How Free Is Speech at Work?

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INTRODUCTION©

Free speech challenges to Title VII regulation are a recent development although Title VII of the Civil Rights Act of 1964, banning discrimination on the basis of sex in employment, has been on the books for over two decades and charges involving harassing speech have been recognized for decades. Only a few lower courts have considered such challenges to date.

In this Article, I do assume that Title VII's prohibition of racial and sexual harassment does raise First Amendment concerns. The initial question, as always under the First Amendment, is which set of cases is applicable. If the cases setting standards for general governmental regulation of speech on the basis of content are applicable, then the Free Speech Clause likely places severe limits on the scope of Title VII's ban on sexually harassing speech at work. Thus, if the fighting words doctrine and similar stringent limitations on speech regulation apply, the permissible scope of Title VII regulation is likely to be exceedingly narrow. There are, however, many First Amendment doctrines and cases far more tolerant of restrictions on speech.[1]

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[1] THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 3, 6-7 (Laura J. Lederer & Richard Delgado eds., 1995) [hereinafter THE PRICE WE PAY]. These restrictions on speech include:

The cases most similar to Title VII's prohibition of harassment are, I believe, those involving regulation of workplace speech. The American workplace is not in general an arena of protected speech. Private employers are free to fire employees for disfavored speech and often do. Although much speech and much political speech takes place on the job, it is unprotected. For example, most lesbians and gay men are closeted at work because of fear of adverse reactions to "out" speech.

Neither Congress nor the electorate has viewed private employment as an important enough arena of free speech to warrant protection. For example, Title VII bans discrimination on the basis of sex, race, religion, national origin, and color but not discrimination on the basis of speech, even political speech. Congress has never even considered extending such protection to speech in private employment, nor has there ever been pressure from voters for such an extension. Indeed, much of what regulation there is consists of content-based *limits* on speech in private employment. For example, labor law prohibits certain employer speech during union elections and much employee speech. Antitrust law also restricts employment and market-related speech.

There is some constitutional protection of employee speech and association-rights in public employment, but that protection has been limited by the Supreme Court. Public employers can-

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> [S]peech used to form a criminal conspiracy, speech that disseminates an official secret, speech that defames or libels someone, . . . speech that violates a trademark or plagiarizes another's words, speech that creates a clear and present danger (for instance, shouting fire in a crowded theater), speech used to defraud a consumer, speech used to fix prices, speech used to communicate a criminal threat (for example, "stick 'em up"), untruthful or irrelevant speech given under oath or during a trial, and disrespectful words aimed at a judge or a military officer.

Id.

I can easily think of others: limits on what jurors can talk about, hear, or read during a trial and countless rules and practices regulating and rewarding or penalizing certain kinds of speech in public universities. For a discussion of the many ways in which public universities routinely regulate speech, see Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1033-39 (1993). Other examples include: ethical limits on what lawyers, doctors, and other fiduciaries and professionals can reveal about their clients; speech likely to be unduly prejudicial to a criminal defendant in light of its probative value; speech that is hearsay and barred by rules of evidence for that reason; and much other speech.

not fire non-policy making employees in order to replace them with their own loyal patronage workers.[2] Policy-making employees can, however, be fired for belonging to the "wrong" political party. In addition, public employers can prohibit much political speech and activity by public employees and censor employee speech in viewpoint-specific ways when disfavored speech impedes efficient governmental operations, as it often does.[3]

Thus, even if the Constitution were to protect speech in private employment to the extent it is protected in public employment, speech, even political speech of employees, would be protected only to a very limited extent. But perhaps greater constitutional protection is warranted when government *requires* private employers to regulate speech that harasses on the basis of sex or race. Such regulation will affect many more workers than government regulation of public employees' speech and the government cannot justify its regulation by the need to ensure efficient governmental operations.

The Supreme Court has, however, allowed government to censor even political speech in private employment in content-specific ways under the labor laws. It has also shown a similar tolerance for antitrust regulation of speech related to the workplace and even to restrictions of political activities by public employees. There appears to be an emerging category in which content-specific regulation is tolerated under fairly lax standards — governmental regulation of workplace speech.[4]

A number of commentators have discussed issues raised by Title VII's prohibition on sexual harassment. In early cases, courts had declined to recognize sexual behavior or speech as sex discrimination.[5] In *Sexual Harassment of Working Women,*

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[2] Rutan v. Republican Party, 497 U.S. 62, 75 (1990); Branti v. Finkel, 445 U.S. 507, 519-20 (1980); Elrod v. Burns, 427 U.S. 347, 359-60 (1976).

[3] Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994); Rankin v. McPherson, 483 U.S. 378, 384-88 (1987); Connick v. Myers, 461 U.S. 138, 151-54 (1983); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-65 (1973); Pickering v. Board of Educ., 391 U.S. 563, 572-73 (1968); United Pub. Workers v. Mitchell, 330 U.S. 75, 99-104 (1947).

[4] Richard Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 12.

[5] *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975) (holding if Title VII prohibited sexual advances, only asexual employees would fall outside scope), *vacated*, 562 F.2d 55 (9th Cir. 1977).

Catharine MacKinnon explained how sexual conduct or speech can be discrimination on the basis of sex in employment settings.[6] MacKinnon described how sexual harassment systematically harms women and benefits men in the workplace, contributing in important ways to the lack of equal employment opportunities on the basis of sex. Since then, many others have described the harm done by sexual harassment[7] and criticized specific aspects of emerging doctrines.[8] More recently, a number of commentators have debated the meaning of the "reasonableness" requirement.[9]

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[6] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 59 (1979).

[7] *See, e.g.*, Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991). Estrich generally evaluates the scope of sexual harassment, citing a 1976 Redbook study in which 9 out of 10 readers said they had been victims of unwanted sexual attention at work from male bosses or colleagues, and 75% of them claimed it was "embarrassing, demeaning or intimidating." *Id.* at 821 (citing Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149). For other discussions of the harm caused by sexual harassment to women and how it benefits men, see Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Morrison Torrey, *We Get The Message: Pornography in the Workplace*, 22 SW. U. L. REV. 53 (1992).

[8] *See, e.g.*, Estrich, *supra* note 7, at 831. The difficulties of proof, with regard to welcomeness, for example, are huge because it is empirically clear that women usually do not reveal sexual harassment, even to friends. *Id.* at 829. Courts have assumed that the lack of a complaint reveals ambivalence, yet one rarely witnesses women testifying to this ambivalence on the stand. *Id.* at 830.

[9] For example, a number of commentators have considered whether the reasonableness requirement should focus on whether a reasonable woman, rather than a reasonable person, would find that harassment posed a significant problem. *See, e.g.*, Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005, 1005-06 (1992) (arguing for wholly subjective standard); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 122-23 (1992) (noting advantage of reasonable woman standard as giving more weight to perspective of victim); Estrich, *supra* note 7, at 846 (arguing that courts' definitions of "reasonable" women vary, are inconsistent and even genderless). *Cf.* Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994) (arguing, inter alia, for greater weight to be given to victim's perspective); Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1198 (1990) (noting that "reasonableness" — whether reasonable person, reasonable man, or reasonable woman — tends to hide value judgments by presenting conclusion as neutral and objective).

In a recent article, Professor Gillian K. Hadfield used economic analysis to argue that harassment should be regarded as actionable under Title VII "whenever it would lead a hypothetical rational woman to alter her employment decisions if she could do so at little or no cost." Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1151 (1995).

Recent articles have also begun to explore First Amendment issues, questioning the initial assumption that Title VII regulation does not raise First Amendment concerns. In a 1990 article, Jack Balkin noted that the First Amendment had not been used much as a defense in Title VII harassment cases "due to an unconscious form of categorization — that speech in the workplace is not considered speech in the same sense as political or expressive speech generally, but is thought to be utilitarian, pedestrian, and incidental to the performance of work."[10] After an extremely brief discussion of the issue, Balkin concluded that censorship of harassing speech at work should be permissible because "[f]ew audiences are more captive than the average worker."[11]

In a 1991 article, Kingsley Browne disagreed, arguing that the First Amendment should limit Title VII's scope with respect to verbal harassment.[12] Browne stressed the need to avoid vague rules chilling speech, particularly in the workplace where, he asserted, most Americans engage in political speech. He then proposed that Title VII plaintiffs should not be able to use allegations about speech to establish discrimination, except in limited cases to prove that the motive was racial or sexual discrimination.

Other commentators have supported the line the American Civil Liberties Union (ACLU) seemed about to draw in the late eighties: Title VII's ban on harassment should reach only speech targeted at a specific woman. Thus, pornographic pictures and offensive jokes should not be actionable if not directed at specific individuals.[13] A number of commentators have argued in

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[10] Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423.

[11] *Id. See also*, Estrich, *supra* note 7, at 846. Estrich argues that women stay in hostile work environments because of economic necessity, and therefore it cannot be seen as truly voluntary. *Id.* Estrich also argues that the market does not protect women from such harassment. *Id.* at 847.

[12] Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 481-84 (1991).

[13] Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 43 (1990); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment — Avoiding a Collision*, 37 VILL. L. REV. 757, 762-64 (1992); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1857-63 (1992).

general for broader First Amendment protection of public[14] and private[15] employees.

However, other commentators have agreed with Balkin. In a 1991 comment, Amy Horton argued that Title VII's prohibition on harassment should be constitutional just as labor law regulations of *employers'* speech are constitutional.[16] Richard Fallon also emphasized labor law limits on employers' speech,[17] as well as a number of other First Amendment categories in which content regulation has been permitted.[18] Fallon argued that Title VII should be limited only by two exceptions: (1) speech or expressive conduct "reasonably designed or intended to contribute to reasoned debate on issues of public concern";[19] and

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[14] *See* THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 563-92 (1970) (arguing for broader speech rights for public employees by protecting even disruptive speech if directed at public and by regarding limits on political activities of public employees as unconstitutional); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990) (arguing that public employees' speech should be protected — as long as not disruptive — regardless of whether judges regard speech as matter of public interest); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987) (suggesting elimination of public interest requirement for protected public employee speech and supporting imposition of greater obligation on public employer to show that speech will cause harm).

[15] Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341 (1994) (arguing that private employees' speech should be protected under same standard as that used for public employees' speech); Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality and Labor Speech*, 82 GEO. L.J. 1903 (1994) (arguing that there should be constitutional protection for some secondary boycotts by unions, particularly when speech raises issues of sexual or racial equality).

[16] Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 424 (1991).

[17] Fallon, like Balkin, stresses the special nature of the workplace and the limited scope of free expression, but distinguishes his position from Balkin's by rejecting "captive audience" as a coherent doctrine. Fallon, *supra* note 4, at 18-19. Thus, Fallon sees his approach as based on a different standard for regulation of speech in the workplace. It is not, however, clear that Balkin would disagree.

[18] The categories are the following: commercial speech, sexually-explicit non-obscene speech, labor law limits on employer speech during union elections, public employees' speech, "private" speech, libel, broadcast media speech, student speech, speech in non-public fora, government-sponsored speech, overbreadth challenges to speech (degree of scrutiny for overbreadth depends on content of speech), and election regulation. *See id.* at 23-28.

[19] *Id.* at 47 (quoting from draft Guidelines Concerning Sexual Harassment developed by Harvard Law School Committee on Sexual Harassment, which Fallon chaired, presented to Harvard Law School faculty in May 1994).

(2) constitutionally protected materials, i.e. pornography, in the workplaces in which the material is produced.[20]

Like Balkin and Horton, I argue that the scope of Title VII's ban on sexual harassment should be a question of statutory construction. I thus break with Fallon's exceptions which are constitutionally based. Furthermore, I consider a broader range of employment-related cases than either Horton or Fallon. But both my analysis and conclusion have much in common with the articles of Balkin, Horton, and Fallon. These articles view workplace speech as a category for which First Amendment scrutiny has been and should be limited.

I begin by describing developments under Title VII, tracing the courts' recognition of the discriminatory harm done by racial, and later sexual, harassment under the assumption that Title VII is not limited by the First Amendment. I then describe the recent challenges questioning that assumption. In Part II, I discuss free speech and private employment apart from the Title VII issue, noting that employees have no protected rights to speak in private employment, and that labor law regulates speech in content-specific ways in private employment without violating the Free Speech Clause. Antitrust law also limits employment-related speech in content-based ways.

In Part III, I describe the limited scope of constitutional protection of speech in public employment. Public employers are bound by the First Amendment of the Constitution; public employees therefore have some protection against employer retaliation for disfavored speech. But this protection is quite limited. Indeed, when this standard is applied to public employer limits on sexually or racially harassing speech, such regulation does not violate the Constitution.

In Part IV, I consider whether, under the Constitution, Title VII can *require* private employers to regulate harassing speech. I conclude that the Constitution can be interpreted as allowing such an interpretation of Title VII. In Part V, I consider whether concern for women's equality might in fact cut in favor of constitutional limits, since Title VII regulation might reinforce

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[20] *Id.* at 50.

notions that women need protection, particularly from sexually explicit speech.

In this Article, I only consider whether Title VII's ban on racially or sexually harassing speech, speech that creates an objectively hostile or abusive environment,[21] is unconstitutional under the First Amendment. Far more complicated issues are often raised when a plaintiff alleges religious harassment, since one person's expression of faith, protected by the Free Exercise Clause, can be religious harassment to another.[22] I do not, however, address the difficult question of what forms of religious expression Title VII can constitutionally prohibit in order to protect listeners from religious harassment.[23]

Nor do I consider the broad normative question of the ideal level of protection for worker speech in private and public employment. Rather, I accept the general contours of protection and nonprotection in law today and ask how, in light of this current reality, the new issue of free speech as a defense under Title VII claims should be resolved. If we were to radically restructure workers' rights in the United States tomorrow, my analysis might no longer apply. I doubt, however, that we will see any great expansion of workers' rights for some time to come.

I. THE EMERGENCE OF RACIAL AND SEXUAL HARASSMENT CLAIMS

When Congress enacted Title VII of the Civil Rights Act of 1964, supporters and opponents saw it as regulating conduct — discrimination on the basis of race, sex, religion, national origin or color. The initial Title VII enforcement focus was on race, and the first suits alleging harassment involved racial harassment. Since the early seventies, the EEOC has ruled that use of racially derogatory terms (particularly "nigger") in the workplace

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[21] *See infra* notes 97-100 and accompanying text (relating use of objective "hostile and abusive environment" standard in *Harris* case).

[22] *See* Douglas Laycock, Testimony Before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary of the United States Senate (June 4, 1994).

[23] It seems likely that some state courts have gone to unconstitutional lengths. *See, e.g.*, Brown Transp. Corp. v. Commonwealth of Pa., 578 A.2d 555, 562 (Pa. Commw. Ct. 1990) (banning articles on religion in private entity's company newsletter and printing of Bible verses on company checks).

violates Title VII.[24] When such cases reached the courts, they have agreed.[25]

A. Racial Harassment

I illustrate this development — and the centrality of speech to the creation of racially hostile workplaces — with two cases. The first is a 1980 case from the district court in Minnesota, *EEOC v. Murphy Motor Freight Lines.*[26] In that case, Ray Wells, an African American, alleged that he was racially harassed by other workers while working as a dockman at a truck terminal. Freight within the terminal moved on carts with blackboards about one-foot square which often carried messages such as: "Ray Wells is a nigger," "[t]he only good nigger is a dead nigger," "Ray Wells is a mother," "[S]end all blacks back to Africa," and "[n]iggers [or, on other occasions, Ray Wells] are [is] a living example that the Indians screwed Buffalo."[27] In the lunchroom, other employees placed licorice dolls on the table with derogatory notes attached.[28] When Wells and another African American began eating lunch elsewhere, the door to that room was labeled "niggers only" and "nigger lunchroom."[29] Employees posted derogatory articles about African Americans on the bulletin board, and they wrote racially-negative messages on restroom walls and near the loading dock. The threat of violence implicit in such harassment was palpable, as employees slashed Wells's tires and placed a foul-smelling substance in Wells's shoes.[30]

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[24] EEOC Dec. 72-0957, 4 F.E.P. Cas. 837 (1972) (stating manager's ethnic jokes and use of "nigger" violates Title VII); EEOC Dec. 72-0779, 4 F.E.P. Cas. 317 (1971) (discussing supervisor's reference to employee as "nigger" as Title VII violation); EEOC Dec. 71-2598, 4 F.E.P. Cas. 21 (1971) (holding employer liable for toleration of co-workers' racial jokes and for atmosphere where customers and other workers avoided African-American employee); EEOC Dec. 71-909, 3 F.E.P. Cas. 269 (1970) (noting supervisor's use of "niggers" to refer to African-American employees).

[25] Snell v. Suffolk County, 611 F. Supp. 521, 525 (E.D.N.Y 1985) (noting much of harassment consisted of speech, cartoons, etc., often directed at no particular minority employee, such as cartoon in which depicting "a Ku Klux Klan member who after shooting a Black person remarks to a Ranger 'Whatcha mean, 'Out of Season'?'"); EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384 (D. Minn. 1980).

[26] 488 F. Supp. 381 (D. Minn. 1980).

[27] *Id.* at 384.

[28] *Id.* at 385 (quoting Wells's testimony).

[29] *Id.*

[30] *Id.*

Snell v. Suffolk County is a second example of racial harassment.[31] Plaintiffs were sixteen African American and Hispanic employees of the Sheriff's Department of Suffolk County, New York. They held jobs as a correction officer, a sergeant, or a lieutenant, and they worked in the jail. The trial judge found that "plaintiffs have been subject to continuing verbal and other abuse."[32] For example, many cartoons and other written messages were posted on official bulletin boards or in other places where minority officers would see them. The court described a number of these communications in some detail:

> Exhibit 9 purports to be a study guide for a special minority police officer civil service examination. The "guide" consists of [puzzles] and games such as "which one is different?" commonly found in playbooks for five-year-olds, except that one of the puzzles has a distinctively racist cast. ("How many Honkies are in this picture?") Exhibit 10 is a cartoon depicting a Ku Klux Klan member who after shooting a Black person remarks to a ranger, "Whatcha mean, 'Out of Season'?" Names familiar to jail employees have been attached to the figures . . . . Exhibit 11 is a highly offensive depiction of a large-breasted Black woman in some form of native garb; in the same vein, Exhibit 12 is a national geographic magazine-type photograph of a naked Black woman with the words "Yo Mama" and a bone added above her head. Exhibit 13 also depicts a naked Black person, this time accompanied by the words "Official Runnin' Nigger Target" and what appear to be bullet holes. Exhibit 14 is a questionnaire that begins "Photo not necessary since you all look alike" and asks such questions as "[how many] years [spent] in local prisons?" and "[give] approximate estimate of income [from] theft, welfare, . . . false insurance claims . . . ." Finally, Exhibit 38 is a photograph from the first page of the Suffolk Federal Credit Union "News n Views" of newly elected credit officers. One is a Black man; the other four have been altered to resemble Ku Klux Klan members. The cumulative intent of these cartoons, "jokes" and pictures is clear.[33]

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[31] 611 F. Supp. 521 (E.D.N.Y. 1985).

[32] *Id.* at 525. Plaintiffs also claimed to have been discriminated against in job assignments but the trial judge found that they had not proven such discrimination. *Id.* at 524.

[33] *Id.* at 525.

Within the jail, African American officers were routinely referred to as "nigger," and one received a Ku Klux Klan application.[34]

The trial judge held that these "vicious and demeaning" remarks and material were "designed to demean, harass, and intimidate."[35] The Warden was ordered to:

> [F]orbid the use by correction officers on any County property and on all County business of: (1) epithets such as "nigger," "pollack," "kike," "spic," "guinea," "honky," "mick," "coon," and "black bitch" (all of which have been used on the job by correction officers in recent years); (2) posting or distribution of derogatory bulletins, cartoons and other written material; (3) mimicking officers because of what some correction officers may believe to be stereotypical characteristics of minorities; and (4) any racial, ethnic, or religious slurs whether in the form of "jokes," "jests," or otherwise.[36]

Again, the physical safety of the minority officers was at risk. "White officers" had been avoiding one of the plaintiffs, Ramos, because of "his frequent complaints of racial harassment."[37] Often, the trial court found, Ramos did "not receive the full cooperation of [w]hite officers, making his job more dangerous and stressful. On one occasion, the security squad took so long to respond to Ramos's call for help that he was assaulted."[38] The trial judge reported that "plaintiffs have felt humiliated, fearful and depressed on the job"[39] and held that the employer had violated Title VII by failing to "take reasonable steps to prevent the racial harassment."[40]

Fear for one's own physical safety is a common reaction to racial harassment and doubtless present in both the Murphy freight terminal and the Suffolk County jail. But stop and imagine the other feelings an African American employee would have going in to work: humiliation, embarrassment, shame, low

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[34] *Id.* at 526.

[35] *Id.* at 529.

[36] *Id.* at 531-32. The Warden was also ordered to do a number of other things, including announce the new policy in the terms described in text to an assembly of the officers and explain that violation of the policy would result "in prompt and severe discipline." *Id.* at 532.

[37] *Id.* at 526.

[38] *Id.*

[39] *Id.* at 528.

[40] *Id.* at 527.

self-esteem, and a feeling of being trapped in an unbearable situation because of the need to earn a living for one's self and for one's family. One would feel invisible as an individual human being, visible only as a type representative of all one's race. Imagine the difficulty of trying to do one's job well in such situations. Imagine how distracted one would be by fear and other complicated emotions making it difficult to concentrate and perform successfully.

Such working conditions discriminate; in such workplaces, minority employees must work in environments far more hostile than those of their white co-workers. One's "working conditions" depended on one's race, both at the Murphy freight terminal and at the Suffolk County jail.[41]

Abuse puts individual employees in an impossible "catch 22": whether to go along and appear to acquiesce in the judgment of her or his inferiority or to complain, thus identifying oneself as a troublemaker and calling attention to oneself in a way that might provoke further and even worse abuse. Anxiety about how to respond and how to hide one's actual feelings wastes time and energy, leading to lower productivity and more errors. In addition, abusive environments often have the purpose and effect of keeping desirable jobs all white, thus denying employment opportunities on the basis of race.

B. Sexual Harassment

Despite a great deal of similarity between the racial harassment cases and sexual harassment cases, the courts were initially reluctant to recognize *sexual* harassment by co-workers as discrimination on the basis of sex, particularly when the harassment involved sexuality and speech about sex. Courts tended to regard sexual advances and harassment as beyond the scope of

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[41] Title VII provides that:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, *conditions*, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994) (emphasis added).

congressional intent,[42] not the company's responsibility because not required by explicit corporate policy,[43] or based on interpersonal attraction and desire rather than the sex of the target as such.[44] Eventually, between 1975 and 1979 or so, courts came to recognize sexual harassment as analogous to racial harassment and actionable under Title VII.

Two kinds of sexual harassment cases emerged: quid pro quo and hostile environment. In quid pro quo cases, a supervisor makes compliance with sexual requests a condition of employment.[45] Free speech has not been used as a defense in these cases.

Hostile environment cases involving sex are often much like those involving race.[46] *Robinson v. Jacksonville Shipyards, Inc.*[47] is illustrative and quite similar to the cases involving racial harassment described above. Lois Robinson was a welder at Jacksonville Shipyards, one of the few women working in skilled craft positions.[48] On a shift of fifty to one hundred people, there might be only one or two women, according to a welding

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[42] Given that "sex" was added as a floor amendment to Title VII's list of proscribed forms of discrimination, it seems most likely that few, if any, members of Congress consciously considered whether Title VII would, or would not, reach sexual harassment. *See* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 1945-1968, 176-82 (1988) (describing how "sex" was added to Title VII).

[43] *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (finding no relief under Civil Rights Act for verbal and physical sexual abuse where no employer policy addressed such conduct).

[44] *See* Barnes v. Train, 13 F.E.P. Cas. 123 (D.D.C. 1974) (holding no violation of Title VII where supervisor asked subordinate for sex because he found her attractive and retaliated against her because she rejected him), *rev'd sub nom.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); *see also* Miller v. Bank of America, 418 F. Supp. 233, 234 (N.D. Cal. 1976) (holding employer not liable under Title VII "for what is essentially the isolated and unauthorized sex misconduct of one employee to another"), *rev'd*, 600 F.2d 211 (9th Cir. 1979). For a discussion of other reasons for the courts' initial reluctance to find sexual harassment actionable under Title VII, see BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 10-142 (1992) (mentioning other factors such as bias on part of male-dominated judiciary and fear of deluge of litigation).

[45] LINDEMANN & KADUE, *supra* note 44.

[46] Sarah Burns argues that sexual harassment is perhaps more oppressive due to the social norms against racism that do not similarly apply to sexism. Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, 51 J. SOC. ISSUES 193, 197 (1995).

[47] 760 F. Supp. 1486 (M.D. Fla. 1991).

[48] As of 1986, the last year for which the district court reported numbers, there were 6 women and 846 men in skilled craft positions. *Id.* at 1493.

leadsman.[49] Thus, a woman in a craft position was often the only woman in an all-male group when on duty on a particular task. Again, physical safety was at risk. There is danger in ship repair work. Welders faced particular risks, particularly when working with others, because "'one slip' could lead to someone getting hurt."[50]

The shipyard was filled with pornographic images of women, in part because workers received calendars full of such pictures from suppliers and were allowed to display them, although prior approval of the company was required for posting other material.[51] Managers indicated that nude pictures of men were never displayed and that if someone were to display such pictures, they would be disallowed. For example, a foreman stated he "would probably throw such a calendar in the trash."[52] In the past, the company had "denied employees' requests to post political materials, advertisements and commercial materials."[53] Employees were not supposed to bring or read magazines, but nevertheless "read pornographic magazines in the workplace without apparent sanctions" and were allowed to post pictures from such magazines and to draw similar graffiti.[54] Management often posted their own pictures from such magazines or calendars.[55]

For example, women at the shipyard saw "drawings and graffiti on the walls, including a drawing depicting a frontal view of a nude female torso with the words 'USDA Choice' written on it";[56] "a picture of a woman's pubic area with a meat spatula pressed on it";[57] "a dart board with a drawing of a woman's breast with her nipple as the bull's eye";[58] as well as many *Playboy* centerfold type shots throughout the ship yard. Pornographic pictures were repeatedly put in Robinson's toolbox.[59]

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[49] *Id.*

[50] *Id.* at 1492 (quoting deposition of McIlwain who was President of defendant corporation).

[51] *Id.* at 1494.

[52] *Id.* (quoting deposition of defendant Lovett who was shopfitting foreman).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1495.

[57] *Id.*

[58] *Id.* at 1497.

[59] *Id.*

Men routinely directed pornography, sexual comments, and jokes at women in the shipyards. For example, Robinson reported hearing: "'Hey pussycat, come here and give me a whiff'";[60] "[t]he more you lick it the harder it gets";[61] "'[b]lack women taste like sardines'";[62] "'women are only fit company for something that howls'";[63] and "'there's nothing worse than having to work around women.'"[64] Once when Robinson was welding in an enclosed area with about six men, one of the men waived around a picture of a nude blonde wearing high heels and holding a whip (Robinson was blonde and worked with a welding tool known as a "whip").[65] One co-worker told a "joke" about "boola-boola" (sodomous rape) and afterwards "teased Robinson in a threatening fashion by yelling 'boola-boola' at her in the parking lot."[66] After these incidents, some male co-workers nick-named Robinson "boola-boola."[67] Another worker objected to working with Robinson because of her sex and commented "'women are only fit company for something that howls,' and 'there's nothing worse than having to work around women.'"[68] Graffiti on the walls where Robinson worked included "'lick me you whore dog bitch,' 'eat me,' and 'pussy.'"[69]

The harms of sexual harassment are similar, though not always identical, to those produced by racial harassment. At Jacksonville Shipyards, like the Murphy freight terminal or the Suffolk County jail, harassed employees often feared for their physical safety. Like those harassed on the basis of race, Robinson and other women at the shipyard must often have found it very difficult to perform well, given their fear, shame, embarrassment, humiliation, and the feeling of being trapped. Robinson and other women must often have felt invisible as individual human beings and visible only as females because of the shape of their

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[60] *Id.* at 1498.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 1496.
[66] *Id.* at 1499.
[67] *Id.* at 1496.
[68] *Id.* at 1498.
[69] *Id.* at 1499.

bodies. It seems likely that some or all of the women might also have had to learn not to react sexually to such provocations, complicating their ability to respond sexually in appropriate situations.

Sexual harassment reinforces a message women are constantly hearing in our culture: women are primarily sexual beings and valuable to the extent their sexuality pleases men. Most women first experience sexual harassment from peers in grade and high school,[70] when their self esteem also begins to drop relative to that of their male peers.

As this suggests, sex is not a gender-neutral phenomenon in contemporary American culture. Sex continues to be seen as degrading to women and as scoring for men. Women, not men, are either madonnas or whores, innocent virgins or sluts.[71] A workplace full of sex talk can therefore be a treacherous place for a woman to walk. The problem here is not that sex talk is offensive in some aesthetic sense or that women take offense more readily than men do.[72] The problem is that a sexually-charged workplace is a different environment for women and for men — just as the Murphy freight terminal and the Suffolk County jail were quite different workplaces for European Americans and African Americans — because of the quite different messages members of various groups receive from such messages.

Sexual harassment harms women in many ways. Trying to figure out and control responses to sexual harassment wastes time and energy. Although confrontation is the most effective

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[70] *See* LOUIS HARRIS & ASSOCIATES, COMMISSION BY AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HIGHWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993) (describing widespread sexual harassment by peers in grade and high school).

[71] Jennifer E. Smith, *Fine Tuning the Wrong Balance: Why the New Rule 412 Does Not Go Far Enough to End Harassment in Sexual Harassment Litigation*, 10 WIS. WOMEN'S L.J. 63, 80 (1995) (arguing that societal inference that women are sexually available — whores — relates to whether females are seen to welcome attention and harassment of males or not). The implication is that a friendly woman invites harassment and attention from any man. *Id.*

[72] Kingsley Browne seems unable to see anything to sexual harassment claims other than "offense," i.e. "that the work atmosphere did *not* change in response to the addition of women (or minorities) to the environment" with the result that harassment charges arise because of "conduct that appears harmless to men [but] may be offensive to women." Browne, *supra* note 12, at 487.

way of meeting harassment,[73] few women use it, presumably because of fear of worsening the harassment and because women are not socialized to be assertive, particularly in sexual situations.[74] Many women are hurt economically by harassment.[75] Some women choose jobs in order to avoid sexual harassment.[76] Women who experience sexual harassment often quit.[77] Many are fired.[78] Those who left traditionally male (higher-paying) blue-collar trades, such as fire fighting and ship repairing, often went to "lower-paying, traditionally female jobs or sought alternative [sic] work environments through self-employment or small, nonunion contractors."[79]

Women harassed on the job often experience not just declines in work performance,[80] but also "loss of motivation, lowered job satisfaction, negative attitudes toward co-workers and supervisors, high absenteeism and turnover, and a lowered sense of confidence."[81] Psychological problems do not end at the end of the work day and are likely to include "anger, fright, guilt, depression, anxiety, decreased self esteem, and . . . [increased] inner turmoil outside work and lower life satisfaction generally."[82]

Thus, the problems caused by sexual harassment, similar to the problems caused by racial harassment, are not simply that some sensitive souls take offense. Both sorts of harassment have the purpose and effect of putting a group, either a racial group

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[73] MARTHA A. LANGELAN, BACK OFF! HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS 96-113 (1993).

[74] *See, e.g.*, Smith, *supra* note 71, at 83 (arguing that many women in male-dominated fields feel it necessary to go along with harassment in order to keep performing their duties and to keep their jobs).

[75] *See* Hadfield, *supra* note 9, at 1151 (discussing economic effects of harassment).

[76] Sally J. Kaplan, *Consequences of Sexual Harassment in the Workplace*, 6 AFFILIA: J. WOMEN & SOC. WORK 50, 55 (1991).

[77] In one study, 75% of harassed women quit. *Id.* at 54.

[78] Another study reported that 45% of women harassed were fired and 22.7% had quit. *Id.*

[79] *See* Crain, *supra* note 15, at 1923.

[80] James E. Gruber & Lars Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271, 277 (1982) (stating declines in productivity especially likely when those harassed are excluded from informal networks important to success on job because of feedback or training or other kinds of support).

[81] *See* Crain, *supra* note 15, at 1927.

[82] *Id.* at 1928.

or women, back in their subordinate place and outside the economic territory of the harassers. Neither the purpose nor the effect is the communication of ideas. Nevertheless, in recent years free speech claims have appeared as defenses in cases involving sexual harassment. Although I have not heard of such a defense in a racial harassment case, it is difficult to imagine that the First Amendment issue could be resolved differently in these two contexts. Rather, it seems likely that any First Amendment limits to Title VII's ability to prohibit sexually harassing speech will also limit its ability to prohibit racially harassing speech.

C. The Slow Emergence of a Free Speech Defense in Sexual Harassment Cases

Some commentators have argued that Title VII can reach harassing speech directed at one or more particular individuals but not generally harassing speech.[83] But in the three cases described in Part I,[84] there is no clear line between directed and non-directed speech. Consider, for example, in *EEOC v. Murphy Motor Freight Lines*,[85] the sign "nigger lunchroom" put up in a room where two African Americans ate lunch to avoid the racial harassment in the main lunchroom. Is such speech directed? Or consider, in *Robinson v. Jacksonville Shipyards, Inc.*,[86] the picture of the nude blond with a whip waived at Robinson, who was blonde and worked with a welder's "whip," the graffiti (i.e. "eat me") written in Robinson's work area, or the pornographic pictures repeatedly put in Robinson's toolbox. If those were all instances of speech directed against specific individuals, what of the graffiti on the walls where Robinson worked ("'lick me you whore dog bitch,' 'eat me,' and 'pussy'")? Where is the line between directed and non-directed speech?

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[83] *See* Strossen, *supra* note 13 (stating Title VII is limited in application to specifically directed speech and does not affect general harassing speech); Volokh, *supra* note 13 (same).

[84] *See* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991) (involving sexual harassment); Snell v. Suffolk County, 611 F. Supp. 521 (E.D.N.Y. 1985) (involving racial harassment); EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381 (D. Minn. 1980) (involving racial harassment).

[85] 488 F. Supp. 381, 385 (D. Minn. 1980).

[86] 760 F. Supp. 1486, 1496 (M.D. Fla. 1991).

Initially, all participants seem to have assumed, regardless of whether the setting was private[87] or public[88] employment, that the First Amendment is not a defense to a sexual harassment charge under Title VII. The two Supreme Court cases recognizing sexual harassment as a violation of Title VII assumed that the First Amendment does not limit the scope of Title VII. Moreover, the Supreme Court's 1992 decision striking down Minneapolis' ordinance prohibiting bias-motivated disorderly conduct, *R.A.V. v. City of St. Paul*,[89] stated that Title VII's ban on sexual harassment is not a constitutional problem. Thus, three Supreme Court cases in the last ten years suggest or state that Title VII's prohibition of sexual harassment in the workplace is not limited by First Amendment concerns.[90]

The first of these cases is *Meritor Savings Bank v. Vinson*.[91] *Meritor* was the first case in which the Court ruled on a sexual harassment claim. Although the claim at issue in that case was quid pro quo — a supervisor requiring sex as a condition of keeping a job — the Court quoted with approval the broad definition of sexual harassment in the EEOC guidelines. That definition included not just sexual advances and requests for sex, but also "other verbal or physical conduct of a sexual

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[87] *See, e.g.*, Waltman v. International Paper, 875 F.2d 468 (5th Cir. 1989) (ruling on sexual harassment suit against *private* employer without mention of First Amendment); Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1989) (same); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993) (same); Barbetta v. Chemlawn, 669 F. Supp. 569 (W.D.N.Y. 1987) (same).

[88] *See, e.g.*, Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993) (ruling on sexual harassment suit against *public* employer without mention of First Amendment); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (same); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (same); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (same); Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982) (same); Poulsen v. City of N. Tonawanda, 811 F. Supp. 884 (W.D.N.Y. 1993) (same); Sims v. Montgomery County, 766 F. Supp. 1052 (M.D. Ala. 1990) (same); Jen v. University of Iowa, 749 F. Supp 946 (S.D. Iowa 1990) (same); Sanchez v. Miami Beach, 720 F. Supp. 974 (S.D. Fla. 1989) (same); Broderick v. Ruder, 685 F. Supp 1269 (D.D.C. 1988) (same); Arnold v. Seminole, 614 F. Supp 853 (E.D. Okla. 1985) (same); Berkman v. New York, 580 F. Supp. 226 (E.D.N.Y. 1983) (same); Brown v. City of Guthrie, 1980 WL 380 (W.D. Okla. 1980) (same).

[89] 505 U.S. 377 (1992).

[90] This position is supported by Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What is it and How Should it be Assessed After* Harris v. Forklift Systems, Inc., 21 N.Y.U. REV. L. & SOC. CHANGE 357, 414 (1995). Burns argues that Title VII is a legal critique of speech as conduct that causes a discriminatory harm, instead of speech as such. *Id.*

[91] 477 U.S. 57 (1986).

nature"[92] when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[93] Nothing in the decision suggested that the Supreme Court was concerned about interpreting Title VII so as to avoid a First Amendment violation.

In the second Supreme Court case, the Court did more than assume that Title VII and the First Amendment were compatible. *R.A.V.* held that government cannot make all hate speech criminal.[94] But in dicta, the Court indicated expressly that Title VII poses no First Amendment issues:

> Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "*justified* without reference to the content of the . . . speech . . . ." Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.[95]

In this passage, the Court indicated expressly that content-based discrimination in the application of Title VII's ban on conduct, i.e. sex discrimination, would not violate the First Amendment since the regulation is directed at the "secondary effects" of the speech, sex discrimination in employment, rather than at the speech itself.[96]

The third case, *Harris v. Forklift Systems, Inc.*,[97] was a hostile environment case involving only speech. Hardy, the owner of

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[92] *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1995)).

[93] *Id.*

[94] 505 U.S. 377 (1992).

[95] *Id.* at 369 (citations omitted).

[96] *See* Burns, *supra* note 90, at 413 (arguing that hostile environment claim is not speech regulation since remedy is directed at employer and is in response to hostile employment environment and not hostile statement by individual).

[97] 114 S. Ct. 367 (1993).

the company routinely made hostile and sexist remarks, often of a sexual nature, to Harris, a woman employee:

> Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was a "dumb ass woman." Again, in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris's] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendoes about [Harris's] and other women's clothing.[98]

After Harris complained, Hardy promised to stop. But thereafter, "[w]hile Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, 'What did you do, promise the guy . . . some [sex] Saturday night?"[99]

The Supreme Court held that Harris had stated a valid claim of sexual harassment. The standard used by the Court was whether there was an objectively hostile or abusive environment, a standard consistent with that suggested earlier in *Meritor*.[100] And though the defendant raised the First Amendment as a defense in its brief to the Court on the merits, the Supreme Court did not even mention free speech restraints on the reach of Title VII in such cases.

Whether the Supreme Court will view free speech issues as even arising in Title VII cases is unclear in light of these cases, particularly *R.A.V.*[101] In *Meritor* and *Harris*, the Court simply said nothing about possible First Amendment concerns. In *R.A.V.*, however, Justice Scalia, speaking for the Court, invoked the "incidental restraints" doctrine to explain why Title VII's ban on sexual harassment is permissible.[102] Under this doctrine, at least some laws explicitly directed at non-communicative activities may have incidental effects on speech without rasing any free

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[98] *Id.* at 369 (citations omitted).

[99] *Id.*

[100] *See id.* at 370 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

[101] 505 U.S. 377 (1992).

[102] *R.A.V.*, 505 U.S. at 389-90.

speech issues.[103] At least arguably, Title VII's ban on harassing speech might be viewed as only an incidental effect of its ban on discriminatory conduct and hence does not even raise a free speech issue, the result suggested by Justice Scalia's explanation, quoted above, in *R.A.V.*[104]

The weakness in this approach, however, is uncertainty as to when conduct regulation affecting speech does and does not fall within the incidental effects doctrine.[105] Two modern cases, *Roberts v. United States Jaycees*[106] and *Board of Directors v. Rotary International*,[107] raised First Amendment rights of private association and of expressive association, in actions to enforce laws forbidding sex discrimination in public accommodations. In these two cases, the Court did not use the incidental effects doctrine, though the state bans on sex discrimination in places of public accommodation expressly regulated only conduct. Instead, the Court stressed the compelling nature of the government's interest in ending sex discrimination.[108] In *Roberts*, the Court noted that the challenged state statute "protects the State's citizenry from a number of serious social and personal harms."[109] The Court then explained the damage done by sex discrimination: "[I]t . . . both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."[110] Finally, the Court concluded that "[a]ssuring women equal access" to the employment-related benefits of being members of the Jaycees "clearly furthers compelling state interests."[111]

These cases suggest that speech concerns might arise in sexual harassment cases under Title VII — rather than such cases being free of First Amendment issues under the incidental ef-

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[103] *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 105-08 (1987) (discussing incidental effects doctrine and criticizing four arguments in support of doctrine).

[104] *R.A.V.*, 505 U.S. at 389-90.

[105] Stone, *supra* note 103, at 105-06.

[106] 468 U.S. 609 (1984).

[107] 481 U.S. 537 (1987).

[108] *See Roberts*, 468 U.S. at 626 (stating that eliminating discrimination serves state interest); *Rotary Int'l*, 481 U.S. at 549 (same).

[109] *See Roberts*, 468 U.S. at 625.

[110] *Id.*

[111] *Id.* at 626.

fects doctrine — though they also indicate that any First Amendment concern should be balanced against government's powerful interest in ending race and sex discrimination in employment.[112] Moreover, the EEOC regulations on sexual harassment, approved by the Court in *Meritor*,[113] are not content-neutral. Under the EEOC Guidelines, proscribed "conduct" includes "[u]nwelcome sexual advances, requests for sexual behaviors, and other verbal or physical conduct of a sexual nature."[114] Furthermore, the government as employer often bans all pornography in its own workplace.[115] Such a ban cannot be regarded as content-neutral and hence cannot be immunized from First Amendment analysis by the incidental effects doctrine. For these reasons, it is at least highly doubtful that the incidental effects doctrine can immunize Title VII's ban on sexual harassment. I analyze the constitutionality of Title VII as though the ban on harassing speech does raise free speech concerns.

Free speech issues have recently emerged in Title VII cases and commentary. This development seems to be the result of successful challenges to public university speech codes on First Amendment grounds in two district court decisions.[116] Although the codes were adopted pursuant to Title IX's ban on

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[112] For a case using similar balancing to uphold against a religious freedom challenge the IRS's denial of charitable status to a racially-discriminatory religious university, see Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (denying university admission to applicants married to person of another race or who advocated such marriages). In *Bob Jones*, the Court stressed its "view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." *Id.* at 593. Even against the asserted claim based on the right to free expression of religion, the Court found a "compelling" and "fundamental, overriding interest in eradicating racial discrimination in education." *Id.* at 604. *See also* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338, 2347 (1995) (holding unconstitutional state's requirement, under non-discrimination in public accommodations statute, that openly lesbian-gay contingent be allowed to march in Boston's St. Patrick's Day Parade because such requirement impermissibly interferes with free speech rights of parade organizers); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

[113] *Meritor*, 477 U.S. at 65.

[114] 29 C.F.R. § 1604.11(a) (1995).

[115] *See* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1434 (1994) (describing fire department's ban on *Playboy* magazine); *infra* notes 136-47 and accompanying text (discussing *Johnson*).

[116] Balkin, *supra* note 10, at 423. These lower court decisions support this proposition: UWM Post v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

discrimination in education, rather than Title VII's ban on discrimination in employment, the decisions did suggest that the need to eliminate discrimination might not make constitutional all limits on speech in settings such as employment as well as universities. Following these two district court decisions, a number of commentators and two trial courts in Title VII cases have considered First Amendment issues in hostile environment cases.

Between *Meritor* and *Harris*, two lower federal courts struck down university speech codes at public universities as unconstitutional infringements on speech rights in high-publicity cases.[117] Defense lawyers in Title VII cases realized that the First Amendment might limit the reach of bans on harassing language.[118] There are now two district court decisions reaching the merits of the constitutional issue in a Title VII case, one going each way.

Most of the facts of the first case have already been described. In *Robinson v. Jacksonville Shipyards, Inc.*,[119] the court issued a broad injunction against pornography and harassing speech at Jacksonville Shipyards. In addition to hearing the testimony of Lois Robinson, the named plaintiff, the court heard testimony from two female co-workers, though the incidents they described occurred outside the filing period for Title VII claims.[120] Robinson testified about the widespread verbal harassment and displays of pornography, described earlier, as well as about the "new wave of harassing behavior [including displays of "hard

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[117] *UWM Post*, 774 F. Supp. at 1163; *Doe*, 721 F. Supp. at 852. *See also* Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994) (ordering reinstatement of Black Studies professor removed as department chair after controversial off-campus speech), *vacated*, 115 U.S. 502 (1994) (vacating in light of Waters v. Churchill, 114 S. Ct. 1878 (1994)); Corry v. Stanford, No. 740309 (Cal. Super. Ct. Santa Clara County Feb. 27, 1995) (finding Stanford speech code unconstitutional and enjoining its enforcement because, although Stanford is private school, state statute imposes federal constitutional limits on speech regulation by private university); Silva v. University of N.H., 888 F. Supp. 293 (D.N.H. 1994) (issuing preliminary injunction requiring state university to reinstate tenured professor pending outcome of suit despite his use of gratuitous sexual language and metaphors in classroom); Bill Workman, *Hate Speech Ban Struck Down*, S.F. CHRON., March 1, 1995, at A15 (describing California case in which county judge struck Stanford's speech code under California "Leonard Law," which extended free speech clause of First Amendment to private schools).

[118] *See* Balkin, *supra* note 10, at 423 (stating defense counsels believe that First Amendment limits laws banning harassing speech).

[119] 760 F. Supp. 1486 (1991).

[120] *Id.* at 1499.

pornography"] directed against her and other women" following her complaints.[121] Two experts testified for plaintiff Robinson, supporting her claim that the sexual harassment at Jacksonville Shipyards was harmful to women.[122]

Two experts testified for defendants that the pornography at the shipyard or similar pornography did not seriously offend most women or adversely affect their psychological well being.[123] Defendants also introduced evidence that women often bought similar magazines and that similar conditions prevailed at two other shipyards without any complaints being made by the women workers.[124]

Women in craft positions at Jacksonville Shipyards were "an extreme rarity."[125] For example, in 1986, the shipyard employed 6 women and 846 men as skilled craft workers.[126] And, as the *Robinson* court pointed out, "[s]hip repair work is a dangerous profession."[127]

The court in *Robinson* did not see the relief available under Title VII as impeded by the First Amendment. The court noted that the employer denied that it was expressing itself "through the sexually-oriented pictures or the verbal harassment by its employees."[128] In addition, the court regarded "the pictures and verbal harassment [as] not protected speech because they act as discriminatory conduct in the form of a hostile work environment,"[129] citing in support *Roberts v. United States Jaycees.*[130] In *Roberts*, the Supreme Court upheld a Minnesota stat-

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[121] *Id.* at 1514.

[122] *Id.* at 1502-07 (noting testimony of Dr. Susan Fiske and Ms. K.C. Wagner).

[123] *Id.* at 1507-09 (noting testimony of Dr. Donald Mosher and Dr. Joseph Scott).

[124] *Id.* at 1509. Sarah Burns was critical of this approach in *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, 51 J. SOC. ISSUES 193, 196-97 (1995). Burns said that the focus on the reactions of women — asking why they did not complain, why they appeared flattered, why they joked and participated in reciprocal slurs — tended to introduce distortion of the victim's blame. *Id.*

[125] *Robinson*, 760 F. Supp. at 1493.

[126] *Id.*

[127] *Id.* at 1492.

[128] *Id.* at 1534.

[129] *Id.* at 1535. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (upholding local prohibition of sex discrimination in help-wanted ads on ground that ads were not expressive speech of press but rather commercial speech promoting illegally discriminatory economic activity).

[130] 468 U.S. 609, 628 (1984).

ute banning sex discrimination against a First Amendment challenge by noting that "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."[131] The *Robinson* court also regarded (1) the regulation at issue as only a time, place and manner restriction;[132] (2) the elimination of discrimination against women as a compelling governmental interest;[133] (3) women workers as a captive audience;[134] and (4) "the public employee speech cases as a supportive analogy."[135]

In contrast to *Robinson*, in *Johnson v. County of Los Angeles Fire Department*,[136] the court held that firefighters could not constitutionally be prohibited from reading *Playboy* and other sexually-explicit magazines featuring females as sex objects while on duty — during "down" time — at the fire station.[137] At the time of the trial, "only 11 women [were] employed as fire fighters" in all of L.A. county.[138] The first had been hired in 1983.[139] Prior to the department's 1992 banning of pornography from fire stations, "magazines with pictures of nude women were commonplace."[140] Such magazines included *Playboy*, *Penthouse*, *Hustler*, *Cheri*, and *Gallery*.[141] Following the 1992 ban, several male employees sued for injunctive relief, arguing that the ban violated their First Amendment rights.

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[131] *Id.*

[132] *Robinson*, 760 F. Supp. at 1535.

[133] *Id.*

[134] *Id.* at 1535-36.

[135] *Id.* at 1536. The district court distinguished American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down Indianapolis ordinance providing certain remedies for harms caused by pornography as First Amendment violation), *aff'd*, 475 U.S. 1001 (1986).

[136] 865 F. Supp. 1430 (C.D. Cal. 1994). *See also* De Angelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995) (overturning jury finding of sexual harassment where plaintiff alleged she was harassed in 10 anonymous columns over two and half year period in police union's newsletter hostile to policewomen in general or herself in particular; court found isolated incidents insufficient basis for actionable harassment under Title VII as statutory matter).

[137] "Down" time is time a firefighter spends at the station for pay, but during which she or he can relax or sleep if there is no fire. *Johnson*, 865 F. Supp. at 1438.

[138] *Id.* at 1434.

[139] *Id.*

[140] *Id.*

[141] *Id.*

Two women firefighters testified in support of the department's ban on sexually-explicit material at work. One testified that she found the magazines offensive and "that the male firefighters often made lewd comments and gestures while reading the magazines."[142] The other testified that she too was offended and described "the constant barrage of abusive and suggestive remarks made by male fire fighters while reading magazines with nude pictures."[143]

Two women fire fighters testified against the policy, asserting that *Playboy* was not offensive and did "not make them feel intimidated or uncomfortable."[144] Lisa Natale, Corporate Director of Market Research at Playboy Enterprises, Inc., testified that "on average, only 15% of *Playboy* magazine consists of nude photographs." The *Johnson* court also noted that "*Playboy* is a stanch advocate of equality for women" and has a woman as president.[145]

The court in *Johnson* found the fire department's ban on pornography in fire stations unconstitutional. The court applied the federal cases defining speech rights of public employees. Public employees' speech is protected if on a matter of public interest and if, on balance, the interest of government as employer in an efficient workplace is outweighed by the interest of the employees in speaking. After characterizing firefighters' interest in reading pornography on the job as very strong during their "down" time — because they were generally allowed to do what they wanted at the station during that time[146] — the court concluded:

> If defendants choose to impose a content-based regulation on employees' speech, they must produce evidence that the speech contributes directly to a sexually harassing environment. In the present case, they have simply failed to show that plaintiff's quiet reading of *Playboy* contributes to such an environment.[147]

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[142] *Id.* at 1435.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 1437.
[147] *Id.* at 1442.

There are two groups of cases relevant to whether the *Robinson* and *Johnson* cases were rightly decided. The first group, involves public employment, as in *Johnson*. The other group, like *Robinson*, involves private employment. I begin with the Supreme Court decisions determining the scope of private employees' First Amendment rights.

II. FREE SPEECH AND PRIVATE EMPLOYMENT

Employees in the private sector enjoy no free speech rights, either under the Constitution or under any statutory scheme. The Free Speech Clause of the First Amendment protects only against state action and thus affords no protection when private employers retaliate against private employees for speech. And neither Title VII nor any other statutory scheme protects private employee's speech from retaliation.

In this section, I discuss three sets of cases permitting the federal government to limit speech in private workplaces. The first two sets arise under the National Labor Relations Act (NLRA). The last set arises under antitrust law.

A. NLRA

The NLRA does protect some employee speech, but that protection is quite limited. The NLRA protects "*only* employee speech relating to the terms and conditions of employment."[148] Ironically, under this rule, the more political the speech, in terms of general public interest in an issue seen as political, the less likely labor law is to protect it. Labor law protects all speech about terms and conditions of employment at a certain workplace, a matter the general public might regard as of little interest and as not of "political" concern, but protected speech does not, for example, include speech about the environmental effects of employer policies.[149]

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[148] Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 924 (1992) (emphasis added).

[149] *Id.* at 938-41 (stating that employers have censored employee speech that employer viewed as unselfish or unrelated to employment terms and conditions).

Employers are also free to fire employees for speech considered part of a "secondary boycott."[150] For example, employers can fire employees without violating the NLRA for distributing handbills making disparaging remarks about the quality of the employer's television broadcasts.[151] And although the NLRA gives employees the right to distribute union literature and solicit members on employers' premises, employers can prohibit such solicitation during the working hours, in places frequented by the public, or when solicitation would cause inefficiency.[152] Often state or federal labor law actually prohibits employee speech defined in terms of *content.* For example, in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title),*[153] the Court upheld as constitutional a provision of the federal labor law prohibiting union picketing of a title insurance company not directly involved in the original labor dispute. (The picketers urged consumers to boycott the title company.)

Another set of labor cases allow the federal government to limit speech of private employers, rather than of employees, and these limits have been held constitutionally permissible by the Supreme Court. Under the NLRA, employers are not allowed to make certain kinds of statements to employees under union campaigns. This content-specific provision of the NLRA prohibits employers from expressing "any views, argument or opinion" during a union election that communicates a "threat of reprisal or force or promise of benefit" contingent upon the outcome of the election.[154] In upholding this provision against a free speech challenge brought by the employer in *NLRB v. Gissel Packing Co.*, the Supreme Court explained that "an employer's rights cannot outweigh the equal rights of the employees to associate freely" under the NLRA.[155] And the Supreme Court

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[150] When striking employees interfere with the business of an entity with whom their employer does business, that interference is a secondary boycott. *See* NLRB v. International Bhd. of Elec. Workers (Jefferson Standard Broadcasting Co.), 346 U.S. 464, 477 (1953).

[151] *See id.* (holding that employer did not violate NLRA by firing employee for distributing disparaging handbills).

[152] *See, e.g.,* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945) (noting that employers may prohibit solicitation during working hours).

[153] NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title), 447 U.S. 607 (1980).

[154] NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

[155] *Id.* at 575.

struck that balance on the side of employees' rights to associate in unions rather than employers' rights to describe the consequences of unionization in a way that might discourage employees from voting for the union. The Court explained that "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 unintended implications of the latter that might be more readily dismissed by a more disinterested ear."[156]

B. Antitrust Law

Antitrust laws also prohibit secondary boycotts, even when political, if motivated by individual gain. In *Federal Trade Commission v. Superior Court Trial Lawyers' Ass'n*,[157] members of an organization of lawyers refused to represent indigent defendants in criminal cases in an attempt to extract an increase in fees from the legislature. The organization argued that the boycott was political because it was "altruistic";[158] it's purpose was to improve the quality of representation afforded indigents. Although the lawyers' organization argued that the boycott was protected political activity speech under the First Amendment, the Supreme Court held that the boycott could be enjoined as a violation of the antitrust laws because the lawyers were seeking economic gain.

Most American employees in the private sector are not in unions, and employers are free to fire these employees for speech at any time. The Constitution provides no protection, no matter how political the speech or how biased the retaliation, because there is no state action. Thus, private employers are free to ban harassing language as broadly as they wish. Public-sector employees are protected by the Free Speech Clause of the Constitution, but such protection is quite narrow. The scope of

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[156] *Id.*

[157] 493 U.S. 411 (1990). *See also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (upholding antitrust limits on manufacturer's ability to "conspire" to prevent inclusion of certain substance in certain industry standards when those standards were routinely adopted by state and local governments).

[158] For an excellent criticism of the Court's categorization of speech in public employee cases as either personal (if based on self interest) or political (if altruistic), though political speech is often motivated by both factors, see Estlund, *supra* note 14.

protection for public employees is described in the next section. Thereafter, this Article discusses what standard should apply when government restricts speech in private employment to prevent sexual and racial discrimination.

III. FREE SPEECH AND PUBLIC EMPLOYMENT

When an adverse action is taken against a state or federal governmental employee, three strands of Supreme Court cases afford some protection under the First Amendment: the patronage cases, the Hatch Act cases, and the *Pickering* cases. In the patronage cases, the Supreme Court held that only policy-making public employees can be fired in order to replace them with loyal patronage workers after an election has shifted local governmental power.[159] Under the Hatch Act cases, public employers can broadly prohibit much political speech and activity by public employees.[160] And under the *Pickering* line of cases, public employers can censor employee speech in viewpoint-specific ways when speech causes inefficiency in governmental operations.[161]

A. Patronage Cases

The patronage and Hatch Act cases arise in slightly different settings than censorship of harassing speech, but both suggest that the Supreme Court is likely to be tolerant of such censorship in public employment. The patronage cases deal with rights of political association in the absence of any evidence that the disfavored association with the prior administration impedes effective job performance in the present. In contrast, harassing speech is censored because of its impact on the ability of others to do their jobs effectively. Indeed, the policy-making exception

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[159] *See* Rutan v. Republican Party, 497 U.S. 62, 74 (1990) (holding patronage practices unconstitutional unless narrowly tailored to further vital government interests); Branti v. Finkel, 445 U.S. 507, 517 (1980) (noting that patronage dismissals justified only if they advanced governmental interest); Elrod v. Burns, 427 U.S. 347, 371 (1976) (holding that patronage dismissals are limited by other individual belief and association rights flowing from First Amendment).

[160] *See infra* notes 164-70 and accompanying text (describing Hatch Act cases).

[161] *See infra* notes 171-93 and accompanying text (describing Pickering v. Board of Educ., 391 U.S. 563 (1968) and its progeny).

allows new officials to fire policy makers and replace them with their own workers because of the possibility that "party affiliation is an appropriate requirement for the effective performance of the public office involved."[162]

The Supreme Court applied strict scrutiny to employees' rights of political association and found unconvincing arguments that patronage replacements would be more efficient workers. But the Court also found compelling the governmental interest in policy-making employees committed to the new policies, and therefore held that policy makers could be fired for patronage reasons without case-by-case balancing under a strict scrutiny standard.[163] The evidence that sexual and racial harassment impedes the ability of those harassed to do their jobs is at least as strong as the evidence that policy makers will do a more effective job when of the same party as their boss.

B. Hatch Act Cases

Under the Hatch Act and similar statutes at state and local levels in some jurisdictions, federal and many state employees are subject to severe but constitutional restrictions on their ability to engage in *political* speech and activity. Under the federal Hatch Act, federal executive employees, the vast majority of federal employees, and state or local employees engaged in federally-financed activities are prohibited from engaging in almost all political activities other than voting and expressing their views in private. Thus, for example, they are prohibited from soliciting votes on behalf of a candidate or endorsing or opposing a candidate in a political ad or in campaign literature, participating as a delegate in conventions, raising funds for a candidate, holding any position within a party, and running for office.[164] Many states have similar restrictions for state and local employees not covered by the Hatch Act.[165]

Twice the Hatch Act has been upheld by the Supreme Court, most recently in *United States Civil Service Commission v. National Ass'n of Letter Carriers*[166] in 1973. The Court regarded the

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[162] *Branti*, 445 U.S. at 518.

[163] *Elrod*, 427 U.S. at 367.

[164] 5 U.S.C. §§ 1501-1508 (1994); 5 C.F.R. §§ 733-34 (1995).

[165] EMERSON, *supra* note 14, at 584.

[166] 413 U.S. 548 (1973). The earlier case is United Public Workers v. Mitchell, 330 U.S.

broad Hatch Act restrictions as constitutional reform measures "to prevent the political exploitation of government employees, to improve efficiency of the service through maintenance of a 'merit' system, and to promote impartiality in government administration."[167] As Emerson noted in 1970, "[a]ll of these objectives are open to attainment by other measures, the control of expression being a supplementary shortcut."[168] In upholding these drastic restrictions on political activity applicable to millions[169] of state and federal workers, the Court reasoned that though a different balance might have been struck between the interests of employees and of the government, "the balance [Congress] struck is sustainable by the obviously important interests sought to be served by [the] . . . Hatch Act."[170] Thus, the Hatch Act cases permit broad restrictions on political speech by governmental workers under a balancing test, like the balancing test applied in the third set of cases, the set factually most like those involving censorship of harassing speech.

C. Pickering *Cases*

For this third and most similar set of cases, the leading Supreme Court decision is *Pickering v. Board of Education*,[171] in which the Court considered the right of a teacher to write a letter to a local newspaper concerning the Board of Education's "recently proposed tax increase."[172] The letter was "critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenues."[173] The Court upheld the right of the employee to speak after balancing "the interests of the teacher . . . in commenting upon matters of public concern and the interest of the state, as

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75 (1947).

[167] EMERSON, *supra* note 165 and accompanying text.

[168] *Id.*

[169] *Id.* (reporting 1966 estimate that eight million employees were covered).

[170] United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973). Public employees in non policy-making positions have been protected from discharge for belonging to the *wrong* political party when an election results in a party change. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976).

[171] 391 U.S. 563 (1968).

[172] *Id.* at 564.

[173] *Id.*

an employer, in promoting the efficiency of the public services it performs through its employees." The Court found that "absent proof of false statements knowingly or recklessly made by [the employee], [his] right to speak on issues of public importance may not furnish the basis for dismissal from public employment."[174]

In subsequent cases, the Court has been unwilling to support the right of employees to speak when speech undermines internal departmental authority. For example, in *Connick v. Myers*,[175] the Court held that the district attorney could fire an assistant district attorney who, after receiving a transfer to which she objected, circulated a questionnaire to other assistant district attorneys soliciting their views on the transfer policy, morale, confidence in supervisors, the need for a grievance committee, and pressure to work on political campaigns. The Court noted that Connick, a district attorney, had not been engaged in public debate or seeking to inform the public, but "gather[ing] ammunition for another round of controversy with her superiors."[176] The Court regarded all but one of her grievances as matters of only private concern, and therefore her speech was not protected by the First Amendment. The one issue of public concern, in the Court's view, was whether the New Orleans district attorneys were pressured to work on political campaigns. The Court regarded this as of "limited First Amendment interest."[177] Given the importance of good working relations and the incompatibility of insubordination with such relations, the Court upheld the District Attorney's decision to fire Connick, despite the public interest in this aspect of her speech.

Similarly, in *Waters v. Churchill*,[178] the Court held that even on matters of public concern, the government as employer has substantial leeway in assessing the risks of disruption as a result of speech. In this case, the parties disagreed as to what Churchill said about her nursing job at a public hospital to a coworker during a break. According to the employer, she made

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[174] *Id.* at 568, 574.
[175] 461 U.S. 138 (1983).
[176] *Id.* at 148.
[177] *Id.* at 154.
[178] 114 S. Ct. 1878 (1994).

"disruptive statements critical of her department and . . . superiors."[179] According to Churchill, she made "nondisruptive statements critical of the hospital's 'cross-training' policy, which she believed threatened patient care."[180] The Supreme Court remanded for a determination of whether Churchill was fired because her superiors thought that she had made disruptive criticisms of them or because they thought that she had made nondisruptive criticisms of the cross-training policy.[181] The Court also noted that government employers are free to react in any way they desire to employee speech of purely private concern.[182]

In only one post-*Pickering* case has the Court held that employee speech was protected — *Rankin v. McPherson.*[183] In *Rankin,* the Court held that a clerical employee in a county sheriff's office could not be discharged for telling a co-worker, after hearing of a failed attempt on the President's life, "if they go for him [the President] again, I hope they get him."[184] In holding this speech constitutionally protected, the Court noted its private nature — i.e. made in a private conversation with one other employee, though on a matter of public concern — and that the employee was not involved in law enforcement but held a purely clerical position.[185]

Thus, the Court did not apply strict scrutiny. Rather, the Court applied a balancing-of-interests analysis in the *Pickering*

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[179] *Id.* at 1880.

[180] *Id.*

[181] *Id.* at 1891.

[182] *Id.* at 1890. Courts have held that public employee's complaints about sexual harassment on the job are *not* of public concern. *E.g.,* Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993); Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987); *see also* Deremo v. Watkins, 939 F.2d 908 (11th Cir. 1991) (holding compensation demands of those who say they were sexually harassed are of no public interest). *But see* Wilson v. UT Health Ctr., 973 F.2d 1263 (5th Cir. 1992) (stating speech regarding reports of sexual harassment of great public concern). Sexually harassing speech (calling women "bitch," "whore," and "hen") has been held not to be of public interest. *See* Black v. City of Auburn, 857 F. Supp. 1540 (1994). But constitutional right of public employee to free speech violated when he was fired for verbal support of woman who alleged sex discrimination. *See* Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993).

[183] 483 U.S. 378 (1987). *See also* United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995) (striking ban on honoraria for federal employees).

[184] *Rankin,* 483 U.S. at 378.

[185] *Id.*

and Hatch Act cases. When a public employer bans harassing speech, the question is whether the ban is constitutional given *these* cases, not other kinds of cases in non-employment settings where strict scrutiny is applied. Under a balancing test, finding a basis for upholding public employer censorship of sexually harassing speech is easy.

D. Sexual Harassment and the Public Employee Cases

Given the scope of actionable sexual harassment under Title VII — the plaintiff must show verbal harassment "severe or pervasive enough to create an objectively hostile or abusive work environment" — a public employer policy prohibiting such speech would be constitutional under the *Pickering* cases. Such a policy promotes efficiency, creating an environment in which all employees can work effectively. Nor is the censorship motivated solely by the fact that co-workers' response is hostile. The censorship is motivated by the employer's desire to afford all employees, in as far as possible, a fair and pleasant environment in which to work so as to maximize their performance. The censored speech would disrupt the workplace, not just by provoking hostility, but by hurting women workers in ways likely to affect their job performance. Even purely verbal abuse, and even when such abuse is directed at women in general rather than at specific women, is hurtful in this way when the *Harris* standard is met; it creates "an objectively hostile or abusive work environment."[186]

In the *Pickering* cases, the key question involves balancing the rights of the employee to speak against the rights of the employer to maintain an efficient and well-disciplined workplace. Nothing in this set of cases, or the other cases discussed earlier in this section regarding the patronage and Hatch Act cases, suggest that the Supreme Court regards whether the speech is "directed" or "non-directed" as key or even as relevant. Nevertheless, various commentators have suggested that only "directed" harassing speech, i.e. speech aimed at a particular individual, rather than generally directed at a disfavored group such as women or African Americans, can be constitutionally prohibited

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[186] *Harris*, 114 S. Ct. at 370.

under Title VII. The Supreme Court could have held, for example, that only speech *directed* overtly against a supervisor could be constitutionally suppressed to maintain discipline and internal efficiency. Instead, the Court in *Connick v. Myers* held that the entire questionnaire could be censored although the questions were not directed explicitly at the District Attorney.[187] Indeed, such a line would have been pointless and could not have adequately served the District Attorney's interest in efficiency and discipline, since even overtly "neutral" questions — how is morale — were in fact intended and understood as pointed. So too, sexual and racial harassment are intended and understood as pointed at women and racial groups, whether directed at particular individuals or not. These cases also suggest that speech disrupting the workplace can be censored by the government as employer even if the censored speech is also disfavored and even if the censoring is applied in content- and even viewpoint-specific ways. Thus, it is true, the censored speech is offensive to women workers and members of disfavored racial groups because of its content.[188] But this is also true in a *Pickering* type case, where a supervisor finds speech critical of her or his performance and organization offensive, as in *Connick v. Myers.*[189] Nevertheless, the Supreme Court permitted the censorship.

It is also true that when a government employer censors speech because it creates a hostile or abusive work environment, the censorship is content-based. But all of the permissible regulations of employee speech discussed in this section are content- and even viewpoint-specific. A public employer has legitimate interests in the content of an employee's speech, particularly on the job, but even off the job to the extent it interferes with the ability of an employee to effectively perform the job for which she is being paid. This is illustrated by the *Pickering* cases, such as *Connick*, upholding censorship of speech even on a matter of public interest — whether employees were required to work on campaigns — because disruptive and designed to collect opinions critical of the District Attorney.[190] Not everyone who

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[187] *Connick*, 461 U.S. at 154.

[188] *See* Browne, *supra* note 12, at 481.

[189] *Connick*, 461 U.S. at 141.

[190] *Id.* at 149-50, 154.

said anything about the District Attorney's performance was fired; only the woman who circulated a petition designed to collect hostile viewpoints.

McMullen v. Carson,[191] also illustrates this point with a powerful set of facts, though the case did not reach the Supreme Court. A member of the county sheriff's office appeared on the evening news and identified himself as a recruiter for the Ku Klux Klan. In the past, relations between the sheriff's office and the African American community had been severely strained and distrustful. The sheriff fired the employee because of the likelihood that the African American community "would categorically distrust the sheriff's office if a known Klan member were permitted to stay" in his clerical position in the office.[192] It would be impossible for an employer to respond to such employee speech without regard to its content and viewpoint. The content and viewpoint are relevant to the employer's legitimate reasons for regulating the speech.

Thus, the patronage, Hatch Act, and *Pickering* cases dealing with First Amendment rights of public employees do not suggest that sexually or racially harassing speech in public workplaces can be prohibited without constitutional problems. In the patronage cases, the Supreme Court applied strict scrutiny to hold unconstitutional across-the-board patronage firing following an election in which the party in power changed. The Court, however, upheld the ability of newly elected officials to replace policy-making employees without case-by-case strict scrutiny of whether that policy maker's replacement was a compelling governmental interest. In the Hatch Act cases, the Supreme Court allowed legislators to place severe limitations on governmental

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[191] 754 F.2d 936 (11th Cir. 1985). *McMullen* suggests that had the Fifth Circuit actually reached the merits of the First Amendment claim in De Angelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995), the First Amendment would not have limited the state's ability, as employer, to discipline or fine workers for harassing off-duty speech. In *De Angelis*, an anonymous column in the police union newsletter expressed hostility to women officers and the plaintiff in particular. *Id.* at 592. The Fifth Circuit, without discussing the *Pickering* standard, expressed concern about "the difficult question whether Title VII may be violated by expressions of a opinion published in the . . . columns in the Association's newsletter." *Id.* at 596. But in *McMullen*, the Eleventh Circuit applied *Pickering* to uphold the firing of an employee for a single appearance on the evening news during which the employee stated a pro-Klan political opinion. *McMullen*, 754 F.2d at 939-40.

[192] *McMullen*, 754 F.2d at 939.

employees' political activities and applied only a balancing test. In the *Pickering* cases, the Court allowed governmental employers to censor on the basis of content and viewpoint, namely speech critical of those in charge and likely to cause inefficiency and insubordination. In every set, the Supreme Court allowed government to censor speech likely to be as disruptive as sexually harassing speech actionable under Title VII, i.e. speech that is not simply "offensive" but which creates "an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive."[193]

IV. PRIVATE EMPLOYMENT AND CONSTITUTIONAL STATUTORY REGULATION

Although the current cases defining the scope of public employees' speech suggest that actionable sexual harassment under Title VII can be censored by governmental employers, these cases are not necessarily controlling with respect to the constitutionality of Title VII requirements that private employers censor such speech. When the state censors *all* speech in *all* workplaces, private as well as public, different considerations are present. The justification for such censorship cannot be the state's need to operate government in an efficient manner. And the impact of such regulation on speech will obviously be much broader than when government regulates as employer in public workplaces. It is, therefore, possible that a different constitutional standard might be appropriate, with the result that government employers and private employers would operate under different standards.

In this section, I consider whether government can and should constitutionally require that private employers prohibit harassing speech. I begin with the broad constitutional issues, discussing first the constitutionality of such regulation under the Supreme Court labor and antitrust cases described in Part II and then under the lower court university speech code cases described in this section. I conclude that the Supreme Court can easily uphold Title VII's ban on sexual harassment against constitutional challenge and then turn to the question of whether it

[193] Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).

should do so and I next consider this normative question. Finally, I discuss the merits of a standard that would only require employers to prohibit harassing speech directed at an individual, concluding that such a limitation is inappropriate on either constitutional or normative grounds.

A. Sexual Harassment and the Labor and Antitrust Cases

The labor and antitrust cases discussed in Part II suggest that the Supreme Court is likely to use a balancing standard not unlike that used in the public employees' free speech cases under *Pickering* in considering the constitutionality of federal regulation of racially or sexually harassing speech in private employment under Title VII. As indicated earlier, a balancing standard, not strict scrutiny, was used in the labor and antitrust cases.

There are strong similarities between bans on sexual and racial harassment and the labor and antitrust cases permitting censorship in employment settings under a balancing standard. Like the NLRA and antitrust law, Title VII limits on harassing speech are designed to regulate economic relationships and to ensure all Americans equal employment opportunities, not to control what employees discuss on the job.

Similar to the labor law limitations on employers' speech during election campaigns, harassing speech occurs when a power differential is present and increased by the harassing speech, just as an employer's power over employees is increased by speech predicting dire consequences for unionization during an election campaign. Like speech that arises during secondary boycotts, when strikers picket those who do business with the struck employer, harassing speech often carries with it an implicit threat of violence. Consumers who cross a secondary-boycott picket line often feel the threat of violence as do those subject to sexual and racial harassment, particularly in jobs, like firefighters and craft workers in shipyards, involving hazardous employment.

Like the NLRA restrictions on both employer and employee speech and the antitrust prohibitions on speech, limits on sexually harassing speech in the workplace depend on content and even viewpoint and are political in some sense. In *NLRB v.*

Retail Store Employees Union, Local 1001 (Safeco Title),[194] for example, the Supreme Court upheld an interpretation of the NLRA[195] forbidding strikers from picketing buyers of their employer's product to induce consumers to stop buying the product. This rule, like Title VII's ban on sexual harassment, is content- and even viewpoint-specific; speech inducing disruption of the business of a non-party to a labor dispute is regulated, but not all speech on that subject is regulated. The Court nevertheless regarded the key question as whether the speech would be likely to produce only an "incidental injury" to the non-party's business, in which case an injunction would be inappropriate, or whether the picketing could "reasonably . . . be expected to threaten neutral parties with ruin or substantial loss."[196] The Court viewed this question as one of statutory interpretation, not constitutional limitations imposed by the First Amendment.[197] Penalties for such impermissible secondary boycotts are "severe: not only may secondary picketers be enjoined from picketing, but they may be fired from their jobs and sued for damages."[198]

Labor law censors employers' speech too in terms of content and viewpoint. In *NLRB v. Gissel Packing Co.*,[199] the Court upheld the NLRA's regulation of employer speech during a union election banning speech that contains a "threat of reprisal or force or promise of benefit" for election of a union.[200] Al-

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[194] NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title), 447 U.S. 607 (1980).

[195] National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1994) (stating that it is "an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain" someone not party to labor dispute "where . . . an object thereof is . . . forcing or requiring [her or him] to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person").

[196] *Harris*, 447 U.S. at 614.

[197] *Id.* (citing portions of NLRB v. Servette, Inc. (Tree Fruits), 377 U.S. 46, 63-64, 72-73 (1964) that deal with issue as statutory).

[198] Crain, *supra* note 15, at 1985 (citing NLRA § 10(c) for proposition that employee discharged for cause cannot be reinstated, § 10(a),(j) regarding availability of injunctions, and § 302 discussing damages). *See also Matter of Swan*, 833 F. Supp. 794 (C.D. Cal. 1993) (upholding against First Amendment challenge disciplinary sanction imposed on defense attorney for sexist remarks to assistant United States attorney), *rev'd sub nom.*, United States v. Wunsch, No. 93-50671, 1996 WL 275005 (9th Cir. May 24, 1996).

[199] 395 U.S. 575 (1969). *See also* Horton, *supra* note 16, at 422-24.

[200] National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1994).

though this regulation of political speech was also content-specific, the Court upheld it against a First Amendment challenge. In reaching this conclusion, the court noted that "an employer's rights [to free speech] cannot outweigh the equal rights of the employees to associate freely" in a union.[201] The Court stressed that "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."[202] Under such circumstances, the Court concluded that it was constitutional to forbid an employer even to tell employees in all honesty and good faith "'what he reasonably believes will be the likely economic consequences of unionization,'" unless the prediction is based on objective facts outside the employer's control.[203] Similarly, antitrust law prohibits some employment-related speech, as described earlier. In *Federal Trade Commission v. Superior Court Trial Lawyers' Ass'n*,[204] the Supreme Court upheld an antitrust injunction restraining lawyers from asking other lawyers to refuse to represent indigent defendants until fees were increased.

Kingsley Browne has argued that Title VII's ban on harassing speech has as its "primary purpose the limitation of 'offensive' expression" whereas in the labor cases, the restrictions on employer speech were "incidental effects" of the regulation, not its "primary purpose."[205] Thus, according to Browne, "the fact remains that the purpose of [Title VII] regulation is [unlike labor law regulation of employer speech] to prohibit expression because of the ideology expressed."[206] But how does Browne know that the "primary purpose" of the NLRA limits on employer anti-union speech had nothing to do with the suppression of a disfavored ideology — unions are bad? Or how does Browne know that the "primary purpose" of Title VII's ban on racially

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[201] *Gissel Packing Co.*, 395 U.S. at 617.

[202] *Id.*

[203] *Id.* at 619 (quoting NLRB v. River Togs, Inc., 382 F.2d 198, 202 (2d Cir. 1967)).

[204] 493 U.S. 411 (1990).

[205] *See* Browne, *supra* note 12, at 515.

[206] *Id.*

and sexually harassing speech is purely ideological, rather than economic egalitarianism — to give all Americans equal opportunities to earn a living? Indeed, what would one look at to determine "the primary purpose" of vague legislation interpreted by the courts to ban harassing speech or anti-union employer speech during union elections? Surely a more honest and realistic appraisal of these statutes would admit that in both, speech is censored because of harm associated with it, harm that is associated in each setting with a particular ideology. Nothing meaningful can be said about the "primary purpose" of either statute as interpreted by the federal courts.

Perhaps, it might be argued, the NLRA cases should be understood as arising during an earlier era, when the right of free speech was less well-developed and the courts felt a greater commitment to industrial peace than they might today. But the employment-related antitrust cases and the public employee cases are recent. Moreover, the public commitment to ending discrimination on the basis of sex and race is also recent and as strong as the earlier era's commitment to good labor-management relations. But in the eighties, the Supreme Court showed a similar commitment to ending discrimination on the basis of sex and race in the three cases discussed above[207] in which it rejected constitutional challenges to bans on sexual or racial discrimination. In those cases, the Court stressed the compelling nature of eradicating, for example, discrimination in the form of business clubs, like the Rotary or Jaycees, open only to men.

There are equally compelling needs for laws prohibiting racial and sexual harassment in the context of employment. Sexual harassment often has the purpose and effect of keeping women out of certain jobs, especially blue-collar jobs,[208] while thus giving men an employment-related bonus at women's expense; men can exercise *their* autonomy to demean women in ways they themselves find sexually titillating and with the result that the

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[207] *See supra* notes 106-15 and accompanying text.

[208] *See* Horton, *supra* note 16, at 414-15 (noting sexual harassment law has done least for blue-collar women and number of women in such jobs remains low). On needs of blue collar women, see Elvia R. Arriola, *What's the Big Deal? Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 COLUM. HUM. RTS. L. REV. 21 (1990); Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9 (1995).

women are less likely to be effective economic competitors.[209] Sexual harassment is used to keep women out of male work forces, just as employer threats or promises of benefits are used to keep unions out during election campaigns — and for that reason are illegal under the NLRA. When women invade male economic territory, men respond with sexual harassment "to manage ongoing male-female interactions according to accepted sex status norms, and to maintain male dominance occupationally and therefore economically, by intimidating, discouraging, or precipitating removal of women from work."[210]

B. Sexual Harassment in Public Employment and the University Speech Code Cases

The lower federal courts have struck down public university speech codes on the ground that such codes, which tend to ban racial and sexual harassment, among other things, violate the Free Speech Clause of the First Amendment.[211] Perhaps these cases suggest constitutional limits on Title VII's ban on harassment. I have criticized these results elsewhere[212] on the ground that universities are in the business of regulating speech and seeing such regulation only in speech codes is inappropriate. But even if one thinks the university speech code cases were rightly decided by the lower federal courts, the employment setting should be looked at under a different lens, as suggested by the labor cases and others raising speech issues in public and private employment and the many differences between workers and university or college students.

Although students at a university campus are dependent on the university for grades, they have greater freedom to speak expressively because they are more autonomous — far less de-

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[209] *See, e.g.*, Burns, *supra* note 90, at 413-16 (arguing that employer who makes work environment hostile to women by participating in or condoning abuse burdens female employees' rights to equal employment, and should be restricted).

[210] SANDRA S. TANGRI ET AL., SEXUAL HARASSMENT AT WORK: THREE EXPLANATORY MODELS, IN SEXUAL HARASSMENT: CONFRONTATIONS AND DECISIONS 89, 96 (Edmund Wall ed., 1992).

[211] *See, e.g.*, UWM Post v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991) (challenging rule prohibiting use of racial epithets); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (challenging university's policy on discrimination).

[212] Becker, *supra* note 1.

pendent on the cooperation and support of those around them — than workers while on the job in private employment, who are subject not only to bad reviews but also loss of their livelihoods. Further, students are not hired to do jobs that may be incompatible with certain forms of speech. Students are also less captive as an audience than workers in the sense that one need not attend an institution of higher education to survive. Relative to workers, students have much greater autonomy and are much more likely to have the independence necessary to be able to speak freely on campus or to avoid speech they do not wish to hear.

The Supreme Court could, therefore, conclude that Title VII's ban on sex discrimination in private employment raises no constitutional difficulty. On the other hand, there being no set of cases absolutely squarely on point, the Court could also write a decision finding a governmental ban on sex discrimination unconstitutional as applied to some or all such speech in private work places. As a normative matter, what *should* the Court do?

C. Normative Analysis

Title VII should not be regarded as limited by the Free Speech Clause for two related reasons, in addition to the strength of the public interest in ending discrimination in employment and Supreme Court precedents supporting such regulation. First, the private workplace is not an arena of autonomy and free speech. Second, free speech in the workplace does not mean free speech for workers independent of what the employer will tolerate.

Private employment is an area of inherently limited autonomy and, therefore, of limited free speech. Workers are dependents hired to do a job, not so that the employer can subsidize their soap boxes. Part of doing one's job means satisfying employers and getting along with co-workers. Employees are inevitably dependent on the good will of others in order to do, and keep, their jobs. As dependents, they inevitably have less autonomy in speaking, as in other aspects of their workday lives, than they do in other settings, such as in their living rooms or in public fora.

Two related aspects of this dependency, this lack of autonomy, bear stress. As noted earlier, workers are economically dependent on employers. Continued employment is necessary for

food, clothing, shelter, and often for medical insurance. Harassed employees are, therefore, a captive audience. In using this term, I do not mean to suggest that the Supreme Court cases previously using it[213] can be reconciled with other speech cases or form a coherent body of case law. Rather, as Jack Balkin put the point, the "employee working for low wages in a tight job market who is sexually harassed by her employer or co-worker" is a far more paradigmatic case of a captive audience than "passengers on the public buses [who may see advertisements they would rather avoid] or the child running through stations on the radio dial."[214] Furthermore, allowing Title VII hostile environment claims to proceed without constitutional limits draws a clear and principled line that protects these vulnerable and captive workers regardless of the difficulty of understanding the Supreme Court's use of "captive audience" in other settings. Even if other employment is available, it may be at lower pay or entail loss of seniority or health insurance, particularly frightening for those with pre-existing medical conditions. Thus, the first aspect of dependency is the great need workers have for jobs, and the fact that those harassed are likely to be a truly captive audience.

A second and related aspect of dependency in the workplace has implications for free-speech analysis. The point of free speech protection is to protect unpopular speakers from repressive regulation through democratic processes. It is true that in recent years, free speech has increasingly become conservative, protecting the powerful.[215] But society should not forget the real purpose of free speech in a democracy: to protect those

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[213] *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding broadcast of obscenities to captive audience was against FCC regulations); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1975) (permitting captive audience to exercise control over unwanted mail); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (holding city transit system ban on political advertising did not violate Fourteenth Amendment because transit riders were captive audience). *But see* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 88, 121 (1991) (stating captive audience argument is "riddled with inconsistency and ambiguity.").

[214] Balkin, *supra* note 10, at 424.

[215] *See, e.g., id.* at 423 (stating that libertarian theory of First Amendment drifting toward conservative social interests); Becker, *supra* note 1, at 987 (concluding that binding judicial review is conservative); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 955 (1993) (concluding that economic conservatives profit from conservative free speech).

who need protection from the intolerance of the majority increasing, hopefully, the net sum of individual autonomy and free speech. Recognizing constitutional limits on Title VII's ban on hostile and abusive speech in private employment will not protect the vulnerable in cases like *Robinson v. Jacksonville Shipyards, Inc.* and *Johnson v. County of Los Angeles Fire Department*: women trying to enter traditionally white-male work places.[216] Rather, the recognition of free speech limits on Title VII will reinforce the hostility and intolerance of those who control the political system and such workplaces: white men. Recognition of free speech limits will increase the vulnerability of the women and minorities who are stuck in a situation from which they cannot just walk away. Recognition of free speech limits on Title VII will silence these marginal workers.

Constitutional limits on Title VII's ability to censor hostile and abusive speech at Jacksonville Shipyards are not likely to yield a work place with greater free speech and individual autonomy for all those interested in employment there. To be sure, such limits will increase the free speech of those who, along with management at the shipyard, enjoy pornography and abusing women employees. But think of the many who are uncomfortable in this heterosexually-charged atmosphere and feeling anything but autonomous or able to express *their* sexuality: gay men — pressured to join conversations they would prefer to avoid or open themselves to harassment; lesbians — pressured to pretend to be heterosexual in an atmosphere in which to be heterosexual and a woman is to be degraded as an object; and many, if not all women, facing an impossible double bind — to play along in conversations they find demeaning and frightening or face greater harassment and danger by refusing to do so. Title VII's restrictions on harassing speech will yield a workplace likely to enable more employees and potential employees to be autonomous agents able to speak with relative freedom than that produced by constitutional limits on Title VII. Thus, for a number of reasons, the dependency of workers argues against free-speech limits on Title VII.

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[216] *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1490-91, 1535 (M.D. Fla. 1991); Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430 (1994).

The point here is not that because workers are vulnerable, they should not get *any* constitutional protection. Rather, there is little point in enforcing constitutional limits on the ability of Congress to prohibit sexual harassment under Title VII in order to protect the speech of *workers*. Workplaces free of sexually and racially harassing speech might well be workplaces with more, not less, freedom of speech (and freedom not to speak) though to be sure there would be differences in what is said and in which employees feel free to speak and to be silent. In the context of copyright law, the Supreme Court has recognized that, sometimes, limits on free speech actually further real speech and autonomy concerns: "Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value [in freedom not to speak]."[217] So too, Title VII's limits on harassing speech actually further general free speech and autonomy.

My second major argument against constitutional limits on Title VII is that such limits will not actually mean free speech rights for *employees*. Given private employers' freedom to fire workers for disfavored speech, a First Amendment limitation on Title VII will actually translate into a right for employers not employees. The conflict is between the private employee's right to the opportunity to work free of discrimination and the private employer's right to control workplace speech.[218] Recognition of constitutional limits on Title VII will protect only the right of private employers to control the work force and its speech.

There is no such thing as free speech in private employment. Recall that in *Robinson v. Jacksonville Shipyards, Inc.*, male pornography was not displayed, and supervisors indicated they would tear it down if they saw it.[219] Similarly, management forbade political posters in the shipyard. There was plenty of censorship in the shipyard, though female pornography was tolerated and enjoyed by many managers, as well as workers.

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[217] Harper & Row v. Nation Enter., 471 U.S. 539, 560 (1985).

[218] *See* Horton, *supra* note 16, at 409.

[219] *Robinson*, 760 F. Supp. at 1494.

Kingsley Browne and Eugene Volokh have argued that the workplace is where most workers engage in much of their political speech.[220] But unpopular views are not freely expressed at work. In most workplaces, women worry about what they say lest they be labeled "feminazi" and African Americans worry about what they say lest they be labeled radical and anti-white. Most gay men and lesbians are exceedingly careful about what the say at work, and only the most foolish would "flaunt" their sexual exploits the way many other employees do. I have tenure and far more job security than most Americans, but I worry a great deal about what I say at work on political issues, particularly issues involving law school appointments and politics. Protecting much racially or sexually harassing speech for this reason, as Browne and Volokh apparently would, will not translate into tolerance for feminists or Black nationalists. Indeed, it will mean tolerance of harassing speech only to the extent tolerated by the employer.

Constitutional limits on Title VII will translate into freedom of speech for employees only if and when and to the extent employers tolerate the speech Title VII cannot ban, i.e. only when the employer permits the hostile and abusive speech. As we move into the twenty-first century with its multicultural work force, most of whom will not be white men, employers are increasingly going to regulate this speech anyway for economic reasons.[221] There are already many workplaces which men who would like to post porn feel that they are the silenced underdogs, and the number is likely to increase in the future, regardless of the reach of Title VII. This is not to say that there is no longer any need for Title VII's ban on harassing speech. Employers are more conscious today than in the past of the dollar-and-cents cost of sexual and racial harassment *because* Title VII made it illegal. And not all employers are as yet committed to eliminating such speech. Indeed, some employers such as Jacksonville Shipyards, employers with traditionally male or white work forces, may view sexual and racial harassment as valuable, tending to discourage entry of workers their current employees

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[220] Browne, *supra* note 12, at 516; Volokh, *supra* note 13, at 1849.

[221] For a discussion of the costs to business associated with sexual harassment, see Kaplan, *supra* note 76.

would resent and prefer to avoid. For such employers, Title VII's ban on racial and sexual harassment is absolutely necessary if employment opportunities are to be available to all regardless of race or sex.

If private employment is an important arena of free speech on political issues, then we need to extend First Amendment protection to private employment in general so that *all* people with disfavored politics are entitled to speak as freely as those with mainstream politics.[222] Employers routinely repress *disfavored* political speech in workplace. Unless some kind of limit on discrimination on the basis of speech in private employment is adopted by courts or legislature or constitutional amendment, holding unconstitutional Title VII's ban on harassing speech in private employment cannot protect employees' speech rights. The Court should, therefore, uphold Title VII under the relatively lenient balancing standard that it articulated in the anti-trust cases and the labor cases, cases which also involved speech in settings of private employment. Perhaps, however, Title VII should ban only harassing speech directed *at* particular individuals. I turn next to an analysis of this suggested distinction.

D. Directed Versus Non-Directed Speech

Nadine Strossen and Eugene Volokh suggested that only directed speech should be actionable under Title VII without any constitutional issue.[223] Under this approach, Title VII could censor one worker yelling sexual or racial epithets at another. But Title VII could not censor non-directed speech, such as pornographic posters on the walls, because of First Amendment constraints.[224] Strossen and Volokh do not derive this "rule" from the language of the First Amendment, as it does not give guidance on when regulation of speech is and is not permissible. Nor has the Supreme Court articulated this "rule" in cases dealing with restrictions on speech in public or private employment. None of these cases, discussed in Parts I and II above,

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[222] Lisa Bingham makes such an argument. *See* Bingham, *supra* note 15.

[223] *See* Strossen, *supra* note 13; Volokh, *supra* note 13.

[224] Strossen, *supra* note 13, at 777-78.

suggests the line Strossen and Volokh would draw. Three possibilities may explain the rule articulated by Strossen and Volkh.

First, perhaps this is based on a recognition that much directed speech is already regulated and would be hard to distinguish. Consider for example obscene phone calls, which are regarded as constitutionally criminal and are directed speech. But of course, government censors much more speech than just obscene phone calls. The NLRA and antitrust cases, discussed above, seem far more analogous.

A second possibility is based on the fact that perhaps the NLRA cases permit regulation of speech because the speech regulated explicitly or implicitly threatens violence or other illegal action, as suggested earlier.[225] Thus, perhaps injunctions against union picketers in secondary boycotts are permitted because of the implicit threat of violence to consumers and other third parties who attempt to cross the picket line. Injunctions against anti-union speech by employers in union elections are perhaps permitted because of the implicit threat of illegal retaliation against workers if they elect the union.

Perhaps harassing speech directed against particular employees similarly carries explicit or implicit threats of illegal action, such as refusing to cooperate with the harassed co-worker, or to show her the ropes, or to behave in other discriminatory ways, or even of violence. This is true. But non-directed harassing speech is similar when it creates a hostile or abusive environment. At Jacksonville Shipyards, a woman need not hear abusive language directed at her as an individual to hear the threat implicit in the pornography surrounding her that she will not be treated as an individual worker, worthy of dignity and respect, but as an object; that the men are not likely to be willing to show her the ropes, help, and support her the way they would one of the boys; and even that she should be careful walking to her car at night alone in the shipyard parking lot, because violence may be directed at her as well as the targeted

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[225] This possible basis is suggested by Kent Greenawault's work on the First Amendment, though he does not develop such points. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 257-58 (1989) (discussing possible sanctions as response to privileged speech); Kent Greenawalt, *Speech and Crime*, 1980 AM. BAR. FOUND. RES. J. 645.

breast.[226] Recall that a co worker yelled "boola-boola," a reference to sodomous rape, at Lois Robinson in the parking lot.

Finally, a third possibility may explain the Strossen position: both our culture and the ACLU tend to focus on rights of individuals, not groups. Rights are seen primarily in terms of individual rights. This is true even when talking about a ban on discrimination on the basis of group membership like sex or race. But this approach does not work well when analyzing speech hostile or abusive on the basis of group membership.[227] There is not much difference between directed and non-directed speech hostile and abusive on this basis. Women and men, as well as whites and people of color, understand this in the real world. There is not much difference between epithets hurled at an individual woman and pornographic pictures all over the walls at work. An individual woman understands that she is a woman, that those are women, and that those pictures indicate how her co-workers look at women, including herself. In fact, in both *Robinson v. Jacksonville Shipyards, Inc.* and *Johnson v. County of Los Angeles Fire Department*, the consumption of pornography *was* associated with abuse directed at individual women.[228] I suspect that this will often be the case.

Another problem with this directed and non-directed line is that it would be very hard, if not impossible, to apply. How would one decide whether speech is directed or non-directed when it is harassing on the basis of sex or race, i.e. membership in a group? Recall that in *Robinson*, plaintiff Lois Robinson was a blond and a welder who worked with a welding instrument known as a whip.[229] Once she was in a small enclosed area with six or eight guys, no other women, and one of the guys waved around a piece of pornography of a blond with a whip. Would that be directed or non-directed? What if it were on a wall in the men's locker room? On the wall near her locker? Should the graffiti on the walls where Robinson worked be considered directed or non-directed?[230]

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[226] Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1499 (M.D. Fla. 1991).

[227] *See* Burns, *supra* note 124, at 196-97 (arguing that group-based stereotyping is more pernicious and insidious on group members than disparagement not group-based).

[228] *Robinson*, 760 F. Supp. at 1494; Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1439 (1994).

[229] *Robinson*, 760 F. Supp. at 1496.

[230] The graffiti where she worked included "'lick me you whore dog,' 'bitch,' 'eat me,'

In terms of harm, the harm can be exactly the same whether speech is directed or non-directed. In fact, a few mild directed remarks would be much less harmful than pervasive non-directed hostile or abusive speech. Nor can one distinguish between directed and non-directed speech in terms of the purpose of the harassing men. Both can be used to make women feel they are not welcome in the workplace, to communicate the message that they had best get out before they get hurt, particularly if it is a traditionally male and hazardous workplace like the shipyards or the fire station. Or they had best keep their place and be always on guard if the harassment is coming from a supervisor as in *Harris v. Forklift Systems, Inc.*[231] Finally, note that Strossen's distinction doesn't eliminate the need for content and viewpoint discrimination. Her line, too, is based on content and viewpoint, since under it Title VII would ban hostile, but not friendly, directed speech.

Richard Fallon has argued for two limitations to Title VII's ban on harassing environments. First, speech which is "reasonably designed or intended to contribute to reasoned debate on issues of public concern" should be constitutionally protected.[232] Second, producers and purveyors of pornography should not be subject to harassing environment claims involving the material they produce and purvey.[233] However, speech "reasonably designed or intended to contribute to reasoned debate" will not meet the Supreme Court's harassment standard: speech that is not simply "offensive" but which creates "an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive."[234] And women working in the large pornographic industry should not, therefore, be unprotected from sex discrimination when it does occur under this standard.

In this section, I have argued that Title VII's prohibition on racially and sexually harassing speech should be and will be

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and 'pussy.'" *Id.* at 1499.

[231] 114 S. Ct. 367 (1993).

[232] *See* Fallon, *supra* note 4, at 47 (adapting from draft Guidelines Concerning Sexual Harassment developed by Harvard Law School Committee on Sexual Harassment Guidelines, which Fallon chaired, presented to Harvard Law School faculty in May 1994).

[233] *Id.* at 50.

[234] *Harris*, 114 S. Ct. at 370.

regarded as constitutional by the Supreme Court. In similar cases, the Court has indicated a willingness to allow economic regulation even when overtly directed at speech expressing certain viewpoints. Equally important, the Court has indicated that the government's interest in eliminating sexual and racial discrimination from economic arenas is a compelling state interest. Perhaps, however, the current understanding of the scope of Title VII's restriction on sexual harassment contributes to perceptions that women are victims and is actually inconsistent with sexual equality. I turn to this final concern in the next section.

V. TOO MUCH PROTECTION: WOMEN AS VICTIMS

Nadine Stossen has argued that equality concerns cut against too much protection of women from sexual speech. She suggested that over-broad regulation of sexual speech in the workplace would be analogous to protectionist legislation which applied only to women workers. This in turn often limited their employment opportunities and hence hurt them.[235] So too, Strossen suggested, "'[p]rotectionist' measures designed to shelter women from sexually explicit expression . . . in fact reflect and reinforce a patronizing, paternalistic view of women's sexuality that is inconsistent with women's full equality."[236] Strossen expressed concern that limits on sexual harassment in the workplace reflect "a concept of women's unique vulnerability to speech about sex — and, indeed, to sex itself — that many feminists find antithetical to gender equality."[237] Strossen also stressed the importance of broad protection for freedom of expression for those committed to equality for women because they advocate social change.[238]

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[235] Strossen, *supra* note 13, at 777-78.
[236] *Id.* at 778-79.
[237] *Id.* at 780.
[238] *Id.* at 781.

Strossen concluded by quoting from the "FACT briefs,"[239] which described changes more important to women than regulation of sexual speech:

> [The] sex segregated wage labor market; systemic devaluation of work traditionally done by women; sexist concepts of marriage and family; inadequate income maintenance programs for women unable to find wage work; lack of day care services and the premise that child care is an exclusively female responsibility; barriers to reproductive freedom; and discrimination and segregation in education and athletics.[240]

Strossen's analysis is, however, entirely conclusory[241] and cannot support her bottom line: that any regulation of workplace harassment beyond the precise line she would draw — harassing speech is actionable without constitutional violation if only if targeted at specific workers — will hurt women's struggle for equality. Every assertion she made about the dangers of banning harassing speech for women could be made as easily about her own proposal. Nor did she explore possible connections between sexual speech derogatory of a woman or women and the items on her approved priority list, such as the link between pornography in male blue-collar workplaces and the continued segregation of women into lower paying women's jobs.

More generally, the line to be drawn between too little and too much "protection" of anyone is inevitably a strategic one, to be made in light not of armchair identification of the ideal line, but of where the real world problems are, how well various remedies work, and what advantages and disadvantages are associated with them. Such questions are likely to be better addressed when the question is one of statutory interpretation, and

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[239] I.e., the brief filed by feminists opposed to general regulation of pornography along the lines of the proposals of Catharine A. MacKinnon and Andrea Dworkin. This brief was filed in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, *aff'd mem.*, 475 U.S. 1001 (1986). The Seventh Circuit decision struck down such regulation as a violation of the First Amendment. Neither the case nor the brief considered speech in the workplace or under Title VII. The brief itself is cited at the end of the material quoted in text. *See infra* note 240 and accompanying text.

[240] Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Task Force, et al., in* American Booksellers' Association v. Hudnut, 21 U. MICH. J.L. REF. 69 (1987-1988).

[241] *See* Horton, *supra* note 16 (providing less conclusory discussion of this issue).

thus more easily adjusted, than of a constitutional line in the sand.

Accusing feminists of reinforcing women's status as victims has become increasingly popular of late. Any criticism of the status quo or demand for change, particularly in sexual areas, can be countered by the assertion that merely mentioning either problems or possible solutions only reinforces stereotypes of women's weaknesses, ineffectiveness, vulnerability, and lack of agency as sexual beings. But the alternative to complaining about problems and suggesting solutions is accepting the status quo, thereby relinquishing any hope of attaining equality between the sexes (unless we are already there). If there is any realm in which we remain far from equality, it is surely the sexual realm, where male aggression towards and objectification of women continue to be seen simply as sex. Sex education continues to teach — for overtly neutral reasons — about male sexual pleasure and female plumbing and pregnancy. Sexually active girls in high school are still "sluts" and the boys they are intimate with "score." Women are still either madonnas or whores. Sexual double standards surround us. To pretend this is equality is to give up on reducing the level of sexual inequality in the United States today.[242]

If in fact women are not equal in employment today and sexual harassment at work is one factor retarding women's economic progress, we need to consider how to lessen such harassment without inadvertently causing more harm than good. Assertions that proposed solutions reinforce the stereotype of woman-as-victim do not work in the necessary analysis of how to balance these competing concerns, no matter which way one comes out in the end on the merits. In a 1991 article, Amy Horton noted that it seems unlikely that censoring hostile speech in working environments so hostile as to be actionable under Title VII will

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[242] For a discussion of the different environments women and men experience when sexuality pervades the workplace, see BARBARA A. GUTEK, SEX AND THE WORKPLACE (1985). Gutek points out, for example, that "[b]eing a sex object" is a "fairly central aspect" of the female sex role while being a sex object does not seem to be central to the male sex role. *Id.* at 16. The central aspect of the male sex role would probably concern "sexual aggressiveness or assertiveness." *Id.*

be overprotective or sanitize workplaces in a way oppressive to both women and men.[243]

Part of the problem is that our culture tends to view individuals as either autonomous agents, entirely responsible for their actions, or as helpless victims, battered by forces beyond their control.[244] We either act freely as a result of an individual choice, or our behavior is controlled by our socialization and the forces surrounding us. Reality is not, however, so simplistic. Most of us are in part active agents influencing the world around us and in part the beings created by our socialization and responding to forces beyond our control.

For most workers, these points are particularly true on the job; workers are both agents and subject to others' control. As employees, they need cooperation, good will, and support not just from their bosses, but from co-workers and often even subordinates if they are to be effective. At the same time, employees are not usually *only* passive victims without any influence on the conditions of their employment or their relationships with those with whom they work. And many employees, some men as well as women, find themselves in environments in which sexually harassing speech creates problems too severe for them to handle. In this Article, I have argued that the precise contours of an employer's obligation to control such speech under Title VII should be a question of statutory interpretation rather than of constitutional limitations.

CONCLUSION

Free speech rights are effective only to the extent individuals are autonomous — able to voice their views despite adverse reactions. Autonomy will always vary with race, gender, and most especially economic means, class. But there are fora in which it is at least somewhat reasonable to assume that individuals are autonomous: for instance, when an individual speaks in a public

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[243] Horton, *supra* note 16, at 444-48.

[244] For an excellent discussion of the problem — that feminists are accused of reinforcing women's status as victims when they describe and confront oppression — in the context of domestic violence, see MARTHA MAHONEY, VICTIMIZATION OR OPPRESSION? WOMEN'S LIVES, VIOLENCE, AND AGENCY IN THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 59 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

forum, in their own home, or at a political meeting. It is not however, equally reasonable to assume autonomy on the job, nor would such an assumption be likely to further free speech and individual autonomy on the job. Few, other than federal judges and tenured academics, are very autonomous as speakers when on the job. And even these privileged workers are likely to be quite careful of what they say and to whom at work. As an employee, even the Surgeon General is dependent on continued support from superiors and others if she is to be able to continue to hold and be effective in her job. Indeed, limits on harassing speech will further autonomy for an otherwise captive audience who otherwise must try to work in an "objectively hostile or abusive" environment.

Further, there is no reason to be particularly suspicious of government when it regulates speech at work. Such regulation, even of private employers, has long been tolerated under labor law, with the purpose of achieving desired results in terms of relationships between workers and employers. And although labor laws afford some protection to employee speech, that protection is quite limited. Labor law protects employee speech about the terms and conditions of employment, but that protection does not reach even speech on these matters during work hours and in work areas. And it certainly does not extend to political sense in any broad sense. Indeed, labor law censors much political speech, as described above. Congress and the Court seem to agree that private employment is not an important arena of free speech. Similarly, public employers are allowed to regulate employee speech to achieve legitimate employment-related ends and smooth interpersonal relationships. Public employees have a quite limited constitutional right to speak even on matters of public interest: such speech is protected only when not disruptive of internal discipline and relationships. For example, speech on a matter of public interest can be restricted because of its disruptive effects when critical of a superior or of internal operations and procedures. Sexually harassing speech is analogous. There are sound reasons for government to censor such speech: to promote internal efficiency and smooth relationships between co-workers — analogous to the desire to ensure smooth relationships between supervisors and employees. In the absence of such restrictions, sexually harassing speech will

inevitably require supervisors either to tolerate inefficient relationships between co-workers or to waste time trying to foster cooperation, respect, and self confidence in an environment in which hostile and offensive speech continues.

Thus, government regulations of harassing speech — in the form of a Title VII requirement that private employers limit sexual and racial harassment on the job — are analogous to constitutional labor law restrictions on speech of private employers during election campaigns, to constitutional restrictions on the speech of public employees, to antitrust limits on employment-related speech, and should be regarded as one of the many areas in which government is allowed to regulate speech.[245] The Article concludes that the First Amendment does not forbid an interpretation of Title VII as requiring all employers to restrict sexually and racially harassing speech.

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[245] Other areas include the following: slander, libel, breach of obligations of confidentiality, obscenity, fraud, misrepresentation, threats to the life of the President, commercial speech, contracts, antitrust, criminal conspiracy, public education, copyright, trademark, giving secrets to enemies. *See, e.g.*, THE PRICE WE PAY, *supra* note 1, at 6-7 (listing some of many areas in which we allow regulation of speech).