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## Speaking of Workplace Harassment: A First Amendment Push Toward a Status-Blind Statute Regulating "Workplace Bullying"

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# SPEAKING OF WORKPLACE HARASSMENT: A FIRST AMENDMENT PUSH TOWARD A STATUS- BLIND STATUTE REGULATING “WORKPLACE BULLYING”

*Jessica R. Vartanian*

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## SPEAKING OF WORKPLACE HARASSMENT: A FIRST AMENDMENT PUSH TOWARD A STATUS- BLIND STATUTE REGULATING “WORKPLACE BULLYING”

*Jessica R. Vartanian\**

### I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 makes discrimination in employment unlawful, but only based on certain suspect classes: race, color, religion, sex, and national origin.<sup>1</sup> Courts have interpreted the statute to ban workplace harassment in this same limited fashion,<sup>2</sup> refusing to recognize harassment claims based on sexual orientation or any other unspecified classification.<sup>3</sup> Although Congress may regulate in this selective manner consistent with equal protection,<sup>4</sup> workplace harassment differs from other forms of discrimination proscribed under Title VII in one very important respect—workplace harassment is often achieved through an array of expression traditionally protected under the First Amendment.<sup>5</sup>

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1. 42 U.S.C. § 2000e-2(a)(1) (2006).

2. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002) (racial harassment); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (sexual harassment); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313-14 (4th Cir. 2008) (religious harassment); *Velez v. City of Chicago*, 442 F.3d 1043, 1047 (7th Cir. 2006) (national origin harassment).

3. *E.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“As is evident from the [statutory] language, sexual orientation is not a prohibited basis for discriminatory acts under Title VII.”).

4. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 954 (7th Cir. 2002) (“[D]iscrimination against homosexuals . . . will only constitute a violation of equal protection if it lacks a rational basis”). *But see Romer v. Evans*, 517 U.S. 620, 632-36 (1996) (striking down Colorado’s constitutional amendment prohibiting the enactment of legislation protecting the rights of gays and lesbians).

5. *See* Frederick Schauer, *The Speech-ing of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 347, 352 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (“[A] survey of the kinds of events that generate hostile environment claims demonstrates that in most of them the hostile environment is created by an environment of insults, jokes, catcalls, comments, and other forms of undeniably verbal conduct.”); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 *TEX. L. REV.* 687, 691 (1997) (“[S]ome sexual harassment cases rest largely on the display of pornography, the use of sexually offensive epithets, statements of hostility toward women in the occupation or the workplace, or other verbal or graphic expression”); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 *UCLA L. REV.* 1791, 1800-01 (1992) (“Most of the speech involved in harassment cases consist of sexual propositions; sexually explicit comments; demeaning . . . words used to address women . . . ; bigoted epithets; and pornography posted in the workplace.” (footnotes omitted)). *But see* Catharine A. MacKinnon,

Under Title VII's hostile environment theory, expression that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment constitutes discrimination.<sup>6</sup> Although the government may be justified in regulating workplace harassment because it fits the criteria that have warranted the suppression of speech in other contexts,<sup>7</sup> that is not the end of the inquiry. Assuming that workplace harassment is proscribable under the First Amendment, the following question remains: can the government choose to selectively regulate only certain disfavored subjects of workplace harassment? The question concerns the problem of subject-matter underinclusion.

Although not a harassment case, the Supreme Court confronted the issue of subject-matter underinclusion in *R.A.V. v. City of St. Paul*, a case challenging the constitutionality of a "fighting words" ordinance.<sup>8</sup> Despite its recognition that the government may constitutionally proscribe fighting words, the Court struck down the ordinance because it made unlawful only those fighting words based on race, color, creed, religion, and gender.<sup>9</sup> By not proscribing fighting words based on other topics such as political affiliation, union membership, and sexual orientation, the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."<sup>10</sup> The Court provided two exceptions to the rule against subject-matter underinclusion: (1) when the underinclusion "consists entirely of the very reason the entire class of speech at issue is proscribable"<sup>11</sup> and (2) when the suppression of select subjects of speech targets the secondary effects of the speech or is merely incidental to a statute directed at conduct.<sup>12</sup> Otherwise, underinclusive regulations of proscribable speech must survive strict scrutiny.<sup>13</sup>

The principal argument advanced in this Article is that Title VII's hostile environment theory violates the rule against subject-matter underinclusion. Like the fighting words ordinance in *R.A.V.*, hostile environment theory proscribes harassing speech in the workplace based on race, color, religion, sex, and national origin, while permitting harassing speech based on sexual orientation or any other unspecified classification. In this way, hostile environment theory creates a hierarchy of expression, prohibiting certain subjects while tolerating others. Although not explicit, the unmistakable message is that the government finds certain forms of harassing speech (e.g., sexist speech) more offensive and disagreeable than others (e.g., heterosexist speech). It is axiomatic that the government may not suppress the expression of ideas simply because society finds

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*Pornography as Defamation and Discrimination*, 71 B.U.L. REV. 793, 804 (1991) (characterizing all discrimination as conduct).

6. *Meritor*, 477 U.S. at 67.

7. *See infra* Part III.B.

8. 505 U.S. 377 (1992). Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (internal citations omitted).

9. *R.A.V.*, 505 U.S. at 391.

10. *Id.* at 381.

11. *Id.* at 388.

12. *Id.* at 389.

13. *Id.* at 395-96.

the ideas offensive or disagreeable.<sup>14</sup> Fundamentally, the First Amendment regards all expression in the marketplace of ideas as equally valuable.<sup>15</sup>

Further, it is unlikely that hostile environment theory can be saved under either exception to the rule against subject-matter underinclusion.<sup>16</sup> First, the subject-matter limitation does not consist entirely of the very reason the entire class of speech (workplace harassment as a whole) is proscribable because it does not target only the most hostile harassment. Second, hostile environment theory does not target the secondary effects of speech but is instead concerned with the content of the harassment and its primary effect on the listener. Nor is the suppression of expression merely incidental to a statute aimed at conduct, as the Supreme Court suggested in dicta.<sup>17</sup> Rather, silencing harassers and shielding victims from verbal abuse are the primary goals of hostile environment theory. Although acknowledging the possibility that hostile environment theory might survive strict scrutiny (perhaps based on the government's compelling interest to provide equal opportunity in employment to historically disadvantaged groups), the existence of less restrictive alternatives could make the limitation on subject matter invalid.

Accordingly, this Article proposes the enactment of a statute regulating "workplace bullying," the status-blind equivalent of workplace harassment. A workplace-bullying statute would prohibit workplace abuse that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile environment, but it would apply irrespective of discriminatory intent.<sup>18</sup> Although abandoning the discrimination paradigm in favor of a status-blind statute would mark a significant departure in the law, the idea has gained attention and popularity in the United States even apart from any First Amendment concerns. Perhaps the most significant development is the Healthy Workplace Bill,<sup>19</sup> workplace-bullying legislation introduced in several state legislatures.<sup>20</sup> Another sign of progress is the emergence of contractual protections against workplace bullying. In the private sector, employers have voluntarily adopted workplace-bullying policies, and the same has been achieved in the public sector through collective bargaining.<sup>21</sup> In many ways, the stage is set for regulating workplace harassment broadly in the United States, as many European countries have done for

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14. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

15. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 479 (2011) ("[T]he First Amendment regards all ideas as equal because all ideas equally reflect the autonomy of their speakers, and because this autonomy deserves equal respect.").

16. See *infra* Part III.C.2.

17. *R.A.V.*, 505 U.S. at 388 (suggesting in dicta that the suppression of select subclasses of proscribable speech under hostile environment theory is merely an incidental consequence of a statute directed at conduct). At least one court has questioned this suggestion. See *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97, & n.7 (5th Cir. 1995).

18. See, e.g., An Act Addressing Workplace Bullying, Mobbing, and Harassment, Without Regard to Protected Class Status, S.B. 699, 186th Gen. Ct. (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S699> [hereinafter Mass. Senate No. 699].

19. *Id.*

20. The Healthy Workplace Bill's website reports that twenty-one state legislatures have considered the bill. The Healthy Workplace Campaign, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/> (last visited Sept. 14, 2012).

21. See *infra* Part IV.A.

years.<sup>22</sup> The problem of subject-matter underinclusion provides an additional reason for American lawmakers to seriously consider a status-blind statute.

Part II introduces Title VII and outlines the evolution of hostile environment theory. Part III, which is divided into three subparts, addresses the free speech implications for regulating workplace harassment. Part III.A reaches the threshold conclusion that workplace harassment constitutes speech within the meaning of the First Amendment. Part III.B concludes that the government is justified in regulating workplace harassment because it fits the criteria that have warranted the suppression of speech in other contexts. Part III.C, however, concludes that there exists no justification for limiting the regulation of workplace harassment to specified suspect classes, and Title VII's hostile environment theory likely fails constitutional scrutiny under *R.A.V.* Accordingly, to align workplace harassment law with the First Amendment, Part IV proposes abandoning the status-based model in favor of a statute regulating workplace bullying. In support of this proposal, this Part discusses the workplace-bullying movement and addresses anticipated criticisms to a status-blind statute. Part V concludes.

## II. TITLE VII AND HOSTILE ENVIRONMENT THEORY

Title VII makes it unlawful for an employer to discriminate against an individual with regard to the terms or conditions of employment based on the individual's race, color, religion, sex, or national origin.<sup>23</sup> The Equal Employment Opportunity Commission (EEOC) is the agency responsible for enforcing Title VII<sup>24</sup> and has promulgated regulations interpreting the statute.<sup>25</sup> Although Title VII does not expressly prohibit workplace harassment, courts and the EEOC have recognized workplace harassment as a form of employment discrimination for more than four decades.<sup>26</sup>

Workplace harassment claims may be predicated on any one of Title VII's protected classes.<sup>27</sup> In terms of legal framework, however, only sexual harassment is bifurcated into "quid pro quo" and "hostile environment."<sup>28</sup> Quid pro quo harassment occurs when the receipt of an employment benefit or the avoidance of a job detriment is made contingent on an employee's provision of sexual favors to an employer or supervisor.<sup>29</sup> Hostile environment harassment, which can be based on

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22. *Id.*

23. 42 U.S.C. § 2000e-2(a)(1).

24. *See* 42 U.S.C. § 2000e-4 to -5 (2006).

25. *See, e.g.*, EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11 (2011) [hereinafter EEOC Guidelines].

26. *See* Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729, 730 (1995) ("Numerous cases have established that Title VII's prohibitions against discrimination in the terms and conditions of employment include a prohibition against harassment."); *Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors*, at Question 1, <http://www.eeoc.gov/policy/docs/harassment-facts.html> (Apr. 1, 2010) [hereinafter EEOC Q&A] (explaining that harassment that is sufficiently frequent and severe to create a hostile working environment violates federal law).

27. *See* cases cited *supra* note 2.

28. EEOC Guidelines, *supra* note 25, at § 1604.11(a).

29. *Id.*

any protected class,<sup>30</sup> occurs when harassment is sufficiently severe or pervasive to create an intimidating, hostile, or offensive work environment.<sup>31</sup>

Only hostile environment theory is challenged here because of its impingement on free expression. Although accomplished by words, the exchange in quid pro quo harassment does not constitute speech in the First Amendment sense, but more resembles an act of extortion than the expression of an idea.<sup>32</sup> By contrast, the intimidation, ridicule, and insult characteristic of hostile environment harassment is often brimming with social and political meaning. For example, verbal abuse might include comments regarding proper gender roles, criticism regarding affirmative action policies, or statistics purporting to signify women's lesser competence compared to men in certain occupations.<sup>33</sup> And even though a great deal of harassing speech is not socially or politically significant, Title VII's hostile environment theory nonetheless regulates expression because the legal standard turns on the harassment's content and emotive impact on the victim.<sup>34</sup>

Workplace harassment as a legal wrong was first judicially recognized in 1971, in a race discrimination case.<sup>35</sup> In *Rogers v. EEOC*, the Fifth Circuit stated that "the phrase 'terms, conditions, or privileges of employment' . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."<sup>36</sup> Recognition of sexual harassment as a legal wrong emerged shortly thereafter. In the earliest appellate case, *Barnes v. Costle*, the court held that a male supervisor who conditioned a female's employment on her willingness to concede to demands for sexual favors discriminated based on sex.<sup>37</sup> The court found it "too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men."<sup>38</sup> Since *Barnes*, workplace harassment law has developed most fully with regard to sexual harassment.<sup>39</sup>

Catharine MacKinnon's publication, *Sexual Harassment of Working Women*,

30. See EEOC Q&A, Question 2 (clarifying that its guidance applies not only to sexual harassment but "to all types of unlawful harassment").

31. EEOC Guidelines, *supra* note 25, at § 1604.11(a).

32. See Estlund, *supra* note 5, at 703 (explaining that, like other performative utterances, the words used to accomplish quid pro quo harassment do not raise free speech concerns); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 704 (1995) ("First Amendment tensions with the concept of sexual harassment arise only from the hostile environment branch of harassment."); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 837 (1993) ("If someone says to an employee, 'Sleep with me or lose your job,' we say that he is committing an act of harassment. The words do not cause the act. The words are the act."); Volokh, *supra* note 5, at 1800 (explaining that quid pro quo harassment "would seemingly be as unprotected by the First Amendment as any other form of threat or extortion").

33. See J.M. Balkin, Essay, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999).

34. See Jessica M. Karner, Comment, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CALIF. L. REV. 637, 668 (1995).

35. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

36. *Id.*

37. 561 F.2d 983, 989-95 (D.C. Cir. 1977).

38. *Id.* at 989-90.

39. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

provided a major catalyst in courts' acceptance of sexual harassment as a legal harm.<sup>40</sup> MacKinnon relied on the experiences of women to support her position that sexual coercion in the workplace causes women injury for which the law should provide a remedy, and she crafted a legal framework to address the harm in a way that courts could accept and apply.<sup>41</sup> It was MacKinnon who initially divided the sexual harassment experienced by women into the two forms judicially recognized today.<sup>42</sup> She defined the quid pro quo variety as an exchange in which a woman must comply sexually or forfeit a tangible employment benefit<sup>43</sup> and defined the condition of work variety, now known as hostile environment harassment, as pervasive verbal or physical behavior directed toward a woman that makes continued presence in the workplace intolerable.<sup>44</sup>

The Supreme Court first recognized the maintenance of a hostile environment as a form of sex discrimination in *Meritor Savings Bank v. Vinson*, decided in 1986.<sup>45</sup> In *Meritor*, the plaintiff's supervisor repeatedly demanded sexual favors from the plaintiff, which she returned for fear of losing her job.<sup>46</sup> The Court held that a claim predicated on a sexually hostile environment is actionable where the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>47</sup>

Seven years later, in *Harris v. Forklift Systems, Inc.*, the plaintiff alleged that repeated and unwelcomed sexual innuendo and degrading comments expressing negativity toward women in the workplace forced her to quit her job.<sup>48</sup> The Supreme Court further delineated the standard announced in *Meritor* by inserting a reasonable person component and clarifying that a plaintiff need not prove psychological injury.<sup>49</sup> Under *Harris*, conduct that is sufficiently severe or pervasive to create a hostile or abusive work environment from both an objective and subjective standpoint is actionable under Title VII even absent evidence that the plaintiff suffered psychological injury.<sup>50</sup> Although the Court at times referred to such harassment as achieved through "conduct,"<sup>51</sup> it indicated that severe or pervasive intimidation, ridicule, and insult could alone create a hostile

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40. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). *See also* Reva B. Siegel, *A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 9 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

41. MACKINNON, *supra* note 40, at 32. *See also* SIEGEL, *supra* note 37, at 9 (explaining that Catharine MacKinnon played a crucial role in persuading the judiciary to accept sexual harassment as discrimination by presenting "the injuries inflicted on women by sexual coercion at work . . . in terms that could be assimilated to a body of law adopted to regulate practices of racial segregation in the workplace").

42. MACKINNON, *supra* note 40, at 32-47.

43. *Id.* at 32.

44. *Id.* at 40.

45. 477 U.S. 57, 73 (1986).

46. *Id.* at 60.

47. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (alteration in original).

48. 510 U.S. 17, 19 (1993).

49. *Id.* at 21-22.

50. *Id.* at 22.

51. *Id.* at 21-22.



environment, thus contemplating a cause of action based on purely verbal abuse.<sup>52</sup>

Of course, for any sex discrimination claim to be actionable, the discrimination must be because of sex. Claims of same-sex sexual harassment raised new questions because of a potential that the victim's sexual orientation motivated the harassment. In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that nothing in Title VII bars a sex discrimination claim simply because the plaintiff and the defendant are of the same sex.<sup>53</sup> For example, a general hostility toward women in the workplace may motivate a woman to harass another woman through use of sex-specific and derogatory terms, and this may constitute sex discrimination.<sup>54</sup> Still, a plaintiff must prove that the harassment was because of sex, as opposed to some other classification, such as sexual orientation.<sup>55</sup>

*Price Waterhouse v. Hopkins* also brought about significant change to the law of sex discrimination.<sup>56</sup> *Price Waterhouse* tells the story of Ann Hopkins, an ambitious career woman seeking partnership in a large accounting firm.<sup>57</sup> Although Hopkins' credentials, dedication, and performance surpassed that of her male colleagues, the firm denied her partnership because she appeared too aggressive and assertive and lacked feminine social graces.<sup>58</sup> In ruling in Hopkins' favor, the Court stated that, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."<sup>59</sup> According to the Court, "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."<sup>60</sup>

Under *Price Waterhouse*, an employer who discriminates against an employee because of his or her gender non-conforming behavior may violate Title VII's prohibition of sex discrimination.<sup>61</sup> This is true even though the terms "sex" and

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52. *Id.* at 21 (citing *Meritor Sav. Bank*, 477 U.S. at 65, 67). The parties in *Harris* included arguments in their briefs discussing the potential free speech implications for Title VII's hostile environment theory. Brief of Respondent at 41-44, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 302223, at \*31-33; Reply Brief for Petitioner at 14-15, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 632335, at \*10. Yet the Court did not so much as mention the First Amendment in rendering its decision. There are many reasons that might lead a court to remain silent on an issue, and one can only speculate about the Court's motive for remaining silent in *Harris*. As with all judicial decisions, *Harris* should be read to mean only that which it explicitly provides. See Kingsley R. Browne, *The Silenced Workplace: Employer Censorship Under Title VII*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 399, 402-03 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). Because the Supreme Court has never directly confronted the free speech implications for regulating workplace harassment, this Article treats the issue as open and deserving of discussion. *But see* SCHAUER, *supra* note 5, at 356-60 (suggesting that the Court dismissed the parties' free speech arguments as too trivial to warrant discussion).

53. 523 U.S. 75, 79 (1998).

54. *Id.* at 80.

55. *Id.* at 81.

56. 490 U.S. 228 (1989).

57. *Id.* at 232-33.

58. *Id.* at 234-37.

59. *Id.* at 251.

60. *Id.*

61. *See id.* ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually

“gender” are not synonymous. “Sex” refers to the anatomical distinction between men and women, whereas “gender” is the social meaning given to sex—in other words, what society understands as masculine and feminine.<sup>62</sup> *Price Waterhouse* thus blurred the line between sex and gender, at least as far as the law is concerned.<sup>63</sup> Lower courts have followed the Supreme Court’s guidance, concluding that it is unlawful under Title VII to harass individuals based on their failure to conform to stereotypical notions about how men and women should behave.<sup>64</sup>

Courts often uphold claims of sex discrimination against transgender individuals, invoking the sex stereotyping analysis from *Price Waterhouse*. Before *Price Waterhouse*, courts rejected Title VII claims brought by transgender individuals, reasoning that Congress did not intend the term “sex” to include transsexualism.<sup>65</sup> Following *Price Waterhouse*, however, courts increasingly treat transsexualism like any other instance of gender nonconformity.<sup>66</sup>

Despite its success in other areas, sex stereotyping has not provided an avenue of relief for harassment based on sexual orientation.<sup>67</sup> This creates an odd juxtaposition in the law because an individual’s status as a homosexual would seem to constitute quintessential gender nonconforming behavior under *Price*

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relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part.”).

62. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 20-23 (1995); see also RICHARD A. POSNER, SEX AND REASON 24-25 (1992) (describing “gender” as a term “borrowed from grammar to designate the sexes as viewed as social rather than biological classes”).

63. See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (reasoning that the Court in *Price Waterhouse* interpreted “sex” under Title VII to encompass not only sex in the biological sense, but also gender in the societal sense).

64. See *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) (“A man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of his sex.’”); see also, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (2d Cir. 2001) (stating that harassment may constitute sex discrimination where the “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”).

65. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (rejecting the plaintiff’s claim because she “was not discriminated against as a female” and because “Title VII is not so expansive in scope as to prohibit discrimination against transsexuals”); *Sommers v. Budgets Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (same); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (same).

66. E.g., *Schwenk*, 204 F.3d at 1201-02; *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). But see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (concluding that “discrimination against a transsexual because she is a transsexual is not ‘discrimination because of sex’”).

67. See Valdes, *supra* note 62, at 22-23 (defining sexual orientation as the sexual and emotional attraction to the opposite sex, the same sex, or both sexes).

*Waterhouse*. In this way, maintaining the line between sex discrimination and sexual orientation discrimination has become less sustainable. As a practical matter, the concepts of sex, sexual orientation, and gender are intertwined, with one concept often informing the others.

For example, as Sylvia Law has argued, heterosexism preserves traditional notions of masculinity and femininity, thereby informing the social meaning of gender.<sup>68</sup> By protecting heterosexuality and censuring homosexuality, the law preserves gender role expectations.<sup>69</sup> Sylvia Law explains the societal message as follows: “Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction.”<sup>70</sup> This is sex stereotyping at its core.

Nonetheless, no court has recognized a claim of sexual orientation harassment under Title VII. Regrettably, given the statutory text, such reluctance is understandable. It is difficult to dispute the difference between sex and sexual orientation or that Congress viewed the concepts as distinct. The statute unambiguously prohibits discrimination only based on certain subjects. Whether the statute’s limitation is consistent with the First Amendment, however, is a separate matter.

### III. FREE SPEECH IMPLICATIONS FOR REGULATING WORKPLACE HARASSMENT

Under the First Amendment, “Congress shall make no law . . . abridging the freedom of speech.”<sup>71</sup> Courts have never interpreted this language in a pure textual sense. Rather, speech is not limited to the spoken or written word,<sup>72</sup> and the government may abridge the freedom of speech in certain circumstances.<sup>73</sup> This Part addresses whether workplace harassment constitutes “speech” under the First Amendment and, if so, whether the government can constitutionally regulate it.

#### A. Does Workplace Harassment Constitute “Speech”?

The strictures of the First Amendment apply only to the government’s regulation of speech. Many courts and scholars take the position that Title VII’s hostile environment theory regulates conduct, a position that would end the First Amendment argument presented in this Article before it begins,<sup>74</sup> but such a

68. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196, 218-21(1988).

69. *Id.* at 196.

70. *Id.*

71. U.S. CONST. amend I.

72. *Spence v. Washington*, 418 U.S. 405, 409 (1974). For example, the First Amendment applies to flag desecration, *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989), and the wearing of black armbands in protest of war, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969).

73. *Elrod v. Burns*, 427 U.S. 347, 360 (1976) (“[T]he prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons.”).

74. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (opining that “pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment”); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 862 (E.D. Mich. 1989) (characterizing workplace harassment creating a hostile environment as mere conduct that does not raise First Amendment concerns); Keith R. Fentonmiller, *Verbal Sexual Harassment as Equality-Depriving Conduct*, 27 U. MICH. J.L. REFORM 565, 599-604 (1994); MACKINNON, *supra* note 40, at 87.

position is unsustainable for several reasons.

First, workplace harassment law presents a clear case in which the government seeks to restrict speech because of the message it conveys and the effect of that message on the listener.<sup>75</sup> This is evident from the central inquiry in any hostile environment claim: whether the harassment is severe or pervasive enough to alter the conditions of the victim's employment and create a hostile or abusive environment. Simply, the question cannot be answered without considering the expressive content of the harassment and its emotive impact on the victim.

The major opponent to the conclusion that workplace harassment law regulates speech is Catharine MacKinnon, who characterizes harassment and other expression that is harmful to women as conduct.<sup>76</sup> MacKinnon and Andrea Dworkin worked to establish a law that made pornography a civil rights violation, but the United States Court of Appeals for the Seventh Circuit struck down the Indianapolis version of their law in *American Booksellers Ass'n v. Hudnut*.<sup>77</sup> MacKinnon takes exception to the ruling, claiming that a law against pornography is not content-based.<sup>78</sup> She instead characterizes the law as harm-based, a legal scheme aimed at an act or practice that subordinates women,<sup>79</sup> and asserts that a law banning pornography "comes nowhere near anybody's speech rights."<sup>80</sup>

In a thought-provoking opinion, Judge Frank Easterbrook considered the position advanced in favor of a law banning pornography:

[P]ornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.<sup>81</sup>

He willingly accepted the truth to this argument, that by perpetuating the subordination of women, pornography harms women in their pursuit of equality and other rights.<sup>82</sup> Yet, according to Judge Easterbrook, this no more changes the communicative quality of pornography than does the invidiousness of racial bigotry and anti-Semitism and the harm those communications cause.<sup>83</sup> Rather, "this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech."<sup>84</sup>

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75. See Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CALIF. L. REV. 637, 668 (1995) (explaining that "hostile environment harassment can be carried out entirely through expression, and it is the impact of the expression on the victim that is the target of the regulation").

76. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 210 (1987).

77. 771 F.2d 323, 331-32 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

78. MACKINNON, *supra* note 76, at 212.

79. *Id.*

80. *Id.*

81. *Am. Booksellers*, 771 F.2d at 328 (footnote omitted).

82. *Id.* at 329.

83. *Id.* at 329-30.

84. *Id.* at 329.

Judge Easterbrook properly analyzed the First Amendment issue. The point missed by MacKinnon and others who view workplace harassment law as harm-based is that all regulations of speech are harm-based in some sense. What would prompt lawmakers to restrict speech not perceived as at least minimally harmful? Laws prohibiting obscenity, fighting words, and defamation do so precisely to protect against the deleterious effects associated with those communications. Yet their status as speech has never been challenged, and courts have never so much as considered labeling these categories of speech as conduct. To borrow Judge Easterbrook's words, if workplace harassment is what it does, then so is other speech such as fighting words and hate speech, which also advance aspects of dominance and hinder equality. With regard to pornography in particular, one scholar points out the perhaps regrettable truth that "if there is anything that prompts a reflexive reaction that the First Amendment is involved, it is *Playboy*."<sup>85</sup> Pornography and other vehicles of harassment should be taken at face value for what they are, however disagreeable.

In addition, there is a tendency when seeking to justify restricting certain kinds of speech to label the speech as conduct to avoid engaging in a serious free speech analysis that might, inconveniently, raise constitutional concern.<sup>86</sup> For example, in *Robinson v. Jacksonville Shipyards, Inc.*,<sup>87</sup> a case in which the plaintiff alleged that the defendant unlawfully maintained a sexually hostile work environment,<sup>88</sup> the defendant argued that the First Amendment prevented the court from ordering injunctive relief.<sup>89</sup> The court rejected the defendant's argument because "pictures and verbal harassment . . . act as discriminatory conduct in the form of a hostile work environment."<sup>90</sup> Although the court correctly noted that the government may regulate "expressive activities that produce special harms distinct from their communicative impact,"<sup>91</sup> the court failed to identify a harm apart from harassment's communicative impact on victims with which hostile environment theory is concerned. It also failed to otherwise support the characterization of harassing speech as conduct. This dangerous tendency should be resisted.<sup>92</sup> A law that restricts speech because of the message it conveys and the effect of that message upon the listener is a speech restriction.<sup>93</sup> Speech restrictions must satisfy the First Amendment and may not be summarily dismissed by mere labels.<sup>94</sup>

Finally, the fact that workplace harassment occurs in the workplace does not change its character as speech. It does not follow that the taunts, jokes, ridicule, and displays of pornography that are undeniably speech outside the workplace somehow change in form when expressed in the workplace and used to support a

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85. Schauer, *supra* note 5, at 354.

86. See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1347 (2005).

87. 760 F. Supp. 1486 (M.D. Fla. 1991).

88. *Id.* at 1490.

89. *Id.* at 1534.

90. *Id.* at 1535.

91. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).

92. See Volokh, *supra* note 86, at 1347.

93. See *id.*

94. See *id.*

hostile environment claim. As explained below, the setting in which speech takes place may offer a greater justification for governmental regulation, but the character of speech as such remains the same.<sup>95</sup>

### *B. Can the Government Regulate Workplace Harassment?*

Having concluded that workplace harassment is properly characterized as expression under the First Amendment, the next question is whether the government may constitutionally regulate it. Central to courts' approach to the First Amendment is the distinction between content-based regulations—those in which the government restricts expression based on its agreement or disagreement with the ideas or views conveyed—and content-neutral regulations—those in which the government restricts expression without regard to the ideas or views conveyed.<sup>96</sup> Title VII's hostile environment theory is a content-based regulation of speech because whether expression in the workplace constitutes actionable harassment depends on its communicative content—whether the expression is sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile or abusive environment. Content-based regulations are “presumptively invalid”<sup>97</sup> and subject to “the most exacting scrutiny.”<sup>98</sup> Nevertheless, there are certain circumstances under which courts have held that the government can regulate speech based on its content. This subpart discusses three such circumstances.

#### *1. Captive Audiences and the Confines of the Employment Relationship*

Under the captive audience doctrine, the government has the power to protect listeners from unwelcomed speech, even based on content, where their privacy is being invaded in an intolerable way.<sup>99</sup> That is, if an individual is being unfairly coerced into listening to speech and cannot reasonably avoid the speech, then the government can intervene to prevent the speech. The doctrine has typically applied to protect the privacy of the home and has rarely been extended to other contexts. For instance, the Court used the doctrine to uphold a statute giving homeowners the right to restrict the delivery of offensive mail<sup>100</sup> and an ordinance prohibiting residential picketing of individual homes.<sup>101</sup> But the Court refused to extend the

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95. See Balkin, *supra* note 33, at 2307 (explaining that “[o]ften speech that would be protected in the public square becomes unprotected when it occurs in special social situations involving special social roles”).

96. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994). Compare *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (ordinance prohibiting the display of signs near a foreign embassy if the signs tend to bring that foreign government into public disrepute was content-based), with *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (ordinance prohibiting the posting of signs on public property was content-neutral because it restricted speech without regard to subject matter or viewpoint).

97. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

98. *Turner Broad. Sys.*, 512 U.S. at 642.

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

100. *Rowan v. Post Office Dep't*, 397 U.S. 728, 736-38 (1970).

101. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

doctrine to a courtroom in *Cohen v. California*<sup>102</sup> or to the memorial service of a soldier killed in the line of duty in *Snyder v. Phelps*.<sup>103</sup>

The one instance in which the Court has extended the doctrine outside the home was to uphold a ban of political advertising on public buses in *Lehman v. City of Shaker Heights*.<sup>104</sup> The Court stated that “the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question.”<sup>105</sup> The Court reasoned that the city had an interest in making reasonable choices regarding acceptable advertising on its buses “to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.”<sup>106</sup> This suggests that the Court might not view the captive audience doctrine so narrowly as to foreclose its extension to forums other than the home, where interests other than privacy are in play.

Justice Douglas made an even more forceful argument regarding captivity in his concurrence:

While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.<sup>107</sup>

Justice Douglas also noted that public transportation is “a practical necessity for millions in our urban centers.”<sup>108</sup>

Justice Douglas’s interpretation of the captive audience doctrine is persuasive. For many, use of public transportation is no more a choice than is the decision to eat, sleep, and earn a living. Thus, although one has a greater claim to privacy in the home than when riding a public bus, other more urgent and fundamental interests are greater when on a bus than when in the home. These interests, too, are worthy of consideration in determining whether individuals should be deemed captives to offensive speech. In this way, *Lehman* offers a starting point in favor of extending the captive audience doctrine to contexts in which interests other than privacy are implicated.<sup>109</sup> In fact, at least one federal district court has applied the doctrine to uphold the regulation of workplace harassment. In *Robinson v. Jacksonville Shipyards, Inc.*, the U.S. District Court for the Middle District of Florida held that employees unwillingly subjected to racist and sexist speech creating a hostile environment were captives to the speech because of the coercion inherent in the employment relationship.<sup>110</sup>

J.M. Balkin argues persuasively that the captive audience doctrine justifies

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102. *Cohen*, 403 U.S. at 21-22.

103. 131 S. Ct. 1207, 1220 (2011).

104. 418 U.S. 298, 301-04 (1974).

105. *Id.* at 302-03.

106. *Id.* at 304.

107. *Id.* at 307 (Douglas, J., concurring).

108. *Id.*

109. See Karner, *supra* note 34, at 670.

110. 760 F. Supp. 1486, 1535-36 (M.D. Fla. 1991).

regulating workplace harassment because victims must endure the unwelcomed speech to preserve their livelihood and social status; victims of workplace harassment are captives in every real sense of the word.<sup>111</sup> While acknowledging that the doctrine typically applies to the home, Balkin finds the doctrine better suited for the workplace.<sup>112</sup> According to Balkin, the same speech protected outside the workplace becomes unprotected within the workplace because of the economic and social dependence of employees on continued employment.<sup>113</sup> Because of our economic and social dependence on work, the consequences of avoiding unwanted speech in the workplace are for most people far greater than the consequences of avoiding unwanted speech in the home.

Opposing Balkin, Eugene Volokh argues that extending the captive audience doctrine to the workplace would require the absurd conclusion that individuals are somehow more captive to offensive speech at work than when in a courthouse, as in *Cohen*, or at a school board meeting, as in *Rosenfeld v. New Jersey*.<sup>114</sup> But such a conclusion is not absurd. What Volokh overlooks is that the workplace is different from the courtroom or school board meeting because of the economic and social dependence inherent in the employment relationship. Continued presence is more of a choice in a courthouse or school board meeting than in the workplace because one's livelihood and social status depend on maintaining gainful employment.

Volokh also finds it implausible that the Court would have reached different outcomes had it been employees, as opposed to mere attendees, who were at the courtroom and school board meeting and unable to avoid the offensive speech because their jobs required them to remain.<sup>115</sup> Yet the right of *employees* to be free from offensive speech was not at issue in *Cohen* or *Rosenfeld*,<sup>116</sup> and the Court has never confronted the question whether the captive audience doctrine might apply with greater force in the employment context than in public places. Furthermore, the speech at issue in *Cohen* and *Rosenfeld* (a few offensive epithets) would in all likelihood not have established a hostile environment under Title VII. Title VII does not prevent all commentary with the effect to offend.<sup>117</sup>

Although the Court's articulation of the captive audience doctrine has been more concerned with privacy interests than with actual captivity,<sup>118</sup> perhaps this is the wrong focus. If we are truly concerned with captivity, as the doctrine would suggest, then the doctrine should extend to the workplace because of employees' social and economic dependence on work.

Further, the Court has already recognized the confines of the employment relationship as a justification for restricting workplace speech. In *NLRB v. Gissel*

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111. Balkin, *supra* note 33, at 2310.

112. *Id.* at 2312.

113. *Id.* at 2307. See also Karner, *supra* note 34, at 683 ("The costs and uncertainties associated with leaving are high enough to create a degree of captivity that distinguishes the workplace from all other places in society . . . . In fact, there is arguably a lesser degree of 'captivity' in the home, where there is no penalty for leaving . . . .").

114. Volokh, *supra* note 5, at 1838.

115. *Id.*

116. Order Vacating and Remanding on Appeal, *Rosenfeld v. New Jersey*, 408 U.S. 901, 904 (1972).

117. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

118. See Karner, *supra* note 34, at 670.



*Packing Co.*, the Court considered the speech rights of a private employer in the context of labor relations.<sup>119</sup> The Court explained that the speech rights of employers must account for the economic dependence of employees on continued employment.<sup>120</sup> Because of this dependency, employees' ability to listen objectively and act independently in a union election is far more constrained than citizens' ability to vote freely in a government election or on the enactment of legislation.<sup>121</sup> In other words, the employment relationship compromises employee free choice. Therefore, the Court held that an employer's right to speak is limited—an employer cannot make “threat[s] of reprisal . . . or promise[s] of benefit” in connection with a union election.<sup>122</sup>

How does this affect workplace harassment? *Gissel* is relevant because hostile environments are employer-maintained. The ability of employees to act independently in response to workplace harassment and challenge its continuation is compromised because employees depend on their employer, who has maintained the hostile environment, for continued employment. Without the free choice to challenge the hostile environment, a victim of workplace harassment faces a similar predicament as an employee whose employer has made threats or promises in connection with a union election. Thus, while acknowledging the narrow circumstances under which *Gissel* was decided (speech rights of a private employer in the context of a union election), the decision nonetheless lends support to the government's ability to regulate workplace harassment.

## 2. Existing Limitations on Employee Speech

The Court has also decided cases regarding the speech rights of public employees. Public employees were once thought to surrender their constitutional rights by reason of government employment.<sup>123</sup> That position has since been rejected.<sup>124</sup> In *Pickering v. Board of Education*, the Court held that a school district could not fire a teacher for sending a letter to a local newspaper critical of the school board's funding policies.<sup>125</sup> “The problem in any case is to arrive at a balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>126</sup> According to the Court, sending the letter did not interfere with the teacher's daily work and, therefore, did not negatively affect efficiency in the education of students.<sup>127</sup> Because questions on school funding present matters of public concern for which teachers are likely to have informed opinions, allowing teachers to contribute to public debate without fear of retaliatory dismissal furthers

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119. 395 U.S. 575 (1969).

120. *Id.* at 617.

121. *Id.* at 617-18.

122. *Id.* at 618.

123. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

124. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967).

125. *Pickering*, 391 U.S. at 564, 574.

126. *Id.* at 568.

127. *Id.* at 569-70.

informed decision-making by the electorate.<sup>128</sup>

The Court revisited the issue of public employee speech in *Connick v. Myers*.<sup>129</sup> There, the Court held that the First Amendment did not prevent the dismissal of an assistant district attorney who prepared and distributed a questionnaire soliciting views of her coworkers about various office matters.<sup>130</sup> Because the “questionnaire touched upon matters of public concern” only minimally and primarily reflected an employee’s displeasure with internal office policy, the Court upheld the dismissal.<sup>131</sup>

The *Pickering-Connick* balancing test continues to govern the speech rights of public employees. Only speech on matters of public concern that does not unduly interfere with business efficiency receives First Amendment protection.<sup>132</sup> With regard to workplace harassment, although some harassing speech creating a hostile environment could be said to touch on matters of public concern,<sup>133</sup> harassers are often motivated by purely personal interests unrelated to any political, social, or other communal concern. Moreover, harassing speech creating a hostile environment, by definition, interferes with business efficiency. To be actionable, the harassment must be so severe or pervasive that the employee literally cannot tolerate working in the environment.<sup>134</sup> Because very little workplace harassment touches on matters of public concern and all harassment creating a hostile environment disrupts business efficiency, a workplace harassment statute could be upheld under the *Pickering-Connick* balancing test or some variation thereof.

One concern with relying on the *Pickering-Connick* balancing test is that it developed in the context of public employment, and Title VII applies to both the public and private sectors. Nonetheless, this should not preclude the use of the test to assess the constitutionality of a workplace harassment statute because public employees have more speech rights than private employees. If speech creating a hostile environment in the public sector can be infringed under the *Pickering-Connick* balancing test, then there would seem no question that speech creating a hostile environment in the private sector can be infringed.

A second concern stems from the fact that the *Pickering-Connick* balancing test was formulated to address the government’s ability *as an employer* to restrict expression, whereas the constitutionality of Title VII’s hostile environment theory concerns the government’s ability *as a regulator* to restrict expression. Admittedly, the government’s interest as an employer in restricting employee speech is greater than its interest as a regulator in restricting the speech of citizens in general.<sup>135</sup> But this is not to say that the government’s interest as a regulator is

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128. *Id.* at 571-72.

129. 461 U.S. 138 (1983).

130. *Id.* at 140, 154.

131. *Id.* at 154.

132. *Id.*

133. Wayne Lindsey Robbins, Jr., *When Two Liberal Views Collide in an Era of “Political Correctness”*: *First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 794 (1995) (“There can be little doubt that the role of women in the workplace, and more generally the relationship between the sexes, are issues of extreme political importance in our society.”).

134. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

135. *Connick*, 461 U.S. at 140.

never great enough to justify a restriction on workplace speech. The government, even as a regulator, has a strong interest in ensuring employees a workplace free from hostility and abuse. Thus, the *Pickering-Connick* balancing test may provide a viable means to uphold a workplace harassment statute.

### 3. *Categorical Exceptions*

Our society permits content-based regulations of certain categories of speech deemed as having such slight social value that society's interest in order and morality outweigh any benefit that may be derived from the speech.<sup>136</sup> Existing categories of proscribable speech that may be relevant to workplace harassment law include fighting words, obscenity, and defamation.<sup>137</sup> In addition, the government has some latitude to regulate speech that is sexually explicit though not obscene if the regulation restricts only the time, place, and manner of the speech and is concerned, not with the message conveyed by the speech, but with the secondary effects associated with the speech.<sup>138</sup> As this subpart explains, workplace harassment law cannot be justified under any existing categorical exception. Nonetheless, an examination of the Court's methodology for announcing new classes of proscribable speech could support creating a categorical exception for workplace harassment.

#### *a. Existing Categories of Proscribable Speech Do Not Justify Regulating Workplace Harassment*

The Supreme Court announced the "fighting words" doctrine in *Chaplinsky v. New Hampshire*, holding that the government may proscribe words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>139</sup> The Court later refined the test, limiting fighting words to those utterances directed at an individual and likely to provoke a violent reaction.<sup>140</sup> Thus, the doctrine does not permit the government to suppress utterances that are not directed at a particular individual or that merely cause offense or discomfort among unwilling listeners.<sup>141</sup>

Hostile environment theory is too broad to be justified under the fighting words doctrine. First, harassment need not be directed at an individual to be actionable and the plaintiff does not need to prove that the harasser intended to discriminate.<sup>142</sup> The question is whether the harassment altered the conditions of

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136. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

137. *See Karner, supra* note 34, at 659-65.

138. *See id.* at 665-67.

139. 315 U.S. 568, 571-72 (1942).

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

141. *Id.* at 20-21 ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult," nor was there any "showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result."). *See also Texas v. Johnson*, 491 U.S. 397, 409 (1989) ("No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.").

142. *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 336 (6th Cir. 2008) (holding that relevant evidence of a hostile environment included the harassment of other black employees at the company);

the plaintiff's employment, the focus being the working environment from the plaintiff's perspective.<sup>143</sup> Accordingly, undirected negative sentiments regarding women's presence in the workplace<sup>144</sup> and pornographic pictures displayed in community areas for all to view<sup>145</sup> can support a hostile environment claim, even where the harasser had no intent to discriminate against a particular victim. Second, harassment need not be likely to provoke a violent reaction to be actionable.<sup>146</sup> Sexual propositions, pornographic material, and disparaging comments toward women, while offensive (even intolerably so), are not typically thought to provoke violence, though they might cause a victim to quit or file a complaint.

"Obscenity" is another category of speech deemed beyond the purview of the First Amendment.<sup>147</sup> To be considered obscene, material must appeal to the prurient interest in sex in a patently offensive manner and lack serious redeeming "literary, artistic, political, or scientific value."<sup>148</sup> Depictions of sexual acts and masturbation meet the patently offensive requirement, but mere nudity, without more, does not.<sup>149</sup> Workplace harassment law cannot be justified on the basis of obscenity alone because only the most graphic displays of pornography qualify as obscene. Not only does the vast majority of what courts deem sexually harassing speech fall outside this narrow category, but also, harassing speech supporting a hostile environment claim based on sex need not be sexual at all, so long as the speech can be said to discriminate based on sex. Many courts have recognized this principle,<sup>150</sup> and courts that continue to require harassment based on sex to be

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Huff v. Sheahan, 493 F.3d 893, 902-03 (7th Cir. 2007) (acknowledging that a Title VII plaintiff need not be an intended target of harassment if the plaintiff is within the protected class that the harassment targets more generally); Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997) (explaining that racially derogatory comments made outside a plaintiff's presence can be relevant in a hostile environment claim).

143. See *Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999); *King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 537-38 (7th Cir. 1990); *Bohen v. City of E. Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986).

144. See *Jackson*, 191 F.3d at 661 ("[I]n the sexual harassment context, this Court has deemed probative remarks that demeaned women generally while not demeaning any one woman in particular."); *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 110 (3d Cir. 1999) ("[A] plaintiff may show that, while she was not personally subjected to harassing conduct, her working conditions were nevertheless altered as a result of witnessing a defendant's hostility towards other women at the workplace.>").

145. See *Hoyle v. Freightliner, L.L.C.*, 650 F.3d 321, 331-32 (4th Cir. 2011) ("A juror could reasonably find that sexualizing the work environment by placing photos of nude women or women in sexually provocative dress and poses in common areas is detrimental to female employees and satisfies the 'because of sex' requirement."); *Harley v. McCoach*, 928 F. Supp. 533, 539 (E.D. Pa. 1996) ("An objectively hostile work environment can arise from . . . the pervasive display of pornography in common areas in the workplace.>").

146. See *Karner*, *supra* note 34, at 664.

147. *Roth v. United States*, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press.>").

148. *Miller v. California*, 413 U.S. 15, 24 (1973).

149. *Id.* at 25-26.

150. *E.g.*, *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

sexual in nature are misguided.<sup>151</sup> Finally, only perhaps in a very unusual case could obscene material support a hostile environment based on race, religion, or national origin. Accordingly, hostile environment theory is overbroad as a regulation of obscenity.

The government may also constitutionally proscribe defamation.<sup>152</sup> Although the Court once upheld a group libel statute in *Beauharnais v. Illinois*,<sup>153</sup> such a statute would probably not pass constitutional muster today.<sup>154</sup> This is because modern defamation law requires a showing that a reasonable person would perceive the alleged defamatory statements to be directed at or referring to the plaintiff.<sup>155</sup> Further, statements of opinion are not actionable unless the opinion could be reasonably interpreted as a statement of fact.<sup>156</sup> This second limitation protects inherently unverifiable assertions from regulation.<sup>157</sup>

Defamation law cannot save workplace harassment law. As explained above, there is no requirement under Title VII that a harasser have directed his or her speech at a particular plaintiff. Furthermore, loose generalizations (e.g., “women make poor police officers”) are commonplace in harassment claims, and only some harassing statements could be viewed as assertions of fact. For example, although the assertion that Suzie employee has slept with several men in the office could, under the proper circumstances, be reasonably interpreted as a statement of fact, the assertion that Suzie employee sleeps with every man she meets could not. In short, defamation law justifies only a fraction of the speech that constitutes actionable workplace harassment.

Finally, the Court has long held that the First Amendment allows “time, place, and manner” regulations of speech. To qualify as a “time, place, and manner” regulation, the regulation “must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave

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151. See Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 365, 369 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (“[H]ostility directed toward women workers need not be sexual in nature to constitute discrimination.”).

152. See *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (“Libelous utterances [are] not . . . within the area of constitutionally protected speech.”).

153. *Id.* at 258 (“[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group . . .”).

154. See Karner, *supra* note 34, at 662 (opining that the group libel doctrine is no longer viable); Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 HARV. BLACKLETTER L.J. 1, 34 (1995) (noting the general understanding that *Beauharnais* is no longer good law).

155. See RESTATEMENT (SECOND) OF TORTS § 564A (1977); see also, e.g., *Diaz v. NBC Universal, Inc.*, 337 F. App’x 94, 96 (2d Cir. 2009) (“[A] plaintiff’s claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group, unless the plaintiff can show that the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the plaintiff.”); *Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union of United States, Inc.*, 233 F.3d 24, 26 n.2 (1st Cir. 2000) (noting that an actionable defamatory statement must normally refer to the plaintiff and that “absent special circumstances, a general condemnation of a large group or class would not normally be taken to refer to an individual within the class.”); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) (“[N]o claim arises from a defamatory remark directed toward a group whose membership is so numerous that no individual member can reasonably be deemed its intended object.”).

156. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990).

157. *Id.* at 20-22.

open ample alternatives for communication.”<sup>158</sup> The main reason that workplace harassment law cannot be justified as a “time, place, and manner” regulation is because it is not content-neutral.<sup>159</sup> Whether harassment is severe or pervasive enough to alter the conditions of the victim’s employment and create a hostile environment turns entirely upon its content; simply, one cannot determine whether harassment amounts to a hostile environment without considering its communicative content.<sup>160</sup>

Nevertheless, courts have provided the government some latitude in regulating the location of sexually explicit speech. Although not obscene, and thus protected by the First Amendment, sexually explicit speech is deemed low value, falling only “within the outer perimeters of the First Amendment.”<sup>161</sup> To uphold restrictions on sexually explicit speech, the Court has relied on the “time, place, and manner” doctrine in conjunction with the “secondary effects” doctrine. For instance, in *Young v. American Mini Theatres*, the Court considered whether a zoning ordinance differentiating between motion picture theaters that exhibited sexually explicit films from those that did not constituted an impermissible content-based restriction of speech.<sup>162</sup> Whether a film was “adult” was determined based on its content; however, because the ordinance merely limited the place in which adult films could be exhibited, the Court held that the interest in preserving neighborhood character justified the classification.<sup>163</sup> The Court in *City of Renton v. Playtime Theatres, Inc.* engaged in a similar analysis to uphold a zoning ordinance preventing adult theaters from operating 1,000 feet from designated places such as churches, parks, or schools.<sup>164</sup> Like the ordinance in *Young*, the ordinance in *Renton* limited only the location of adult theaters.<sup>165</sup> The Court acknowledged that the ordinance did not fall neatly within the “time, place, and manner” doctrine because it treated theaters that exhibited adult films differently than those that did not.<sup>166</sup> Nonetheless, it upheld the ordinance because it was aimed at the secondary effects on the quality of urban life caused by adult theaters, rather than the suppression of expression.<sup>167</sup>

Workplace harassment law does not fall within this line of cases. Title VII is far more sweeping in application than the zoning ordinances in *Young* and *Renton*, extending to all employers other than the federal government having fifteen or more employees.<sup>168</sup> Title VII also targets far more than sexually explicit speech. Sexist speech need not be sexual in nature, and Title VII targets harassment based on race, religion, and national origin as well. Moreover, because hostile

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158. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

159. *See* Volokh, *supra* note 5, at 1826.

160. *But see* *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (“[T]he regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech.”).

161. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

162. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976).

163. *Id.* at 71-72.

164. 475 U.S. 41, 43 (1986).

165. *Id.* at 46.

166. *Id.* at 47.

167. *Id.* at 48-50.

168. *See* 42 U.S.C. § 2000e(b) (2006) (defining “employer”).

environment theory targets the primary effects of harassing speech, it cannot be justified under the secondary effects doctrine.<sup>169</sup> The government's interest in regulating harassment at work—providing employees a work environment free from hostility and abuse based on race, color, religion, sex, and national origin—although important, cannot be fairly characterized as aimed at secondary effects or unrelated to the suppression of expression because the law's application turns entirely upon the ideas conveyed and their primary effect upon the listener.<sup>170</sup>

Title VII's hostile environment theory reflects a desire to prevent psychological damage to victims of workplace harassment.<sup>171</sup> In *Boos v. Barry*, the Court explained:

Regulations that focus on the direct impact of speech on its audience present a different situation [than in *Renton*]. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.<sup>172</sup>

Employing this reasoning, a legal scheme targeting the psychological damage experienced by employees subjected to ridicule and insult amounting to a hostile work environment is one aimed at the primary effects of speech.

The evidence that courts consider in harassment cases illustrates the law's concern for primary effects. In *Robinson*, for example, the court noted that harassment causes side effects including distraction from tasks, dread of work, inability to work, anger, fear of physical safety, anxiety, depression, guilt, humiliation, and embarrassment.<sup>173</sup> The court stated that "[s]exual harassment has a cumulative, eroding effect on the victim's well-being."<sup>174</sup> It is no wonder that courts find these types of psychological damage relevant in hostile environment claims. Whether harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" depends in large part on the emotive impact of the harassment on the victim.<sup>175</sup> Yet psychological damage and other negative reactions of unwilling listeners are primary effects of speech.<sup>176</sup> It is for all of these reasons that workplace harassment law cannot be justified as a "time, place, and manner" regulation aimed at secondary effects.

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169. See Volokh, *supra* note 5, at 1826-27 (explaining that workplace harassment does not fit within even the expansive definition of content-neutrality in *Renton*).

170. *Texas v. Johnson*, 491 U.S. 397, 412 (1989) ("[T]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself.") (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

171. See Volokh, *supra* note 5, at 1826-27.

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

173. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1506-07 (M.D. Fla. 1991).

174. *Id.* at 1507.

175. *Id.* at 1523 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

176. See *Boos*, 485 U.S. at 321.

*b. Workplace Harassment as a New Categorical Exception*

Although workplace harassment law cannot be justified under any existing category of proscribable speech, perhaps the Court should declare a new categorical exception for workplace harassment. At the outset, it must be acknowledged that the Court is wary of announcing new categorical exceptions for fear of diluting the First Amendment,<sup>177</sup> and no court has embraced a categorical exception for workplace harassment.<sup>178</sup> Nonetheless, the Court's methodology could support creating a categorical exception for workplace harassment.

Two considerations have driven the Court's analysis in this area. The Court has first considered whether the speech at issue is so lacking in the values embodied by the First Amendment that the "Constitution affords no protection to that expression."<sup>179</sup> Second, the Court has considered the interests competing with any benefit that may be derived from the speech.<sup>180</sup> Using this methodology, the Court has delineated certain categories of speech that play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>181</sup>

The value of self-governance recognizes the importance in allowing citizens to contribute to public debate. Political speech ranks as perhaps the most valued speech protected under the First Amendment.<sup>182</sup> Although workplace speech can, in some instances, further self-governance, hostile environment theory suppresses little, if any, of the type of speech that furthers self-governance. As described above, the Court seems to have already taken its position on the role of self-governance in the workplace. Only speech on matters of public concern that does not unduly disrupt business operations receives First Amendment protection.<sup>183</sup> Because most harassment is personal in nature and not intended to contribute to public debate, prohibiting harassment at work does not unduly hinder the value of self-governance. Moreover, harassment that touches on matters of public concern is only prohibited under Title VII if it is sufficiently severe or pervasive to alter the victim's conditions of employment and create an abusive environment. It is in this circumstance, and only this circumstance, that Title VII places the interest in order and morality above any benefit that may be derived from the speech. Accordingly, the hindrance to self-governance caused by regulating workplace harassment is relatively small.

The second value, individual autonomy, recognizes that expression can be self-defining. Speech can be valuable for the simple reason that it allows speakers to

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177. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("[A] limited categorical approach has remained an important part of our First Amendment jurisprudence.").

178. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) ("[T]he courts have never embraced a categorical 'harassment exception' from First Amendment protection for speech that is within the ambit of federal anti-discrimination laws.").

179. *R.A.V.*, 505 U.S. at 399 (White, J., concurring).

180. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

181. *Id.* (footnote omitted).

182. See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 540 (1991).

183. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).



express themselves.<sup>184</sup> With regard to hostile environment theory, individuals remain free to engage in harassment outside the workplace. Also, practically speaking, there seem to exist far superior means with which to express one's self than to harass someone else. Therefore, the hindrance to individual autonomy caused by regulating workplace harassment would also seem relatively small.

The third value, to promote truth through the marketplace of ideas, reflects the understanding that the truth is most likely to emerge from the clash of ideas.<sup>185</sup> Although Title VII's hostile environment theory hinders the free flow of ideas, it does so only in the workplace. While people spend a great deal of their lives at work, and the workplace is part of the marketplace in which ideas flow, the workplace implicates competing interests absent in public discourse that should be balanced against the truth-promoting benefit that might be derived from harassment. Namely, hostile environment theory serves the important function of ensuring employees a workplace free from hostility and abuse.

The fourth value, tolerance, signifies a concern for helping shape the intellectual character of society.<sup>186</sup> There is a value in having all viewpoints expressed, however undesirable, because exposure to unpopular views promotes tolerance.<sup>187</sup> Although Title VII's hostile environment theory silences unpopular views, the same harassing speech that Title VII forbids in the workplace remains protected in public discourse. As far as tolerating unpopular views, Title VII strikes a reasonable balance. Unpopular views are silenced only at an absolute breaking point—when the harassment is so severe or pervasive that continued presence in the workplace is literally intolerable.

As this analysis suggests, perhaps workplace harassment is so lacking in the values underlying the First Amendment that the Constitution should afford no protection to that expression. It seems that little benefit is served by allowing harassing speech to flow freely in the workplace. Further, the competing interest to ensure employees an environment free from hostility and abuse is undoubtedly important, even compelling. Thus, although perhaps unlikely given the resistance to further dilute the First Amendment, the Court's methodology could support a new categorical exception for workplace harassment.

### *B. Can the Government Regulate Workplace Harassment Based on Subject Matter?*

Assuming that workplace harassment is proscribable under any one of the theories described above, still remaining is the effect, if any, of the rule against subject-matter underinclusion.<sup>188</sup> This Part discusses the key case regarding subject-matter underinclusion, *R.A.V. v. City of St. Paul*. It then argues that Title VII's hostile environment theory violates the rule against subject-matter

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184. See Karner, *supra* note 34, at 675.

185. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

186. See Browne, *supra* note 182, at 542 (“[E]xpressions of sexist and racist views may actually have a beneficial impact on social views, because hearing such statements in their baldest form may have the effect of demonstrating the poverty of the beliefs expressed.”).

187. See *id.*

188. *Id.* at 518 (stating that workplace harassment law's underinclusiveness “casts doubt on its entitlement to the captive-audience exception”).

underinclusion by regulating harassing speech at work based solely on the subjects the speech addresses. Hostile environment theory also fails to fit either exception to the rule against subject-matter underinclusion and likely fails strict scrutiny. Accordingly, this Part concludes that hostile environment theory is constitutionally invalid.

*I. R.A.V. v. City of St. Paul and the Rule Against Subject-Matter Underinclusion*

In *R.A.V. v. City of St. Paul*,<sup>189</sup> St. Paul charged the petitioner for setting fire to a cross on a black family's property in violation of the following city ordinance:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>190</sup>

The Supreme Court granted certiorari to consider whether, as petitioner argued, the claim should be dismissed on First Amendment grounds because the ordinance constituted an invalid content-based regulation.<sup>191</sup>

As the Court explained, the government generally may not proscribe speech or expressive conduct based on the ideas conveyed, but there are exceptions to the rule.<sup>192</sup> Although the Court acknowledged that it often speaks of certain categories of speech as beyond the purview of the First Amendment, it clarified that what it really means is that the government may, consistent with the First Amendment, proscribe these categories of speech.<sup>193</sup> But these categories of speech are not invisible to the First Amendment, and regulations of proscribable speech may not be made vehicles of further limitations on content or viewpoint.<sup>194</sup> For example, although "the government may proscribe libel [because of its scant social value, the government] may not make the further content [and viewpoint distinction] by proscribing *only* libel critical of the government."<sup>195</sup> To hold otherwise, the Court reasoned, would defy common sense and upset its commitment to the First Amendment.<sup>196</sup> Generally, the government may regulate within a category of proscribable speech only if the regulation survives strict scrutiny.<sup>197</sup>

Notwithstanding the general rule against subject-matter underinclusion, the Court indicated that the government may regulate within a category of proscribable speech in two circumstances. The first circumstance is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable"—in other words, the regulation targets a particularly

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189. 505 U.S. 377 (1992).

190. *Id.* at 379-80.

191. *Id.* at 380-81.

192. *Id.* at 382-83.

193. *Id.* at 383-85.

194. *Id.* at 383-84.

195. *Id.* at 384.

196. *Id.*

197. *Id.* at 382-83.

offensive mode of expression.<sup>198</sup> For example, the government “might choose to prohibit only that obscenity which is the most patently offensive in its prurience.”<sup>199</sup> The second circumstance is where the regulation is concerned with the secondary effects of a particular subclass of speech rather than its content.<sup>200</sup> For example, the government may choose to “permit all obscene live performances except those involving minors,”<sup>201</sup> the interest being to protect the well-being of minors, not to suppress ideas. Also under the secondary effects exception, a “subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”<sup>202</sup> According to the Court, these two circumstances “refute the proposition that the selectivity of the restriction is ‘even arguably conditioned upon the sovereign’s agreement with what a speaker may intend to say’”<sup>203</sup> and present “no realistic possibility that official suppression of ideas is afoot.”<sup>204</sup>

In addressing the fighting words ordinance at hand, the Court assumed without deciding that the ordinance regulated only fighting words as defined in *Chaplinsky*, eliminating the need to address the issue of overbreadth.<sup>205</sup> Nonetheless, the ordinance made unlawful only those fighting words based on “race, color, creed, religion, or gender.”<sup>206</sup> By not proscribing fighting words based on other topics, such as political affiliation, union membership, or sexual orientation, the ordinance discriminated within a proscribable category of speech based on content.<sup>207</sup> It also discriminated based on viewpoint, allowing the opponents of silenced speakers to express themselves freely.<sup>208</sup> Further, the ordinance did not fall within either exception to the rule against subject-matter underinclusion.<sup>209</sup> First, the ordinance could not be said to regulate only the most virulent fighting words:

[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression--it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.<sup>210</sup>

The Court also rejected the argument that St. Paul’s ordinance targeted

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198. *Id.* at 388.

199. *Id.* (emphasis omitted).

200. *Id.* at 389.

201. *Id.*

202. *Id.*

203. *Id.* at 390 (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 555 (1981)).

204. *Id.*

205. *Id.* at 381.

206. *Id.* at 391.

207. *Id.*

208. *Id.* at 391-92.

209. *Id.* at 393.

210. *Id.* at 393-94 (emphasis omitted).

secondary effects within the meaning of *Renton*.<sup>211</sup> Rather, the ordinance targeted listeners' reactions to words, or the emotive impact of those words on the audience, which is a primary effect of speech.<sup>212</sup> Finally, the ordinance failed to survive strict scrutiny.<sup>213</sup> Although the city had a compelling interest in protecting the basic human rights of historically discriminated groups, the ordinance was not reasonably necessary because a less selective ordinance would have provided a suitable means to this end.<sup>214</sup> Accordingly, the Court found the ordinance "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."<sup>215</sup>

Cases predating *R.A.V.* use the same line of reasoning in the context of labor picketing. In *Police Department of Chicago v. Mosley*,<sup>216</sup> the Court considered the constitutionality of a Chicago ordinance prohibiting picketing near a school except peaceful picketing concerning a labor dispute of which the targeted school was involved.<sup>217</sup> The ordinance was challenged by Earl Mosley, a federal postal employee who sought to peacefully picket a high school with signs charging the school with race discrimination.<sup>218</sup> The question posed was whether Chicago could, consistent with the First Amendment, selectively exclude labor picketing from a general ban on picketing near a school.<sup>219</sup> The Court struck down the ordinance as unconstitutional because it defined lawful picketing in terms of subject matter.<sup>220</sup> The ordinance permitted peaceful picketing concerning a school's labor dispute to the exclusion of peaceful picketing on all other subjects.<sup>221</sup> The First Amendment does not tolerate this type of selective underinclusion:

[The] government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.<sup>222</sup>

As the Court explained, selective regulation of expression such as picketing is constitutional only to the extent that the selectivity (i.e., the discrimination among types of picketing) is "tailored to serve a substantial governmental interest."<sup>223</sup> Although the Court recognized the substantial governmental interest in preventing

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211. *Id.* at 394.

212. *Id.*

213. *Id.* at 395-96.

214. *Id.*

215. *Id.* at 381.

216. 408 U.S. 92 (1972).

217. *Id.* at 92-93.

218. *Id.* at 93-94.

219. *Id.* at 94.

220. *Id.* at 95.

221. *Id.*

222. *Id.* at 96 (footnote omitted).

223. *Id.* at 99.

school disruption, the ordinance imposed a selective restriction on expressive conduct far greater than necessary to further that interest.<sup>224</sup>

The Court struck down a similar ordinance in *Carey v. Brown*,<sup>225</sup> also predating *R.A.V.* *Carey* involved members of a civil rights organization arrested for engaging in a peaceful demonstration on the sidewalk outside the home of the city mayor, “protesting his alleged failure to support the busing of school children to achieve racial integration.”<sup>226</sup> The protesters were convicted under a statute barring picketing except the peaceful picketing of a place of employment involved in a labor dispute.<sup>227</sup> Viewing the statute as indistinguishable from the ordinance in *Mosley*, the Court held that the statute’s selective exclusion of labor picketing from its general ban on picketing “accord[ed] preferential treatment to the expression of views on one particular subject.”<sup>228</sup> Although the Court recognized the state’s substantial interest in protecting the privacy of the home, the statute was not sufficiently tailored to advance that objective because it differentiated based on the subject matter of the picketing, when one’s privacy is invaded regardless of the message that picketers are conveying.<sup>229</sup> In other words, the captive audience doctrine is no defense to subject-matter underinclusion.<sup>230</sup>

After *R.A.V.*, the Court reaffirmed its framework for assessing statutes that regulate within a category of proscribable speech in *Virginia v. Black*.<sup>231</sup> There, the Court considered Virginia’s statute banning cross burning carried out with “an intent to intimidate a person or group of persons.”<sup>232</sup> As an initial matter, the Court clarified the communicative nature of cross burning: “when a cross burning is used to intimidate, few if any messages are more powerful.”<sup>233</sup> It also recognized “true threats” as a category of proscribable speech, defined as words that “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>234</sup> The parties did not dispute that cross burning is a form of true threat.<sup>235</sup> The question was whether banning only cross burning, and not all true threats, violated the holding in *R.A.V.*<sup>236</sup>

Although underinclusive, the Court upheld the statute under the first exception for underinclusive regulations that consist entirely of the very reason the entire

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224. *Id.* at 100-02.

225. 447 U.S. 455 (1980).

226. *Id.* at 457.

227. *Id.* at 457-58.

228. *Id.* at 460-61.

229. *Id.* at 471.

230. See Estlund, *supra* note 5, at 716 (acknowledging that “the captive-audience concern has not previously justified regulation based on the viewpoint expressed”).

231. 538 U.S. 343 (2003).

232. *Id.* at 347 (citing VA. CODE ANN. §18.2-423 (1996)). Nonetheless, the Court found part of the statute unconstitutional. “[T]he provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.” *Id.* at 347-48.

233. *Id.* at 357.

234. *Id.* at 359.

235. *Id.* at 360.

236. *Id.* at 361-63.

class of speech at issue is proscribable.<sup>237</sup> Unlike the fighting words ordinance in *R.A.V.*, Virginia's cross burning statute did not selectively regulate speech directed at certain disfavored topics: "It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.'"<sup>238</sup> Rather, Virginia merely chose to target "a particularly virulent" true threat:

Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.<sup>239</sup>

*Black* is an important case because it signifies the Court's position that the rule against underinclusion is not limited to fighting words ordinances, but extends to other underinclusive regulations of speech. Further, *Black* means that the rule against underinclusion applies with equal force to regulations of expressive conduct, since cross burning is a form of expressive conduct rather than pure speech. Finally, the fact that the Court suggested that Virginia could not target true threats limited to specified classifications such as race, sex, and religion carries serious implications for Title VII's hostile environment theory, which imposes just such limitation.

## 2. *Hostile Environment Theory Impermissibly Restricts Speech Based on the Subjects the Speech Addresses*

In my view, Title VII's hostile environment theory violates the rule against subject-matter underinclusion and cannot be saved under either exception articulated in *R.A.V.* Like the fighting words ordinance in *R.A.V.* and the picketing ordinances in *Mosley* and *Carey*, hostile environment theory selectively suppresses certain disfavored subjects of harassing speech. By limiting the reach of workplace harassment law, the government has accorded harsher treatment to the expression of views on the subjects of race, color, religion, sex, and national origin. The unmistakable message is that the government finds certain forms of harassing speech more offensive and disagreeable than others, violating a central tenet of First Amendment doctrine.<sup>240</sup>

### a. *Hostile Environment Theory Does Not Consist Entirely of the Reason Why Workplace Harassment as a Whole is Proscribable*

Under the first exception, content discrimination within a category of proscribable speech is justified "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is

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237. *Id.* at 363.

238. *Id.* at 362 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

239. *Id.* at 363.

240. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

proscribable”;<sup>241</sup> in other words, when the regulation targets the most virulent manner of expression within a category of proscribable speech.

Title VII’s hostile environment theory cannot be said to target only the most virulent harassment. As I have argued, the very reasons that the entire category of workplace harassment should be deemed proscribable are because (1) the confines of the employment relationship compromise what might otherwise be a free choice to avoid workplace harassment; (2) workplace harassment contributes little to public debate and disrupts business operations by making continued presence in the workplace intolerable; and (3) the government’s interest to ensure employees an environment free from hostility and abuse outweighs any benefit that might be derived from workplace harassment. The subject-matter limitation of hostile environment theory is not justified for these reasons.

To illustrate, consider the law’s protection against sexual harassment to the exclusion of sexual orientation harassment. First, a homosexual who is harassed for being homosexual is just as confined by the employment relationship and unable to avoid unwanted speech as a woman who is harassed for being female. Both employees face the same predicament—endure the harassment or forfeit their livelihood. Second, heterosexist speech cannot be said to contribute more to public debate than sexist speech, and both forms of harassment disrupt business efficiency to the same extent. Third, the government’s interest to have a workplace free from hostility and abuse is not furthered by censoring sexual harassment but not sexual orientation harassment—sexual harassment is not inherently more hostile and abusive than sexual orientation harassment. Thus, there is no indication that the government has targeted “particularly virulent” forms of workplace harassment.<sup>242</sup> Instead, it appears that it has proscribed workplace harassment “of whatever manner” that communicates messages of racial, gender, religious, or ethnic intolerance, which suggests nothing more than a desire to suppress the expression of certain, disfavored ideas.<sup>243</sup>

Further, to conclude that Title VII’s hostile environment theory targets only the most virulent workplace harassment would run counter to the Court’s decisions in *R.A.V.* and *Black*. According to the Court, the practically identical subject-matter limitation in *R.A.V.* did not target only the most virulent fighting words. And in *Black*, although the statute at issue did not contain a similar subject-matter limitation, if it had, the Court suggested that the statute would be unconstitutional. The subject-matter limitation in Title VII’s hostile environment is virtually indistinguishable from the subject-matter limitations in *R.A.V.* and the hypothetical in *Black*.

Finally, as a practical matter, it is difficult to think of a basis for the Court to declare sexist speech to be a more offensive mode of expression than heterosexist speech. Although equal protection analysis involves a hierarchical approach, placing certain classifications and rights ahead of others by declaring certain classifications “suspect” and certain rights “fundamental,” this hierarchical approach of subjects is patently out of place in a First Amendment analysis, where

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241. *R.A.V.*, 505 U.S. at 388.

242. *Virginia v. Black*, 538 U.S. 343 (2003).

243. *R.A.V.*, 505 U.S. at 393-94.

all subjects of speech, however disagreeable, contribute to the free market place of ideas.

*b. The Suppression of Expression Under Hostile Environment Theory is Not Incidental*

Under the second exception, regulating within a category of proscribable speech is justified where the limitation targets the secondary effects of a particular subclass of speech rather than its content.<sup>244</sup> The Court indicated that a “subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”<sup>245</sup> Of particular importance, the Court suggested that Title VII does not impinge on First Amendment freedoms: “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 . . . .”<sup>246</sup> In proving this example, the Court cited to the regulation pertaining to sexual harassment, which is defined to include the maintenance of a sexually hostile environment.<sup>247</sup> In the Court’s view, the suppression of select subclasses of proscribable speech under hostile environment theory is merely an incidental consequence of a statute directed at conduct.<sup>248</sup>

Apart from this suggestion being dicta, this statement by the Court is flawed in several respects. First, although part of a broader statute regulating conduct (discriminatory hiring and firing practices, as well as quid pro quo harassment), the suppression of speech under Title VII’s hostile environment theory is not incidental, but primarily the goal of the regulation.<sup>249</sup> Contrast this with the speech merely incidentally suppressed in a discriminatory firing claim. An employer who fires an employee because she is black may be sanctioned even though the employer accomplishes the discharge through words and even though certain statements made by the employer may ultimately prove the racial motivation behind the firing.<sup>250</sup> The suppression of speech is incidental because the firing is discriminatory, and therefore unlawful, regardless of the manner in which it is accomplished or the emotive impact of the speech on the victim. In a hostile environment claim, by contrast, an employer can be held liable only if the harassment is sufficiently hostile and only if the victim is subjected to an abusive work environment judged from the plaintiff’s perspective.<sup>251</sup>

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244. *Id.* at 389.

245. *Id.* (internal citations omitted).

246. *Id.*

247. EEOC Guidelines, *supra* note 25.

248. *R.A.V.*, 505 U.S. at 389.

249. *See* Estlund, *supra* note 5, at 705-06 (arguing that it is problematic to characterize a regulation targeting the effect of a message on listeners as incidentally suppressing expression).

250. *See* Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 885 (1993); *see also* Sunstein, *supra* note 32, at 837 (“The written or oral statement, ‘You’re fired,’ is an act, not merely speech, in the sense that the words are simply a way of committing an unlawful discharge.”) (footnote omitted).

251. *See* Jackson v. Quanex Corp., 191 F.3d 647, 658 (6th Cir. 1999); King v. Bd. of Regents of the Univ. of Wisc. Sys., 898 F.2d 533, 537-38 (7th Cir. 1990); *see also* Bohem v. City of East Chicago, 799 F.2d 1180, 1186-87 (7th Cir. 1986).



Concurring in *R.A.V.*, Justice White criticized the majority's suggestion that hostile environment theory has only an incidental effect on speech. According to Justice White, "application of this exception to a hostile work environment claim does not hold up under close examination."<sup>252</sup> As he explained:

First, the hostile work environment regulation is not keyed to the presence or absence of an economic *quid pro quo*, but to the impact of the speech on the victimized worker. Consequently, the regulation would no more fall within a secondary effects exception than does the St. Paul ordinance. Second, 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. If the relationship between the broader statute and specific regulation is sufficient to bring the Title VII regulation within *O'Brien*, then all St. Paul need do to bring its ordinance within this exception is to add some prefatory language concerning discrimination generally.<sup>253</sup>

Justice White makes two valid points. The hostile work environment regulation provides that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . [it] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."<sup>254</sup> The fact that the majority merely cited to the sexual harassment regulation but actually referred to Title VII's "general" prohibition against sexual discrimination in employment practices suggests that it might have "glossed over" Title VII's hostile environment theory and its more than incidental suppression of speech. Title VII's general prohibition against discriminatory acts does not make hostile environment theory's suppression of speech any less direct. To find otherwise would create a loophole through which governmental bodies could selectively suppress certain, disfavored topics so long as they incorporate their direct regulations of speech into civil rights statutes that primarily target discriminatory conduct. To characterize a speech restriction within a broad statute targeting conduct as "incidental" to the statute, and therefore free from First Amendment scrutiny, is both troublesome and lacking precedential support, as the Court has never exempted a generally applicable regulation from First Amendment scrutiny when it is clear that the regulation operates, at least in part, to restrict speech because of its content and emotive impact on the audience.<sup>255</sup>

At least one court has questioned the Court's dicta, opining that, at least in the case before it, Title VII regulates speech on the basis of its expressive content.<sup>256</sup> The Fifth Circuit stated that "Title VII steers into the territory of the First Amendment" and "when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-

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

253. *Id.*

254. EEOC Guidelines, *supra* note 25, § 1604.11(a).

255. Volokh, *supra* note 5, at 1830. See also Sunstein, *supra* note 32, at 822 (agreeing with Justice White's conclusion).

256. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 597 n.7 (5th Cir.1995).

based, viewpoint-discriminatory restrictions on speech.”<sup>257</sup>

*c. Hostile Environment Theory Likely Fails Strict Scrutiny*

Because neither exception to the rule against subject-matter underinclusion saves hostile environment theory, to be upheld, the law must survive strict scrutiny—the subject-matter limitation must be narrowly tailored to a compelling governmental interest.<sup>258</sup> There is little doubt that the interest in ensuring equal opportunity in employment is compelling. The Court in *R.A.V.* agreed with St. Paul that the interest protected by its ordinance was compelling because “the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish.”<sup>259</sup> Nonetheless, the ordinance was not narrowly tailored because a less restrictive ordinance would have served precisely the same benefit of ensuring basic human rights to historically disadvantaged groups but would have extended the benefit to all groups.<sup>260</sup> Although hostile environment theory aims to promote equal opportunity in employment to historically disadvantaged groups, this aim can be achieved through less restrictive means. The government could promote workplace equality without targeting only certain subjects of hostile expression. Accordingly, hostile environment theory could be held invalid under the First Amendment.

The protection against sexual harassment to the exclusion of sexual orientation harassment is particularly suggestive of the government’s desire to suppress offensive and disagreeable ideas. This is because the speech used to harass victims based on sexual orientation can be strikingly similar to the speech used to harass victims based on sex. Even having offered similar evidentiary support (e.g., degrading sexual commentary, pornographic materials, and sexual jokes), only plaintiffs alleging sexual harassment stand a chance at establishing a claim.<sup>261</sup> The message is that the government disapproves of sexist speech but is willing to tolerate—and impliedly approves of—heterosexist speech.

This narrow example is merely illustrative of the broader problem. Hostile environment theory creates a hierarchy of expression. It does this by shielding employees from racially, sexually, religiously, and ethnically harassing speech sufficiently severe or pervasive to create a hostile environment (disfavored topics and viewpoints), while allowing or tolerating all other types of harassing speech meeting the same criteria, despite that the First Amendment regards all expression in the marketplace of ideas as equally valuable.<sup>262</sup> In short, one cannot reasonably conclude that hostile environment theory presents “no realistic possibility that official suppression of ideas is afoot”<sup>263</sup> because whether a victim of harassment can state a claim is entirely conditioned upon the sovereign’s agreement or

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257. *Id.* at 596-97.

258. *R.A.V.*, 505 U.S. at 395.

259. *Id.*

260. *Id.* at 396.

261. Compare *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (sexual orientation harassment) with *Fairbrother v. Morrison*, 412 F.3d 39, 42-43 (2d Cir. 2005) (sexual harassment).

262. See Post, *supra* note 15, at 479.

263. *R.A.V.*, 505 U.S. at 390.

disagreement with the harasser's message.

#### IV. THE VIABILITY OF A STATUS-BLIND STATUTE

Having concluded that our current legal framework for regulating workplace harassment is unconstitutional, but recognizing the importance of preventing this type of verbal abuse, this Part proposes the enactment of a statute regulating "workplace bullying," the status-blind equivalent of workplace harassment. A status-blind statute would mark a significant departure in the law, but the idea has gained attention and popularity in the United States even apart from any First Amendment concerns. This Part discusses the workplace-bullying movement, both in the United States and abroad, and addresses anticipated criticisms to a proposal of this kind.

##### *A. The Workplace Bullying Movement*

Professor Yamada is at the forefront of the movement in favor of a status-blind statute. He drafted the Healthy Workplace Bill to address what he regards as "the most neglected form of serious worker mistreatment in American employment law."<sup>264</sup> The Healthy Workplace Bill would create a cause of action for victims of severe workplace bullying and provide incentives for employers to prevent and respond to such abuse.<sup>265</sup>

The bill would make it unlawful "to subject an employee to an abusive work environment," which "exists when the defendant, acting with malice, subjects an employee to abusive conduct so severe that it causes tangible harm to the employee."<sup>266</sup> The bill defines abusive conduct as that which "a reasonable person would find hostile, based on the severity, nature, and frequency of the defendant's conduct."<sup>267</sup> Actionable abuse includes "repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee's work performance; or attempts to exploit a[n] employee's known psychological or physical vulnerability."<sup>268</sup>

Several state legislatures have considered the bill or some variation thereof.<sup>269</sup> Although a legislature is yet to adopt it, the bill has received positive attention.<sup>270</sup> The bill has also generated a buzz in the social media, with articles devoted to

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264. David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 253 (2010); see also, e.g., Mass. Senate No. 699.

265. *Id.* at 259.

266. Mass. Senate No. 699, §§ 3(a), 2(a).

267. *Id.* § 2(a)(1).

268. *Id.*

269. The Healthy Workplace Bill's website reports that twenty-one state legislatures have considered the bill. The Healthy Workplace Campaign, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/> (last visited Oct. 4, 2012).

270. More than 300 legislators have supported the bill. The Healthy Workplace Campaign, *The Movement*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/> (last visited Oct. 4, 2012).

workplace bullying appearing in prominent magazines and news periodicals.<sup>271</sup> There are signs that the public's sentiments regarding the bill are transforming from skepticism to advocacy,<sup>272</sup> leading attorneys in the field to anticipate eventual enactment.<sup>273</sup>

As another indication of the trend, a small but increasing number of employment policies proscribe workplace bullying.<sup>274</sup> Professor Yamada attributes this development to the fact that courts and legislatures have started to take workplace bullying more seriously, which has led attorneys and human resources specialists to advise employers to provide status-blind protection against workplace bullying in their employee handbooks.<sup>275</sup> Nonetheless, providing the protection is strictly voluntary.

Another recent breakthrough came in the form of a provision in a collective bargaining agreement (CBA). In 2009, unions in Massachusetts affiliated with the Service Employees International Union and the National Association of Government Employees negotiated a three-year CBA that includes a provision protecting against workplace bullying.<sup>276</sup> An excerpt of the provision provides:

Behaviors that contribute to a hostile, humiliating or intimidating work environment, including abusive language or behavior, are unacceptable and will not be tolerated. Employees who believe they are subject to such behavior should raise their concerns with an appropriate manager or supervisor as soon as possible, but no later than ninety (90) days from the occurrence of the incident(s).<sup>277</sup>

This bargained-for provision, covering over 21,000 public employees,<sup>278</sup> is an indication that the problem of workplace bullying has caught the attention of labor and management. As Professor David Yamada explains, however, this particular CBA allows an employee only to *grieve* an allegation of workplace bullying.<sup>279</sup> Grievances may not proceed to arbitration, making the provision only minimally effective.<sup>280</sup> Further, not all unions will be as successful at negotiating. A statutory remedy remains necessary to provide employees with effective and reliable protection against workplace bullying.

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271. See, e.g., Janet Kinsian, *Workplace Bullying: Do We Need a Law?*, PARADE (July 18, 2010), <http://www.parade.com/news/intelligence-report/archive/100718-workplace-bullying-do-we-need-a-law.html>; Adam Cohen, *New Laws Target Workplace Bullying*, TIME (July 21, 2010), <http://www.time.com/time/nation/article/0,8599,2005358,00.html>; Tara Parker-Pope, *When the Bully Sits in the Next Cubicle*, N.Y. TIMES (Mar. 25, 2008), <http://www.nytimes.com/2008/03/25/health/25well.html>; Cari Tuna, *Lawyers and Employers Take the Fight to "Workplace Bullies,"* WALL ST. J. (Aug. 4, 2008), <http://online.wsj.com/article/SB121779280946008121.html>.

272. For example, in the poll conducted in the Parade piece, 93% of those who responded indicated their view that workplace bullying should be illegal. Kinsian, *supra* note 271.

273. Yamada, *supra* note 264, at 267-68.

274. *Id.* at 273.

275. *See id.*

276. *Id.* at 271.

277. *Id.* (quoting *First Anti-Bullying Provision in Major CBA in the U.S., March 2009*, WORKPLACE BULLYING FOR UNIONS (Mar. 2009), <http://www.workplacebullyingforunions.com/6a/>).

278. *Id.*

279. *Id.*

280. *Id.*

*B. Influences from Abroad*

Globally, the United States is behind in providing status-blind protection against workplace bullying.<sup>281</sup> Many European countries refer to the problem as “mobbing,” a term that originated in industrial psychology to describe the behavior of a group of animals collaborating against an unwelcomed newcomer.<sup>282</sup> Mobbing was then used by a Swedish child psychologist to describe the exclusionary tactics of a group of children against a particular child.<sup>283</sup> Heinz Leymann, a German psychologist living in Sweden, carried the term over into the adult workplace.<sup>284</sup> Leymann’s research is thought to be among the earliest works uncovering and conceptualizing the phenomenon of workplace mobbing in the 1980s.<sup>285</sup> French psychotherapist Marie-France Hirigoyen was also highly influential in bringing what she referred to as “moral harassment” into the legal lexicon in Europe and elsewhere.<sup>286</sup> According to Hirigoyen, sexual and other forms of discriminatory harassment—which are prohibited under Title VII—comprise merely one subset of moral harassment.<sup>287</sup>

Among the countries that have responded to the problem of workplace bullying with specific legislation are France, Belgium, Quebec, South Australia, and Sweden.<sup>288</sup> Although Germany lacks specific legislation, victims of workplace abuse have had the benefit of unique constitutional and labor law protections establishing a tradition of preserving individual dignity.<sup>289</sup> Germany’s Constitution provides that “[h]uman dignity shall be inviolable”<sup>290</sup> and “[e]veryone shall have the right to free development of his personality.”<sup>291</sup> In addition, German law imposes two duties on the employment relationship: employers owe a duty of care

281. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 263 (2003).

282. *Id.* 247-48.

283. *Id.*

284. Yamada, *supra* note 264, at 254 (citing Stale Einarsen et al., *The Concept of Bullying at Work: The European Tradition, in Bullying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice* 4 (Stale Einarsen et al. eds., 2003)).

285. *Id.*

286. Katherine Lippel, *The Law of Workplace Bullying: An International Overview*, 32 COMP. LAB. L. & POL’Y J. 1, 1-2 (2010) (citing Marie-France Hirigoyen, *Harcelement Moral: la Violence Perverse au Quotidien* (La Decouverte et Syros, ed. 1998); Marie-France Hirigoyen, *La Malaise dans le Travail, Harcelement Moral: Demeler le Vrai du Faux* (Syros, 2001)).

287. Friedman & Whitman, *supra* note 281, at 251.

288. Lippel, *supra* note 286, at 6 (citing law review articles documenting laws in the named countries).

289. See *Global Perspectives on Workplace Harassment Law: Proceedings of the 2004 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 8 EMP. RTS. & EMP. POL’Y J. 151, 157-59 (2004).

290. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], July 11, 2012, BGBl. I, art. 1, § 1 (Ger.), translated in *The Federal Republic of Germany: Constitution, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1, 2 (Rudiger Wolfrum & Rainer Grote eds., 2009).

291. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG], BGBl. I, art. 2, § 1 (Ger.), translated in *The Federal Republic of Germany: Constitution, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1, 2 (Rudiger Wolfrum & Rainer Grote eds., 2009).

to their employees,<sup>292</sup> and employees owe a corresponding duty of loyalty to their employers.<sup>293</sup> Employers also have the duty to protect the right of employees to develop their personalities.<sup>294</sup> German jurists were able to seize on these unique protections to make mobbing legally cognizable even without a statute or regulation prohibiting it by name.<sup>295</sup>

For several reasons, workplace harassment has had a very different history in the United States. Workplace harassment was first conceptualized, not by prominent psychologists studying the effects of workplace abuse, but by feminists and civil rights lawyers concerned with breaking down barriers impeding women and other minorities in their pursuit of equality.<sup>296</sup> Originating in a country with a dark history of slavery and inequality, it is not surprising that hostile environment theory emerged out of a concern for combating discrimination. America's highly mobile employment market and norm of at-will employment also explain the focus on discrimination.<sup>297</sup>

Although the focus on discrimination makes sense from a historical perspective, without specific legislation prohibiting workplace bullying, and without a national tradition of protecting individual dignity, many victims of workplace abuse may be left without legal recourse.<sup>298</sup> This unremedied problem is a real one, with 37% of adult Americans reporting that they have experienced it themselves.<sup>299</sup> The Healthy Workplace Bill or other status-blind legislation is necessary to address this troubling void in American employment law.

### C. Anticipated Concerns

With the problem of workplace bullying becoming clearer, and the advocacy for specific legislation growing stronger, several concerns have been raised about a status-blind statute. Would a status-blind statute cause a flooding of frivolous claims? Would a status-blind statute demand civility in the workplace? Is it possible to protect individual dignity without losing sight of equality? These concerns are addressed below.

First, although there would likely be an initial surge in litigation, the volume of frivolous claims would subside as claimants and their attorneys are reminded of the

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292. Bürgerliches Gesetzbuch [BGB] [Civil Code], Jan. 2, 2012, BUNDESGESETZBLATT [BGBl.] at 617-19 (Ger.).

293. The duty of care is explicit in the civil code, but the duty of loyalty "has been developed by scholarly writing and by the Courts' jurisdiction." Manfred Weiss, *Employee Loyalty in Germany*, 20 COMP. LAB. L. & POL'Y J. 237, 237 (1999).

294. Betriebsverfassungsgesetz [BetrVG] [Law on Representation of Workers and Works Councils], July 29, 2009, BUNDESGESETZBLATT [BGBl.] at 75 (Ger.).

295. Friedman & Whitman, *supra* note 281, at 254-57.

296. *Global Perspectives on Workplace Harassment Law*, *supra* note 289, at 151.

297. Friedman & Whitman, *supra* note 281, at 265-66.

298. Lippel, *supra* note 286, at 6. Some employees have sought relief in tort under the guise of intentional infliction of emotional distress (IIED), but such claims rarely succeed. *Global Perspectives on Workplace Harassment Law*, *supra* note 289, at 181 (stating that "typical workplace bullying seldom results in liability for IIED").

299. The Healthy Workplace Campaign, *The Problem: Why is it a Problem?*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/problem.php#problem> (last visited Oct. 4, 2012) (offering this and other statistics).

severity of abuse required to satisfy the legal standard.<sup>300</sup> As under hostile environment theory, actionable harassment under a status-blind statute would have to be truly extreme. A status-blind statute would not make it unlawful to engage in ordinary teasing, flirting, joking, or horseplay. Much like hostile environment theory, the Healthy Workplace Bill would proscribe harassment “that a reasonable person would find hostile, based on the severity, nature, and frequency of the defendant’s conduct.”<sup>301</sup> The reasonable person standard draws heavily from the Supreme Court’s decision in *Harris* concerning hostile environment theory.<sup>302</sup> The legal standard is not easily met. A status-blind statute such as the Healthy Workplace Bill would not require workers to be respectful, kind, or caring to one another. The concern that a status-blind statute would impose a workplace civility code reflects a misunderstanding about the difference between mere incivility and intolerable abuse.

The Healthy Workplace Bill also includes safeguards specifically designed to discourage frivolous claims and signify the bill’s concern for only the most severe forms of bullying.<sup>303</sup> First, the bill is made enforceable “solely by a private right of action.”<sup>304</sup> This feature of the bill would discourage the filing of frivolous claims because plaintiffs’ attorneys would be reluctant to take on weak cases.<sup>305</sup> Although limiting the bill’s enforcement mechanism to a private right of action would leave some victims of actionable workplace harassment without legal representation, it could go a long way in garnering legislative support. The bill also requires a showing that the harassment was undertaken with “[m]alice,” which means “the desire to cause pain, injury, or distress to another.”<sup>306</sup> Professor Yamada included this requirement, with some reluctance, to shield off marginal claims and to signify the bill’s concern for only serious workplace abuse.<sup>307</sup> The downside is that some victims of harmful bullying would have difficulty proving malice,<sup>308</sup> but the requirement does tend to make the bill more politically palatable.

The remaining concern is whether a status-blind statute would somehow trivialize the problem of discrimination.<sup>309</sup> American employment law is overwhelmingly concerned about women and minorities, not employees in general.<sup>310</sup> The primary concern is breaking down barriers facing historically disadvantaged groups, never mind that those same barriers stand in the way of

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300. Yamada, *supra* note 264, at 269 (predicting an initial surge in claims if a state enacts the Healthy Workplace Bill).

301. Mass. Senate No. 699, *supra* note 18, § 2(a)(1).

302. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

303. *See* Mass. Senate No. 699, *supra* note 18.

304. *Id.* at § 8(a).

305. *See* Yamada, *supra* note 264, at 266.

306. Mass. Senate No. 699, *supra* note 18, § 2(a)(2).

307. Yamada, *supra* note 264, at 262.

308. *Id.*

309. *See* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1224 (2011) (“If the focus of harassment law shifts from discrimination to dignity, we may lose sight of how harassment can be part of a project of maintaining the workplace as a site of male privilege.”); Friedman & Whitman, *supra* note 282, at 243 (expressing concern that “[w]e may not be able to pursue the goals of dignity without sacrificing some or all of the goals of anti-discrimination”).

310. Friedman & Whitman, *supra* note 282, at 265.

other employees.<sup>311</sup> Because protecting women and minorities matters most in American culture, abandoning the discrimination paradigm would likely be met with resistance.<sup>312</sup>

However, recognizing discriminatory harassment as but one subset of workplace abuse does not make the goal of combating discrimination less significant. Importantly, a status-blind statute would not foreclose status-based claims. The claimant would simply no longer have to *prove* a discriminatory motive. Defining the harm in terms of dignity is for a practical reason: all discrimination is harmful to individual dignity, but not all dignitary harms result from discrimination.<sup>313</sup> To make clear that lawmakers remain concerned about discriminatory harassment, a status-blind statute could define moral harassment as an offense against one's dignity that *includes* discrimination. The Healthy Workplace Bill as drafted does not explicitly mention discrimination, but discriminatory harassment could easily be added to the illustrations of actionable workplace abuse. Thus, perhaps it is possible to further dignity and equality simultaneously.

In fact, some scholars argue that focusing on discriminatory harassment may have consequences for equality. Rosa Ehrenreich, for example, has argued that focusing excessively on the discriminatory context in which workplace harassment occurs has fostered the distorted view of sexual harassment as a special "women's injury."<sup>314</sup> As she explains, sexual harassment is wrong, not because women are women, but because it is an affront to women's dignity as human beings.<sup>315</sup> In addition, Vicki Schultz has argued that the sexual focus of sexual harassment has obscured the broader structural inequalities that are at the heart of employment discrimination legislation.<sup>316</sup> According to Schultz, focusing on the sexual nature of harassment does not align with the goal of equal opportunity in employment, and efforts to eliminate sexual expression "may even encourage organizations to act in ways that undermine genuine workplace equality."<sup>317</sup> Schultz has argued that the focus on sexuality has led courts and employers "to neglect equally serious, nonsexual forms of harassment and exclusion that work to preserve traditional gender roles at work."<sup>318</sup> While these scholars do not suggest abandoning the discrimination paradigm, their concerns suggest that conceptualizing workplace harassment in terms of dignity would not necessarily mean a loss for equality.

Although change is never easy, careful drafting can address many of the concerns associated with a status-blind statute, and other concerns reflect a misunderstanding about what a status-blind statute would look like and how it would operate. In the end, regulating workplace bullying serves the benefit of all.

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311. *See id.* at 265-66.

312. *See id.* at 265.

313. *Global Perspectives on Workplace Harassment Law*, *supra* note 289, at 160 ("It may be that all discrimination visits a dignitary injury on the victim, but the reverse isn't the case.").

314. Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 3 (1999).

315. *Id.* at 4.

316. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2093 (2003).

317. *Id.* at 2131.

318. *Id.* at 2087.



Adding to this picture are the First Amendment concerns associated with underinclusive regulations of speech.

#### V. CONCLUSION

As this Article has principally argued, a status-blind statute may be necessary to align workplace harassment law with the First Amendment. Regulations that are underinclusive in subject matter present the very real possibility that the government is targeting speech because of its agreement or disagreement with the views expressed. Under Title VII's hostile environment theory, the government has selectively targeted workplace harassment expressing views of racial, gender, religious, and ethnic intolerance, while leaving all other forms of harassment without legal recourse, precisely as the Court in *R.A.V.* condemned. The Healthy Workplace Bill or other status-blind legislation offers a viable option for regulating discriminatory and other workplace abuse consistent with the First Amendment.