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THE TENSIONS BETWEEN REGULATING WORKPLACE HARASSMENT AND THE FIRST AMENDMENT: NO TRUMP*

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I. INTRODUCTION

I am happy to address the important subject of this year's Kenneth M. Piper Lecture—the tensions between regulating workplace harassment and the First Amendment. This topic has long been of concern to me both in my academic capacity and in my capacity as President of the American Civil Liberties Union. I first wrote about these tensions in 1992,[1] when they had received almost no scholarly attention,[2] and the ACLU has been discussing them since a decade earlier, in the process of adopting and refining policy statements and formulating positions in various cases around the country.[3]

I—and the ACLU—consider the subject to be especially challenging because we have always strongly supported both rights at is-

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1. Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 201 (1992); Nadine Strossen, *Sexual Harassment in The Workplace: Accommodating Free Speech and Gender Equality Values*, *in* FREE SPEECH YEARBOOK 1 (1993).

2. At the time the only law review articles on the subject were Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) [hereinafter Browne I] and Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 33-41 (1990). Since then the relevant law review publications have been increasing. *See* Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579 (1995) [hereinafter Browne II]; Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Suzanne Sangree, *A Reply to Professors Volokh and Browne*, 47 RUTGERS L. REV. 595 (1995); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) [hereinafter Volokh I]; Amy Horton, Comment, *Of Supervision, Centerfolds and Censorship: Sexual Harassment, The First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) [hereinafter Volokh II].

3. *See* ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 316 (rev. ed. 1995) [hereinafter ACLU POLICY GUIDE].

sue: the right to be free from gender-based discrimination at work[4] and the right of free expression, including in the workplace.[5] We are particularly concerned about rights of non-discrimination at work now, in light of the many recent attacks on affirmative action,[6] and in light of the "Glass Ceiling Commission" report,[7] and other recent studies that indicate that bias and prejudice still hamper the advancement of women and members of racial minorities in the workplace.[8]

I will first outline the essential elements of both important rights at issue. I will then address the central challenge faced by those of us who refuse to automatically exalt one such right above the other: how to distinguish workplace expression that is protected free speech from

4. *See generally* Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940 (1991) (outlining the history of the ACLU's work in support of women's rights since its founding in 1920, including its Women's Rights Project and Reproductive Freedom Project).

5. *See* ACLU POLICY GUIDE, *supra* note 3, at Policy No. 53, FREE SPEECH RIGHTS OF CORPORATE EMPLOYEES:

> In all cases, the employee's rights to free speech and association should be limited only by minimal and traditionally acceptable time, place and manner regulations, provided that the employee's exercise of the right does not substantially, materially and directly interfere with his or her bona fide job performance, or substantially, materially and directly obstruct other employees. This should not protect speech which directly interferes with the ability of the employee adequately to perform his/her job.

Id. Much of the ACLU's work on behalf of employees' free speech rights is carried out through its national Workplace Rights Task Force.

6. *See Affirmative Action: University of California Regents Ban Affirmative Action in Hiring, Admissions*, DAILY LAB. REP., July 24, 1995, at A10 ("University of California regents voted [by a vote of 15-10] to end affirmative action programs in hiring, contracting, and admissions at the nine-campus university system."); Diana Kunde, *Women's Group to Oppose Affirmative Action Revisions*, DALLAS MORNING NEWS, Mar. 21, 1995, at 4D ("Sen. Phil Gramm . . . promised to overturn federal executive orders on affirmative action programs as his first action if elected president."); David Lightman, *Franks to Lead Battle in Congress: Attack to Target Affirmative Action*, HARTFORD COURANT, July 13, 1995, at A3 (African-American Congressman Gary A. Franks leads House Republicans in effort to delete provisions for set-aside programs.); Bob Minzesheimer, *Affirmative Action Under Fire: Debate rages as GOP offers preview of '96*, USA TODAY, Feb. 23, 1995, at 4A (reporting that one poll has two-thirds of respondents opposing affirmative action, and another poll has 73% of Californians supporting the California Civil Rights Initiative, which would outlaw affirmative action); *States' Legislative Action: State Legislatures Respond to Affirmative Action Uproar*, DAILY LAB. REP., Aug. 1, 1995, at D33 ("[T]he California Rights Initiative . . . seeks to add an amendment to the state constitution prohibiting discrimination of and preferential treatment given to individuals in public employment, education, and contracting on account of race, gender, ethnicity, or national origin."); Phil Willon, *Affirmative Action Faces A Host of Battles*, TAMPA TRIB., Mar. 20, 1995, at 1 ("There have been lawsuits filed in several Florida cities attacking affirmative action."); *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112-13, 2117 (1995) (holding that set-aside program for minority contractors is presumptively unconstitutional).

7. U.S. DEP'T OF LAB. GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995).

8. *See Adarand*, 115 S. Ct. at 2135 (Ginsburg, J., dissenting) ("[D]iscrimination's lingering effects . . . [are] reflective of [a] system of a racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race." (citations omitted)).

workplace expression that is prohibited harassment. I will explain why both the Supreme Court and the ACLU have concluded that there is no single, bright-line test for making this distinction. The only way to classify any particular workplace expression as either protected free speech or prohibited harassment is by considering that expression in its full context, taking into account all the facts and circumstances. Consistent with that flexible, fact-specific approach, no single factor characterizing the expression should be dispositive.

Finally, I will discuss problems arising from the fact that—contrary to the foregoing contextual approach—many employers and some lower courts have erroneously treated one factor as dispositive in evaluating whether workplace expression is prohibited sexual harassment. Specifically, they have deemed any sexually-oriented expression in the workplace to be sexually harassing, regardless of its context. This false equation between sexual expression and sexual harassment violates employees' free speech rights. Moreover, far from advancing women's right to be free from gender-based discrimination in employment, ironically, it undermines that vital right in several ways by perpetuating paternalistic and disempowering stereotypes about women, work, and sexuality.

II. RIGHT TO BE FREE FROM DISCRIMINATORY HARASSMENT AT WORK

Let me start by outlining several key elements of each important right at issue, beginning with the right to be free from discriminatory harassment at work.[9]

Meaningful equality of opportunity in employment requires more than mere non-discrimination at the entry level. It is not enough to simply open the doors of workplaces to women and members of other groups that have traditionally been excluded. Meaningful equality of opportunity also entails a full chance to participate and to succeed. Accordingly, the courts[10] and Congress[11] have recognized that the

9. Consistent with the title of this year's Piper Lecture, I will focus on "sexual harassment," or harassment that is gender-based. My comments are generally applicable, though, to other forms of discriminatory harassment in employment, such as racial harassment. Likewise, while my remarks focus on the designated topic of workplace harassment, they are largely applicable to the related subject of campus harassment. Many colleges and universities have adopted and enforced anti-harassment rules that jeopardize free speech rights. *See generally* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 24-29, 120, 128-29, 131-32, 135-36 (1995).

10. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

11. Civil Rights Act of 1991 § 101(b), 42 U.S.C.A. § 1981(b) (Supp. 1992) (prohibiting discrimination in "making, performance, modification, and termination of contracts"), *overruling*

right to equal employment opportunity includes a right to be free from harassment based on such characteristics as gender or race.

Concerning sexual harassment specifically, the Supreme Court has endorsed guidelines that the Equal Employment Opportunity Commission (EEOC) issued, recognizing two types of such harassment: first, quid pro quo harassment, which occurs when an employment opportunity or benefit is conditioned on an employee's granting sexual favors to a supervisor; and second, hostile environment harassment, which occurs when "verbal or physical conduct of a sexual nature . . . has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[12]

Expression is at the heart of both forms of harassment, since the demands for sexual favors involved in quid pro quo harassment, as well as conduct that creates a hostile environment, generally take the form of expression. However, First Amendment tensions with the concept of sexual harassment arise only from the hostile environment branch of harassment.

Even the most diehard free speech absolutist recognizes that the speech involved in quid pro quo harassment is tantamount to threats or extortion,[13] expression that has long been punishable without raising substantial free speech concerns in any context.[14] This is true even

Patterson v. McLean Credit Union, 491 U.S. 164, 176-78 (1989) (finding racial harassment not actionable under Civil Rights Act of 1866 because the Court interpreted the Act as applying only to contract formation and unlawful dismissal, not to conditions of employment).

12. Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1985).

13. *See* Browne I, *supra* note 2, at 485; Volokh I, *supra* note 2, at 573; Volokh II, *supra* note 2, at 1800.

14. *See* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 78-79 (1995):

> Sexual harassment takes two discrete forms, only one of which generates serious First Amendment questions. One form is called *quid pro quo* harassment; it typically involves conditioning someone's employment position on her sexual involvement. . . . [T]his kind of threat alters the situation of the listener. It presents her with a new and potentially disturbing choice—whether to engage in unwelcome sexual relations or lose her job. Such situation-altering utterances are not the sort of speech that warrants protection under a guarantee of free speech.

Id.

Although prohibiting quid pro quo harassment is conceptually consistent with free speech principles, the danger still remains that such a prohibition could be enforced in a way that violates free speech principles, by overbroadly stifling expression that should not be deemed quid pro quo harassment. For example, although the ACLU's policy on free speech and bias on college campuses does not oppose "disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy," the policy cautions: "As always, however, great care must be taken to avoid applying such provisions overbroadly to protected expression. The ACLU will continue to review such college codes and their application in specific situations on a case-by-

in public forums—public property such as parks or streets—where free speech rights are at their apogee.[15]

In contrast, hostile environment harassment may well consist of words or expressive conduct that, outside the workplace context, would be protected.[16] Nevertheless, some such expression may be prohibited, consistent with the First Amendment, for several reasons. First, the mere fact that harassing conduct consists in part of expression never has been sufficient to immunize it from regulation. Even we in the ACLU, with our absolutist view of the First Amendment, never have argued that it protects targeted individual harassment in the form of expression. For example, although the ACLU has been the leading opponent of campus hate speech codes that target speech on the basis of its racist or sexist ideas,[17] our policy on this issue expressly recognizes that universities may prohibit "harassment, intimidation and invasion of privacy."[18] ACLU policy provides the following guidelines, which generally pertain to the employment situation as well, insofar as both require reconciling anti-discrimination and free speech values:

> The ACLU has opposed and will continue to oppose and challenge disciplinary codes that reach beyond permissible boundaries into the realm of protected speech, even when those codes are directed at the problem of bias on campus.

case basis under the principles set forth in this policy." ACLU POLICY GUIDE, *supra* note 3, at Policy No. 72a (adopted 1990).

15. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 810 n.18, 964-65, 986-87 (1988).

16. *See* GREENAWALT, *supra* note 14, at 80:

> No one doubts that speech of various sorts can create a working environment that a woman reasonably experiences as hostile. Furthermore, no one doubts that even civil expressions, as in a company newsletter, can contribute to such an environment. . . . On the other hand, expressions of opinion and feeling are normally protected against government restriction by the First Amendment, even when the speech disturbs others. This is the constitutional problem about hostile environment harassment. It is most sharply posed by civil expressions on serious topics that may nonetheless contribute to an abusive work environment.

Id.

17. *See* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Wu v. University of Conn., No. Civ. H-89-649 PCD (D. Conn. 1990); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (cases in which ACLU represented parties that successfully challenged campus hate speech codes). I am aware of only one other decision striking down a campus hate speech code on constitutional grounds, Dambrot v. Central Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995). Additionally, a state court judge recently invalidated Stanford University's hate speech code under a state statute. Corry v. Stanford Univ., No. 740309, Superior Court, Santa Clara, Feb. 27, 1995; *see also* Bill Workman, *Stanford Won't Appeal Ruling On Anti-Hate Speech Rule*, S.F. CHRON., Mar. 10, 1995, at A11.

18. ACLU POLICY GUIDE, *supra* note 3, at Policy No. 72a, FREE SPEECH AND BIAS ON COLLEGE CAMPUSES (adopted 1990).

> This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation, and invasion of privacy. Although "harassment," "intimidation," and "invasion of privacy" are imprecise terms susceptible of impermissibly overbroad application, each term defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student's dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than to create an unpleasant learning environment, however, would not be the proper subject of regulation.
>
> The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation. For example, intimidating telephone calls, threats of attack, extortion and blackmail are unprotected forms of conduct which include an element of verbal or written expression. As always, however, great care must be taken to avoid applying such provisions overbroadly to protected expression. The ACLU will continue to review such college codes and their application in specific situations on a case-by-case basis under the principles set forth in this policy.[19]

There is a second reason why some workplace expression may be deemed illegal harassment consistent with the First Amendment. People who are targets of harassing expression at work may constitute what the Supreme Court has called a captive audience—persons who must be in a certain place for an important purpose. Such people may be protected from unwanted verbal assaults while at work, even if they would not be protected from the same expression in any other context.[20]

Other special attributes of many workplace settings underscore the captive situation of many employees, and hence constitute further reasons why expression that might be protected in other contexts should not necessarily be protected at work. The first such attribute is the hierarchical structure of most workplaces, and the fact that some individuals exercise supervisory and economic power over others. A second, related attribute of many workplaces is that they often impose severe limitations on employees' opportunities to engage in speech. Far from being the quintessential "marketplace of ideas" in which

19. *Id.*

20. *See* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 89-103 (1991). *But see id.* at 88, 121 (showing how current case law is "riddled with inconsistency and ambiguity," and proposing factors courts should consider in employing the captive audience concept and balancing it against free speech interests; the goal is to make doctrine "a method of analysis, not just a catchy slogan").

speech and counter-speech are freely bandied about, many workplaces are highly regulated environments in which non-work-related speech is at best discouraged, and at worst, banned or restricted.

Further distinguishing places of work from the marketplaces of ideas is the fact that a central speech-protective precept that applies in public forums cannot be transported to the workplace: that the appropriate response to speech that listeners find wrongheaded or offensive is not to suppress or punish the speech, but rather to answer it.[21] To relegate an employee who is the target of insulting, sexist remarks by her boss to the "remedy" of answering him back is to foreclose her from any meaningful recourse at all.

For the foregoing reasons, some sexist expression in the workplace constitutes harassment that may—and, indeed, *should*—be prohibited and punished, even if the First Amendment would protect the same expression in other settings. Gender-discriminatory harassment in employment may not be condoned simply because it is effected through expression. Free speech rights should not automatically and mechanically trump equality rights.

III. RIGHT TO FREE EXPRESSION AT WORK

On the other hand, the ACLU has always advocated free expression rights of workers. Going back to our earliest days, more than 75 years ago, we championed such rights on the part of pioneering labor organizers.[22] Given how many waking hours most people spend on the job, if they do not have speech rights there, then for all practical purposes, they have very few free speech rights indeed. Accordingly, the ACLU maintains that all employees should enjoy freedom of expression while at work, as long as that expression does not substantially interfere with workplace operations.[23]

Of course, the First Amendment does not directly bar private sector employers from restricting their employees' speech, since it directly constrains only governmental actions. But when private employers restrict their employees' speech to comply with government mandates, including Title VII and EEOC regulations, then the

21. *See* Texas v. Johnson, 491 U.S. 397, 420 (1989) ("We can imagine no more appropriate response to burning a flag than waving one's own."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence.").

22. *See* Martha Glaser, *Paterson, 1924: The ACLU and Labor*, 94 N.J. HIST. 155, 156 (1976); *see also*, SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 51 (1990).

23. *See* ACLU POLICY GUIDE, *supra* note 3, at Policy No. 53.

employer is in effect acting as a government agent. Government-instigated speech restrictions are subject to First Amendment constraints even in the private sector.[24]

I previously set forth several reasons why some workplace expression *may* be restricted as harassment, *despite* the First Amendment. Underscoring how hard it is to draw bright-line rules in this area, I will now list several reasons why some workplace expression may *not* be restricted as harassment, *because of* the First Amendment. First, outside the workplace, the kinds of speech that have been deemed sexually harassing are clearly entitled to First Amendment protection. For example, the Supreme Court repeatedly has affirmed the protected status of expression that is sexual,[25] sexist,[26] insulting,[27] offensive,[28] and biased.[29]

In fact, the Court has stressed that the most egregious First Amendment violation is what it calls viewpoint-based speech regulation, which restricts speech because of the ideas or viewpoint it con-

24. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), which held that the Fourth Amendment applies to searches and seizures conducted by a private party which acts "as an instrument or agent of the Government," *id.* at 614, and noted that such a relationship will be found even if "the Government has not compelled a private party to perform a search." *Id.* at 615. The Court concluded that the Fourth Amendment did apply to the searches at issue because "the Government did more than adopt a passive position toward" them, and because they were not "primarily the result of private initiative." *Id.*

25. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (striking down restrictions on "dial-a-porn" as violating Free Speech Clause because "sexual expression which is indecent but not obscene is protected by the First Amendment"); Roth v. United States, 354 U.S. 476, 487 (1957) ("Sex and obscenity are not synonymous. . . . The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.").

26. *See, e.g.*, American Booksellers Ass'n v. Hudnut, 475 U.S. 1001 (1986), *aff'g* 771 F.2d 323 (7th Cir. 1985), *aff'g* 598 F. Supp. 1316 (D. Ind. 1984) (summarily affirming lower court decision). The Seventh Circuit held that the First Amendment was violated by anti-pornography law aimed at graphic sexually explicit subordination of women through pictures and/or words. *Hudnut*, 771 F.2d at 324; *see also id.* at 425 (quoting anti-pornography statute).

27. *See, e.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974) (reversing conviction of woman who said "you god damn mother fucking police" to a police officer); Brown v. Oklahoma, 408 U.S. 914 (1972) (summarily vacating conviction of Black Panther for calling specific policemen "mother-fucking fascist pig cops"); Gooding v. Wilson, 405 U.S. 518, 520 (1972) (reversing conviction of black demonstrator who had called a police officer "white son of a bitch").

28. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (reversing conviction for burning the U.S. flag, although surveys show large majority of Americans are deeply offended by this expressive conduct); Texas v. Johnson, 491 U.S. 397 (1989) (same); Cohen v. California, 403 U.S. 15 (1971) (reversing defendant's conviction for wearing a jacket that said "Fuck the draft" in a courthouse).

29. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (reversing conviction for burning cross on property of African-American family, who had recently moved to previously all-white neighborhood); Terminiello v. Chicago, 337 U.S. 1 (1949) (reversing conviction for racist speech containing anti-black and anti-semitic statements).

veys.[30] But sexually harassing expression is restricted precisely because of its viewpoint—namely, a sexist one. Much as we may abhor a sexist viewpoint, that abhorrence is no justification for suppression of its expression outside the workplace. The Court stressed this cardinal free speech principle in its two flag-burning decisions in 1989[31] and 1990,[32] which upheld free speech rights for a viewpoint that a large majority of Americans found deeply repugnant.[33] The Court declared: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[34]

As the preceding discussion makes clear, if we extended generally applicable First Amendment principles to the workplace, much expression that has been deemed proscribable harassment would in fact be protected. For several reasons we cannot simply rely on the captive audience doctrine to exempt the workplace from the First Amendment. First, as UCLA Law Professor Eugene Volokh has noted, "the [Supreme] Court has . . . never found that employees in the workplace are 'captive,' and there are good reasons for it not to do so."[35]

Further, even if employees could reasonably be viewed as captive audiences in some contexts, that still would not justify the selective prohibition or punishment of speech based on its viewpoint. The Court has never upheld viewpoint-discriminatory regulations under the captive audience theory.[36] Therefore, current precedents would

30. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

31. *Johnson*, 491 U.S. 397 (1989).

32. *Eichman*, 496 U.S. 310 (1990).

33. *See House Backs Flag-Protection Amendment*, FACTS ON FILE WORLD NEWS DIGEST, July 13, 1995, at 497 G2 (Public opinion polls indicate that about 75% of voters favor an amendment to ban burning and other disfiguring of the flag.). *But see* Gail Appleson, REUTERS, Aug. 4, 1995 (ABA poll showed that while 64% of Americans think they want a flag burning amendment, only 38% support such an amendment if it would result in a restriction of free speech and political protest.).

34. *Johnson*, 491 U.S. at 414.

35. Volokh II, *supra* note 2, at 1832-33 (noting that Court has never upheld content-based speech restriction on "captive audience" rationale outside the home).

36. *See id.* at 1840-43 (citing Supreme Court decisions). Likewise, the ACLU condones speech regulations to protect captive audiences only when they are content- and viewpoint-neutral:

> [T]he First Amendment is not inconsistent with reasonable regulations designed to restrict sensory intrusions so intense as to be assaultive. Reasonable regulations are those that apply only to time, place and manner *without regard to content* . . . . What constitutes a "reasonable" regulation will necessarily vary depending upon such factors

not warrant the selective restriction of workplace speech that conveys discriminatory attitudes toward women.[37]

Additionally, as Columbia Law School Professor Kent Greenawalt has noted, in the workplace, the captive *audience* concern is offset by a captive *speaker* concern, which weighs against regulation and in favor of free speech. He explains:

> *When* people are working, the only place they can express themselves is within the workplace. The speakers are no more free to go elsewhere than the audience. If I spend most of the day in the office *and* I like to look at provocative pictures of nude women, there is no substitute for my hanging such pictures on my office wall or putting them on my desk. . . . I am no less a captive at work than other workers who may enter my office and be offended.[38]

Finally, speech may not be suppressed simply because it conveys ideas inconsistent with gender equality. Such expression does not necessarily undermine gender equality. For example, speeches arguing that women should be second-class citizens might persuade some who hear them or hear about them, but they may well galvanize greater numbers to oppose those views, and to work against them. Even assuming that some sexist speech might have a net adverse impact on gender equality—for example, by instilling negative attitudes toward women and women's rights—that would not justify suppressing it. Under the Supreme Court's precedents, even speech advocating gender discrimination or violence against women should be protected un-

> as (1) the size of the . . . area involved, (2) the duration [or] frequency with which an individual is in the area . . . or (3) the extent to which alternatives exist so that the individual can reasonably be called upon to avoid the area . . . . Assaultive sensory intrusions are those that are objectionable to the average person because of an excessive degree of intensity, e.g., volume or brightness, and which cannot be avoided.

ACLU POLICY GUIDE, *supra* note 3, at Policy No. 43 (emphasis added).

37. But see R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) dictum: "[W]ords can in some circumstances violate laws directed not against speech but against conduct . . . . [F]or example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."

This dictum has been heavily criticized. *See, e.g.*, Jeffrey A. Steele, *Fighting the Devil with a Double-Edged Sword: Is the Speech-Invoked Hostile Work Environment Hostile to* O'Brien?, 72 U. DET. MERCY L. REV. 83, 90 n.36, 120 n.199, 139 (1994). Steele argues that "the dictum in *R.A.V.* should not be interpreted to support the constitutionality of . . . the use of disfavored speech in finding a hostile work environment. . . . [T]he analysis of the case itself make[s] a speech-invoked hostile work environment appear to be an unconstitutional governmental regulation of viewpoints." *Id.* at 139; *see also* Keith R. Fentonmiller, *Verbal Sexual Harrassment as Equality-Depriving Conduct*, 27 U. MICH. J.L. REF. 565, 604 (1994); James H. Fowles, III, Note, *Hostile Environment and the First Amendment: What Now After* Harris *and* St. Paul?, 46 S.C. L. REV. 471, 497 (1995) ("If the conduct consists primarily of speech and the speech expresses a viewpoint, the hostile environment theory does not sweep up anything except the speech itself—and, perhaps, the First Amendment as well.").

38. GREENAWALT, *supra* note 14, at 86 (emphasis in original).

less it constitutes intentional incitement to imminent illegal discrimination or violence.[39]

For the foregoing reasons, some sexist expression in the workplace may not be prohibited or punished as sexual harassment. In short, equality rights should not automatically and mechanically trump free speech rights any more than—as I previously noted—free speech rights should automatically and mechanically trump equality rights.

IV. THE CHALLENGE OF CHARACTERIZING PARTICULAR WORKPLACE EXPRESSION: DISTINGUISHING PROTECTED FREE SPEECH FROM DISCRIMINATORY HARASSMENT

So far I have reached the following conclusions: First, that some sexist workplace expression constitutes proscribable harassment; but, second, that some sexist workplace expression constitutes protected free speech. How do we draw the line between these two categories of workplace expression? How do we distinguish between expression that is harassing and must be suppressed to honor gender equality rights, and expression that is merely offensive and must be protected in order to honor free speech rights?

For individuals and organizations primarily concerned with one of the two rights at stake—either gender equality or free speech—it is relatively simple to draw this line because they maintain that one right automatically trumps the other. Therefore, those of us who try to draw a line somewhere in the middle so as to respect both rights have been attacked from both directions. For example, the ACLU's position has been attacked by both Wayne State Law School Professor Kingsley Browne, who says we overprotect equality at the expense of free speech,[40] and University of Southern California Law Professor Judith Resnik, who says we overprotect free speech at the expense of equality.[41] Such diametrically opposed criticisms give me some comfort that we may well have struck the balance just about right!

39. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

40. Kingsley R. Browne, *Stifling Sexually Hostile Speech: To What Extent Does the First Amendment Limit the Reach of Sexual Harassment Law When the Hostile Environment is Created by Speech?*, CONN. L. TRIB., Nov. 29, 1993, at 19 ("Notwithstanding this viewpoint-based restriction on speech [through sexual harassment rules], organizations such as the American Civil Liberties Union have shown an uncharacteristic lack of concern about the First Amendment, being satisfied to balance free-speech rights against their perceptions of workplace equality. Workplace equality usually wins.").

41. Oral statements by Judith Resnik to author at a conference held on October 16, 1993 and co-sponsored by N.Y.U. School of Law's Hays Civil Liberties Program and the Fund for Free Expression entitled *Free Speech and Equality; Do We Have to Choose?* and at the National

At one extreme, some free speech absolutists, such as Browne, have essentially argued that the entire concept of hostile environment sexual harassment is inherently unconstitutional, at least when it is based on expression rather than unwanted physical contact.[42] A similar position has been espoused by Jeff Rosen, the Legal Affairs Editor of *The New Republic*. He declared: "[T]he most serious threat to the First Amendment of the past decade [is] the notion that words that create an 'intimidating, hostile or offensive working environment,' without inflicting more tangible harms, can be punished as harassment."[43]

A. *Supreme Court's Ruling in* Harris v. Forklift Systems

The Supreme Court expressly rejected this free speech absolutist position in *Harris v. Forklift Systems*.[44] There, the Court unanimously overruled the Sixth Circuit, which had demanded proof of psychological injury in order to show hostile environment sexual harassment.[45] And rightly so. No such prerequisite is imposed on victims of other kinds of employment discrimination—for good reasons, as explained by legal journalist Stuart Taylor, Jr.:

> Requiring proof of psychological injury would deny a remedy to any victim tough enough to keep her emotional composure while her status at work was being degraded by the most repugnant sexual harassment. It would force some victims to endure (while tempting others to feign) mental breakdowns to get relief. It would also be bad for employers, by allowing to fester (while damages snowball) grievances that the law should seek to nip in the bud. And it would convert harassment trials into costly and unhelpful swearing contests between psychiatric experts.[46]

Association of Women Judges Annual Conference, Scotsdale, Arizona, Oct. 2, 1994; *see also* Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 Geo L.J. 1903 (1994). Crain argues that "[t]he First Amendment has proved to be of far more service to the dominant group than to outsiders," *id.* at 1993, and concludes "free speech values must yield to equality values." *Id.* at 1996.

42. Browne I, *supra* note 2, at 544 (hostile environment harassment liability should be based only on "unwanted sexual touching"). Professor Eugene Volokh, who has also criticized the current concept of hostile environment sexual harassment as insufficiently protective of free speech, has characterized Browne's position as "extreme." Volokh II, *supra* note 2, at 1797. In contrast with Browne, Volokh would sanction hostile environment sexual harassment claims based on expression, but only when the expression is consciously directed at a particular person whom the speaker knows does not welcome it. *Id.* at 1843-68.

43. Jeff Rosen, *Court Watch: Reasonable Women*, THE NEW REPUBLIC, Nov. 1, 1993, at 12.

44. 114 S. Ct. 367 (1993).

45. *Id.* at 370.

46. Stuart Taylor, Jr., *Sexual Harassment: Where's the Line?*, LEGAL TIMES, Oct. 18, 1993, at 25.

Indeed, even the lawyers for the *Harris* defendant rejected the psychological-injury test as did *all* of the many amici curiae.[47]

In *Harris*, the Supreme Court also rejected the position at the opposite extreme of the spectrum, asserted by those who exalt gender equality over free speech: that any workplace conduct that an employee finds "offensive" should be deemed illegal sexual harassment. This position was advocated, for example, in an amicus brief filed by what Stuart Taylor called "speech-police feminists,"[48] including University of Michigan Law Professor Catharine MacKinnon and the NOW Legal Defense and Education Fund. The brief suggested that "a woman has a sexual harassment claim any time she subjectively feels that her working environment is 'offensive' because of the gender-based comments made by a male co-worker,"[49] no matter how unreasonable that feeling might be. The brief declared that "[t]he reasonableness of any particular plaintiff's reaction . . . is irrelevant."[50]

The *Harris* Court did not focus specifically on tensions between free speech and gender equity because that issue was not directly presented. Even apart from free speech concerns, the Court ruled that an employee's subjective view that conduct is offensive is not enough to deem such conduct hostile environment harassment under Title VII or the EEOC guidelines.[51] When also taking free speech concerns into account, they provide an additional basis for rejecting the subjective-offense standard. Any such standard would greatly chill the expression of all employees, and force employers to act as speech police.

As just noted, the *Harris* decision did not expressly focus on drawing the line between harassing and protected expression at work; rather, it staked out the broad bounds within which that line must be drawn. Beyond rejecting the two extreme positions—either that sexual harassment exists anytime an employee is offended, or that it never exists unless an employee has suffered tangible psychological harm—the Court provided scant additional guidance. It said only that, to constitute hostile environment harassment, conduct has to be "severe or pervasive enough" that it would be perceived as abusive or

47. *See* Stuart Taylor, Jr., *Sexual Harassment: Drawing the Line in Shifting Sands*, CONN. L. TRIB., Oct. 25, 1993, at 18.

48. *Id.*

49. *Id.* (referring to amicus brief filed by NOW Legal Defense and Education Fund and Catharine A. MacKinnon).

50. *Id.* (quoting amicus brief filed by NOW Legal Defense and Education Fund and Catharine A. MacKinnon).

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

hostile by both a hypothetical "reasonable person" and the actually affected employee.[52]

The Court acknowledged that this standard is imprecise, and emphasized the necessarily fact-bound nature of the determination in any particular case:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. . . . [W]hile psychological harm, like any other relevant factor, may be taken into account, no single factor is required.[53]

Justice Scalia commented in his separate concurring opinion that the Court's unclear standard "[a]s a practical matter . . . lets virtually unguided juries decide whether sex-related conduct" in the workplace constitutes prohibited sexual harassment. He confessed, however, that he was unable to formulate an alternative, more precise, standard. Accordingly, he endorsed the open-ended, contextual approach laid out in the majority opinion.[54]

I also believe that whether conduct is sexually harassing must be determined on a case-by-case basis. Consistent with this approach, Justice Ginsburg suggested a helpful benchmark of hostile environment harassment: "The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[55]

As the Supreme Court Justices have concluded, it is difficult, if not impossible, to formulate a precise legal definition of sexual harassment. This difficulty is compounded when the alleged harassing be-

52. *Id.* at 371.
53. *Id.*
54. *Id.* at 372 (Scalia, J., concurring).
55. *Id.* at 372 (Ginsburg, J., concurring). *But see* Browne, *supra* note 40, at 19:

> During oral argument in the Harris case, Justice Ruth Bader Ginsburg unwittingly demonstrated the substantial difficulty of crafting a rule that comports with First Amendment standards. Among the plaintiff's complaints was that her boss had said to her, "You're a woman, what do you know?" In discussing hypotheticals involving the relevance of similar comments being directed toward men, Ginsburg asserted, "'You're a woman, what do you know?' means something different than 'you're a man, what do you know?'" Possibly it does, although if Ginsburg dismissed a male clerk's observations about the *Harris* case by saying "You're a man, what do you know?" the clerk might be just as offended as Harris was by her boss's comment.
>
> In any event, even if Justice Ginsburg is correct, how on earth are employers to make such delicate linguistic judgments in advance? The answer is that they cannot, and the rational employer wishing to avoid liability will therefore prohibit both statements.

Id.

havior consists of expression that would be entitled to First Amendment protection in other contexts. Neither of the Supreme Court's two opinions concerning sexual harassment[56] expressly discussed this First Amendment issue, since it was not germane to either. But extrapolating from those cases, as well as from recent free speech rulings, it is clear that protected expression can be distinguished from proscribable harassment only on a contextual basis, turning on the facts and circumstances of each particular case.[57]

B. *Building on* Harris: *Specifying Factors that are Relevant and Irrelevant, Dispositive and Non-Dispositive*

I think the best one can do is to continue the process that the Supreme Court began in *Harris* by both specifying factors that should be relevant and specifying factors that should be irrelevant, or at least non-dispositive.[58] This is precisely what the ACLU has done—to the apparent frustration of many journalists. Whenever a reporter asks me, "Does the ACLU believe—or do you believe—that expression at work should be treated as sexual harassment or protected free speech?," I am constrained to answer, "It depends."[59]

The ACLU policy concerning hostile environment harassment—which, like the Supreme Court's definition in *Harris*, turns on an assessment of the facts and circumstances in any particular case—reads as follows:

> The ACLU supports the right of all persons to enjoy equal employment free from discrimination on the basis of sex or sexual orientation. One form discrimination takes is sexual harassment. Sexual harassment is a historic mode of discrimination against women, but its victims may be male or female, heterosexual or homosexual depending on the distribution of power in the workplace and the status of victims and perpetrators. Sexual harassment is made possible by power imbalances; victims of harassment are generally in a minority in the workplace or in positions of relative powerlessness. Conduct or expression that might not be actionable outside the workplace may constitute harassment in the workplace precisely because of its hierarchical nature—employers and employees, su-

56. *Harris*, 114 S. Ct. 367 (1993) and Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 56 (1986).

57. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524-30 (1994).

58. While the *Harris* Court held that proof of a tangible psychological injury was not *necessary* for showing sexual harassment—in other words, that the absence of such proof did not *foreclose* a harassment claim—it also held that proof of a psychological injury was a relevant factor, which the factfinder could weigh in favor of finding that sexual harassment had occurred. *Harris*, 114 S. Ct. at 371.

59. *See, e.g.*, Kimberly Blanton, *Free Speech: New Defense In Cases of Harassment*, BOSTON GLOBE, Aug. 7, 1994, at 24.

pervisors and subordinates do not interact as equals—and because most people have to work to live.

Sexual harassment exists in any of the following situations:

. . .

6) Where conduct or expression is severe or pervasive enough to create unequal working conditions based on sex or sexual orientation by, among other things, significantly hindering a reasonable employee in performing his or her job because of the employee's sex or sexual orientation, or significantly harming the employee's physical, mental or emotional well-being because of the employee's sex or sexual orientation. Conduct or expression that meets this definition is actionable because of the unique characteristics of the workplace—including the existence of authority relationships, the economic necessity to remain, and the limited opportunity to respond—even though it might not be actionable in other settings. Sexual harassment may be actionable even if it was not directed at any particular employee. Sexually explicit literature, graphic displays or speech may constitute harassment under this policy, but they do not constitute harassment per se.[60]

C. *Advantages and Disadvantages of a Moderate, Fact-Specific Approach*

I recognize that a fact-specific, contextual approach of the sort that the foregoing policy lays out does not give precise guidance to employers or employees as to exactly what expression should be off-limits. Therefore, it creates the danger that employers will err in favor of overly restrictive rules to avoid Title VII liability, and that employees will engage in self-censorship to avoid being labeled as sexual harassers.

However, I do not see an alternative. Unlike Kingsley Browne, I do not think the free speech threats posed by hostile environment sexual harassment regulations—troubling as they are—should *always* trump every employee's right to be free from (non-quid-pro-quo) verbal abuse in all cases. As Stuart Taylor wrote in defense of a "middle ground" position, rejecting not only the extreme positions of "speech-police feminists" (Taylor's phrase), but also the extreme positions of Browne and other "speech-centered non-feminists"[61] (my coinage, as a counterpart to Taylor's):

60. ACLU POLICY GUIDE, *supra* note 3, at Policy No. 316.

61. As Taylor stated:

[Browne] questions whether any standard sufficiently clear to pass First Amendment muster can be devised that would impose liability for gender-based (or race-based) harassment in the form of verbal abuse or symbolic expression . . . no matter how severe the vilification, no matter how injurious the intent of the harasser or the effect on the target, and no matter how much power the harasser has over the target.

> I think the key is to distinguish generalized statements of opinion—which should enjoy absolute protection no matter how sexist—from gender-based verbal abuse that (1) is targeted on a particular employee, and so extreme that (2) the target reasonably feels diminished in her status or effectiveness at work, and that (3) amounts to intentional infliction of severe emotional distress. This last (new) component, which imports a familiar common-law concept, is designed to draw a reasonably intelligible line (for employers and courts alike) between free speech and impermissible personal harassment, without requiring anything so clinical as the "psychological injury" standard that the Supreme Court properly rejected in *Harris*.[62]

Certainly Browne and others—including myself[63]—have pointed to particular cases where sexual harassment regulations have been abused to suppress workplace expression that should be protected.[64] But these abuses do not disprove the basic concept at issue: that some workplace expression violates a woman's right to equal employment opportunities.[65] There have been abuses in the other direction, too, where courts refused to find hostile environment harassment despite severe, pervasive, harassing speech, directed at female employees, which these employees reasonably perceived as hostile and abusive.[66] These abuses also should not disprove the other basic concept at issue: that some workplace expression should be constitutionally protected.

Stuart Taylor, Jr. responding *in* Browne, *supra* note 40, at 19.

62. *Id.*

63. *See* STROSSEN, *supra* note 9, at 121-22, 126-30, 133-35.

64. *See* cases cited by Browne I, *supra* note 2 at 483; Volokh II, *supra* note 2, at 1794 nn.7 & 8. I do not necessarily agree with the authors' descriptions of the dispositive facts in these cases. But, assuming *arguendo* that they are accurately described, at least some of them would raise troubling concerns about the overenforcement of prohibitions on sexual harassment, at the expense of free speech in the workplace.

65. No less staunch a defender of free speech than Columbia University Law School Professor Kent Greenawalt made this point in the following forceful terms: "Were all workplace speech held irrelevant to harassment, men could make working conditions extremely hostile for women, and drive many of them from their jobs. If women are to be treated equally in the workplace environment, restricting harassing language is very important." GREENAWALT, *supra* note 14, at 80.

66. *See* Deborah Epstein, *Can A 'Dumb Ass Woman' Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996). Professor Epstein cites numerous cases in which harassing workplace speech was held insufficiently severe or pervasive to constitute hostile environment sexual harassment. *Id.* at 413 n.88, 416-17 nn.104-11. Professor Epstein also cites additional cases in which courts have refused to impose liability for hostile environment sexual harassment based on an "extremely narrow definition of the welcomeness requirement." *Id.* at 414 n.92. I do not necessarily agree with Professor Epstein's descriptions of the dispositive facts in all of these cases. But, assuming *arguendo* that they are accurately described, at least some of them would raise troubling concerns about the underenforcement of prohibitions against sexual harassment, at the expense of gender equality in employment.

There may well be disagreement over details even among those who are generally committed to what I consider a "moderate" position—i.e., one that neither automatically prohibits hostile environment sexual harassment claims that are based (in whole or in part) on expression, nor automatically upholds such claims whenever the plaintiff employee was offended by workplace expression. Because such a moderate position requires an evaluation of various factors in any particular case, its supporters may well disagree as to whether any particular factor should be determinative, relevant, or irrelevant.

D. One Debatable Factor: Should Expression that is not Directed at the Complaining Employee be Considered in a Hostile Environment Harassment Claim?

One factor that has triggered much debate is the directed or non-directed nature of the allegedly harassing expression. If workplace expression is deliberately aimed at a particular employee with the intent of creating a hostile or abusive working environment for her, surely that is a factor that should weigh in favor of finding hostile environment harassment; the direct targeting of the allegedly harassing expression is certainly a *relevant* factor. But is it, as some contend, a *dispositive* factor? More precisely, is the direct or intentional targeting of expression toward the complaining employee a prerequisite for a hostile environment harassment claim based on expression?

Jeffrey Rosen,[67] Stuart Taylor,[68] and Eugene Volokh[69] all have urged that absent direct targeting, expression should not be considered in a hostile environment harassment claim. Within the ACLU, that position previously was reflected in our sexual harassment policy, although the current policy, quoted above,[70] does not require direct targeting. During the debates that culminated in the current policy, the direct targeting issue was a major focus of discussion.[71]

67. *See* Rosen, *supra* note 43, at 12.
68. *See* Taylor, *supra* note 46, at 25.
69. *See* Volokh II, *supra* note 2, at 1846.
70. *See supra* text accompanying note 60.
71. One committee report proposed reinstating a direct targeting requirement when the alleged harassment consists solely or primarily of expression, explaining:

> To balance free speech, privacy and equality interests in the workplace, we have established a two tiered standard of review for sexual harassment cases involving speech and conduct. When the alleged harassment does not consist primarily or solely of speech, we are proposing something akin to a disparate impact test: Sexual conduct that creates differential working conditions and has a demonstrable effect on job performance or opportunities is actionable regardless of its intent. Sexual speech is actionable only when it is intended to harass the particular person or group against whom it is directed. Intent may be inferred, however, and directedness may be covert. For example, some-

V. ONE NON-DISPOSITIVE FACTOR: NOT ALL SEXUAL EXPRESSION AT WORK IS SEXUAL HARASSMENT

In the remainder of this Article, I would like to focus on one factor that should not be dispositive in defining sexually harassing expression: the sexual content of the expression. Unfortunately, this factor has been given great and even conclusive weight in too many workplace rules and in some judicial decisions. An entire chapter in my 1995 book, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS, discusses this subject. It is entitled *Defining Sexual Harassment: Sexuality Does Not Equal Sexism.* I will only summarize that analysis here.

The problem begins with the EEOC's definition of "hostile environment" harassment, which targets conduct that is sex*ual* rather than sex*ist*. The EEOC guidelines, issued in 1980, define hostile environment harassment as "verbal or physical conduct of a *sexual* nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[72]

Since Title VII's goal, appropriately, is to protect women from gender-based discrimination, its focus on conduct "of a sexual nature" is misplaced. That focus is both underinclusive and overinclusive. It is underinclusive insofar as it does *not* encompass *non*sexual conduct that *is* gender discriminatory. It is overinclusive insofar as it *does* encompass *sexual* conduct that is *not* gender discriminatory.

In a policy statement issued in 1990, the EEOC declared that, notwithstanding the 1980 guidelines' focus on sexual conduct or expression, sex-based harassment could also be accomplished through

> one who persists in making sexually explicit remarks after being asked to stop or after a clear indication that the remarks are unwelcome may intend to harass the person or persons . . . within whose hearing the remarks are persistently made. But arguably intimidating or exclusionary remarks that are not meant to be overheard could not constitute harassment.

Majority Report (ACLU/Special Committee on Sexual Harassment), Apr. 1995, at 4-3.

> Another committee report opposed the direct targeting requirement, explaining:
>
> Victims of sexual harassment . . . should not be required to prove that speech or conduct was specifically directed at them. If the workplace is so pervasively sexist—if sexual harassment is so widespread, broadly aimed, or effective—that nothing need be directed at any particular women . . . workers to destroy workplace equality, drive some or all of them off the job, hinder their job performance, or produce physical or psychological harm, then the violation is *worse* than if only a few persons are targeted for unequal mistreatment based on sex.

Minority Report (ACLU/Special Committee on Sexual Harassment), Apr. 14, 1995, at 10-11 (emphasis in original).

72. 29 C.F.R. § 1604.11(a) (1992) (emphasis added).

nonsexual conduct or expression.[73] Accordingly, in 1993 the EEOC decided to "put in guideline form the rule that sex harassment is not limited to harassment that is sexual in nature, but also includes harassment due to gender-based animus."[74] This effort, however, was unsuccessful. The EEOC withdrew the proposed new guidelines in response to much criticism that they violated First Amendment rights, and offered scant guidance on how to determine when non-sexual expression and conduct constitutes sex harassment.[75] Reflecting the failure of the EEOC guidelines to explicitly extend to nonsexual conduct and expression, many—although not all[76]—federal courts have failed to recognize that sexual harassment in violation of Title VII may consist of nonsexual behavior.[77]

73. *See EEOC Policy Guidance on Current Issues of Sexual Harassment, reprinted in* 60 DAILY LAB. REP., Mar. 28, 1990, at E-1, E-5:

> Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or pervasive" and directed at employees because of their sex.

Id.

74. 58 Fed. Reg. 51,266 (1993).

75. The proposed guidelines stated that harassing conduct includes, but is not limited to:

> (i) epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts that relate to race, color, religion, gender, national origin, age, or disability; and
> (ii) written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.

Id. at 268.

76. Courts of Appeals have held that predicate acts underlying a sexual harassment claim need not be clearly sexual in nature. *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir., 1987) (threats of physical and sexual violence and incidents of verbal abuse, in which the defendant called the plaintiff "Buffalo Butt," as well as uttered racial and ethnic slurs at her and in her presence, were properly considered in support of plaintiff's sexual harassment claim); McKinney v. Dole, 765 F.2d 1129, 1139 (D.C. Cir. 1985) (acts of physical aggression were properly considered in support of plaintiff's sexual harassment claim); *see also* Hall v. Gus Construction Co., Inc., 842 F.2d 1010, 1014 (8th Cir. 1988) ("While the definition of sexual harassment in the EEOC regulation emphasizes explicitly sexual behavior, the regulations do not state that other types of harassment should not be considered. . . . Intimidation and hostility toward women because they are women can obviously result from conduct other than sexual advances."); Cronin v. United Serv. Stations, Inc., 809 F. Supp. 922, 929 (M.D. Ala. 1992) (finding liability where comments and behavior were not overtly sexual, but were derogatory and insulting to women generally and demeaning to the plaintiff personally); Laughinghouse v. Risser, 754 F. Supp. 836, 840 (D. Kan. 1990) (denying summary judgment for defendant where most of the comments were not sexual in nature).

77. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596 (5th Cir. 1995) (citing nonsexualized nature of comments disparaging women's competence as police officers in rejecting sexual harassment claim by female police sergeant); Cram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995) (concluding that defendant's "interactions with [Plaintiff] . . . were brief, sporadic, nonsexual, nonthreatening, and polite," thereby not making out claim of hostile working environment); EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35, 40 (W.D.N.Y. 1994)(concluding that female employee who was called a "whore" could

Consistent with the EEOC guidelines' explicit focus on sexual conduct and expression—and the parallel focus of several courts—many workplace definitions of sexual harassment replicate the same misplaced focus. That focus is certainly consistent with the views of University of Michigan Law School Professor Catharine MacKinnon, who played a key role in formulating the concept of sexual harassment; she has repeatedly asserted that her concern *is* sexual conduct or expression, and not nonsexual, but sexist, conduct or expression.[78]

The Supreme Court has not ruled on whether the sexual nature of conduct or expression may make it, *ipso facto*, sexually harassing. But any such definition is plainly at odds with the *Harris* Court's contextual approach to hostile environment sexual harassment, which stresses the importance of all the facts and circumstances in any particular situation.[79] Thus, consistent with the Court's rationale, any conduct or expression must be evaluated in its overall setting, and cannot be deemed illegal harassment merely because of its con*tent* without regard to its con*text*.

Notwithstanding the *Harris* decision, too many workplace rules treat sexually oriented expression in an acontextual fashion, concluding that such expression automatically constitutes sexual harassment no matter what the surrounding facts and circumstances.[80] Worse yet, some lower courts have endorsed this approach.

Sexual expression, along with all other expression or conduct, may constitute sexual harassment, if, but only if, it is used in a certain way. This point is made by a case that was recently settled while it was pending before the United States Court of Appeals for the Fifth

recover for sexual harassment but that second female employee who was not directly called a "whore" could not).

78. *See, e.g*, CATHARINE A. MACKINNON, ONLY WORDS 56-57 (1993):

> For expressive purposes, the distinction that matters, in my view, is not between harassment based on race and harassment based on gender, which are often inseparable in any case, but between speech that is sex and speech that is not. Harassment that is sexual is a sex act, like pornography. Harassment that is not sexual works more through its content . . . . By harassment that is not explicitly sexual, I mean teachers' saying that women students are no good at this subject or calling on only men.

See also id. at 61-62; CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); Catharine A. MacKinnon, *Introduction*, 10 CAP. U. L. REV. i (1981).

79. *See supra* notes 43-54 and accompanying text.

80. For example, in 1992 the Los Angeles County Fire Department issued a sweeping sexual harassment policy that banned all "sexually-oriented magazines, particularly those containing nude pictures . . . posters or calendars which display nudity or are overtly sexual, [and] . . . [a]ll other material . . . of a clear sexual connotation" from the entire workplace, including dormitories, restrooms, and lockers. Amicus Brief for Feminists for Free Expression at 5, Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994) (quoting Los Angeles County Fire Department policy on sexual harassment).

Circuit, *Robinson v. Jacksonville Shipyards*.[81] In that case, male coworkers had forced sexually explicit photographs upon a female welder, Lois Robinson, in ways that made it more difficult for her to work, with apparent gender-discriminatory intent. For example, a picture of a nude woman, with her knees drawn up to her chest and exposing her genitals, was left on a toolbox where Robinson had to return her tools. Several male coworkers were present when she did so and laughed at her when she became visibly upset by the picture.[82] Similarly, another male coworker waved around a picture of a nude woman with long blond hair holding a whip, in an enclosed area where he and Robinson were working with about five other men. Robinson felt particularly targeted by this action, because she has long blond hair and worked with a welding tool known as a "whip."[83]

This type of conduct was appropriately deemed sexual harassment. But Robinson's federal court complaint, as well as the trial judge's order, went much further. Robinson sought, and the judge issued, a total ban on all "sexually suggestive" pictures, regardless of how they were used.[84] Thus, the court banished from the workplace not only the sexually oriented images that some employees used to harass Robinson, but also sexually oriented images that employees used for their own private enjoyment, and that interfered with neither their own work nor that of any coworkers.

Under the court's sweeping order, no employees could bring any sexually suggestive pictures to work, even if they kept the pictures in their own lockers, or discreetly looked at them during their lunch breaks, without showing them to any other employees. The judge's expansive definition of proscribed images included any picture of a woman "who is not fully clothed or in clothes that are not suited to . . . routine work in and around the shipyard and who is posed for the obvious purpose of . . . drawing attention to private portions of . . . her body."[85]

In 1992, the ACLU filed an amicus appellate brief in the *Robinson* case protesting the trial judge's overbroad purge of sexually ori-

81. 760 F. Supp. 1486 (M.D. Fla. 1991), *cross appeals dismissed per stipulation* (1995). According to Deborah A. Ellis, Legal Director of the NOW Legal Defense and Education Fund, which represented the plaintiff, "[t]he settlement agreement provides for damages and attorneys fees of an undisclosed amount, leaves intact the injunctive relief obtained from the federal trial court, and dismisses all pending appeals." Letter from Deborah A. Ellis to Terisa E. Chaw (Apr. 14, 1995) (on file with the author).

82. *Robinson*, 760 F. Supp. at 1497.

83. *Id.* at 1496.

84. *Id.* at 1540, 1542-43.

85. *Id.* at 1542-43.

ented expression. Our brief noted that his prohibition could well encompass fashion magazines, family photographs, and classic works of art.[86] Defenders of the *Robinson* order pooh-poohed these fears as speculative. But they proved sadly prophetic in 1993, when officials of the University of Nebraska invoked their sexual harassment policy to order a teaching assistant to remove a photograph of his wife in a bathing suit from his office.[87]

A growing number of sexual harassment rules overbroadly bar sexual expression from workplaces, even when such expression is not targeted at, or even seen by, any objecting female employees. For example, in 1992 the Los Angeles County Fire Department issued a sweeping sexual harassment policy that banned "[a]ll . . . material . . . of a clear sexual connotation" from the entire workplace, including dormitories, restrooms, and lockers.[88] Not only were firefighters forbidden to read these materials; they could not even bring them to the firehouse.

Such total bans on sexual speech are especially onerous for firefighters, who often spend several days in a row at their stations serving round-the-clock shifts. To forbid firefighters from looking at certain materials there, even when they are on personal time and in their private quarters, is tantamount to prohibiting them from enjoying these materials alone in the privacy of their homes.[89] Accordingly, the ACLU challenged the Los Angeles County Fire Department's sweeping restraints as violating the firefighters' rights of free speech and privacy. In 1994, we won that case in the trial court,[90] and Los Angeles officials subsequently adopted a policy acceptable to Johnson and the ACLU.[91]

86. Amicus Brief of ACLU at 21, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

87. David Moshman, *Banned at UN-L*, ACADEMIC FREEDOM COALITION OF NEBRASKA NEWSLETTER, at 4(2):2.

88. Los Angeles County Fire Department General Operations Manual, ch. 4, Subj. 20, at 3 (July 15, 1992) (quoted in Amicus Brief for Feminists for Free Expression at 5, Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994)).

89. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

90. Johnson v. County of L.A. Fire Dep't, No. 93-7589, 1994 U.S. Dist. LEXIS 8270 (C.D. Cal. June 10, 1994, *amended* Oct. 18, 1994) (holding that the policy was unconstitutional as applied to the quiet reading and possession of sexually oriented materials during a firefighter's personal time).

91. *See* Los Angeles County Fire Department General Operations Manual, ch. 4, subj. 20, at 3 (Sept. 15, 1994). While the revised policy prohibits "[d]isplaying nude photographs, including those contained in magazines, posters, calendars or other publications," it provides that

Beyond rules that sweepingly ban sexual expression from the workplace, an emerging, even more capacious, concept of sexual harassment would bar sexual expression from members of the general public. It has been claimed that stores that sell sexually oriented magazines such as *Playboy*, *Penthouse*, and *Playgirl* are committing sexual harassment against their female employees and customers. Such claims have been leveled at various businesses, including convenience stores and campus bookstores.

This overly expansive, distorted concept of workplace sexual harassment has even engendered efforts to ban sexually oriented expression from public accommodations.[92] For example, in 1991 a waitress at Bette's Oceanview Diner in Berkeley, California refused to serve a journalist who was reading an article in *Playboy* magazine on the ground that this constituted sexual harassment and hence violated Title VII.[93] Suppose a customer had been reading a newsletter from the National Organization for Women or from Planned Parenthood, and the waitress was a Catholic or Evangelical Protestant who believed that abortion is murder. Should she be permitted to refuse to serve the customer on the ground that this reading material constitutes religious harassment, thus violating Title VII's prohibition on religious discrimination in employment?[94]

The Bette's Oceanview Diner scenario raises an additional reason for protecting expression in workplaces, beyond concern for employee free speech rights: one person's workplace is another's public accommodation. In the case of streets, sidewalks, and parks, one person's workplace is for others what the Supreme Court has called a traditional public forum, where speech should be especially free.[95] This problem was explained in a brief by Feminists for Free Expression, a New York-based national organization, in the Los Angeles firefighters case:

> *[E]very conceivable location* constitutes the workplace for some group of workers. . . . [E]ven the[ ] quintessential public fora [e.g. streets and parks] are workplaces for maintenance crews, garbage collectors, postal carriers, and an endless array of other employees. These workers surely have an equal claim to protection from a 'hos-

"[s]uch materials may be viewed privately and quietly" and that "[t]hey may be viewed in the lounge areas, dorm areas or restrooms, or other areas as approved by the Battalion Chief." *Id.*

92. *See generally* STROSSEN, *supra* note 9, at 133-37.

93. *See* James R. Petersen, *The Playboy Read-in*, PLAYBOY, Feb. 1992, at 37-39.

94. Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a (1982) (prohibiting discrimination and segregation in places of public accommodation on the basis of race, color, religion, or national origin).

95. *See* TRIBE, *supra* note 15, at 964-65, 986-87.

> tile work environment.' . . . [W]e cannot afford to exclude so pervasive a realm of life as the workplace from First Amendment protection, without rendering free speech a nullity.[96]

These warnings are realistic. As journalist Mark Schapiro reported in 1994: "In more than a dozen recent cases, allegations of sexual harassment have been used to force removal of artwork from classrooms, municipal buildings, and public art galleries."[97] To add insult to injury, some of these incidents have involved works by female artists and with feminist themes. One victim of this misconceived notion of sexual harassment was Brazilian artist Zoravia Bettiol. In 1993, the Menlo Park, California City Hall presented an exhibit of Bettiol's woodcuts that featured Greek gods and goddesses and scenes from Romeo and Juliet. City officials abruptly terminated the exhibit a few weeks after it opened in response to a female worker's complaint that the nude bodies portrayed in some of these works were sexually harassing.[98]

It is ironic that in the name of protecting women against sexual harassment, women and feminists are being adversely affected, and this irony has reverberations beyond the Bettiol incident, alas. In some important respects workplace harassment regulations present no tension between gender equality and free expression, although the title of the Piper Lecture implies otherwise ("The Tensions Between Regulating Workplace Harassment and the First Amendment"). Rather, harassment regulations that falsely equate sexual expression with sexist harassment threaten *both* women's equality *and* free speech.

Let me briefly sketch three reasons for this conclusion. First, when women or employers cry "sexual harassment!" at any passing reference to sex, they trivialize the issue, make it a laughingstock, and deflect attention and resources from the serious ongoing problems of gender discrimination in the workplace, including the many legitimate claims of hostile environment harassment.

Second, women's equality is undermined by the presumption that the mere presence of sexual expression in the workplace is harassing; this presumption resurrects the very traditional and very disempowering notion that sex and sexual expression are intrinsically demeaning

96. Amicus Brief of Feminists for Free Expression at 6-7, Johnson v. County of L.A. Fire Dep't., 865 F. Supp. 1430 (C.D. Cal. 1994) (emphasis in original).

97. Mark Schapiro, *The Fine Art of Sexual Harassment: Aphrodite Gets Her Day in Court*, HARPER'S, July 1994, at 62-63.

98. *See Hillary the Stupendous*, WASH. TIMES (D.C.), Apr. 10, 1993, at B2 (Editorial).

to women. It is especially ironic that the same desire to protect women from sexual language that is now said to *advance* women's employment opportunities was previously used to *bar* women from many such opportunities, including in my own profession—the law: Historically, judges justified upholding state laws that barred women from practicing law or serving on juries by citing the need to "protect" women from vulgar or sexual language.[99]

As recently as 1949, the Arkansas Supreme Court rejected a challenge to a statute that allowed women to serve on juries only if they specifically volunteered on this very ground. The court "reasoned" as follows: "Criminal court trials often involve testimony of the foulest kind, and . . . the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove . . . degrading to a lady."[100] As we all know from the O.J. Simpson trial, that description is factually accurate! But it does not constitute a legally persuasive reason for excluding women from the workplace. Nor should it now be resurrected to exclude certain language from the workplace out of the same misplaced concern for protecting women. I agree with Professor Kingsley Browne, when he wrote: "The assumption that women as a group may be more offended by profanity than men as a group seems like just the sort of stereotype that Title VII was intended to erase."[101]

Third, the false equation between sexual expression and sexual harassment subverts women's rights in the workplace: by making it harder for women to get jobs and to succeed in them. This is particularly true in occupations that depend heavily on mentor relationships. For example, many female associates at law firms believe that, because firms fear potential harassment charges, they are being denied travel, social, and other opportunities for informal interaction with male partners and clients that would help them rise in their firms.[102]

CONCLUSION

In conclusion, I believe it is possible to develop and apply principles for regulating sexually harassing workplace expression that are faithful to both free speech and equality rights. No doubt, occasional cases will arise where it will be so difficult to draw the line between

99. *See, e.g.*, Bailey v. State, 219 S.W.2d 424 (Ark. 1949).
100. *Id.* at 428.
101. Browne I, *supra* note 2, at 488.
102. *See, e.g.*, Mindy Friedler, *Leveling the Playing Field: How to Turn Fantasy Into Reality*, L. PRAC. MGMT., Sept. 1993, at 30.

protected free speech and proscribable harassment that even individuals committed to both equality and free speech will disagree. But, difficult as the task might sometimes be, it must be undertaken, consistent with the important constitutional rights at stake. Some have advocated the simpler solution of allowing free speech to always trump equality concerns, or vice versa. But any such approach was well-answered by H.L. Mencken when he observed: "For every complex problem, there is a solution which is simple, elegant . . . and wrong."[103]

103. Mark A. Hall & John D. Columbo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH L. REV. 307, 330 n.76 (1991) (quoting H.L. Mencken); *see also* United States v. McCoy, 32 M.J. 906, 909 (1991) ("For every complex problem there is a simple solution . . . and it is usually wrong.") (attributing quote to H.L. Mencken); Bing v. Florida, 492 So.2d 833, 835 n.9 (Fla. Dist. Ct. App. 1986) ("For every complex problem there is a solution that is short, simple and wrong.") (citing H.L. Mencken); United States v. Michael, 645 F.2d 252, 264 n.6 (5th Cir. 1981), *cert. denied*, 454 U.S. 950 (1981) ("For every complex problem there is usually a simple answer—and it's wrong.") (quoting H.L. Mencken).