Verbal Sexual Harassment as Equality-Depriving Conduct

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INTRODUCTION

Title VII of the Civil Rights Act of 1964, as amended, makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." The federal regulations promulgated pursuant to Title VII define two types of sexual harassment that amount to unlawful discrimination. First, quid pro quo sexual harassment involves sexual misconduct directly linked either to the grant or denial of an economic benefit—for example, "sleep with me or you're fired." Second, hostile or offensive work environment sexual harassment involves "[u]nwelcome . . . verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."
Because the federal regulations deem certain "verbal ... conduct" to be illegal, a potential First Amendment issue arises. "[T]he right to express one's social views is generally considered to be at or near the core of the first amendment's protection of free expression," and Title VII prohibits certain expression, albeit sexually abusive expression. Perhaps, as Professor Kingsley Browne argues, "the value of free expression is sufficiently high that the risk of harm must be tolerated."

Professor Browne expresses concern that under the hostile environment theory of sexual (and racial) harassment courts have failed to protect core, "political" speech in the workplace such as: "'You're not a human being, you're a nigger;" "women belong in the bedroom and not the factory;" and epithets like "'polack,' 'kike,' 'spic,' 'guinea,' 'honky,' 'mick,' 'coon,' and 'black bitch.'" Professor Browne believes that society should recognize the value of expressive activity like "'naked or nearly naked women in sexually suggestive poses displayed on the walls,'" as well as whistles and catcalls. He argues that the onslaught of hostile environment sexual harassment claims under Title VII against employers on the basis of such expressions has created an atmosphere which impinges upon the First Amendment rights of employees. He abuse in order to keep his job or to earn some economic benefit. In a quid pro quo case, the employee is denied or granted, or led to believe that she will be denied or granted, some economic benefit depending upon whether she accedes to a sexual demand; it is a kind of sexual blackmail. In a hostile environment case, the conditions of employment have become unbearable due to sexual abuse. Sexual abuse and coercion are at the core of both theories.

5. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
6. Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481, 483 (1991); see also Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 503 (1984) (holding that "the First Amendment presupposes that the freedom to speak one's mind is ... an aspect of individual liberty.").
7. Browne, supra note 6, at 524.
8. Id. at 501 n.139 (quoting Bailey v. Binyon, 583 F. Supp. 923, 925 (N.D. Ill. 1984)).
9. Id. at 501.
10. Id. at 510 (quoting Snell v. Suffolk County, 611 F. Supp. 521, 532 (E.D.N.Y. 1985)).
11. Id. at 508 (quoting Tunis v. Corning Glass Works, 747 F. Supp. 951, 954 (S.D.N.Y. 1990)).
12. Id. at 509.
13. Id. at 501-02.
argues further that the threat of hostile environment claims compels employers either to censor employee expression that is constitutionally protected outside of the workplace or to run the risk of legal liability based upon this otherwise protected expression. P Even if employer liability is premised solely on expression that is not constitutionally protected outside of the workplace, the "risk that liability may be imposed based in part on protected speech is intolerable under the first amendment." Finally, Professor Browne concludes that enforcement of such claims in federal courts constitutes impermissible "state action" in violation of the First Amendment.

Part I of this Note argues that commentators like Browne and some courts have mischaracterized the harm of verbal sexual harassment as mere "offense." Rather, the true harm of a sexually hostile environment created by words and expressive conduct extends beyond offense, emotional distress and economic displacement; at bottom, the harm is equality-deprivation.

14. Id. at 483. The federal regulations provide that an employer "is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c) (1993). "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." Id. § 1604.11(d).

15. Browne, supra note 6, at 484. Browne argues that this risk exists because the hostile environment standard is impermissibly vague. See 29 C.F.R. § 1604.11(a)(3) (1993). It "give[s] little notice of what expression is prohibited." Browne, supra note 6, at 502. Therefore, employers tend to overregulate speech in order to head off potential lawsuits. Id.

16. Id. at 510-11. Even though sexual harassment claims under Title VII are between private parties, federal court enforcement of the law against sexual harassment represents "state action" subject to scrutiny under the First Amendment. Id. at 511. See also New York Times v. Sullivan, 376 U.S. 265 (1964), in which the Court held with respect to a libel action under Alabama state law, that:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. . . . The test [of state action] is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265. Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1816-18 (1992). Browne argues that just as the enforcement of some libel claims brought by private parties in state courts may violate the First Amendment (applied to the states through the Fourteenth Amendment), so too may federal court enforcement of some hostile environment claims violate the First Amendment. Browne, supra note 6, at 511.
Part II explains how a sexually hostile environment is equality-depriving by arguing that words which create a sexually hostile environment must be understood in historical and social context. Words can be used not only to communicate ideas, but also to perform acts of coercion and sexual abuse. Furthermore, sexually abusive speech must be understood in its institutional context. The workplace is the dominant institution in the lives of most adult citizens. It is a community that not only provides financial sustenance, but also serves an identity-forming function. How a worker is perceived and treated in the workplace is related intimately to the formation of his or her self-identity. Sexually abusive speech in the workplace proves to be equality-depriving in the sense that it creates a communally shared set of meanings, a workplace ethos, that defines a harassment victim as inferior to her opposite sex counterpart.

Part III argues that the workplace should be viewed as a public sphere in which the democratic process matters. Decisions that have broad societal impact are made in the workplace. If democracy in this country is to mean more than the occasional vote for a public official, workers should have a greater role and voice in workplace governance. Affording workers a greater voice in order to democratize the workplace, however, does not entail the toleration of sexually abusive expression. Such toleration would only substitute one hierarchy, management over labor, for another, male over female, or vice versa. An employee's ability to be heard in the workplace democracy must not be impeded by a workplace ethos that devalues another employee's humanity.

Part IV explores why the regulation of verbal sexual harassment in the workplace meets constitutional challenges. The regulation of sexually abusive speech in private workplaces is no more problematic from a constitutional perspective than the regulation of other types of coercive speech in the traditional labor and public employee contexts. In those contexts, courts balance free speech interests, of employees against statutory and common-law interests such as industrial harmony and workplace efficiency. Following the balancing approach adopted in the labor and public employee contexts, courts concerned about encroaching on employee free speech in hostile environment cases should balance any free speech interest in the alleged verbal sexual harassment against the compelling governmental interest in ensuring sex equality. A
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balancing of free speech and equality interests often should favor the prohibition from the workplace of sexually stereotyped comments, epithets, propositions, and pornography. The few cases in which the Supreme Court has simultaneously addressed the First Amendment and equality interests reveal a precedent of not forsaking equality to foster an absolutist position on freedom of speech.

Part IV also argues that recent Supreme Court decisions have suggested that the restriction of sexually abusive workplace speech may be legal as a content-neutral regulation of equality-depriving conduct. Hostile environment law is constitutional because it targets equality-depriving conduct generally rather than focusing on particular messages or ideas.

Finally, Part V explores the sweep of hostile environment law, and illustrates that as a content-neutral regulation of equality-depriving conduct, it is neither unconstitutionally overbroad nor vague. This Note concludes that sexual harassment in the workplace is not only sexual abuse, but also constitutes equality-depriving conduct. Consequently, it can be regulated without offending the First Amendment protection of free speech.

I. THE TRUE HARM OF SEXUAL HARASSMENT

In Meritor Savings Bank v. Vinson, the Supreme Court held that to recover for sexual harassment under a hostile environment theory, an individual need not prove any economic harm such as lost wages or job termination. For the Court, proof of harassing conduct is also proof of harm because no woman should be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work..." Although the facts in Vinson evidenced criminal behavior—including sexual assault and rape—as well as

18. Id. at 64. The Court found that "[t]he phrase 'terms, conditions, or privileges of employment' [in Title VII] evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.'" Id. at 64 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).
19. Id. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (1982)).
20. The plaintiff's supervisor repeatedly demanded sex from the plaintiff, fondled the plaintiff, exposed himself to the plaintiff, and forcibly raped the plaintiff. Id. at 67.
Title VII liability, the Court did not hold that a hostile environment claim fails unless some form of physical sexual abuse is alleged. Instead, the Court held that the sexual harassment need only be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”21 Thus, in principle, Vinson sanctioned hostile environment claims based solely on severe or pervasive verbal sexual harassment.

Eight years after Vinson, the Supreme Court endorsed the viability of hostile environment claims based solely on verbal harassment. In Harris v. Forklift Systems, Inc.,22 the company president told the plaintiff, Harris, in the presence of other female employees, “You’re a woman, what do you know?”23 and “[w]e need a man as the rental manager.”24 He also called her a “dumb ass woman,” suggested that the two of them “go to the Holiday Inn to negotiate [Harris’] raise,” and asked Harris and other employees to get coins from his front pants pocket.25 The company president also threw objects on the ground in front of Harris and other women and asked them to pick up the objects,26 made sexual innuendoes about Harris’ and other women’s clothing,27 and stated, while Harris was arranging a deal, “[w]hat did you do, promise the guy ... some [sex] Saturday night?”28 The Court’s opinion was completely silent regarding any First Amendment implications of the fact that the harassment was accomplished entirely through speech and expressive conduct. The Court’s and the parties’ focus in Harris instead was on another question entirely: What is the harm of sexual harassment?

The Court found error in the lower courts’ dismissal of Harris’ claim based solely on her failure to prove that the harassment seriously affected her psychological well-being.29 The Court characterized the harm of hostile environment sexual harassment as the presence of “[a] discriminatorily abusive work environment,”30 reiterating that the harm of sexual harassment is the harassing behavior or words themselves, not their tangible effects, either economic or

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21. Id. (quoting Henson, 682 F.2d at 904).
23. Id. at 369.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at 371.
30. Id. at 370–71.
psychological, on the victim.\textsuperscript{31} Because a hostile work environment "offends Title VII's broad rule of workplace equality,"\textsuperscript{32} the harm of harassment does not lie solely in the victim's mental instability or decreased job performance; these are merely effects correlated with the "legal harm" of a hostile work environment and its concomitant deprivation of equality.\textsuperscript{33} Harassment injures the principle of equality, a principle to be honored in the workplace.\textsuperscript{34}

In light of \textit{Harris}, Professor Browne's argument that sexually demeaning epithets and speech in the workplace should be protected under the First Amendment appears to be obsolete. He characterizes the harm of such harassment as "offense": "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."\textsuperscript{35} The harm of sexual harassment, however, goes beyond offended sensibilities, emotional distress, and decreased employment opportunities to an "offended" rule of equality.\textsuperscript{36}

This misperception of the harm of harassment probably stems in part from lower court decisions documenting the tangible harms correlated with a hostile environment. These

\begin{itemize}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} at 371.
\item \textsuperscript{33} \textit{Id.} at 372 (Scalia, J., concurring).
\item \textsuperscript{34} Congress has not outlawed sexual harassment, and discrimination in general, because of economic and utilitarian reasons. The quintessential harms of harassment are its affront to human dignity and its denial of a human right. The tangible effects of sexual harassment merely shadow the true nature of sexual harassment—the denial of one's equal standing in the community on the basis of an irrelevant, biological characteristic.
\item With regard to the Equal Protection Clause, the Supreme Court
\end{itemize}

has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.


\textsuperscript{35} Browne, \textit{supra} note 9, at 488.
\textsuperscript{36} \textit{See supra} notes 32–34.
decisions have proven to be a double-edged sword. The lower courts, with the aid of experts on sexual stereotyping, have documented that psychological and economic harms are correlated with verbal sexual harassment and pornography in the workplace. They have reiterated that sexual harassment leads not just to "offense" but also to severe psychological, and sometimes physical, harm.\textsuperscript{37} Courts also have recognized that sexual harassment in the form of pornography and degrading and stereotyped comments and jokes perpetuates economic harms to women, such as disparate treatment at work and discouragement from remaining in the workforce.\textsuperscript{38} But by

\textsuperscript{37} E.g., Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1506 (M.D. Fla. 1991) (noting that "stress as a result of sexual harassment is recognized as a specific, diagnosable problem by the American Psychiatric Association."). The court found the effects of stress to include "distraction from tasks, dread of work, ... an inability to work, ... anger, fear of physical safety, anxiety, depression, guilt, humiliation, embarrassment, ... sleeping problems, headaches, weight changes, and other physical ailments." Id. at 1506–07; see also Barbara A. Bremer et al., \textit{Do You Have to Call It "Sexual Harassment" to Feel Harassed?}, 25 C. STUDENT J. 258 (1991) (stating that "sexual harassment in the workplace has been strongly implicated in the appearance of clinically significant symptoms such as depression, loss of weight, sleep disorders, mood changes, decreased concentration, fear, and physical illness.").

\textsuperscript{38} See, e.g., Robinson, 760 F. Supp. at 1502–05. In \textit{Robinson}, Dr. Susan Fiske, an expert on sexual stereotyping, testified that stereotyping is a thought process which involves "categoriz[ing] people along certain lines," so that "in the process of perceiving people as divided into groups, a person tends to maximize the differences among groups, exaggerating those differences, and minimize the differences within groups." Id. at 1502. As a consequence, a superior who "categorizes a female employee based on her sex," might expect that female to be "sexy, affectionate and attractive" and consequently have a greater tendency to give a lower evaluation to that female if she does not conform to that model. Id. at 1502–03. Any stimulus which creates stereotyped thinking ("priming" people to think in this manner) therefore can cause male employees "to view and interact with women coworkers as if those women are sex objects." Id. at 1503; see also Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (stating that "Congress designed Title VII to prevent perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women."); Kristen R. Yount, \textit{Ladies, Flirts, and Tomboys: Strategies for Managing Sexual Harassment in an Underground Coal Mine}, 19 J. CONTEMP. ETHNOGRAPHY 396, 401 (1991) (documenting sexual harassment of female coal miners and finding that "stereotyped conceptions ... were used by antagonistic bosses and workers to justify discrimination in training and assignment opportunities offered to women on the grounds that female workers were impediments to production, safety, and morale."); \textit{Men Exposed to Sexual Material More Likely to Harass Women in Workplace, Psychologist Says}, DAILY LAB. REP. (BNA), Mar. 26, 1993, at A-6 (describing a study which suggests that men's exposure to sexual graffiti "prime" men to think of women in sexualized ways).

While the Supreme Court has not discussed sexual stereotyping in the context of a hostile environment sexual harassment case, the Court has recognized the role that sexual stereotyping may play in disparate treatment cases. \textit{See Price Waterhouse v. Hopkins}, 490 U.S. 228, 251 (1989) (plurality opinion) (holding an accounting firm liable for sex discrimination by denying partnership to a woman when it gave
justifying anti-discrimination law solely by the economic and psychological damage that discrimination creates, many courts have conceded an equality argument. The courts therefore have transformed anti-discrimination law into a law of utility intended to erase the economic fallout of discrimination, not to ensure the civil liberty of equality. This transformation is troubling because even if it were economically efficient to discriminate and even if discrimination victims seemed content with, or at least used to, habitual abuse, the principle of equality would still condemn discriminatory behavior.

II. UNDERSTANDING VERBAL SEXUAL HARASSMENT AS EQUALITY-DEPRIVING CONDUCT

Although invoking the equality principle runs the risk of compounding abstraction upon abstraction in the debate over sexual harassment and free speech in the workplace, equality should not be understood merely as an abstract principle. People do not act in an abstract world; people's lives are shaped in the physical world. Equality therefore is an ideal which arises out of our actions, an epiphenomenon of our choices in the material world. Like "excellence" or "perfection," however, equality cannot be legislated; it must be inculcated. Individuals must be enlightened, encouraged, and sometimes compelled to act or to refrain from acting to promote equality for themselves and for others. It is therefore crucial that people appreciate the

credence and effect to partners' comments that resulted from sex stereotyping about the woman being too aggressive and not feminine enough).

39. The notion that an abstract principle like equality can be human-made can be understood from an existentialist point of view. As John-Paul Sartre stated:

When we say that man chooses his own self, we mean that every one of us does likewise; but we also mean by that that in making this choice he also chooses all men... Therefore, I am responsible for myself and for everyone else. I am creating a certain image of man of my own choosing. In choosing myself, I choose man.

JEAN-PAUL SARTRE, EXISTENTIALISM AND HUMAN EMOTIONS 17–18 (Bernard Frechtman trans., 1957).

The same idea can also be understood from a Kantian perspective which asserts that "every rational being [is] one who must regard himself as making universal law by all the maxims of his will, and must seek to judge himself and his actions from this point of view." IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 100 (H.J. Paton ed. & trans., 3d ed. 1956).
historical, social and institutional context in which they act and speak; for it is context that provides meaning to words, distinguishes harmless flirtation and teasing from sexual abuse and coercion, and determines whether an individual will attain a sense of self-identity grounded in inferiority or equality. Only with a sensitivity to context can people perceive the unbreakable connection between their choices to speak and act in the material world and the integrity of the equality principle.

A. The Coercive Nature of Verbal Sexual Harassment

Actions and words have no meaning absent context. As linguistic philosopher John Searle argues:

If I have a contract with you to cut your grass weekly and on successive weeks I stab it with a butcher knife, gouge a hole in it with a buzz saw, and make incisions with my finger nail, have I literally complied with the letter of the contract? I am inclined to say no.\textsuperscript{40}

The meaning of a sentence containing the word "cut" cannot be only the sum total of the dictionary definitions of the individual words within such a sentence. "[A]s members of our culture we bring to bear on the literal utterance and understanding of a sentence a whole background of information about how nature works and how our culture works."\textsuperscript{41}

Searle's observation is extremely pertinent in the context of hostile environment sexual harassment. Degrading comments and epithets based on sex have meaning beyond the dictionary definitions of their linguistic parts.\textsuperscript{42} Their use captures a painful historical context of powerlessness, rape, and lack of legal and social identity, except as prostitutes\textsuperscript{43} or as men's

\textsuperscript{40} JOHN R. SEARLE ET AL., SPEECH ACT THEORY AND PRAGMATICS 226 (1980).
\textsuperscript{41} Id. at 226–27.
\textsuperscript{42} For example, "Bitch" when applied to a woman means more than "a spiteful woman." AMERICAN HERITAGE DICTIONARY 183 (2d ed. 1985). In fact, the etymology of "bitch" reveals that to be called a bitch, at least to 18th and mid-19th century London prostitutes, was more degrading than to be called a whore. I. ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 57 (5th ed. 1960).
\textsuperscript{43} In his preface to Mrs Warren's Profession, George Bernard Shaw explained that he was inspired to write this play about "the big international commerce" in prostitution to show how "prostitution is caused, not by female depravity and male
Although such words literally express hatred in a gender-specific way, their true power lies in their ability to invoke instantaneously an entire history of subjugation, as well as the present day realities of rape, incest, and domestic violence. They are words of sexual aggression and abuse; "[a]s licentiousness, but simply by underpaying, undervaluing, and overworking women so shamefully that the poorest of them are forced to resort to prostitution to keep body and soul together." George Bernard Shaw, Preface to Mrs Warren's Profession, in PLAYS UNPLEASANT 181 (1983). He condemned an international prostitution trade maintained and promoted not only by prostitutes and their pimps, but also "by the landlords of their houses, the newspapers which advertise them, the restaurants which cater for them, and, in short, all the trades to which they are good customers, not to mention the public officials and representatives whom they silence by complicity, corruption, or blackmail." Id. at 208.

44. See MARTHA J. LANGELOAN, BACK OFF! HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS 58-72 (1993) (draft version) (on file with the University of Michigan Journal of Law Reform). Langelan sketches a history of the sexual harassment of women. She traces this history through the story of Susanna from the Book of Daniel in the Bible, in which Susanna, who refused the sexual advances of two elder judges, was accused of adultery and forced to face a capital trial; the "droit due seigneur," which gave each medieval lord the right to have sex on the first marriage night with any female serf who married on his land holdings; the slavery of African-American women and the male slaveholders' nearly absolute power to sexually violate them; and the plight of women working in the early factories and textile mills who were subject to sexual coercion from mill owners, managers, and foremen. Id.

45. It therefore is disingenuous to argue that "[a] supervisor who refers to subordinates by terms such as 'dumb bastard,' 'dumb bitch,' 'fat bastard,' 'red-headed bastard,' and 'black bastard,' cannot fairly be said to have discriminated against the woman and the black in favor of the fat, dumb, and red-headed employees." Browne, supra
incantations while sexual abuse is occurring, they carry that world with them."^46

It is difficult to defend or dismiss such degrading comments and epithets as "just part of the overall social pattern of sexual attraction and 'courtship' between men and women."^47 Langelan argues that specific behavior, for example, sexual harassment as courtship behavior, becomes a general social practice only when it is successful in achieving its end. As an empirical matter, however, sexual harassment has proven to be an ineffective and counterproductive method of generating sexual interest on the recipient's part: "Women react with disgust, not desire, with fear, not fascination."^49 Langelan therefore argues that sexual harassment must serve some purpose other than courtship to have been so widely adopted as a social norm. She proposes that this other purpose is "to coerce women, not attract them."^50 Men harass women because (1) it is sexually arousing, as with street flashers, obscene phone callers, and rapists who derive pleasure from sexual victimization and conquest;^51 (2) it is an assertion of male dominance that provides men with a gender-based ego boost;^52 or (3) it is an effective tool to maintain social, economic, and political privilege. In the employment context, harassment can be utilized to undermine the performance of a co-worker or to drive women out of traditionally male jobs.^^53

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note 6, at 489. Red-heads were never enslaved and systematically treated as inferior human beings because of their hair color. They were never denied a legal identity or singled out as victims of rape and domestic violence. To say that "red-head" or "fat" is equivalent to "bitch" ignores the reality of what those terms mean when actually employed; the history of and the cultural assumptions regarding women simply are not equivalent to those of red-heads. These types of comparisons only underscore an ignorance of context and a denial of people's histories and life experiences. Context may transform mere teasing into active coercion, exclusion, and denial of equality.

46. CATHERINE A. MACKINNON, ONLY WORDS 58 (1993).
47. LANGE LAN, supra note 44, at 24.
48. Id.
49. Id. at 25.
50. Id. at 26.
51. Id. at 29.
52. Id. at 34.
53. Id. at 40; see also Yount, supra note 38, at 397. In conducting her research on female coal miners, Yount found that "[w]omen who worked in higher-prestige production positions (as opposed to lower-prestige labor positions) were more likely to meet with sexual harassment intended to exclude them." Id. at 402. One miner named Flo reported:

[A co-worker] was harassing me about how long he was and how good it would probably make me feel if I had him and the rest of the crew started talking about
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The courts seem to agree with this model of sexual harassment as coercion, particularly with regard to verbal sexual harassment. The correlation between verbal sexual harassment in the workplace and the economic displacement and sexual degradation of its victims is so strong that courts presume discriminatory intent—a requirement for recovery under Title VII—from the presence of sexually derogatory words and expression.54

Innumerable combinations of words exist which can degrade and disempower in an instant.55 Because sexually harassing words immediately invoke a context, history, and a set of stereotyped assumptions about women, they often are perceived as threats by women. A woman can never be certain that harassing words will not escalate into more harassing words or physical assault.56 Further, if pornography also is prevalent in the workplace, it would be quite reasonable for women to

— I heard a rumor that I had slept with every [manager] there.—They made a lot of really bad, bad times for me. . . . Practical jokes [sigh]. It was all on purpose and a lot of them were in on it.—Finally, I just told them, “I got to quit.”

54. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (holding that “[t]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course”).

55. See Volk v. Coler, 845 F.2d 1422, 1426 (7th Cir. 1988) (finding substantial evidence to support sexual harassment claims against an alleged harasser who called the female plaintiff “hon,” “honey,” “babe,” and “tiger”); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988) (affirming Title VII liability where alleged harassers referred to women construction crew members as “fucking flag girls,” “Blond Bitch,” and “Herpes”); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993) (finding a violation of Title VII in a workplace where men “used language and epithets which were ‘intensely degrading’ to women, e.g., ‘bitch,’ ‘whore,’ and ‘cunt,’ words which ‘derive their power to wound not only from their meaning but also from the disgust and violence they express phonetically.’”); Cline v. General Elec. Capital Auto Lease, Inc., 757 F. Supp. 923, 926–27 (N.D. Ill. 1991) (finding a hostile work environment where harasser used terms like “fat ass,” “dyke,” “dragon lady,” and “syphilis”).

56. See Andrews, 895 F.2d at 1482–83. The Andrews decision involved instances of escalating sexual harassment experienced by two women in the Philadelphia Police Department. Both women were referred to in an offensive and obscene manner. Pornographic pictures of women also were displayed on the inside of a locker which most often was kept open. One of the plaintiffs had her car vandalized three times, had her typewriter damaged to the point of requiring repair, had pornographic pictures placed in her desk drawer, and had her appointment book stolen. She also received harassing anonymous phone calls and received a severe burn on her back when she put on a shirt which had been covered with a lime substance. Id. at 1471–74; see also Yount, supra note 38, at 417 (documenting harassment of woman coal miner who “eventually quit her job and sought psychological counseling when the harassment intensified, culminating in an episode in which she was stripped and greased”).
believe that what is being done to the nude models in the glossy pictures might be done to them as well.\textsuperscript{57}

A woman's perception of sexual harassment therefore typically does not stem from a "hysterical imagination," but instead from a reasonable fear of economic reprisal, humiliation, or sexual assault.\textsuperscript{58} Consequently, several jurisdictions have accommodated the distinct perspective that women have on sexual harassment by inquiring, in the case of a female plaintiff, whether a "reasonable woman would consider [conduct] sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."\textsuperscript{59} The \textit{Yates} court held that:

In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only

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\item \textsuperscript{57} "Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets." American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985).

\item \textsuperscript{58} \textit{Langelan}, supra note 44, at 27; see also Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). The Ninth Circuit noted that:

\begin{quote}
[B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.
\end{quote}

\end{itemize}

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} at 879. Psychological studies have documented women's greater tendency to perceive verbal comments and sex-stereotyped joking as sexual harassment. \textit{See} Amy H. Gervasio & Katy Ruckdeschel, \textit{College Students' Judgments of Verbal Sexual Harassment}, 22 J. APPLIED SOC. PSYCHOL. 190, 208-09 (1992) (finding that denigrating a woman's abilities and using diminutives or euphemistic, objectifying terms for sex is not yet viewed as harassing or very inappropriate by men); Allison Bass, \textit{Harassment Seen Eroding Class Climate}, \textit{BOSTON GLOBE}, June 2, 1993, at 1, 6 (reporting a survey of public school students in grades 8 through 11 in 79 schools nationwide which found that girls suffer adverse emotional, behavioral and educational impacts from sexual harassment three times more often than boys and that girls are far more likely than boys to want to stay home from school because of the harassment). Other research has revealed significant perceptual differences between men's and women's responses to being sexually approached in the workplace. In this type of situation, "[a]pproximately two-thirds of the men responded that they would be flattered; only fifteen percent would feel insulted. For the women the proportions [were] reversed." Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (discussing the effects of sex stereotyping and the sexualization of the workplace).

\item \textsuperscript{59} \textit{Ellison}, 924 F.2d at 879 (emphasis added); \textit{see also} Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) (discussing the sexual harassment of two female employees by their supervisor).
\end{itemize}
reasonable that the person standing in the shoes of the employee should be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.\(^{60}\)

Given the social definition of women provided by history, cultural stereotypes and pornography, understanding the real import behind certain utterances and glossy pictures on the walls can be a particularly frightening prospect for women. Verbal sexual harassment in the workplace, once revealed to be a means of threatening and coercing, sounds less and less like political discourse, and more and more like a tool of equality-deprivation.

**B. The Relationship between Verbal Sexual Harassment in the Workplace and Self-Identity**

Verbal sexual harassment is not only equality-depriving in the sense that a victim is subject to coercion based on her sex, but also in the sense that severe or pervasive sexually abusive speech in the workplace defines her as inferior and instills this sense of inequality into her self-identity. For most adult citizens in this country, the workplace represents a community in which they spend a substantial portion of their time and energy interacting with others.\(^ {61}\) It is their primary source of financial sustenance, personal growth, dissatisfaction, and stress.\(^ {62}\) Consequently, for many individuals, the quality of their work environment, specifically the manner in which they habitually interact with and are viewed and treated by other employees, is intimately related to the formation of their self-identities.\(^ {63}\)

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\(^{60}\) Yates, 819 F.2d at 637.

\(^{61}\) "The modern corporation has emerged as the central form of working relations and as the dominant institution in society. In achieving dominance, the commercial corporation has eclipsed the state, family, residential community, and moral community." STANLEY A. DEETZ, DEMOCRACY IN AN AGE OF CORPORATE COLONIZATION 2 (1992).

\(^{62}\) "Increasingly, work is understood not simply as a paycheck or a fate, but as one of the most important opportunities in life to grow and to experience personal autonomy, self-governance, and interpersonal connection." Karl E. Klare, Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform, 38 CATH. U. L. REV. 1, 9 (1988); see also DEETZ, supra note 61, at 17 (discussing the role of corporate workplaces "in the production of meaning, personal identity, values, knowledge, and reasoning").

\(^{63}\) Dertz argues that:
As the means of defining our life experiences and sharing them with others, language use within a community like a workplace is perhaps the most significant factor that shapes personal identity. A linguistic system represents a particular way of perceiving reality and demarcating differences between things. Moreover, language is the historical product of human minds, and therefore manifests particular value judgments and ways of perceiving reality that have become institutionalized.

In other words, on the issue of gender, for example, whenever we distinguish between men and women, whenever we make a description that notes gender, what we're doing is saying distinction along the line of gender is important and valuable to this society. Man or woman does not simply represent something real out-there; the terms put into play a way of paying attention to the "out-there." In the sense that language represents a historically-created and community-accepted body of meanings in society, language use plays a significant identity-forming function for males and females.

Because the workplace is such a dominant institution in many individuals' lives, language not only plays a reality and

The workplace is a site of learning. Thinking routines and social practices utilized over and over again, day after day, gradually influence the way one thinks. Corporate organizations serve a place where different values and forms of knowledge and different groups' interests are articulated and embodied in decisions, structures and practices. As institutions, they provide meaning and identity.

DEETZ, supra note 61, at 38–39, 54.

64. "Not only is [language] a major constitutive condition of experience itself, but it serves as the medium through which other institutions are brought to conception, both in production and understanding." Id. at 128.

65. "Language holds the possible ways we will engage in the world and produces objects with particular characteristics." Id. at 129–30.

66. Id. at 130–32.

67. Id. at 132. Thus, "the female can be upheld as a mother in a kinship system, a wife in a marital relation, and so forth. In each case each individual so constituted is both advantaged and disadvantaged in the way the institutional arrangements specify opportunities and constraints." Id.

68. "The moral development of individuals cannot be understood without recognizing that individuals are social beings who draw their understandings of themselves and the meaning of their lives from their participation with others. To find ourselves we seek ideas through this commonly created world of language." Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 Tex. L. Rev. 1, 21–23 (1990).
identity forming function at the societal level, but at the institutional, workplace level as well. 69 "The corporation is a special type of fiction held in place by a set of discourses including legal statutes, contracts, and linguistic production of roles, authority, and meaning." 70 It possesses a persona, a "social memory," that records and institutionalizes routines and which "recalls, interprets, and makes the events of the past have implication for the future." 71 The social memory is "selective," however: "Only some experiences are included [in the creation of the social memory], and not all groups are equally involved as historical subjects or as present constructors of the memory. Memory is constructed in the interests of some but not all." 72

Arguably, toleration and encouragement of severe or pervasive sexually abusive speech in the workplace create a social memory that defines female employees as inferior to male employees. Over time, the degrading stereotypes that sexually abusive language embodies "develop a quality of realness and self-evidence," 73 elevating the value and status of maleness over femaleness in the workplace. The sexually hostile work environment proves to be a tangible thing, a workplace ethos comprised of stereotyped definitions and meanings which all employees draw upon, an unwritten reference manual that dictates that male and female employees must view and interact with one another on an unequal plane. 74 This forced participation in and perpetuation of a system of inequality harms everyone. 75

69. Professor Ingber states:

The workplace is a significant learning environment, of crucial importance to the development of an individual's personal identity. It is the one location where employees convene daily and where they share common interests; therefore, it is where they seek to persuade fellow workers in matters related to their status as employees.

Id. at 53.

70. DEETZ, supra note 61, at 307.
71. Id. at 307–08.
72. Id. at 309.
73. Id. at 311.
74. This conclusion is consistent with research on sexual stereotyping discussed earlier. See supra note 38.
75. The idea that sexually hostile work environments harm everyone in society can be understood from a Kantian perspective. Kant argued that every rational being "has in itself an absolute value . . . [and] exists as an end in himself, not merely as a means for arbitrary use by this will or that will." KANT, supra note 39, at 95
The workplace is a community of individuals who simultaneously contribute to and partake of a shared workplace ethos in constructing their senses of self, either as members of a system of equality or subordinates in a system of inequality. This worker interaction is a political process, in which each worker molds the workplace ethos according to his or her will. The resulting corporate decisions not only influence the mental and material security of individual employees, but other public policy concerns such as the use and allocation of natural resources, the use and development of new products and technologies, educational requirements to join the corporate world, the content of entertainment and news, and the quality (emphasis omitted). Therefore, every person should follow a universal rule, a "categorical imperative," when deciding how to interact with others: "Act in such a way that you always treat humanity . . . never simply as a means, but always at the same time as an end." *Id.* at 96. For example, "the man who has a mind to make a false promise to others will see at once that he is intending to make use of another man merely as a means to an end he does not share." *Id.* at 97 (emphasis added). The same is true when a person attempts to deprive another of her freedom for personal gain. *Id.* Such person is not respecting the fact that every person has an "intrinsic value" or "dignity" which is priceless and which prevents one person from making others expendable for ends which all persons do not share. *Id.* at 102.

When a person chooses to live by a "maxim" that tolerates and perpetuates inequality based on sex, that person is proclaiming that his maxim should be a universal law. *Id.* at 101. The irony of choosing to live by such a maxim, however, is that this person too is subject to that universal law. *Id.* Because he has chosen to live by a maxim that denies the dignity of all persons regardless of gender, he is approving of an alternate reality in which he may be the one who, because of his gender, is denied his dignity and used as a means for the personal gain of others. He can thus be viewed as paving the way toward his own inequality.

Finally, from a purely economic standpoint, perpetuation of inequality is inefficient.

To ordain that any kind of persons shall not be physicians, or shall not be advocates, or shall not be members of parliament, is to injure not them only, but all who employ physicians or advocates, or elect members of parliament, and who are deprived of the stimulating effect of greater competition on the exertions of the competitors, as well as restricted to a narrow range of individual choice.

*MILL,* *supra* note 44, at 55.

of family life in the face of corporate demands on employees.\textsuperscript{76} The decisions being made in workplaces have at least as great an influence on society as voting, which is normally thought of as the seminal form of decision making in a democracy.\textsuperscript{77} But unlike voting, workplace decisions are largely immune from public control.\textsuperscript{78} Thus, if democracy is "about society's practices in reaching decisions rather than simply its means of selecting officials," then the individual citizen must participate in decision making at work.

As a general rule, however, the individual employee has little voice in workplace decision making. Most workplaces are organized along strictly hierarchical, undemocratic lines with little decision-making power vested in the rank-and-file employee.\textsuperscript{80} This general disempowerment of workers may result in a decreased sense of self-control and self-responsibility.\textsuperscript{81} Empirical evidence suggests that "work resting on undemocratic authority socializes people into passivity and political apathy."\textsuperscript{82} Conversely, "having control over one's work increases the motivation to take up participatory opportunities in other settings."\textsuperscript{83} Thus, if our democracy is to be a

\textsuperscript{76} DEETZ, supra note 61, at 3, 23-36. "Workplace values and practices extend into nonwork life through time structuring, educational content, economic distributions, product development, and creation of needs." \textit{Id.} at 17. "Decisions are made within [corporate organizations] that affect the public good and different segments of society." \textit{Id.} at 54.

\textsuperscript{77} "The electoral process and information relevant to the electoral process are often conceptualized as more central to the democratic process than information that influences everyday decisions. As many would argue, democracy is historically more linked to election day than to everyday life." \textit{Id.} at 45-46.

\textsuperscript{78} Deetz notes that:

Decision making that affects the general public happens in three realms: the legislative body, the administrative/regulatory/policing bureaucracy, and the corporate. Yet only the legislative body has elected representation. The modern corporation is the most protected from direct public control, and it is there that most decisions are made.

\textit{Id.} at 16.

\textsuperscript{79} \textit{Id.} at x.

\textsuperscript{80} "Typically, the rank and file worker in modern industry finds himself in a work environment where he can use few abilities, and exercises little or no initiative or control over his work." CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 53 (1970). "The authoritative/submissive response style appears to be built into the modern corporation." DEETZ, supra note 61, at 39.

\textsuperscript{81} PATEMAN, supra note 80, at 53.

\textsuperscript{82} DEETZ, supra note 61, at 38.

\textsuperscript{83} \textit{Id.} "Democratic involvement in employment also contributes to civic democracy by enhancing peoples' inherent capacities to participate in politics." Klare,
way of life as opposed to something that just happens on election day, the workplace must be democratized as much as possible and be thought of as "the new public sphere." Democratic communication within the workplace, focusing on employee self-government, and "the formation of knowledge,

supra note 62, at 8; see also PATEMAN, supra note 80, at 34 (discussing John Stuart Mill, who suggested that participation in the government of the workplace has an educative effect beneficial for participation in political government).

84. "[I]ndustry and other spheres provide alternative areas where the individual can participate in decisionmaking in matters of which he has first hand, everyday experience, so that when we refer to 'participatory democracy' we are indicating something very much wider than a set of 'institutional arrangements' at national level." PATEMAN, supra note 80, at 35.

85. Pateman suggests that democratizing the workplace might involve creating a system of workplace government that parallels that of the national government, with the corporate leadership being elected by the employees. Id. at 72. Alternatively, democratization could involve employees making management decisions, or simply making the existing management structure be more responsive to employee concerns. Id. at 72–73.

86. DEETZ, supra note 61, at 348. Political activity should not be tied solely to so-called public spheres like town meetings, public parks, or the marketplace. See Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990) (suggesting that the guarantees of the First Amendment do not apply to casual chitchat because such speech is "too remote from the political rally, the press conference, the demonstration, the theater, or other familiar emporia of the marketplace of ideas."). While these traditional fora may have "provided the place of unrestrained free speech and democratic influence" in the eighteenth and nineteenth centuries, it is not true in today's world where the workplace forum dominates the lives of most. See DEETZ, supra note 61, at 49–50, for a discussion of earlier centuries.

The "information highway" promised to be available to any citizen with a computer and a modem, it has not yet proven itself to be an adequate alternative to the traditional public fora for democratic expression, especially for women. See Deborah Tannen, Gender Gap in Cyberspace, NEWSWEEK, May 16, 1994, at 52, 53 (discussing computer networks as male-dominated domains in which women frequently have their messages ignored or attacked or are deluged with questions about their appearance and invitations to have sex). Thus, if citizens, particularly women, are to have a meaningful influence in this society, their best hope at present is through the institution that determines how human and material resources are managed, that influences public welfare decisions, and that helps to shape their identities—the corporate workplace. DEETZ, supra note 61, at 348. In this sense, "the shop floor and corporate conference rooms may be more significant potential 'public' forums than modern media." Id. at 51.

87. The Supreme Court has regarded a free speech guarantee as important for self-government: "Speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (holding the First Amendment important for public decision making). A free speech guarantee is especially important in the labor-management context. See Thornhill v. Alabama, 310 U.S. 88, 103 (1940) (finding free discussion on conditions of industry and labor disputes crucial to process of self-government); infra notes 98–111 and accompanying text. Under this justification for free speech, "[t]he First Amendment promotes democratic functioning by standing guard against attempts by government to stymie self-governance by interfering with the polity's
experience, and identity," must be encouraged if this view is followed.

Deeming the workplace a new public sphere that should be more open to democratic communication does not require corporations to tolerate sexually abusive expression, even though much of such expression, including pornography, sexist comments and epithets, is constitutionally protected in traditionally public places like parks, street corners, and the media. Because the workplace is a unique political world unto itself, wielding an enormous influence on self-identity, it is reasonable for society to regulate sexually abusive expression within the confines of the workplace, but not necessarily outside of the workplace where the equality-depriving potential of such expression may be significant, but not nearly as significant as within the workplace. Moreover, a policy of giving employees more say in the governance of the workplace while tolerating sexually abusive expression would defeat the spirit of workplace democratization. Victims of abuse would either be too intimidated to participate in workplace democracy or discouraged from participating because their environment defines them as inferior, quieting their voices in matters of workplace governance. Thus, equality is a precondition to the viability of workplace democracy, and in order for this precondition to exist, there cannot be a sexually hostile

ability to obtain and transfer knowledge among its members." Ingber, supra note 68, at 16. As was examined earlier, however, it is highly unlikely that sexually abusive expression promotes democratic functioning within the workplace when it serves to coerce workers based on their sex. It is more likely that such expression discourages participation by promoting a gendered hierarchy. See supra notes 61–75 and accompanying text.

88. DEETZ, supra note 61, at 47.
89. See United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981) (discussing "public forum" status of streets and parks); MACKINNON, supra note 46, at 10 (discussing constitutional protection afforded to pornography); Browne, supra note 9, at 482–83 (discussing how sexual vulgarities and jokes are often constitutionally protected outside of the workplace).
90. See Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (noting that "acts of expression which may not be proscribed if they occur outside of the workplace may be prohibited if they occur at work."); Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 243 (1992) (noting that "the workplace is not quite your home, but neither is it speakers' corner in Hyde Park . . . . [T]he law might assign me a right to limit the intrusions I must endure at work to those that relate to my work."). Like the workplace, "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself." Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).
environment. Unless all employees have equal standing to be heard by their co-employees and management, authoritarianism in the workplace will persist.

As with democratic self-government, the truth-seeking function of the free speech guarantee would not be furthered by tolerating sexually abusive expression in the workplace. John Stuart Mill was concerned about governmental suppression of individual opinion because if the opinion is right, humanity is "deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." Unlike opinions,

91. The Supreme Court has characterized the First Amendment as "essential to the common quest for truth," Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 503 (1983), and has held that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting). Under the Constitution, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), cert. denied, 459 U.S. 1226 (1983); accord Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969) (stating that courts must "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

This "marketplace" model justification of free speech has been criticized because of its internal hypocrisy. The model assumes that there is some type of ultimate truth which the clash of ideas will reveal over time. But it also assumes that there are no false ideas, rendering truth a matter of survival. "Under this survival theory of truth, views accepted in the marketplace are labeled 'true'; rejected views are labeled 'false.' . . . Truth, in this sense, is simply what the majority thinks it is at any given time." Ingber, supra note 68, at 13-14.

92. Professor Fried warns that people should be careful about mistaking an effect of the principle of free speech, like truth-seeking and open public debate, with the principle of free speech itself. Fried, supra note 90, at 226. They should not "substitute[] the effect of liberty for liberty itself." Id. at 227. Rather, people must realize that "[f]reedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself." Id. at 233. While Fried's point is well taken, it is still necessary to remember that a society in which people possess unfettered liberty to speak and act would be no society at all, but a "state of nature" in which each person relies on his individual strength and guile to protect his person and property. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 14 (Charles Frankel trans., 1951). As a member of a society, an individual enters into a "social contract," relinquishing "his natural liberty and an unlimited right to all which tempts him, and which he can obtain; in return, [an individual] acquires civil liberty and the proprietorship of all he possesses." Id. at 19 (emphasis added). By application, in order for the social contract to guarantee everyone the most basic civil liberty—equal standing in society—the liberty to use sexually abusive expression in the workplace must be forsaken. Respecting the liberty interests of prospective victims of abuse not only benefits them, but also means society is no longer denied "the benefits of wide participation in political, economic, and cultural life." Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

93. JOHN S. MILL, ON LIBERTY 18 (David Spitz ed., 1975).
however, much verbal sexual harassment is not capable of truth or falsity. Pornography like a shipyard "dartboard with a drawing of a woman's breast with her nipple as the bull's eye" and sexual propositions like those in the *Harris* case are not true or false. Rather, this expression took place to either coerce female employees into sex or to quit their jobs, or to provide some type of masturbatory thrill.

Some verbal harassment, however, includes propositions that may be labeled true or false, such as "women don't belong here" or "women are only good for sex." Even derogatory epithets like "bitch" and "dragon lady," when ascribed to a person, are as a logical matter capable of truth or falsity. But protecting sexually abusive expression merely because it possesses this logical characteristic would be arbitrary. What the sexually abusive language does in the work place—coerce women and define them as unequal—not its grammatical structure, is the critical factor in creating a hostile environment.

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96. *See Langelan*, *supra* note 44.

97. Even John Stuart Mill did not advocate an unfettered freedom of expression.

On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act [like inciting an angry mob]. . . . The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.

*MILL*, *supra* note 93, at 53.

Also, Mill's awareness of how women's inequality stems in large part from the sexist socialization of males and females may have led him away from an absolutist position on free speech. "All women are brought up from the very earliest years in the belief that their ideal of character is the very opposite to that of men; not self-will, and government by self-control, but submission, and yielding to the control of others." *MILL*, *supra* note 44, at 16. Mill observed this socialization to be an integral part of a society that deprived women of rights to property, *id.* at 32, and to their children, *id.* at 33–34; subjected them to inescapable domestic violence, *id.* at 37; and excluded them from most employment opportunities, ordaining from their birth either that they are not, and cannot by any possibility become, fit for employments which are legally open to the stupidest and basest of the other sex, or else that however fit they may be, those employments shall be interdicted to them, in order to be preserved for the exclusive benefit of males.

*Id.* at 53. He recognized that women's personal development had been so retarded that no one can safely pronounce that if women's nature were left to choose its direction as freely as men's, and if no artificial bent were attempted to be given
IV. HOW THE REGULATION OF SEXUALLY ABUSIVE WORKPLACE SPEECH IS CONSTITUTIONAL

A. Speech Regulation in the Labor Relations and Public Employee Contexts: Lessons in Balancing for Hostile Environment Law

The closest the courts have come to grasping the threat that coercive expression poses to workplace democracy is in the labor relations setting. For instance, the National Labor Relations Board (the Board or NLRB) has the statutory authority and duty to provide, in union certification elections, "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." To provide this laboratory, "[t]he Board must set aside an election if an atmosphere of fear and coercion render[s] free choice impossible." Pro-union employees' engagement in a pre-election campaign of harassment against their anti-union counterparts by slashing their tires, removing lug nuts from their car wheels, threatening them over the telephone, and running their cars off the road, has been viewed by the Board as a "pattern and practice of coercive conduct" which constitutes sufficient grounds to set aside the election. Such conduct is

... to it except that required by conditions of human society, and given to both sexes alike, there would be any material difference, or perhaps any difference at all, in the character and capacities that would unfold themselves.

*Id.* at 61.

Men's development has been adversely affected by this socialization as well; teaching a boy who grows to manhood "that without any merit or any exertion of his own, ... by the mere fact of being born a male he is by right the superior of all and every one of an entire half of the human race." *Id.* at 86–87. According to this view, males are deluded, taught to believe and live a lie that denies the equality of all people regardless of gender.

Given that the workplace has such an enormous influence on the formation of individual character and identity, it does not seem inconsistent with Mill's observations for him to have approved of limitations on sexually abusive speech in the workplace in order to ensure women equal opportunities for self-development and to break this systematic inculcation of inferiority.

100. YKK, 269 N.L.R.B. at 82–83.
not a protected, political discussion concerning the proper role of organized labor in the workplace.

Similarly, when union organizers hold meetings in front of one hundred employees and shout about the need to “stick together against the ‘Japs,’” or lace their speeches with racist remarks like “[d]on’t let the Japs . . . pull the wool over your eyes” and “[w]e beat the Japs after Pearl Harbor and we can beat them again,” the Board does not view such statements as part of a political discussion about the United States’ trade imbalance with Southeast Asia. Nor does the Board view tee-shirts, handbills, and work rags emblazoned with the phrases “Japs,” “Remember Pearl Harbor,” “Japs Go Home,” “Japs speak with forked tongue,” and “slant eyes” as a discussion about the causes of World War II or the anatomical differences between Caucasians and Asians. Rather, “where a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant and inflammatory appeals to racial prejudice,” the Board will not protect such coercive speech and intimidation.

101. Id. at 84.
102. Id.
104. The penalty for an incipient union’s violation of “laboratory conditions” is a new election because such a violation constitutes an unfair labor practice. Any chilling effect that a new election may have on racially divisive expression, therefore, may be significantly less than the chilling effect that compensatory and punitive damages may have on similar speech in hostile environment cases. Although the union engaging in such expression runs the risk of not being certified by the NLRB, employees risk severe discipline or discharge should they subject their employer to an expensive lawsuit. Furthermore, union certification drives do not occur every day, so the temporal infringement on free expression is relatively short. Nonetheless the re-election sanction, although time-limited and not as costly in the monetary sense, can have just as significant a chilling effect on the expression of degrading speech as can hostile environment law. The re-election sanction relates to the most fundamental interest of an union employee—how employees will unite to bargain collectively with their employer to determine the terms and conditions of their employment.

“Free discussion concerning the conditions in industry and the causes of labor disputes appears to [be] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.” Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

When race is invoked not to create racial animosity but rather to encourage racial solidarity, the Board will not set aside an election. Bancroft Mfg. Co., 210 N.L.R.B. 1007, 1007 (1974), cert. denied, 424 U.S. 914 (1976). In Bancroft, a union organizer told a group of employees, that “if blacks did not stay together as a group and the Union lost the election all the blacks would be fired.” Id. Upon finding that “the Union’s viewpoint on the impact of future layoffs on black employees [was] a matter relevant to the campaign, particularly in view of the record evidence that there had
It does not matter that such limitations on expression might not survive constitutional scrutiny outside of the workplace, because the government is entitled to substantial deference when regulating expression within the workplace.\textsuperscript{105} "The scope of constitutional protection of communicative expression is not universally inelastic."\textsuperscript{106} These limitations are permissible because racially inflammatory expression within the workplace inhibits individual employee autonomy, preventing employees from making choices free from a bias-charged atmosphere.\textsuperscript{107} Thus, if the National Labor Relations Act (NLRA),\textsuperscript{108} a series of statutes aimed at industrial harmony, can exert such "thought control" over employees in order to protect them from the influence of racially coercive speech, then courts should extend this rationale to sexually-biased and abusive speech under the authority of Title VII.

Restrictions on employee speech in the labor setting are not limited to racially coercive and physically threatening expression during elections. Section 8(c) of the NLRA outlaws all coercive speech in the labor-management setting: "The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."\textsuperscript{109} Section 8(c) does not immunize coercive employer speech but rather defines it as an unfair labor practice.\textsuperscript{110} Such speech is not protected by the First Amendment, either.\textsuperscript{111}


\textsuperscript{106} "Speech by an employer or a labor union organizer that contains material misrepresentation of fact or appeals to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a certification election . . . Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office." \textit{Id.}

\textsuperscript{107} "Speech by an employer or a labor union organizer that contains material misrepresentation of fact or appeals to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a certification election . . . Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office." \textit{Id.}


\textsuperscript{109} 29 U.S.C. § 158(c).

\textsuperscript{110} "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of [their right to self-organization and concerted activity and their right to refrain from such activity]." \textit{Id.} § 158(a)(1).

\textsuperscript{111} See, \textit{e.g.}, NLRB v. Gissel Packaging Co., 395 U.S. 575, 618 (1969) (holding that speech by employer which contains a threat of reprisal or force, or promise of benefit is not protected by the First Amendment).
Similarly, section 8(c) of the NLRA does not protect union speech amounting to coercion.112

Browne has argued that "Gissel relied heavily on the inequality of power between employer and employee to justify the restriction on employer expression. Harassment by co-workers, or, a fortiori, subordinates, does not involve such an imbalance in power." Browne, supra note 6, at 515. Psychological studies, however, suggest that most reported sexual harassment is from co-workers, not superiors who theoretically have greater organizational power than co-workers. See, e.g., Gervasio & Ruckdeschel, supra note 58, at 196 (noting that "[r]ecent studies suggest that most sexual harassment is actually addressed to peers."); Barbara A. Gutek & Bruce Morasch, Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work, 38 J. Soc. ISSUES 55, 57 (1982) (reporting that in surveys of working people in Los Angeles, "only 45% of the women who reported an experience of one of the more serious forms of sexual harassment (sexual touching, required socializing, or required sexual activity at work) said that the initiator was a supervisor").

This empirical reality demonstrates that organizational power does not account for all sexual harassment. In addition to position in the corporate hierarchy, history and cultural stereotypes define people in the workplace as well. Because women's social definition is traditionally one of subservience and powerlessness, it is probable that this definition exists in the employment context and allows male co-workers to assert dominance, regardless of any direct, tangible control over women's jobs. See Bremer et al., supra note 37, at 266 (noting that "[t]he comparatively high incidence of sexual harassment initiated by peers rather than authority figures indicates that sexual harassment is more a gender issue than a power issue, at least in academic situations."); Gutek & Morasch, supra at 58-59 (suggesting that sexual harassment of women at work is often a product of sex-role spillover, which is defined as the carryover into the workplace of gender-based expectations for behavior that are irrelevant or inappropriate to work).

112. 29 U.S.C. § 158(c) (1988). "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights" to self-organization and concerted activity and their right not to engage in such activity. Id. § 158(b)(1)(A). While "federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point," Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283 (1984), the law does not protect racially or sexually coercive expression as the union election cases show. See Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).

The Supreme Court has stated that outside of the labor context "[s]peech does not lose its protected character ... simply because it may embarrass others or coerce [others] into action." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982). This pronouncement came in the context of a consumer boycott of white merchants engineered by Black leaders who were demanding equality and racial justice. During this boycott, speech was used to urge fellow Blacks to join the common cause. One of these "coercive" tactics included reading the names of boycott violators at a Baptist church and publishing the names in a local Black newspaper, thereby employing "social pressure and the 'threat' of social ostracism." Id. at 909-10.

Although this speech was racially "coercive" in the sense that consumers in the Black community may have felt compelled to join a boycott seeking equality, it does not follow that coercive speech used in the employment context to divide the races or the sexes and to create inequality is also protected. Further, the Claiborne Court, like the Letter Carriers Court, described the labor context as one that permits, to some degree, language that is "often vituperative, abusive, and inexact." Id. at 911 n.46. The Court's reference, however, says nothing about the use of language in the workplace to intimidate on the basis of gender or race. The Board's long-standing prohibition on the use of racially inflammatory speech during elections reveals a
Further, in upholding laws against secondary picketing, the Supreme Court has severely limited employees' freedom to protest when such speech is economically coercive. The NLRA prohibits so-called "secondary activity" by a labor union which forces or requires a neutral, secondary employer to cease doing business with the primary employer with whom the labor union has a dispute.\(^{113}\) In *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*,\(^ {114}\) a union had struck certain Washington fruit packers and also picketed large supermarkets (neutral, secondary employers) to persuade consumers not to buy Washington apples.\(^ {115}\) The Supreme Court held that the union's secondary picketing to "persuade . . . customers not to buy the struck product" was protected by the First Amendment.\(^ {116}\) Sixteen years later, however, in *NLRB v. Retail Store Employees Union*,\(^ {117}\) the Court held that the First Amendment did not protect union picketing at secondary sites when the secondary employer derived over ninety percent of its gross income from the sale of the primary employer's product.\(^ {118}\) The Court reasoned that such picketing would force the secondary employer to choose between survival by severing ties with the primary employer or being picketed out of business by refusing to sever ties, thereby embroiling a neutral employer in industrial strife in violation of the NLRA's ban on secondary activity.\(^ {119}\) Banning secondary picketing in this case imposed no impermissible restriction on protected speech because the picketing furthered the "unlawful objective" of spreading "labor discord."\(^ {120}\)

In his concurrence, Justice Blackmun agreed with the majority that the employee's free speech interests may be compromised to further the statutory objective of industrial harmony because he was "reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers,

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\(^{114}\) 377 U.S. 58 (1964).
\(^{115}\) Id. at 59-60.
\(^{116}\) Id. at 70.
\(^{117}\) 447 U.S. 607 (1980).
\(^{118}\) Id. at 616.
\(^{119}\) Id. at 615.
\(^{120}\) Id. at 616.
employees, and consumers to remain free from coerced participation in industrial strife.\textsuperscript{121} Justice Stevens, in his concurrence, did not even view picketing as speech, but rather as a "signal" to consumers, who, upon receiving it, reflexively refused to do business with the picketed business.\textsuperscript{122} Had members of the general public engaged in the same secondary picketing, no doubt their activity would have been protected.\textsuperscript{123} Thus, if the Supreme Court does not protect picketing workers holding signs in favor of their cause as an attempt at persuasion because a neutral employer may be compelled to make an economic decision, then it should similarly deny protection to sexually abusive expression in the workplace because of its coercive, equality-depriving impact on harassment victims.

Compared to the labor speech context, the Supreme Court has been even more hesitant to afford government employees broad free speech protection. The Court has granted government employers substantial deference in controlling disruptive employee expression in order to ensure workplace harmony. Although "a State may not discharge an employee on a basis that infringes [an] employee's constitutionally protected interest in freedom of speech,"\textsuperscript{124} a government employer still may discipline or discharge its employee for what she says if her speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."\textsuperscript{125}

To determine whether a government employer has properly

\textsuperscript{121} Id. at 617–18 (Blackmun, J., concurring).

\textsuperscript{122} Id. at 619 (Stevens, J., concurring). Justice Stevens further argues that the NLRA prohibits secondary picketing because it deters consumers from entering a business establishment and "affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea." \textit{Id.} If picketing can be regulated as a coercive signal, then so should workplace pornography. Under this logic, pornography is a masturbatory tool, a "signal" that stimulates reflexive action, i.e. coital stimulation. "It is not ideas [men] are ejaculating over. Try arguing with an orgasm sometime." \textsc{Mackinnon}, \textit{supra} note 46, at 17.

\textsuperscript{123} Similar picketing by sympathetic citizens at secondary sites can only be prohibited if the government has a content-neutral reason, such as conflicting demands on the same place for picketing or maintenance of public order. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98–99 (1972). The concept of content-neutrality is discussed further infra notes 137–143.


\textsuperscript{125} Id. at 388 (citing Pickering v. Board of Educ., 391 U.S. 563, 570–73 (1968)).
treated an employee, a court must engage in "a balance between the interests of the [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."\textsuperscript{126}

Under such a balancing test, verbal sexual harassment could be constitutionally banned from government workplaces for at least two reasons. First, sexual harassment creates disharmony among co-workers leading to worker displacement, stress, inefficiency, and equality-deprivation. Second, sexually derogatory epithets, comments, and propositions cannot be considered expression regarding matters of public concern, any more than an assault expresses the idea that violence is a bad thing.\textsuperscript{127} As a means of threatening, coercing, and asserting dominance over employees based on their sex, such words appear to be far removed from "those matters dealing in some way with 'the essence of self-government.'"\textsuperscript{128}

If the free speech rights of millions of employees in government workplaces are subject to being balanced against mundane state interests like efficiency and the avoidance of impropriety,\textsuperscript{129} then any conflict between sexually harassing

\textsuperscript{126} Id. at 384, (quoting Pickering, 391 U.S. at 568); see also Connick v. Myers, 461 U.S. 138, 140 (1983) (holding that the distribution of a questionnaire was a valid exercise of an employee's right of free speech).

\textsuperscript{127} See Johnson v. County of Los Angeles Fire Dept., 1994 U.S. Dist. LEXIS 8270, at *9 (C.D. Cal. June 9, 1994) (holding that a fireman's quiet reading and possession of Playboy magazine on his unrestricted time in his private quarters at the fire station was "expression relating to matters of public concern," due to the articles and interviews in the magazine, and could not be singled out under the Fire Department's sexual harassment policy).

Due to the unique nature of the firefighters' duties in the Johnson case, the court's decision should have little, if any, implications beyond its facts. As the court noted, the firefighters were assigned to two or three consecutive twenty-four hours shifts, requiring them to make the fire station their "de facto home" for up to seventy-two hours consecutively. Id. at *14. Consequently, the court protected the quiet reading and possession of Playboy on private time while in private quarters just as if the firefighter had read Playboy outside of the fire station in his actual home. The court noted, however, that had the firefighter read Playboy outside of his unrestricted private time at the fire station, exposed the sexually explicit photographs to the female firefighters, or made lewd comments based on those photographs, such activities would not have been matters of public concern and, therefore, unprotected. Id. at *23.

\textsuperscript{128} Rankin, 483 U.S. at 395 (Scalia, J., dissenting) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

\textsuperscript{129} The speech of federal government employees is subject to tighter restrictions than state and local government employees. See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 550–51 (1973) (upholding the
speech in the private workplace and equality should be resolved by balancing free speech interests against equality interests. Courts should not hesitate to engage in such balancing once they recognize that Title VII's statutory goal of workplace equality is rooted in the compelling governmental interest in ending sex discrimination, an interest itself rooted in the equal protection guarantee of the Fourteenth Amendment. The balance should tip inexorably in favor of equality and against the protection of sexually-abusive speech.

B. The Balancing of Free Speech and Equality Interests

The few cases in which the Supreme Court has simultaneously addressed First Amendment interests and equality interests suggest that the two are constitutionally equivalent. Consequently, the balancing of free speech and equality interests in the hostile environment context should be permissible. In Roberts v. United States Jaycees, the Jaycees, a nonprofit membership corporation whose objectives were to promote the growth of young men's civic organizations, prevented women from obtaining regular membership in their organization. The Minnesota Human Rights Commission complained that the Jaycees was violating the Minnesota Human Rights Act which made it "an unfair discriminatory practice to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex." The Jaycees argued that its First Amendment right of

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131. See Catharine A. MacKinnon, Pornography as Defamation and Discrimination, 71 B.U. L. Rev. 793, 809-10 (1991) (arguing that pornography should be regulated as group defamation and that constitutionally-guaranteed equality should be balanced against the free expression rights of pornographers).
133. Regular membership was limited to males between the ages of 18 and 35. Women and older men could obtain "associate" memberships. Id. at 613.
134. MINN. STAT. ANN. §§ 363.01-.03 (West 1982).
135. Roberts, 468 U.S. at 615 (citing MINN. STAT. § 363.03, subd. 3 (1982)). The Act's definition of "place of public accommodation" included a business "whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Id.
free association prevented Minnesota from enjoining its discriminatory membership practices.\textsuperscript{136}

In deciding the case, the Court distinguished between two aspects of the freedom of association. The first aspect involves the protection of those associations with attributes like "relative smallness, a high degree of selectivity in decisions . . . and seclusion from others in critical aspects of the relationship."\textsuperscript{137} As a large business enterprise, the Jaycees did not have these attributes.\textsuperscript{138} The second aspect of freedom of association involves the freedom of "expressive association."\textsuperscript{139} In order to protect an individual's freedom to speak, he needs the "correlative freedom to engage in group effort toward [that end]."\textsuperscript{140} Although the Court found that the Jaycees' right to expressive association was implicated in this case, Minnesota's "compelling interest in eradicating discrimination against its female citizens justifie[d] the impact that application of the statute to the Jaycees may have [had] on the male members' associational freedoms."\textsuperscript{141} The Court therefore demonstrated that the government may force a First Amendment interest to yield to the compelling state interest of eliminating sexual discrimination.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{136} \textit{Id.} at 618.
\item \textsuperscript{137} \textit{Id.} at 620.
\item \textsuperscript{138} \textit{Id.} at 621.
\item \textsuperscript{139} \textit{Id.} at 618.
\item \textsuperscript{140} \textit{Id.} at 623. "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." \textit{Id.} at 622.
\item \textsuperscript{141} \textit{Id.} at 623.
\item \textsuperscript{142} \textit{Id.} at 628; \textit{see also} Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (unanimously rejecting a law firm's argument that application of Title VII to their decision not to offer a female associate partnership based on her sex was an infringement upon its constitutional rights of association and expression and holding that the First Amendment did not protect such "[invidious] private discrimination.") Title VII requires that a certain viewpoint, namely that women are not partnership material, not become a basis for an employment decision. Moreover, mere expression of this viewpoint by a company's management may be actionable as evidence of disparate treatment. \textit{See} Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (holding that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). While this evidentiary rule serves to chill certain employees from expressing their sexist beliefs, it does not create the specter of a First Amendment issue. By extension, if a hostile environment is another form of sex discrimination, then severe or pervasive sexually-coercive speech should be deemed just as invidious as the words "we are not making you partner because you are a woman." Such words not only evidence sex discrimination, but are the discrimination. \textit{See} Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).
\end{itemize}
expressive right, like the right of free speech, it can thus be subordinated to a compelling state interest.

The Jaycees also made a freedom of speech argument, asserting that “women members might have a different view or agenda” and that the “admission of women as voting members [would] change the message communicated by the group’s speech because of the gender-based assumptions of the audience.” The Court, however, rejected this argument, stating that “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.” The state’s interest in regulating sex discrimination justified the “incidental” infringement on the Jaycees’ speech.

Hostile environment sexual harassment is likewise an example of such invidious discrimination in the distribution of publicly available goods. If “leadership skills are ‘goods,’ [and] business contacts and employment promotions are ‘privileges’ and ‘advantages’” to which the state may guarantee equal access, so too may the government guarantee workplace equality by ensuring that workers do not have to “run a gauntlet of sexual abuse for the privilege of being allowed to work.” Because a sexually hostile environment is “like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.”

Roberts and like cases also demonstrate that expressive conduct intertwined with discriminatory activity in the commercial context may be prohibited without running afoul of the First Amendment. Because employment is a commercial

143. See Bernard v. United Township High Sch. Dist. No. 30, 804 F. Supp. 1074, 1079 (C.D. Ill. 1992) (holding that “[t]he First Amendment includes several distinct rights which may be grouped under the category ‘freedom of expression’: freedom of speech; of assembly; of association; of press.”).
144. Roberts, 468 U.S. at 627.
145. Id. at 628.
146. Id.
147. Id. at 626 (quoting United States Jaycees v. McClure, 305 N.W.2d 764, 772 (Minn. 1981)).
148. Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982).
149. Roberts, 468 U.S. at 628.
activity, "[d]iscrimination in employment is not only commercial activity, it is illegal commercial activity."\textsuperscript{151} For example, when a newspaper used an advertising system in which employment opportunities were published under headings designating job preferences by sex, the Supreme Court held that such advertisements "‘aid[ed] employers to indicate illegal sex preferences."\textsuperscript{152} Because the commercial activity was illegal, restricting the advertising of that activity was a "valid limitation on economic activity."\textsuperscript{153}

Although verbal sexual abuse is not advertising, such abuse intimidates workers, promotes illegal sex preferences by employers, and weeds workers out of the work force based on their sex.\textsuperscript{154} Moreover, the verbal sexual abuse deprives its victims of equality by defining them as inferior and the harassers and harassers' sex as superior.\textsuperscript{155} The prohibition on sexually hostile environments is in this way "aimed at the commercial activities of those who would profiteer off the ills of society."\textsuperscript{156}

In \textit{Bob Lawrence Realty}, the Fifth Circuit Court of Appeals addressed the practice of "block-busting" by real estate agents. This term refers to the practice of real estate agents approaching homeowners to stimulate racial bigotry by initiating rumors that non-whites are about to move into a given area and that as a consequence all whites will leave the area, leading to decreased property values and segregated neighborhoods. Addressing a First Amendment defense to this practice, the court stated that:

It is evident that the [Federal Fair Housing Act] did not make mere speech unlawful. What it does make unlawful is economic exploitation of racial bias and panic selling. [The trial court] conclude[d] that the statute is one regulating conduct, and that any inhibiting effect it may have upon speech is justified by the Government's interest in protecting its citizens from discriminatory housing practices and is not violative of the First Amendment.

\textit{Id.} at 121. Although the Supreme Court denied certiorari to this case, it should be noted that the result was not inconsistent with the Court's decision in Bigelow v. Virginia, 421 U.S. 809, 825 n.10 (1975) (finding that a clear relationship existed between advertising practice in \textit{Bob Lawrence Realty} and legitimate government interest in regulating that practice).

152. \textit{Id.} at 389.
153. \textit{Id.}
154. See supra notes 34, 37–38.
155. For a more complete discussion of the coercive and equality-depriving nature of sexually abusive expression, see supra Part III.
156. \textit{Bob Lawrence Realty}, 474 F.2d at 121.
C. Regulating Verbal Sexual Harassment

as Discriminatory Speech Acts

Like promising, taking an oath, or threatening someone over the telephone, sexually derogatory comments, epithets, propositions, jokes, and pornography should be viewed as verbal acts or "acts that exist only by virtue of being spoken." Though the medium of verbal sexual harassment is language, the historical, social, and institutional context suggest that the severe or pervasive use of such words can be as tangible as a slap on the face. While phrases like "blacks don't belong here because they are fit only to be slaves," or "women belong in the bedroom and not the factory," may be "political" in some commentators' minds, such "expression" not only effectuates, but is itself an illegal act; it is coercive, equality-depriving treatment.

In recent years, the Supreme Court has subscribed to the view that expressive activity tantamount to illegal speech acts may be regulated without running afoul of the free speech guarantee. In R.A.V. v. City of St. Paul, Minnesota, several white teenagers had assembled a cross by taping together broken chair legs, which they burned inside the fenced yard of a Black family. The City of St. Paul charged one of the teenagers under an ordinance making it a misdemeanor to display any symbol that one knew or had reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."

In addressing the constitutionality of this ordinance, Justice Scalia, writing for the Court, first noted that the Court's

157. Id.
158. Gervasio & Ruckdeschel, supra note 58, at 194.
159. See Browne, supra note 6, at 540–41 (finding that such speech constitutes "an expression of views on important issues of social policy" and represents a "safety valve . . . to encourage expression of feelings of frustration and thereby decrease resort to violence"). Browne's safety valve argument not only lacks empirical support, but it appears to be counter-intuitive. Bigoted expression would seem to encourage violence, not quell it.
160. "A sign saying 'White Only' is only words, but it is not legally seen as expressing the viewpoint 'we do not want Black people in this store,' or as dissenting from the policy view that both Blacks and whites must be served, or even as hate speech . . . ". MacKinnon, supra note 46, at 13.
162. Id. at 2541.
163. Id.
interpretation of the ordinance was limited by the Minnesota Supreme Court's pronouncement that the ordinance only reached those expressions which constituted "fighting words" under the ruling in *Chaplinsky v. New Hampshire*.\(^\text{164}\) He then explained that although libel, obscenity, defamation, and fighting words can be regulated because of a constitutionally-proscribable element they contain, they cannot be singled out due to hostility or favoritism towards the nonproscribable message they contain.\(^\text{165}\) For example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."\(^\text{166}\) The St. Paul ordinance was content-discriminatory because it only banned fighting words in connection with certain ideas like racial bigotry, but not in connection with other ideas like homosexual bigotry.\(^\text{167}\) Further, the St. Paul ordinance was viewpoint-discriminatory,\(^\text{168}\) because it outlawed only those fighting words that contained messages of bias-motivated hatred based on race, color, creed, religion, and gender; fighting words expressing messages of racial tolerance did not subject one to prosecution under the ordinance.\(^\text{169}\)

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164. *Id.* at 2542 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (describing fighting words as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

165. *Id.* at 2543.

166. *Id.*

167. *Id.* at 2547–48.

168. The Court "implicitly distinguishes between expressions based on subject matter and restrictions based on viewpoint, indicating that the latter are particularly pernicious . . . '[especially where [such restrictions suggest] an attempt to give one side of a debatable public question an advantage in expressing its views to the people.]'" *Id.* at 2568 (Stevens, J., concurring) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1978)).

169. *Id.* at 2547–48. The Court, however, does not consistently strike down content-discriminatory speech regulations. Justice Scalia observed that content-neutral speech regulations are only "presumptively invalid" and that "presumptive invalidity does not mean invariable invalidity." *Id.* at 2547 n.6. For example, the commercial speech doctrine depends upon content-discrimination: speech whose content "proposes a commercial transaction" automatically receives less constitutional protection than other speech. Board of Trustees v. Fox, 492 U.S. 469, 482 (1989); see also *supra* note 126 (noting that government employee speech protected only if it addresses public concern) and note 129 (noting that political participation by federal employees not protected).

Professor Cass Sunstein, by comparing free speech rights to property rights, has challenged the idea that government really can be content- and viewpoint-neutral as a practical matter. Just as what people own is a function of legal entitlements, so too is what people say and how effectively they can say it. Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 264–66 (1992). Society cannot assume that the pre-regulatory market for free speech maximizes liberty for all; a regime in which certain people could monopolize all media of speech because they have the material resources
The flaw in St. Paul's ordinance was that it was aimed at the message of the fighting words, not at the proscribable component—that nonspeech element which "embodies a particularly intolerable (and socially unnecessary) mode" of expression because it incites an immediate breach of the peace. Perhaps because the city defended its ordinance by

to do so would be unfair and would render free speech a privilege of the wealthy few. Id. at 263 n.21. Furthermore, the government, by failing to enact a law against such a monopoly, would be promoting such a system through inaction. Id. at 270.

Consequently, in certain contexts the government has reallocated rights to free speech to protect the quality or content of the marketplace of ideas. For example, the FCC has devised the "fairness doctrine," requiring broadcasters to "give adequate coverage to public issues [that is] fair in that it accurately reflects opposing views." Red Lion Broadcasting v. FCC, 395 U.S. 367, 377 (1969). Recognizing that free speech rights in the broadcasting context are a scarce resource that need to be allocated, the government has acted to ensure that other viewpoints are expressed. Doing so necessarily has diminished the power of others to express their viewpoints on debatable public issues. R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538, 2568 (1991).

Under Sunstein's reasoning, it could be argued that the history of women suggests that the pre-regulatory market for free speech is skewed in favor of sexual inequality. Without regulation of sexist speech in the workplace, women would not be able to assimilate into the workforce and gain the social respect and economic power to make their own voices and viewpoints heard. Anti-harassment law therefore represents positive government action to ensure that all people enjoy the same ability to express their viewpoints.

Two major problems with the preceding argument exist, however. First, claiming that the free speech market currently favors the expression of sex inequality assumes that verbal sexual harassment is speech which impinges upon the free speech rights, not the equality rights, of its victims. As has been argued, however, verbal sexual harassment is neither the expression of a viewpoint nor an attempt at political discussion, but rather an equality-depriving speech act. Second, the Supreme Court has held that the area of broadcast regulation in which the Red Lion case is set is unique to the First Amendment. As a general rule, "the concept that government may restrict the free speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (holding that the Federal Election Campaign Act's limitation on individual expenditures to political individuals or groups abridged the First Amendment despite government's interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections").

Because of the Supreme Court's unwillingness to reallocate free speech rights outside of the broadcasting context, certain views in society are amplified and others are silenced through government action or inaction.

Through authority over economic, political, educational, and social conditions, and a superior position in data gathering and dissemination, our government actively participates in the socialization of the citizenry. Contrary to individualism's image of persons freely choosing truth from among competing ideas, the government is capable of strongly encouraging the public to favor or disfavor certain views.

Ingber, supra note 68, at 15.

170. R.A.V., 112 S. Ct. at 2549. "Fighting words are thus analogous to a noisy sound truck... both can be used to convey an idea; but neither has, in and of itself,
arguing that people cannot communicate certain messages, for example, Black people are inferior,\textsuperscript{171} instead of arguing that the ordinance regulated particular conduct, namely inciting racial violence, the ordinance was struck down as impermissibly content- and viewpoint-based.\textsuperscript{172} By characterizing the ordinance as one directed at symbols that express "messages of 'bias-motivated' hatred,"\textsuperscript{173} the City and the Minnesota Supreme Court abandoned the possibility of arguing that cross burning is an act of racial intimidation and therefore could be regulated as such.\textsuperscript{174}

Justice White's concurrence argued that, under the majority's ruling, "hostile work environment claims based on sexual harassment should fail First Amendment review; because a general ban on harassment in the workplace would cover the problem of sexual harassment, any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment."\textsuperscript{175} Only targeting this expression would involve the government favoring the particular viewpoint that sex discrimination is unacceptable.

Justice Scalia addressed this argument by finding that "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech,"\textsuperscript{176} thereby extinguishing concerns about content and viewpoint discrimination.

Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.\textsuperscript{177}

\textsuperscript{171} "[The City] argued in the Juvenile Court that '[t]he burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate.'" R.A.V., 112 S. Ct. at 2548.

\textsuperscript{172} \textit{Id.} at 2549.

\textsuperscript{173} \textit{Id.} at 2548.

\textsuperscript{174} \textit{Id.} at 2549.

\textsuperscript{175} \textit{Id.} at 2557 (White, J. concurring).

\textsuperscript{176} \textit{Id.} at 2546.

\textsuperscript{177} \textit{Id.} at 2546–47 (emphasis added).
Justice Scalia therefore implied that sexually derogatory fighting words, among other words, are really discriminatory speech acts, illegal under Title VII and constitutionally unprotected regardless of the messages they express.

Accordingly, whether sexually derogatory epithets, comments, or threats linguistically express discriminatory viewpoints or ideas is irrelevant under the First Amendment. Such words are not legally "expressive" for the purposes of the First Amendment, but rather are illegal, equality-depriving speech acts that the government has a "sufficiently important governmental interest in regulating."178 "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court has] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"179 But speech which creates a sexually hostile environment reveals no more of an intent to convey a particularized message of gender inferiority or hatred than an assault on a red-haired person reveals an intent to convey the message that the assailter dislikes red hair. An assault, the threat of an assault, or words which create a hostile environment, legally constitute acts.180 Similarly, Title VII's prohibitions against sexual harassment do not violate the First Amendment because they are aimed at conduct in the same way that a law against treason is aimed at the speech act of telling the enemy of the nation's defense secrets.181

Finally, the R.A.V. Court asserted that a law which regulates the "primary effects" of speech—its persuasive (or


180. "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993). For example, an assailter who selects his victim based on negative viewpoints about the victim's race, religion, or disability is not only unprotected by the First Amendment, but also can be punished criminally. Id. at 2202; see also United States v. Gilbert, 813 F.2d 1523, 1529–31 (9th Cir. 1987) (finding that racially derogatory and threatening correspondence violated the Fair Housing Act (FHA) by intimidating the director of an adoption organization responsible for the placement and adoption of Black and Asian children and that prosecution under the FHA did not violate the First Amendment because the Act regulates conduct).

181. R.A.V., 112 S. Ct. at 2546; see also Mitchell, 113 S. Ct. at 2200 (noting that "in R.A.V. v. St. Paul, . . . we cited Title VII . . . as an example of a permissible content-neutral regulation of conduct").
repellent) force" on the listener—is unconstitutional,182 but that a law which regulates the "‘secondary effects’ [of speech is] ‘justified without reference to the content of the . . . speech.’"183 While “[t]he emotive impact of speech on its audience is not a ‘secondary effect,’”184 the harm that hostile environment law seeks to eradicate is equality-deprivation, not emotional distress.185 Thus, under the “secondary effects” exception, Title VII imposes no unconstitutional restrictions on freedom of speech because it regulates only the secondary, equality-depriving effects of sexually abusive workplace speech.

V. OVERBREADTH AND VAGUENESS

Although the Court’s dicta in R.A.V. suggest that Title VII represents a content-neutral regulation of conduct and contentless, sexually derogatory "fighting words,"186 it is unclear whether all expressions or statements that courts have termed sexually abusive qualify as fighting words.187 If

182. R.A.V., 112 S. Ct. at 2549 n.7.
183. Id. at 2546 (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)); see also Mitchell, 113 S. Ct. at 2201 (upholding a Wisconsin statute that provided for an enhanced sentence when the actor intentionally selected his victim based on the victim’s race because the statute’s purpose was to minimize the secondary effects of bias-motivated crimes); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–54 (1986) (upholding an ordinance prohibiting adult movie theaters from locating within 1000 feet of any residential zone, church, park or school because the ordinance was not aimed at the content of the films shown, but rather at the "secondary effects of such theaters on the surrounding community" such as crime, reduced retail trade, decreased property values, and reduced quality of life).
185. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370–71 (1993) (holding that the plaintiff need not allege psychological disruption in her hostile environment claim because the harm consists of severe or pervasive discriminatory conduct). But cf. R.A.V., 112 S. Ct. at 2557 (White, J., concurring) (arguing that because sexually hostile work environment regulation is “keyed . . . to the impact of the speech on the victimized worker,” it would not fall within the secondary effects exception).
186. R.A.V., 112 S. Ct. at 2546–47.
187. See, e.g., Volokh, supra note 16, at 1794–95 (citing cases in which courts have suggested that Title VII liability could be premised in part on the use of gender-based job titles, such as “draftsman” or “foreman”; the presence of sexually suggestive material, defined broadly enough to include reproductions of classical paintings; a male homosexual’s discussion with a male employee of his sexual preference or of political issues related to homosexuality; and an employee telling a female coworker that women make bad doctors because they are unreliable when they menstruate).
the scope of the dicta in *R.A.V.* is limited to those speech acts which are blatantly coercive and intimidating, then the regulation of statements premised on stereotypes, or which invoke sexuality in some way but do not seem to amount to coercive, equality-depriving speech acts, requires further justification.  

Admittedly, concerns about the sweep of hostile environment law arise when the alleged severe or pervasive verbal harassment includes statements like "women should not be entitled to affirmative action" or "I think women should stay at home and raise children." Such statements are not necessarily invoked to coerce or dominate other employees, but may be part of a good faith political discussion.  

Similarly, a nude painting or sculpture may be in the work place for aesthetic interests, not to derive a sexual thrill. However, if a supervisor makes these statements to a subordinate or repeatedly refers to the sculpture with the subordinate's name in a joking manner, such expression could contribute to a hostile environment. In some sense, the application of hostile environment law is somewhat unpredictable.

But the degree of unpredictability inherent in the hostile environment standard is not unconstitutional. As a content-neutral regulation of conduct, hostile environment law is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression;  

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188. The Third Circuit has shown a willingness to examine the effects of alleged harassing words or conduct, rather than the intent. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).

189. *Browne*, *supra* note 6, at 520 (suggesting most citizens carry on the bulk of their social and political discussion in the workplace). Moreover, the Supreme Court has stated that "[t]he First Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas." *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

190. "Unwelcome . . . verbal or physical conduct of a sexual nature [constitutes sexual harassment if it] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 29 C.F.R. § 1604.11(a) (1993). This conduct must also be "severe or pervasive." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Other factors which are relevant, but not dispositive, in a hostile environment determination 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." *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993).
and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{191}

The government has a compelling interest in regulating equality-depriving speech acts in the workplace,\textsuperscript{192} and that interest is unrelated to the suppression of free expression to ensure equality.\textsuperscript{193}

Finally, the prohibition on sexually hostile work environments represents no more than an incidental restriction on non-abusive employee speech, being neither unconstitutionally overbroad nor vague. A statute must be "invalidated [as overbroad] if it is fairly capable of being applied to punish people for constitutionally protected speech or conduct."\textsuperscript{194} A party invoking an overbreadth attack "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him."\textsuperscript{195} Thus, an employer, being legally responsible for the acts of harassers it employs,\textsuperscript{196} may assert the free speech rights of its employees, even though the employer's free speech rights may not be at issue. An employer would argue that the amount of workplace speech that employers generally prohibit to avoid potential lawsuits is substantially more than the domain of coercive, equality-depriving speech which creates a hostile environment under the law. Because employers are risk-averse when it comes to legal exposure, they are inclined to create a buffer zone against potentially hostile environments by forbidding far more expression than legally required.\textsuperscript{197} Hostile environment law speech limitations, an employer might argue, are substantially overbroad because an employee "who contemplates protected activity might be discouraged by the in terrorem effect of the [law]," enforced through her employer.\textsuperscript{198}

But "[t]he bare possibility of unconstitutional application is not enough [for an overbreadth challenge to succeed]; the law is unconstitutionally overbroad only if it reaches substantially

\begin{enumerate}
\item See supra notes 170-181 and accompanying text.
\item BLACK'S LAW DICTIONARY 1103 (6th ed. 1990).
\item Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978).
\item 29 C.F.R. § 1604.11(c) (1993).
\item Volokh, supra note 16, at 1811-14.
\end{enumerate}
beyond the permissible scope of legislative regulation," and "the unprotected activity is a significant part of the law's target." If, in reality, the number of instances in which hostile environment law "may be applied to protected expression is small in comparison to the number of instances of unprotected behavior which are the law's legitimate targets," and employers are not substantially censoring their employees, the overbreadth challenge will fail. Moreover, even if hostile environment law reaches numerous protected statements, "such applications, although substantial in absolute number, [are] insubstantial when compared with the law's legitimate applications." Thus, the few examples of employer censorship of non-coercive expression and the few cases suggesting that non-coercive expression might contribute to a hostile environment do not indicate that a hostile environment law would be overbroad.

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202. Id. (citing Broadrick v. Oklahoma, 413 U.S. 601, 609–18 (1973) (finding that a state law prohibiting civil service employees from engaging in political activities like fund-raising, belonging to a political party committee, being a member of a partisan political club, running for office, or running a campaign was not overbroad even though it reached protected acts like wearing campaign buttons and displaying bumper stickers). The restrictions on sexually abusive workplace expression need not be the least restrictive means of ensuring equality. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989).
203. Based upon several trial court decisions since the Supreme Court's Harris decision, employees should not be concerned that they will no longer be able to raise sensitive political topics like affirmative action or women's proper societal role. Hostile environment law requires a plaintiff to allege much more than a discussion of these topics in the workplace in order to meet the sexual abuse threshold. See, e.g., Thompson v. Campbell, 845 F. Supp. 665, 673–74 (D. Minn. 1994) (finding that harassment of plaintiff was not severe or pervasive when she alleged that her supervisor often commented on the size and appearance of the breasts and buttocks of other women in the office; opined on whether their clothing displayed those attributes to his liking; told plaintiff that he had sexual fantasies about her; and placed or attempted to place his arm around plaintiff's shoulders despite plaintiff's protestations); Doe v. Donnelley & Sons Co., 843 F. Supp. 1278, 1279–81 (S.D. Ind. 1994) (indicating that a hostile environment claim cannot survive summary judgment if the plaintiff alleges that her supervisor commented that she would "look nice in a body suit"; asked her what she wore to the gym and at home and how she looked in it; told her how beautiful she was; asked her how much weight she had lost; patted her rear end twice after being told not to do so; and that another employee had left four "heavy-breathing" voice messages for her). These cases indicate to employers that they should not be overly concerned about censoring all sexually degrading comments, let alone comments on women's political issues. As long as courts continue to interpret the "severe or pervasive" requirement in this manner, any concern about extensive employer censorship of employee speech seems misplaced.
Nor is hostile environment law impermissibly vague, "subject[ing] the exercise of the right of [free speech] to an unascertainable standard," such that "the line between innocent and condemned conduct becomes a matter of guesswork" for employees. The Supreme Court has been quite tolerant of similarly vague standards when a law directly implicates expressive conduct. For example, the Court has recognized a state's broad power to regulate "obscenity" to maintain a decent society. States constitutionally may regulate obscene works which (1) appeal to a "prurient interest" in sex; (2) "depict [] or describe [], in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (3) "lack [] serious literary, artistic, political, or scientific value." The obscenity standard is not so vague that juries require an expert on obscenity to distinguish the obscene from the non-obscene. It is generally within the province of the jury to determine those works which are offensively erotic. This "offensive eroticism" standard is just as vague, if not more so, than the hostile environment standard. The same is true with respect to other laws that the Supreme Court has upheld against vagueness attacks, such as a ban on "loud and raucous" noises or a law which punished "the distribution of obscene, lewd, lascivious, filthy, indecent or disgusting magazines."

204. "Because vagueness closely parallels overbreadth in its deterrence of protected expression, the analysis of excessive vagueness in the first amendment area closely parallels that of overbreadth: The expression deterred by a vague statute must be both real and substantial" TRIBE, supra note 201, § 12-31; see also Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 n.6 (1982) (finding that a "court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of the law affects the overbreadth analysis").


206. TRIBE, supra note 201, at § 12-31.

207. The Supreme Court is more tolerant of vagueness in economic legislation and in laws imposing civil penalties. Hoffman Estates, 455 U.S. at 498-99. Title VII can be viewed as a civil enactment that regulates economic activity.


210. Paris Adult Theatre, 413 U.S. at 56 n.6.

211. Id.

212. Kovacs v. Cooper, 336 U.S. 77, 79-80 (1949) (finding that although "loud and raucous" are abstract words, they have acquired a well-understood meaning through daily use and therefore a statute prohibiting the use of a sound amplifier to create loud and raucous noise is not unconstitutionally vague).

213. Winters v. New York, 333 U.S. 507, 511 (1948) (finding that the words in question are not vague but nonetheless rejecting the statute as too vague).
Finally, in the *Harris* case, a case premised entirely on verbal and expressive sexual harassment, the Court observed that a hostile environment standard "is not, and by its nature cannot be, a mathematically precise test." Justice Scalia's concurring opinion stated: "'[a]busive' (or 'hostile,' which in this context I take to mean the same thing) does not seem to me a very clear standard . . . . Be that as it may, I know of no alternative to the course the Court today has taken."

Despite the constitutionality of the hostile environment standard, workers nonetheless need to have some freedom to talk about social and political issues such as affirmative action at work without discipline from their employers. Society simply cannot dismiss such expression as "[c]asual chit-chat . . . important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment." The Supreme Court has recognized that the First Amendment may be "thought to be primarily an instrument to enlighten public decision-making in a democracy" requiring the preservation of "the free flow of information . . . ." Thus, if democratic communication is to flourish, employees should not be discouraged from expressing dissenting political opinions.

Workers should not, however, be able to use the phrase "political expression" as a shield for derogatory epithets and comments based on sex by disingenuously characterizing such coercive speech acts as part of a larger discussion about the merits of affirmative action or women's role in society. The dissemination of information also involves allowing people to make the best and freest choices for themselves, and at some point the marginal informational benefits from stereotyped comments which permeate the work environment and become coercive will be far outweighed by the costs of equality infringement. Finding this point does not require determining

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215. *Id.* at 372 (Scalia, J., concurring). Scalia speculated, "[o]ne might say that what constitutes 'negligence' (a traditional jury question) is not much more clear and certain than what constitutes 'abusiveness.'" *Id.*
218. See supra Part III.
where emotional sensibilities will be optimally protected, but
does require determining where expression transforms the
underlying assumptions about women in a particular work-
place into assumptions of inferiority. 220 When employees are
locked into rigid sex roles which require them to interact with
their opposite-sexed colleagues on an unequal plane, free
choice has become limited to those actions which create
inequality. A hostile environment ultimately harms everyone
in the workplace. 221 

A failure to regulate sexually hostile work environments
ultimately would result in a new reduction in freedom for
everyone; any vagueness in such temporary regulation is therefore
acceptable. Inevitably, the line between coercive, equality-
depriving expression and non-actionable expression—where
expression is no longer severe or pervasive sexual abuse—will
be borne out through case-by-case adjudication. 222 Although
utilizing case-by-case adjudication creates some temporary
uncertainty, such uncertainty is acceptable in the First Amend-
ment context 223 and creates no more vagueness or overbreadth
concerns than concepts like defamation, 224 or obscenity. 225
Concerns over any non-coercive speech being temporarily swept
up in the process of defining abusive workplace speech are
insubstantial when compared to the benefits gained from
preserving equality.

220. See supra notes 55–75 and accompanying text.
221. See supra note 75.
222. It is inevitable in case-by-case adjudication of a legal standard that there will
be some inconsistency between courts. But such inconsistency is constitutionally
acceptable, until appellate courts establish uniformity. As the Supreme Court stated
in reference to the nebulous meaning of "reckless disregard" in defamation law,
"[i]nevitably its outer limits will be marked out through case-by-case adjudication,
as is true with so many legal standards for judging concrete cases, whether the standard
is provided by the Constitution, statutes, or case law." Bose Corp. v. Consumers Union,
(1968)).
223. "Few dividing lines in First Amendment law are straight and unwavering,
and efforts at categorization inevitably give rise to fuzzy boundaries. [The] definitions
of 'obscenity,' and 'public forum' illustrate this all too well." R.A.V. v. City of St. Paul,
"Speech interacts with the rest of our reality in too many complicated ways to allow
the hope or the expectation that a single vision or a single theory could explain, or
dictate helpful conclusions in, the vast terrain of speech regulation." Steven Shiffrin,
The First Amendment and Economic Regulation: Away From a General Theory of the
First Amendment, 78 NW. U. L. REV. 1212, 1283 (1983); see also supra notes 204, 206.
225. See Miller v. California, 413 U.S. 15, 24 (1973); Paris Adult Theatre I v. Slaton,
413 U.S. 49, 56 n.6, 68–69 (1973).
CONCLUSION

Verbal sexual harassment in the workplace is sexual abuse. It is equality-depriving conduct and therefore can be regulated without offending the Constitution. Although the precise limitations on the regulation of sexist speech are unclear, few legal standards governing speech have more precise boundaries than the hostile environment standard. Any temporary chilling of constitutionally-protected workplace speech is incidental, given that almost all verbal sexual harassment is coercive and should not be protected because of the dictates of the equality principle.