. This compelling government interest, in conjunction with the necessity of hostile environment harassment law and its narrowly tailored definition, demonstrates that the law passes strict scrutiny.

Finally, in Part V, I discuss the Supreme Court's indication that it might uphold workplace harassment law over a free speech challenge on the basis of the recently developed "secondary effects" exception. In this Part, I describe the dangers inherent in expanding this exception beyond the confines of sexually explicit speech and conclude that the Court would be unwise to move in this direction.

I. THE HARM INFLICTED BY HOSTILE ENVIRONMENT HARASSING SPEECH

A full understanding of the harm inflicted by harassing workplace speech is a necessary prerequisite to any attempt to determine the appropriate balance between the government's interest in protecting citizens from such speech and the First Amendment's guarantee of free expression. As Professor Charles Lawrence has noted, "To engage in a debate about the first amendment and [discriminatory] speech without a full understanding of the nature and extent of the harm of [such] speech risks making the first amendment an instrument of domination rather than a vehicle of liberation."[14]

14. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 459; *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

Sexual harassment has been called the most widespread problem faced by women on the job.[15] A 1981 United States Merit Systems Protection Board ("MSPB")[16] survey of approximately 23,000 federal employees found that 42% of all women and 15% of all men had experienced some form of sexual harassment at work.[17] When the MSPB conducted a follow-up study in 1988, these numbers remained virtually identical.[18] Recent surveys conducted in the private sector demonstrate that about 59% of women executives are harassed at some point in their careers.[19] Other surveys have shown that women experience sexual harassment in the workplace at even higher rates, ranging from 42% to 88%.[20] Approximately 15% of women working for Fortune 500 companies experience sexual harassment on an annual basis.[21]

Harassing speech accounts for a substantial portion of the problem. The majority of sexual harassment complaints involve allegations of verbal harassment.[22] One survey shows that two-thirds of working women have been subjected to verbal harassment on the job.[23] In 1994, a survey of 2000 lawyers at twelve large law firms across the nation showed that 91% of the women and 13% of the men had been subjected to unwelcome verbal harassment within the past year.[24] A recent survey of 182 women who work in traditionally male industries (including plumbers, electricians, carpenters, fire fighters, and police

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15. *See Sex Discrimination in the Workplace, Hearings Before the Senate Committee on Labor and Human Resources*, 97th Cong., 1st Sess. 336, 342 (1981) (statement of Karen Sauvigne, Program Director of Working Women's Institute); *see also* 106 L.R.R. News and Background Information 333-35 (Apr. 27, 1981) (statement of J. Clay Smith, Jr., Acting Chair of EEOC) (noting that sexual harassment is widespread problem); Matthew C. Hesse & Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASHBURN L.J. 574 (1985). The vast majority of victims of sexual harassment are women, although between 1990 and 1994 the proportion of complaints filed by men increased from 8% to 10%, according to the EEOC. Jane Gross, *Now Look Who's Taunting, Now Look Who's Suing*, N.Y. TIMES, Feb. 26, 1995, § 4, at 1.

16. The MSPB is a quasi-judicial federal agency responsible for hearing appeals of personnel actions taken against federal employees. *See* 5 C.F.R. § 1200.1 (1994).

17. U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE—IS IT A PROBLEM? 81 (1981) [hereinafter 1981 MSPB SURVEY].

18. U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 16 (1988) [hereinafter 1988 MSPB SURVEY].

19. Sharon Walsh, *Hushing Up Harassment?*, WASH. POST, Apr. 9, 1995, at H1 (citing 1993 Korn-Ferry Survey).

20. Mark Pazniokas, *Capitol Confronts Sexual Coercion*, HARTFORD COURANT, Feb. 13, 1993, at A1; *see also* Kara Swisher, *Laying Down the Law on Harassment: Court Rulings Spur Firms to Take Preventive Tack*, WASH. POST, Feb. 6, 1994, at H1 (citing survey finding that 40% to 60% of women say they have been sexually harassed at work). Sexual harassment complaints filed with the EEOC more than doubled between 1991 and 1993. *Id.*

21. Walsh, *supra* note 19, at H1 (citing 1993 Korn-Ferry survey and recent Klein Associates survey).

22. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 115 (1987); Strauss, *supra* note 7, at 11.

23. WORKING WOMEN'S INST., RESEARCH SERIES REP. NO. 3, THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN (1970) [hereinafter WWI, A PROFILE].

24. Margot Slade, *Law Firms Begin Reining in Sex-Harassing Partners*, N.Y. TIMES, Feb. 25, 1994, at A19. The survey asked whether the lawyers had experienced unwelcome sexual advances in the form of sexual teasing, jokes, remarks, or questions; pressure for dates; letters, phone calls, cartoons, or other materials of a sexual nature; sexually suggestive looks or gestures; or pressure for sexual favors.

officers) revealed that 83% received unwelcome sexual remarks, and 88% were forced to view pictures of naked or partially dressed women in the workplace.[25]

Professors Browne and Volokh acknowledge that gender-based verbal harassment can result in employment discrimination, but neither recognizes the seriousness of the problem. This is particularly true of Professor Browne, who fails to engage in any substantial discussion of the harm that discriminatory harassing speech can inflict on a female worker and how that harm can create substantial obstacles to her success on the job.[26]

Professor Browne claims that it is "far from clear that sexuality implies a lack of respect. . . . [T]here is no necessary contradiction in viewing one's colleague (or even one's subordinate) simultaneously as an attractive sexual being and a competent co-worker."[27] But there is a significant difference between *viewing* a coworker as a sexual object and *acting* on that view. The vast majority of women dislike being subjected to sexual expression at work, finding it "embarrassing," "demeaning," or "intimidating." Only a small minority of women report that they see such expression as "flattering."[28] Perhaps at some point in the future, when women are less frequently stereotyped as mere erotic playthings, sexualizing a subordinate employee will carry with it no derogatory connotation. Today, however, that is the exception, not the rule.

Gender-based harassment of female employees subjects them to an extensive range of harms not experienced by their male colleagues. These harms often include an adverse effect on a woman's job performance.[29] The 1981 MSPB Survey showed that harassment victims suffered in terms of the quantity and quality of their work, their ability to work with others, and their attendance record.[30] Other studies have found that between 45% and 75% of sexual harassment victims experience some adverse effect on their work performance.[31]

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25. In addition, 57% were subjected to offensive touching or requests for sex. LAURIE W. LEBRETON & SARA S. LOEVY, BREAKING NEW GROUND: WORKSITE 2000, A REPORT PREPARED BY CHICAGO WOMEN IN TRADES 10-12 (1992).

26. *See generally* Browne, *supra* note 8. While Professor Volokh admits that harassing speech may inflict harm on its targets, he is solely concerned with "the most egregious sorts of harassment" that involve "truly harrowing abuse." *See* Volokh, *supra* note 8, at 1807-09.

27. Browne, *supra* note 8, at 491 n.60.

28. Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 361 n.85 (1980) (citing Claire Safran, *What Men Do to Women on the Job*, 148 REDBOOK 149, 217 (1976)); *see also* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1208-12 & n.118 (1989); Ben Bursten, *Psychiatric Injury in Women's Workplaces*, 14 BULL. AM. ACAD. PSYCHIATRY 245, 247 (1986). While men are more likely to feel flattered than threatened by sexual remarks in the workplace, women tend to worry that such comments could escalate and lead to sexual assault. Gross, *supra* note 15, at 1.

29. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 878 n.8 (9th Cir. 1991); Peggy Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 AM. J. ORTHOPSYCHIATRY 539, 541 (1982) (noting that 75% of women who had been sexually harassed reported that their job performance had suffered).

30. 1981 MSPB SURVEY, *supra* note 17, at 81.

31. WORKING WOMEN UNITED INST., SEXUAL HARASSMENT ON THE JOB: RESULTS OF PRELIMINARY SURVEY (1975) [hereinafter WWI STUDY] (noting that 45% of victims reported an adverse effect on job

In the two-year period from May 1985 to May 1987, the federal government incurred estimated expenses of $267 million in sexual harassment-related costs, including money lost through decreased worker productivity, sick leave awards, and replacement of employees who left their jobs because of sexual harassment.[32]

Hostile environment harassment also can hurt the target's psychological and physical well-being. A study conducted by the Working Women's Institute shows that 96% of sexual harassment victims experience emotional distress and 35% suffer from physical stress-related problems.[33] Typical symptoms include anger, fear, anxiety, depression, guilt, humiliation, embarrassment, nausea, fatigue, headaches, and weight gain or loss.[34]

Gender-based harassing expression that is sexual in nature, such as nude or seminude photographs of women and sexual jokes or slurs, harms women by encouraging men to view them as sex objects who should be treated according to that purpose alone.[35] In the workplace context, this not only undermines a woman's dignity, but also her efforts to function in a different role.[36] It encourages men to evaluate female employees based on qualities unrelated to job performance.[37] As Professor Kathryn Abrams explains:

> Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish

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performance); WWI, A PROFILE, *supra* note 23 (noting that 75% of victims reported adverse effect on job performance).

32. 1988 MSPB SURVEY, *supra* note 18, at 39.

33. WWI STUDY, *supra* note 31.

34. For example, one study showed that 90% of victims of sexual harassment felt anger, fear, and nervousness, and 63% experienced nausea, headaches, and fatigue. WWI, A PROFILE, *supra* note 23; *see also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1496, 1506 (M.D. Fla. 1991) (finding that workplace harassment caused plaintiff to feel anxious, have difficulty sleeping, and miss several days of work); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 783 (E.D. Wis. 1984) (stating that employee's doctor diagnosed her anxiety, diarrhea, vomiting, nausea, and cramping as caused by workplace harassment); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 775 (1989) ("Sexual harassment victims experience powerlessness, humiliation, fear, and loss of self-confidence and self-esteem.").

35. *See Robinson*, 760 F. Supp. at 1502-05 (crediting expert testimony of Dr. Susan Fiske on sexual stereotyping); Taub, *supra* note 28, at 361 (arguing that sexual comments toward women are "quintessential expression of stereotypic role expectations"); *see also* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880-83 (D. Minn. 1993) (discussing expert testimony of Dr. Eugene Borgida on sexual stereotyping).

36. Although some women may appreciate such sexual expression in the workplace, most do not. *See supra* text accompanying notes 27-28.

37. *See* Abrams, *supra* note 28, at 1208-12 (discussing how courts need to be more responsive to harassment that denies women a sense of professional respect); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 484 (1990) (discussing how relationship of sex stereotypes and notions of power are linked, thus making it more difficult for women to enter positions of power); Taub, *supra* note 28, at 361 (discussing how sexual harassment affects a woman's ability to perform by decreasing both her own sense of self and how she is perceived by male supervisors); Thomas L. Ruble et al., *Sex Stereotypes: Occupational Barriers for Women*, 27 AM. BEHAV. SCI. 339, 351 (1984) (discussing how sex stereotypes perpetuate the notion that women will do poorly at a masculine task, thus leading to slower progress for women); *see also Robinson*, 760 F. Supp. at 1503-04 (discussing expert testimony of Dr. Susan Fiske on sexual stereotyping).

> to be viewed in the workplace. Depending on the material in question, it may communicate that women should be objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. Any of these images may communicate to male coworkers that it is acceptable to view women in a predominantly sexual way.[38]

The cases challenging gender-specific abuse and gender-based sexually harassing speech provide compelling examples of the harms identified above. In *Robinson v. Jacksonville Shipyards, Inc.*,[39] for example, Lois Robinson worked as a welder and as one of a few female skilled craftworkers employed by a shipyard.[40] At work, Ms. Robinson was repeatedly subjected to sexual and gender-specific harassing comments: a male welder told her that he wished her shirt would blow over her head so he could look at her breasts; a shipfitter told her that he wished her shirt was tighter; another told her that "women are only fit company for something that howls," and that "there's nothing worse than having to work around women"; and a foreman asked her to sit on his lap. Coworkers further harassed Ms. Robinson by placing gender-specific abusive and sexual graffiti on the workplace walls. For example, a coworker wrote over the place where Ms. Robinson hung her jacket, "lick me you whore dog bitch"; and another wrote "pussy" on a wall of her work area when she left to get a drink of water.[41]

Ms. Robinson also was surrounded by prominently displayed pictures that depicted women in various stages of undress and in sexually suggestive or submissive poses,[42] including: a dart board made out of a drawing of a woman's breast, with her nipple as the bull's eye; a picture of a naked woman with long blond hair, wearing high heels and holding a whip (Ms. Robinson found this picture particularly troubling because she has long blond hair and works with a welding tool known as a "whip"); a picture of a nude woman, with legs spread and breasts and genitals exposed; a drawing of a naked woman with fluid flowing from her genital area; a picture of a woman's pubic area with a spatula pressed on it; a drawing of a naked woman with the caption "USDA Choice"; a picture of a naked woman playing with a piece of cloth between her legs; and calendar photos depicting nude and partially nude women. Ms. Robinson's male coworkers made frequent sexual comments about these pictures in her presence, such as "I'd like to have some of that" and "I'd like to get into bed with that."[43] No similar pictures of men were displayed.[44]

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38. Abrams, *supra* note 28, at 1208, 1212 n.118.

39. 760 F. Supp. 1486 (M.D. Fla. 1991).

40. *Id.* at 1491.

41. *Id.* at 1498-99.

42. *Id.* at 1493. In direct contrast, *Jacksonville Shipyards* denied employees' requests to post political and commercial materials in the workplace. *Id.* at 1494.

43. *Id.* at 1494-97, 1513.

44. One foreman at the shipyard testified that if he ever saw a picture of a nude or semiclad man he would throw it in the trash. *Id.* at 1494.

After Ms. Robinson complained to shipyard management, the number of displayed pornographic pictures actually increased.[45] Ms. Robinson testified that this constant barrage of sexual and gender-based hostile comments and pictures made her feel extremely anxious, caused her to have difficulty sleeping, and resulted in her having to miss several days of work each year.[46]

In *Harris v. Forklift Systems, Inc.*,[47] Teresa Harris spent more than three years working as a manager for an equipment rental company. During that time, she was frequently subjected to gender-specific abusive speech. The company's president, Charles Hardy, repeatedly stated to Ms. Harris, in the presence of her fellow employees, "You're a woman, what do you know?," called her a "dumb ass woman," and told her that the company needed a man to do her job.[48] Hardy also made numerous sexually suggestive requests, asking Ms. Harris to retrieve coins from his front pants pocket by saying, "Teresa, I have a quarter way down there. Would you get that out of my pocket?" He threw objects on the ground in front of Ms. Harris, asking her to bend over and pick them up, and suggested that female Forklift Systems employees should dress in a way that would expose their breasts. He also told women workers that he had heard that eating corn would make their breasts grow. In the presence of other employees, Hardy proposed that he and Ms. Harris "go to the Holiday Inn to negotiate [her] raise." Hardy also suggested to Ms. Harris that they should start "screwing around."[49] There was no evidence that similar gender-specific abuse or sexually suggestive remarks were made to male employees.

Ms. Harris asked her boss to stop making these comments, and he promised to do so. But soon afterwards, when Ms. Harris was negotiating a deal with a customer, Hardy asked her, in front of her fellow employees, "What did you do, promise the guy . . . some bugger Saturday night?"[50]

In *Rabidue v. Osceola Refining Co.*,[51] Vivienne Rabidue, an administrative assistant, was forced to work with a supervisor[52] who routinely referred to women as "whore," "cunt," "pussy," and "tits," all gender-specific derogatory terms focused on female sexuality or sexual body parts. With respect to Ms. Rabidue, the supervisor stated, "All that bitch needs is a good lay." Ms. Rabidue was exposed on a daily basis to posters and pinups of naked and partially naked women, including one poster, which remained on the wall for eight years, depicting a prone woman with a golf ball on her breasts with a man

45. *Id.* at 1500-01.
46. *Id.* at 1519.
47. 114 S. Ct. 367 (1993).
48. *Id.* at 369.
49. Brief for Petitioner at 4-5, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168).
50. *Id.* at 8. The term "bugger" refers to anal intercourse.
51. 805 F.2d 611 (6th Cir. 1986).
52. Although the supervisor had no direct authority over Ms. Rabidue, he ranked higher than she did in the company's hierarchy, and his position carried significant authority. Ms. Rabidue was forced to interact with him on a regular basis. *Id.* at 615.

standing over her, golf club in hand, shouting "Fore."[53] No evidence was submitted suggesting similar treatment of Ms. Rabidue's male counterparts.[54]

As these examples demonstrate, Professor Browne is wrong when he claims that expression of racist and sexist sentiments are no longer socially acceptable and, accordingly, there is no longer a need for the "protectionist doctrine" of workplace harassment laws.[55] In fact, gender-based harassing speech continues to force women to perform their jobs under adverse conditions not imposed on men. This discrimination perpetuates the historic inequality between men and women in the workplace that Title VII was designed to remedy, "operat[ing] as overt exclusion once did to erect a significant barrier to equality in the workplace."[56]

II. POORLY DEFINED LAW OR POORLY INFORMED CRITICS? HOSTILE ENVIRONMENT HARASSMENT AND THE DOCTRINES OF VAGUENESS, OVERBREADTH, AND CHILLING EFFECT

A frequently stated complaint about workplace harassment law, particularly with regard to harassing speech, is that it is so poorly defined that no one really knows what is legal and what is not. Countless news stories in the popular press describe men tiptoeing around the workplace, afraid that if they unintentionally offend a female worker, she will file a harassment suit.[57] A television talk show host recently complained about a "rush to judgment . . . against the male" in harassment cases, and commented, "You can sue anybody for anything."[58] Legal commentators like Professor Browne have parroted this refrain, asserting that the law "give[s] little notice of what expression is prohibited," and that

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53. *Id.* at 624 (Keith, J., dissenting in part).

54. The Sixth Circuit ruled against Ms. Rabidue, finding that the sexualized slurs directed at her were merely "annoying," and that the "sexually oriented poster displays had a de minimis effect on [her] work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." *Id.* at 622.

55. Browne, *supra* note 8, at 544.

56. Strauss, *supra* note 7, at 5.

57. *See, e.g.*, Janet Cawley, *Political Correctness Has Its Own Backlash*, CHI. TRIB., Dec. 25, 1994, at 19 (quoting business consultant, "I know high-level executives who refuse to talk to women in their offices without the door open. Men are very much afraid of [being accused of] sexual harassment.") (internal ellipsis omitted); John Powers, *Afraid to Offend*, BOSTON GLOBE, Dec. 11, 1994, at 7 ("Most folks seem to agree that [workplace] harassment is a bad thing. Few of them agree on what it is."); Stephen Robinson, *The Fifty Million Dollar Insult*, DAILY TEL. (London), July 5, 1995, at 15 (stating that workplace harassment law has given men "a fear of tripping unawares into deep water"); Maureen West, *$43 Million for Accused Harasser*, PHOENIX GAZETTE, Apr. 7, 1995, at B7 (noting "the fear many a man has that any time he accompanies a female co-worker to lunch it could be a career-buster day"); John Seigenthaler, *Freedom Speaks*, Mar. 17, 1995 ("It's very tough for me to know what I can say and what I can't say. Without some definition, how is one to know?") (transcript of television program, on file with *The Georgetown Law Journal*).

58. Laura Flanders, *Paula Jones and Sexual Harassment: The World Stayed Right-Side Up*, EXTRA!, July-Aug. 1994, at 5 (quoting John McLaughlin).

once expression has "been labelled as racist or sexist, all [of it] has been deemed regulable" by the courts.[59]

The First Amendment requires specificity in any restriction on expression. Although a law need not be defined with "mathematical certainty," it must provide potential violators with adequate notice of what is prohibited.[60] Although some limited elaboration of what constitutes actionable harassing speech would be useful, examination of the legal definition of harassing speech and its stringent proof requirements makes clear that, contrary to the claims of Professors Browne and Volokh,[61] the law is far from vague.

A. FORMS OF PROHIBITED WORKPLACE HARASSMENT

Congress enacted Title VII as part of the Civil Rights Act of 1964 to eliminate certain forms of workplace discrimination. Specifically, Title VII makes 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 individual's race, color, religion, sex,[62] or national origin."[63]

Although Title VII clearly prohibits gender-based workplace discrimination, it does not expressly set forth a cause of action for harassment. Approximately ten years after the statute's enactment, however, the courts began to recognize that certain forms of harassment, when inflicted on workers of only one gender, constitute prohibited discrimination.[64] This concept was later adopted by the Equal Employment Opportunity Commission ("EEOC") in its *Guidelines on Discrimination Because of Sex*,[65] and in 1986 it was unanimously embraced by the Supreme Court in *Meritor Savings Bank v. Vinson*.[66] Seven years later, in its

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59. Browne, *supra* note 8, at 502, 548.

60. Grayned v. City of Rockford, 408 U.S. 104, 108 (1971).

61. *See* Browne, *supra* note 8, at 502-10; Volokh, *supra* note 8, at 1812 & n.97.

62. The statute's prohibition on gender discrimination was a last minute addition, made through an amendment on the floor of the House of Representatives. The amendment, adding "sex" to Title VII's list of prohibited bases for discrimination, was proposed by conservative opponents of the civil rights legislation who believed that it would lead to the defeat of the entire bill. Norbert A. Schlei, *Foreword to* BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW at xi-xii (2d ed. 1983). The strategic maneuver backfired, however, and Congress enacted the bill as amended. *Id.* at xii. Because of the eleventh-hour status of Title VII's ban on sex discrimination, little legislative history is available to assess congressional intent as to this provision.

63. 42 U.S.C. § 2000e-2(a)(1) (1994).

64. The first opinion to hold that Title VII prohibits harassment as a form of workplace discrimination arose in the racial harassment context. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The first Title VII sexual harassment case was Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976). In *Williams*, the court held, without actually using the term "sexual harassment," that a supervisor's repeated harassment and humiliation of the plaintiff after she refused his sexual advances constituted a violation of Title VII. *Id.* at 657-58.

65. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1995). Although the EEOC has not been granted the authority to promulgate substantive regulations, the courts consistently have relied on the agency's *Guidelines* in interpreting Title VII.

66. 477 U.S. 57 (1986).

most recent pronouncement on harassment law, the Court unanimously reaffirmed that Title VII's prohibition on gender discrimination incorporates a ban on gender-based harassment.[67]

Perhaps the most widely discussed form of gender-based harassment is *sexual* harassment, defined by the EEOC as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,"[68] directed at members of one gender and not the other. Illegal sexual harassment exists in two distinct forms. In a "quid pro quo" case, the target of the harassment, because of her gender, is coerced into performing an unwelcome sexual act as part of a bargain to obtain an employment benefit or avoid an employment disadvantage. Quid pro quo harassment is essentially the equivalent of extortion or blackmail, and, accordingly, it is not subject to First Amendment protection.[69]

The second form of sexual harassment prohibited under the *Guidelines*, "hostile environment" harassment, exists when an employee, in contrast to similarly situated workers of another gender, is subjected to a workplace so "permeated with discriminatory intimidation, ridicule, and insult that [it] is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."[70]

Other forms of gender-based workplace harassment that are not sexual in nature also may constitute illegal discrimination. The EEOC has recognized that gender-specific abuse is actionable if it is sufficiently severe or pervasive to create a hostile work environment.[71] Recently, in *Harris v. Forklift Systems, Inc.*, the Court upheld the imposition of Title VII liability based in part on a supervisor's abusive but nonsexual comments to a woman subordinate that were based specifically on her gender, such as "You're a woman, what do you know"; "We need a man [to do your job]"; and "[You're] a dumb ass woman."[72]

Although gender-specific harassment[73] and gender-based sexual harassment are conceptually different, most courts and numerous commentators have failed

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67. Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).

68. 29 C.F.R. § 1604.11(a).

69. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 397-98 (1987) (Scalia, J., dissenting).

70. *Harris*, 114 S. Ct. at 370 (citations omitted). As these definitions make plain, quid pro quo and hostile environment claims may arise in a single sexual harassment case.

71. In its *Policy Guidance on Sexual Harassment*, the EEOC notes that "sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin, or religion) if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex." *EEOC Policy Guidance on Sexual Harassment*, 8 Fair Empl. Prac. Man. (BNA) 405:6692 (Mar. 19, 1990). The EEOC proposed new guidelines covering nonsexual gender-based harassment in 1993, but these guidelines have not yet been adopted. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (1993).

72. *Harris*, 114 S. Ct. at 369.

73. This term originates from the Brief Amici Curiae of the NAACP Legal Defense and Educational Fund and the National Council of Jewish Women, submitted in support of petitioner in *Harris*, 114 S. Ct. 367 (1993) (No. 92-1168). To date, neither the courts nor the EEOC has articulated a definitive term applicable to this form of workplace harassment.

to distinguish between the two, referring to both as "sexual." This confusion may stem in part from the frequency with which both forms of harassment arise in a single case, and from the identical standard of proof, the creation of a hostile environment, which applies to both.

B. THE ELEMENTS OF A HOSTILE ENVIRONMENT HARASSMENT CLAIM

Professors Browne and Volokh perpetuate the widespread misunderstanding of hostile environment harassment law by consistently referring to it as a prohibition on all speech that subjectively "offends" the listener, and by inventing a misleading parade of horribles designed to create the impression that harassment law censors all speech that fails a politically correct litmus test.[74] But in fact, as an examination of the requisite elements of a hostile evironment harassment claim demonstrates, the "mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate Title VII."[75]

1. Harassment Must Be Gender-Based

A victim of workplace harassment must show that, but for her gender, she would not have been the object of harassment.[76] When sexual harassment or gender-specific abuse is directed at workers of both sexes, it does not constitute discrimination on the basis of sex and is therefore not actionable under Title VII. For example, an early, often-cited case indicates that when a bisexual supervisor sexually harasses both male and female subordinates, no gender discrimination occurs, because "the insistence upon sexual favors . . . would apply to male and female employees alike."[77]

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74. *See* Browne, *supra* note 8, at 521, 530, 535, 539-40, 542-43, 548, 550. In similar vein, Browne incorrectly characterizes the law as an attempt to "decrease the amount of offense suffered by the groups intended to be protected" and to " 'prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers'," *id.* at 543, 504 n. 153, describes Title VII supporters as those who "advocate eliminating First Amendment protection for offensive speech," *id.* at 543, and elsewhere states, "[a] mighty conviction that 'women should not be sex objects' or that 'bigotry is bad' is an insufficient basis for attempting to outlaw expressions of those views." *Id.* at 536. Professor Volokh's article contains many similar misstatements. *See* Volokh, *supra* note 8, at 1809, *passim* (noting that harassment law threatens employers with liability if they do not punish employees who "say offensive things").

75. *Harris*, 114 S. Ct. at 370.

76. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986); 29 C.F.R. § 1604.11 (1995). Although this article focuses on gender-based harassment, the same elements are applicable to hostile environment claims based on race, color, religion, or national origin.

77. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *see also* Sheehan v. Purolator, Inc., 839 F.2d 99, 105-06 (2d Cir.) (reaching same conclusion in case involving nonsexual gender-specific abuse), *cert. denied*, 488 U.S. 891 (1988); Gilliam v. City of Omaha, 524 F.2d 1013, 1016 (8th Cir. 1975) (same). This line of cases creates an anomalous liability gap by barring a harassment victim from legal recourse simply because her harasser happens to be bisexual. It is difficult to believe that Congress intended to hand bisexual persons a free pass to engage in workplace abuse. The obstacle created by the law's gender-based requirement in the case of a bisexual harasser requires substantial attention that is beyond the scope of this article.

2. The Employer or Its Agent Must Perpetrate or Condone the Harassment

Title VII applies to employers, not to the individual personnel who engage in harassing or otherwise discriminatory behavior.[78] As a result, hostile environment liability may be imposed on an employer only if it had sufficient notice of its occurrence and, despite this fact, failed to take prompt and effective remedial action.[79]

The requisite notice depends on the identity of the harasser. If the harasser is a supervisor, acting within the actual or apparent scope of his authority, notice is automatically imputed to the employer.[80] If the harasser is a nonmanagement employee, the courts generally impute notice to the employer only when a supervisor or other agent knew or should have known of the harassment.[81]

Once an employer has adequate notice, it may avoid liability by taking remedial action that is reasonably calculated to end the harassment.[82] Typically, this would include conducting an investigation of the harassment allegations[83] and, if they are substantiated, disciplining the harasser. Appropriate disciplinary action varies on a case-by-case basis and may range from a warning to termination.

Title VII hostile environment liability therefore lies only when the employer's authority is used to perpetrate the harassment, or when the employer implicitly condones the harassment because it has notice and fails to take corrective action.

3. Harassment Must Be Severe or Pervasive

Harassment will trigger Title VII liability only if it is "sufficiently severe or pervasive to alter the [terms, privileges, or] conditions of [the target's] employment and creates an abusive working environment."[84] The required showing of

78. 42 U.S.C. § 2000e-2(a)(1) (1994).

79. *Vinson*, 477 U.S. at 66-72; 29 C.F.R. § 1604.11(d). An employer may be held liable without notice only when he provides no reasonable avenue for a victim to report a complaint. *See, e.g.*, Karibian v. Columbia Univ., 14 F.3d 773, 779-80 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

80. *See, e.g.*, *Karibian*, 14 F.3d at 780. In cases involving quid pro quo harassment, in contrast, employers are strictly liable for the acts of their employees. *See, e.g.*, *id.* at 777.

81. *See, e.g.*, Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 63-64 (2d Cir. 1992).

82. *See, e.g.*, Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

83. Some courts have held that remedial action is insufficient if no investigation occurs. *See, e.g.*, Davis v. Tri-State Mack Distrib., Inc., 981 F.2d 340, 343, 344 n.2 (8th Cir. 1991).

84. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). To be actionable, sexual harassment must have "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Employment Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1995).

The courts have interpreted the "terms, conditions or privileges of employment" quite broadly. According to the Supreme Court, the phrase "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." Harris v. Forklift Sys., Inc., 114 S. Ct. 367,

severity varies inversely with the pervasiveness of the abuse. The more pervasive or frequently occurring the harassment is, the less severe or serious it need be to support liability, and vice versa.[85]

The *EEOC Policy Guidance on Sexual Harassment* acknowledges that, as a general rule, verbal harassment is inherently less severe than physical harassment.[86] For this reason, a single instance of gender-based abusive speech will rarely, if ever, be sufficiently "severe" to support the imposition of liability.[87] Because verbal harassment tends to fall low on the severity scale, it is likely to be actionable only when it is pervasive and permeates the work environment of employees of only one gender. The courts have acted in accordance with this rule and have not imposed Title VII liability on the basis of a few, occasional incidents of verbal harassment.[88]

4. Harassment Must Be Unwelcome to Its Target

Another prerequisite for imposition of Title VII hostile environment liability is that the harassment must be "unwelcome."[89] Harassment is unwelcome if the victim did not invite it and regards it as offensive or undesirable.[90] This requirement evolved out of a recognition that consensual sexual relationships can occur in the workplace; even conduct or speech that discriminates, by creating a different environment for members of one gender and not the other, is not illegal if the target appreciates it and does not view it as harmful.

The unwelcomeness requirement protects employers from liability unless and until a victim indicates that she wants the harassment to stop. A victim may communicate unwelcomeness by directly informing her harasser or an appropriate supervisor that particular actions or comments are unwelcome, or she may do so through her conduct, by removing offensive pictures, by erasing or

370 (1993) (citations omitted). Thus, harassment need not affect the terms set forth in a worker's employment contract to be actionable. It is enough if the harassment has such an adverse effect on a worker's regular job conditions that it creates an abusive work environment.

85. *EEOC Policy Guidance on Sexual Harassment*, *supra* note 71, at 405:6689-91.

86. *Id.* at 405:6691 ("More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.").

87. It is possible that a single, credible threat of rape would be sufficient to meet the hostile environment severity requirement. For purposes of free speech analysis, however, such a statement constitutes a criminal threat and is not entitled to First Amendment protection.

88. Courts have held that harassment is not sufficiently severe or pervasive to support a hostile environment when it consists of any of the following: an offensive racial or gender epithet, *Harris*, 114 S. Ct. at 370; gender-related jokes and occasional teasing, Hallquist v. Max Fish Plumbing & Heating Co., 46 Fair Empl. Prac. Cas. (BNA) 1855, 1860 (D. Mass. 1987); two requests for dates by coworkers, Robinson v. Thornburgh, 54 Fair Empl. Prac. Cas. (BNA) 324, 326 (D.D.C. 1990); an obscene message from coworkers and a sexual solicitation from another coworker, Freedman v. American Standard, 41 Fair Empl. Prac. Cas. (BNA) 471, 476 (D.N.J. 1986); one sexual invitation, Sapp v. City of Warner Robins, 655 F. Supp. 1043, 1049 (M.D. Ga. 1987); and casual or sporadic racist comments, Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981).

89. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); 29 C.F.R. § 1604.11(a) (1995).

90. *See, e.g.*, Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564-65 (8th Cir. 1992) (analyzing "unwelcomeness" as element of quid pro quo claim); Chamberlain v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (same).

obliterating graffiti, by complaining about the speech, or by consistently failing to respond to her harasser's suggestive comments.[91] When a victim's attempts to communicate unwelcomeness to her harasser are not sufficiently clear and direct, her hostile environment claim will fail.[92] Title VII thus regulates harassing speech only when the harasser clearly has been put on notice that his target wishes him to stop—and he refuses to do so.

A limited exception exists for certain extreme forms of harassment, which are so patently degrading that the courts presume unwelcomeness and do not require specific proof on this issue. For example, when a supervisor pretended to masturbate and ejaculate behind a female employee's back, the court held the actions to be of "such a degrading nature that no ordinary person would welcome them," and required no affirmative proof of unwelcomeness.[93]

5. Harassment Must Create a Subjectively and Objectively Hostile Work Environment

Finally, hostile environment harassment law requires the victim to prove not only that she personally found that the harassment created a hostile or abusive work environment, but also that a "reasonable person" would agree with her.[94] The reasonableness requirement ensures that gender-based abusive or sexual acts are not restricted whenever they offend the fragile sensibilities of a hypersensitive listener, but only when they rise to an objectively abusive level.

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91. *See Vinson*, 477 U.S. at 68 (holding that welcomeness turns on "whether [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome"). The employer may then avoid liability by taking prompt and effective action to stop future incidents of harassment. *See supra* text accompanying notes 78-83. For an extensive report of fact patterns that have been held to either satisfy or fail Title VII's unwelcomeness requirement, see Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 513-20 (1994).

92. *See, e.g.*, Kouri v. Liberian Servs., 55 Fair Empl. Prac. Cas. (BNA) 124 (E.D. Va. 1991), *cert. denied*, 506 U.S. 865 (1992). Many courts have applied an extremely narrow definition of the welcomeness requirement. In *Kouri*, for example, Karen Kouri worked as a secretary for her company's personnel director, James Todd. Todd harassed Kouri continuously over a six-month period, during which he regularly insisted on escorting her when she needed to go to the bathroom or to her car, frequently tried to hug or kiss her, gave her back rubs at the office, repeatedly insisted on driving her home and entering her house and bedroom, and accused her of having affairs with other coworkers. Kouri attempted to stop this harassment by signalling to Todd that she was happily married. She arranged for her husband to send her flowers and come to the office to visit her. In the court's view, Ms. Kouri's actions were "hopelessly indirect," and it ruled against her, holding that she had failed to prove that she did not welcome her boss's actions. *See also* Sauers v. Salt Lake County, 1 F.3d 1122, 1125-27 (10th Cir. 1993) (finding conduct not unwelcome when plaintiff only viewed it as "disgusting and degrading"); Tindall v. Housing Auth., 55 Fair Empl. Prac. Cas. (BNA) 22, 26 (W.D. Ark. 1991) (finding conduct not unwelcome when plaintiff kept allegedly offensive cartoon and freely joined in sexual jokes with coworkers); Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315, 1319 (D.N.J. 1983) (finding conduct not unwelcome when no evidence that plaintiff objected to language used on floor of plant); Gan v. Kepro Circuit Sys., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982) (finding conduct not unwelcome when plaintiff herself used profane and sexually suggestive language).

93. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 53 Fair Empl. Prac. Cas. (BNA) 1148, 1150 (N.D.N.Y. 1990).

94. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).

Taken together, these five proof requirements create a concrete definition of illegal gender-specific abuse and gender-based sexual harassment, and they focus the law's regulatory reach on its most objectively extreme, persistent, and unwelcome forms. Viewed against this background, it is clear that, contrary to Professor Browne's suggestion, the sole statement, "Women do not belong in the medical profession; they should stay home and make babies!" does not constitute "sexual harassment in violation of Title VII."[95] A complaint based on such a statement, standing alone, could not survive a motion to dismiss for failure to state a claim.[96]

C. THE LOW RISK OF OVERBROAD ENFORCEMENT AND CHILLING EFFECT

Because Professors Browne and Volokh fail to understand the elements of a hostile environment claim, they conclude that harassment law prohibits all offensive speech. They then argue that the legal definition of workplace harassment is so unclear that it is constitutionally impermissible. In their view, this vague definition enables the courts to engage in "overbroad" enforcement by outlawing speech that should be protected, and it encourages employers to "chill" workplace speech by engaging in widespread censorship to avoid litigation.[97] But as the following discussion demonstrates, neither of these potential threats to the First Amendment has been realized.

1. Harassment Law and the First Amendment Overbreadth Doctrine

According to current Supreme Court doctrine, a regulation of expression must be struck down as overbroad if, in addition to its constitutionally permis-

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95. Browne, *supra* note 8, at 481.

96. Browne offers no evidence that male workers were free from analogous hostile comments, that the comment was made or condoned by the target's supervisor or boss, or that it was "unwelcome" to the target (the listener might well agree and wish her financial status allowed her to stay home with her children). This single comment fails the pervasiveness test, and pursuant to applicable case law it is not severe. Finally, even if the listener personally felt that the comment was sufficiently abusive to alter her work environment, it would be hard to find a "reasonable person" to agree with her.

Professor Browne's other hypotheticals are similarly flawed. In one, an employer attempts to comply with Title VII by directing his workers not to use any form of profanity in the presence of a woman. Browne, *supra* note 8, at 488. This rule appears old-fashioned and paternalistic, and Browne condemns it as based on "just the sort of stereotype [of women being more easily offended than men] that Title VII was intended to erase." *Id.* But all of this has little to do with the requirements of hostile environment harassment law. As Professor Browne himself concedes, "Title VII is not a 'clean language act,' " *id.* at 492 (quoting Katz v. Doyle, 709 F.2d 251, 256 (4th Cir. 1983)), and the law does not prohibit profanity in the workplace, unless it meets all five of the stringent elements of a discrimination claim. A more appropriate hypothetical would be a situation in which every day women workers are subjected to insulting profanity based on their gender, with their coworkers repeatedly referring to them as "bitch," "cunt," or "tits," while no such gender-based profanity is directed at their male counterparts.

97. Browne, *supra* note 8, at 501-10; Volokh, *supra* note 8, at 1812. Professor Sangree also criticizes Browne's and Volokh's arguments regarding overbreadth and chilling effect. *See* Sangree, *supra* note 7, at 528-32. In her critique, however, Sangree conflates these two conceptually distinct issues. The overbreadth doctrine focuses on potential overenforcement by courts in the context of a litigated case. "Chilling effect" focuses on potential prelitigation overenforcement by employers, through harassment policies and the like, designed to prevent a challenge from reaching a court in the first place.

sible applications, the courts might interpret it to restrict otherwise protected speech.[98] All speech restrictions have the potential for some degree of overbroad enforcement;[99] it is only when this risk is "substantial" that it violates the Constitution.[100] Professors Browne and Volokh argue that workplace harassment law creates precisely this risk, and therefore must be significantly modified[101] or invalidated in its entirety.[102]

Historically, overbreadth challenges have been brought immediately after a speech-restrictive law goes into effect, forcing the court to assess the risk of substantial overbreadth in the abstract. But such a theoretical analysis is not necessary in the context of Title VII's prohibitions on hostile environment harassment. Courts have enforced these restrictions for almost ten years without impeding First Amendment rights.[103] This ample, concrete enforcement record actually demonstrates that the courts have interpreted hostile environment harassment law far too narrowly, allowing a great deal of discriminatory speech (and conduct) to go unregulated. The primary danger, therefore, is not the one contemplated by Professors Browne and Volokh—that harassment law is enforced too broadly—but that it is enforced too narrowly.

Each of the following scenarios of harassing workplace speech has been held to be insufficiently severe or pervasive to support the imposition of hostile environment liability: a male coworker's four requests over a four-month period that plaintiff have sex with him;[104] a manager's request that plaintiff sit on his face;[105] a male coworker's calling a plaintiff a "cunt" and a "douche bag cunt," shaking his crotch at her, and occasionally giving her "the finger";[106] and a supervisor's three sexual propositions to a female attorney employed as the company's Manager of Equal Employment Opportunity Programs, including one suggestion that he take her to a hotel because she supposedly needed the "comfort of a man."[107]

Even when hostile environment harassment has involved physical touching as well as verbal abuse, the courts have interpreted the regulatory reach of harassment law quite narrowly. For example, one court held that harassment was not sufficiently severe or pervasive to support liability when, over an

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98. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

99. Even a highly specific statute, such as one outlawing threats to kill the President, holds some risk of overbroad enforcement, perhaps against someone who claims that his "threat" was made in jest.

100. *Broadrick*, 413 U.S. at 615 (stating that "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

101. *See* Volokh, *supra* note 8, at 1843-70.

102. *See* Browne, *supra* note 8, at 484.

103. *See infra* text accompanying notes 118-27.

104. Hollis v. Fleetguard, Inc., 668 F. Supp. 631, 636 (M.D. Tenn. 1987), *aff'd*, 848 F.2d 191 (6th Cir. 1988).

105. Wolf v. Burum, No. 88-1233-C, 1990 WL 81219, at *7 (D. Kan. May 16, 1990).

106. Reynolds v. Atlantic City Convention Ctr. Auth., 53 Fair Empl. Prac. Cas. (BNA) 1852, 1866 (D.N.J. 1990), *aff'd mem.*, 925 F.2d 419 (3d Cir. 1991).

107. Jones v. Flagship Int'l, 793 F.2d 714, 720-21 (5th Cir. 1986); *see also supra* text accompanying notes 51-54.

eight-month period, a male quality control inspector requested several times per week that a female coworker "suck him" or "give him head," repeatedly grabbed her crotch and breasts, once pointed to her crotch and stated, "Give me some of that stuff," and, in addition, another male inspector exposed his penis and placed it in her hand.[108] In another case, a sheriff made numerous sexual advances toward and once raped a county ambulance dispatcher, but the court held that the harassment was not sufficiently severe or pervasive.[109] A court refused to impose liability when a supervisor repeatedly requested that an automobile mechanic trainee go out on dates with him and suggested that he give her a "rubdown," and coworkers repeatedly slapped her on the buttocks and told her that they thought she must "moan and groan" while having sex.[110] Finally, a court found in favor of the defendant when, over the course of approximately two months, a supervisor touched a female security guard's buttocks, stating, "I'm going to get you yet," grabbed her breasts and said, "I got you," and subjected her to several threats of physical violence and verbal abuse.[111]

As these cases demonstrate, Title VII's restrictions on workplace harassment hardly present a situation of "overbreadth run amok," as one commentator proclaims.[112] Instead, they show that the scope of judicial enforcement has been excessively restrained,[113] and many lower courts, like Professors Browne and Volokh, have failed to fathom the seriousness of the harm inflicted by discriminatory workplace harassment, whether verbal or physical in nature. The results reached in many of these cases reveal the deeply troubling fact that the lower courts are failing to provide women workers with the protection to which they are legally entitled, and instead are creating obstacles to workplace equality.

Admittedly, as Professors Browne and Volokh point out, several far less serious workplace harassment complaints have been filed, and a small number of these have even succeeded at trial. These cases invite ridicule (and a

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108. Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1565-66 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991).

109. Staton v. Maries County, 868 F.2d 996, 997-98 (8th Cir. 1989).

110. Scott v. Sears, Roebuck & Co., 798 F.2d 210, 211-14 (7th Cir. 1986).

111. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1410-11 (10th Cir. 1987).

112. Gerard, *supra* note 8, at 1028.

113. This pattern of narrow judicial enforcement contrasts sharply with the broad administrative enforcement of university hate speech codes. For example, the University of Michigan speech code was applied to punish a social work graduate student who stated in class that he believed that homosexuality was a disease, and that he intended to develop a counseling plan for changing gay clients into heterosexuals; a Business School student who read a homophobic limerick in an entrepreneurship class public speaking exercise; and a dentistry student who stated, in a class reputed to be especially tough, that he had heard that minorities had a difficult time in the course and were not treated fairly. *See* Doe v. University of Mich., 721 F. Supp. 852, 865-66 (E.D. Mich. 1989). In all three of the First Amendment challenges brought against university hate speech codes, the courts have struck them down as unconstitutionally overbroad. *See* Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1185 (6th Cir. 1995); UWM Post, Inc. v. Board of Regents Univ. of Wis., 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe*, 721 F. Supp. at 867. For a more extensive discussion of the enforcement history of campus speech codes, see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 528.

disproportionate amount of media coverage), but they are the exceptions to the rule. If the constitutionality of any legal principle was determined on the basis of the most frivolous filings and most bizarre judicial misapplications, little legislation would survive scrutiny. What matters here is that in the vast majority of cases, the judiciary is not engaging in overbroad enforcement, but instead is failing to impose liability on employers who create discriminatory, adverse job conditions for women workers on the basis of their gender.

2. Harassment Law and the Danger of a Chilling Effect

Professors Browne and Volokh further argue that hostile environment harassment law has a significant chilling effect, suppressing not only the discriminatory expression that the law targets, but also protected expression that is beyond its intended scope. They assert that this chilling effect is exacerbated by the fact that Title VII imposes liability on employers rather than on individual speakers; an employer is more likely to be concerned about its potential liability than about allowing employees to speak freely. Professor Browne maintains that the result has been "a relentless campaign of government-mandated workplace censorship,"[114] and asserts that "[t]he rational employer . . . does not prohibit merely the expression of actually prohibited language; it prohibits, and punishes, all expression that could even arguably be viewed as impermissible."[115]

But this claim of massive censorship is hard to square with the ever-increasing number of harassment suits that continue to be filed. Surveys show that gender-based harassment persists even though the threat of Title VII liability has hung over employers' heads for almost ten years.[116] As Professor Sangree points out, "the fact that employers have generally not banned all nonwork-related speech from workplaces, despite their power to do so,[117] demonstrates that employers recognize the potentially adverse impact of speech restrictions on employee morale."[118]

Professor Browne challenges this assessment, claiming that the persistence of workplace harassment is irrelevant because "no matter what efforts employers make, they are not going to be completely effective at preventing employees from offending each other."[119] If, however, employers were overregulating, and only disobedient employees were engaging in harassing speech, one should see more employers asserting, as a potential defense to liability, that they made their best efforts to prevent harassment by drafting and enforcing draconian, speech-restrictive antiharassment policies. There is no evidence of such an increase.

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114. Kingsley Browne, *Muzzling Sexually Hostile Speech*, LEGAL TIMES, Nov. 22, 1993, at 26.

115. Browne, *supra* note 8, at 505.

116. *See supra* text accompanying notes 16-25.

117. Employers could impose such a broad ban on employee speech consistent with the First Amendment because no state action would exist. *See supra* note 5.

118. Sangree, *supra* note 7, at 551.

119. Kingsley Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579, 584 (1995).

Even if we assume that employers are engaging in some degree of overregulation of employee speech, the problem cannot be resolved by modifying or eliminating hostile environment harassment law, because a chilling effect would still arise out of Title VII's clearly permissible prohibition on intentional discriminatory *conduct*.[120] When a worker brings a Title VII disparate treatment case, claiming that she was terminated, demoted, or subjected to some other adverse employment action based on her gender, she is required to prove that the alleged discriminatory conduct was intentional.[121] Typically, she does so through her employer's statements, and the admissibility of speech for this purpose is well settled.[122] The Court repeatedly has held that the First Amendment "does not prohibit the evidentiary use of speech . . . to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in . . . trials subject to evidentiary rules dealing with relevance, reliability, and the like."[123]

Thus, even if hostile environment harassment law were completely abolished and Title VII's reach were limited to cases of discriminatory workplace conduct, employers still would have an incentive to censor their workers' gender-based speech to eliminate potential complainants' principal source of proof of illegal intent. The potential for chilling expression therefore would still exist; retaining a cause of action for verbal hostile environment harassment does little to change this.

Finally, contrary to the assertions of Professors Browne and Volokh, an employer can easily create a narrow, speech-protective antiharassment policy that minimizes any chilling effect. One strategy is to explain to workers that they may make gender-specific or sexual comments until they receive an indication from a particular employee that such statements are unwelcome. Employers can provide training on how to recognize expressions of unwelcomeness, which should include both the suggestion that silence may in some circumstances indicate unwelcomess and the suggestion that if a female employee's response is unclear, the best strategy is to *ask* how she feels. Once a worker has indicated that the speech is unwelcome, the speaker should be directed to either stop or set up a meeting with an in-house, designated EEO officer for

120. *See* Sangree, *supra* note 7, at 558.

121. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (setting forth elements of Title VII disparate treatment prima facie case); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (same).

122. For example, in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a woman who was denied partnership at an accounting firm challenged the decision as intentional sex discrimination in violation of Title VII. Her evidence of the firm's discriminatory intent included repeated comments by one partner that "he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers." *Id.* at 236. These statements were held admissible to prove illegal intent, and the Supreme Court relied on them (among other evidence) in holding in Ms. Hopkins' favor. *Id.* at 256-58.

123. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993). Professor Browne acknowledges that such evidence is admissible to prove discriminatory motive, provided it is more probative than prejudicial. Browne, *supra* note 8, at 545.

advice. The employer can regularly encourage workers to report immediately any incidents that they consider abusive or harassing and ensure that a victim-friendly grievance procedure exists. Complainants should be assured of anonymity and of a rapid investigation of their allegations. By educating workers about the scope of hostile work environment harassment law and by creating grievance procedures that allow effective responses to harassment complaints, an employer can protect itself from liability while allowing workers substantial breathing room for expression.

III. THE IMPORTANCE OF CONTEXT

The significance of context pervades First Amendment jurisprudence. Several categories of expression, such as those encompassed by the captive audience and time, place, and manner doctrines, are entitled to a lesser degree of constitutional protection not based on the content of the speech, but on the physical, temporal, or interpersonal context that surrounds it.[124] In some situations, context is significant because it creates the potential for speech to inflict serious harm. Children in grade school learn that although the Constitution protects their right to shout falsely "Fire!" in the middle of the woods, they cannot do so in a crowded theater.[125] Both the physical context of a confined space and the interpersonal context of a crowd are important here; they convert otherwise protected speech into a "clear and present danger" to the audience and make government regulation of such expression constitutionally permissible.

Another important aspect of context is its role in determining an individual's expectation of privacy and related desire to be free from unwanted speech. In recognition of this context-driven expectation, the Court has developed a location-based continuum for regulating expression, ranging from maximum tolerance for speech restriction in places where a person's need for privacy is greatest, such as her home, to minimal tolerance in public fora such as parks, streets, and sidewalks.[126]

Professors Browne and Volokh analyze harassing expression in a vacuum,

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124. The First Amendment Free Speech Clause reads: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. Although it appears on its face to be an absolute ban on government regulation of expression, courts and commentators have read numerous exceptions into the Clause. In addition to the context-based exceptions noted above, other exceptions, such as obscenity, carve out limited categories of expression based on subject matter and remove them entirely from the scope of First Amendment protection.

125. In his famous hypothetical, Justice Holmes stated, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919). The version that is typically repeated in the popular press and numerous Supreme Court opinions has been modified to assume a *crowded* theater. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (White, J., concurring); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); Smith v. Collin, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of cert.).

126. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 471 (1980); Spence v. Washington, 418 U.S. 405, 412 (1974).

entirely divorced from its context. Consequently, they miss one of the most important aspects of the interplay between harassment law and the First Amendment: hostile environment harassing speech occurs in the workplace.[127] For purposes of First Amendment analysis, the workplace has two essential contextual components: a physical context, such as an office or a factory, and a less tangible interpersonal context, a hierarchy of authority that is symbolized by the "corporate ladder." These two contexts must be carefully explored to determine the appropriate scope of First Amendment protection for hostile environment harassing speech.

Professor Volokh's focus on content over context may stem from his fundamental failure to understand that the regulatory reach of hostile environment harassment law is generally limited to speech that occurs in the workplace.[128] And as described below, Professor Browne touches on the context issue only briefly, summarily concluding that "the term 'workplace' is not a talisman that extinguishes first amendment protections. . . . [W]orkers do not shed [their constitutional rights to freedom of speech] at the factory gate."[129] This statement is correct in its black and white terms, but it fails to recognize the existence of gray zones. Workers' free speech rights are not surrendered entirely on the job, but they are limited to some extent by physical and interpersonal contextual constraints.

A. THE PHYSICAL CONTEXT OF THE WORKPLACE

Whether the workplace is a factory, office, or construction site, it is a setting in which employees are typically unable to avoid gender-based harassing speech. Outside of the workplace, an individual has a far greater degree of choice, and in most instances can avoid erotic, pornographic, or gender-specific abusive expression. "Girlie" magazines typically are not openly displayed on newsstands; radios and television sets have power switches and channel chang-

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127. Of course, such speech also occurs in other contexts, such as the university campus, where similar issues have been raised and debated. *See infra* text accompanying notes 153-58. That debate, however, is beyond the scope of this article.

128. Professor Volokh claims that the idea that "a hostile work environment can be created by speech outside the workplace . . . is accepted as a matter of law." Volokh, *supra* note 8, at 1848. Neither of the two cases he cites supports his claim. In Ellison v. Brady, 924 F.2d 872, 874 (9th Cir. 1991), the court relied in part on a letter, mailed by a male employee to a woman worker at a job training site. Although the site was located away from the main office, it was still her workplace during the training period. In Bundy v. Jackson, 641 F.2d 934, 940 n.2 (D.C. Cir. 1981), the court relied in part on a telephone call made by a supervisor to a woman worker's home—in addition to numerous instances of abusive speech at the office. But this case was decided four years before the EEOC published its first *Guidelines* dealing with sexual harassment, and five years before the Supreme Court recognized a cause of action for a hostile work environment.

I have not been able to locate a single post-*Vinson* case in which extraworkplace speech was relied on to support a hostile environment claim, and I do not believe that any exist. If such a case arose, however, I would argue that consideration of the speech as support for the existence of a hostile work environment should turn on whether the harasser has supervisory or other workplace authority over the victim. *See infra* text accompanying notes 165-88.

129. Browne, *supra* note 8, at 516.

ers; and movies are rated for sex, violence, and profanity.[130] A pedestrian on the street is free to walk away[131] and avoid all but the initial impact of unwanted, gender-based abusive or sexually harassing expression; this may constitute a painful blow,[132] but at least additional rounds may be avoided.

The workplace is different. If pornography or gender-specific abusive slogans are openly displayed in areas that a female worker must frequent to perform her job, she loses the power to avoid such speech. When a woman must choose between routinely viewing gender-based demeaning or abusive expression and quitting her job, her choice can hardly be labelled a "free" one.

The Court has long recognized that physical context places limits on a person's ability to avoid unwanted speech. The "captive audience" doctrine evolved out of this recognition, and it creates a context-based balance between the listener's right to personal privacy and the speaker's right to express himself freely.[133] As a general rule, the doctrine gives priority to the speaker's rights over the listener's and dictates that if a listener is offended or otherwise harmed by speech, First Amendment principles require her to avoid it. Whenever possible, a person must walk away from speech that she does not wish to hear.[134] Any other rule would cede too much censorship power to the government and enable it to restrict otherwise protected speech solely on the basis of speculation that the targeted audience may be offended or unwilling to listen.[135]

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130. Some of these examples are borrowed from the Brief of the Women's Legal Defense Fund et al. as Amici Curiae in Support of Petitioner at 25 n.22, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168).

131. Such a person is in a situation similar to that of someone in a courthouse lobby who is confronted by a controversial political message, such as "fuck the draft." *See* Cohen v. California, 403 U.S. 15, 16, 21 (1971).

132. Lawrence, *supra* note 14, at 452 (discussing immediate and severe nature of harm inflicted by racist speech).

133. The right to personal privacy has been interpreted to include the right to be free from the intrusions of the outside world. It defines the limit of where the public domain ends and the individual one begins. Among other things, the right to personal privacy protects the individual from the intrusion of unwanted communication. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." Rowan v. United States Post Office Dep't, 397 U.S. 728, 734 (1970).

The conflict between freedom of speech and privacy also has arisen in a different but related context—that of the right to remain silent. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), for example, the Court held that the First Amendment prohibits public school officials from compelling the children of Jehovah's Witnesses to participate in a pledge of allegiance. The Court noted that coercing an individual to express patriotism would violate "the sphere of intellect and spirit" that the First Amendment "reserve[s] from all official control." *Id.* at 642. This decision and other related opinions indicate that the Free Speech Clause incorporates a right to privacy. For a comprehensive discussion of this issue, see Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U. L. REV. 153 (1972); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

134. *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); *Cohen*, 403 U.S. at 21-22.

135. *See* Street v. New York, 394 U.S. 576, 592 (1969); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). It is a fundamental tenet of First Amendment jurisprudence that one of the "function[s] of free speech under our system of government is to invite dispute. It may indeed best serve its high

But free speech interests are not always paramount in constitutional balancing. The captive audience doctrine permits limited regulation of expression in situations in which the targeted audience is not only unwilling to listen to speech but is also "captive," because she has no realistic way to avoid it. The theory here is that "the right of some people to hear what they want to hear, or to say what they want to say, must at times yield to the right of other people to avoid being forced to hear the speech."[136] For example, a municipality may regulate focused picketing in front of a residence, because the target resident is figuratively, if not literally, trapped and left with no ready means of avoiding the unwanted speech.[137]

The need to protect the privacy of a captive audience may be strongest when the speech in question intrudes into the unwilling listener's home, which the Court has described as "the last citadel of the tired, the weary, and the sick."[138] In *Rowan v. United States Post Office Dep't*,[139] the Court applied the captive audience doctrine to uphold a statute allowing the Postal Service, upon an individual resident's request, to stop a mail-order company from continuing to send him advertisements that he finds unacceptably sexual or provocative.[140] The Court held that the right of the resident to be free from unwelcome expression was stronger than the right of the mailer to communicate.[141] The captive audience doctrine also has been applied to prevent harassing telephone calls and other forms of communication from entering the home of an unwilling listener.[142] Victims of telephone harassment are not required to avoid such speech by hanging up on the caller or by screening calls through an answering machine or voice mail. As one court put it, "the right to express ideas does not

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purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello*, 337 U.S. at 4.

136. Strauss, *supra* note 7, at 13. Justice Douglas, one of the most stalwart defenders of free expression, repeatedly recognized the importance of the right of the listener to avoid unwelcome speech. In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion), for example, he stated that there is "no right to force [a] message upon those incapable of declining to receive it." *Id.* at 307 (Douglas, J., concurring); *see also* Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting).

137. *Frisby*, 487 U.S. at 486-87.

138. *Id.* at 484; Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970); Kovacs v. Cooper, 336 U.S. 77, 87 (1949). The "State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Frisby*, 487 U.S. at 484.

139. 397 U.S. at 728.

140. *Id.* at 729-30.

141. *Id.* at 736-37.

142. *See* Gormley v. Director, Conn. State Dep't of Probation, 632 F.2d 938, 941 (2d Cir.) (upholding constitutionality of antitelephone harassment statute), *cert. denied*, 449 U.S. 1023 (1980); Von Lusch v. C & P Telephone Co., 457 F. Supp. 814, 819 (D. Md. 1978) (same).

Similarly, in FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978), the Court held that the captive audience doctrine extends to protect the privacy of listeners in their homes from "indecent" radio broadcasts. I cite *Pacifica* not because I agree with its reasoning (the concept that a person is truly "captive" to a radio broadcast is hardly persuasive when she can so easily flick a switch and turn the radio off), but to give the reader a complete picture of existing doctrine in this area.

include the right to impose the communication of those ideas on an unwilling listener. . . . Citizens have a right to speak. Citizens also have a right not to be forced to listen."[143]

Professor Volokh argues that the captive audience doctrine applies only to speech that occurs in the home and therefore cannot encompass hostile environment harassing speech.[144] Nothing in First Amendment doctrine or principle, however, supports this view.[145] Although the Supreme Court has been reluctant to apply the captive audience doctrine to speech that occurs beyond the confines of a listener's home, it has done so in situations in which the listener is unable to avoid unwelcome speech without significant burden. For example, the captive audience doctrine allows regulation of: expression in public buses, because some riders have no realistic transportation alternative;[146] the speech of anti-choice protestors outside of abortion clinics, because a patient may be captive due to medical circumstance;[147] and the speech of perpetrators of telephone harassment, whether they are calling their victims at home, at the office, or elsewhere.[148] This expansion of the doctrine is a principled one; an individual's personal privacy and integrity does not stop at the door of her home, but travels, at least to some extent, with her. In a physical setting in which an individual is "captive," some carefully tailored regulation of expression should be permitted.

The same principle should protect targets of gender-specific abuse and sexually harassing speech in the workplace. Just as a resident is trapped in the home, a commuter is trapped on a bus, and a patient is trapped at a doctor's office, workers are trapped in the workplace and cannot realistically escape the harm inflicted by discriminatory harassing speech.

Professor Volokh claims that "employees are no more and no less captive to offensive [expression] than are people in the street."[149] Professor Browne

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143. *Von Lusch*, 457 F. Supp. at 819. Even in the home, however, limitations exist on the government's ability to regulate speech on the basis of the captive audience doctrine. In Consolidated Edison Co., Inc. v. Public Serv. Comm'n, 447 U.S. 530 (1980), the state Public Service Commission prohibited a utility from placing written inserts in its billing envelopes promoting nuclear power or other political matters. The utility challenged the restriction and the Court struck it down, holding that "even if a short exposure to [the utility company's] views may offend the sensibilities of some consumers, the ability of the government 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." *Id.* at 541.

144. Volokh, *supra* note 8, at 1833-40; *see also* Browne, *supra* note 8, at 516-20; Gerard, *supra* note 8, at 1031.

145. *See* Sangree, *supra* note 7, at 515-17.

146. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion).

147. *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2528 (1994); *id.* at 2533 (Stevens, J., dissenting in part).

148. Shackelford v. Shirley, 948 F.2d 935 (5th Cir. 1991); Thorne v. Bailey, 846 F.2d 241 (4th Cir.), *cert. denied*, 488 U.S. 984 (1988); Gormley v. Director, Conn. State Dep't of Probation, 632 F.2d 938 (2d Cir. 1980); United States v. Lampley, 573 F.2d 783 (3d Cir. 1978).

149. Volokh, *supra* note 8, at 1839. He elaborates, "[I]f captivity consists of an inability to avoid offensive speech, in today's society we are all 'captive' to profanity. We may walk away from someone who is using it, but we cannot avoid it altogether—we hear it wherever we go." *Id.* at 1840. This argument fails to recognize that degrees of "captivity" exist. The mere fact that a person walking down

suggests that workers constitute a captive audience in the workplace only if one believes that individuals lack free will, "have little control over their lives[,] and are thus 'captives' wherever they might be."[150] These arguments are particularly inaccurate in the case of working women, who because of the very discrimination that Title VII is designed to eliminate, face particularly daunting hurdles if they decide to leave their jobs and attempt to find new ones. To put it simply, women who cannot afford to be unemployed cannot avoid harassing speech in the workplace. Female employees therefore constitute the quintessential captive audience. The Constitution does not and should not force a woman into a Hobson's choice between quitting her job or facing a work environment in which she is subjected to severe or pervasive harassing speech that is not inflicted on her male counterparts.[151]

Because women are less captive outside of the workplace, hostile environment harassment law has only a limited application there. Once a potential harasser leaves work, he is free to express any view he wishes without interference, regardless of the extent to which it could harm members of one gender and not the other. Consider the example of a man who bumps into a female colleague in a bar across the street from the office. If he makes comments about her physical appearance, asks her to go out on a date, or asks her to have sex with him, she is likely to feel more free to choose whether to listen to him, engage in a conversation, or leave without risking her job. If she is indeed not captive, she may be required to bear the burden of avoiding speech when it is unwelcome. Hostile environment harassment law, as interpreted by the courts and the *EEOC Guidelines*, appropriately distinguishes between these two different contexts in regulating expression.[152]

In contrast, the broad university hate speech codes that have proliferated in recent years fail to make such context-based distinctions. A fierce debate has

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the street cannot fully insulate herself from abusive or offensive speech does not mean that she is in a situation comparable to that facing the worker in the workplace. The woman on the street can avoid all but the initial impact of abusive speech; the worker on the job cannot.

150. Browne, *supra* note 8, at 520.

151. Hostile environment harassment law also meets the other two requirements of the captive audience doctrine. First, the law leaves open ample alternative channels of communication by allowing individuals to engage in harassing speech: (1) with any listener in the workplace so long as his speech is neither so severe nor so pervasive that it affects the terms or conditions of her employment; (2) with any listener in any manner, unless and until she indicates that his speech is unwelcome; and (3) with any person, in any manner, outside of the workplace. *See supra* text accompanying notes 84-93. Because the law constitutes neither a complete ban on discriminatory workplace speech nor a restriction on speech outside of the workplace, it does not "permit[] majoritarian tastes completely to preclude a protected message from [reaching] a receptive, unoffended minority." FCC v. Pacifica Found., 438 U.S. 726, 776 (1978) (Brennan, J., dissenting). Second, the law is narrowly tailored. *See infra* text accompanying notes 240-54.

152. The situation changes when the harasser is the woman's supervisor. A supervisor has coercive power and authority over his workers, which makes them "captive" to his speech whether they are at the worksite or elsewhere. As a result, if a management-level harasser subjects one of his employees to sexual propositions or other gender-based abusive speech outside of the workplace, it is possible that such speech could form the basis for a hostile environment harassment claim.

raged among scholars over the constitutionality of these codes,[153] although they consistently have been struck down by the courts when challenged on First Amendment grounds.[154]

University hate speech codes typically are designed to regulate "words that wound"[155] the listener, regardless of the physical context in which the expression occurs. Their restrictions apply on every part of campus, at any time of day or night, to all aspects of university life.[156] Most of these codes do not distinguish between locations in which a student cannot avoid harassing speech, such as in the classroom when a professor directs it toward her,[157] and those in which she has greater ability to walk away, such as on the campus green or pathways.[158] Accordingly, workplace harassment law fits far more easily into the parameters of traditional First Amendment jurisprudence, and even those opposed to campus hate speech codes could still support regulation of verbal harassment on the job.

Of course, the "workplace" is not a single, uniform physical setting. Professor Sangree errs by analyzing the physical location of the job site as a monolithic entity.[159] Many work sites contain areas that are relatively avoidable, such

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153. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Marjorie Heins, *Banning Words: A Comment on "Words that Wound,"* 18 HARV. C.R.-C.L. L. REV. 585 (1983); Nan Hunter & Sylvia Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce in* American Booksellers Association v. Hudnut, 21 MICH. J.L. REF. 69 (1989); Lawrence, *supra* note 14; Strossen, *supra* note 113.

154. Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1185 (6th Cir. 1995); UWM Post, Inc. v. Board of Regents Univ. of Wis., 774 F. Supp. 1163, 1174 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852, 864 (E.D. Mich. 1989).

155. The phrase is Professor Delgado's. *See* Delgado, *supra* note 153.

156. *Dambrot*, 839 F. Supp. at 477; *UWM Post*, 774 F. Supp. at 1163; *Doe*, 721 F. Supp. at 852.

157. *See* Strossen, *supra* note 113, at 505-06. Similarly, a student cannot escape a peer's harassing speech when it occurs in her dorm room. In these situations, the university context is more directly analogous to that of the workplace, and some regulation of hate speech may be permissible on the basis of a captive audience argument.

158. The difference between the purpose of a university and that of a workplace also is significant for First Amendment analysis. The essential purpose of a university is to facilitate a vigorous exchange of ideas and robust debate. "[T]he classroom is peculiarly the marketplace of ideas." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). Several writers analyzing the First Amendment implications of campus hate speech codes have emphasized this point. *See, e.g.*, Strossen, *supra* note 113, at 502-03; Lawrence & Gunther, *Good Speech, Bad Speech*, STAN. LAW., Spring 1990, at 4, 7. *But see* J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 415-16 (1991) ("The university should properly be seen as a distinct social entity, whose commitment to enhancing the quality of speech justifies setting minimum standards for the manner of speech among its members.").

In contrast, "the workplace is for working"; although workers' speech is valuable and important, the workplace differs from a university in that it is not designed as a forum for employees to "discuss matters of great importance to themselves, perhaps to society as a whole, but not to the employer." May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1110 (7th Cir. 1986). A number of restrictions on the free speech rights of workers have been upheld on the ground that the purpose of the workplace is to get work done. For example, even government employees, whose speech on matters of public concern is generally subject to First Amendment protection from the state-as-employer, may not engage in expression if it "impairs . . . harmony among co-workers" or "interferes with the regular operation of the [employer's] enterprise." Rankin v. McPherson, 483 U.S. 378, 388 (1987).

159. Sangree, *supra* note 7, at 538-43.

as personal lockers or work stations. In these enclaves, the captivity argument diminishes in strength. If a woman worker has no work-related need to enter an area and can readily avoid it, then she cannot be deemed "captive" to expression that is verbalized or posted there.

The difficulty lies in defining what part of the workplace is avoidable. Consider the example of an individual's personal office. If the office belongs to a supervisor, it may be critically important for other workers to have access to it, either to accomplish their jobs effectively or to make personal connections that could result in a raise, promotion, or other job-related benefit. A rule of law that allows a supervisor to plaster the walls of his office with nude photographs of people of one gender, or gender-specific abusive slogans, presents workers of the targeted gender with an unacceptable choice: face abuse on the basis of your gender or avoid contact with management and weaken your position on the job.

The office of a nonsupervisory employee presents its own difficulties. If other workers need not enter his office, and his door is always closed, it would appear that female workers would not be captive in this portion of the workplace, and, therefore, First Amendment protections would be strong. Certainly it is a place where harassment law should not prohibit an employee from reading pornographic magazines or similar materials when he is alone. But if gender-based expression that otherwise would constitute harassment is allowed here, the office could rapidly turn into an "old boys club," in which male coworkers congregate, socialize, and cement the interpersonal bonds that can contribute substantially to one's ability to get ahead on the job. Once this happens, women have a work-related need to frequent this office, to make the same connections as their male counterparts, and then they *are* captive to any expression posted there. As these examples illustrate, no principled First Amendment line can be drawn at the doors of individual offices or cubicles within the workplace.

Perhaps the only context-sensitive line that can be drawn is one that sets off those spaces that are truly avoidable and are not gathering places that could be dominated by members of a single gender. This would entail creating a narrow exception for personal spaces that are sufficiently small that people cannot assemble in them. Such spaces might include a worker's private locker, a corner of his office that is not open to the gaze of those who must enter it, or the interior of his tool box. Because this kind of small, quintessentially private space within the larger physical context of the workplace may be readily avoided by those who wish to do so, an individual should be able to post pornography or other gender-based materials there for his own enjoyment.[160]

160. Of course, the precise definition of a sufficiently private space will vary from case to case. In Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994), for example, a fire fighter challenged a broad government-imposed ban on "sexually-oriented magazines, such as Playboy, Penthouse and Playgirl" in all work locations. *Id.* at 1434. But the fire station in question included dormitories divided into individual sleeping areas, where, in the absence of an emergency, fire fighters were free to read, watch television, and relax. As the court noted, these dormitories "offer sufficient privacy for a fire fighter to read a magazine ... without exposing the contents to an unwitting

To date, only one federal court has found that truly private expression can contribute to the formation of a gender-based hostile work environment. In that case, *Robinson v. Jacksonville Shipyards, Inc.*, the court's decision that the employer had illegally discriminated against the plaintiff was based in part on its findings that *Penthouse* and *Playboy* magazines were kept in desk drawers for male employees to read; an employee had a pornographic magazine in his personal possession; and pictures of nude or partially nude women were posted in employee lockers.[161] These pieces of evidence, however, comprised a tiny percentage of the overwhelming proof of a hostile environment that was presented at trial.[162] In the three other federal cases in which liability was imposed based on quasi-private harassment—specifically, the posting of pornographic pictures on *open* locker doors[163]—the courts also relied on enormous quantities of decidely public abusive expression and conduct. For example, Sue Waltman's suit against International Paper Company was based in part on sexually oriented calendars posted in employee lockers, which were kept open, but she also proved that her coworkers broadcasted obscenities about her over the company's public address system; an employee told her he would cut off her breast and shove it down her throat, and later dangled her over a stairwell more than thirty feet above the floor; one coworker pinched Ms. Waltman's breasts and another grabbed her thigh; her supervisor and others urged her to have sex with a coworker and made sexually suggestive comments like "I would like a piece of that" (referring to Ms. Waltman); a supervisor repeatedly pinched her buttocks with pliers and tried to put his hands in her back pockets; she received over thirty pornographic notes in her locker, including such statements as "Sue sucks everybody's dick," "Sue is a whore," "I am going to eat Sue's pussy," and "Sue has a nice pussy," and the words "Sue is a whore" were scratched in the paint on the elevator in eight-inch letters.[164]

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onlooker," and therefore the employees should be permitted to read anything they wish without government interference. *Id.* at 1434, 1442.

161. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1494-95 (M.D. Fla. 1991).

162. *See supra* text accompanying notes 39-44.

163. Andrews v. City of Philadelphia, 895 F.2d 1469, 1471-75 (3d Cir. 1990); Waltman v. International Paper Co., 875 F.2d 468, 470-71 (5th Cir. 1989); Arnold v. City of Seminole, 614 F. Supp. 853, 863 (E.D. Okla. 1985).

164. *Waltman*, 875 F.2d at 470-71. Similarly, when patrol officer Mona Arnold sued the City of Seminole, Oklahoma, her claim was based in part on a picture of a nude woman posted on a locker door—which was always kept open and was in full public view—under which was written Ms. Arnold's name and the words, "Do women make good cops—No-No-No." *Arnold*, 614 F. Supp. at 863. But Ms. Arnold also proved that pornographic cartoons directed at her were posted in the officers' quarters and in the station house for public view, including a picture of a man having sex with a goat with Ms. Arnold's name written over the goat; her fellow officers commented that women were not fit to be police officers, and one told her that he would harass her until she quit or was fired; numerous false officer misconduct complaints were filed against her; she was excluded from squad meetings that she was entitled to attend; a supervisor told Ms. Arnold that if she considered filing a discrimination suit against the city, her job and that of her husband would be in jeopardy; after Ms. Arnold's son was arrested and detained in jail, a lieutenant advised her that the incident was pure harassment; other officers parked Ms. Arnold's vehicle with the keys locked inside or within inches of another car so that

Thus, the courts appear to be well sensitized to the fact that reliance on private, gender-based disparagement or displays of pornography is improper under current doctrine. Still, these cases point to a need for the EEOC to distinguish expressly between genuinely private workplace expression and expression to which other employees are captive. Such an addition to the current *Guidelines* would ensure that equality of opportunity in the workplace can be promoted at the least possible expense to employees' free speech rights.

B. THE INTERPERSONAL CONTEXT OF THE WORKPLACE

Another factor that influences the First Amendment analysis of hostile environment harassing speech is the interpersonal context, or power hierarchy, of the workplace. The power disparity between harasser and targeted worker contributes to the worker's captivity and restricts her freedom to respond. In many situations, the woman worker knows that she must choose between listening in silence or responding and risking some adverse action by her employer. "Women and minorities often use the same word to describe individuals who confront . . . their bosses [about discrimination]—unemployed."[165]

This problem is exacerbated by the power structure of most workplaces, which continues to be largely sex-segregated. Although women now constitute nearly half of the U.S. workforce,[166] their relatively recent entry into many fields means that most of them hold jobs that fall in the low range of the professional hierarchy,[167] with men occupying the vast majority of supervisory and managerial positions.[168] For example, in March 1995, the Federal Glass

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it was impossible to open the door on the driver's side, rolled down her windows when it rained so the seats got wet, and once placed a dead, coiled snake in her police car; a memorandum was circulated to Ms. Arnold advising her that male officers would give up their compensation time to keep her from working; an officer pushed her across the room, knocking her into a file cabinet and bruising her; a coworker drew a face on a punching bag in the office exercise room with the words, "Mona hit me, hate me," and on another wrote, "Mona love me," and a lieutenant commented, "That's all women officers are good for"; coworkers removed her name from her mail shelf; and coworkers shoved a two-inch plug down the barrel of her shotgun. *Id.* at 865-66.

Finally, when officers Priscilla Kelsey-Andrews and Debra Conn sued the Philadelphia Police Department, they demonstrated that, in addition to the pictures of naked women displayed on a locker door that was usually open, women were referred to as "bitches," "cunts," "whores," and "bimbos"; photographs of women were placed in the drawer of a desk used by women officers; Ms. Andrews' uniform was coated with calcium oxide, and when she took it out of her police locker and put it on, she sustained skin injuries and had to be taken to a medical clinic for treatment; someone spit on Ms. Conn's coat and cut the band off her hat; and Ms. Andrews received anonymous harassing phone calls at her unlisted number. Kelsey-Andrews v. City of Philadelphia, No. 88-4101, 1988 U.S. Dist. LEXIS 14476, at *3-12 (E.D. Pa. Dec. 20, 1988), *vacated in part*, 895 F.2d 1469 (3d Cir. 1990).

165. Brief Amici Curiae of the NAACP Legal Defense and Education Fund, Inc. and the National Council of Jewish Women at 24, filed in support of Petitioner, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168).

166. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ANALYSIS OF THE UNITED STATES 396 (1994) [hereinafter STATISTICAL ABSTRACT].

167. Abrams, *supra* note 28, at 1204; Taub, *supra* note 28, at 346.

168. In addition to being severely underrepresented in managerial positions, women continue to be relegated to traditional "pink collar" jobs. For example, in 1972 women represented 99.1% of all

Ceiling Commission reported that although women make up 45.7% of the U.S. workforce, 97% of senior managers at the Fortune 1000 industrial corporations are white men, and only 5% of the top managers at Fortune 2000 industrial and service companies are women.[169] The picture is similar outside of the business community. A 1991 *National Law Journal* survey showed that women constituted 37% of the associates at the 250 largest U.S. law firms but only 11% of the partners.[170] The lower status of most women workers leads them to perceive their own position in the workplace as marginal or precarious,[171] making them especially reluctant to take employment-related risks.

Modern First Amendment jurisprudence has recognized that the power hierarchy present in the workplace justifies some regulation of management speech to ensure the adequate protection of workers' rights. Professor Browne admits that the Court "has endorsed a higher degree of regulation of speech in the workplace in limited situations," but he does not explore whether the special characteristics of the workplace justify restrictions on hostile environment harassing speech.[172] Instead, he summarily concludes that there is no "general governmental right to regulate speech in the workplace"; the government may limit certain forms of coercive speech to protect its interest in economic regulation, but harassing speech is not one of them.[173] Professor Volokh conducts an even more limited analysis, concluding that the Court treats workplace speech differently only if it falls within what he dubs the "threat-or-promise" exception: "both employees and employers have [full] First Amendment rights in the workplace, so long as the communications do not contain a threat of reprisal or force or promise of benefit."[174]

Neither commentator's conclusion is correct, as demonstrated by the regulation of workplace speech that the Court upheld in *NLRB v. Gissel Packing Co.*[175]

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secretaries. ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 4 (2d ed. 1994). In 1990, the percentage remained virtually the same—99%. *Id.* During the same time period, women went from 97.6% of all registered nurses to 94.5%. *Id.* (quoting BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKING WOMEN: A CHARTBOOK, BULLETIN 2385, at 43 (1991)). During the six-year period from 1983 to 1988, the number of women working in the traditionally male construction industry remained at a steady 2%. *Id.* And according to 1994 census data, women constitute only 3.9% of airplane pilots and navigators; 8.6% of engineers; 18.6% of architects; and just over 20% of lawyers and doctors. STATISTICAL ABSTRACT, *supra* note 166, at 407-09.

The persistence of gender segregation in the marketplace and the painfully slow rate at which women are infiltrating nontraditional areas of employment have contributed to the problem of gender-based harassment. Studies have shown that women in male-dominated occupations are harassed more frequently. Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433, 436 (1986).

169. Walsh, *supra* note 19, at H1.

170. Terry Pristin, *Firms Wake up to the Problem of Sex Harassment*, N.Y. TIMES, Oct. 14, 1994, at B18.

171. Abrams, *supra* note 28, at 1204-05.

172. Browne, *supra* note 8, at 513.

173. *Id.* at 513-14.

174. Volokh, *supra* note 8, at 1821 (footnotes omitted).

175. 395 U.S. 575 (1969).

During a union organizing drive, the company president stated that the company might close the plant in question if local workers elected the union and subsequently called a strike. The union lost the election and filed charges of unfair labor practices with the National Labor Relations Board. The Board deemed the employer's statement an unfair labor practice and set aside the election, ordering the company to bargain with the union. The company appealed, arguing that the finding violated its First Amendment free speech rights. The Supreme Court rejected this argument, holding that the coercive power hierarchy inherent in the workplace justified limited restriction of an employer's speech. As the Court put it:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely . . . [a]nd any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[176]

The Court thus held that limitations on an employer's freedom of expression are constitutionally permissible even when they extend beyond a quid pro quo scenario. Gissel Packing's president made no direct threat to close the plant or pursue other forms of economic reprisal if its employees voted in the union; his statements were explicitly predicated on the possibility of a future union decision to strike.[177] Specifically, the Court stated that during a union election drive, any employer predictions as to the effects of unionization on a company "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."[178] Accordingly, "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof."[179]

In a similar case, the Court held that an employer had unfairly interfered with a union election when, on the eve of the vote, it wrote a letter to its workers promising substantial new benefits: "The union can't put any of those . . . [benefits] in your envelope—only the Company can do that."[180] In finding that

176. *Id.* at 617.

177. In addition, it was undisputed that the president's statements were honest expressions of his opinion about the economic impact that a union-engineered strike would have on the company. The Court's holding reflects its belief that, in a context of economic dependence, even factually correct statements can be interpreted as threatening or coercive, and so may impermissibly interfere with employees' rights.

178. *Gissel Packing*, 395 U.S. at 618.

179. *Id.* at 618-19.

180. NLRB v. Exchange Parts Co., 375 U.S. 405, 409-10 & n.3 (1964).

the promise of benefits violated the National Labor Relations Act, the Court emphasized the contextual power hierarchy of the workplace:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.[181]

Although the *Gissel Packing* and *Exchange Parts* cases do not convert the workplace into an enclave where the First Amendment does not apply, they recognize that free speech analysis must be sensitive to the coercive interpersonal context that exists on the job.[182] This context deserves similar recognition in the case of unwelcome gender-based harassing speech.[183] As Professor Balkin has suggested, "Certainly, if employer-employee relations involve sufficient coercion that we can justify regulation in other contexts, then this coercion does not suddenly vanish when the issue is submission to racist or sexist speech."[184] His point is well illustrated by a study that showed that 24% of victims surveyed were fired because they complained about sexual harassment.[185]

Other studies also support the theory that the coercive environment of the workplace makes most women reluctant to confront their harassers directly. An analysis of ten studies of sexual harassment in the workplace showed that a median of 41% of harassment victims responded by avoiding or ignoring it, and an additional 24% tried to defuse the situation through indirect strategies such as joking or stalling. Twenty-three percent used some form of negotiation, such as requesting that the harasser stop. Only 10% responded with confrontation, including telling the harasser to stop or making a formal complaint.[186]

In sum, both the physical and the interpersonal contexts of the workplace create special pressures on women workers, making them captive to harassers' hostile and abusive speech. Here, as in other situations recognized by the courts,

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181. *Id.* at 409.

182. Commentators have noted that the *Gissel* Court clearly distinguished the workplace election setting from that of political elections for purposes of First Amendment analysis. Sangree, *supra* note 7, at 541.

183. The fighting words doctrine is another example of First Amendment theory that turns on the importance of "interpersonal context." The narrowly limited doctrine permits regulation of expression in a context in which it has "a direct tendency to cause acts of violence by the person to whom, individually [it is] addressed." Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); *see also* Gooding v. Wilson, 405 U.S. 518 (1972).

184. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 424.

185. WWI, A PROFILE, *supra* note 23.

186. James Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 SOCIOL. & SOCIAL RES. 3, 5 (1989). A recent survey conducted by *Working Woman* magazine showed that the most common tactic, used by 46% of women victims, is trying to ignore the problem. Among those who had been harassed, 40% told the harasser to stop and only 26% reported the harassment. Ronni Sandroff, *Sexual Harassment: The Inside Story*, WORKING WOMAN, June 1992, at 50.

the context in which the speech occurs reduces the strength of First Amendment protections.

C. VIEWPOINT NEUTRALITY AND HARASSING SPEECH

One could argue, as do Professors Browne and Volokh, that the deference given to context in First Amendment jurisprudence is never sufficient to overcome the requirement that restrictions on expression be viewpoint neutral.[187] The argument against viewpoint-based regulation of speech is that it invites abusive enforcement by allowing officials to censor only expression critical of the state and thus distort the marketplace of ideas. Courts and commentators frequently articulate the principle that viewpoint-discriminatory regulations of expression are more constitutionally suspect than those that are viewpoint neutral.[188]

I agree with Professors Browne and Volokh that Title VII's restrictions on hostile environment harassment are viewpoint discriminatory.[189] The law prohibits expression only if it voices the view that women and men should be treated differently. As Professor Volokh puts it:

> One person in the lunch room may speak eloquently and loudly about how women are equal to men, and harassment law will not stop him. But when another tries to respond that women are inferior—belong in the home, are unreliable during their menstrual periods, or should not be allowed on the police force—harassment law steps in.[190]

By restricting expression of only one point of view, the law does exactly what the viewpoint-neutrality requirement was designed to prevent: it distorts the underlying debate on the issue of gender equality.[191]

Despite its repeated endorsements of the viewpoint-neutrality principle, how-

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187. Browne, *supra* note 8, at 518-19, 521-25; Volokh, *supra* note 8, at 1840-43, *passim*.

188. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976) (stating that state's "regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator").

189. The restrictions also are *content* discriminatory. Workplace harassment law only regulates speech related to certain subjects, such as gender, race, or religion, and not others, such as hair color or weight. The focus of First Amendment jurisprudence has shifted from a prohibition on *content* discrimination, in which a regulation authorizes differential treatment based on the subject matter of speech, to a prohibition on *viewpoint* discrimination, in which a regulation allows expression of a particular viewpoint on a subject while allowing related, rival ideas to go unrestricted. For a thorough analysis of this shift in emphasis, see Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

190. Volokh, *supra* note 8, at 1854-55.

191. Professor Sangree asserts that even an employment discrimination law targeted exclusively at conduct, rather than speech, would not be viewpoint neutral. Sangree, *supra* note 7, at 522-28. By definition, gender-based discriminatory conduct expresses, directly or indirectly, the message that the actor or speaker believes the target worker is different and inferior, either because women are not good workers, because women should remain in the home, or because women exist only as sexual toys for men's pleasure. Professor Sangree argues that if hostile environment harassment law is a constitutionally impermissible restriction on speech, then so must be the entirety of employment discrimination law. *See* Sangree, *supra* note 7, at 465, 557-58.

ever, the Court has occasionally departed from it. In applying the captive audience doctrine, for example, the Court has approved several restrictions on expression that are viewpoint discriminatory. In *Madsen v. Women's Health Center, Inc.*,[192] the Court upheld portions of an injunction that prohibited antiabortion protestors from entering a thirty-six foot buffer zone around a clinic's entrances and driveway. The injunction was directed solely at the expression of antiabortion protestors, and it placed no restrictions on potential speech by prochoice activists.[193] In *Rowan v. United States Post Office Department*,[194] the Court upheld a statute that allowed the Postal Service to prohibit mailers from sending an individual resident advertisements that, "in his sole discretion[, he] believes to be erotically arousing or sexually provocative."[195] The statute did not permit similar restrictions on advertisements that promoted a different view—sexual puritanism, for example—or those that were neutral on the subject of sex.[196] The Court's restrictions on employers' antiunion speech have been similarly viewpoint based, placing no parallel restrictions on the expression of prounion sentiments.[197]

There are powerful reasons to demand viewpoint neutrality in the regulation of expression. But as with any doctrine, situations exist in which those reasons diminish. Workplace harassment law is one of them, in part because the captive nature of the victim and the coercive power of the harasser contribute to the

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That discriminatory conduct has an expressive component, however, does not necessarily convert regulation of such conduct into a free speech issue. All action is based on and reflects, to some extent, the expression of an idea held by the actor. If the First Amendment bars the regulation of all action that might contain a kernel of expression, we would be paralyzed from enacting legislation and this overbroad interpretation would render the First Amendment meaningless.

In many situations, the line between expression and conduct may be difficult to draw. A large universe of expressive conduct, such as participating in a civil rights demonstration or burning a flag, contains significant elements of both. But generally it is possible to differentiate between the two. A thief who breaks into a home does so for a reason; although that reason could be cast in free speech terms, we punish him because he did more than simply express an idea (for example, that the rich should share their wealth with the poor)—he acted on it. Similarly, firing a woman worker involves some action—the termination itself—even if it is accomplished through words ("You're fired because women can't do this job."). A coworker's statement about the inferiority of women workers ("I hate working with you because women can't do this job."), in contrast, is speech, pure and simple. No action has been taken, and there is no conclusive result.

192. 114 S. Ct. 2516 (1994).

193. *Id.* at 2521-22. The majority disingenuously described the injunction as viewpoint neutral, on the ground that an injunction, "by its very nature, applies only to a particular group (or individual) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties." *Id.* at 2523.

194. 397 U.S. 728 (1970).

195. 39 U.S.C. § 4009(a) (1964 ed., Supp. IV).

196. That the speech at issue was sexual may well have been outcome-determinative. The Court has a long history of according lesser protection to sexual speech. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (finding statute requiring "exotic" dancers to wear pasties and a G-string did not violate First Amendment); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (commenting that society's interest in protecting sexual speech "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

197. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969); NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

strength of the government's interest in preventing workplace harassment. As demonstrated in Part IV of this article, the compelling nature of this interest and the narrow tailoring of existing restrictions on harassing speech combine to demonstrate that the law survives First Amendment strict scrutiny analysis.

IV. HOSTILE ENVIRONMENT HARASSMENT LAW AND FIRST AMENDMENT STRICT SCRUTINY

The restrictive physical context and coercive interpersonal context of the workplace magnify the harm inflicted by hostile environment harassing speech. As discussed below, the government's interest in preventing this harm is heightened by its constitutional mandate to enforce the Fourteenth Amendment guarantee of equal protection of the laws. The best methodology for resolving such a clash between freedom of expression and another fundamental interest is application of the Court's "strict scrutiny" test, the most rigorous analysis available under current First Amendment doctrine.

To survive strict scrutiny, a restriction on expression must pass a three-pronged test. The restriction must be supported by a "compelling" government interest; necessary to accomplish that interest; and narrowly tailored so that it places the least possible burden on expression.[198] The test is considered so demanding that if a restriction on expression survives strict scrutiny, it is constitutionally permissible even if it is not viewpoint neutral.[199]

Professor Sangree does not subject hostile environment harassment law to strict scrutiny analysis,[200] in part because she believes there is no conflict between equality rights and free speech rights, and thus no need to balance the two against each other. Sangree asserts that "[p]rohibiting [harassing] speech enhances First Amendment free speech principles," and that therefore "it is clear that the First Amendment is not harmed by hostile environment law."[201] Although she does not fully develop this argument, it appears to be based on the premise that discriminatory speech silences its targets; if such speech is eliminated, members of targeted groups will be more free to express themselves. Therefore, while hostile environment harassment law suppresses some instances of harassers' discriminatory speech, it simultaneously promotes the speech of

198. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). One of the two district courts to rule on a free speech challenge to Title VII has indicated that the statute's prohibition on hostile environment harassment survives strict scrutiny. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1536 (M.D. Fla. 1991) (holding that Title VII's prohibition on gender discrimination in workplace constitutes "compelling" state interest within meaning of First Amendment strict scrutiny).

199. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 117 (1991).

200. Professor Sangree asserts that the government's interest in "[e]radicating sex discrimination from employment is an interest recognized . . . to be highly important if not compelling." Sangree, *supra* note 7, at 554. In the context of strict scrutiny, this distinction is a fundamental one, because a "compelling" interest is sufficient to pass the test, while an "important" one is not.

201. *Id.* at 481, 559.

those who were previously silenced. On the whole, the amount of speech will remain constant or even increase.

Arguments like Professor Sangree's have been advanced in the hate speech debate, and they have a strong appeal. But this approach to the First Amendment is risky and controversial. The courts have never interpreted the Free Speech Clause to provide a collective right to maximize the total amount of expression that occurs in our society. Instead, the Clause has long been viewed as a source of individual liberty, a guarantee that every *individual person* has a right to express herself. Accordingly, promoting the speech of one group (targets of workplace harassment) at the expense of silencing another (harassers) is antithetical to traditional First Amendment doctrine. Before we can embark on such a new approach to First Amendment jurisprudence, we must decide whether equality is a precondition for free speech, or free speech is a precondition for equality.[202]

Resolution of this expansive debate is not necessary to settle the narrower controversy over the constitutionality of workplace harassment law. The relatively small scope of hostile environment harassment restrictions makes them particularly amenable to traditional First Amendment strict scrutiny analysis.

A. THE COMPELLING GOVERNMENT INTEREST BEHIND WORKPLACE HARASSMENT LAW

Although Professors Browne and Volokh each discuss interests that may be balanced against free speech in workplace harassment cases,[203] neither of them actually performs a strict scrutiny analysis. By focusing on the Free Speech Clause as the only constitutional dimension to the hostile environment harassment debate, they fail to see that the Equal Protection Clause weighs in on the other side of the scale.[204]

1. The Equal Protection Clause as a Source of the Government's Compelling Interest

The conflict between harassers' freedom of expression and workers' equality of opportunity boils down to a clash between two constitutional amendments:

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202. For an overview of the contours of this debate, see Lawrence, *supra* note 14 (arguing that equality is a precondition for freedom of expression); Matsuda, *supra* note 14 (same); Strossen, *supra* note 113 (arguing that equality and freedom of expression have a "symbiotic relationship," and citing others who claim liberty is "more basic" than equality).

203. Browne, *supra* note 8, at 541-42, 543 (referring to interest underlying harassment law as "eliminating prejudice" and "decreasing the amount of offense suffered"); Volokh, *supra* note 8, at 1807-09 (referring to interests underlying harassment law as preventing "harrowing abuse," which "interferes with [workers'] ability to make a living, and creates barriers for them that others . . . do not have to overcome").

204. *See* Susan Deller Ross, *Today's Sexy Issue: Sexual Harassment Law and the First Amendment, in* SPEECH AND EQUALITY: DO WE HAVE TO CHOOSE? (Gora La Marche ed., 1995).

Professor Sangree notes that the Civil Rights Act of 1964, including Title VII, was enacted pursuant to Congress's power to enforce the Fourteenth Amendment Equal Protection Clause as well as its Commerce Clause power, but she does not explore the issue further. *See* Sangree, *supra* note 7, at 554.

the First and the Fourteenth. The Fourteenth Amendment Equal Protection Clause is triggered because Congress expressly enacted Title VII based not only its Commerce Clause authority, but also on its Fourteenth Amendment, Section 5 authority "to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]."[205] One of these provisions is the Equal Protection Clause.[206]

In *Heart of Atlanta Motel, Inc. v. United States*,[207] the Court recognized Congress's intent to enact the 1964 Civil Rights Act pursuant to its power under the Fourteenth Amendment as well as its Commerce Clause power. Because the Court found that the Act was properly supported by the government's Commerce Clause power, it never reached the question of whether Congress was correct in determining that the Fourteenth Amendment's grant of enforcement authority could have served as an independent and sufficient basis for the law. Justices Douglas and Goldberg each wrote separately, however, to make clear that if the question had been addressed, the answer would have been a resounding "yes."[208] Title VII's restrictions on gender-based workplace harassment therefore are supported by one of the most compelling interests conceivable—the government's interest in fulfilling its constitutional obligation to enforce the dictates of the Fourteenth Amendment Equal Protection Clause.

2. Policy and Doctrinal Support for the Government's Compelling Interest

Strong policy reasons provide further support for the compelling nature of the government interest in restricting discriminatory workplace expression. As Justice Goldberg noted in *Heart of Atlanta Motel*, Congress's primary purpose in passing the 1964 Civil Rights Act was "the vindication of human dignity."[209] Gender-based verbal harassment assaults the dignity of a female worker in many ways: by adversely affecting her work environment while leaving her

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205. The legislative history of the Act expressly states that Congress enacted it on two bases, the Commerce Clause and Section 5 of the Fourteenth Amendment. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964); *see also id.* at 286-91 (appendix to opinion of Douglas, J., concurring, setting forth relevant excerpts from legislative history).

206. The Senator who introduced the Fourteenth Amendment to the Senate described Section 5 as a "direct affirmative delegation of power to Congress," and stated that it "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith. . . . It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." Katzenbach v. Morgan, 384 U.S. 641, 649 n.8 (1966) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766, 2768 (1866)).

207. 379 U.S. 241 (1964).

208. *Id.* at 281-86 (Douglas, J., concurring); *id.* at 291-93 (Goldberg, J., concurring). As a practical matter, it is highly unlikely that this issue will ever reach the Court. Because Congress's Commerce Clause power was sufficient to support the 1964 Act, there is no need to consider the same question in light of its Fourteenth Amendment Section 5 power. But the Court's recent affirmative action opinion, in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), indicates that if confronted with the issue, a majority of the current Justices would support the Douglas-Goldberg position. *See* Ross, *supra* note 204 (arguing that at least five current Justices may support a broad interpretation of Congress's Fourteenth Amendment enforcement power).

209. *Heart of Atlanta Motel*, 379 U.S. at 377 (Goldberg, J., concurring).

male counterparts free of similar obstacles; by encouraging men to treat her as a sex object, which typically undermines her efforts to function in a different role; by harming her psychological and physical well-being; and, at its worst, by excluding her from the workplace entirely.[210] This form of employment discrimination, like other forms, harms female employees by creating substantial obstacles to their self-fulfillment and harms society as a whole by depriving it of the full contribution that each individual can make.[211] The government's interest in reducing or eliminating such harm is therefore a profound one, and no bold expansion of existing doctrine is needed to find it "compelling" within the meaning of the strict scrutiny test. In closely related contexts, the Court repeatedly has recognized that the elimination of gender-based marketplace discrimination is a sufficiently compelling interest to justify limited restrictions on competing First Amendment rights.[212]

a. The All-Male Club Cases. *Roberts v. United States Jaycees*[213] involved a First Amendment free association challenge brought by the Jaycees, a charitable organization, in defense of their male-only membership policy. When two local chapters began to admit women as full-fledged members, the national organization threatened to revoke their charters.[214] In response, the local chapters filed charges of discrimination with the Minnesota Department of Human Rights, alleging that the national organization's policy constituted gender discrimination in violation of the Minnesota Human Rights Act ("MHRA").[215] The national organization filed suit in federal court, claiming that application of the MHRA to the Jaycees' membership policy would violate male members' constitutional right to freedom of expressive association. The Supreme Court disagreed and held that the restrictions imposed by the MHRA survive constitutional scrutiny:

> The right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. We are persuaded that Minnesota's *compelling interest* in eradicating discrimination against its female citizens justifies the impact that application

210. *See supra* text accompanying notes 15-38.
211. *See* Taub, *supra* note 28, at 346.
212. *See infra* text accompanying notes 213-29.
213. 468 U.S. 609, 612-13 (1984).
214. *Id.* at 614.
215. *Id.* at 614-15. The MHRA provides, in relevant part:

> It is an unfair discriminatory practice: to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex . . . .

MINN. STAT. § 363.03, subd. 3 (1982). The Jaycees organization is a "place of public accommodation" within the meaning of the MHRA. *Roberts*, 468 U.S. at 616.

> of the statute to the Jaycees may have on the male members' associational freedoms.[216]

The Court further stated that "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," constitutes a compelling government interest.[217] "[A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent . . . ."[218] The Court has reaffirmed this holding in two similar cases involving freedom of expressive association challenges to local laws against all-male private clubs in California and New York.[219]

These cases are not precisely analogous to those involving hostile environment harassing speech for two reasons. First, the all-male club cases focus on freedom of expressive association,[220] rather than freedom of expression itself. But this distinction is not a significant one. Courts and commentators uniformly have conceptualized freedom of expressive association as a privilege implicit in the First Amendment's free speech guarantee.[221] The theory is that an individual's right to express her views may not be sufficiently protected from the potentially powerful machinery of government censorship unless she has a

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216. *Roberts*, 468 U.S. at 623 (emphasis added).

217. *Id.* at 626.

218. *Id.* at 628; *see also* Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (stating that "while invidious private discrimination may be characterized as a form of exercising . . . First Amendment [freedoms] . . . it has never been accorded affirmative constitutional protections").

219. Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (holding that club's male-only membership policy violated California public accommodation law, on ground that state had a "compelling" interest in ensuring that women obtain equal access to the acquisition of leadership skills and business contacts); *see also* New York State Club Ass'n v. City of New York, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring) (reaffirming "power of states to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society") (quoting *Roberts*, 468 U.S. at 632).

It is worth noting that in the Fourteenth Amendment equal protection context, the Court has treated gender-based classifications as less important than those that are race-based, by subjecting them to intermediate (rather than strict) scrutiny. Intermediate scrutiny requires that a particular law serve an "important," rather than a "compelling," government interest. But as Justice Ginsburg noted in Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 373 (1993), and Justice O'Connor indicated in Mississippi Univ. of Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), the Court has expressly left open the ultimate question of whether *strict* scrutiny is the appropriate standard. Numerous women's groups recently joined together to file an amicus brief urging the Court to resolve this issue in favor of strict scrutiny. Brief for Amicus Curiae, National Women's Law Center, American Civil Liberties Union et al., at 4-30, United States v. Virginia (No. 94-1941) (1995).

220. The Court has recognized two distinct types of "freedom of association." First, the right to freedom of *expressive* association is guaranteed by the Constitution as an indispensable means of preserving individual freedom of expression and is derived directly from the Free Speech Clause. *See infra* text accompanying notes 221-22.

Second, the Court has held that the Constitution protects from state intrusion certain personal choices to enter into and maintain intimate relationships. This freedom of *intimate* association is a fundamental component of personal liberty, separate and distinct from freedom of expression. It is the case law developed under the first type of free association that is relevant to Title VII free speech issues.

221. *See Roberts*, 468 U.S. at 622.

corresponding right to associate with others who have similar views.[222] Because expression and expressive association are two sides of the same coin, an interest that is sufficiently compelling to permit regulation of expression in the free association context ought to be sufficiently compelling in the free speech context as well.[223] The underlying reasoning of the *Roberts* line of cases therefore should apply in the hostile environment harassment context. One of the two district courts to consider a First Amendment challenge to Title VII's hostile environment harassment restrictions agreed, holding that the state's interest in eliminating workplace "impediments to the equality of women" is sufficiently "compelling" to justify the regulation of discriminatory speech.[224]

A second possible flaw in the analogy is that the result reached in the all-male club cases may have been driven by the frailty of club members' First Amendment interests, rather than by the strength of the government's interest in gender equality. In theory, the Court should have determined whether the government's interest was strong enough to be "compelling" (and thus survive strict scrutiny) on an independent basis, without considering the relative strength of the club members' competing First Amendment interests. But it is not clear that the Court did so. The First Amendment interest in the private club cases was relatively weak. In *Roberts*, for example, the Jaycees already had allowed women to participate in many of its training and community activities.[225] This history of de facto integration, in conjunction with the club's failure to demonstrate any relationship between their discriminatory membership policies and any organizational advocacy of political ideas, substantially detracted from the male members' argument that they could only express themselves fully by excluding women from formal membership. The relative weakness of the First Amendment interest here made it easier for the Court to weigh in on the side of equality of opportunity.

It is possible that when faced with a situation in which equal opportunity conflicts with more robust free speech rights, the Court may arrive at a different result. But this is unlikely to occur in a hostile environment harassment case, in which the First Amendment rights of harassers are relatively weak because their speech arises in a special context—the workplace—where physical and interpersonal dimensions convert women into a captive audience subject to economic coercion.[226]

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222. *See, e.g., id.* at 622.

223. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982).

224. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1536 (M.D. Fla. 1991); *see also* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994) (invalidating local government's ban on "sexually oriented" magazines in firehouse, but noting that "[t]here is no doubt that the prevention of sexual harassment is a compelling government interest").

225. *Roberts*, 468 U.S. at 609; *see also* New York State Club Ass'n v. City of New York, 487 U.S. 1, 12 (1988) (finding that nonmembers regularly participated in meetings); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 547 (1987) ("Many of the Rotary Clubs' central activities are carried on in the presence of strangers. . . . At some Rotary Clubs, the visitors number 'in the tens and twenties each week.' ").

226. *See supra* text accompanying notes 124-86.

b. The Pittsburgh Press Decision. Additional support for the government's compelling interest in supporting workplace harassment law may be drawn from the Court's holding in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[227] A newspaper had violated a local human rights ordinance by publishing help-wanted advertisements in two separate columns, one for "male" jobs and another for "female" jobs. The Court rejected the newspaper's free speech challenge to the ordinance and ordered it to discontinue its practice. *Pittsburgh Press* is arguably distinguishable from hostile environment harassment cases because it involved a restriction on commercial speech, which is entitled to a lesser degree of First Amendment protection than are other forms of expression.[228] Despite this distinction, the opinion stands for the general principle that the government's interest in eliminating workplace gender discrimination can be sufficiently important to justify some limitation on free expression.[229]

c. Telephone Harassment Laws. Several courts also have held that the government's interest in protecting targets from abusive speech over the telephone is compelling.[230] Expression prohibited by telephone harassment statutes typically includes the kind of speech that would constitute gender-specific abuse and sexual harassment under hostile environment law.[231]

Consider the recent, highly publicized example of Richard Berendzen, former president of American University, who pleaded guilty to two charges of making indecent telephone calls to a woman who had advertised her home daycare services. The woman, who was married to a police officer, recorded the calls, in which Berendzen "described in graphic detail how he and his wife had sex with their children. He talked about his extensive collection of videotaped child pornography and sometimes even insisted that he kept a 4-year-old Filipino girl as a 'sex slave' in a basement dog cage."[232] Berendzen often suggested that the

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227. 413 U.S. 376 (1973).

228. *Id.* at 385; *see also* Virginia State Pharmacy Bd. v. Virginia Consumer Council, Inc., 425 U.S. 748, 770-72 (1976).

229. *Pittsburgh Press*, 413 U.S. at 391.

230. Lampley v. United States, 573 F.2d 783, 787 (3d Cir. 1978). In *Lampley*, the court upheld a federal statute outlawing harassing telephone calls based on the government's compelling interest in "the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who [engage in such speech] not to communicate, but for other unjustifiable motives." *Id.* The statute in question prohibited any person from making an interstate telephone call in which he or she:

> (A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent; (B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number; (C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or (D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number . . . .

47 U.S.C. § 223(1) (1995); *see also* Gormley v. Director, Conn. State Dep't of Probation, 632 F.2d 938, 940-41 (2d Cir.) (upholding state statute outlawing telephone harassment on basis of compelling state interest), *cert. denied*, 449 U.S. 1023 (1980).

231. *See supra* text accompanying notes 75-94.

232. Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451, 1452

woman put her two daughters, aged twelve and five, on the line so that he could instruct them on how to perform sexual acts on their mother. He also boasted that he used bizarre sadomasochistic tools to exert "tremendous discipline" over his family. He said he sometimes strapped his wife to a wheel that he kept in his basement. Berendzen sometimes told the woman that he was masturbating as he talked to her.[233]

Berendzen's statements are much like those made in workplace harassment cases. Women employees often are forced to listen to their male coworkers boast about their sexual prowess, detail the sexual acts they have performed and fantasize about performing, and suggest what kinds of sexual activities the target of their harassment would enjoy.[234] If the government's interest in restricting such speech is sufficiently compelling when it occurs over the phone, it is even stronger when it occurs in the workplace. It is far more difficult to get a new job than simply to hang up the telephone or get an unlisted number.

B. THE NECESSITY OF HARASSMENT LAW'S RESTRICTIONS ON SPEECH

Prevention of verbal harassment is necessary to eradicate employment discrimination because harassing speech inflicts substantial harm on its targets and accounts for a large part of the differential, adverse treatment of women employees.[235] Professor Browne claims, however, that antiharassment laws directed at speech are not necessary to prevent verbal harassment, because, "in an age when racist and sexist sentiments are deemed in most circles to reflect adversely on the speaker rather than the target, . . . legal sanctions against racist and sexist expression seem[] largely unnecessary."[236] Yet the real-life examples described in Part I of this article,[237] all of which occurred within the past five to ten years, make it painfully obvious that most harassers have not been embarrassed into silence.

In addition, studies show that most women are unable to stop or significantly reduce sexual harassment without filing an antidiscrimination lawsuit. A survey of female federal employees who attempted to put an end to unwanted sexual harassment found that nothing short of legal action was particularly effective. Only 29% of the women who ignored the harassment found that this lessened the problem. Of those women who said they "went along with" it, only 16% reported that this approach was effective. Even women who directly told their harassers to stop found that this failed to improve the situation in 39% of cases, and others found that threatening to tell or actually telling others about the harassment was effective only about half of the time.[238]

(1992) (quoting B. Hewitt & G. Clifford, *A University President Tumbles from Grace Following Charges that He Made Obscene Phone Calls*, PEOPLE MAG., May 14, 1990, at 54).

233. *Id.*

234. *See supra* text accompanying notes 39-54.

235. *See supra* text accompanying notes 22-38.

236. *See* Browne, *supra* note 8, at 544.

237. *See supra* text accompanying notes 39-54.

238. 1988 MSPB SURVEY, *supra* note 18, at 35.

Finally, this problem cannot be resolved through reasoned debate. Because women are captive in the workplace context, and because of the power disparity between harassers and their targets, most women workers do not have a realistic opportunity to counter harassment by engaging in speech supportive of women's equality.[239]

C. THE NARROW TAILORING OF WORKPLACE HARASSMENT LAW

A regulation is narrowly tailored within the meaning of First Amendment strict scrutiny if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[240] It must regulate expression to the extent necessary to prevent the fundamental harm of gender-based workplace discrimination—and no more.

The question of whether current restrictions on hostile environment harassing speech are sufficiently narrowly tailored is an extremely difficult one. Some limits on the law's regulatory reach may be found in the five demanding proof requirements for assertion of a hostile environment claim.[241] Taken together, these elements restrict the law's regulatory reach to the most extreme, persistent, and unwelcome forms of workplace harassment. But perhaps the best way to determine whether these limitations are sufficiently narrow is to consider the alternatives. If a less speech-restrictive alternative exists that will still allow the government to realize its compelling interest of eliminating gender-based workplace discrimination, the current law cannot stand.[242]

Professor Volokh has proposed one less restrictive alternative: regulate only discriminatory workplace speech that is directed at a particular individual, and leave "undirected" expressions of gender-based intolerance unregulated.[243] Volokh contends that "undirected" harassing speech "is a vital part of national social and political debate," whereas "directed" speech "does not have this sort of value; it is much less likely to convince or to edify, and more likely only to offend."[244] But this dichotomy is a false one. A woman may feel worse when harassing speech is specifically directed at her; the statement, "You're a cunt," may be more emotionally painful to hear than, "All women are cunts." It would be difficult to argue, however, that only the latter statement is a vital part of a national political debate, or that it is more likely than the former to convince and edify the listener.

Moreover, undirected harassment, aimed at women as a group, results in the same fundamental harm as directed harassment: the creation of adverse employ-

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239. *See supra* text accompanying notes 165-70.

240. Frisby v. Schultz, 487 U.S. 474, 485 (1988).

241. *See supra* text accompanying notes 76-94.

242. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 527 (1981) (Brennan, J., concurring) (finding ordinance unconstitutional because it served as total ban and less restrictive alternative was available).

243. *See* Volokh, *supra* note 8, at 1846-47.

244. *Id.* at 1798.

ment conditions imposed only on women. Consider a factory floor that is decorated with signs bearing slogans such as, "It takes a man to do the job" and "A woman's place is on her back," and with posters of naked women in sexually provocative positions over the caption, "Now *she* deserves a raise." None of this expression is directed at a particular woman worker, but it creates a profoundly inhospitable environment for all women, in direct contrast to their male coworkers. A narrowing of the law to insulate such speech from regulation would eviscerate the government's ability to ensure equal opportunity in the workplace.[245] The First Amendment does not require this result.

A second, potentially less restrictive alternative is to create a "free speech zone" at every worksite, a designated space where vigorous debate on issues of gender equality is encouraged.[246] Within these zones, workers and management would be permitted to say or post anything they choose, with no risk of liability or retaliation. This concept is laudable because it promotes "more speech" over regulation, but its viability is dubious. Several studies demonstrate that most women victims of workplace harassment are extremely reluctant to confront harassing speech.[247] It is unlikely that this reluctance will evaporate simply because an employer promises that no retaliation will occur on the basis of statements made in a protected zone. Any employee will realize that this guarantee will be difficult to enforce. In most cases, a low-level worker cannot realistically rely on her supervisor to separate conscientiously those statements she makes in a "free speech zone" from those she makes outside of it. How can she be sure that she will not somehow be punished on the job for talking back to her supervisor within the zone, particularly if the debate occurs in front of other workers who cheer her on and embarrass him?

An even larger problem is that most instances of harassing speech are not designed to communicate and therefore are difficult to respond to even absent any fear of retribution. Professor Browne suggests that the "only effective method" for reducing discriminatory workplace speech "is to provide a persuasive response—that is 'more speech,' " and adds that " 'Shut up!' is not a persuasive response."[248] But Browne fails to explore how a persuasive response can occur within the workplace hierarchy. What kind of rational rejoinder could Flora Villalobos have made to her boss's comment, "You have such a fine ass.

245. Both district courts that have addressed the First Amendment implications of Title VII's hostile environment restrictions have rejected the directed versus undirected distinction for this reason. *See* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 n.89 (D. Minn. 1993); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1523 (M.D. Fla. 1991).

246. In the particular context of the *Robinson* case, the ACLU supported this kind of approach as an initial step to be taken prior to suppressing speech. *See* Brief for Amicus Curiae, American Civil Liberties Union Foundation of Florida, Inc. and American Civil Liberties Union, Inc. at 21-22, Robinson v. Jacksonville Shipyards, Inc. (11th Cir. 1991) (No. 91-3655); *see also* Strossen, *supra* note 8, at 771-72.

247. *See supra* text accompanying note 186.

248. Browne, *supra* note 8, at 550.

It's a nice ass to stick a nice dick into. How may dicks have you eaten?"[249] What could Teresa Harris have said in response to her boss calling her a "dumb ass woman?" Should she deny the accusation? Hurl derogatory names back at him, even though he controlled her day-to-day job responsibilities? How should Ms. Harris have engaged him in debate over his view that women subordinates should dress in a way that exposed their breasts? And what about Patty Baxter, whose coworkers called her a "cavern cunt?"[250] As Professor Lawrence has eloquently stated in the analogous context of racist speech, "Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow."[251]

Moreover, free speech zones are based on a First Amendment concept that seems inapplicable to hostile environment harassment—the free marketplace of ideas. This theory posits that for society to winnow truth from falsehood, all ideas must be aired and tested against each other in open competition, and eventually the truth will prevail.[252] But the workplace is not a free market of expression. The power dynamic that exists on the job silences victims of harassment, distorting the debate and making a laissez-faire approach highly problematic.

It also is far from clear that the marketplace of ideas metaphor is a useful construct for dealing with sexist speech in any context. The theory presupposes that people act entirely rationally, sifting through the universe of available ideas in an attempt to find the truth. In fact, however, no evidence exists to support the view that people function this way when prejudiced belief systems are involved.[253] Even unconscious gender-based prejudices may dictate what information a person pays attention to and what he or she discounts or ignores.[254]

The many critics of current hostile environment harassment law have failed to propose other alternatives. Although both of the above-described proposals would lessen restrictions on expression, they fail to meet the Supreme Court's

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249. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1508 (9th Cir. 1989).

250. Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988).

251. Lawrence, *supra* note 14, at 452.

252. In the words of Justice Brandeis, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of [a] thought to get itself accepted in the competition of the market . . . ."); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966) (arguing that more speech is best process for promoting knowledge and truth).

253. *See* David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 469-70 (1987). Of course, it may be that even a defective marketplace of ideas constitutes a better path toward truth than one distorted by government censorship. *See* Strauss, *supra* note 7, at 28 ("Truth is more likely to prevail even in an imperfect market than under a system of government censorship.").

254. *See* Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1286 (1995).

requirement of being practicable or effective, because they will result in a substantial drop in equal employment opportunities for women. Although Title VII's hostile environment restrictions may be far from perfect, they represent the best possible balance between these two fundamental rights that has been proposed thus far.

V. HOSTILE ENVIRONMENT HARASSING SPEECH AND THE DANGERS OF THE SECONDARY EFFECTS DOCTRINE

Five of the current Supreme Court Justices have indicated that, if faced with a free speech challenge to workplace harassment law, they would make an end run around the rigorous strict scrutiny test and instead would uphold the law pursuant to the First Amendment "secondary effects" doctrine.[255] As discussed below, such a strategy is unwise, primarily because the parameters of this recently developed doctrine are poorly defined and therefore highly susceptible to legislative manipulation. The resulting potential for unwarranted suppression of speech pursuant to this doctrine has thus far been limited because its reach has been restricted to sexually explicit speech. Its extension to cover the wide range of expression that may contribute to a hostile work environment would substantially increase the government's censorship power.

The secondary effects doctrine draws a constitutional distinction between laws that regulate primary versus secondary effects of expression. "Primary effects" are those specifically related to the ideas that speech conveys: in other words, the emotional, intellectual, or physical response of the listener. A statute that prohibits all expression that its audience finds offensive, for example, is aimed at a primary effect of speech and therefore cannot be upheld pursuant to this doctrine. "Secondary effects," in contrast, are not related to the content of speech; they may include the disturbance of a neighborhood caused by high decibel-level expression, or an increase in litter resulting from pamphleting. If a government regulation focuses on a secondary effect of expression, it may restrict speech that is "merely incidental" to that focus.[256] The doctrine does not require that such a regulation be supported by a compelling government interest; any interest other than censorship is enough, regardless of its degree of significance.[257] A law targeted at a secondary effect of speech may even have a viewpoint-discriminatory impact on expression that is "swept up incidentally" within its reach.[258]

For example, in *City of Renton v. Playtime Theatres, Inc.*,[259] the Court upheld a municipal zoning ordinance that regulated the location of adult movie the-

255. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 390-91 (1992); *see also infra* text accompanying notes 264-65.

256. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 320 (1987) (plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986).

257. *See R.A.V.*, 505 U.S. at 389-90.

258. *See Renton*, 475 U.S. at 48.

259. 475 U.S. 41 (1986).

aters.[260] The Court recognized that this restriction lacked viewpoint neutrality because it treated theaters specializing in adult films differently than other types of movie houses. Nevertheless, it upheld the ordinance on the grounds that the city council's intent was "unrelated to the suppression of free expression," and that the ordinance was not aimed at the "content of the films shown at 'adult motion picture theaters.' "[261] Instead, the Court found that the council's purpose was to eliminate the "secondary effects" created by adult theaters, such as the spread of crime, the devaluation of property, and the deterioration of the quality of residential neighborhoods, commercial districts, and urban life in general.[262]

Similarly, one could argue that hostile environment restrictions focus on a secondary effect of harassing speech—that of employment discrimination. Professor Volokh is incorrect when he asserts that the law turns on primary effects such as "the emotive impact" of harassing workplace speech and the prevention of "psychological damage to the targets" of harassment.[263] Although these effects can be important elements of a hostile environment claim, even the most brutally abusive harassment would not violate Title VII on that basis alone. It is only when speech results in the creation of an adverse environment for members of a single gender, in other words, when it has the secondary effect of employment discrimination, that liability is triggered.

In recent dicta, a majority of the Court cited Title VII as an example of a permissible restriction on speech pursuant to the secondary effects doctrine.[264]

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260. Specifically, the ordinance dictated that movie theaters specializing in "adult motion pictures" could not be located within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or school. *Id.* at 57 (Brennan, J., dissenting).

261. *Id.* at 47, 48 (emphasis omitted).

262. *Id.* at 47. The ordinance's "dubious legislative history belie[s] the Court's conclusion that the city's pursuit of its zoning interests . . . was unrelated to the suppression of free expression." *Id.* at 57 (Brennan, J., dissenting). It was only *after* two adult movie theaters challenged the ordinance on First Amendment grounds that the city council amended the ordinance to state that its intent was to regulate the secondary effects of this type of expression. *Id.* at 59. The Court simply accepted the city's post hoc rationalization at face value and ignored evidence that the ordinance was a response to the content of the regulated expression.

263. Volokh, *supra* note 8, at 1826-27; *see also* Browne, *supra* note 8, at 521-25 (criticizing primary-secondary effects distinction). Professor Sangree conflates the issue of viewpoint neutrality with that of secondary effects. Although she asserts her agreement with Professors Browne and Volokh that harassment law regulates only the primary effects of speech, she later argues that harassment law is viewpoint neutral because it "does not target [any] viewpoint directly," but only targets words "when they operate to bar or burden a person's employment"—in other words, when they have a secondary effect. Sangree, *supra* note 7, at 510-11, 523-24. This argument is similar to one articulated by Professor Marcy Strauss. *See* Strauss, *supra* note 7, at 38-41 (arguing that discriminatory speech can be prohibited when it causes women tangible harm).

264. *R.A.V.*, 505 U.S. at 390-91; *see also* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) ("[T]itle VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which creates an offensive working environment. That expression is 'swept up' in this proscription does not violate First Amendment principles."). The Court also has held that the congressional purpose underlying Title VII was to accomplish a goal independent of expression—the elimination of workplace discrimination. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). "[T]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated

The Court has made similar, though more oblique, comments in related contexts. In a freedom of expressive association case, the Court stated that "acts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit," and added, "[a]ccordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection."[265]

But application of the secondary effects doctrine to workplace harassment law has highly problematic implications for First Amendment jurisprudence. First, the doctrine eviscerates the viewpoint-neutrality requirement in cases in which no compelling state interest is at stake.[266] Prior to the Court's adoption of this doctrine, the government had to combat such problems as crime and property devaluation only in a way that was viewpoint neutral with respect to any incidental restriction on speech. By allowing legislatures to circumvent this long-standing First Amendment requirement, the Court has offered them countless new excuses for viewpoint-based suppression of speech.[267]

Second, unlike other precepts permitting a reduction in First Amendment protection, the boundaries of the secondary effects doctrine are extremely vague. The lack of a clear, principled distinction between legislation directed at primary versus secondary effects of speech exposes the doctrine to exploitation by a government that wishes to censor.

These problems are well illustrated by the Court's opinion in *Boos v. Barry*.[268] The case involved a District of Columbia statute outlawing the display of any sign, within 500 feet of a foreign embassy, that tends to bring the foreign government into "public odium" or "public disrepute." The District government argued that the law was justified because it was not aimed at the content of antigovernment speech itself, but only at the secondary effect of offending the dignity of foreign diplomats. The Court struck down the statute on the ground that the emotional impact of speech on its listeners is a "primary" effect, inseparable from the speech itself, and thus cannot support the use of the secondary effects exception.[269] The majority suggested, however, that it might

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in the past to favor [certain identifiable groups of] employees over other employees." *Id. But see R.A.V.*, 505 U.S. at 410-11 (White, J., concurring) (stating that Title VII does not fit within secondary effects exception).

265. Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984). The theory that the Court will uphold hostile environment harassment against a First Amendment challenge is further supported by its decision not to address any First Amendment issues in the *Harris* case, even though the case was limited exclusively to verbal harassment and both parties as well as numerous amici briefed the issue. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).

266. Although there are situations in which viewpoint neutrality is not absolutely necessary (such as those in which a restriction of speech is supported by a compelling state interest and is narrowly tailored), *see supra* text accompanying notes 198-99, such neutrality is typically an essential prerequisite to the preservation of free speech rights.

267. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 335 (1988) (pluralilty opinion) (Brennan, J., concurring).

268. 485 U.S. 312 (1988).

269. *Id.* at 320-21; *see also* Texas v. Johnson, 491 U.S. 397, 411-12 (1989) (finding antiflag-burning

have upheld the identical viewpoint-based restriction on expression if the legislature had asserted that the law was not intended to regulate antigovernment speech itself, but only the secondary effects of such speech, such as "congestion," "interference with ingress and egress," "visual clutter," or "security."[270]

As the Court's dicta in *Boos* makes clear, the secondary effects doctrine provides a loophole through which a legislature may manipulate its way into viewpoint-based regulation of speech. As Justice Brennan pointed out in dissent, the government could plausibly argue that gatherings of certain political parties are more likely than others to attract large crowds causing congestion, or that speakers delivering a controversial message are more likely than others to attract an unruly audience that could present security problems.[271] Thus, the doctrine "creates a possible avenue for government censorship whenever censors can concoct 'secondary' rationalizations for regulating the content" of speech.[272] This potentially enormous expansion of the state's power to censor expression is deeply troubling.

Thus far, the Court has been restrained in its use of the secondary effects doctrine, relying on it only to uphold statutes restricting sexually explicit expression, such as nude dancing and adult films.[273] Because such expression has long been accorded diminished First Amendment protection,[274] the Court could contain the dangers inherent in the doctrine by restricting its applicability to sexually explicit speech. Thus far, at least one current Justice—David Souter—has indicated his approval of such a strategy.[275]

Although a portion of the harassing speech that may contribute to the creation of a hostile work environment is sexually explicit, much of it is not. The expression regulated by harassment law also includes a wide variety of gender-specific abuse and nonexplicit sexual propositions.[276] If the Court relies on the secondary effects doctrine to uphold Title VII over a free speech challenge, it

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law aimed at preventing "serious offense" to viewers geared toward primary, not secondary, effect of speech); Forsythe County v. Nationalist Movement, 505 U.S. 123 (1992) (finding parade fee not aimed at secondary effects).

270. *Boos*, 485 U.S. at 321.

271. *Id.* at 335 (Brennan, J., concurring).

272. *Id.*

273. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 50 (1976). In *Boos*, the Court suggested that the secondary effects exception may allow the regulation of political, antigovernment speech on the ground that the law was directed at a secondary effect. *See Boos*, 485 U.S. at 321. However, because the Court struck down the statute in question, this analysis is dicta and does not necessarily represent an expansion of the doctrine's reach to political speech.

274. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 586 n.3 (1991) (Souter, J., concurring) (asserting that sexually explicit speech such as nude dancing may be of lesser societal importance than other forms of expression); *Renton*, 475 U.S. at 49 & n.2 (same with respect to adult films displaying "specified anatomical areas").

275. *See Barnes*, 501 U.S. at 582-86 & n.3 (Souter, J., concurring); *see also Boos*, 485 U.S. at 337-38 (Brennan, J., concurring).

276. *See supra* text accompanying notes 68-72.

would substantially expand the doctrine's reach, and with it the state's potential censorship power.

CONCLUSION

To determine the constitutionality of the law's restrictions on hostile environment harassing speech, one must weigh the obstacles it creates to equal employment opportunity against harassers' rights of free expression on the job. Professors Browne and Volokh have given inadequate weight to the equal opportunity side of the scale by seriously underestimating the harm that verbal harassment inflicts on women workers. Harassing speech subjects women to severe or pervasive abuse while their male counterparts are free to perform their jobs without facing such obstacles. It causes many women to suffer physically and psychologically, and often has an adverse effect on their job performance. The government's interest in eradicating discriminatory harassing speech from the workplace could hardly be more compelling, because it fulfills the mandate of the Fourteenth Amendment Equal Protection Clause.

Professors Browne and Volokh are not the only ones who have failed to understand the gravity of the harm caused by harassing speech. The lower courts have lagged far behind the Supreme Court on this issue, siding with harassers in far too many cases. These opinions are driven not by a concern about competing free speech interests, but by a deeply disturbing willingness to overlook gender-based employment discrimination, even in conduct-based harassment cases. The real-world enforcement record on this issue should lay to rest the abstract fear that the courts will apply the law in an *overbroad* fashion. They are doing just the opposite. The recalcitrance of numerous lower courts to provide women workers with equal opportunity demonstrates the need for judicial education; trial judges must begin to grasp the serious consequences of discriminatory workplace harassment, whether verbal or physical in nature, and must begin to impose liability when women prove that they were subjected to a hostile work environment.

On the other end of the spectrum, Professor Sangree's analysis gives enormous deference to equality interests. She asserts that by fostering equality, hostile environment restrictions actually enhance freedom of expression. This argument, while appealing, would require a fundamental transformation of First Amendment jurisprudence. Regardless of whether this view prevails, as supporters of hate speech regulations and critical race theorists hope, such a sweeping change is not a necessary prerequisite to the constitutionality of hostile environment harassment law. In contrast to broadly defined, wide-ranging hate speech restrictions, workplace harassment law is fairly narrow in scope and is amenable to traditional First Amendment strict scrutiny analysis.

There is an important constitutional interest in protecting the free speech rights of workers who wish to engage in or listen to gender-based abusive or harassing expression. Workers, like any other group of citizens, have a vital need to express themselves freely, and the First Amendment forcefully protects

their right to do so before or after work, on the streets, and in their homes. But what Professors Browne and Volokh fail to recognize is that the workplace is different. Both commentators focus on the content of workplace harassing speech—dubbing it "political" and therefore at the heart of First Amendment protection—and ignore the context in which it occurs. The physical context of the job site effectively traps the victims of harassing and abusive speech so that they cannot avoid it. And because harassing speech is prohibited only when it is explicitly or implicitly condoned by the target's employer, the power hierarchy that operates in the workplace makes "more speech" an unrealistic option. These factors reduce the strength of First Amendment interests in the workplace; what may be said with impunity outside of the workplace may be regulated within it.

Professor Sangree, in contrast, places so much emphasis on the importance of the workplace context that she abdicates any real concern about workers' free speech rights. Her focus on the captivity of female employees blinds her to the reality that most worksites have within them relatively private settings, in which women are not captive and can avoid gender-specific abusive or harassing speech. She fails to recognize that in these portions of the workplace, such as a personal locker or a protected corner of a private office, pornography or other gender-based material will not create a differential, adverse environment for women workers. In these avoidable areas, an employee should be free to post or engage in whatever speech he desires.

The Supreme Court has effectively balanced the interests of equality of opportunity and freedom of speech through the five elements that define a hostile environment harassment claim. These elements ensure that only the most extreme, persistent, and unwelcome forms of speech are subject to regulation, while providing substantial breathing room for harassers' expression.

The Court's indication that it might rely on the secondary effects doctrine to uphold harassment law over a free speech challenge, however, is a move in the wrong direction. The secondary effects doctrine lacks clearly defined, principled boundaries. An expansion of its reach beyond sexually explicit speech would dangerously increase the potential for abuse of the government's censorship power.

In sum, the current formulation of hostile environment harassment law strikes the best possible balance between the fundamental interests of equal opportunity and free speech thus far articulated. The Supreme Court and the *EEOC Guidelines* have created a regulatory system that passes the strictest First Amendment scrutiny, while taking a giant step toward eradicating the most widespread problem faced by women on the job.