Strange Fruit*: Harassment and the First Amendment

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There seems no cause for panic, though I find much cause for concern. The Supreme Court has indicated clearly that, one way or another, it will continue to find harassing speech to violate Title VII. Even in *R.A.V. v. City of St. Paul*,[1] Justice Scalia writes that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in the workplace."[2] Comments of the concurring Justices in *R.A.V.* suggest no erosion in the prohibition of harassing speech under Title VII. Most recently, in *Wisconsin v. Mitchell*,[3] Justice Rehnquist cited approvingly the Court's precedents upholding federal antidiscrimination laws against constitutional challenge, writing that the Court had "rejected the argument that Title VII infringed employers' First Amendment rights."[4] Describing *R.A.V.*, the Chief Justice wrote that "we cited Title VII . . . as an example of a permissible content-neutral regulation of conduct."[5] Because of these statements, I will not panic.

I find much cause for concern, however, in the Court's manner of resolving the issue of the regulation of hate speech, which may in the future bear on the Court's resolution of the issue of sexual and racial harassment, the hate speech of the

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* The title, *Strange Fruit*, is the title of a song composed by Lewis Allan and sung by Billie Holiday and, more recently, Cassandra Wilson. The song describes painfully the sight of strange Southern fruit, lynched black bodies hanging from trees.

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[1] 505 U.S. 377 (1992).

[2] *Id.* at 389.

[3] 508 U.S. 476 (1993).

[4] *Id.* at 487.

[5] *Id.*

workplace. The abstruse majority opinion in *R.A.V.* casts the racist cross-burners as the victims of the overbearing, thought-controlling St. Paul City Council who, but for the Court, would impose an unbearable orthodoxy upon racist cross-burners. The majority opinion notably ignores the real victims of the episode, Russ and Laura Jones and their young son, the only black family on the block in a predominantly white neighborhood, who were awakened in the middle of the night by the American symbol of hatred of African Americans, a burning cross. Thus was the Jones's experience in St. Paul tied to centuries of violence and hatred inflicted upon African Americans, and over a century of crosses burning and midnight awakenings.[6]

The Court makes a cursory nod to the Joneses: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible."[7] This statement speaks volumes about how much the Court missed. Someone, in this case, was not anyone. The cross was burned in the front lawn of an African American family. It was an act calculated to terrorize by invoking the centuries of violence and hatred that, to some extent, remain our legacy.

The *R.A.V.* Court missed, or ignored, the story of those who were most injured by the cross-burning. The Court's analysis thus missed a crucial aspect of the injuries caused by the expression the St. Paul City Council was not permitted to regulate. I would characterize some part of the injuries to the Jones family as injuries to equality interests, society's compelling interest in eliminating our racial, ethnic, and sexual systems of caste. In effect, the Court ignored how free speech may injure equality values also of constitutional stature. Given the posture of the *R.A.V.* litigation, it seems that the Court could only have considered equality interests through some assessment of the injuries such as I described above. In the Title VII context, however, the conflict between the equality commanded by the statute and free speech seems clearly presented.

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[6] *See* Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 787-88 (1992) (describing racial hatred directed towards African-American family living in Minnesota in 1990).

[7] *R.A.V.*, 505 U.S. at 396.

I. WHY HARASSING SPEECH IN THE WORKPLACE RAISES A LEGITIMATE FIRST AMENDMENT ISSUE

The Supreme Court has recognized that Title VII prohibits harassment because of sex in the workplace that results in a hostile or abusive environment.[8] The Court seems to have tacitly assumed that harassment because of a hostile or abusive environment presents no First Amendment problem. In the two leading cases on sexual harassment, no Justice has commented on the relevance or potential applicability of the First Amendment.[9] In its recent First Amendment cases, the Court appears to approve of the regulation of harassing conduct as incidental to general prohibitions on discrimination.

However, it is not clear to me why the First Amendment should not apply to harassing speech. Particularly in *Harris v. Forklift Systems, Inc.*,[10] which involved a hostile work environment, the harassment occurred through verbal sexual comments, innuendos, and insults that Harris's male supervisor made to her. Her supervisor's speech, insulting and degrading, was the exclusive cause of the environment the Court found hostile.

Since extremely offensive speech alone was found to violate Title VII, I think a First Amendment problem, under the current construction of the Amendment, may be squarely posed. Just because the Court didn't discuss the possible application of the First Amendment nor resolve any conflict that might exist between the First Amendment and Title VII doesn't mean that no problem exists, as some commentators have recognized.[11] Ignoring any potential conflict has the obvious advantages of ease of resolution and facilitation of appropriate outcomes, as demonstrated in the Court's two leading precedents. The Court's failure, to date, to address this conflict directly, however,

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[8] *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (holding that Title VII prohibits harassment in workplace that results in hostile or abusive environment).

[9] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); *Harris*, 114 S. Ct. at 367.

[10] 114 S. Ct. 367 (1993).

[11] *See, e.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 481 (1991) (stating that few courts have acknowledged possibility of constitutional protection for sexually harassing statements); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 149 (1992) (stating that Court should examine how First Amendment related to sexually harassing statements).

has supplied no satisfactory rationale for its resolution, nor a guarantee that the conflict will not be raised nor addressed in some future case.

I cannot assume that the First Amendment does not apply. Let me state briefly the straightforward reasons why I think it does apply. Particularly in *Harris*, the hostile environment that violated Title VII was created entirely through repeated offensive verbal statements of Harris's male supervisor. While the supervisor's statements were offensive, sexual, and degrading, they fall within none of the currently recognized exceptions to First Amendment protection: they were not, for example, clearly obscene, nor fighting words, nor words of imminent incitement to unlawful conduct. Since the supervisor's words constituted illegal harassment because of their sexual, degrading, and abusive content, we have an example of governmental regulation precisely because of objectionable content. This kind of regulation presents a classic First Amendment problem: governmental regulation and prohibition of speech because of its content.

Hateful, degrading, and subordinating speech communicates a powerful idea: it is a hostile assertion of the inferiority of nonwhite peoples and women, an assertion of white, and usually male dominance in the workplace, and a denial of the rightful place of women and people of color in the workplace and in society.

The best response to the First Amendment problem posed by harassing speech, in my view, lies in recognizing the serious, degrading injuries caused by harassing speech and in asserting that values of equality and anti-subordination outweigh whatever little social value harassing speech may contain. I recognize that my argument departs from current First Amendment doctrine, but I believe the currently unsatisfactory weighing of the interests warrants such departure.

II. THE ANTI-SUBORDINATION RATIONALE FOR REGULATION OF HARASSMENT

I find the anti-subordination rationale to be the most compelling and the best reason for prohibiting harassing speech in the workplace and, indeed, in many forums. In some ideal world, and in this one, employees should share an environment of

equal respect, dignity, and opportunity. As Professor Becker correctly notes, the speech that accomplishes either racial or sexual harassment (and I would add harassment on the basis of ethnicity to the list) has "the purpose and effect of putting a group . . . back in [its] (subordinate) place and outside the economic territory of the harassers."[12]

Harassing speech, the hate speech of the workplace, maintains established relationships of caste and subordination and undermines the core value of equality which lies at the heart of Title VII.[13] Sexual harassment aims to keep women in their subordinated place in relation to men in the workplace. Harassment because of race and ethnicity aims to keep people of color in their subordinated place in relation to whites in the workplace. Harassment because of sexual orientation aims to keep gay and lesbian persons in their subordinated place in relation to heterosexuals. Equal treatment in the workplace, and in society, must mean equal dignity and respect for every individual's personhood. Equal treatment, should, therefore, mean freedom from harassing speech that impairs equality.[14]

III. THE HARMS OF HARASSING SPEECH

It is not hard to demonstrate the harms that flow from permitting harassment in the workplace. A study performed by the Working Women's Institute found that the following stress injuries were suffered by victims of sexual harassment: ninety-six per cent of victims experienced emotional distress; forty-five percent of victims experienced work performance stress, stress that interferes directly with work performance; and thirty-five per cent of victims suffered physical stress, bodily ailments induced by stress.[15] Similar stress injuries result from harassment because of race.[16] Harassment causes emotional distress and psychological

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[12] Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 832 (1996).

[13] Roberts v. United States Jaycees, 468 U.S. 609, 628-29 (1984) (segregation of women not allowed); Lawrence, *supra* note 6, at 792.

[14] *See generally* Sharon E. Rush, *Feminist Judging: An Introductory Essay*, 2 REV. L. & WOMEN'S STUD. 609, 627 (1993).

[15] Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1507 (M.D. Fla. 1991).

[16] Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L.L. REV. 133, 137, 143 (1982) (stating that racial stigmatization injures its victims' relationships with others); Mari J. Matsuda, *Public Response to Racist*

trauma to the harassed employee, which can reach the extremes of post-traumatic stress syndrome.[17] The emotional distress that results from harassment is recognized as a specific diagnosable condition by the American Psychiatric Association.[18] This distress manifests itself in various ways, including anger, fear for one's safety, "anxiety, depression, guilt, humiliation and embarrassment."[19]

All of these forms of emotional distress are evident in the harassment cases. In *Robinson v. Jacksonville Shipyards, Inc.*,[20] the plaintiff, Lois Robinson, and her very few female co-workers, testified about their feelings of humiliation and embarrassment when confronted with a daily barrage of pornography and crude, explicit sexual comments directed at them. Robinson testified that anxiety produced by her working environment caused her to request a thirty-day leave of absence, to miss additional work days, and to have difficulty sleeping.[21] In *Wells v. Murphy Motor Freight Lines*,[22] Ray Wells, the African-American plaintiff, sued his employer in response to a pattern of racial harassment the court described as "vicious" and "frequent."[23] Wells's rage in response to his daily abuse by his coworkers, who frequently called him "nigger," who refused to eat with him, and who sent him Ku Klux Klan crosses, is palpable and justified.[24] In *Harris v. Forklift Systems, Inc.*,[25] the Supreme Court recognized that such humiliation, and harm to an employee's "psychological well-being," are among the relevant factors to be considered in deciding whether a hostile environment exists.

Harassment at work also results in "work performance stress," which includes "distraction from tasks, dread of work, and an

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Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2336 (1989) (stating that victims of hate propoganda experience physiological symptoms and emotional distress).

[17] Dorchen Leidholdt, *Pornography in the Workplace: Sexual Harassment Litigation Under Title VII, in* THE PRICE WE PAY 218 (Laura J. Lederer & Richard Delgado eds., 1995).

[18] *Robinson*, 760 F. Supp. at 1505 (noting expert testimony of K.C. Wagner).

[19] *Id.* at 1506-07.

[20] *Id.* at 1486.

[21] *Id.* at 1519.

[22] 488 F. Supp. 381 (D. Minn. 1980).

[23] *Id.* at 384.

[24] *Id.* at 384-85.

[25] 114 S. Ct. 367, 370-71 (1993).

inability to work."[26] It should come as no surprise that harassment interferes with work performance. Who among us who have been targets of racial, ethnic, or sexual insults can remain impervious and act as if nothing happened? We may desperately want to persevere and act as if nothing happened, and we may be successful at maintaining outward appearances of professionalism, but something shattering and turbulent has happened. According to Dr. Susan Fiske, "when sex comes into the workplace, women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it."[27] And the effects of such work performance stress extend beyond just the immediate job: victims are deterred from seeking other jobs or promotions, quit their jobs, get transferred, or may be fired.[28] As just one illustration from the cases, Lois Robinson testified that "she missed several days each year because she could not face entering the hostile work environment."[29] Enlightened employers should see it in their self-interest to prohibit harassment, if only because it interferes with employee productivity, which ought to be their main concern.

IV. THE ASYMMETRICAL NATURE AND EFFECTS OF HARASSING SPEECH

It is important to note that these effects of harassing speech are essentially one-way: all the costs are paid by victims of harassing speech. In contrast to the profound effects of sexualization of the workplace upon women, the effects upon men have been described as "vanishingly small."[30] Interestingly, *Robinson* illustrates that men simply will not tolerate the kind of indignity that they are often willing to impose upon women. Despite the ubiquitous and persistent presence of pornography depicting women in the Jacksonville shipyard, the employer never distributed nor tolerated the distribution of calendars with pictures of nude or

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[26] Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1506 (M.D. Fla. 1991).
[27] *Id.* at 1505.
[28] *Id.*
[29] *Id.* at 1519.
[30] *Id.* at 1505.

partially nude men which, according to the testimony, would have been thrown in the trash.[31]

If males are unwilling to accept centerfold pictures and nudie calendars of themselves in a workplace, this confirms the subordinating purposes of sexual harassment and pornography depicting women in the workplace. Men are able to create and maintain workplaces in which they do not become sexual objects. Sexual harassment of women and pornography sexualize the workplace in a way that allows all female workers to be seen as sexual objects, rather than as equal fellow employees. And as long as only women are sexualized in this way, men remain the dominant group whose worth is evaluated in terms of their job performance, rather than in terms of their bodies and genitalia.

V. HARASSMENT AND THE ESCALATION OF VIOLENCE

Hostile environments in which sexual and racial insults, pornography, and stereotyping are common tend to have a priming effect on the workforce which leads to encouragement of others to view harassment victims in a disparaging way.[32] In this way, harassment escalates into threats of violence and actual violence. In *Robinson*, one of Lois Robinson's male co-workers, George Leach, told an offensive joke about sodomous rape, "boola-boola," in her presence.[33] Leach later teased Robinson in a threatening way in the company parking lot by referring to the sodomous rape joke. In *Wells*, in addition to enduring racial insults and Ku Klux Klan crosses, Ray Wells had the tires of his car slashed.[34]

In *Snell v. Suffolk County*,[35] African-American and Latino police officers, including Officer Ramos, were abused regularly through demeaning comments and cartoons posted on official bulletin boards.[36] On one occasion, white officers dressed a Hispanic prisoner in a straw hat, a sheet, and a sign that read

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[31] *Id.* at 1494.
[32] *Id.* at 1504-05.
[33] *Id.* at 1498-99.
[34] Wells v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384-85 (D. Minn. 1980).
[35] 611 F. Supp. 521 (E.D.N.Y. 1985).
[36] *Id.* at 525.

"Spic."[37] These white officers then referred to the prisoner as "Ramos's son."[38] When Officer Ramos complained to the appropriate officers and filed an incident report, he was accused of "making waves."[39] Officer Pritchard told Ramos to change the incident report. Pritchard then threatened Ramos, telling him "we know how to take care of fellows like you."[40] Soon after, Ramos's car was vandalized, and he began receiving harassing phone calls at his home at all hours, day and night.[41]

Responding to Ramos's incident report, the Police Chief of Staff told Ramos that an investigation revealed that the incident never happened. Ramos then produced pictures of the Hispanic prisoner, at which point he was told to see internal affairs. Once a hearing on Ramos's complaint was set, the intensity of the harassment of Ramos apparently increased: he was called "Spic" and threatened with the words "[w]e'll get you."[42]

These stories from the cases demonstrate the correlation between harassment and violence. Violence and threats of harm seem often to be part of the harassing hostile environment. As stated by Twiss Butler, "all unequal power relationships must, in the end, rely on the threat or reality of violence to protect themselves. . . . [V]iolence is necessary to enforce subordination of an individual or group."[43]

This section has discussed some of the ways that harassment contributes to the subordination of women and people of color in the workplace. Hate speech in the workplace intentionally injures people emotionally and physically. It often interferes significantly with an employee's job performance, which ought to be an employer's primary concern. And harassment breeds more harassment, which mushrooms into threats and violence.[44] All of these effects of harassment, taken together, undermine se-

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 526.

[43] Twiss Butler, *Why the First Amendment is Being Used to Protect Violence Against Women, in* THE PRICE WE PAY, *supra* note 17, at 163.

[44] *See* GORDON ALLPORT, THE NATURE OF PREJUDICE 390, 396, 436 (2d ed. 1958) (recognizing similar phenomenon in progressive escalation from racial harassment to discrimination to violence).

verely one of our society's most important interests and commitments: the core value of equality, protected statutorily by Title VII and protected by the Constitution in the Equal Protection Clause of the Fourteenth Amendment.

VI. RECONCILING HARASSMENT WITH THE FIRST AMENDMENT

It is possible to reconcile the regulation of harassing speech with the First Amendment without departing dramatically from current First Amendment jurisprudence. Many forms of speech can be regulated or prohibited consistent with the First Amendment under current doctrines.[45] In each case, the Court has balanced the right to freedom of speech against some other right or interest implicated by the speech, such as public safety, freedom from crime or fraud, and freedom from injury to one's reputation.[46] And the Court has concluded that the competing social interest was more important, justifying regulation of the speech.

In one of its cases permitting the regulation of speech in the workplace setting, *NLRB v. Gissel Packing Co.*,[47] the Supreme Court upheld regulations of employer and employee speech during labor organizing against a First Amendment challenge. Under *Gissel*, employers must not make coercive statements to employees nor suggest retaliation if employees decide to support a union in their workplace. In *Gissel*, the Court balanced the employer's free speech interests against employees' rights of association and concluded that "an employer's rights cannot outweigh the equal rights of the employees to associate free-

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[45] A partial list includes:

> [S]peech used to form a criminal conspiracy, speech that disseminates an official secret, speech that defames or libels someone, speech that creates a hostile working place, 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 military officer.

See Laura J. Lederer & Richard Delgado, *Introduction*, *in* THE PRICE WE PAY, *supra* note 17, at 6-7.

[46] *Id.*

[47] 395 U.S. 575 (1969).

ly."[48] Furthermore, the Court stated that "any balancing of those rights must take into account the economic dependence of the employees on their employers."[49]

The Court recognized explicitly that the enormous disparity in bargaining power between employers and employees makes a difference in the power of messages conveyed by employers: employees could not help but be coerced in the face of the power imbalance, and this coercion justified the regulation.[50] The Court continued:

> [W]hat is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, *not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be free to listen more objectively and employers as a class freer to talk.*[51]

The Court thus recognizes a significant, perhaps dispositive, difference between speech in the workplace, which may be regulated, and political speech, which deserves the highest level of protection under the First Amendment.[52]

More generally, it seems that the Supreme Court's crafting of its categories of protected and non-protected speech has often reflected a balancing of the value of the speech at issue against the potential harms generated by the speech. This was true in *Gissel.* As another example, in deciding that First Amendment protections do not apply to the regulation of obscenity, important elements of the Court's reasoning balance the offensiveness of explicit sexual materials against their social value: obscene materials can be regulated when they "appeal to the prurient interest in sex, . . . portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[53] When the offense caused by explicit sexual materials outweighs the marginal, at

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[48] *Id.* at 617.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 617-618 (emphasis added).

[52] *Cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

[53] Miller v. California, 413 U.S. 15, 23-24 (1973).

best, value of these materials, then they are deemed to be appropriately prohibited. The Court also recognized the legitimacy of the state interest in prohibiting the offensive harms that sexually explicit materials inflict upon unwilling recipients or observers.[54]

In *Chaplinsky v. New Hampshire*,[55] the Court recited its often-quoted list of classes of speech that could be prevented or punished: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[56] An although its list may sound a bit dated, the Court's rationale for allowing the regulation of these classes of speech is most timely: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[57] It is not difficult, in balancing the harms resulting from sexual or racial harassment against their low value in any kind of reasoned discourse to reach the conclusion that harassing speech is of "such slight social value" that it should appropriately be regulated in the interests of promoting values of equality in the workplace.[58]

VII. THE REGULATION OF HATE SPEECH IN OTHER JURISDICTIONS

Although American courts have refused to permit the regulation of hate speech because of the First Amendment,[59] other jurisdictions have handled the same problem very differently. International norms of human rights and other common-law jurisdictions have resolved the problem of hate speech very differently than American courts. The International Convention on the Elimination of all Forms of Racial Discrimination was

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[54] *Id.* at 18. *See also* Elena Kagan, *Regulation of Hate Speech and Pornography after* R.A.V., 60 U. CHI. L. REV. 873, 892-96 (1993) (arguing that government can regulate sexually graphic materials).

[55] 315 U.S. 568 (1942).

[56] *Id.* at 571-72.

[57] *Id.* at 572 (footnotes omitted).

[58] *See* Sharon Rush, *Feminist Judging: An Introductory Essay*, 2 S. CAL. REV. L. & WOMEN'S STUD. 609, 622 (1993).

[59] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding state hate speech ordinance unconstitutional).

adopted by the General Assembly of the United Nations in 1965.[60] Article 4 of this Convention condemns "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin."[61] Article 4 also prohibits:

> [A]ll dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of another persons of another colour or ethnic origin, and also the provision of any assistance to racist activities.[62]

These principles of international law would prohibit comfortably racial harassment in the workplace. Although the United States signed the Convention, it made a reservation explicitly grounded in "the right of free speech" and declared that "nothing in the Convention shall be deemed to require or to authorize legislation . . . incompatible with the provisions of the Constitution of the United States of America."[63] Thus the United States committed itself to the values of racial equality embodied in the Convention, while allowing free speech values to override equality values.[64] In its rigid adherence to its traditional free speech doctrines, the United States lags somewhat behind international human rights norms and other common-law jurisdictions.

In England, for example, the Race Relations Act punishes "[i]ncitement to racial hatred."[65] This statute punishes the publication or distribution of writings, or the use of words, "which are threatening, abusive, or insulting, in a case where . . . hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question."[66] The racial harass-

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[60] *See* International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, 660 U.N.T.S. 212 n.1. *See also* NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1980).

[61] *See* International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 60, at 218.

[62] *Id.* at 220.

[63] *See* LERNER, *supra* note 60, at 53, 161 (describing United States' stipulations in signing convention).

[64] *See* Matsuda, *supra* note 16, at 2345 (discussing United States' stipulations in signing Article 4 of Convention).

[65] ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN GREAT BRITAIN 419 (1972).

[66] *Id. See generally* Matsuda, *supra* note 16, at 2347 (discussing advances in race relations in other countries).

ment described in American cases would seem to be prohibited under these English principles.

Canada, too, has prohibited hate propaganda. The Canadian example can be particularly instructive for us since the Canadian Charter of Rights and Freedoms guarantees to everyone the fundamental "freedom of thought, belief, opinion and expression, including freedom of the press."[67] Section 15 of the Canadian charter guarantees that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."[68] Coexisting with the guarantee of freedom of expression, Canada prohibits verbal "statements, other than in private conversation, [that] willfully promote[] hatred against any identifiable group."[69] Accordingly, decisions of the Canadian Supreme Court considering the validity of prosecutions for engaging in hate propaganda or distributing pornography have balanced the freedom of expression guarantee against the injury to the equality guarantee produced by such expression.[70] Canadian courts have found in favor of equality rights, upholding the conviction of a teacher who made anti-semitic remarks in his classroom[71] and the general validity of a prosecution for distribution of hard core pornography.[72]

CONCLUSION

So the ways are there to prohibit racial and sexual harassment, if the courts come to recognize what is currently only a

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[67] CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

[68] *See* Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77, 78 (Winter 1992) (quoting § 15(1) of Canadian Charter).

[69] Hate Propoganda Act, R.S.C. § 319(2) (1985) (Can.) (pt. VIII (Offences Against the Person and Reputation)).

[70] *See* Kathleen Mahoney, *Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propoganda, in* THE PRICE WE PAY, *supra* note 17, at 278, 282-89. *But see* Robert Marten, *Group Defamation in Canada, in* GROUP DEFAMATION AND FREEDOM OF SPEECH 190, 213 (Monroe H. Freedman & Eric M. Freedman eds., 1995) (criticizing "new and repressive orthodoxy" promulgated by Supreme Court of Canada in *Keegstra*).

[71] Regina v. Keegstra, 61 C.C.C. 3d 1 (Can. 1990).

[72] Regina v. Butler, 70 C.C.C. 3d 129 (Can. 1992).

potential First Amendment problem. The Supreme Court may develop further the traditional conception of our First Amendment jurisprudence. The Court may learn from other jurisdictions, and allow them to influence its interpretation of the First Amendment. Whatever route the Court chooses, any balance between the principle of equal treatment and the degrading and demeaning values of racist and sexist speech in the workplace must be struck in favor of equal treatment.

Equality is an evolving idea, a process of recognition and gradual implementation.[73] Its full realization is still a work-in-progress. Further steps in the development and refinement of First Amendment jurisprudence in the service of this equality-process and equality-progress are well worth the taking. Rather than ask "How can such speech possibly be regulated?," the time has come to ask different questions: "How can we allow such speech to go unregulated? Why have we waited so long to regulate it?" Rather than "How can we?" the question has become "Why not and how?"[74] The Court's concluding words in *Miller v. California* are worth repeating in this conclusion:

> [T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press."[75]

So too, to equate the highest First Amendment values with the subordinating vulgarity of sexist and racist speech in the workplace demeans the First Amendment. Let us not misuse our great guarantees.

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[73] *See* Mahoney, *supra* note 70, at 280 (quoting Canadian Justice Rosalie Abelia on evolutionary nature of equality).

[74] *See generally* Lederer & Delgado, *supra* note 45.

[75] Miller v. California, 413 U.S. 15, 34 (1973).