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Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech

KINGSLEY R. BROWNE*

In *Meritor Savings Bank, FSB v. Vinson*,¹ the Supreme Court ruled that Title VII of the Civil Rights Act of 1964² prohibits sexual harassment of the "hostile environment" variety, stating that employees need not "run a gauntlet of sexual abuse in return for the privilege of being allowed to work."³ The Court appeared to endorse the EEOC Guidelines, which describe sexual harassment as "verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."⁴ Not all speech or conduct that might be labeled "harassment" is necessarily actionable, however; instead, the Court has said that in order to be actionable, harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁵ In *Meritor* and subsequent cases,⁶ the Supreme Court has held that employers may, in some circumstances, avoid liability for harassment by adopting effective anti-harassment policies and taking reasonable corrective action against harassment that does occur.

Much of the "conduct" that is complained of in harassment cases constitutes speech or other expression. Sexual jokes, sexual propositions, sexually explicit pictures or cartoons, and sexist remarks – such as statements that women should not be doctors or police officers – are common fare in sexual harassment cases.⁷ Courts have held that no malicious intent is necessary on the part of the accused harasser,⁸ and the Ninth Circuit has stated

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1. 477 U.S. 57 (1986).

2. 42 U.S.C. §§ 2000e-2000e-17 (1994).

3. *Meritor*, 477 U.S. at 59 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

4. 29 C.F.R. § 1604.11(a) (1999).

5. *Meritor*, 477 U.S. at 60 (quoting *Henson*, 682 F.2d at 904).

6. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

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

8. *Newton v. Dep't of the Air Force*, 85 F.3d 595, 598 (Fed. Cir. 1996); *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991); *Katz v. City of Aurora*, 85 F. Supp. 2d 1012 (D. Colo. 2000), *aff'd*, No. 00-1103, 2001 U.S. App. LEXIS 15368 (10th Cir. 2001); *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me. 1991), *amended by*, 765 F. Supp. 1529 (D. Me. 1991).

that even "well-intentioned compliments" may lead to liability.⁹ The "severe or pervasive" limitation of *Meritor*, designed to ensure that isolated and trivial incidents do not create liability, is assessed using a "totality-of-the-circumstances" standard.¹⁰

One might have thought it obvious that imposing liability on the basis of the content of speech raises substantial First Amendment issues, especially since liability depends in many cases on the viewpoint expressed. That is, a statement that women should *not* be doctors or police officers may contribute to liability, while a statement expressing the opposite opinion would not. Nonetheless, despite a rich debate that has raged for the last decade in the academic literature,¹¹ case law addressing the First Amendment implications of harassment regulation has been meager.¹²

I. FIRST AMENDMENT DOCTRINES THAT HAVE BEEN INVOKED TO JUSTIFY HARASSMENT REGULATION

If there can be said to be a core principle of First Amendment doctrine, it is that the government may not impose sanctions against the expression of particular views because of the viewpoint expressed. As the Supreme Court stated in *Rosenberger v. Rector and Visitors of the University of Virginia*,¹³ "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys" and "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."¹⁴ Given this principle, how can a court base a liability finding, even in part, on the statement "there's nothing worse than having to work around women"¹⁵ when it would not do so for the statement "it is a joy to work around women," at least so long as the latter statement was made in a non-sarcastic manner? Although a number of commentators, and a few courts, have invoked previously recognized doctrines that would allow such regulation, none of these doctrines can, without modification, justify the breadth of harassment

9. *Ellison*, 924 F.2d at 880.

10. *Meritor*, 477 U.S. at 69; *Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999) (stating that a "district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode"); *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992) (same).

11. See *infra* note 77.

12. See discussion *infra* Section V.

13. 515 U.S. 819 (1995).

14. *Id.* at 828-29.

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

regulation, as even some supporters of hostile-environment law acknowledge.¹⁶

A. Labor Speech

One doctrine that might justify harassment regulation is the “labor speech” doctrine enunciated in the Supreme Court’s decision in *NLRB v. Gissel Packing Co.*¹⁷ *Gissel* upheld a bargaining order against an employer that had predicted during a representation campaign that selection of the union could lead to the closing of the employer’s plant or transfer of operations if the union called a strike.¹⁸ The Court viewed this speech as “a threat of retaliation based on misrepresentation and coercion.”¹⁹ The Court was careful to note that its ruling did not limit employers’ rights to state their opinions, however. It stated that employers are “free to communicate . . . [their] general views about unionism or . . . a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’”²⁰

Although some have found support for harassment regulation in *Gissel*,²¹ the Court’s rationale does not extend so far. The basis for the *Gissel* decision was a transactional one: the Court viewed the employer’s speech as the equivalent of “if you vote in the union, I will close down the plant.”²² While this transactional rationale applies to quid pro quo harassment – “sleep with me or you are fired” – it does not extend to hostile-environment harassment. Expressing negative views about women is more analogous to the expression of negative views about unions, which the *Gissel* Court said the employer was free to do.

B. Captive Audience

Related to the labor-speech doctrine is that of the “captive audience.” Many commentators have argued that precedents allowing greater regulation of speech when the audience is somehow “captive” apply to the workplace

16. See, e.g., Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1 (1994).

17. 395 U.S. 575 (1969).

18. *Id.* at 620.

19. *Id.* at 618.

20. *Id.*

21. See, e.g., Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Amy Horton, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 400 (1991).

22. See *Gissel*, 395 U.S. at 616-20.

because workers lack the freedom they would enjoy on the street to avoid offensive speech.²³ While serious arguments can be made that captive-audience doctrine should be extended to encompass harassing speech, the exception as currently structured does not fit harassment cases.²⁴

Most captive-audience cases have emphasized the sanctity and uniqueness of the home.²⁵ In *Rowan v. United States Post Office Department*,²⁶ for example, the Court upheld a statute permitting persons having received advertisements for "sexually provocative" materials to request the Post Office to require mailers to stop future mailings to the addressee. The Court stated: "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere."²⁷ Although some of the Court's precedents are subject-matter based, as in *Rowan*,²⁸ none involves viewpoint-based regulation.

Unlike the laws involved in the Court's captive-audience precedents, harassment regulation attempts to insulate one captive from the speech of another captive, for typically the harassing co-worker is no less captive than his target. Had the statute at issue in *Rowan* purported to allow *any* member of the household to bar entry of sexually provocative materials to the entire household, the result would likely have been different.²⁹ An analogous situation is presented by a law that allows one worker to exercise a similar veto over the possession of sexually suggestive materials or expression of sexist or sexual remarks in the workplace by all other co-workers.

The captive-audience doctrine could, of course, be expanded to cover harassment regulation, but there is good reason for caution. As Laurence Tribe has noted, "The concept of a 'captive audience' is dangerously encompassing, and the Court has properly been reluctant to accept its implications whenever a regulation is not content-neutral."³⁰ Moreover, if people are captives for First Amendment purposes in their workplaces as well as in their homes, the "limited exception" to ordinary First Amendment

23. See Epstein, *supra* note 21; Sangree, *supra* note 21.

24. See Fallon, *supra* note 16.

25. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737-38 (1970).

26. 397 U.S. 728 (1970).

27. *Id.* at 738.

28. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

29. Justice Brennan's concurrence in *Rowan* noted that that the Court was leaving open the constitutionality of the statute's provision allowing a householder to stop mailings to the householder's children under the age of 19, and suggesting that the provision raised "constitutional problems." *Rowan*, 397 U.S. at 741 (Brennan, J., concurring).

30. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-19, at 950 n.24 (2d. ed. 1988).

principles becomes the rule, rather than the exception, as the two locales in which individuals are most likely to engage in discussion of social issues are extended less than full First Amendment protection.

C. *Time, Place, or Manner Regulation*

In some circumstances, regulation of the “time, place, or manner” of speech may be acceptable.³¹ Some have argued that workplace harassment regulation falls within this doctrine because it regulates speech in just one place – the workplace.³² In order for speech regulation to be justified under the time, place, or manner doctrine, however, the law must be both content neutral and narrowly tailored to serve a significant government interest.³³ Harassment law is not content-neutral, and although women’s workplace equality is a significant governmental interest, harassment law – reaching everything from forcible rape to the vilest obscene epithet to a well-intended compliment – is anything but narrowly tailored.

D. *“Secondary Effects” Doctrine*

Speech can sometimes be regulated, even on the basis of content, when the regulation is directed not at speech itself but rather at its “secondary effects.” The leading case is *Renton v. Playtime Theatres, Inc.*,³⁴ which upheld a zoning ordinance prohibiting adult theaters from locating near homes, churches, and schools. The Court held that the ordinance was permissible because it was aimed at the “secondary effects” of adult theaters – crime, lowered property values, and disintegration of neighborhoods.³⁵ According to the Court, the ordinance was not designed to suppress offensive speech and therefore was not to be subjected to the rigorous review it would otherwise face.³⁶

Some have argued that harassing speech disadvantages women and minorities by lowering their self-esteem, interfering with their ability to perform their jobs, and generally demoralizing them. Because the concrete harm to employment opportunities is a “secondary effect” of the speech that is being regulated, the argument goes, harassment regulation is a permissible restriction on speech under *Renton*.³⁷ The flaw in this argument is that the

31. *United States v. Grace*, 461 U.S. 171 (1983).

32. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

33. *Grace*, 461 U.S. at 177.

34. 475 U.S. 41 (1986).

35. *Id.* at 50-53.

36. *See id.* at 51-52.

37. *See Lydia A. Clougherty, Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability*, 75 NEB. L. REV. 1 (1996).

Supreme Court has held that "listeners' reactions to speech" are not the kind of "secondary effects" discussed in *Renton*.³⁸ It is precisely the listeners' reactions that are of concern in harassment cases – either women's reactions to hostile speech that impairs their ability to function in the workplace or co-workers' reactions to the speech that may lead them to view women as primarily sexual creatures rather than co-workers of equal status.

E. Fighting Words

Yet another class of speech that has been held to be entitled to lesser protection is, as the Court recognized in *Chaplinsky v. New Hampshire*,³⁹ "the insulting or fighting words – those which by their very utterance *inflict injury or tend to incite an immediate breach of the peace.*"⁴⁰ Although harassing words could be said to inflict injury "by their very utterance" – as could virtually all other speech that is deemed harmful – the Court since *Chaplinsky* has relied on the breach-of-the-peace rationale rather than the "injurious in themselves" rationale.

Very little harassing expression fits within the definition of "fighting words," as most would not tend to incite a breach of the peace. Moreover, the selectivity of the fighting words that are prohibited tends to undercut an argument that the purpose of the regulation is to preserve the peace, and the standard for assessing a hostile-environment does not make the likelihood of a breach of the peace particularly relevant.

In sum, none of the existing First Amendment doctrines that have been relied upon by commentators can justify the broad regulation of workplace speech. It will be instructive at this point to examine what courts have said about potential constitutional limitations on harassment regulation.

II. CASE LAW ON THE APPLICABILITY OF THE FIRST AMENDMENT TO HOSTILE-ENVIRONMENT HARASSMENT

Given that workplace speech has been subject to regulation for the last two decades, it might have been expected that the law's constitutionality would have been by now well settled. Strangely, however, case law on the subject remains quite sparse.

38. *Boos v. Barry*, 485 U.S. 312, 334-36 (1988).

39. 315 U.S. 568 (1942).

40. *Id.* at 572 (emphasis added).

A. *The Supreme Court*

The Supreme Court has not yet decided a case involving a First Amendment challenge to sexual harassment regulation, although it has expressed some views on the subject in dictum. In *R.A.V. v. City of St. Paul*,⁴¹ the Court held unconstitutional a city ordinance defining as disorderly conduct the display of a symbol, such as a burning cross or swastika, “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁴² The Supreme Court held that a regulation of fighting words that is viewpoint-based is impermissible, even though “fighting words” traditionally had been thought to be beyond constitutional protection.⁴³ The Court explained that when it had previously described categories of expression such as obscenity and fighting words as being outside the bounds of constitutional protection, it had simply meant that this expression could be regulated because of its “constitutionally proscribable content.”⁴⁴ That does not mean, the Court stated, that these categories of expression are subject to “content discrimination unrelated to their distinctively proscribable content.”⁴⁵

The holding of *R.A.V.* provides strong support for the view that viewpoint-based restrictions on so-called harassing speech are impermissible. After all, in *R.A.V.*, the Court struck down viewpoint-based restrictions on “fighting words” – that is, speech that had long been thought outside First Amendment protection – while much speech involved in harassment cases is clearly within the sphere of First Amendment protection. Indeed, some of the speech involved in harassment cases – such as expression of negative views about the participation of women in the workforce – seems like socio-political speech that is at the core of First Amendment protection.⁴⁶

Notwithstanding the holding that would appear to call much harassment regulation into question, the majority in dictum denied that its analysis would outlaw hostile-environment regulation. The Court stated:

41. 505 U.S. 377 (1992).

42. *Id.* at 380.

43. *See id.* at 381.

44. *Id.* at 383.

45. *Id.* The concurring Justices also viewed the ordinance as unconstitutional, because it extended beyond just fighting words to words that would “arouse anger, alarm, or resentment,” rejecting the Minnesota Supreme Court’s construction of the statute as extending no farther than prohibition of fighting words. *See R.A.V.*, 505 U.S. at 397 (White, J., concurring); *id.* at 415 (Blackmun, J., concurring); *id.* at 416 (Stevens, J., concurring).

46. *See, e.g., Carey v. Brown*, 447 U.S. 455, 467 (1980) (expression on public issues “has always rested on the highest rung of the hierarchy of First Amendment values”); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (speech “concerning public affairs is more than self-expression; it is the essence of self-government”).

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. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.⁴⁷

One might question whether the *R.A.V.* dictum is an accurate description of harassment law. Is it truly fair to say that the EEOC Guidelines' definition of "verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment"⁴⁸ is aimed primarily at nonexpressive conduct and reaches expression only "incidentally"? In his concurring opinion, Justice White took the majority to task for this description, stating that "the majority's focus on the statute's general prohibition on discrimination glosses over the language of the specific regulation governing hostile working environment, which reaches beyond any 'incidental' effect on speech."⁴⁹

Even if the *R.A.V.* dictum is to be taken at face value, however, it will not save most hostile-environment regulation. The *R.A.V.* majority spoke of "a particular content-based subcategory of a *proscribable class of speech*"⁵⁰ that might be swept up incidentally by a statute regulating conduct. At most, this language would allow incidental content-based regulation of types of speech, such as obscenity or fighting words, that have already been given diminished protection. Current harassment doctrine, however, extends well beyond "proscribable class[es] of speech" and, as such, is not authorized by *R.A.V.*

Two terms after *R.A.V.*, the Supreme Court was presented with briefs raising the First Amendment issue in *Harris v. Forklift Systems, Inc.*⁵¹ The Court did not address the issue, leading some to argue that the Court thereby indicated its lack of sympathy for the argument.⁵² The Court's failure to

47. *R.A.V.*, 505 U.S. at 389-90 (citations omitted).

48. 29 C.F.R. § 1604.11(a) (1999).

49. *R.A.V.*, 505 U.S. at 410 (White, J., concurring).

50. *Id.* at 389-90 (emphasis added).

51. 510 U.S. 17 (1993).

52. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional*

address the issue cannot be taken as a reflection of its views on the merits, however. The First Amendment issue received only cursory discussion in the parties' briefs, and was argued primarily by amici. Moreover, the courts below had not mentioned the issue, and it appears not to have been mentioned in any of the lower-court briefs. Finally, the First Amendment issue was not really before the Court in *Harris*. The question presented in the case was "whether conduct, to be actionable as 'abusive work environment' harassment . . . must 'seriously affect [an employee's] psychological well-being.'"⁵³ That question focused on what kinds of harm the plaintiff must suffer rather than what kind of conduct by a defendant creates liability. Thus, the Court's refusal to discuss an issue that was so tangential to the case is wholly unsurprising.

Four dissenting Justices acknowledged First Amendment limitations on harassment regulation in *Davis v. Monroe County Board of Education*,⁵⁴ although it was not a workplace case. In rejecting the majority's conclusion that Title IX of the Educational Amendments of 1972⁵⁵ should be interpreted to recognize a private cause of action for peer sexual harassment, Justice Kennedy (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) argued that schools often lack effective control over the expression of their students. Citing lower-court cases that had struck down university speech codes, the dissenters stated that a "university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment."⁵⁶

Most recently, the Court had before it the petition for certiorari in *Avis Rent a Car System, Inc., v. Aguilar*.⁵⁷ The petition challenged an injunction issued by a state court in California in a racial harassment case. The case did not raise the broad question of whether the First Amendment imposes a general limitation on harassment doctrine, but rather the narrower question whether an injunction against racial epithets that was issued following a finding of liability violated the First Amendment where the employer did not challenge the liability finding on First Amendment grounds.⁵⁸ The Court denied the petition. Justice Thomas, however, dissented from the denial, stating that "[a]ttaching liability to the utterance of words in the workplace is

Consistency, 72 DENV. U. L. REV. 989, 992 (1995).

53. *Harris*, 510 U.S. at 20.

54. 526 U.S. 629 (1999).

55. 20 U.S.C. §§ 1681-1688 (1994).

56. *Davis*, 526 U.S. at 667 (5-4 decision) (Kennedy, J., dissenting).

57. 529 U.S. 1138 (2000).

58. *Id.* at 1139-40.

likely invalid for the simple reason that this speech is fully protected speech."⁵⁹

B. Lower-Court Cases Supporting the First Amendment Argument

A number of lower-court cases have dealt with the constitutionality of speech regulation in contexts somewhat analogous to harassment cases. For example, several cases have struck down hostile-environment harassment policies of public universities⁶⁰ or school districts⁶¹ on First Amendment grounds. Also, in *Henderson v. City of Murfreesboro*,⁶² the court held that the defendant City had violated an artist's First Amendment rights when it took down her painting of a naked woman from the City Hall, even though the City had argued that because the City Hall is a "workplace," it needed to take down the painting to comply with sexual harassment law.⁶³

None of the above cases involved a defensive assertion of the First Amendment in a harassment action. Some courts have acknowledged that harassment regulation of private employers raises serious First Amendment issues but have found it unnecessary to reach the issue. For example, the First Amendment issue was raised defensively in *DeAngelis v. El Paso Municipal Police Officers Association*.⁶⁴ However, the court held that the challenged statements in an Association newsletter that were critical of both the plaintiff in particular and women police officers in general were not sufficiently severe or pervasive to constitute actionable harassment.⁶⁵ Consequently, it did not reach the "difficult question whether Title VII may be violated by expressions of opinion published in . . . the Association's newsletter."⁶⁶

C. Lower Court Cases Supporting Regulation of Harassing Speech

There is an even larger body of cases expressly rejecting the First Amendment argument, the first of which was *Robinson v. Jacksonville*

59. *Id.* at 1140-41 (Thomas, J., dissenting).

60. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

61. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

62. 960 F. Supp. 1292 (M.D. Tenn. 1997).

63. *Id.*

64. 51 F.3d 591 (5th Cir. 1995).

65. *Id.* at 595-96.

66. *Id.* at 596. The court characterized the Supreme Court's "offhand pronouncements" in *R.A.V.* as "unilluminating." *Id.* at 597. See also *Baliko v. Stecker*, 645 A.2d 1218 (N.J. Super. Ct. App. Div. 1994) (acknowledging the tension between the First Amendment and harassment law, but declining to resolve it because of an inadequate record and lack of full briefing).

*Shipyards, Inc.*⁶⁷ In the space of approximately two pages out of a 54-page opinion, the court addressed the First Amendment issue and rejected it on six independent grounds: (1) the defendant was not expressing *itself* through speech of employees; (2) expression is not protected because it is “discriminatory conduct”; (3) regulation is merely a time, place, or manner restriction; (4) employees are a “captive audience”; (5) sexual equality is a compelling interest and the regulation is narrowly tailored; and (6) workplace speech of private employees may be regulated by analogy to workplace speech of public employees.⁶⁸

It seems doubtful that anyone would suggest that the *Robinson* court was correct on each of its grounds, although some agree with the opinion on some of the grounds. The suggestion that the First Amendment defense cannot be raised by the employer because the speech of the employees was not the speech of the employer is bizarre. According to that reasoning, a law holding parents liable for the speech of their children could not be challenged on First Amendment grounds by parents in an enforcement action. Moreover, because the law requires affirmative steps by the employer to stifle the speech of their employees, the employers’ own First Amendment interests are implicated.⁶⁹ The court’s bland pronouncement that harassing speech is not speech at all, but rather conduct, would validate almost any regulation of speech. The “time, place, or manner” and “captive audience” doctrines have been discussed already, and, as stated before, cannot in their current form justify the viewpoint-based speech restrictions embodied in hostile-environment doctrine. Finally, the analogy to public employees is wholly misplaced. The Supreme Court has held that the government as employer has greater latitude in regulating the speech of employees than the government does when it is acting in its capacity as a regulator. Consequently, robust constitutional protection of public-employee speech comes into play only when the speech is a matter of “public concern.”⁷⁰ To suggest that because the government as employer may regulate speech, the government as regulator may do so as well, is an unwarranted bootstrapping argument that has no basis in Supreme Court precedent.

67. 760 F. Supp. 1486 (M.D. Fla. 1991).

68. *Id.* at 1534-36.

69. *Cf. Wooley v. Maynard*, 430 U.S. 705, 705 (1977) (holding that the state may not “constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public”). If the First Amendment protects an individual against coerced dissemination of a message, it should also protect against coerced censorship.

70. See Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529 (1998).

Notwithstanding the skeletal analysis provided by the *Robinson* court, other courts have invoked *Robinson* as a basis for rejecting the First Amendment argument. The Tenth Circuit, for example, largely without analysis, rejected the defense stating that it “agree[s] with the reasoning of the *Robinson* court.”⁷¹ Similarly, the District Court for the District of Columbia rejected the defense in a footnote, citing *Robinson*.⁷²

A few cases have rejected the First Amendment argument on other grounds. For example, a District Court in Minnesota rejected the argument in a footnote, citing *R.A.V.*, an opinion which, as discussed before, does not justify rejection of the First Amendment defense in most contexts.⁷³ Similarly, the New Jersey Superior Court rejected the argument on the ground that the harassment involved was not “solely verbal.”⁷⁴ The Supreme Court of California considered and rejected the First Amendment defense in *Aguilar v. Avis Rent a Car System, Inc.*,⁷⁵ but the posture of the case was somewhat unusual, given the employer’s failure to challenge the constitutionality of the underlying finding of liability.

D. Why the Dearth of First-Amendment Analysis in the Cases?

A consistent characteristic of courts addressing the First Amendment issue is that their discussions tend to be skeletal at best. The failure of courts to pay serious attention to the First Amendment argument is puzzling. In other contexts, judges seem eager to address broad constitutional issues as a welcome respite from the day-to-day tedium of routine cases.⁷⁶ Yet most courts have declined to give more than cursory attention to the First Amendment issue. One can only speculate as to the cause of their reticence. The most obvious reasons are either that courts simply believe that the issue is a frivolous one, unworthy of serious attention, or else they think that it is a serious issue but are unsure how to justify on doctrinal grounds their intuition that the First Amendment defense should be rejected. Surely, the Tenth Circuit, which rejected the defense simply by stating its agreement with the *Robinson* opinion, could not have believed that all of the grounds given in the *Robinson* opinion were meritorious.

71. *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1247 (10th Cir. 1999).

72. *Berman v. Washington Times Corp.*, No. 92-2738 (WBB), 1994 U.S. Dist. LEXIS 16476, at *10 n.4 (D. D.C. 1994).

73. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992)).

74. *Woods-Pirozzi v. Nabisco Foods*, 675 A.2d 684, 694 (N.J. Super. Ct. App. Div. 1996).

75. 980 P.2d 846 (Cal. 1999), cert. denied, 529 U.S. 1138 (2000).

76. See *R.A.V.*, 505 U.S. at 415 (noting “the frequently irresistible impulse of judges to tinker with the First Amendment”) (White, J., concurring).

The suggestion that it is the considered judgment of courts that the issue is frivolous is difficult to credit. Over the last ten years, scores of law review articles have been written dealing with the subject, and opinions of commentators range from the suggestion that hostile-environment regulation presents grave First Amendment issues to the suggestion that with some moderate amount of "tweaking" of either First Amendment doctrine or harassment doctrine the two can be reconciled to the suggestion that current First Amendment doctrine presents no impediment at all to broad regulation of workplace speech.⁷⁷ The argument that hostile-environment regulation

77. A partial list of articles devoted specifically to the First Amendment and workplace speech follows. It is important to note that this long list does not include the many articles that are only partially devoted to the issue and does not include the large number of articles dealing with the related issues of hostile-environment regulation in schools and criminal regulation of "hate speech." Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83 (2001); Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579 (1995); Browne, *supra* note 7; James A. Burns, *Sexual Harassment as Free Speech: Comment on Article by Kingsley Browne*, 17 EMP. REL. L.J. 693 (1992); Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person"*, 58 OHIO ST. L.J. 1217 (1997); Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to a Content-Neutral Hostile Environment Theory*, 1996 UTAH L. REV. 227 (1996); Clougherty, *supra* note 37; Sonali Das, *Silencing Speech in the Workplace: Re-examining the Use of Specific Speech Injunctive Relief for Title VII Hostile Environment Work Claims*, 34 J. MARSHALL L. REV. 321 (2000); Epstein, *supra* note 21; Cynthia L. Estlund, *Propter Honoris Respectum: The Architecture of the First Amendment and the Case of Workplace Harassment*, 72 NOTRE DAME L. REV. 1361 (1997); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); Fallon, *supra* note 16; Keith R. Fentonmiller, Note, *Verbal Sexual Harassment as Equality-Depriving Conduct*, 27 U. MICH. J.L. REFORM 565 (1994); James H. Fowles III, Note, *Hostile Environment and the First Amendment: What Now After Harris and St. Paul?*, 46 S.C. L. REV. 471 (1995); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace After Ellerth and Faragher*, 42 HOW. L.J. 327 (1999); Amy Horton, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); David M. Jaffe, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses*, 80 MINN. L. REV. 979 (1996); Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81 (2000-2001); Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637 (1995); Aileen V. Kent, Note, *First Amendment Defense to Hostile Environment Sexual Harassment: Does Discriminatory Conduct Deserve Constitutional Protection?*, 23 HOFSTRA L. REV. 513 (1994); Mark N. Mallery & Robert Rachal, *Report on the Growing Tension Between the First Amendment and Harassment Law*, 12 LAB. LAW. 475 (1997); Shannon McAuliffe, *Speak no Evil: The First Amendment Offers no Protection for Sexual Harassers*, 29 SUFFOLK U. L. REV. 233 (1995); Pamela F. Mucklow, *Title VII as the Regulation of the Secondary Effects of Speech*, 46 LAB. L.J. 301 (1995); Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL'Y & L. 127 (1996); Juan F. Perea, *Strange Fruit: Harassment and the First Amendment*, 29 U.C. DAVIS L. REV. 875 (1996); Wayne L. Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment*

violates the First Amendment ultimately may not carry the day, but few who have examined the issue in detail appear to believe that it is frivolous.

It seems more likely that the intuition of many judges is that the First Amendment argument is wrong but that they cannot, in the context of current First Amendment cases, say why it is wrong or they cannot declare it wrong without establishing precedent that would be unwelcome in other contexts. Failing to analyze an issue because the justification for one's position is elusive, however, is an abdication of judicial responsibility.

So, what might be behind an intuition that the First Amendment *ought* not to interfere with regulation of speech in the workplace, and why can't that intuition be squared with First Amendment doctrine? The fact that harassment doctrine does not fit easily within existing First Amendment "cubbyholes" has already been discussed, but there may be other, more impressionistic, grounds for courts' intuition – reasons that may seem meritorious on first impression but that will not withstand scrutiny under existing law.

Perhaps the initial reaction is simply to assume that there is no "state action" for constitutional purposes when private employers censor the speech of their employees. Although a few commentators have suggested the absence of state action,⁷⁸ for the most part the existence of state action is uncontroversial even among commentators who are generally sympathetic to harassment regulation.⁷⁹ The state-action appears in two places. First, it

Protection as a Check on Speech-Based Title VII Hostile Environment Claims, 47 BAYLOR L. REV. 789 (1995); Sangree, *supra* note 21; Sangree, *infra* note 78; Jeffrey A. Steele, *Fighting the Devil with a Double-Edged Sword: Is the Speech-Invoked Hostile Work Environment Hostile to O'Brien?*, 72 U. DET. MERCY L. REV. 83 (1994); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701 (1995); Nadine Strossen, *Sexual Harassment in the Workplace: Accommodating Free Speech and Gender Equality Values*, 31 FREE SPEECH Y.B. 1 (1993); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment: Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Joan Kennedy Taylor, *Sexual Harassment and the First Amendment*, 4 COMM. LAW CONSPECTUS 189 (1996); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009 (1996); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

78. See, e.g., Suzanne Sangree, *A Reply to Professors Volokh and Browne*, 47 RUTGERS L. REV. 595, 604 n.23 (1995) (stating that "Professor Browne also seems to overlook the fact that a private employer's efforts to comply with Title VII does not constitute the type of state action needed to sustain an employee's First Amendment claim. Employees clearly have First Amendment claims only when their employer is the government or when their free speech is infringed by a court order"). See also Horton, *supra* note 21, at 419.

79. Estlund, *supra* note 77, at 689 (stating that "when the law condemns employee speech and effectively compels employers to regulate it, as in the case of Title VII's law of discriminatory harassment, we cross the state action threshold and confront constitutional issues") (footnote omitted). See also J. M.

exists when a court imposes liability on a defendant in a harassment action, just as it exists when a court imposes liability on a defendant in a defamation action.⁸⁰ Second, even before a court is involved, state action exists in Title VII's mandate to employers to censor their employees, as a governmental mandate to private parties constitutes state action.⁸¹

One way the state-action issue is smuggled into the discussion is when it is argued that private employees have no free speech rights in the workplace (or that their speech rights are already so restricted that a little more restriction should not be a cause of concern).⁸² Those who make this argument typically invoke the public-employee cases to argue that while the speech of public employees is entitled to a measure of protection (that is, when they are speaking about matters of public concern), private employees have no similar protection.⁸³ This argument seriously misapprehends Supreme Court doctrine.

Contrary to what many appear to believe, the First Amendment provides *greater* protection to the speech of private employees than it does to the speech of public employees, as long as First Amendment protection is properly characterized. The speech of private employees is entitled to *full* constitutional protection from *governmental* regulation, while the speech of public employees is entitled only to *partial* protection – that is, their expression is protected when they speak on matters of public concern but not otherwise.⁸⁴ The power of the government to regulate public employee speech is based upon the fact that “the government as employer . . . has far broader powers than does the government as sovereign,”⁸⁵ because its “interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”⁸⁶ It is true that only public employees have First Amendment protection from speech regulation *by their employers*, but that is

Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2299 (1999); Epstein, *supra* note 21, at 451 n.5.

80. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *see also* Browne, *supra* note 7, at 510-11.

81. *Cf. Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614-16 (1989) (holding that regulations requiring private railroads to test employees for drugs were subject to Fourth Amendment challenge).

82. Sangree, *supra* note 78, at 603; *see also* Becker, *supra* note 77.

83. For example, Cynthia Estlund has argued that “[e]mployees in the private sector do not enjoy even the limited constitutional right of freedom of expression at the workplace that public employees have, for their employers’ actions are not state action.” Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 129-30 (1995). That statement is true only to the extent that it is understood to mean that private employees have no constitutional protection from restrictions on their speech *by their employers* when the employer adopts the restriction *voluntarily* without governmental coercion.

84. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

85. *Waters v. Churchill*, 511 U.S. 661, 671 (1994).

86. *Id.* at 675.

not because private employees' speech is not protected from government regulation but because the First Amendment regulates only governmental speech restrictions. When the government acts as regulator – as it does when it restricts the speech of private-sector employees – its power to regulate speech is substantially *less* than when it acts as employer.⁸⁷

Because the argument that the public-employee speech cases justify regulation of private-employee speech is untenable (notwithstanding the *Robinson* court's contention to the contrary), the argument may then devolve to the suggestion that because private employers may freely regulate the speech of their employees, regulation by the government is more justifiable than it otherwise would be. Again, however, that argument has no doctrinal support, which may account for its absence in reported cases. Parents heavily regulate the speech of their children (at least they try), but the fact of parental regulation does not expand the government's power to regulate the speech of children. Moreover, if one of the reasons to deny the government power to regulate speech is to prevent the establishment of a state-sponsored orthodoxy, then the fact that hundreds of thousands of employers regulate the speech of their employees in hundreds of thousands of different ways is less problematic than a government requirement that they all regulate the speech of their employees in the same way.

Another intuition behind the apparent failure to take the First Amendment issue seriously may be that the First Amendment is not important because many harassment cases involve mixtures of speech and conduct. The First Amendment issue may not seem important except in those cases that involve only speech. That rationale was explicitly adopted by the court in *Woods-Pirozzi v. Nabisco Foods*,⁸⁸ in which the court rejected the First Amendment argument on the ground that the harassment complained of was not "solely verbal."⁸⁹ Similarly, the Fifth Circuit in *DeAngelis v. El Paso Municipal Police Officers Ass'n*,⁹⁰ while not reaching the First Amendment issue because it found that the complained-of speech did not satisfy the "severe or pervasive" standard, suggested that there were serious First Amendment issues because "pure expression" was involved.⁹¹ The court

87. It should be noted that the distinction is not merely between public and private employers. When a municipal government, for example, restricts the speech of its employees because Title VII, a federal law, requires it to, the federal government's interest in an efficient work force does not extend to the municipal employees. Thus, these employees are in the same position as private-sector employees: their speech can be regulated by federal law only to the extent that the federal government's interest as *regulator* authorizes it.

88. 675 A.2d 684 (N.J. Super. Ct. App. Div. 1996).

89. *Id.* at 694.

90. 51 F.3d 591 (5th Cir. 1995).

91. *Id.* at 596.

continued: "It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded *solely* on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."⁹²

Although the "not solely verbal" argument may have a certain superficial appeal, it is inconsistent with existing precedent. In *NAACP v. Claiborne Hardware*,⁹³ the Court held that a judgment against the NAACP based upon a boycott of white-owned businesses violated the First Amendment even though the boycott was effected in part by physical force against potential customers.⁹⁴ Because the state-court judgment *might* have been based upon protected speech as well as unprotected conduct, the judgment was invalid. The "ambiguous" findings of the state court "were inadequate to assure the 'precision of regulation' demanded by [the First Amendment]."⁹⁵ Thus, according to the Court, a judgment that rests, or might rest, in part upon protected expression is invalid. As a result, the issue in a harassment case is not whether all of the expression forming the basis for the claim is protected; rather, the question is whether any of it is.

The risk that a judgment might be based in part on protected speech is particularly acute in harassment cases. The hostile-environment standard requires an examination of the "totality of the circumstances" to determine whether the behavior is sufficiently severe or pervasive to alter the terms and conditions of employment. In most cases, a single act of harassment is insufficient to support liability. Thus, where a case involves both unprotected conduct and protected expression, it may be the protected expression that takes the case over the "severe or pervasive" threshold. Alternatively, in the broad range of cases in which there is enough unprotected expression that a trier-of-fact *could* impose liability but not enough that it *must*, there is a risk that liability will be imposed precisely because of the protected expression. This risk is heightened by the fact that expressions of bigotry will tend to support the view that the speaker is a "bad person," making a finding of liability that much easier.

These suggestions about courts' possible reasons for not dealing head-on with the First Amendment issues are speculative, of course, and they may not be right. Some explanation is necessary, however, to account for the courts' failure to take this very serious issue seriously.

Not all of the responsibility rests with the courts, however, as it appears that the First Amendment defense is raised only rarely by employers. That

92. *Id.* at 596-97 (emphasis added).

93. 458 U.S. 886 (1982).

94. *See id.*

95. *Id.* at 921.

fact also requires some explanation. Part of the reason may simply be that attorneys who defend private-sector employers are not used to thinking in constitutional terms. Another reason may be that they also are implicitly adopting the “not solely verbal” argument, and do not raise the argument when there is ample nonverbal conduct alleged in addition to the speech, not realizing the constitutional objections to liability based even in part on protected speech. Moreover, employers may be somewhat reluctant to “hide behind the First Amendment,” perceiving that strategy as suggesting that they have a “right” to harass their employees.

Rather than raising specific objections to application of hostile-environment law, employers might be better advised to challenge the very foundations of the regime. An examination of the functioning of hostile-environment regulation demonstrates how it acts as an extraordinarily broad limitation on employee speech. The next section will discuss how features of hostile-environment doctrine act to compel employers to restrict employee speech and the predictable employer response to those incentives.

III. HOSTILE-ENVIRONMENT REGULATION RESULTS IN AN OVERBROAD RESTRICTION OF EMPLOYEE SPEECH

A. Three Features of Hostile-Environment Law Coalesce to Pressure Employers to Impose Broad Speech Restrictions: Vagueness, the Totality-of-the-Circumstances Standard, and Third-Party Liability

The focus on doctrinal categories of speech entitled to lesser protection – and indeed the entire notion of “protected” and “unprotected” speech – often obscures an important point about First Amendment doctrine. Although the term “protected speech” is commonly used – indeed, it is used in this article – it is misleading in important ways. The First Amendment does not, strictly speaking, protect speech; rather, it prohibits (some) governmental regulation of speech. There is no speech that is protected under all circumstances, and there is no speech that is unprotected under all circumstances. The critical issue is the nature of the regulation. A political speech advocating the election of a certain presidential candidate is at the core of First Amendment values, but if it is given in the middle of a courtroom or an intensive-care unit it may properly be prohibited. Are statements intended and likely to cause an imminent breach of the peace protected by the First Amendment? They likely fall within the category of “fighting words,” but, as *R.A.V.* held, the government may not make viewpoint-based decisions about which fighting

words to prohibit.⁹⁶ Naturally, none of the speech is “protected” by the First Amendment against purely *private* infringement.

The concept of protected and unprotected speech causes the discussion of harassment regulation to proceed in unproductive directions. The assertion that it is unconstitutional to hold an employer liable for the speech of its employees is sometimes met by responses such as “Well, wouldn’t you agree that if a co-worker/supervisor said X to a female employee every day for Y years that the speech would not be protected?” or “What if instead of saying X to the employee, the co-worker/supervisor said Z? Surely that is not protected.” The appropriate answer is that whatever the nature of the hypothetical speech, it is actionable only pursuant to an appropriately tailored regulation. That regulation must give sufficient notice of what speech is prohibited and must not extend substantially beyond the boundaries of regulable speech. The core problem of harassment regulation – even if categories of regulable speech were modified to cover workplace speech – is that it does not, and perhaps cannot even if modified, satisfy these requirements.

1. The Vagueness of the Standard Leaves Employers Unsure about What Speech They Should Restrict

The hostile-environment standard provides little notice of what speech speakers should avoid or what speech employers must restrict. The EEOC Guidelines prohibit “verbal . . . conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.”⁹⁷ When a supervisor must decide whether an employee must be told not to say something to another employee, the legal standard is of very little assistance. Justice Scalia recognized this indeterminacy in his concurring opinion in *Harris v. Forklift Systems, Inc.*, where he noted that the standard lets “virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.”⁹⁸ The legal consequences of a finding that the law is vague will be discussed in Section IV, below. For now, suffice it to say that the predictable behavioral response to a vague liability standard is to err on the side of caution and stifle more, rather than less, expression.

96. See *supra* text accompanying notes 42-43.

97. 29 C.F.R. § 1604.11(a) (1999).

98. 510 U.S. 17, 24 (1993).

2. The Problem of Vagueness is Exacerbated by the Totality-of-the-Circumstances Standard

Vagueness is a potential problem with any restriction on speech, but the vagueness problem is exacerbated by the totality-of-the-circumstances standard. Whether a given statement is actionable turns not just on the nature of that statement but also on all other statements that a plaintiff might rely upon in subsequent litigation. Thus, an employer cannot know whether a given expression is ultimately going to form a basis for liability without knowing what else has already been said and will be said in the future both by the particular speaker and all other co-workers. The question facing an employer, therefore, is not whether the complained-of speech creates liability by itself, but whether that speech might ultimately go into the mix of speech that forms the totality of the circumstances in a hostile-environment lawsuit.

The employer's situation is easily illustrated. Suppose a female employee complains that a co-worker told an off-color joke, and suppose that all would agree that the joke, though tasteless, would not by itself create hostile-environment liability. How should the employer respond? Does the employer say to the complaining employee "I've read the sexual harassment case law and can tell you that the joke is not sufficiently severe or pervasive to constitute sexual harassment; therefore you must put up with it"? Or does he think "even though this is not sufficiently severe or pervasive to constitute harassment, it could be added in with other things about which I have no knowledge to make a hostile-environment claim, and if a lawsuit ever comes I will be judged on the basis of the way I respond to complaints"? Quite plainly, a well-counseled employer will respond in the latter fashion.

3. The Vague Standard and Employer Liability Combine to Require Overbroad Regulation by Employers

The vague hostile-environment standard, coupled with the totality of the circumstances test, is sufficient to pose grave threats to freedom of expression. There is yet another feature of hostile-environment law that virtually assures that the law results in an overbroad regulation of speech, that is, that it results in the suppression of much speech that a constitutionally valid regulation would not suppress. This feature is the system of third-party liability, under which employers are responsible for the speech of their employees, or, put another way, are responsible for failing to stifle the speech of their employees.

No regulation of speech can specify with absolute precision what is permitted and what is prohibited, other than an itemized list of words that cannot be said in any context; there is virtually always some "grey area" and therefore some potential for a "chilling effect." When an individual's speech is directly punishable, the individual is subjected to countervailing pressures that tend to minimize the extent to which protected speech is stifled. The

individual's desire to avoid punishment pushes him away from the line, but his desire for self-expression pushes him back toward it. That is, the speaker may think to himself, "I know I might get in trouble for this, but I just have to say it." Even under a totality-of-the-circumstances standard, as long as he is responsible for only his own speech, he can make some judgment about whether everything that he has said, and will probably say in the future, constitutes actionable harassment.

The calculus changes when a third party is responsible for regulating the speech and is subject to a substantial penalty for under-regulation. Now, the incentives become far less symmetrical. The employer, unlike the individual himself, derives little satisfaction from the speech at issue, but the employer may be subjected to substantial penalties for failing to restrict the speech. Thus, the employer may think, "I get no benefit from Joe's speaking his mind about his views of sexual equality, but if I let him talk, I may pay for it later, especially since I must worry not only about Joe's speech but the cumulative total of all other speech that may be complained of later." The employer thus has every reason to restrict speech and little reason to allow it (other than, at the extreme, to preserve employee morale).

B. What Are Employers Advised to Do, and How Do They Respond to this Advice?

It is difficult to imagine how the combination of a vague standard, a totality-of-the-circumstances test, and third-party liability for failing to censor speech could do anything other than create a climate in which expression cannot thrive. Perhaps, though, this is all speculative. Perhaps employers really do not over-regulate the speech of their employees; perhaps employers are as interested in promoting the expression of their employees as the employees are themselves. These are empirical questions, and the answer is clear: from the "zero-tolerance" policies that employers adopt at the behest of their lawyers to the often draconian penalties that they mete out for their violation, employers engage in rampant censorship of employee speech out of a desire to avoid liability.

1. The Advice Employers Receive Concerning Their Responsibility for the Speech of Their Employees

Employers consistently receive advice from both lawyers and enforcement agencies that they should not tolerate *any* conduct that might be deemed harassing, which has led to the proud adoption by many employers of "zero tolerance" policies. For example, the Maryland Commission on Human Relations has advised that "[b]ecause the legal boundaries are so poorly marked, the best course of action is to avoid all sexually offensive conduct in

the workplace.”⁹⁹ Similarly, the EEOC attorney who wrote the guidance on employer liability advised lawyers that harassment policies “should be broadly written” and that employers “must take steps to nip harassment in the bud.”¹⁰⁰ The EEOC itself has also spoken forcefully about employers’ obligations to police their premises to purge them of offensive material. In *Merriex v. Henderson*,¹⁰¹ for example, although the EEOC rejected the complainant’s assertion that her complaints about the presence of “offensive KKK material” on postal property were related to her termination, it went on to say:

Although we do not find discrimination in the context of the removal action, the agency is reminded of its obligation to provide a work environment free of discriminatory harassment. The agency is advised to investigate the claim that racist materials are located on its premises, and immediately remove such items if they are in fact found.¹⁰²

Law firm newsletters routinely encourage employers to be aggressive in policing their workplaces. One advises employers “to routinely audit the workplace to identify potential problems and remove materials likely to be found offensive prior to receiving complaints from employees.”¹⁰³ Another advises that because

[s]everal courts have found a hostile work environment based, at least in part, on the presence in the work place of sexually oriented calendars, pictures and magazines . . . it would make sense for all employers to inspect their work places carefully for pornographic material and to remove any potentially offensive material found on walls or otherwise on public display.¹⁰⁴

It also advises employers not to “participate even in the slightest way in sexual harassment,” as by advising employees to “[g]et a tougher skin” or by laughing at “off-color jokes.”¹⁰⁵

99. Jonathan Rauch, *Offices and Gentlemen*, NEW REPUBLIC, June 23, 1997, at 22.

100. Nancy Montwieler, *EEOC Attorney Advises Employers to Establish Clear Anti-Harassment Policies*, DAILY LAB. REP. (BNA) No. 60, March 28, 2000, at A-3.

101. No. 01A00583, 2000 WL 683086 (EEOC, May 16, 2000).

102. *Id.* at *3 n.2; cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (holding that a state “Commission to Encourage Morality in Youth” violated the First Amendment by intimidating booksellers into stopping the sale of certain “objectionable” [not necessarily obscene] publications, despite the fact that the Commission relied on only “informal sanctions”).

103. Jack, Lyon & Jones, P.A., *Wal-Mart Ordered to Pay \$50 Million as a Warning Against Permitting Sexual Harassment*, ARK. EMP. LAW LETTER, Nov. 1995.

104. Lois C. Schlissel, *What is Sexual Harassment?—An Overview*, at http://www.msek.com/meyer_set_details.cfm?id=22 (last visited Sept. 4, 2001).

105. *Id.*

The caution advised by lawyers is not unreasonable. Case law makes clear that whether employers will be held liable for sexual harassment often depends in very large part on what steps they have taken to prevent sexual harassment and to deal with it when it occurs. Sensitivity to the expressive interests of employees is a legally risky course. For example, in a case involving the harassment of a white woman who was romantically involved with, and later married, a black man, the following excerpt from a memorandum from one supervisor to another was used as evidence against the employer:

Becky, I'm afraid if Sue is entering into this relationship she had better be prepared to get snide remarks from just about anyone and everyone. I don't think inter-marriages are accepted in our society today and although you and I certainly would not say anything, I am not sure we can keep our staff from saying things. I am not sure that we could fire them on the basis of their remarks. You had better check with [the company lawyer] and see if he agrees with what I am saying.¹⁰⁶

The court found that this memo was "[t]he most convincing evidence of [the employer's] toleration of the harassment" and "ample evidence of an intent to discriminate against [plaintiff] on the basis of her race because it shows that [the employer] would not act against [plaintiff's] harassers due to an intolerance for interracial relationships."¹⁰⁷

The Sixth Circuit has also been quite explicit in describing the legal obligation of employers to censor their employees. In a racial harassment case, the court described employers' obligations as follows:

In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.¹⁰⁸

106. *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 259 (N.D. Ind. 1985).

107. *Id.* at 275.

108. *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); *see also Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997) (quoting *Davis*, 858 F.2d at 350); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (same).

This passage constituted a rebuke to the District Court, which had suggested limits on the reach of Title VII:

The Archie Bunkers of this world, within limitations, still may assert their biased view. We have not yet reached the point where we have taken from individuals the right to be prejudiced, so long as such prejudice did not evidence itself in discrimination. This Court will secure plaintiff against discrimination; no court can secure him against prejudice. The defendant in this case is charged by law with avoiding all discrimination; the defendant is not charged by law with discharging all Archie Bunkers in its employ. Absent a showing of something other than disrespect and prejudice by his fellow workers, plaintiff cannot bring himself within the terms of either [Section 1981 or Title VII].¹⁰⁹

According to the court of appeals, “[b]y emphasizing the point that an employer ‘is not charged by law with discharging all Archie Bunkers in its employ,’ the district court may erroneously be encouraging the perpetuation of the status quo.”¹¹⁰

The message to employers is clear: if they want to avoid liability for harassment, they must be vigorous in the suppression of their employees’ speech. The next section illustrates how employers have responded to this message.

2. The Employer Response to the Liability Regime

All indications are that employers have taken the advice they are given to heart. Most employers of any size have harassment policies, and most, it seems, enforce them. Although sexual harassment cases continue to be brought, these usually reflect the breakdown of an employer’s policy rather than its absence. The magnitude of the response by employers is difficult to measure. When employers have training workshops for employees, or when they announce zero-tolerance policies, or even when they discipline or discharge employees for violating harassment policies, there is usually no public record of the event.

In contending that harassment law does not result in substantial restrictions on speech, defenders of the current regime typically point to decided sexual harassment cases and contend that in those cases where the employer loses, the speech is usually egregious or coupled with non-

109. *Howard v. Nat’l Cash Register Co.*, 388 F. Supp. 603, 606 (S.D. Ohio 1975); see *Davis*, 858 F.2d at 350.

110. *Davis*, 858 F.2d at 350 (citation omitted).

expressive conduct. That is, indeed, often the case. Focusing on decided cases to assess the impact of the law is misguided, however, because it assumes that the principal censorship spawned by the law comes in the form of sanctions in litigation. In fact, most of the censorship is analogous to a prior restraint: it consists of employers' instructions to employees not to speak because of employers' fear of liability, rather than punishment of employers for the speech of their employees after it occurs.

There are relatively few legal cases involving the direct application of harassment policies against accused harassers. In the overwhelming number of cases, one imagines, the offending employee is counseled not to do it again, and he complies with the instruction. If the employee instead is disciplined or discharged, most employees are without recourse.

If an at-will employee is discharged for violating his employer's sexual harassment policy, he usually has no legal recourse. The classic statement of at-will employment is that an at-will employee may be discharged for "good reason, bad reason, or no reason at all."¹¹¹ Unless the reason is one that violates some clear legislative directive – such as the anti-discrimination laws – or some other clearly enunciated public policy, even an unfairly discharged at-will employee is simply out of luck. A number of courts have specifically held that an employer owes no tort duty toward an accused harasser to conduct a reasonable investigation before discharging him.¹¹² At least one court has held that no claim is stated under state law by an assertion that the employer discharged an at-will employee to insulate itself against a claim of sexual harassment by another employee even though the employer did not believe that cause for discharge existed.¹¹³ As a result, unless the employer defames the employee in a context that deprives it of its good-faith qualified immunity, the employee is without a remedy.¹¹⁴

Even employees having implied just-cause protection – of the sort that may be created by employer policy manuals – may not be protected against even erroneous application of the employer's policy. An implied just-cause standard ordinarily protects employees only from arbitrary discharge. The California Supreme Court has held, for example, that where the accused harasser enjoys implied just-cause protection,

111. *Slatery v. Northeast Miss. Contract Procurement, Inc.*, 747 So. 2d 257, 259 (Miss. 1999); *see also Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561, 589 (W. Va. 1996).

112. *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282 (Tex. App. 2000); *Williams v. Continental Airlines, Inc.*, 943 P.2d 10 (Colo. App. 1996); *Lambert v. Morehouse*, 843 P.2d 1116 (Wash. App. 1993).

113. *Mackenzie v. Miller Brewing Co.*, 608 N.W.2d 331 (Wisc. App. 2000), *aff'd* 623 N.W.2d 739 (Wis. 2001).

114. *See Wal-Mart Stores, Inc.*, 31 S.W.3d at 293 (overturning slander award for plaintiff because of lack of showing of malice).

the question critical to defendants' liability is not whether plaintiff in fact sexually harassed other employees, but whether at the time the decision to terminate his employment was made, defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so."¹¹⁵

Moreover, implied just-cause rules typically impose little limitation on the kinds of policies that an employer can adopt. Thus, an employer who clearly informs employees, for example, that no off-color jokes will be tolerated and that they will result in discharge, may ordinarily follow through on that threat notwithstanding the employees' just-cause protection.

Only employees with express just-cause protection, such as many union or public employees, have substantial protection against overzealous enforcement of sexual harassment policies, and, as we will see below, that protection is largely procedural. That is, employees may have their employers' decisions overturned on grounds such as lack of notice, discriminatory or inconsistent application of policies, or actual innocence, but it is difficult to overturn an employer's decision on the ground that a clearly enunciated and consistently applied harassment policy was "too harsh." We will turn now to an examination of a number of cases where employees have challenged their discharge or other discipline.

a. At-Will Employees

At-will employees, as mentioned previously, occasionally bring wrongful-discharge actions. A well-publicized case involved a Miller Brewing executive who was discharged after he described an episode of *Seinfeld*.¹¹⁶ In the episode in question, the protagonist could not recall the name of a woman he was going out with; all he could remember was that her name rhymed with a female sexual anatomical part. It turned out that the woman's name was Dolores. When the plaintiff described the episode to a woman in the office, the woman did not understand the joke, so the plaintiff showed her a dictionary page containing the word "clitoris" (obviously, the rhyme was a bit off). The woman filed an internal sexual harassment charge, and the man was discharged.¹¹⁷ The man sued Miller challenging his discharge and also raising other claims. He won a multi-million dollar

115. *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412, 423 (Cal. 1998).

116. See *Sexual Harassment: Jury Awards \$26 Million to Executive Fired after Discussing 'Seinfeld' Episode*, DAILY LAB. REP. (BNA) No. 137, July 17, 1997, at A-11.

117. *Mackenzie*, 608 N.W.2d at 336.

judgment, only a small part of which was related to his discharge, although the award was ultimately vacated in its entirety.¹¹⁸

b. Civil Service and Other Public Employees

Public employees often enjoy civil-service protection or constitutional protection resulting from due-process obligations of their employers, and a number of them have run afoul of their employer's harassment policies.

- A machinist foreman told a female apprentice that he was from the "old school" and did not believe that women had any place in the shipyards, that the apprentice program was a "joke," and that she should have gotten a "typewriter" job. He was demoted to machinist.¹¹⁹

The Merit Systems Protection Board (MSPB) sustained the demotion.¹²⁰

- A Postal Service supervisor addressed a subordinate "on more than one occasion" as "sweet thing." He was demoted to Letter Carrier.¹²¹

An administrative law judge sustained the charge and the demotion, but the MSPB reduced the penalty to a 30-day suspension.¹²²

- A Warehouse Worker Foreman said approximately ten times during a four-year period "that he believed that women in general were incapable of performing work in the [warehouse] and that he would never hire a woman." He was subsequently demoted.¹²³

The MSPB upheld the demotion, but the Court of Appeals for the Federal Circuit overturned it, ruling that because the employee had not acted on his attitudes or created a hostile environment, he had not violated any regulations.¹²⁴

- An Arizona police officer, upon learning that he scored well on the Sergeant's exam, e-mailed a friend of his, a civilian woman in the department, "Now that I am on the Sergeant's List will

118. *Id.* at 361.

119. *Curry v. Dep't of the Navy*, 13 M.S.P.R. 327 (1982).

120. *Id.* at 332.

121. *Dubiel v. United States Postal Serv.*, 54 M.S.P.R. 428 (1992).

122. *Id.* at 435.

123. *Holland v. Dep't of the Air Force*, 31 F.3d 1118, 1118-19 (Fed. Cir. 1994).

124. *Id.* at 1121.

you sleep with me?"¹²⁵ His friend was amused and not at all offended but she mentioned the message to someone who reported it to a supervisor. The officer's name was then removed from the Sergeant's List.¹²⁶

He sued alleging deprivation of due process, and the District Court denied summary judgment to the employer on the due process claim.¹²⁷

c. *Union Employees Protected by Collective Bargaining Agreements*

Arbitration cases are a fertile source of information about the application of policies, because they often involve discipline less than discharge or even demotion and so pick up many of the more routine applications of policies.

- A computer operator brought a copy of *National Lampoon* magazine to work. It was found by a female employee who gave it to a manager. The manager decided that the pictures of scantily clad women in the magazine violated the company's sexual harassment policy, and the employee was discharged.

The arbitrator overturned the discharge on the grounds that the grievant was unaware that the photos were in the magazine and that the employer had not disciplined others who brought such material into the workplace.¹²⁸

- A leadman at an Oregon manufacturing plant, along with several other male employees, looked unobtrusively at a copy of *Penthouse* magazine containing pictures of local celebrity Tonya Harding. One of the employees later mentioned the magazine to a female co-worker, who in turn notified management. The employee was suspended for three days.

The arbitrator overturned the suspension because the grievant was a 17-year employee with no disciplinary history, and his punishment was excessive compared to others involved in the incident.¹²⁹

- A Hispanic woman wore an African print scarf on her head. Some black employees were offended that she would wear an African scarf and complained. She was told to remove it

125. *Olive v. City of Scottsdale*, 969 F. Supp. 564, 567 (D. Ariz. 1996).

126. *Id.* at 567-69.

127. *Id.* at 571, 579.

128. *In re RMS Techs., Inc.*, 94 LAB. ARB. (BNA) 297 (1990).

129. *In re American Mail-Well Envelope*, 105 LAB. ARB. (BNA) 1209 (1995).

because it offended her co-employees; when she refused, she was discharged for insubordination.

The arbitrator overturned the discharge, finding that the grievant had not meant any racial offense. Despite that finding, the arbitrator required that the grievant apologize to all black employees and attend sensitivity training.¹³⁰

- Just before Halloween, an air traffic controller found a piece of rope in a construction area of the Indianapolis Control Tower. He tied it in a hangman's noose and hung it over the curtain rod that cordoned off the construction area. Apparently, no one saw it, but he admitted he had done it after a second noose (which he had nothing to do with) appeared and caused a furor among black employees. Although there was no allegation that he had any racial motivation (and an arbitrator subsequently found that he clearly did not), the employee was suspended for two days.

The arbitrator overturned the suspension because he concluded that the grievant did not understand the racial significance of the noose. Nonetheless, the arbitrator approved a written admonishment, because he believed that "some discipline is appropriate for instructional and correctional purposes."¹³¹

- A female employee wore a "Hooters Restaurant" t-shirt to work. She was given a written reprimand for violating the employer's "indecent dress" policy that had been adopted pursuant to its sexual harassment policy.

The arbitrator ruled that shirt indeed violated the policy, but he required that the discipline be removed from the grievant's record, because she had commonly worn the shirt without comment before the dress policy was adopted and was given no notice that it would be deemed to violate the rule. Also, the company had failed to discipline another employee who had brought a tool box with sexually offensive writing to work.¹³²

- An employee circulated the "Oakland Ebonics Quiz," a document that ridiculed "ebonics" in ways that were deemed racially and sexually offensive, at a time when the subject was much in the news. His supervisor told him to stop circulating it,

130. *In re* USCP-WESCO, Inc., 109 LAB. ARB. (BNA) 225 (1997).

131. *In re* Federal Aviation Administration, 109 LAB. ARB. (BNA) 699 (1997).

132. *In re* Clarion Sintered Metals, Inc., 110 LAB. ARB. (BNA) 770 (1998).

at which point he apologized and ripped it up. The employee was suspended for three days.

The arbitrator was convinced that the grievant was “acting out of innocent motives and that he was misled by his supervisors” about the permissibility of his conduct. The arbitrator upheld the suspension anyway, stating that “[t]he Grievant must be given a penalty which impresses on him the seriousness of his offense.”¹³³

- A correctional officer distributed a newsletter on the employer’s premises before and after his shift that contained an article entitled *Where Are All the Balls?* written by military analyst David Hackworth. The article was critical of both the “feminization” of the Army and the “emasculatation of America.” Although the grievant gave copies of the newsletter only to people who welcomed it, a number of women saw copies and complained to management. The officer was suspended for two days for violating the employer’s sexual harassment policy.

The arbitrator upheld the suspension, rejecting the union’s argument that the newsletter addressed a matter of public concern. According to the arbitrator, “the comment on the role of women in combat infantry was only incidental to the pervasive premise that women are generally inferior to men and should not have equal opportunity in the workplace.”¹³⁴ The arbitrator did not explain why a suggestion that women should not have equal opportunity was not a matter of public concern. Surely, she would not have held that a statement expressing the contrary view would be unprotected.

- An employee at a PPG plant had inadvertently not logged off of a computer, leaving his e-mailbox open, and a female employee discovered sexual material on the computer. In a plant-wide investigation, it was discovered that the grievant also had graphic pictures, in addition to sexual jokes, in his e-mail folder. The employer discharged him for violation of its sexual

133. *In re Pepsi Cola Co.*, 110 LAB. ARB. (BNA) 803 (1998); see also Victoria Roberts, *Attorneys Say Employees’ Use of E-Mail Creating Possible Legal Pitfalls for Employers*, DAILY LAB. REP. (BNA) No. 130, July 6, 2000, at C-1 (noting that this same “quiz” had resulted in lawsuits at both Morgan Stanley and Citibank).

134. *In re County of Ramsey*, 114 LAB. ARB. (BNA) 993 (2000).

harassment policy, despite the fact that none of the recipients of the grievant's e-mails had complained.

The arbitrator re-instated the grievant without backpay, converting his discharge into a nine-month unpaid suspension, on the ground that he was a nine-year employee with a clean record and that, despite the fact that "what grievant did was wrong and should never be allowed," the punishment imposed by the employer was excessive compared to that imposed on others.¹³⁵

- An employee of a public utility district was found, during a sexual-harassment investigation of another employee, to have approximately thirty-five "inappropriate" e-mails on his computer, most in the form of jokes and cartoons. Although he had not sent the e-mails to anyone who was offended by them, he was discharged for violation of the employer's sexual harassment policy.

The arbitrator ordered the grievant reinstated on the ground that he had been denied due process because the policy had previously been laxly enforced, the employer had not followed its progressive discipline policy, and discharge was an excessive penalty. The arbitrator nonetheless acknowledged the importance of the employer's policy in protecting against sexual harassment claims.¹³⁶

These cases are simply the visible tip of a very large iceberg. They arise only when there is an actual or purported violation of an employer's policy that leaves its tracks in a written decision. The vast majority of employees heed their employers' warnings not to say anything that offends their fellow workers. Thus, the most egregious censorship fostered by the hostile-environment regime is not imposition of liability on employers for what is often highly offensive speech by their employees or even discipline of employees who violate their employers' harassment policies. Rather, it consists of the day-to-day restrictions on the speech of millions of employees who are likely never to be parties to a lawsuit – decent people who must walk on eggshells because their employers have made it clear that their jobs hang in the balance if they say the wrong thing.¹³⁷

135. *In re PPG Indus., Inc.*, 113 LAB. ARB. (BNA) 833 (2000).

136. *In re Snohomish County Public Utility Dist. No. 1*, 115 LAB. ARB. (BNA) 1 (2001).

137. The Supreme Court recognized the chilling effect that can occur in the workplace through vague speech regulation in *Keyishian v. Board of Regents*, 385 U.S. 589, 604 ("When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone

C. *Are the Above Cases "Overreactions by Paranoid Employers" or Examples of the System Operating the Way it Is Supposed To Operate?*

The cases described above have certain elements in common. In each, the employer disciplined or discharged an employee for expression that clearly would not, by itself, constitute actionable harassment. Nonetheless, in the majority of the cases, the employee ended up suffering some discipline even after pursuing appeals. When the employees were completely successful in their appeals, in almost all cases it was because of some procedural infirmity, such as lack of notice or disproportionality in comparison with the treatment of other employees. The legitimacy of the employer's taking *some* action against a properly warned employee is seldom challenged.¹³⁸

Some argue that when employers discipline employees for "sub-actionable" conduct, they are acting in a "paranoid" fashion¹³⁹ or acting pursuant to "bizarre" misapplications of the law.¹⁴⁰ If employers are going beyond what the law requires, the argument goes, their censorship cannot be attributed to governmental action; instead, it is simply private action beyond the reach of the First Amendment. While it is true that the actions of private employers do not implicate the First Amendment if they are genuinely privately motivated, the desire to avoid liability under a vague legal standard is not "purely private" behavior.

Is it fair to say that when employers prohibit "sub-actionable" speech they are over-reacting? Put another way, do employers have no legal obligation to prohibit harassment prior to the point that it crosses the "severe or pervasive" threshold? Presumably, everyone would agree that they have a substantial legal *incentive* to do so, since several incidents of "sub-actionable" speech can be aggregated under the totality-of-the-circumstances standard to add up to a hostile environment. But the case can be made more strongly. Suppose that there is some expression that by itself is sub-actionable but if said three times will be sufficiently severe or pervasive to alter the terms and conditions of employment. When the offending employee says it the first time, the employer tells the complaining employee, "That speech is not

... ' For 'the threat of sanctions may deter . . . almost as potently as the actual application of sanctions.'" (citations omitted).

138. With changes in technology, employers are finding new ways to censor new media of expression. Increasingly, employees have been fired for accessing pornographic websites or sending off-color or racially offensive e-mails. Many employers use filters to block access to sexually oriented websites and to block e-mails with "inappropriate" content, and they are doing it for the purpose of avoiding harassment liability. See Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 309-10 (2000).

139. Sangree, *supra* note 78, at 595.

140. Epstein, *supra* note 21, at 418.

sufficiently severe or pervasive as to constitute harassment; therefore I will not prohibit him from saying it, and you should just 'toughen up.'" When the complaining employee complains about a second incident, the employer responds in the same way. Then, it happens a third time, taking the circumstances over the threshold of actionability. The complaining employee may then quit and allege a constructive discharge or remain in employment and sue. By hypothesis, a hostile environment exists, which means that the employer's liability will turn on whether it has taken reasonable steps to prevent harassment before it occurs and to remedy it once it has occurred.¹⁴¹ Our employer will have a hard time meeting this standard, given its repeated refusal to act on the employee's complaints, and there is little doubt that it would be held liable. What would its liability be based upon? Its prior failure to stifle sub-actionable speech.

The employer's obligation to act in such circumstances has been clearly recognized by the MSPB. Although acknowledging that an "isolated incident" of "sexist" harassment will not result in employer liability, the Board has stated:

[S]uch conduct by one of its supervisory employees cannot go unchecked by the agency, lest the agency be said to condone such remarks by its employees. Furthermore, if such conduct were not to be held actionable, a course of conduct or pattern of discriminatory behavior could emerge wherein the agency as employer could ultimately be held liable under Title VII.¹⁴²

Employers of at-will employees labor under even fewer constraints than public or unionized employers, because they need not even persuade an administrative agency or arbitrator that acting prior to reaching the legal standard for harassment is justified. Again, the incentives are overwhelmingly on the side of over-regulation.

Arguably, this analysis might change as a result of the Supreme Court's recent *per curiam* decision in *Clark County School District v. Breeden*.¹⁴³ The plaintiff in *Breeden* had complained that her supervisor had laughed inappropriately about an off-color comment made by a job applicant in his

141. See *White v. New Hampshire Dep't of Corrections*, 221 F.3d 254, 261 (1st Cir. 2000) (stating that employer is liable for co-worker harassment if the employer "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action"); *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999) (same).

142. *Curry v. Dep't of the Navy*, 13 M.S.P.R. 326, 330 (1982); see also *Carosella v. United States Postal Serv.*, 816 F.2d 638, 643 (Fed. Cir. 1987) (stating that "[a]n employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action").

143. 121 S. Ct. 1508 (2001).

prior job; shortly thereafter, the plaintiff was transferred to another position. She contended that the transfer constituted unlawful retaliation under section 704 of Title VII.¹⁴⁴ Although agreeing with the District Court that this one incident was not sufficiently severe or pervasive to constitute unlawful harassment, the Ninth Circuit reversed the District Court's grant of summary judgment in favor of the employer.¹⁴⁵ It reasoned that section 704 protects not just complaints about practices that are actually unlawful but also practices that the employee reasonably but erroneously believes to be unlawful.¹⁴⁶ Thus, the Ninth Circuit held, her opposition was protected "if she had a reasonable good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment."¹⁴⁷ The Supreme Court reversed, holding that even if the Ninth Circuit was correct in protecting opposition to conduct that is reasonably but erroneously believed to be unlawful, "no one could reasonably believe that the incident . . . violated Title VII."¹⁴⁸

On its face, the Supreme Court's decision makes perfect sense. Surely Title VII does not protect all employee complaints, no matter how unreasonable, that an employer's conduct violates Title VII. Outside the harassment area, such a rule poses little problem. If a woman repeatedly complains, for example, that the employer is engaged in sex discrimination because male executives earn more than female clerical staff, the policies behind Title VII are not significantly implicated if the employer tells her to quit complaining and imposes sanctions against her if she does not. In the harassment context, with its "severe or pervasive" standard, however, this reasoning presents problems. If the anti-retaliation provisions are not triggered until harassing conduct becomes severe or pervasive enough to be actionable – or at least until a reasonable person could believe that it was – then that implies that an employer could respond to a woman's good-faith complaints about sub-actionable harassment by firing her, at least as long as it did not single out discrimination complaints for such harsh treatment. This result – bringing new meaning to the phrase "nipping harassment in the bud" – seems inconsistent with a regime that is designed to encourage employers to adopt anti-harassment policies and to encourage employees to take advantage of the policies.

144. *Id.* at 1509 (citing 42 U.S.C. § 2000e-3(a) (1994) (making it unlawful "for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]").

145. *Breedon*, 121 S. Ct. at 1511.

146. *Id.* at 1510.

147. *Id.* at 1509 (citation omitted).

148. *Id.*

If employers are now authorized to discharge employees for their first complaint of harassment as long as it is sub-actionable, then it is somewhat incongruous to suggest that they have an obligation to remedy sub-actionable harassment when it occurs or that their failure to do so can be used against them in subsequent litigation. It would be an odd rule that allows employers to fire employees for complaints of sub-actionable harassment but that punishes employers for failing to remedy that harassment in the event that enough harassment occurs subsequently to push the totality of the circumstances into the realm of illegality.

A predictable result of *Breeden*, if it remains good law, is that courts will lower the bar of what a reasonable person might think constitutes actionable harassment in order to protect women who complain about their workplace conditions. Many courts would be uncomfortable ruling, for example, that a woman who is fired after complaining about the presence of a single pin-up calendar in the workplace is without a remedy, even though the calendar would not by itself suffice to create employer liability. Under *Breeden*, in order to find the complaint protected, however, a court would have to find that a reasonable person could believe that a single pin-up violates Title VII. If a reasonable person could believe that a single pin-up violates Title VII, then that further implies that a hostile-environment claim based upon a single pin-up should go to trial, rather than being resolved on summary judgment in favor of the employer, as it would be today. After all, if reasonable minds could differ over the question, then it is ordinarily a jury question whether a hostile environment exists. Unfortunately, the Court did not discuss any of the implications of its decision.¹⁴⁹

IV. RAISING THE FIRST AMENDMENT CHALLENGE: THE EEOC GUIDELINES, AS INTERPRETED BY COURTS, ARE VOID ON THEIR FACE

Most of the focus of court opinions and academic debate has centered on the question whether hostile-environment speech regulation is permitted by virtue of some doctrinal category, such as the captive-audience doctrine or time, place, or manner doctrine. In some sense, this debate may be largely beside the point, because even if much of the speech can be shoe-horned into one or another of such categories, the standard under which the speech is regulated must satisfy more general First Amendment rules, such as those relating to vagueness and overbreadth, and the hostile-environment standard cannot do so.

149. The Court's apparent failure to consider the full implications of its decision is a predictable consequence of its unfortunate practice of occasionally deciding cases, as here, without benefit of briefs on the merits, oral argument, or the amicus briefs that a case like this would ordinarily generate.

The primary way that employers have so far raised the First Amendment challenge has been to make the general argument that because some or all of the complained-of “conduct” in the case constitutes speech, imposition of liability would violate the First Amendment. Despite ample doctrinal support for that argument, courts have not been very receptive to the invitation to decide whether the speech at issue – which may be quite offensive – should be placed in the “protected” or “unprotected” category.

An alternative approach, and one that may hold more promise, is to raise a facial challenge to the law. Rather than defending the specific speech at issue in the case, the employer would challenge the legal standard on grounds of both vagueness and overbreadth, shifting the focus to where it belongs – on the vague and overbroad regulatory standard that forces employers to censor speech that should be immune from government regulation.

A. *Vagueness*

A central principle of First Amendment doctrine is that any law regulating speech must give reasonable notice of what is prohibited. A vague law restricts too much speech, because “[u]ncertain meanings inevitably lead citizens to steer far wide of the unlawful zone.”¹⁵⁰ A vague law creates a “chilling effect,” such that individuals will stifle not only their expression of appropriately prohibited speech but also their expression of protected speech that comes anywhere close to the line because of their inability to perceive with confidence where the line is.¹⁵¹

The legal standard governing harassment liability provides little guidance about what speech is actionable. The EEOC Guidelines define harassment as “verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.”¹⁵² The Supreme Court, when characterizing its holdings, has tended to use the phrase “hostile or abusive” to describe the actionable work environment,¹⁵³ perhaps to reinforce its view that mere “offense” is not enough to create liability.¹⁵⁴ The Court has further added the gloss that the harassment must be “severe or

150. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

151. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

152. 29 C.F.R. § 1604.11(a) (1999).

153. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

154. *See Harris*, 510 U.S. at 21 (stating that “mere utterance of an . . . epithet which engenders offensive feelings in a employee does not sufficiently affect the conditions of employment to implicate Title VII”) (citation and internal quotation marks omitted).

pervasive,"¹⁵⁵ a determination that is to be made "by looking at all the circumstances."¹⁵⁶ Moreover, despite the EEOC Guidelines' inclusion of verbal conduct having the "purpose or effect" of creating a hostile environment, the Supreme Court has defined the hostile environment only in terms of its effect, stating that the environment must be one that "a reasonable person would find hostile or abusive" and that the victim must "subjectively perceive the environment to be abusive."¹⁵⁷ Despite these limitations, however, the question of liability is, as Justice Scalia's *Harris* concurrence observed, decided by "virtually unguided juries."¹⁵⁸ While such an unclear standard may be acceptable in some contexts, when it comes to regulation of speech, "precision of regulation is demanded."¹⁵⁹

B. Overbreadth

The indeterminacy of the liability standard coupled with the totality-of-the-circumstances rule and the regime of employer liability¹⁶⁰ eliminates, in a perverse way, the vagueness of the standard by which employers are to gauge their obligation to stifle employee speech. The law pressures employers to censor *all speech* that is sexist or sexual, even if no one has complained about it. If litigation ensues, the employer's liability will be judged in large part by how vigilant it has been in policing sexually charged speech and conduct. So understood, hostile-environment law can be seen to impose clear obligations that are sweeping in their prohibition of speech and thus fatally overbroad.¹⁶¹

From a litigation perspective, the substantial overbreadth of the legal standard is a potential boon to employers, because under Supreme Court precedent a litigant challenging an overbroad restriction on speech is not required to demonstrate that his own speech could not be regulated by an appropriately tailored statute.¹⁶² Thus, an employer need not demonstrate that the speech relied upon by a sexual-harassment plaintiff is "protected" from any conceivable regulation; it is sufficient that the employer demonstrate that

155. *Id.* at 22.

156. *Id.* at 23.

157. *Id.* at 21-22.

158. *Id.* at 24.

159. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (citation and internal quotation marks omitted).

160. *See supra* Section III(A).

161. *See* Robert A. Sedler, *The First Amendment in the Workplace: Private Free Speech vs. Legal Protections Against Discrimination*, LAB. & EMP. L.A.W.NOTES, at 7 (1996); Gerard, *supra* note 77.

162. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

the law's overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."¹⁶³

If the law clearly set forth what virtually all employment lawyers and judges appear to think it requires of employers, the facial invalidity of the law would be plain. Imagine a statute that explicitly prohibited employees from engaging in the following expressions in the workplace: stating that women do not belong in male-dominated occupations;¹⁶⁴ possessing *National Lampoon* or *Penthouse*;¹⁶⁵ wearing "Hooters Restaurant" t-shirts;¹⁶⁶ ridiculing "ebonics";¹⁶⁷ and circulating David Hackworth columns critical of women in combat.¹⁶⁸ One doubts that a single First Amendment scholar or judge could be found who would vouch for the constitutionality of the statute.

Hostile-environment regulation is a classic example of the rationale for allowing overbreadth challenges under the First Amendment despite the general rule that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others."¹⁶⁹ Claims that a law is facially overbroad are permitted because of the belief that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."¹⁷⁰ The millions of employees who must censor themselves every day because their employers have made clear that a desire to avoid harassment liability has led them to have "zero tolerance" for offensive speech are unlikely to be in a position to raise their own First Amendment rights and thus must rely on their employers to do so.

Courts have been relatively receptive to facial challenges to public-sector harassment policies, having shown themselves willing to strike them down in both declaratory actions¹⁷¹ and actions challenging discipline imposed under the policies.¹⁷² In public-sector cases, it is not necessary to determine whether the policy was adopted to comply with the law or whether it goes beyond what

163. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

164. *See supra* text accompanying notes 99 & 101.

165. *See supra* text accompanying notes 103 & 104.

166. *See supra* text accompanying note 107.

167. *See supra* text accompanying note 108.

168. *See supra* text accompanying note 109.

169. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

170. *Id.* at 612.

171. *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

172. *See Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993).

the law would require. In *Dambrot v. Central Michigan University*,¹⁷³ for example, the plaintiff basketball coach had been discharged for using the word “nigger” in motivational sessions with his players.¹⁷⁴ Although his use of the word was not intended to offend the players,¹⁷⁵ the university maintained that he had violated its discriminatory harassment policy. That policy defined racial and ethnic harassment as follows:

any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.¹⁷⁶

Dambrot challenged his discharge on the ground that the harassment policy was facially unconstitutional. The district court agreed, and the court of appeals affirmed.

The court of appeals reasoned that the harassment policy was both vague and overbroad.¹⁷⁷ The policy did not provide fair notice of what speech was prohibited, and on its face reached a substantial amount of constitutionally protected speech.¹⁷⁸ Regardless of the political value of the speech, the court reasoned, the policy allowed the university to prohibit the speech on the basis of subjective judgments about what speech was “negative” or “offensive.”¹⁷⁹

Similarly, in *Saxe v. State College Area School District*,¹⁸⁰ the Third Circuit found a public school district's harassment policy to be facially overbroad. The policy provided in part:

Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's

173. *Dambrot*, 55 F.3d at 1177.

174. *Id.* at 1180-81.

175. In fact, several members of the basketball team joined the plaintiff's lawsuit as plaintiffs. *Id.* at 1181.

176. *Id.* at 1182.

177. *Id.* at 1184-85.

178. *Dambrot*, 55 F.3d at 1184-85.

179. *Id.* at 1184. Despite having declared the hostile-environment policy unconstitutional, however, the court nonetheless held that the plaintiff's termination did not violate the First Amendment. Even without the policy, the court said, the university was free to discharge him because his speech did not touch on matters of public concern. *Id.* at 1185-88.

180. 240 F.3d 200 (3d Cir. 2001).

educational performance or creating an intimidating, hostile or offensive environment.¹⁸¹

The policy also stated that harassment "can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above" and that religious harassment is "unwelcome verbal, written or physical conduct directed at the characteristics of a person's religion, such as derogatory comments regarding surnames, religious tradition, or religious clothing, or religious slurs, or graffiti."¹⁸²

According to the Third Circuit, "[t]here is no categorical 'harassment exception' to the First Amendment."¹⁸³ No one, the court stated, "would suggest that a school could constitutionally ban 'any unwelcome verbal . . . conduct which offends . . . an individual because of' some enumerated personal characteristics."¹⁸⁴ Moreover, the court observed, the policy defined harassment as conduct having either the purpose or effect of creating a hostile environment (just as the EEOC Guidelines do), whereas the Supreme Court's cases define harassment solely by its effects.¹⁸⁵ Therefore, notwithstanding the latitude that schools have to regulate the speech of students, the policy had a far broader reach than the Constitution would allow.

The policies struck down in *Dambrot* and *Saxe* are very similar to the EEOC Guidelines and the case law that has relied upon those Guidelines, as well as to the policies adopted by many employers in both the private and public sector pursuant to their understanding of the dictates of Title VII. *Dambrot* and *Saxe*, therefore, provide strong ammunition for the conclusion that hostile-environment law is facially invalid.

The difficulty with mounting a facial challenge to federal harassment law is that it is based on an amalgam of statute, administrative guidelines, and case law. The underlying statutory provision is quite plainly not invalid under the First Amendment, as it simply prohibits sex discrimination.¹⁸⁶ The EEOC Guidelines, while influential, do not have the force of law.¹⁸⁷ That leaves the interpretive case law, much of it from the Supreme Court, as the primary legal directive to employers to engage in censorship. The fact that facial invalidity can be avoided by a limiting construction¹⁸⁸ suggests that anyone challenging

181. *Id.* at 202.

182. *Id.* at 202-03.

183. *Id.* at 204.

184. *Id.* at 215.

185. *Saxe*, 240 F.3d at 206.

186. 42 U.S.C. § 2000e-2(a)(1) (1994).

187. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

188. *See United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).

the facial validity of harassment law is likely to face a moving target. This difficulty would not be faced in a federal-court challenge to the many state anti-discrimination laws that effectively codify the EEOC Guidelines.¹⁸⁹

V. POSSIBLE ALTERNATIVES TO THE PRESENT REGIME

If First Amendment protections are not to fall victim to the war on harassment, it must be harassment doctrine, rather than constitutional doctrine, that must change. One possibility is to narrow actionable harassment to speech that is “directly targeted” toward the plaintiff, so that such undirected expression as cartoons posted on a wall or jokes inadvertently overheard will not support liability. A more promising, yet more radical, possibility is to eliminate employer liability altogether.

A. *Directly Targeted Speech*

Some commentators, while believing that current harassment standards unduly restrict expression, have argued that First Amendment problems can be avoided by requiring that speech be “targeted” toward a particular victim in order to be actionable.¹⁹⁰ Thus, a plaintiff could not rely on overheard jokes or objectionable displays that are exhibited for all to see. Such a standard would unquestionably be an improvement over the current standard, but faith in this revised standard reflects the view that a law is working appropriately if the right parties are prevailing in the litigated cases. The relevant question, however, is whether a “targeted” standard would substantially reduce the core problem of hostile-environment regulation, which is censorship by employers because of fear of liability. The answer appears to be in the negative.

Under any sensible interpretation of a “targeted” standard, statements that were intentionally made in the plaintiff’s presence would qualify even if they were not formally directed toward her. That is, if a woman overhears sexist jokes or remarks and asserts that they were made because of her presence, it would presumably be a jury question whether the statements were in fact “targeted.” Similarly, if a woman argues that suggestive pictures were posted specifically to offend her, she may be able to get to a jury on her claim. Of course, if the picture predated her employment in that location, such a claim would be hard to make. However, if she complained about the first

189. See, e.g., CAL. EDUC. CODE § 212.5 (WEST 2001); CONN. GEN. STAT. § 46A-60 (2001); 775 ILL. COMP. STAT. 5/2-101 (2001); MASS. GEN. LAWS. Ch. 151B, § 1 (2001); MICH. COMP. LAWS § 37.2103 (2001); MINN. STAT. § 363.01 (2000); NEB. REV. STAT. § 48-1102 (2001); R.I. GEN. LAWS § 28-51-1 (2001); VT. STAT. ANN. tit. 21, § 495d (2001); WIS. STAT. § 111.36 (2000).

190. See Volokh, *supra* note 77, at 1871; Stuart Taylor, Jr., *Real Sexual Harassment*, LEGAL TIMES, May 6, 1996, at 23.

picture after she entered the workplace and then additional pictures were posted, she might reasonably argue that the later pictures were directed at her in retaliation for her earlier complaints.

A “targeted” standard would simply not provide the employer the tools for distinguishing between the speech it must regulate and the speech it may allow. Many of the cases described in Section III could plausibly be characterized as involving “targeted” speech. While not sufficient by itself to create liability, the speech in each of those cases could potentially be aggregated with other speech to support a hostile-environment finding. Thus, the employer would still experience the same pressure to censor the speech, so that even a “targeted” standard would still require the employer to impose viewpoint-based speech restrictions.

B. Elimination of Employer Liability

A substantially superior way of regulating harassment – at least harassment that takes the form of speech – would be to eliminate employer liability under Title VII and rely on tort actions against harassers themselves for intentional infliction of emotional distress.¹⁹¹ Such a course would diminish employer incentives to over-censor employee speech. Employers would nonetheless retain an interest in restricting the most egregious forms of harassment because of their interest in workplace efficiency, but the huge incentives to hypersensitivity would diminish. Thus, employers would still draw lines, but they would probably draw them in a way that would be more protective of the expression of their employees.

At the same time, individual liability would have the advantage of imposing liability on the primary malefactor, who would risk substantial economic sanctions for highly abusive speech. There is reason to think that jurors would be more speech-protective in an action against a co-worker than in an action against a deep-pocket corporate employer. The impulse to self-censorship would not be as great, because employees would know that they would be held liable only for their own speech. Thus, they would not have to be concerned about whether the speech of others could be added to their own to create liability, unless they were acting in concert with the other employees.

A system of individual liability would mitigate many of the most pernicious aspects of current regulation – the cumulation of speech of numerous speakers and the system of third-party censorship. It is not, however, a panacea. The “outrageous conduct” element of the intentional

191. See Mark M. Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375 (1998) (arguing that tort law is a superior method of regulation, at least in some kinds of cases); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990) (same).

infliction of emotional distress tort suffers some of the same vagueness problems that the current hostile-environment standard suffers. In overturning a tort award obtained by Jerry Falwell against *Hustler* magazine, the Supreme Court held that the “outrageousness” standard was insufficiently precise.¹⁹² The Court stated that “[o]utrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”¹⁹³ Although the Court’s solicitude for First Amendment values was heightened by the fact that Jerry Falwell is a public figure, the standard provides no more or less guidance depending upon the status of the plaintiff. Moreover, the speech at issue in many sexual and racial harassment cases raises a significant likelihood that jurors would do exactly what the Court feared in *Hustler*: impose liability based upon their own tastes and upon their dislike of certain kinds of speech.

VI. CONCLUSION

The First Amendment issue will continue to arise, but in the cases in which employers are most likely to raise it, they are least likely to need it – that is, in cases like *DeAngelis* where the court thinks that the harassment was not really very bad. In more serious cases, most courts will probably continue to feel strong pressures to disregard the issue because when there is a lot of speech that a court thinks unprotected, or when there is speech mixed with bad conduct, courts will view the First Amendment issue as a smokescreen. Eventually, however, the Supreme Court will have to address the issue, and when it does it will find that it cannot endorse the status quo without dramatically modifying First Amendment doctrine.

Many people are troubled by invocation of the First Amendment to protect speech that is in many cases so self-evidently of little value at best, and affirmatively harmful at worst. However, the perceived harmfulness of harassing speech does not distinguish it from any other speech that might be the subject of regulation. The expression targeted by regulation is always thought to be harmful – whether it be speech of Communists, nude dancing, flag burning, solicitation in airports, protesting against a war, or pornography. If the First Amendment did not impose costs by requiring us to endure speech we would rather avoid, it would not be worth having. That we must endure such speech is not an unpleasant side effect of the First Amendment; it is its core purpose.

192. *Hustler v. Falwell*, 485 U.S. 45 (1988).

193. *Id.* at 55.