Actions as Words, Words as Actions:
Sexual Harassment Law, The First Amendment and Verbal Acts

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Abstract: The article examines the tension between the hostile work environment under the civil rights laws and the First Amendment's protection of free speech, even when such speech is offensive and even discriminatory. After discussing the tension and its limits, the author examines other rationales proposed to resolve this tension, and rejecting them as unsatisfactory. Noting that hostile work environment doctrine, as a variable standard, employs a less "bright-line" approach than is typical of the First Amendment's rule, the author nonetheless finds that the "open texture" of all rules, and the requirement that a hostile work environment be systematically pervasive or severe brings the conduct prohibited within the scope of "verbal acts" and thus is roughly consistent with the First Amendment.

I. Introduction

For nearly two decades, a debate has smouldered over the perceived tension between the law of sexual harassment and the First Amendment's guarantee of freedom of speech. As the protection against sexual harassment in the workplace spread beyond overt discrimination in discrete employment decisions and quid-pro-quo sexual harassment to include the less readily quantified "hostile work environment," free speech advocates became less sanguine about the compatibility between the protections against workplace discrimination and the First Amendment, especially its proscription of viewpoint discrimination.

This previously almost purely academic controversy is likely to take on practical and doctrinal significance with the retirement of Justice Sandra Day O'Connor, and the recent appointment of Justice Samuel Alito to the Supreme Court. Justice Alito authored as a federal appeals court judge an opinion striking as unconstitutionally overbroad a college anti-discrimination policy that purported to bar only speech proscribed under federal and anti-discrimination laws; he wrote that "we have found no categorical rule that divests 'harassing' speech, as defined by federal

anti-discrimination statutes, of First Amendment protection," and referred to "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech."[1] Plainly, Justice Alito is not one to flinch from an analysis of hostile work environment doctrine in the light of the First Amendment–an analysis that the Court has avoided to date. How the doctrine will fare in such an examination is unclear.

Beginning with the Supreme Court's ratification of the hostile work environment doctrine as consistent with the statutory mandate of the Civil rights Act of 1964 in *Meritor Savings Bank, FSB v. Vinson*,[2] a cottage industry of scholarly comment sprang into being. Since then, advocates of gender equality in the workplace and advocates of the First Amendment have clashed over the legitimacy of the hostile work environment cause of action under the First Amendment.

In the ensuing welter of attacks on hostile work environment doctrine, a series of rationales

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[1]Saxe v. State Area College School District, 240 F.3d 200 (3d Cir. 2001).

[2]477 U.S. 57, 65 (1986). *Meritor* involved a sexual harassment claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000-e); however, hostile work environment claims or hostile learning environment claims may also be brought under other sections of the Civil Rights Act, such as Title IX (20 U.S.C. §1681), barring discrimination in education, or under 42 U.S.C. §1983, on the theory that a state actor has intentionally deprived an individual of federal statutory or constitutional rights. In every context, the definition of hostile work/learning environment is the same. *See* Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75 (1992) (Title IX); Hayut v. State University of New York, 352 F.3d 733, 744-745, 750 (2d Cir.2003)(1983 and Title IX; citing cases).

While many of these cases involve sexual harassment, hostile work environment claims may be raised by members of any protected class. *See, e.g. Meritor,* 477 U.S. at 65-66 (noting that early regulations and lower court decisions applying hostile work environment theory of recovery involved claims of racial or national-origin discrimination, and that early regulations applying the concept to sexual harassment "appropriately drew from, and were fully consistent with, the existing caselaw"); Torres v. Pisano, 116 F.3d 625, 631 (2d Cir.), *cert. denied,* 522 U.S. 997 (1997) (race and national origin claims involving hostile work environment claims judged by same standard as sexual harassment hostile work environment claims).

have been proffered to justify a civil cause of action which penalizes speech based on its poisonous effects in the work environment. These rationales range from the elegant–analogizing workers to "captive audiences"–to the overtly political–declaring the goal of workplace equality so important that it should outweigh the constitutional imperatives of protecting free speech.

In the end, these arguments either turn upon artificially tortured logic, or they allow for an impermissible subjectivity in judicial decisions regarding the legal status of speech. Neither avenue is healthy for the future of constitutional governance. While Richard Posner's call for pragmatic judicial decisions even where no legal doctrine supports (let alone compels) such decisions is refreshingly candid,[3] it underlines the extent to which the judiciary is constituting itself as an infallible, unelected power elite reminiscent of Plato's Guardians–a fear expressed by the great conservative jurist Learned Hand nearly fifty years ago[4].

In fact, the arguments for protecting against a hostile work environment need neither be so tortured, nor overtly political. The limits of the hostile work environment standard evince respect for the essence of the First Amendment's guarantee of free speech, if not complete harmony with contemporary free speech doctrine. One need not categorize speech as "high" or "low" value (thus introducing the moral and social values of the decider as a "filter"), nor need one balance the social utility of the protecting the right of free speech against that of protecting the right to be free of a discriminatory hostile work environment. Rather, recourse to first principles demonstrates that conduct which creates a hostile work environment fits largely within the parameters of what the Supreme Court has long recognized as a "verbal act," an act performed through speech and thus

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[3]RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003).

[4]LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

remains outside the boundaries of First Amendment protection, not based upon governmental disapproval of the speech in question but because those words spoken in the particular factual context have the effect of an act, not of a communication.[5]

One reason for the tension between these two doctrines is that the judge-created criteria for hostile work environment liability partake of the nature of a variable standard, while First Amendment jurisprudence generally applies a rule, to use the terms employed by H.L.A. Hart.[6] The distinction between rules and standards is not often marked in conversation, or even in legal practice. Indeed, many legal scholars have, on occasion, conflated the two. Hart's categories are helpful in exploring the tension between these two legal imperatives. More importantly, the reconciliation of the two imperatives is advanced by recognizing the limits of Hart's categories and the extent to which they blur at the fringes..

In exploring the compatibility of the hostile work environment standard with the First Amendment, both the First Amendment's core and the often-neglected doctrine of the verbal act need to be examined. So too the limitations of hostile work environment doctrine must be fully understood., especially its threshold requirement limiting applicability to harassive speech that is "severe or pervasive enough to create an objectively hostile or abusive work environment."[7] This requirement, that the "workplace be so severely permeated with discriminatory intimidation, ridicule

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[5]*See generally* JOHN F. WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH (2d Ed. 2004) (hereinafter, "FIRST AMENDMENT, FIRST PRINCIPLES").

[6]H.L.A. HART, THE CONCEPT OF LAW (1961) at 129, 130.

[7]Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

and insult that the terms and conditions of [] employment were thereby altered,"[8] bears a striking resemblance to the kind of inquiry that has been employed by the courts, especially the Supreme Court, in delineating the distinction between speech, which is protected, and a verbal act, which may be regulated.

This is not to assert that the courts have deliberately tailored the contours of the hostile work environment claim to respect the parameters of free speech. The congruence between the caselaw establishing the scope of the hostile work environment doctrine and the verbal act concept is not perfect. However it is sufficiently close to justify retention of this cause of action as consistent with the mandates of the First Amendment.

II. Rules, Standards and the Fringes

Conflict between hostile work environment doctrine and the protection accorded speech under the First Amendment can be illuminated by examining the nature of legal rules and standards. Without summarizing the extensive academic literature,[9] legal imperatives, or directives may be roughly divided into two kinds. First, "rules" which may be briefly defined as "clear prescription[s] that exist[s] prior to [its] application that determine[s] appropriate conduct or legal outcomes," that

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[8]Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002); *see generally* Sprague v. Adventures, Inc., 121 Fed. Appx. 813 (10th Cir. 2005); Valentine v. City of Chicago, 452 F.3d 670 (6th Cir. 2006)(describing requirement that environment be "objectively hostile").

[9]For a provocative *tour d'horizon* encompassing much of the classic "rules versus standards" literature, *see* Pierre J. Schlag, Rules and Standards, 33 U.C.L.A. L. Rev. 379 (1985) (describing the "dialectic" between rules and standards as "irreducible," as rules represent a type of knowledge which is "too simplistic" while standards represent a "heuristic and open-ended" type of knowledge which is "so tentative, so epistemologically insecure, that they furnish little in the way of learning." *Id.* at 428. Schlag concludes with the pointed, if somewhat unhelpful, question: "why and how it is we allow such silly games to have such serious consequences." *Id.* at 430).

is, "relatively determinate prescriptions that minimize the necessity of moral or practical calculation in application."[10] The second form of directive, "variable standards," are employed "where the sphere to be controlled is such that it is impossible to identify a class of specific actions to be uniformly done or foreborne and to make them the subject of a simple rule, yet the range of circumstances, though very varied, covers familiar features of common experience."[11] The use of variable standards "leaves to individuals, subject to correction by a court, the task of weighing up and striking a reasonable balance between the social claims which arise in various unanticipatable forms."[12] In such cases, those whose conduct falls within the sphere of regulation "are required to conform to a variable standard *before* it has been officially defined, and they may learn from a court only *ex post facto* when they have violated it, what, in terms of specific actions or forbearances, is the standard required of them."[13]

These broad definitions of rules and standards should not be taken as representing a sharp distinction in all contexts, however; as Hart states:

> the distinction between the uncertainties of communication by important example (precedent) and the certainties of communication by authoritative general language (legislation) is far less firm than this naive contrast suggests. Even when verbally formulated general rules are used, uncertainties as to the form of behavior required by them may break out in particularly concrete cases. . . . In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can

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[10]Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 14, 15n. 58 (1997)

[11]HART, THE CONCEPT OF LAW at 128-129.

[12]*Id.* at 129.

[13]HART, THE CONCEPT OF LAW at 129.

provide.[14]

Thus, Hart himself asserts that all rules have, at their fringe, "an open texture."[15] Similarly, "even with very general standards, there will be plain indisputable examples of what does, or does not, satisfy them. Some extreme cases of what is, or is not, a 'fair rate' or a 'safe system' will always be identifiable *ab initio.*"[16]

Despite this open texture inherent in all rules, and the limits to the variability of the variable standard, there is a useful distinction to be drawn between the strategy of drawing a "bright-line" rule which endeavors to govern the sphere to be controlled with the maximum of clarity and precision, and those instances where "the sphere to be legally controlled is recognized from the start as one where the features of individual cases will vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance."[17]

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[14]*Id.* at 123.

[15] Id. at 124.

[16]*Id.* at 128.

[17]*Id.* at 127. Of course, the utility of this distinction can be and has been drawn into question–notably by Pierre Schlag, *supra,* 33 U.C.L.A. L. Rev. at 430 (Concluding that "much of legal argumentation is simply an exercise in the formalistic mechanics in a dialectic which doesn't go anywhere"). Moreover, adopting of Hart's terminology does not necessarily entail acceptance of Hart's defense of positivism; Ronald M. Dworkin, in mounting "a general attack on positivism," using "H.L.A. Hart's version as a target," acknowledged the distinction between rules and what he called "principles, policies and, other sorts of standards." Ronald Dworkin, *Is Law A System of Rules?*, in RONALD M. DWORKIN, ed. THE PHILOSOPHY OF LAW (1977) 38, 43; *see also*, Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14 (1967). Dworkin subdivides the category of "standards" more finely than does Hart, but also states that "often I shall use the term 'principles' generically to refer to the whole set of standards other than rules." *Id.* Because Dworkin freights the term "principles" with a moral quality not germane to the distinction as employed here–though highly relevant to his own project–I follow Hart's usage.

Both rules and standards are deeply rooted in Anglo-American law. Indeed, Hart goes further, acknowledging that:

> all systems, in different ways, compromise between two social needs: the need for certain rules, which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open for later settlement by an informed, official choice, issues which can only properly be appreciated and settled when they arise in a concrete case.[18]

Rules and standards each serve an important function; the question is selecting which approach to adopt in a given context, and that turns upon a value-laden inquiry. For example, criminal statutes have long been required to define the acts proscribed with sufficient particularity as to place a reasonable person on notice to enable her to conform her conduct to the law; a legislature that fails to provide such notice has enacted a void statute–a nullity.[19] Rules can deter wrongful conduct, and encourage people to act with security that their actions will, as long as they stay on the right side of the bright line, not form the basis of liability, either civil or criminal; this reflects the view of Oliver Wendell Holmes that if "you want to know the law, and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, the vaguer sanctions of conscience."[20]

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[18]HART, THE CONCEPT OF LAW at 127.

[19] *See, e.g.,* City of Chicago v. Morales, 527 U.S. 41 (1999); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Papachristou v. Jacksonville, 405 U.S. 110, 162-172 (1972). Notably, this distinction is not of new vintage nor controversial. *See,* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820).

[20]Oliver Wendell Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS (1920) 171. This is not to assert that Holmes simplemindedly preferred rules to standards. In THE COMMON LAW (1881), Holmes examined the standard of negligence, and argued not only for its

Thus, the constitutional requirement that no person is eligible to serve as President of the United States "who has not attained the age of thirty-five Years"[21] clearly limits the age of any potential presidential candidate–if nominated, they could not run, and if elected they could not serve. Additionally, rules limit the extent to which the enforcing agency or court can allow whim or prejudice to infect the outcome, and tend to secure equality before the law.[22]

In the context of free speech cases, especially, a bright line rule is far less susceptible to manipulation than a multi-factor balancing test. Early Supreme Court decisions regarding the scope of freedom of speech often asserted that their holdings were "not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, itself unconquerable," and then found ways to allow penalization of a speaker, explicitly premised on disapproval of his views.[23]

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application, but for its *objective* content–that is, that acts are a foundation for liability only when "a man of ordinary intelligence and forethought would have been to blame for acting as he did." THE COMMON LAW at 110; *see generally id.* at 108-129.

[21]U.S. Const. Art II, §1 cl. 5 (1787).

[22]See, e.g., Marvin Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972) (arguing, pre-enactment of federal sentencing guidelines, that wide discretion afforded judges in sentencing allowed for gross inequities and favoritism).

[23]Turner v. Williams, 194 U.S. 279, 294 (1904). In *Turner*, the Immigration Act of 1903, barring entrance to the United States by anarchists; the Supreme Court declared itself to be "at a loss" to see the First Amendment problem arose, since the *entrance* by one holding disfavored views was barred, and not any actual speech–although speech consonant with such views would lead to expulsion. The unfortunate alien "does not become one of the people to whom these things [First Amendment rights] are secured by our Constitution by an attempt to enter forbidden by law." *Id.* at 290.

Other cases in which rhetorically strong protections accorded speech dwindled in the face of actual holdings that speech might be silenced include the World War I Espionage Act cases–Schenck v. United States,249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919) and their progeny. While I have pointed out

One of two Supreme Court decisions to explicitly adopt balancing methodology–a classic variable standard approach–to First Amendment general analysis, *Dennis v. United States*, ostensibly embraced a speech-enhancing approach to First Amendment analysis, but in essence allowed for the outlawing of the American Communist Party, on the basis that their credo, if adopted by a substantial portion of the body politic, might later result in significant harm, although the likelihood was admittedly minimal.[24] In short, the experience of judges applying standard-like approaches to free speech points out that when free to suppress unpopular speech that they themselves find offensive or potentially dangerous, judges will do so. Speech will lose, more often than not, if the judge is free to balance, because judges are women and men like the rest of us, and capable of succumbing to their prejudices if afforded the latitude to do so.[25]

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the fact that these cases created a libertarian theory of free speech–the "clear and present danger" test to be applied to speech issues, and overruled older cases to do so–the fact is that the clear and present danger rule was announced in ringing terms, but almost every case found a way of satisfying the requirement. FIRST AMENDMENT, FIRST PRINCIPLES at 29-42. Further, the rhetorically strong protection of "core" First Amendment speech must be contrasted with the extensive carving out of significant swaths of speech as "nonspeech" or "lesser value" speech, simply because its content offends social mores. *See, e.g.,* Chaplinsky v. New Hampshire, 314 U.S. 568 (1942) (carving out from protection "the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting' words"). At least one of those areas, the obscene, remains as fully vital today as it did in 1942, despite admitted difficulties of definition, which have increased in the modern age as technology erodes local community-based distinctions. *See* Nitke v. Gonzales, 413 F. Supp.2d 262 (S.D.N.Y. 2005), *aff'd*, 164 L.Ed.2d 295 (2006). For my critique of this "Chaplinskyism" dividing the unitary language of the First Amendment, *see* FIRST AMENDMENT, FIRST PRINCIPLES at 72-121.

[24]341 U.S. 494 (1951). For an extended critique of *Dennis's* balancing approach, see FIRST AMENDMENT, FIRST PRINCIPLES at 56-62.

[25]For a recent example, see Rice v. Paladin Enterprises, 128 F.3d 233 (4th Cir. 1997), in which an admittedly offensive book, HIT MAN: A TECHNICAL GUIDE FOR INDEPENDENT CONTRACTORS, was held to be subject to liability in tort for "causing"a murder 10 years after its publication, despite the First Amendment protection afforded speech advocating violence in Brandenburg v. Ohio, 395 U.S. 444 (1969). The Court in *Brandenburg* barred such liability unless that speech takes place in circumstances where the resultant violence is both "imminent"

However, rules can often lead to over-rigidity, not taking sufficient account of the unique equities of a given situation. Even Victor Hugo's inflexible Inspector Javert comes to realize that, "the rule might be inadequate in the presence of a fact, that everything cannot be framed within the text of the code, that the unforseen compelled obedience."[26] This insight has been brought harshly to light when the law attempts to eliminate discretion, or cabin it sharply, as in the Federal Sentencing Guidelines, or the Rockefeller drug laws, which have forced judges to pass sentences far in excess of those which they deem appropriate.[27]

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in time and intended specifically by the speaker. In *Rice*, the Fourth Circuit unconvincingly sought to limit *Brandenburg's* holding to speech advocating political violence, citing disingenuously cases overruled *sub silentio* by *Brandenburg* and out-of context quotations from cases analogizing to *Brandenburg* in non-political contexts, and thus inconsistent with the conclusion drawn by the *Rice* court from them. *Compare* 128 F.3d at 264 (*quoting* 44 Liquormart v. Rhode Island, 517 U.S. 484, 498 (1996); purportedly limiting scope of *Brandenburg* to political speech) with *44 Liquormart*, 517 U.S. at 498 (*citing Brandenburg* to apply by analogy to context of commercial speech). For background and fuller analysis of *Rice* see FIRST AMENDMENT, FIRST PRINCIPLES at 182-245. Notably, the Supreme Court has recently firmly reaffirmed *Brandenburg*, and rejected the arguments deployed in *Rice*, in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (striking as unconstitutional federal statute banning as child pornography depictions based upon graphic imaging without employing real-life models, holding that lesser showing required to ban child pornography is justified by harm to victimized children in creating the images; absent such harm, the "mere tendency of speech to encourage unlawful acts is not a sufficient reason to ban it").

[26]Victor Hugo, 5 LES MISERABLES 147 (1862) (Isabel F. Hapgood, trans., Thomas Y. Crowell & Co.)(1862). In the more standard Wilbour translation, the passage is less eloquent. LES MISERABLES (trans. Charles E. Wilbour) (1909) at 1298.

[27]*See, e.g.*, Benjamin Weiser, "A Judge's Struggle to Avoid Imposing a Penalty He Hated," *New York Times,* January 13, 2004 A1 (detailing Judge Gerard E. Lynch's imposition under federal sentencing guidelines of a 10 year sentence on a first offender aged 18 for disseminating child pornography over the Internet. Judge Lynch is quoted as stating that "[t]his is without question the worst case of my judicial career...[the] unjust and harmful [sentence] has the potential to do disastrous damage someone who is not much more than a child himself"). *See generally*, KATE STITH & JOSE´ A. CABRANES: FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9-22 (1998); Mark Oslar, Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home, 64 S.C. L. Rev. 649 (2003); A. Thomas Levin, Another Fine Mess, 75-Aug. NYSTBJ 5

Standards partake of the virtue of recognizing that the limits of human foresight prevent us from envisioning every circumstance which a law might need to cover, even when we allow for the recognition of the unusual or even aberrational case. In the context of criminal law, some states have recognized this, and have created a "safety valve" allowing the court to dismiss an otherwise proper criminal case , based upon a finding that the dismissal is warranted to serve the "interests of justice."[28] New York State's statutory scheme allows a defendant, regardless of guilt, to make a motion for dismissal based on the interests of justice, and instructs the court to "examine, collectively and individually," a series of factors, no one of which need be found to exist in order to grant the motion.[29] The purpose of this motion–called a "Clayton motion" by practitioners after the decision that introduced some of the factors later codified by the Legislature–is to "allow the

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(2003)("There is nearly unanimous agreement among various political factions that these laws have not served their purpose, are outdated and unrealistic, and have caused the state to spend millions of dollars for the incarceration of relatively minor offenders, without putting a drug kingpin in jail and without making a dent in the substance abuse problem").

Based upon the Sixth Amendment right to a jury trial on factual issues, such as those involved in applying the Guidelines, The Supreme Court struck down the mandatory application of the federal sentencing guidelines in United States v. Booker, 543 U.S. 220 (2005). In so doing, the Court emphasized that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." In view of the mathematically calibrated, extremely detailed nature of the Guidelines, it remains unclear to what extent *Booker* will cure the problem of over-determinacy in criminal sentencing.

[28]See John F. Wirenius, A Model of Discretion: New York's "Interests of Justice" Dismissal Statute, 58 Alb. L. Rev. 175 (1994). For a state-by-state analysis, see Sheila Kles, How Much Further is the Furtherance of Justice, 1989 Ann. Survey Am. L. 413.

[29]N.Y. Crim. Proc. L. §§170.40(1) (governing misdemeanor cases); 210.40(1)(governing felony cases). The factors, codified from decisional law, range from the seriousness and circumstances of the offense, to the presence of any exceptionally serious misconduct on the part of law enforcement, and the purpose and effect of imposing upon the defendant a sentence authorized for the offense. See Wirenius, *supra* note 26 at 202.

letter of the law to gracefully and charitably succumb to the spirit of justice."[30] Yet, in many cases, the intermediate appellate courts have reversed these dismissals, not because of any error of law or methodology, but because the judges on appeal reached a different view of the equities on the merits.

It is fair to say that judges are not entirely comfortable with standards and their innate fluidity. Professor Oliver Wendell Holmes, giving the lectures that became *The Common Law*, spoke at length about the negligence standard, which asks "what a prudent man would do under given circumstance." In answering this question, Holmes looks to the "teachings of experience" and concludes that as these teachings–and thus the legal standard as applied–"are matters of fact, it is easy to see why the jury should be consulted as to them."[31] Yet when confronted with a new

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[30]People v. Davis, 286 N.Y.S.2d 396, 400 (Sup. Ct. N.Y. Co. 1967). The decision introducing the factors was People v. Clayton, 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dep't 1973). See Wirenius, *supra* note 27 for the evolution of the factors, and a discussion of how they have been applied by lower courts and the resultant scrutiny by appellate courts of the lower court decisions. As I argued in that article, the Appellate Division in reviewing *Clayton* dismissals by the state trial courts have employed the language of "abuse of discretion" review, but have reversed more freely than is normal with such a normally deferential standard of review. Rather, the Appellate Divisions have reversed dismissals in the interest of justice based on mere disagreement with the weighing of the factors by the trial court, a review more akin to *de novo* review, confined to purely legal determinations. 58 Alb. L. Rev. at 210-222. For a more recent example of the same phenomenon, see People v. Rahmen, 302 A.D.2d 408, 754 N.Y.S.2d 553 (2d Dep't 2002), *app. den.*, 99 N.Y.2d 657, 760 N.Y.S.2d 122 (2003), in which the Court in reversing a *Clayton* dismissal stated simply that "we are not persuaded that the interest of justice was served by the dismissal of the indictment in this case," and characterized the decision below as "improvident." Notably lacking from the decision was any discussion of the deference due the lower court, what (if any) of the enumerated factors the Court had over or under estimated, or any other claim of abuse of discretion. Mere disagreement with the determination appears to be enough to warrant a reversal. Again, this patent discomfort with conclusions reached under a standard, and the swiftness with which reversal can ensue, illustrates quite vividly the difficulties inherent in applying a multi-factor balancing test.

[31]HOLMES, THE COMMON LAW, *supra* at 150.

application of the negligence test, to a new technology, the automobile, Justice Holmes reached for a rule, holding that the driver must in every instance stop at the crossing, and visually inspect the railroad tracks outside of her car.[32]

So too the New York intermediate appellate courts have not accorded discretionary dismissals of criminal indictments the usual deference appellate courts normally extend to rulings of mixed questions of fact and law, but have felt free to reverse where the judges simply reached a contrary conclusion in an independent weighing of the required factors admittedly employed by the lower court. Finally, Hart's insight that standards and rules tend to bleed into one another is of paramount importance. For just as the tension between standards and rules illuminates the tension between the hostile work environment doctrine and the First Amendment, the "open texture" of rules and the finitude of standards provide a meeting place to reconcile these two legal imperatives.

III. Standards At Work: Title VII and Hostile Work Environment

Title VII of the Civil Right Act of 1964 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 that individual's race, color, religion, sex, or national origin."[33] After a period in which lower courts reached often inconsistent understandings of the scope of the protection against sexual harassment,[34] the Supreme Court clarified that the

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[32] Baltimore & Ohio Railroad Co. v. Goodman, 275 U.S. 66, 67 (1927). Several years later, his successor on the Supreme Court, Benjamin Nathan Cardozo, applied a standard–the negligence standard so ably defended by Holmes in 1881. Pokora v. Wabash Railroad Co., 292 U.S. 98, 105-106 (1934).

[33] 42 U.S.C. §2000-e (2)(a)(1).

[34] For a discussion of the initial efforts to apply Title VII in the sexual harassment context, see Catharine A. MacKinnon, *Sexual Harassment* in CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE: DISCOURSES ON LIFE AND LAW (1987) at 103-116; *see also,*

discrimination proscribed by the statute "is not limited to 'economic' or 'tangible' discrimination."[35] Rather, the language of the statute "evinces a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women in employment.'"[36] Thus, the *Meritor* Court concluded, the statute's prohibition extends beyond the obvious differential pay or benefits,[37] and even beyond so-called *quid pro quo* sexual harassment, and "includes requiring people to work in a discriminatorily hostile or abusive environment."[38]

Of course, the parameters of what is needed to establish a hostile work environment are the essence of the protection–the broader the definition extends, the more protective the statute is of employees, but also the more speech that is likely to be barred, and thus the more stark the potential conflict between the statute and the First Amendment. In *Meritor*, the Court offered some but not much amplification on the scope of the prohibition, stating that "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title

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Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in MACKINNON & SIEGEL, DIRECTIONS IN SEXUAL HARASSMENT LAW (2004). While not a systematic marshaling of the cases, Professor MacKinnon's account provides a useful view of the process by which it came to be accepted in something like its present day form from one of the architects of the cause of action. *See* Burlington Industries v. Ellereth, 524 U.S.742, 752 (1998) (stating that "the terms [hostile work environment and *quid pro quo* sexual harassment] first appeared in the academic literature,"and citing MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979)).

[35]*Meritor*, 477 U.S. at 64.

[36]*Id.; quoting,* Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978). The Court in *Manhart* itself took the language employed from Sprogis v. United Air Lines, 444 F.2d 1194, 1198 (7th Cir. 1971).

[37]*Manhart*, *supra* note 7.

[38]*Meritor*, 477 U.S. at 65.

VII is violated."[39] Aside from the circularity of the standard–an "abusive" workplace exists where the objectionable conduct reaches the point that it becomes "abusive"–the definition left open several issues.[40] The Court's blanket statement that "mere utterance of an . . . epithet which engenders offensive feelings in an employee" is insufficient to impact work conditions and create a hostile work environment suggested that some balance would be pitched between the values of free expression and that of workplace (and thus economic) equality.

In *Harris v. Forklift Systems, Inc.*, the Court reaffirmed *Meritor* and answered some of the questions left open by that decision. The primary issue decided by the Court in *Harris* was whether a plaintiff was required, as some circuit courts had held, to establish that the level of the hostility was such that it "must seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury."[41] The Court rejected this requirement, holding that the rule in *Meritor*, "which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[42]

The Court in *Harris* explained its standard in terms of what was not included:

> Conduct that is not severe or pervasive enough to create an

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[39]Harris v. Forklift Systems, 510 U.S. 17, 21 (1993) (summarizing and quoting *Meritor*, 477 U.S. at 65, 67).

[40]As Justice Scalia noted in concurring in *Harris*, the terms "abusive" work environment and "hostile" work environment have been uniformly treated as synonymous. 510 U.S. at 24-25 (Scalia, J., concurring).

[41]*Harris*, 510 U.S. at 20, *quoting* record below (editing signs omitted); *citing* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied,* 481 U.S. 1041 (1987) (requiring such a showing); Vance v. Southern Bell Telephone& Telegraph Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (same); Downes v. FAA, 775 F.2d 288, 292 (D.C. Cir. 1984)(same); and Ellison v. Brady, 924 F.2d 872, 877-878 (9th Cir. 1991) (rejecting such a requirement).

[42]*Harris*, 510 U.S. at 21.

> objectively hostile or abusive work environment–an environment that a reasonable person would find hostile or abusive–is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[43]

In Justice O'Connor's opinion for the Court in *Harris*, she noted that "Title VII comes into play before the victim has a nervous breakdown," and stated that a "discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[44] Additionally, Justice O'Connor noted that even apart from these tangible effects, the fact that "the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."[45]

This is not, "and by its nature cannot be, a mathematically precise test," Justice O'Connor admitted, although she did try to provide some guidance:

> whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, *no single factor*

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[43]*Harris*, 510 U.S. at 21-22.

[44]*Harris*, 510 U.S. at 22.

[45]*Id.* Justice O'Connor also went on to note that the description in *Meritor* of the "appalling conduct alleged in *Meritor*...merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." *Id.*

is required.[46]

A. Applying the Factors: The Supreme Court Elaborates

In subsequent decisions, the Court has "emphasized" that "the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[47] A "recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless very serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[48] These standards:

> for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." We have made it clear that conduct must be extreme to amount to a change in terms and conditions in employment, and the Courts of Appeals have heeded this view. [49]

The *Oncale* Court, in an opinion by Justice Scalia, rejected the employer's argument that liability under Title VII for a hostile work environment could not be found where the harrasser and the victim were of the same gender.[50] In reaching this conclusion, the Court was unmoved by the

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[46]*Harris*, 510 U.S. at 23 (emphasis added).

[47]Oncale v. Sundowner Offshore Services, 523 U.S. 75, 81 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

[48]*Faragher*, 528 U.S. at 788 (*quoting Oncale*, 523 U.S. at 82; 42 U.S.C. §2000-e).

[49]*Id.* (internal citations omitted); *citing*, B. LINDEMANN & D. KADUE SEXUAL HARASSMENT AND EMPLOYMENT LAW, 175, 805-807, n. 290 (1992); Carrero v. New York City Housing Authority, 890 F.2d 569, 577-578 (2d Cir. 1989); Moylan v. Maries County, 792 F.2d 746, 749-750 (8th Cir.1986).

[50]523 U.S. at 79-80 ("Title VII prohibits discrimination because of sex in the terms and conditions of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements").

employer's contention that "recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace."[51] Noting that the same risk existed whatever the respective genders of harrasser and victim, the Court found that such risk "is adequately met by careful attention to the requirements of the statute. Title VII "does not prohibit all verbal or physical harassment in the workplace; it is directed only at *discrimination* because of sex."[52] Indeed, the Court went on to state, "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." [53] Rather, the "critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[54]

This understanding of the limits of Title VII informs the limitations of hostile work environment doctrine. Thus, the *Oncale* Court required that discriminatory intent be established, whether the harrasser and the victim are members of the same gender, or not; a woman hostile to the presence of other women in the workplace, or sexual harassment by a homosexual supervisor whose advances are rebuffed are equally but no more credible than the traditional male-female harassment.[55] In each case, sex as the motivating factor must be pleaded and proven.

The requirement that conduct be severe or pervasive is likewise related to the language of

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[51]523 U.S. at 80.

[52]523 U.S. at 80 (emphasis in original; editing and quotation marks omitted).

[53]523 U.S. at 80.

[54]523 U.S. at 80, *quoting, Harris*, 510 U.S. at 23 (Ginsburg, J., concurring).

[55]523 U.S. at 80-81.

Title VII on the theory that "to ensure that the courts and juries do not mistake ordinary socializing in the workplace–such as male-on-male horseplay or intersexual–for discriminatory conditions of employment."[56] Another factor that acts to limit the scope of the doctrine is the requirement that the "objective severity of harassment be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."[57] This requirement mandates "careful consideration of the social context in which particular behavior occurs, and is experienced by its target."[58] The Court provided an example:

> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field--even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[59]

The Court relied, as seen above, on lower courts and on the Courts of Appeals, to distinguish between changed terms and conditions of employment predicated on sex and "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex

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[56]523 U.S. at 81.

[57]523 U.S. at 81, *quoting Harris*, 510 U.S. at 23.

[58]*Oncale*, 523 U.S. at 81.

[59]523 U.S. at 81-82.

and of the opposite sex."[60] In so doing, it explicitly found that the "prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace."[61]

Thus far, limits on the scope of the hostile work environment doctrine have been set forth, to make clear the contours of what is to be held to First Amendment scrutiny. However, an extension of the doctrine should be noted, one which expresses the nature of what constitutes a hostile work environment and helps define the nature of the speech impacted and how that speech is impacted.

The Court has evinced a recognition that a hostile work environment claim is analytically "different in kind from discrete acts" of discrimination, in that "the unlawful employment practice therefore cannot be said to occur on any particular day."[62] Rather, "[i]t occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."[63] Such claims are therefore "based on the cumulative effect of individual acts."[64]

In keeping with this recognition, the Supreme Court has treated such claims differently for purposes of administering the requirement that the plaintiff "file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days 'after the alleged unlawful

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[60]523 U.S. at 81.

[61]523 U.S. at 81.

[62]National Rail Road Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) (*quoting* 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 348-349 (3d ed.1996) ("The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence")).

[63]*Id.*

[64]*Id.*

employment practice occurred.'"[65] Because a "hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice,'"[66] "[t]he timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period."[67]

B. Seeking a Rule: Lower Courts' Efforts to Objectify

The multi-factor, holistic analysis mandated by the Supreme Court in evaluating hostile work environment claims has, it is fair to say, occasioned some level of discomfort in the district courts and courts of appeals as they seek to apply this standard to actual fact patterns. Several strategies have evolved as courts have sought to cabin the scope of the doctrine by finding objective criteria to establish a "floor" for the imposition of liability.

One such strategy is the imposition or adoption of a numerical analysis. In *Hayut v. State University of New York*,[68] the district court sought to quantify the extent to which the actions alleged to create a hostile learning environment actually impacted upon the plaintiff's educational

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[65]*Morgan*, 536 U.S. at 105, *quoting* 42 U.S.C. §2000-e-5(e)(1). The varying time period is to allow parties to avail themselves of available state remedial procedures; in "a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days." 536 U.S. at 109, *summarizing* §2000-e-5(e)(1). Failure to timely file mandates dismissal of any subsequent claim under Title VII. *Id.*

[66]*Morgan*, 536 U.S. at 117.

[67]*Id.*

[68]217 F. Supp.2d 280 (N.D.N.Y.2002) (Munson, J.) (Granting defendants' motion for summary judgment), *rev'd*, 352 F.2d 733 (2d Cir.2004); *see also* Hayut v. State University of New York, et al., 127 F. Supp.2d 333 (N.D.N.Y. 2000) (Hurd, J.) (dismissing in part complaint).

experience. In *Hayut*, the plaintiff was in fall of 1998 a transfer student from a local community college to the State University of New York's ("SUNY") campus located in New Paltz. Ms. Hayut registered for two political science courses with Professor Alex Young, only to find herself used by Young as a foil for classroom "humor" predicated on her alleged physical resemblance to Monica Lewinsky, whose dalliance with then-President William Clinton was prominent in the news. Professor Young nicknamed Hayut "Monica" and made "other comments as well . . . [which] added context to the nickname by associating Hayut with the more sordid details of the Clinton/Lewinsky scandal."[69] As the Court of Appeals summarized the harassing comments:

> Specifically, Professor Young referred to some of Clinton's more notorious conduct, including "how was your weekend with Bill?," which question Hayut claims he asked virtually every Tuesday morning class session. In addition to this "weekend" comment, Professor Young also told Hayut to "be quiet, Monica. I will give you a cigar later." Hayut testified that the "cigar" comment was uttered twice during the Fall 1998 semester, once in her afternoon class period with Professor Young (after he had observed Hayut talking to another student during a lecture), and the second in the very next morning class session. Finally, Professor Young observed to Hayut, in front of her peers, that "you are wearing the same color lipstick that Monica wears." Hayut testified at her deposition that these specific comments by Professor Young–particularly the "cigar"comments by Professor Young–evoked shock and disbelief from students in the class.[70]

Further, Young "would occasionally, in dramatic fashion, attempt to locate Hayut in the classroom by sitting in front of his desk and screaming the name 'Monica.' Hayut testified that the 'Monica' comments occurred at least once per class period throughout the rest of the semester and

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[69]352 F.2d at 738-739 (summarizing record below).

[70]352 F.3d at 739.

persisted even in her absence."[71] Additionally, on one occasion, Young greeted Hayut as "Monica" outside of the class, as they passed each other in the hall.[72]

Hayut "initially laughed at the nickname, rolled her eyes, or simply shrugged her shoulders," passing the comments off; however, at some time in the semester, Hayut requested that Young cease.[73] Moreover, "on at least one occasion in the middle of the semester, Professor Young's comments upset her to the point that she began crying and walked out during his lecture."[74]

Hayut claimed to suffer from humiliation as a result of these comments, loss of sleep and loss of ability to focus on her studies. She further feared that further developments in the Clinton/Lewinsky scandal would inspire Young to new comments at her expense. Further, Young's "Monica" references "led other students–primarily male–to address her as Monica in a ridiculing manner outside of class."[75] After Hayut complained to the administration, she "simply stopped attending classes,"which "led to her receiving failing grades in all courses for that semester."[76] Hayut eventually transferred to Pace University, but was first required to complete a year of remedial education.[77]

In evaluating these facts on the defendants' motion for summary judgment, the district court

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[71]352 F.3d at 738.

[72]*Id.*

[73]*Id.*

[74]352 F.3d at 739; *see Hayut*, 217 F. Supp.2d at 284.

[75]352 F.3d at 739.

[76]352 F.3d at 742.

[77]*Id.*

analyzed the frequency of the comments. Judge Munson first reduced the number of relevant days involved in the semester, deducting the time periods in which no incidents occurred, or in which either party was not present:

> Plaintiff attempts to create an appearance of pervasiveness by asserting that Prof. Young frequently called her "Monica" and made "Monica-related comments" through the entire Fall 1998 semester. However, according to plaintiff's own deposition testimony, Prof. Young did not start calling her "Monica" until the third week of classes. Furthermore, plaintiff missed two and a half weeks of classes for her brother's bar mitzvah in October. Finally, in the beginning of November, Prof. Young missed one full week of classes to make a trip to Japan. Considering that there are approximately 14 weeks in each semester, the inappropriate conduct could have occurred only for about half of the semester. Taking all the evidence into account, the court finds that alleged conduct constitutes sporadic and infrequent contact which is insufficient to establish a hostile environment claim.[78]

Judge Munson attempted to justify his mathematical approach by citing *Baskerville v. Culligan International, Inc*,[79] described as "holding that nine comments over a seven month period could not 'reasonably be thought to add up to sexual harassment.'"[80] In *Baskerville*, however, there were eight specific, one-time instances and one category of reiterated occasional comments;

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[78]217 F. Supp.2d at 287. The district court's choice of phrasing is interesting, in that it suggests a feeling that plaintiff had been disingenuous in presenting her case; the Court of Appeals, noted, however, that "Young does not dispute that he addressed Hayut as 'Monica' or that he made the other 'Monica' comments. He stated that the comments were intended to be taken in a joking manner but, later, characterized them as a form of discipline." 352 F.3d at 745. In view of this concession (not explicitly alluded to in the district court opinion), this veiled hostility to the plaintiff seems plainly unwarranted.

[79]50 F.3d 428, 430 (7th Cir. 1995).

[80]217 F. Supp.2d at 287.

frequency was deemed "relevant" but was not the crux of the decision.[81] On appeal, the Second Circuit "reject[ed] the district court's attempt to employ a mathematical equation of sorts to calculate the number of instances of misconduct in order to show that Professor Young's behavior did not pervade and color the classes throughout the entire semester."[82]

A similar instance of computational analysis by the district court in *Hayut* was the comparison between the plaintiff's mediocre performance at SUNY New Paltz prior to the harassment's beginning, and her similar performance at Pace subsequent to her transfer:

> Even though plaintiff alleges that her educational experience was disrupted, her allegations are not supported by the submitted evidence. Plaintiff's cumulative GPA during her community college enrollment and before enrolling at SUNY New Paltz was 2.38. While at SUNY New Paltz, plaintiff earned a 2.09 GPA. Subsequent to her enrollment at SUNY New Paltz, plaintiff's GPA was 2.5 after her first semester at Pace University. Considering that plaintiff's grades at SUNY New Paltz were consistent with the grades that she received at her community college, as well as with those she earned at Pace, a reasonable jury, based on this information alone, may not conclude that alleged conduct interfered with plaintiff's educational progress or academic performance.[83]

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[81] 150 F.3d at 430. While the opinion in *Baskerville* takes rather a diminishing view of the conduct alleged, one must admire Judge Posner's pithy and no doubt rather bruising description of the alleged harasser's repartee as having "the sexual charge of an Abbott and Costello movie." *Id.*

[82] 352 F.3d at 746. This "'rigid calculate and compare' methodology was rejected on two grounds: first, it was not appropriate because of the proper role of courts in evaluating a summary judgment motion which is to "construe all facts and draw all inferences in the light most favorable to the nonmovant," in order to determine if a reasonable jury could find in favor of the plaintiff. 352 F.3d at 746. Additionally, the computational analysis of the district court was independently rejected on the grounds that, as the Supreme Court had stated in *Harris*, "hostile environment is not, and by its nature cannot be, a mathematically precise test." *Id.*, *quoting* 510 U.S. at 22.

[83] 217 F. Supp.2d at 287-288. Again, the actual statistics deployed by Judge Munson to establish that the conduct alleged (and conceded) failed to amount to proscribed harassment seem to be susceptible to a reading far more favorable than that employed by the district court;

Despite the unequivocal words from the Court that no single factor need be established in order to prove the existence of a hostile work environment, the lower court in *Hayut* drew support from decisions suggesting that an impact on job performance (or educational performance) was needed to show the existence of a hostile work environment.

At least one decision, in finding the evidence of a hostile work environment insufficient as a matter of law, "emphasized that there is no incident here of such severity and character as to itself subvert the plaintiff's ability to function in the workplace."[84] In that case, a female corrections officer claimed that a series of sexually-themed "pranks" and remarks, combined with other personnel actions, constituted sexual harassment. The jury awarded the plaintiff emotional damages based on her hostile work environment claim, but the Court of Appeals reversed.

While the Court of Appeals did scrutinize the evidence in conjunction with the factors enumerated by Justice O'Connor in *Harris* and found it lacking, the Court compared the facts presented with a case in which liability was upheld, *Howley v. Town of Stratford*.[85] In that case, "a woman firefighter was subjected to a sexually explicit and degrading barrage of insult, delivered in front of her subordinates by a firefighter who later resisted orders from Howley and spread rumors questioning her competence."[86] Whereas the *Howley* Court found that a rational juror "could view

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On a 4 point grading scale, Ms. Hayut's performance declined .29–nearly one-third of a full point, and then after she transferred from SUNY New Paltz rose again, from 2.09 to 2.5–.41 of a point. While the decline and subsequent rise may not be as steep as the court might have found to be sufficient to predicate damages, it is difficult to call these differences nugatory.

[84]Alfano v. Costello, 294 F.3d 365, 381 (2d Cir. 2002).

[85]217 F.3d 141 (2d Cir. 2000).

[86]*Alfano*, 294 F.2d at 380, *summarizing Howley*, 217 F.3d at 148, 154-155.

such a tirade as humiliating and as resulting in an intolerable alteration of Howley's working conditions,"[87] the Court in *Alfano* drew a different conclusion:

> Corrections officers [like firefighters] also work in an environment that can pose physical dangers and requires trust and confidence among co-workers. But Alfano has not pointed to any conduct that endangered her or her authority in a way that would drive her from a perilous employment. She was simply embarrassed on a handful of occasions by the boorish behavior of one or more unidentified co-workers, and by one fellow officer who made a dumb joke.[88]

The court in *Howley*, by seeming to require that the "alteration" of working conditions be "intolerable" suggests that a hostile work environment cannot be found except where the evidence would support a constructive discharge–that is, a finding that the "employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily."[89] The threshold of proof is higher, as the nature of the concepts suggests, to establish a constructive discharge than to establish a hostile work environment, and evidence that fails to establish the former may make out the latter.[90]

The Second Circuit's statement in *Howley* may be written off, as Justice O'Connor wrote off a similar one in *Meritor*, as a description of particularly egregious facts.[91] However, the analysis

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[87]*Howley*, 217 F.3d at 154.

[88]*Alfano*, 294 F.3d at 380.

[89]Fitzgerald v. Henderson, 251 F.3d 345, 357-358 (2d Cir. 2001) (distinguishing between constructive discharge and hostile work environment).

[90]*Fitzgerald*, 251 F.3d at 358. To make out a claim sounding in constructive discharge, "the trier of fact must be satisfied that the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.; quoting* Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 73 (2d Cir. 2000).

[91]See note 15, *supra*.

in *Alfano* suggests a genuine inclination to limit hostile work environment claims–else the distinction made at some length by the court would be the classic "distinction without a difference."[92] In at least two other cases, the Second Circuit has suggested that the proof of a hostile work environment requires some showing that the conduct complained of "directly interfered with [the plaintiff's] ability to do her job."[93] This requirement of a concrete impact, however, does not require that such impact be intolerable; other decisions have been rendered by the Second Circuit in which it has clearly rejected the conflation of a hostile work environment claim with a constructive discharge, or even the adoption of a requirement that the hostile work environment impact the plaintiff's job performance.[94] Thus, in *Whidbee*, the Court squarely rejected the contention

> that conduct was not severe or pervasive because it did not render the plaintiffs' jobs "unendurable" or "intolerable." The bar is not set so high, however. While a mild, isolated incident does not make a work environment hostile, the test is whether "the harassment is of such quality or quantity that a reasonable employee would find the

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[92]Apparently, this phrase was originated by Chief Justice John Marshall in Livingston & Gilchrist v. Maryland Insurance Co., 7 Cranch (11 U.S.) 506, 537 (1813); it has been adopted by, among many others, Joseph Story. *See* Proprietors of the Charles River Bridge v. Proprietors of the Warren River Bridge, 36 U.S. 420, 611 (1837) (Story, J., dissenting).

[93]Gregory v.Daly, 243 F.3d 687, 693 (2d Cir. 2001); Brennan v. Metropolitan Opera Association, Inc., 192 F.3d 310, 319 (2d Cir. 1999) (no rational trier of fact could find hostile work environment created by sexually provocative pictures and lewd banter where plaintiff presented no evidence that either hampered her job performance). See also Figueroa v. New York City Department of Sanitation, 118 Fed. Appx 524 (2d Cir. 2004)(upholding dismissal of claim where "allegations do not meet the *Alfano* threshold for frequency and severity").

[94]*See, e.g., Fitzgerald,* 251 F.3d at 358; *Whidbee,* 223 F.3d at 70; *Torres v. Piasno*, 116 F.3d at 632 ("Harassed employees do not have to be Jackie Robinson, nobly turning the other cheek and remaining unaffected in the face of constant degradation. They are held only to a standard of reasonableness").

conditions of her employment *altered for the worse.*[95]

The courts have, however found that a single incident may, if it is of sufficient severity, alone act to establish a hostile work environment–although much dispute exists about the level of severity required.[96]

This focus on one circuit's struggling with the tension between the desire to reduce the hostile work environment's broad and more than slightly abstract standard to a rule, is illuminating, if slightly parochial. As New York State appellate courts have resisted deferring to lower courts' statutory discretion in deciding *Clayton* motions, federal district courts have resisted applying wide-ranging discretion accorded them in administering the hostile work environment standard. This resistance has led to reversals, some quite clearly correct, others based on unexplained subjective disagreements, by the appellate courts.[97] Pirouettes of a similar nature can be seen within other circuits, and support the same point: finding the existence of a hostile work environment requires applying a series of factors, no one of which is dispositive, and the weighing of each can vary

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[95]223 F.3d at 70 (emphasis in original). *See also Hayut v. State University of New York*, 352 F.3d at 748-749, in which the court, rejected a defendant's claim in a Title IX case that the plaintiff's similar academic performance before and after the alleged harassment established as a matter of law that no hostile work environment existed, and reiterated that "[i]n order to be actionable, conduct need not be 'unendurable' or intolerable'" (*quoting Whidbee*).

[96] *See* Harvill v. Westward Communications, LLC, 433 F.3d 428 (5th Cir. 2005); Worth v. Tyler, 276 F.3d 249, 268 (7th Cir. 2001).

[97] *See, e.g.,* Mendoza v. Borden, Inc., 195 F.3d 1238, 1247 (11th Cir. 1999) (numerically quantifying incidents and threat levels posed thereby); McKinnis v. Crescent Guardian, Inc., 2005 U.S. Dist. LEXIS 11564 (E.D. La. June 9, 2005), *rev'd*, 2006 U.S. App. LEXIS 17050 (5th Cir. July 7, 2006)(finding insufficient numerosity and severity of incidents; reversed for isolating incidents); Cerros v. Steel Technologies, Inc., 398 F.3d 994 (7th Cir. 2005)(reversing, for a second time, district court finding that plaintiff had failed to make out cause of action based on hostile work environment).

dramatically from case to case.[98] "Generally speaking,"as the Second Circuit opined in *Hayut*, "this analysis is fact-specific and therefore . . . is best left for trial."[99]

Regardless, the varying weight each of the factors may be accorded by a different trier of fact and law in varying circumstances does not, absent infringement of a constitutional right, render the hostile work environment doctrine arbitrary or capricious; other legal doctrines require a multi-factor analysis and are accepted as valuable components of the legal system, as when the breadth of interests to be served cannot be confined within a rule. And the Supreme Court has resisted these efforts to redefine the hostile work environment doctrine along more rule-like contours.

III. Rule of Law: The First Amendment in Operation

The First Amendment's guarantee of freedom of speech is set forth in seemingly stark, absolute terms: "Congress shall make no law . . . abridging the freedom of speech."[100] The Supreme

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[98]A good example of this can be seen in Mack v. ST Mobile Aerospace Engineering, Inc., 2006 U.S. App. LEXIS 19470 (11th Cir. July 31, 2006) at **18-20, in which the court finds sufficient facts to state a claim for a hostile work environment, distinguishing *Mendoza, supra* note 96, and stating that a hostile work environment may be proven through "very few" incidents. While the district court, like that in *Hayut* viewed each incident in isolation, atomizing the conduct complained of and then dismissing the sufficiency of each, the Court of Appeals properly reverted to the contextual perspective required. However, the Court of Appeals' effort to distinguish *Mendoza* is quite vague, and provides the lower court no real substantive guidance, beyond the error in methodology reflected in isolating incidents. In *McKinnis, supra* note 96, the Court of Appeals similarly reverses a District Court grant of summary judgment to an employer, on the ground that the facts could support the existence of sufficiently severe harrassive acts, contrasting two precedents, Shepherd v. Comptroller of Public Accounts, 168 F.3d 871 (5th Cir. 1999), in which the alleged conduct was deemed insufficient, and Harvill v. Westward Communications, LLC, 433 F.3d 428 (5th Cir. 2005), in which it was deemed sufficient. The *McKinnis* court is not terribly helpful in reconciling the two precedents, stating merely that "the facts in this case fall much closer to those in *Harvill*, where there was an actionable hostile work environment, than *Shepherd*, where there was not." 2006 U.S. App. LEXIS 17050.

[99]352 F.3d at 745.

[100]U.S. Const. Amend. I (1791).

Court has not applied a uniform rule to all varieties of speech, as the text of the Amendment would seem to require. Rather, the jurisprudence "allows for the suppression of some speech without any but the most cursory judicial review, holds the suppression of other kinds of speech up to mild scrutiny, and exposes a third set of speech categories to very exacting scrutiny indeed."[101]

The Court's jurisprudence of free speech has been somewhat lacking in consistency, and in rationality, but a generalized approach may be teased from the cases. The "two-track" theory, that which essentially governs today, distinguishes between protected speech and "lower value" speech:

> The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions on speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to disregard these traditional limitations. Our decisions since the 1960'shave narrowed the scope of the traditional categorical exceptions for defamation and obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.[102]

These categories, however, are not the essence of the First Amendment; rather, the general rule is found in *Terminiello v. Chicago*, "freedom of speech, though not absolute, is nevertheless

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[101]FIRST AMENDMENT, FIRST PRINCIPLES at 72, *et seq*.

[102]R.A.V. v. City of St. Paul, 505 U.S. 377, 382-383 (1991). The reference to this distinction adhering in 1791 is incorrect; the lower-value category of speech doers not enter the jurisprudence until Chaplinsky v. New Hampshire, 341 U.S. 568 (1942). Prior to the Twentieth Century, caselaw existed strongly suggesting that Congress was completely disabled from legislating restrictions on speech, but that the states had, prior to the adoption of the Fourteenth Amendment, plenary power over speakers within their jurisdiction. *See* United States v. Cruikshank, 92 U.S. 542, 552 (1875); Ex Parte Jackson, 96 U.S. 727 (1877); *see* FIRST AMENDMENT, FIRST PRINCIPLES at 20-25; 72, et seq.

protected against censorship or punishment, unless shown likely to produce a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance, or unrest."[103] However, with the core speech receiving maximal protection, and the so-called *Chaplinsky* categories receiving none, an intermediate level of protection, involving a standard-like balancing test, has crept into the jurisprudence, applied to commercial speech, a hybrid class of speech not treated as either "core" speech or low-value speech.[104]

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[103]337 U.S. 1, 4 (1949) (internal citation omitted) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942); Bridges v. California, 314 U.S. 252, 262 (1941); Craig v. Harney, 331 U.S. 367, 373 (1949).

[104]"'Communication that does no more than propose a commercial transaction' is commercial speech." Bland v. Fessler, 88 F.3d 729, 738 (9th Cir. 1996), quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1973). Upon a finding that speech falls within this definitional category, the Court applies a balancing test to proposed regulations of commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980); 44 Liquormart v. Rhode Island, 517 U.S. 484, 500, n. 8 (1996) (Stevens, J., for plurality) (reaffirming validity of Central Hudson test); Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173, 184-189 (1999) (summarizing and applying Central Hudson test to federal prohibitions on broadcast advertisements for gambling). Under the Central Hudson test, "the First Amendment does not protect commercial speech about unlawful activities." 44 Liquormart, 517 U.S. at 497, n. 7; In re Orthopedic Bone Screw Products Liability Litigation, 193 F.3d 781, 793 (3rd Cir. 1999) (same; citing, inter alia, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (same).

Even the seemingly clear definitional category of speech proposing a commercial transaction has been subject to some uncertainty. Commercial speech is "broadly defined as expression related

Two other, limited, areas exist in which the Supreme Court has articulated a role for balancing analysis: speech by employees of the federal, state or local government, whose speech only receives protection if it relates to matters of public concern and the value of the speech outweighs the potential for disruption in the workplace or on the performance of the employer's mission,[105] and prevention by unwilling recipients of unsolicited commercial mailings of an erotic nature.[106] Because these particular scenarios involve voluntary affiliation of the individual with the

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to the economic interests of the speaker and its audience, generally in the form of commercial advertisement for the sale of goods and services." In re Orthopedic Bone Screw Products, 193 F.3d at 793 (quoting U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 933 (3d Cir. 1990); Bad Frog Brewery, Inc. v. New York State Liquor Authority, 134 F.3d 87, 94-97 (2d Cir. 1998) (same; discussing nature of commercial speech). As summarized by the Second Circuit: The "core notion" of commercial speech includes "speech which does no more than propose a commercial transaction." Bolger [v. Youngs Drug Products Corp., 463 U.S. 60,] 66 (citations and internal quotations omitted). Outside of this so-called "core" lie various forms of speech that combine commercial and noncommercial elements. Whether a communication combining those elements is to be treated as commercial speech depends on factors such as whether the communication is an advertisement, whether the communication makes a reference to a specific product, and whether the speaker has an economic motivation for the communication. See *id.* at 66-67. Bolger explained that while none of these factors alone would render the speech in question commercial, the presence of all three factors provides "strong support" for such a determination. Id.; see also New York State Association of Realtors, Inc. v. Shaffer, 27 F.3d 834, 840 (2d Cir. 1994) (considering proper classification of speech concerning commercial and noncommercial elements). *Bad Frog*, 134 F.3d at 26. In applying these factors to speech that combines commercial and non-commercial elements, the Second Circuit also looks to whether "the purported noncommercial message is so inextricably intertwined with the commercial speech as require a finding that the entire [speech] must be treated as "pure" speech." *Bad Frog*, 134 F.3d at 27, quoting Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474 (1989). It is not enough to remove a communication from the realm of commercial speech and its lesser protection that the communication "link a product to a current debate." *Id.* (quoting *Central Hudson*, 447 U.S. at 563, n. 5).

[105]Pickering v. Bd. of Education, 391 U.S. 563 (1968); *see also,* Garcetti v. Ceballos, 547 U.S. ___ (2006); Waters v. Churchill, 511 U.S. 661 (1994); Connick v. Myers, 461 U.S. 138 (1983).

[106]*See* Rowan v. United States Postal Service, 397 U.S. 728 (1970), recently followed in National Coalition of Prayer, Inc. v. Carter, 455 U.S. 783 (7th Cir. 2006) (applying *Rowan* despite more recent decisions affording greater protection to commercial speech; upholding state

Government–the speaker who has accepted government employment, the mailbox holder who affirmatively requests that specified materials be denied access to her home–each makes a choice that draws her into a closer relationship with the Government than that of denizen-at-large.

However, it should be noted that the efforts to create a workable balance between the rights of public employees to speak freely and the right of the public employer to preserve the efficiency of the workplace has not resulted in clear lines of authority that give the speaker clear guidance as to what she may with safety say. As one court has acknowledged, because the First Amendment's protections:

> must reconcile our dual traditions of at-will employment and of robust license to speak freely without Government sanction, neat doctrinal boxes are of unusually limited usefulness. A single, mechanical test will not do for a salmagundi of challenges, involving both on- and off-duty speech, job-related and not, spoken in protest, for laughs, or, as often, just because.[107]

As a result, the decisions in public employee cases often seem perverse, or penalize sincere employees addressing unquestioned matters of public concern, but who did not reach the same solution in the utilitarian calculus as the reviewing court, often years after the speech in question.[108]

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restrictions on telephone solicitors as applied to religious charity). As I point out in the text, without endorsing the logic of *Rowan*, the Court in the instance of the voluntary employee and the unwilling recipient has a genuine conflict of rights to address, and not the question of to what extent the government may restrict the rights of the public at large.

[107]Locurto v. Giuliani, 447 F.3d 159, 173 (2d Cir. 2006). In the interests of full disclosure, the author, as an Assistant Corporation Counsel, represented the City of New York and then-mayor Rudolph Giuliani in pre-trial proceedings in this case.

[108]In *Garcetti, supra*, 547 U.S. at ___, the Supreme Court upheld the termination of an assistant district attorney for writing a memorandum to his superiors in which he sought to alert them to improper conduct in the course of an investigation. The Court intimated that the result would have been different had Ceballos been acting in his private capacity, publishing the wrong-doing outside of the confines of the District Attorney's office, thus paradoxically incentivizing employees to go forward with revelations that could bring their offices into disrepute. Yet, the reasonable potential for disruption when such is the case has been cited to

Some Supreme Court justices and scholars have argued that this wide range of approaches reflects the inevitable failure of any effort to treat so broad a set of issues as those presented by freedom of speech in a "rule" fashion, and have argued for a standard approach instead, arguing for a pragmatic weighing of the estimated value of speech to society as against the speech's foreseeable potential for harm.[109] It is possible that generalized balancing logic may be in the process of staging a comeback in the First Amendment sphere. In a concurring opinion in *Bartnicki v. Vopper*,[110] Justice Stephen Breyer applied a balancing test to address whether the airing by the media of cell phone conversations intercepted in violation of federal and state wiretapping statutes could be redressed through a civil suit for damages.

Justice Breyer framed the proper analysis as examining two speech-related interests, both

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affirm the dismissal of employees whose function it is (like an attorney) to appear on behalf of a larger body and present a case for that body. *See* Lewis v. Cowen, 165 F.3d 154 (2d Cir. 1999). In *Locurto, supra* note 106 the speech took place in 1998; its status as constitutionally unprotected was not resolved until eight years later, when the Second Circuit in 2006 reversed the District Court's finding that the speech was protected. 447 F.3d at 173, *et seq*.

[109]*See, e.g.,* Dennis v. United States, 341 U.S. 494, 517, 542-545 (1951) (Frankfurter, J., concurring) (agreeing with Court's ruling to uphold convictions of Communist Party leaders for "criminal syndicalism" and advocating multiple variable, case-by-case balancing test approach to free speech claims); Beauharnais v. Illinois, 343 U.S. 250 (1952) (opinion per Frankfurter, J.) (applying balancing approach to uphold criminal prohibition against hate speech–there denominated "group libel"); Winters v. New York, 333 U.S. 507, 527 (1948) (Frankfurter, J., dissenting, advocating use of a "rational basis" review of state decisions to ban or punish speech, determining the rationality of the decision by a deferential balancing test).

After an extended period following Brandenburg v. Ohio, supra note 24, in which balancing logic has not been employed in First Amendment cases, a new wave of scholars have advocated balancing speech interests against other policy interests. *See, e.g.,* Richard Delgado, Toward a Legal Realist View of the First Amendment, 113 Harv. L. Rev. 778 (2000); *see also,* DAVID S. ALLEN & ROBERT JENSEN, FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF SPEECH (1995).

[110]532 U.S. 514, 535-536 (Breyer, J., concurring).

of which he found of constitutional order: the "statutes directly interfere with free expression in that they prevent the media from publishing information," but serve to "protect personal privacy" and serve "the interest in fostering speech," by vindicating the expectation that private conversations would remain so.[111] Justice Breyer stated that in view of "these competing interests, on both sides of the equation, the key question becomes one of proper fit."[112] Justice Breyer suggested that the question should be posed as "whether the statutes strike a reasonable balance between their speech-restricting and speech enhancing consequences."[113] In performing that balancing test, Justice Breyer wrote that the Court "should avoid adopting overly broad or rigid rules, which would unnecessarily restrict legislative flexibility."[114]

Justice Breyer's new approach[115] issues a blank check to the judiciary, especially in that he permits a holistic weighing of values not created by constitutional provisions–such as privacy against intrusions by private individuals as was at issue in *Bartnicki*–to, where appropriate in his

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[111]532 U.S. at 536 (Breyer, J., concurring).

[112]*Id.*

[113]*Id.* (internal quotation marks omitted). Justice Breyer quotes his own previous concurrences in Turner Broadcasting System, Inc. v. Federal Communications Commission, 520 U.S. 180, 227 (1997)(Breyer, J., concurring in part) and Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

[114]532 U.S. at 541 (Breyer, J., concurring).

[115]For an analysis that–rightly, in my view–deems this decision to be one of a series of opinions by Justice Breyer that has the potential to re-introduce a holistic balancing test to First Amendment analysis and to replace the more classic rule-driven approach in force since *Brandenburg*, see Paul Gewirtz, "Privacy and Speech," 2001 Sup. Ct. Rev. 139, 189-199 (2002). I agree with Professor Gewirtz's contention that Justice Breyer is "developing the most important new ideas about the First Amendment since Justices Brennan and Black."*Id.* at 198. Unlike Professor Gewirtz who welcomes the revival of balancing logic, I view it as ill-founded and remarkably dangerous, for the reasons explained in the text.

view, outweigh the actual provisions of the Constitution, the freedom of the press secured by the First Amendment.[116]

The slipperiness of balancing is well exemplified by the Court's equivocation as to the extent of protection to be afforded commercial speech, the one area in which holistic balancing is allowed based solely on the content of the speech. So, for example, the Court adopted a paternalistic standard of review in *Posadas de Puerto Rico Association v. Tourism Co.*,[117] permitting a ban on casino advertising limited to residents of Puerto Rico, while permitting similar advertisements directed at tourists, only to jettison the holding and the reasoning of the case in *44 Liquormart v. Rhode Island*.[118] The overruling of *Posadas* was reaffirmed, and the results concurred in by Chief Justice Rehnquist, the author of the Court's opinion in *Posadas*, were finally jettisoned by the Court in *Greater New Orleans Broadcasting Association v. United States.*[119] While the interests involved may be less personally fraught than those of the victims of the Blacklist, whose persecution was legitimized under *Dennis*, the commercial speech debacle of the 1990s is another embarrassing failure of balancing methodology in the First Amendment context.

In view of the repeated failure of balancing tests in American history to secure freedom of speech, the appeal of bright lines in First Amendment jurisprudence cannot be easily rejected; the

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[116]Professor Gewirtz makes this point as well, although he does so approvingly. 2001 Sup. Ct. Rev. at 173-174. Professor Gewirtz argues, quite convincingly, that Justice Breyer is generalizing from the individual fact-patters presented by the cases he cites to a more general impatience with the doctrinal complexity of First Amendment law.

[117]478 U.S. 328 (1986).

[118]517 U.S. 484, 510-514 (1996). *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995) was also in tension with *Posadas*, although the result was less clearly contradictory.

[119] 527 U.S. 173, 184-189 (1999).

uncompromising language of the Amendment, its function as a bulwark against repression in times of crisis, and the ease with which such repression is rationalized in the face of seeming urgency, all militate against subtle, multi-variable equations, which are susceptible to manipulation by judges who desire to reach the "right" (that is, politic) result in any given case. Such yielding to the hydraulic pressure to conform which influences all members of society means that these easily manipulable tests are inherently prone to reducing freedom of speech to a mere empty promise.[120]

Before adverting to the actual rules applied to speech questions by the Supreme Court, one fact should be pointed out: the application of several distinct rules to different categories of speech,

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[120] *See, e.g.,* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940)(upholding rule requiring children to recite Pledge of Allegiance over claims that such compulsion required Jehovah's Witnesses to violate their understanding of the Biblical admonition against worshiping idols), *overruled by*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see also, Dennis*, *supra*, adopting a balancing test to establish "clear and present danger" in a much weaker form than that created by Justice Oliver Wendell Holmes, overruled by *Brandenburg, supra. See* FIRST AMENDMENT, FIRST PRINCIPLES at 56-60. This had happened, of course, shortly after the Supreme Court first crafted the "clear and present danger" approach to free speech question; it collapsed into a ban of any speech found to have a "bad tendency," allowing each of the factors of the Holmes test to be reduced to a jury question of fact, and thus allowing public hostility to socialism during the height of the Red Square to determine the fate of socialists charged under the Espionage Act with speech hostile to World War I. *See*, *e.g.*, Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239, 250 (1920). Similarly, the Supreme Court, under the approach in *Dennis*, allowed the Red Scare of the post-war era to spread to include loyalty investigations inside government and out. See WILLIAM O. DOUGLAS, THE COURT YEARS (1980) 61, *et seq.*; *see generally,* THOMAS EMERSON, THE SYSTEM OF FREE EXPRESSION (1970) ; HARRY A. KALVEN, A WORTHY TRADITION (1988); Frank Strong, "Fifty Years of Clear and Present Danger," 1969 Sup. Ct. Rev. 41 (1970).

The controversy attached to the topic of the speech seems to sometime impact the result in cases where bright lines do not apply with full force, as in the context of government-sponsored speech. *Compare*, Rust v. Sullivan, 505 U.S. (1991) (upholding federal regulation limiting advice doctors may provide patients in federally funded programs to exclude discussion of abortion options) *with* Legal Services Corp. v. Velasquez, 531 U.S. 533 (2001) (striking as unconstitutional similar regulation limiting advice attorneys employed by federally funded programs may provide their clients).

while pernicious and without textual or logical foundation,[121] does not reduce the First Amendment to a standard. Rather, several distinct rules are presently applied to speech questions, depending upon the category of speech that is drawn into question. Justice Breyer, in seeking to reinvigorate the holistic balancing test employed in *Dennis* and *Beauharnais*, as well as in "bad tendency" cases like *Schaefer* and *Pierce*, is seeking a dramatic change of approach, one which would greatly empower the judiciary to advance the speech of which it approves and regulate that which it does not.[122]

In striving to draw bright lines to protect freedom of speech, the Supreme Court has adopted various strategies, some more convincing than others. Perhaps the most viable, however, is the notion of the "verbal act" or "speech brigaded with action," a concept that has persisted in the jurisprudence since its beginning.[123] The verbal act approach to free speech claims avoids many of the difficulties posed by other interpretative approaches to the First Amendment, and commanded

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[121]FIRST AMENDMENT, FIRST PRINCIPLES at 72-121.

[122]A similar problem has been seen in the Court's occasional conflation of the "strict scrutiny" analysis applied to equal protection questions and the *Brandenburg* test presently applied to speech admittedly at the core of First Amendment protection. *See* Simon and Shuster v. Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) (noting application of this analysis to restriction on speech of convicted criminals by majority, and deploring as leading potentially to "ad hoc balancing" of speech by judges); Burson v.Freeman, 504 U.S. 191, 211-214 (Kennedy, J., concurring).

[123]*See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (upholding labor injunction against boycott on theory that First Amendment does not afford protection to words used in such circumstances where the "become what have been called verbal acts and as much subject to injunction as the use of other force whereby property is unlawfully damaged." *See also*, Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) (recasting verbal act concept as "speech brigaded with action"). For a more extended discussion see FIRST AMENDMENT, FIRST PRINCIPLES at 122-181. For a different view, see Eugene Volokh, Speech as Conduct, Conduct as Speech: Generally Applicable Laws, Illegal Courses of Conduct, "Situation Altering" Utterances, and the Uncharted Zones, 90 Corn. L. Rev. 1277 (2005).

a court in *Brandenburg v. Ohio*, the leading case on the line between protected and proscribable advocacy or depiction of unlawful conduct. In *Brandenburg*, the Supreme Court reaffirmed the principle that:

> The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in Noto v. United States, "the mere abstract teaching of the moral propriety or even moral necessity or a resort to force and violence, is not the same as preparing a group to violent action and steeling it to such action."[124]

Justice Douglas, who had lost faith in the "clear and present danger" test, urged the Court to explicitly endorse his rubric that only "speech brigaded with action,"a variant of the "verbal act formulation" could be subject to liability.[125] As Douglas phrased it, the "line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[126] Taking the infamous example of clearly regulable speech as "the case of one who falsely shouts fire in a crowded theatre," Justice Douglas

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[124]395 U.S. at 447-448. The Court predicated its ruling both on the right to free expression and the right of free assembly; even if the expressive conduct was not the target of the criminal syndicalism statute under which Frank Brandenburg and his fellow Ku Klux Klansmen had been charged, statutes impacting free assembly "must observe the established distinctions between mere advocacy and incitement to imminent lawless action '[because]. . . [t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." 395 U.S. at 449 n. 4 (quoting DeJonge v. Oregon, 299 U.S. 353, 364 (1937). *See also* United States v. Cruikshank, 92 U.S. 542, 552 (1876); Hague v. CIO, 307 U.S. 496, 513, 519 (1939); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-461 (1958).

[125]*Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring).

[126]*Id.*

described it as a "classic case of speech brigaded with action."[127] Douglas in addressing the "fire" example explained that the misleading cry and the resultant dangerous chaos were "indeed inseparable and a prosecution can be launched for the overt acts actually caused."[128]

The evolution of the basic rule governing speech cases through the vehicle of government response to "subversive advocacy," extending to violent rhetoric, seems on the surface anomalous; and yet such speech is and always has been at the core of the First Amendment's jurisprudence. The regulation of speech based on its message, where that message consists of advocacy of unlawful conduct, raises problems which the regulation of other forms of speech, which have been brushed away as being of "low value" does not. As a matter of history, the regulation of such advocacy, particularly when it is tied to a political message, has consistently been treated as implicating the fundamental values of freedom of speech.[129]

The fact that such questions were the crucible in which the contours of the First Amendment

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[127]*Id.* (Douglas, J., concurring) (citing Speiser v. Randall, 357 U.S. 513, 536-537 (1958). The "fire" hypothetical was first employed by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919). Holmes employed the hypothetical as a means for cautiously delineating the outer limits of protected speech. *Id.* He then backed into a more difficult but still self-evident class of plainly unprotected speech, the "uttering [of] words that have all the effect of force." *Id.* at 52 (citing *Gompers*, 221 U.S. at 419). For a more extended discussion of these issues, see FIRST AMENDMENT, FIRST PRINCIPLES at 27-36.

[128]*Brandenburg*, 395 U.S. at 456-457. For confirmation that the Court in *Brandenburg* adopted Justice Douglas's position, see Hess v. Indiana, 414 U.S. 105, 107-108 (1973); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 252-243 (2002).

[129]The first decisions to accord any level of substantive protection to speech, as opposed to merely prohibiting punishment prior to publication, each involved subversive advocacy. In the factual circumstances in each of the cases, the Court found that subversive advocacy which led to no discernible danger nonetheless constituted a "clear and present danger" of resultant lawless action which the government was entitled to prevent, and thus upheld convictions under the federal Espionage Act. See *Schenck*, 249 U.S. at 47; *Debs*, 249 U.S. at 215-216; *Frohwerk*, 249 U.S. at 208-209; *see also* FIRST AMENDMENT, FIRST PRINCIPLES at 29-36.

were forged is not merely adventitious, a result of the happenstances attending case-by-case litigation. Rather, the historical primacy for speech exhorting to violation of the law violation makes logical sense, as well, protecting the very urging of revolt and revolution the Framers of the Constitution engaged in leading up to and through the Revolutionary Era. Thus, the tradition of violent rhetoric and hyperbole, the centrality of the American tradition of civil disobedience to various struggles for liberation, and our own revolutionary past, position such speech at the core of the First Amendment's protections.

The *Brandenburg* verbal act approach does not, however have a complete monopoly on how speech questions are evaluated. The *Chaplinsky* exceptions (categories deemed "low value"), and the hybrid class of commercial speech have been drawn upon by those who seek to square the regulation of a hostile work environment with the imperatives of the First Amendment. In addition to deploying these extant classes of more regulable speech, some advocates have urged the creation of a new category of lesser-value speech.

Finally, one effort to avoid acknowledging the existence of a First Amendment problem at all is to depict the prohibition of a hostile work environment as not a content-based regulation, but rather as a "time, manner, place" restriction analogous to zoning, and other permissible infringements on the individual's right to self-expression in a specific fact-driven context while leaving ample opportunity for such expression where it does not present the problem of "the right thing in the wrong place–like a pig in the parlor, and not in the barnyard."[130]

Each of the scholars who argue for the constitutionality of the hostile work environment

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[130] Village of Euclid v. Ambler Realty, Co., 272 U.S. 365, (1926); applied to zoning in the First Amendment context in City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 446 (Kennedy, J., concurring).

doctrine therefore attempt to base their arguments in terms of the line drawn by the Court in *Brandenburg*, reject that line, or redraw a different line, one that supplements the *Brandenburg* line. Some scholars have blinked at the question, seeking to carve out a new category of "low value" speech, thereby ignoring that the increasing permeability of the First Amendment to such *ipse dixit* approaches renders the doctrine progressively diluted, and in the last analysis, meaningless.

III No Controlling Authority: The Supreme Court's Unanswered Question

The Supreme Court has not, as of this writing, explicitly ruled on the existence or extent of a conflict between the hostile work environment doctrine and the First Amendment. Several decisions have touched upon the matter, but the Court's statements on the matter have been thus far limited to caveats, allusions or a plurality's expression of doubt as to the constitutionality of the scope of the doctrine as the lower courts have enunciated it. Thus, in *R.A.V. v. City of St. Paul*,[131] the Court in dicta gave the example of speech constituting a hostile work environment as speech likely to be found outside the ambit of the First Amendment. Similarly, the four dissenters in *Davis v. Monroe County Board of Education*,[132] expressed concern that the scope of the cause of action extends to protected speech.

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[131]505 U.S. 377, (1992) (striking as unconstitutional an ordinance regulating "fighting words" that "arouses anger, alarm, or resentment in others on the basis, of race, color, creed, religion or gender," on the basis that, while "fighting words" may be regulated in general, such regulation must be done in a viewpoint neutral manner, and not favor one viewpoint over another. Recently, the Court distinguished *R.A.V.*, upholding the creation of an offense predicated on cross-burning when done in circumstances such as to constitute a "true threat"–that is, a verbal act. Virginia v. Black, 538 U.S. 343 (2003). Whether *Virginia v. Black* serves as an instance of the "verbal act" applied or as a rubric for the reintroduction of viewpoint discrimination remains unclear at this writing; however, it may best be seen as limited to the "true threat" situation, as the Court went to some lengths to suggest.

[132]526 U.S. 629, 665, 682 (1999)(Kennedy, J., dissenting, joined by Rehnquist, C.J. and Scalia and Thomas, JJ).

Less directly, the Court upheld the application of state anti-discrimination law to require that women be admitted to full membership in the United States Jaycees, instead of the more limited "associate membership" which they were allowed to hold.[133] The Jaycees claimed that their expressive association was founded with the ideal of "promoting the interests of young men" by assisting them in acquiring leadership skills and networking.[134]

The Court, in an opinion by Justice Brennan, rejected the First Amendment defense, holding instead that the presence of women members need not "change the content or impact of the organization's speech," and that the contention that female members might wish to see the message and efforts of the Jaycees expand to the benefit of other women rested "solely on unsupported generalizations of the relative interests and perspectives of men and women . . . [that] may or not have a statistical basis."[135] Thus, Justice Brennan concluded (rather disingenuously, even from the perspective of an admirer), the First Amendment was not implicated, and no conflict needed to be resolved.[136]

Justice Brennan went on to address the First Amendment associational rights of the Jaycees members, stating that "we are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."[137] The Court explained that while:

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[133]Roberts v. United States Jaycees, 468 U.S. 609, 622-623 (1984).

[134]468 U.S. at 626.

[135]*Id.* at 628.

[136]*Id.* at 628.

[137]*Id.* 623.

> enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes. As we have explained, 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. Accordingly, 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.[138]

"In prohibiting such practices," the Court concluded, "the Minnesota Act therefore responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose."[139]

The precedential reach of *Roberts* is unclear; in *Boy Scouts of the United States of America v. Dale*,[140] the Court distinguished *Roberts* and a similar decision, *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*,[141] and declined to uphold the application of public accommodation laws predicated on an anti-discrimination rationale to require expressive associations to admit homosexuals. Notably, the Court did analogize prevention of discrimination against homosexuals to the legitimate state interest of preventing discrimination against women involved in *Roberts* and *Duarte*. The Court recited that "the freedom [of association] could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be

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[138]468 U.S. at 628; *citing,* Runyon v. McCary, 427 U.S. 160, 175-176 (1976); N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 907-908 (1982).

[139]468 U.S. at 628-629 (internal quotation marks omitted)(*quoting* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984).

[140] 530 U.S. 640, 657 (2000).

[141]481 U.S. 537 (1987) (upholding state public accommodation law to Rotary Club's exclusion of women over First Amendment challenge).

achieved through means significantly less restrictive of associational freedoms."[142] However, in distinguishing *Roberts* and *Duarte*, the Court explained that "in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express." In *Dale*, by contrast, the Court determined that "a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct."[143]

In *Dale*, the Court acknowledged that the "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[144] Taking the decision at its word, the decision in *Dale* appears to represent a clear retreat from *Roberts'* First Amendment holding.[145] The Jaycees (and the Rotarians involved in *Duarte*) wished to control their message by controlling their membership. So too the Boy Scouts wished to accomplish the same goal by the

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[142]530 U.S. at 648.

[143]530 U.S. at 659. A similar ruling in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), in which the right of St. Patrick's Day parade organizers to control their message (including a hostility to homosexuality) was held to trump the right of a gay, lesbian and bisexual group to march *under their own banner* in the parade, under public accommodation law, prefigured the Court's decision in *Dale.* However, *Hurley* was technically consistent with *Roberts* and *Duarte*; the expressive content of the parade, and thus the organizers' ability to limit the topics and viewpoints of participants endorsed by the organizers was directly involved, a factual distinction the Court unconvincingly found to not apply in *Roberts* or *Duarte*.

[144]530 U.S. at 646.

[145]For an excellent account of these cases suggesting that *Dale* significantly vitiates the precedential impact of *Roberts*, see David E. Bernstein, Antidiscrimination Laws and the First Amendment, 66 Mo. L. Rev. 83 (2001). Mark Tushnet's analysis of *Dale* concludes that "[p]robably because *Dale* is another of the Chief Justice's terse opinions, the precise scope of the right of expressive association remains to be determined." Mark Tushnet, Vouchers After Zelman, 2002 Sup. Ct. Rev. 1, 25 (2003).

same means, but were successful.

One can, of course, seek to distinguish the cases. The Court appears to have found in the prohibition of homosexuality a viewpoint that was more than tangential to the Boy Scouts, based upon the organization's representations to the Court, and to have concluded that where forced association would undermine the ability to hew to that viewpoint, anti-discrimination law cannot apply.

This logic is invoked by a line of cases regarding the right of religious groups to decline to associate with individuals they deem to have failed to comport themselves within the standards of behavior required by the group.[146] While such cases perform the traditional function of mandating the defender of free speech and free association to stand up for offensive and mean-spirited behavior, the idea of requiring religious congregations and other First Amendment-protected groups to include those who do not believe in or comply with the group ethos would subvert the essence of free association. *Roberts* and *Duarte* may be distinguished on the ground that the associations involved were not classically expressive in nature. Rather, they were predominantly networking, charitable, non-sectarian and business-related associations which could be analogized to public accommodations in the interest of "desegregating" the financial community and leveling the

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[146] *See* Paul v. Watchtower Bible & Tract Society, 819 F.2d 875. 880-883 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987) (dismissing claim sounding in intentional infliction of emotional distress based on "shunning" of "disassociated" former member of Jehovah's Witnesses sect on basis that free exercise clause protected such conduct); Grunwald v. Bornfreund, 696 F. Supp. 838 (E.D.N.Y. 1988) (applying *Paul* to action seeking a writ of prohibition against rabbinical council seeking to excommunicate plaintiff, on the basis that such conduct was privileged under the First Amendment, as long as exclusion from religious community was the only result); *see also,* Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 33-34 (D.D.C. 1990) (following, *inter alia,* Dowd v. Society of St. Columbans, 861 F. 2d 761, 764 (1st Cir. 1988)); Poindexter v. Armstrong, 934 F. Supp. 1052, 1064 (W.D. Ark., Ft. Smith Div. 1994).

business playing field.

In any event, the Court's opinions in *Roberts* and *Duarte* do not in any effective or persuasive way address the First Amendment concerns raised in those decisions. By focusing on the free speech component of the case–the right of the Jaycees and the Rotarians to control their messages, the Court failed to address the free association claims. The Court's conclusion that an association may be forced to waive its membership criteria without any analysis of the right of free association, has little power to persuade. More to the point, the holdings would be difficult to extend to the context of a ban on workplace speech, since the speech claims were elided on the theory that the ability to communicate a desired mention was not impacted by the regulation in question. In any event, *Dale* seems to strongly undercut the precedential viability of *Roberts* and *Duarte*, and suggest that the hostile work environment doctrine must find support elsewhere.

IV. Terra Incognita: The Academy Speculates

Various rationales, as indicated above, have been proffered to justify the constitutionality of the hostile work environment doctrine. A useful breakdown of the most prominent theories is provided by an opponent of all of them:

1. Harassment law is constitutional because speech is already subject to the workplace owner's control and thus the government should also be free to suppress speech in those private workplaces.

2. Harassment law doesn't involve state action because it doesn't itself punish speakers, but only pressures workplace owners into punishing them.

3. Harassment law is content-neutral under the "secondary effects" doctrine and is thus not subject to strict scrutiny.

4. Harassment law is merely part of a ban on discriminatory conduct and thus isn't really a speech restriction.

5. Harassment law is constitutional because the First Amendment doesn't

protect "invidious private discrimination," perhaps because there's a compelling governmental interest in fighting such discrimination.

6. Harassment law is constitutional because the government has a free hand in restricting speech when necessary to protect "captive audiences," such as employees.[147]

To which should be added (and I must confess some surprise that this point has not been argued more often by others),

7. The Equal Protection Clause of the Fourteenth Amendment, and Title VII as "appropriate legislation" to enforce it, are a constitutional counterweight to the First Amendment in this context.[148]

Under these seven headings–understanding that they are phrased by Professor Volokh in a manner calculated to suggested that the rationales are not sufficient to withstand First Amendment analysis–the arguments made by various scholars for the constitutionality of Title VII's ban of the hostile work environment may be briefly examined.

1. Private Control by Employers Warrants Government Control of Workplace Speech

The argument that the extent of employer control of what speech takes place in the

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[147]Eugene Volokh, Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law, 33 Loy. U. Chi. L. Rev. 57, 61 (2001). My employment of Professor Volokh's summary of the various rationales that have been offered to justify what he rather slightingly terms "harassment law" should not be read to imply endorsement of Volokh's evaluation of the arguments, or of his position. As shown in the text, I believe that Volokh makes legitimate points with respect to certain arguments, but oversimplifies the positions held by those with whom he disagrees in an effort to disparage their claims. Nonetheless, his simplified rationales do form a useful organizing principle; a similar template from a perspective contrary to Volokh's is employed by Andrea Meryl Kirschenbaum, Hostile Environment, Sexual Harassment Law and The First Amendment: Can the Two Peacefully Coexist?, 12 Tex. J. Women & Law 67, 71 (2002). Volokh's categories, while similar to Kirshenbaum's, are slightly more narrow and defined–seven proposed rationales as opposed to five–and therefore permit greater specificity.

[148]See FIRST AMENDMENT, FIRST PRINCIPLES at 337-340.

workplace warrants governmental intervention is predicated on a collapse of the distinction between "private" and "public" regulation, and is predicated on an assumption that the words of the First Amendment may be disregarded in support of a holistic ideal of the "values" which the individual academic or jurist believes the First Amendment serves.[149] However, it has long been clear that laws that penalize private speech must comply with the restrictions of the First Amendment, regardless of whether or not other private pressures exist on the speaker. The Supreme Court has reaffirmed that a private entity's control of other voices engaged in expressive conduct under its rubric does not somehow act to exempt the entity from the First Amendment's protection.[150]

This is not to say that critics have no theoretical point whatsoever; more sympathetically

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[149]Several scholars have advanced this argument, including Robert Post, Racist Speech, Democracy and the First Amendment, 32 Wm. & Mary L. Rev. 267, 289 (1991); Rodney A. Smolla, Rethinking First Amendment Assumptions About Racist and Sexist Speech, 47 Wash. & Lee L. Rev. 171, 197(1990); Amy Horton, Comment: Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment and the Contours of Title VII, 46 U. Miami L. Rev. 403, 408 (1991).

[150]*See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,* 515 U.S. at 569-570 (1995) ("a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech"); New York Times v. Sullivan, 376 U.S. 264, 265-266 (1964)(editor's acceptance of paid political advertisement a decision entitled to First Amendment protection); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974)(same; compilation of others' views).

Indeed, the entire line of cases called the "refusal to foster" cases make it clear that the First Amendment protects the right of private entities to not further speech of which they disapprove. *See, e.g.,* Wooley v. Maynard, 430 U.S. 705, 714 (1977); United States v. United Foods, Inc., 533 U.S. 405 (2001) (striking as unconstitutional "compelled speech" a levied sum of money from fresh mushroom handlers to fund generic advertisements promoting mushroom sales); *see also,* Abood v. Detroit Bd. of Educ., 439 U.S. 209, 234-235 (1977). The line of cases originated in the strikingly more compelling crisis of conscience posed by West Virginia Bd. of Educ. v Barnette, 319 U.S. 624 (1942) (striking as unconstitutional compelled recitation, over religious objection, of Pledge of Allegiance).

viewed, the argument rests on a contention that the private workplace is not sufficiently a place of individual autonomy to warrant First Amendment protection. In view of the fact that employers have near-absolute authority over what speech they will or will not tolerate, the argument runs, individual rights may even be better protected by the imposition of more fair restrictions on what speech is tolerated than the caprices and prejudices of (it is to be assumed) majoritarian employers.

In favor of this theory of regulation, the "at-will" employment doctrine which prevails in almost all jurisdictions in fact does permit employers to terminate employees "for any reason or for no reason."[151] As a result, there is nothing to prevent employers from terminating employees for

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[151] Lobosco v. N.Y. Tel. Co./NYNEX, 96 N.Y.2d 312, 316, 727 N.Y.S.2d 383 (2001); *following* Martin v. N.Y. Life Ins. Co., 148 N.Y. 117, 121 (1895)*; Horn v. New York Times*, 100 N.Y.2d 85, 91-92 (2003); The Second Circuit Court of Appeals has explained the rule pithily, "absent contrary legislation, a private employer may regulate the workplace environment, hire and fire, and promote as it pleases." Locurto v. Giuliani, 447 F.3d at ___, *citing* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 897-898 (1961)(contrasting with limits on public employers "the complete freedom of action enjoyed by the private employer").

See generally Clyde B. Summers, Employment at Will in the United States: The Divine Right of Employers, 3 U. Pa. J. Lab. & Empl. L. 65, 73-74 (2000) (giving examples of courts upholding termination of at-will employees based on their core First Amendment speech); William R. Corbett, The Need for a Revitalized Common Law of the Workplace, 69 Brook. L. Rev. 91, 125-135 (2003) (concluding, *id.* at 133-134, that "at will employment has withstood the efforts by employment law reformers"); Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 Colum. L. Rev. 319, 332-333 (2005) ("legal demands for protection of privacy and dignity on and off the job, and for freedoms of belief, association, and expression at work . . . were up against the venerable doctrine of employment at will, and employers' presumptive power to terminate employment at any time for good reason, bad reason, or no reason at all"; concluding that substantial inroads have been made on employer's ability to terminate arbitrarily, but that employees remain without meaningful voice in the workplace).

According to Corbett, at will employment is the "default" position for American employment law. 69 Brook L. Rev. at 133. Corbett's conclusion was soundly endorsed by the New York Court of Appeals in *Horn*; *see also* Scott A. Moss, Where There's At Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will, 67 U. Pitt. L. Rev.

what would be, against the government's efforts to regulate it, clearly protected speech.[152]

However, in addition to the fundamental flaw of ignoring the First Amendment right to foster only that speech which one approves, the contention proves too much; it would have the paradoxical effect of making private employees *more*, not less subject to government regulation than are public employees, as there would be, by the embrace of the argument, no restraining First Amendment brake on the regulation of workplace speech. While many private employers exercise their right to terminate employees for controversial speech, not all do;[153] creating a uniform rationale that workplace speech is not protected against government regulation would end the admittedly sloppy regime presently in place, but would replace it with a susceptibility to thorough-going, comprehensive government regulation. The lack of First Amendment protection in the workplace would infringe more, not less on the speech rights of workers, unless First Amendment protections were imported as well–in which case, of course, the proposed solution does not even address the problem.

2. Lack of State Action

The argument that the state action doctrine does not apply to the hostile work environment cause of action because the liability is not directly imposed on the speaker, but rather upon the employer who is incentivized to use managerial prerogatives to effect equality in the workplace is not worthy of serious concern. It has long been settled that a law which impacts speech by

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295, 299-300 (2005), stating that the doctrine "is the rule in all states except Montana despite California's and New Hampshire's brief flirtations with abandoning it." However, some states do have some protection for off-duty conduct, or employee speech. *See, e.g.,* N.Y. Labor Law §201-d (McKinney's 2006) (protecting off duty conduct).

[152]*Summers*, *supra* note 149 at 73-74.

[153]*See, e.g.,* Estlund, *supra* note 150 at 332-333; Moss, *supra* note 150.

empowering a private party to sue another private party based upon speech implicates state action, and must comport with the limitations of the First Amendment.[154] Moreover, the state action requirement is explicit in the text of the First Amendment ("Congress shall make no law . . . abridging the freedom of speech"). Therefore, plans to

abolish it can only do so by working violence upon the constitutional text.

The only suggestion that renders this proposed justification worthy of serious scrutiny is that one often-cited court decision, that in *Robinson v. Jacksonville Shipyards, Inc,*[155] found that the balancing test used in "the public employee speech cases lend[s] a supportive analogy":

> If this Court's decree is conceptualized as a governmental directive concerning workplace rules that an employer must carry out, then the present inquiry is informed by the limits of a governmental employer's power to enforce workplace rules impinging on free speech. In the public employee speech cases, the interests of the employee in commenting on protected matters is balanced against the employer's interests in maintaining discipline and order in the workplace. When an employee's exercise of free expression undermines the morale of the workforce, the employer may discipline or discharge or the employee without violating the first amendment. Analogously, the Court may, without violating the first amendment, require that a private employer curtail the free expression of some employees in order to remedy demonstrated harm inflicted on other employees.

Well, no. In fact, this statement is extraordinary in that, other than the first clause, properly deeming its order to constitute a "governmental directive concerning workplace rules," it is

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[154]New York Times v. Sullivan, 376 U.S. at 265 ("a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"), *citing* Ex Parte Virginia, 100 U.S. 339, 346-347 (1880); American Federation of Labor v. Swing, 312 U.S. 321 (1941).

[155]760 F. Supp. at 1536.

otherwise completely incorrect, managing to misstate in one paragraph: (a) what the test relating to public employee speech is, (b) how it is applied, and (c) inferring an analogy to the government regulation of the private sector, despite the fact that the entire government interest legitimating the greater regulation of public employee speech is lacking in the private sector. So many errors in so few sentences is some kind of a remarkable achievement, but scarcely one to be emulated.

First, the regulation of public employee speech is, as the *Robinson* court states, a balancing test, but not a static test with a pre-determined bright-line result. Rather, the test is a fact-specific balancing in which the interest of the employee in communicating the particular speech at issue is weighed against the "reasonable potential of disruption"posed by the speech at hand in context.[156] The *Robinson* court, in suggesting that the Supreme Court's *Pickering* test requires that any employee speech that may have the effect of undermining morale is subject to discipline, is simply incorrect. The employee's right to speak must still be weighed against the potential disruption, and where the speech is valuable,[157] the employee may yet prevail. So, for example, the whistleblower who reveals systemic corruption and mistreatment of prisoners by correction officers may throw the

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[156]Waters v. Churchill, 511 U.S. 661 (1994); These facts can have a considerable impact, based upon the nature of the statement, and the likelihood of a resultant disruption. *Locurto v. Giliani*, 447 F.3d at 173. The role of the speaker in the organization is also critical; the more the speaker's views may be equated with that of the government employer, or may undermine the employer's ability to perform its mission, the more likely that discipline will be upheld. *Id*; compare Lewis v. Cowen, 165 F.3d 154 (2d Cir. 1999). A similar holistic balancing test is endorsed by many commentators, such as David M. Jaffe, Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses, 80 Minn L. Rev. 979 (1996). A particularly wide-raging articulation of the same idea can be found in RICHARD ABEL, SPEAKING RESPECT, RESPECTING SPEECH (1998). For my evaluation of and response to Abel's rather peculiar analysis, see John F. Wirenius, The Last Word: Status Conflicts, Individual Autonomy, and Freedom of Speech, 23 Ham. L. Rev. 395 (2000).

[157]*See, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987); Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir.), *cert. den.*, 516 U.S. 862 (1995).

workplace into absolute chaos; the value of the speech, however, is so patently high that any reviewing court would be hard-pressed to support the imposition of discipline.

More fundamentally, however, the *Robinson* court's assumption of a congruity of interests between the government as employer and the government *vis-a-vis* private employers is simply wrong; the Supreme Court in finding a brace of interests which must be balanced in the context of public employee speech, explicitly relied upon the government's interest in acting *as an employer*, and found that the government has a less leeway to prevent employee speech than does a private employer, because it must honor the First Amendment as well as its interests in workplace efficiency.[158] That interest, of course, is what was weighed against the First Amendment interest of the employee speakers, and justified the fact-driven balancing test in such cases. The sole basis justifying government interference, the proprietary interest of the government, is wholly lacking in the context of private employers, and so the *Robinson* court draws an analogy where the interest justifying regulation is absent, and only the countervailing prohibition is present.

Nor does a depiction of the application of Title VII as merely "incentivizing" employers to promote an egalitarian work environment somehow correct the constitutional infirmity;[159] even where the Government employs positive incentives to promote some speech over other speech, such does not constitute an escape clause from the First Amendment.

It is certainly true that the Government is permitted to foster speech, and to encourage speech

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[158]City of San Diego v. Roe, 543 U.S. 77, 84-85 (2004); *Locurto, supra* note 154.

[159]Ironically, this articulation appears to have originated with Eugene Volokh, who argues that the First Amendment is violated by the contours of the hostile work environment doctrine. *See* Volokh, Freedom of Speech and Workplace Harassment, 39 U.C.L.A. L. Rev. 1791, 1809-1811 (1992).

which communicates messages that are consonant with its values–by subsidy, directly commissioning expressive works, or by providing services and limiting the topics which may be addressed in the context of the provision of services.[160] However, even the provision of monies or services with limits cannot be manipulated to become coercive and attempt to drive disfavored ideas from the marketplace.[161]

Moreover, where the limits in question would unduly circumscribe the nature of the service, such that its very character would be altered, such limits may be deemed violative of the First Amendment.[162] Even were the Government to employ a *positive incentive,* the limits of *Finley* and *Velasquez* strongly suggest that the doctrine would not acquire talismanic immunity from First Amendment scrutiny, but could be challenged as an effort to drive ideas out of the workplace.

In the case of the hostile work environment doctrine, of course, there is no government benefit being conditioned on compliance with conditions. The "incentivizing" is being done with the stick, not the carrot. As the Supreme Court ruled in *New York Times v. Sullivan* and *Forsyth County*, coercive efforts by the government in the realm of speech are not permissible, whatever guise they may adopt. Whether one calls it "incentivizing" or "punishing," is not relevant; the underlying reality and not the label controls.

3. Hostile Work Environment as Content Neutral

Some defenders of the hostile work environment have claimed that the doctrine should be

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[160]See National Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998); Rust v. Sullivan, 500 U.S. 173 (1991).

[161]*NEA*, 524 U.S. at 587-588; Legal Services Corp. v. Velasquez, 535 U.S. 533, 542 (2001).

[162]*Legal Services Corp. v. Velasquez*, at 542-544.

analyzed under the more lax level of scrutiny afforded content-neutral regulation.[163] A "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[164] For a regulation to be deemed to be content neutral "requires courts to verify that the 'predominate concerns' motivating the [regulation] were with the secondary effects of . . . speech, and not with the content of . . . speech."[165]

Professor Calleros argues that the hostile work environment doctrine is a content-neutral regulation of speech in that Title VII "imposes liability not on the basis of the content of harassing speech, but on the basis of a harasser's selectively targeting one or more members of a protected class for harassment."[166] However, this effort to bring the hostile work environment doctrine within the rubric of the content neutrality doctrine elides the distinction between primary and secondary effects, recently well put by Justice Kennedy:

> Speech can produce tangible consequences. It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A

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[163]See, e.g., Charles R. Calleos, Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact and the "Reasonable Person," 58 Ohio St. L. J. 1217 (1997); Callleros, Title VII and Free Speech: The First Amendment Is Not Hostile to a Content-Neutral Hostile Work Environment Theory, 1996 Utah L. Rev. 227 (1996); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp.2d 1486, 1535 (M.D. Fla. 1991). A rather skeletal, half-hearted effort to argue that the content-neutrality doctrine may be deployed to square the hostile work environment cause of action with the First Amendment is contained in Kirshenbaum, 12 Tex. J. Women & Law at 67.

[164]Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[165]City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440-441 (2003) (internal quotation marks omitted) (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)).

[166]Calleros, 58 Ohio St. L.J. at 1217-1218.

> newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.[167]

Or, as Justice Blackmun phrased it even more pithily, "[L]isteners' reaction to speech is not a content-neutral basis for regulation."[168] And in the case of the hostile work environment, that is exactly what forms the basis of liability: the reaction of the listeners in the work environment, either the plaintiff

who is offended, or the co-workers who join in ostracizing and isolating the plaintiff.[169] The fact that the listener (if the member of the protected class is indeed the audience) has a negative reaction to the speech, even suffers emotional harm from it, does not render the regulation of such speech somehow content-neutral.

So, the infliction of emotional distress on Rev. Jerry Falwell by Larry Flynt's scabrous Campari ad parody, in which the Reverend was depicted as discussing his "first time"–his fictional sexual initiation by his mother as well as his first time sampling Campari–was not deemed a content neutral grounds for regulation, because it was dependent upon the cognitive or emotive response of the audience, whether approving and joining in the horse laugh at Falwell's expense, disapproving,

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[167]*City of Los Angeles,* 535 U.S. 425, 444 (Kennedy, J., concurring).

[168]Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 134 (1992). Notably, this insight has characterized the jurisprudence of content neutrality since Schneider v. Irvington, 308 U.S. 147 (1939). For a more detailed treatment of the jurisprudence of content neutrality, see Geoffery R. Stone, Content Neutral Restrictions, 54 U.Chi. L. Rev. 46 (1987). More recent developments are discussed in Philip J. Prygoski, Content Neutrality and Levels of Scrutiny in First Amendment Zoning Cases, 25 Whittier L. Rev. 79 (2003).

[169]On just these grounds, the Third Circuit Court of Appeals, in an opinion by now-Justice Alito, rejected the contention "that the application of anti-harassment law to expressive speech can be justified as a regulation of the speech's 'secondary effects.'" Saxe v. State College Area School District, 240 F.3d 200, 209 (3d Cir. 2001).

or even hurt.[170]

The point is not merely that precedent clearly bars the application of the content neutrality doctrine to the hostile work environment cause of action, although it clearly does. Rather, the essence of the doctrine does not in fact apply. There is a difference in kind between the problems that may be incurred by the activities through which expression is performed that does not vary based on the content of the speech, and that which is inflicted by the effect of speech upon the auditor.[171] The risk to free expression is plainly higher in the second kind of regulation–if persuading people to believe undesirable representations becomes a cognizable cause of action, then freedom of speech becomes freedom in the interstices, freedom to advocate that which society approves or upon which it has not yet reached a negative consensus.

While not all content-based restrictions are necessarily invalid, the notions undergirding the content neutrality doctrine are simply inapplicable to the hostile work environment cause of action, and thus the more relaxed standard of scrutiny applied to content neutral regulation does not apply. The congruence of hostile work environment doctrine with the First Amendment cannot be established by deforming the jurisprudence, and efforts to redefine the content-neutrality doctrine to encompass speech which causes injury or unrest bids fair to have the exception swallow the rule.

4. Harassment Law is Merely Part of a Ban on Discriminatory Conduct and Thus Isn't Really a Speech Restriction

The problem with this argument is that it provides no key to distinguishing discriminatory

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[170]Indeed, the rousing of a hostile reaction and triggering a resultant disturbance was deemed to be one of the means by which speech serves its "high purpose" in Terminiello v. Chicago, 349 U.S. 1, 10 (1949) (per Douglas, J.).

[171]For my first effort to draw this distinction, see Wirenius, Giving the Devil the Benefit of Law: Pornographers, the First Amendment, and the Feminist Attack on Free Expression, 20 Ford. Urb. L. J. 27 (1992).

conduct from speech, and seems to imply that as long s the primary target of the doctrine is the course of conduct, the incidental limitations of speech that result are of no moment. Likewise, and consistent with the holding in *Saxe*, the Court in *44 Liquormart* found that holding to be at odds with the First Amendment:

> The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.[172]

The argument that the Government is not targeting speech, but primarily conduct,[173] does not establish that the law does not sweep more broadly than is appropriate. It is well established that a law which targets unprotected words but in its sweep includes a substantial amount of protected speech, is void for overbreadth.[174] Overbreadth challenges are especially apt where, as in the case of the hostile work environment doctrine, the law or regulation is "addressed to speech or to conduct that is necessarily associated with speech."[175] Hostile work environment doctrine cannot claim

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[172]517 U.S. at 512; *see also* Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 193-194 (1999) (noting continued disapproval of rationale of *Posadas*; "for the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct").

[173]This argument has recently been advanced by Rebecca Lee, Pink, White and Blue, Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment, 70 Brook. L. Rev. 677, 698-699. (2005); *see also*, John H. Marks, Title VII's Flight Beyond First Amendment Radar: a Yin-to-Yang Attenuation of "Speech" Incident to Discriminatory "Abuse" in the Workplace, 9 Colum. J. L. & Gender (1999).

[174]Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[175]Virginia v. Hicks, 539 U.S. 113, 124 (2003); *Broadrick*, 413 U.S. at 613-614.

talismanic immunity, therefore, on the ground that it attacks impact and not message; it must be established that the doctrine does not "effectively suppress [] a large amount of speech that adults have the right to . . . address to one another" and would be "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purposes the statute was enacted to serve."[176]

5. *Invidious Private Discrimination Cannot Be Protected by the First Amendment*

This argument actually has a salient point, but does not really advance the discussion much; to the extent that it is saying that acts of invidious discrimination cannot be cloaked in the immunities of the First Amendment, the statement is patently true. The Supreme Court has long recognized that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms." [177]

However, this does not provide any limiting factor as to when "speech" crosses the line into

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[176]Am. Civil Liberties Union v. Ashcroft, 542 U.S. 656, 701 (2004), *quoting* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997).

[177]United States v. O'Brien, 391 U.S. 367, 376 (1968); Citicorp v. Interbank Card Association, 478 F. Supp. 756, 762 (S.D.N.Y. 1979) (where "conduct properly proscribed is coupled with conduct protected by the First Amendment, the latter does not cure the former"); Michael Anthony Jewelers v. Peacock, 795 F. Supp. 639, 649 (S.D.N.Y. 1992) (same); United States v. Viehaus, 168 F.3d 392, 395-396 (10th Cir. 1999) (distinguishing between protected political speech and unprotected threat component of telephone call threatening bombings). See generally Watts v. United States, 394 U.S. 705 (1969)(distinguishing between protected political hyperbole in the form of ostensibly threatening statements and unprotected verbal act of "true threat"); Kelner v. United States, 534 F.2d 1020 (2d Cir. 1976) (same; specifying elements); United States v. Baker, 890 F. Supp. 1375 (E.D.Mich. 1995), aff''d, 104 F.3d 1492 (6th Cir. 1997) (same; following Kelner); United States v. Dinwiddie, 76 F.3d 914 (8th Cir. 1996) (same; threats against abortion clinic staff); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (similar analysis; dicta).

"conduct." Some scholars taking this position have argued that whenever the elements of a hostile work environment have been met, the First Amendment should give way–that a hostile work environment is, by definition conduct, not speech or that the lack of social value of the speech is properly a factor in denying protection.[178] The first argument is not sufficiently elaborated and justified in terms of First Amendment jurisprudence to be established, and is by no means self-evident. The second argument, pinning the protected status of speech to its perceived value to society is both unfounded in the jurisprudence and dangerous.

Speech need not justify itself by proving its social importance. Only in the context of obscenity as defined in *Miller v. California*[179], a perverse aberration in the law of free speech, may a court judge the social value of a speaker's ideas in determining whether the speech falls within the protective ambit of the First Amendment.[180] While the *Pickering* balancing test applicable to speech by government employees allows the social value of the speech to factor into the equation, it does so in the limited context of those individuals who have voluntarily affiliated themselves with the government regulator in question and represent it in a sense to the general citizenry. *Pickering* and its progeny cannot therefore be expanded to a general precept applicable to private individuals at large.

For all these flaws, this approach does have, however, the benefit of posing the right

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[178]Miranda Oshige McGowan, Certain Illusions About Speech: Why the Free Speech Critique of Hostile Work Environment Harassment is Wrong, 19 Const. Comment. 391, 422-423 (2003).

[179]413 U.S. 15 (1973).

[180]*Miller v. California*, at 24; Nitke v. Ashcroft, 253 F.Supp.2d 587, 600, 601 (S.D.N.Y. 2003). For my criticism of *Miller's* social value prong, see FIRST AMENDMENT, FIRST PRINCIPLES at 91-92

question. As will be seen in further detail, a rough congruence exists between hostile work environment doctrine and the "verbal act" concept such that with relatively minor adjustments, the doctrine can be convincingly justified under core First Amendment, as will be explained below.

6. The Captive Audience Problem

One argument that has been raised to defend hostile work environment law is that workers should be considered a "captive audience," thus permitting greater regulation of speech to which they are subjected.[181] Suzanne Sangree, in particular has argued that:

> Most employees are not ultimately free to leave their jobs without fundamentally affecting their basic quality of life. Employees depend upon their jobs for economic survival. Moreover, most employees do not exert much control over their work environments. Female employees are often not free to avoid areas where pornography is posted, or to avoid working with men who harass them. Harassment, if pervasive in the workplace, is often impractical, if not impossible, to avoid. The relative captivity of the employee and the impracticability of avoidance of harassment, are two of the many factors which can contribute to creation of hostile environments in the workplace and, thus, can inform First Amendment analysis in this context.[182]

Sangree does not address the limits of the captive audience line of cases, but rather gleans

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[181]Kirschenbaum, 12 Tex. J. Women & L. 67, 88-90; *citing Saxe*, 240 F.3d at 210; *see also* J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 423-424; Suzanne Sangree, Title VII Hostile Work Environment Prohibitions and the First Amendment: No Collision in Sight, 47 Rutgers L. Rev. 515-521 (1995); Jessica Karner, Political Speech, Sexual Harassment and a Captive Workforce, 83 So. Cal. L. Rev. 637, 682-83 (1995); Marcy Strauss, Sexist Speech in the Workplace, 25 Harv. C.R.-C.L. L. Rev. 1, 12- 13 (1990).

[182]Sangree, 47 Rutgers L. Rev. at 517-518. Sangree does not rest her argument solely on the grounds of the captivity question, and notes that a finding of a captive audience does not end the First Amendment analysis. *See also* Deborah Epstein, Can A "Dumb-Ass Woman"Achieve Equality in the Workplace? Running the Gauntlet of Hostile Work Environment Harassing Speech, 84 Geo. L.J. 399, 421-429 (1997). Epstein also does not address the question of state action underlaying the captivity of the audience–she assumes, like Sangree, that the government has a legitimate moderating role in private relationships based on a power dichotomy.

from them a general principle that could result in the government disfavoring some speakers in preference to others in the workplace, despite the fact that the relationships are governed by contract–viewed in the law as innately voluntary under normal circumstances.

J. M. Balkin has argued that the courts have defined the captive audience doctrine too narrowly, in terms of situations where individuals are in inherently coercive situations, such as the workplace, and too broadly, by sacralizing the home from unwanted intrusions through speech that can be easily disregarded–junk mail can be thrown out, a channel can be changed.[183] Balkin asserts that captivity is a matter of status, not of location, writing that "[e]conomic coercion leaves many workers unable to avoid exposure to harassing speech. Employees are a much better example of a captive audience than the so-called paradigm case of people sitting in their homes."[184]

None of the cases cited by Balkin compels, or even supports, his contention that the a general principle can be found in the First Amendment of the government protecting economically captive audiences from private speakers. *Frisby v. Shultz*–ironically, the only case Balkin cites in which the Court legitimized governmental action protecting a private person against another private person's speech–rested not upon a finding of "captivity" but upon the quintessentially special and private nature of the home.[185] The heightened right of the resident in her dwelling place forms a convection between the First and the Fourth Amendment and has been deemed to be especially worthy of

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[183]J.M. Balkin, Free Speech and Hostile Environments, 99 Colum. L. Rev. 2295, 2310-2314 (1999).

[184]*Id.* at 2312.

[185] Frisby v. Schultz, 487 U.S. 474, 487 (1988) (upholding ban on residential picketing directed at a single house); *see also* Rowan v. United States Post Office Dep't, 397 U.S. 728, 737-38 (1970) (upholding Post Office provision that allowed individuals to specify to the Postmaster General certain sexually explicit mailings they did not wish to receive); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (upholding ban on sound trucks to protect residents).

protection.[186] The Court in *Frisby* explicitly based its conclusion on the special status of the home–the "last citadel of the tired, the weary, and the sick," and deemed the state's interest in protecting the home "of the highest order in a free society."[187]

Similarly, in *FCC v. Pacifica Foundation,* upholding "time, manner, place" restrictions based upon the publicly owned nature of the airwaves, and the ubiquity of radio and television, the Court also emphasized that the special protection afforded the home did not extend beyond its walls, stating that: "Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away."[188]

In *Lehman v. Village of Shaker Heights*,[189] the Court did not create a generally applicable rule that individual citizens could not be subjected to speech of which they disapproved; rather, it used the fact that commuters on a bus would be seriously hampered in their use of the service if they had to depart it to escape political advertisement to deny a claim that a publicly owned and operated bus service constituted a public forum, on the basis that a bus is "no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid,

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[186]*See, e.g.,* Stanley v. Georgia, 394 U.S. 557 (1969).

[187]*Frisby,* 487 U.S. at 431, *quoting* Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring) and Carey v. Brown, 447 U.S.455, 471 (1980).

[188]438 U.S. 726, 748-749 (1978), *quoting* Cohen v. California, 403 U.S. 15, 21 (1971); *citing,* Eroznik v. Jacksonville, 422 U.S. 205 (1975).

[189]418 U.S. 298, 302-303 (1974). Notably, Justice Douglas, the great First Amendment absolutist, concurred in the judgment, noting that municipal ownership of a conveyance did not change the essential nature of the bus service, and transform the public conveyance into a public forum. Justice Douglas did leave open the prospect of a First Amendment right not to receive unwelcome messages beyond the political messages barred from advertising. *Id.* at 305 (Douglas, J., concurring).

convenient, pleasant, and inexpensive service to the commuters of Shaker Heights."[190] Since no public form was found, the restrictions need only be rational, and viewpoint neutral.[191]

Balkin, of course, does not argue that these cases compel the result he favors, and he admits that he is extrapolating. However, he appears to miss the fact that his captive audience concept fails the requirements of content and viewpoint neutrality, just as did the St. Paul, Minnesota ordinance prohibiting a symbolic display "which arouses anger, resentment and alarm in others . . . . on the basis of race, color, creed, religion or gender."[192] In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992), the Supreme Court clarified that even low value speech, which may be permissibly regulated, is not invisible to the First Amendment:

> these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)--not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.[193]

The Court in *R.A.V.* made clear that the First Amendment does not permit "censoring a

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[190] *Id.* at 303.

[191] *Id.* at 303-304. *See also,* United States v. American Library Ass'n, Inc., 539 U.S. 194 (2003)(rejecting claim that public libraries' provision of computers with internet access created a public forum eliminating discretion as to what items are properly included in library, and thus attaching to funding requirement that filtering software be used did not violate First Amendment rights of patrons); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995)(pubic forum doctrine generally).

[192] *R.A.V.*, 505 U.S. at 391-392.

[193] 505 U.S. at 383-384 (emphasis in original).

particular literary theme."[194] In *R.A.V.*, the Court equated the categories of lower value speech with sound trucks, broadcasting speech in residential neighborhoods, which has long been upheld as constitutional, and noting "as with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility--or favoritism-- towards the underlying message expressed." [195]

In *Saxe*, the Third Circuit, in an opinion by then-Judge Alito, examined a restriction on harassing speech (predicated on sexual orientation) under *R.A.V.'s* principles, and found that the lodestone of First Amendment jurisprudence applied: "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content."[196] In short, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[197]

Just as in *R.A.V.*, the protection of workers from discriminatory or belittling speech in the workplace would, unless accompanied by a corollary ban on pro-diversity speech, unconstitutionally "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[198]

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[194]505 U.S. at 384 (*discussing and quoting* New York v. Ferber, 458 U.S. 747, 763 (1982)).

[195]505 U.S. at 386.

[196] 240 F.3d at 207 (*quoting R.A.V.*, 505 U.S. at 392).

[197]*Saxe*, 240 F.3d at 209 (*quoting* Texas v. Johnson, 491 U.S. 397, 413 (1989)).

[198]505 U.S. at 392. Sangree does attempt to argue that the doctrine is not an impermissible viewpoint discrimination, on the rather thin grounds that (1) all bans of discrimination in the workplace act to target the message of discrimination (but not by banning

7. *The Thirteenth and Fourteenth Amendments Empower Congress to Enact Anti-Discrimination Legislation Even If it Abridges Other Protected Liberty Interests*

Section 2 of the Thirteenth Amendment, and Section 5 of the Fourteenth empower Congress to enforce those provisions "by appropriate legislation." As I have previously pointed out, an argument could be constructed that these provisions allow legislation in the interests of equality to create areas in which the First Amendment's liberty principle is required to yield to the imperatives of equality.[199] The problem with this argument is that it essentially deletes from both amendments

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speech); (2) hostile work environment doctrine targets the bars or barriers to women's employment, not the message (somewhat undermining point 1); and (3) the impact on speech is incidental. 47 Rutgers L. Rev. at 521-522, *et seq*.

[199] FIRST AMENDMENT, FIRST PRINCIPLES at 337-340. This discussion draws from that earlier analysis, which was directed not to Title VII, but to regulation of hate speech. The only sustained effort to make this argument of which I am aware is Jennifer Conn, Sexual Harassment: A Thirteenth Amendment Response, 28 Colum. J. L & Soc. Prob. 519 (1995). Ms. Conn analogizes the position of working women to that of female slaves and argues that the verbal harassment of working women is a "badge of slavery" subject to regulation under the Thirteenth Amendment. She does not address the potential limiting effect of the term "appropriate" and argues, in a rather circular style, that "[f]reedom of speech does not grant the speaker the right to violate a constitutional amendment." *Id.* at 556. Still, she is to be commended in her efforts to ground hostile work environment law in the constitutional text, and contributes important insights to the ways in which the doctrine serves the constitutional imperative of equality. See also, Marion Crain, Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech, 82 Geo. L. J.1903, 1994-1995 (1994).

The questions posed by the Reconstruction Amendments are raised–but not answered–by Akil Reed Amar, The Case of the Missing Amendments: RAV v. City of St. Paul, 106 Harv. L. Rev. 124 (1992). Amar's article informs the analysis, on different grounds, employed by Guy Uriel-Charles in arguing for a structural reading of the right of free association in conjunction with the Thirteenth and Fourteenth amendments, but only briefly mentions speech implications. See Uriel Charles, Racial Identity, Electoral Structures, and the First Amendment Right of Association, 91 Calif. L. Rev. 1209, 1214 (2003). Similarly, James E. Fleming approvingly cites Amar as properly raising egalitarian values which need to be construed in conjunction with the First Amendment's guarantees, but does not address questions of limitations or of the applicability to hostile work environment doctrine. See Fleming, The Constitutional Essentials of Political Liberalism: Securing Direct Democracy, 72 Ford. L. Rev. 1435, 1467 (2005). See generally, Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment, 39 U.C. Davis 1373 (2006).

the critical qualifier, "appropriate."

As far back as *Marbury v. Madison*, the Supreme Court has routinely reaffirmed that "[it] cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore, such a construction is inadmissible unless the words require it."[200] This treatment of the Constitution accords with the general rules applicable to statutory construction. As Justice Scalia has pertinently explained, "[i]t is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"[201]

In the context of construing "appropriate" in the Civil Rights Amendments, the very concept of appropriateness carries with it some sense of limitation. So, too, does logic; the Fourteenth Amendment protects not merely equal protection of the laws, but liberties thereunder; there is nothing in the general text to suggest that one may completely dominate over the other.

To define the limiting principle of the Fourteenth Amendment's use of the term "appropriate," the most reasonable construction appears to view it as a further extension of power–not unlike that under the "Necessary and Proper" language of Article I, section 9 of the Constitution–to pass legislation to effect the goals of the Fourteenth Amendment, as long as such

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The indefatigable Eugene Volokh, along with Judge Alez Kozinski, responded to Amar on the ground that constitutional "penumbras" are dangerous and to be avoided. Kozinski & Volokh, A Penumbra Too Far, 106 Harv. L. Rev. 1639, 1657 (1993).

[200] 1 Cranch (5 U.S.) 137, 174 (1803).

[201] *See* Regions Hosp. v. Shalala, 522 U.S. 448, 118 S.Ct. 909, 920 (1998)(Scalia, J., dissenting), *quoting* Market Co. v. Hoffman, *U.S.* 101 112, 115-116 (1879); *see also,* Duncan v. Walker, 533 U.S. 167, 172-173 (2001); Connecticut National Bank v. Hoffman, 503 U.S. 249, 254 (1992).

legislation does not independently violate any specific proscriptions.

This reading serves the long standing principle of interpretation that the "general is controlled by the particular," [202] in that the specific guarantees of the Bill of Rights would not be subject to abrogation by Congress in the name of fostering equality.[203] Additionally, this reading makes historical sense, in that it frees not only Congress but the People, as citizens of their respective states, from the reliance on the states alone as guarantors of their fundamental rights, with no recourse if the state chose to abrogate or deny rights protected as against the federal government in the Bill of Rights.[204] as originally enacted. In other words, it redresses a systemic failure in the

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[202]Two principle versions of this maxim are best known: *genralis clausula non porrigitur ad ea quaeantea specialiter sunt comprehensa* , or "a general clause does not extent to those things which are provided for specially," COKE'S ENGLISH KINGS BENCH REPORTS, Part 8, 154b, *translated and quoted in* BLACK'S LAW DICTIONARY (4th Ed. 1968) at 815, and "*generalia specialibus non derogant*, or, "general words do not derogate from special," *Id; quoting and translating* JENKIN'S EIGHT CENTURIES OF REPORTS, English Exchequer at 120, *see also* 4 English Law Reports: Exchequeur (1866-1975) at 226. Lord Coke's maxim is an application of the second maxim.

[203]Indeed, the present Court's approach to Congressional power under the Fourteenth Amendment is rather more stingy, restricting Congress to acts designed to effectuate the Court's own interpretation of the Amendment, and limiting it to means "proportional" and "congruent" thereto. City of Boerne v. Flores, 521 U.S. 507, 518-520 (1997); *see also* Nevada State Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003). I have addressed the text and language of the Constitution, rather than merely relying on *City of Boerne*, because the Court has in the past afforded Congress considerably more scope in legislation under section 5. *See* Ex parte Virginia, 100 U.S. 339, 345-346 (1880)(treating Section 5 as a grant of power analogous to the Necessary and Proper Clause, Art. I, sec 9). For a more extended discussion of the Fourteenth Amendment's impact on First Amendment jurisprudence, and my views on the difficulties presented by early improper limitation of the Amendment's scope, see FIRST AMENDMENT, FIRST PRINCIPLES at 23-27, 125-131.

[204]This prior constitutional order held sway under Barron v. Baltimore, 7 Pet. (32 U.S.) 243 (1833), and was applied to the First Amendment by Permoli v. First Municipality, New Orleans, 3 How. (44 U.S.) 589 (1844). For an excellent discussion of the long road by which the Fourteenth Amendment was deemed to incorporate all but the jury trial right in civil cases of the Sixth Amendment, and the Third Amendment, see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986). Intriguingly,

Constitution laid bare by the Civil War: the states were not, as the Framers hoped, reliable guardians of individual civil rights and liberties. [205]

Finally, the aspect of interpretative strategy–it scarcely can be elevated to the level of a principle–of *fit*, a pragmatic recognition that constitutional theorists do not write on a *tabula rasa*, that the historical evolution of the constitution provides a loose framework with which proposed refinements and developments should harmonize, stands for this more limited reading of "appropriate."[206]

Curtis himself has touched upon the legitimate scope of regulation of hate speech and has rejected a Thirteenth and Fourteenth Amendment based approach, on the ground that only racially-directed speech could fall within its scope. Curtis, Critics of Free Speech and the Uses of the Past, 12 Const. Commentary 29, 51, n. 93 (1995).

[205]CURTIS, NO STATE SHALL ABRIDGE, at 54-56, 62-92. A more pragmatic argument for not allowing subsequent amendments to limit the First Amendment absent explicit language doing so is made by Stephen G. Gey, A Few Questions About Cross-Burning, Intimidation and Free Speech, 80 Notre Dame L. Rev. 1287, 1300-1301 at n. 56 (2005), who argues that the same structural logic would force the First Amendment, and the rest of the Bill of Rights, to bow to any of the governmental powers enumerated in the Constitution–and thereby denude them of meaning.

[206]*See, inter alia,* Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve, 65 Ford. L. Rev. 1249, 1254-1256 (1997) (discussing notion that historical evolution of constitutional law may not be entirely disregarded in interpretation of document's meaning). Interestingly, this approach is not a creation of Dworkin's; indeed, Charles M. Gray traces it in the writings of Sir Edward Coke (1552-1634). Gray, *Further Reflections on Artificial Reason*, in LAW, LIBERTY AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE (ALLEN D. BOYER, Ed.)(Liberty Fund 2004) at 121-125.

Of course, "fit" can be argued to privilege the Fourteenth Amendment over the First, see Carlos Gonzales, The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms, 80 Or. L. Rev. 447, 523-532 (2001)(arguing that chronology favors a finding that the Fourteenth Amendment should trump the First; no discussion of "appropriate" as potential limitation). Such an argument, in my view, disserves the text by failing to grapple with the limitation inherent in the Fourteenth Amendment, but also falls into the trap suggested by Gey, *supra* note 205, by failing to construe the amendments in harmony. Gonzales's argument forces a conflict not required by the text, canons of construction, the history of the Fourteenth Amendment, or the constitutional structure

V. Border Raids: The Blurry Line Between Speech and Action

In critiquing the work of those who have sought to justify the hostile work environment prohibition, my intent has not been to suggest that these scholars have not contributed valuable insights; rather, the common flaw in these approaches is that they are advocacy pieces designed to justify a position with respect to the cause of action to which the author is committed. As a result, the efforts to square First Amendment jurisprudence with Title VII deform the First Amendment and not the statutory cause of action where the two are in tension. This elevates the lesser over the greater–the statute over the Constitution. Such an approach violates the fundamental axiom of interpretation that the Constitution is "the Supreme Law of the Land."[207]

Moreover, the difficulty pointed out by Alan Dershwowitz that "[m]ost, though not all jurisprudential theorists construct elaborate frameworks of principle and theories of rights that just happen to lead them to the promised land of policies that they favor on political, religious or personal grounds,"[208] should lead to caution, both in watering down constitutional texts to "admonitions of moderation," in Learned Hand's infamous and oft-criticized words,[209] and in striking down the enactments of a democratically elected legislature. Just as proponents of hostile work environment can be willing to work violence to established First Amendment principles to

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itself.

[207]U.S. Const., Art. VI, cl. 2. *See generally*, Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803). For my effort to construct some axioms of constitutional construction, see FIRST AMENDMENT, FIRST PRINCIPLES at 10-14.

[208]ALAN M. DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS (2004) at 137.

[209]LEARNED HAND, THE SPIRIT OF LIBERTY at 277; *see* Justice Douglas's stinging rebuke in Scales v. United States, 367 U.S. 203, 270 (1961)(Douglas, J. dissenting).

preserve the cause of action, so too can opponents of the hostile work environment be prepared to artificially sharpen the line between speech and conduct, in order to avoid any blurring at all.

For example, Professor Volokh has recently called for a simplification of the First Amendment caselaw regarding "speech brigaded with action"[210] that would overturn decades of settled precedent, including *Giboney v. Empire Storage & Ice Co.*[211] Volohk's concern with the effect of blurring the line between speech and action is admirable, but his solution–to further undermine the cogency of First Amendment jurisprudence by carving out yet more *Chaplinsky*-style exceptions would swiftly leave freedom of speech as porous, leaky patchwork, good for mostly symbolic purposes. Moreover, once policy considerations become a proper ground for exceptions to the First Amendment, there is little to prevent temporary majorities from enforcing their preferences against those who hold unpopular views.[212] Unlike Professor Volokh, I believe in full

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[210]Volokh, Speech as Conduct, *supra*. Professor Volokh rejects the cases holding that speech should be punishable where it is part of an illegal course of conduct, speech brigaded with action, or speech acts, rather than pure speech, largely rejecting Professor Kent Greenawalt's view, in his SPEECH, CRIME AND THE USES OF LANGUAGE (1989) that certain kinds of statements are situation-altering utterances and thus unprotected conduct. Finally, the article confronts what Volokh calls the "uncharted zones" of free speech - criminal agreements, criminal solicitation, much verbal aiding and abetting, professional speech, and the like - and suggests that these zones are best dealt with by recognizing properly bounded First Amendment exceptions (as the Court has done with regard to libel, incitement, fighting words, and the like), and not by relabeling the speech as conduct.

My own effort to address some of the issues raised by Professor Greenawalt may be found in FIRST AMENDMENT, FIRST PRINCIPLES at 147-156; 189-200.

[211]335 U.S. 490 (1949).

[212]FIRST AMENDMENT, FIRST PRINCIPLES at 73-121. Indeed, a recent example of this can be seen in a case in which I was lead counsel; in Nitke v. Gonzales, 413 F. Supp.2d 262, aff'd 547 U.S. ___ , 164 L.Ed.2d 295 (2006) (a previous opinion in the same case was rendered under the name Nitke v. Ashcroft, 253 F. Supp.2d 587 (S.D.N.Y. 2003)), a constitutional challenge to the application of obscenity doctrine, based on geographical community standards, to the Internet. Although the district court dismissed the case for failure to establish overbreadth,

First Amendment coverage for all speech, rejection of balancing except where constitutional imperatives are forced into conflict, and minimization of exceptions to the First Amendment.[213] So, then, the reasonable reader might ask, how can hostile work environment doctrine comport with the First Amendment?

The answer is in the fact that all rules are, as H.L. Hart emphasized, subject to some blurring at the fringes. Acknowledging the existence to a limited extent of open texture to a rule does not strip it of its status, or transform it into a standard. Rather, it denotes acceptance that boundaries are seldom perfect; we police them as carefully as possible, strive to make them as narrow as possible, but like the lines of a pencil in a drawing, the space they occupy, however slender, creates a frontier whose breadth marks an imperfection. So, too, hostile work environment law, though a standard, closes the universe of facts that may fit into its ambit; speech that does not both objectively and subjectively alter the working environment does not fit the definition–and the harassing speech that falls short of that standard is both outside of the statute's sweep *and* fully entitled to constitutional protection. The fact that the outer boundaries of the standard and those of the rule abut, and even

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the three judge panel credited expert testimony that the offensiveness of sexually themed materials, in part a function of depiction of non-traditional sexual practices, impacted negatively the fact-finder's willingness to find serious value in the material. Subsequently, a memorandum from the U.S. Department of Justice was released confirming this insight:

http://www.washingtonpost.com/wp-dyn/content/article/2005/09/19/AR2005091901570_pf.html

For legislative confirmation of this, the Federal Sentencing Guidelines single out sado-masochistic themes as especially subject to sanction, instructing the trial court "If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase [base level of the sentence] by 4 levels." 18 U.S.C. §2G3.1 In other words, the provision of s/m themed materials to consenting adults is seen by Congress as only slightly worse than providing obscene materials to minors (an enhancement factor of 5 levels, *id*.).

[213]FIRST AMENDMENT, FIRST PRINCIPLES at 156-181.

permeate each other means that the two encompass some common ground.

In short, the question is not, whether the cause of action founded in a hostile work environment comports at all with the First Amendment, but whether the doctrine protects enough speech to be consistent with the First Amendment. While a comprehensive answer cannot profitably be undertaken until courts begin, as the Third Circuit did in *Saxe*, to scrutinize the contours of the cause of action against the limits of First amendment verbal act doctrine, a preliminary analysis strongly supports the conclusion that the requirement that the harassive speech or conduct be systematically pervasive or severe is at least asking the same questions as other examples of the difficult to categorize, underanalyzed boundary line of speech brigaded with action.

The Supreme Court in *Brandenburg* laid out that boundary in the context of subversive advocacy, stating that "the Constitutional guarantees of free speech and free press do not permit a state to forbid or prescribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action or is likely to incite or produce such action."[214] The imminence and specific intent requirements capture the dynamic of principal and agent, as I have previously argued; one who speaks intending to galvanize auditors into immediate action and who either succeeds or was likely to succeed has so affiliated herself with the act discussed that liability for the result, or on an attempt theory does not violate the First Amendment.[215]

The *Brandenburg* scenario does not encapsulate the only set of circumstances in which a verbal act may be discerned. Rather, it captures the dynamic of when an action undertaken by an

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[214]395 U.S. at 447.

[215]FIRST AMENDMENT, FIRST PRINCIPLES at 68-70; 194-200.

auditor may be imputed to another whose sole contribution to the act takes the form of speech that falls short of a command. The rule, as Justice Douglas explained it, is that "[f]reedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with action as to be an inseparable part of it."[216]

This concept of "speech brigaded with action"advanced by Justice Douglas (which I have maintained is captured by the threshold for suppression established in *Brandenburg*) harks back to the concept of a verbal act, notably set out in *Gompers v. Bucks Stove & Range Co.*[217] The *Gompers* concept, that speech is not immunized from prosecution when it functions not as a means of communication but rather solely as an integral component in an action that the state (or federal) government has a right to proscribe, is reflected as well in the jurisprudence, as pointed out earlier. Picketing, for example, was described by Justice Douglas as "free speech plus," meaning that it combined expressive elements with regulable conduct, and that the regulable component did not gain immunity because of the entwined expression.[218] Thus, "[t]hough the activities themselves are under the First Amendment, the manner of their exercise or the collateral aspects fall without it."[219]

In the earliest of the three Espionage Act cases, in which a unanimous Court in opinions by Justice Holmes first adopted the "clear and present danger" test, *Schenck v. United States*, that was the entire point of the classic Holmes analogy that permitted punishment for falsely shouting "Fire!"

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[216]Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) (citing *Giboney, supra*).

[217]221 U.S. 418, 439 (1911); *see also* Fox v. Washington, 236 U.S. 273, 277 91915). Both cases are more fully discussed in FIRST AMENDMENT, FIRST PRINCIPLES at 27-29; 132-133.

[218]Communist Party v. SAC Board, 367 U.S. 1, 173 (1960) (Douglas, J., dissenting).

[219]*Id.*

in a crowded theater. From this clear example of speech that functions as a "verbal act," Holmes moved immediately to the injunction in *Gompers,* justifying that decision because the First Amendment does not protect "words that may have all the effect of force" in the context in which they are uttered.[220]

The *Brandenburg* test and the concept of verbal acts are not automatic formulae that will magically wave away any difficulty in adjudicating cases. The *Brandenburg* test usefully captures several of the criteria for identifying a verbal act, or when a speaker can appropriately be held liable for actions physically performed by another; it thus recognizes what is or is not functional speech under the First Amendment in such a context. The requirement of temporal imminence serves the purpose of aligning the speaker with the performed action. Like a command that carries along with the message of "do this" the subliminal or implicit corollary of either "or else" or "on my authority," the temporal imminence requirement personally involves the speaker in the resultant act, and (through the intent requirement) puts his or her imprimatur on it. [221]

However, the imminence requirement may be misunderstood here, by carving out the quotation of the test applicable to undirected advocacy from that context, and suggesting that only temporal imminence will do; in fact, a specific agreement to violate the law, or a pre-existing command relationship can serve the same purpose. Thus, a party's using words as a vehicle to participate in the violation of law may properly provide a basis for a finding of civil or criminal

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[220]249 U.S. 47, 52 (1919).

[221]FIRST AMENDMENT, FIRST PRINCIPLES at 243-244 (giving examples of Henry II asking his barons rhetorically "will no one rid me of this turbulent priest?" understood by them as a command based on pre-existing power relationship and Professor Moriarity's reasonable expectation that his instruction to his subordinate to kill Sherlock Holmes will be obeyed).

liability.[222]

Admittedly, the Supreme Court has not been particularly helpful, in delineating the boundary line between speech and conduct, tending to rely on rather unhelpful generalizations:

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or the underlying conduct, the constitutional immunities that the First Amendment extends to speech. Finally, while a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing

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[222]United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999). The Second Circuit described such unprotected words as "ones that instruct, solicit, or persuade others to commit crimes of violence," and found that they might appropriately be prosecuted under statutes of "general applicability." Id. (upholding conviction of Muslim cleric for his role in terrorist conspiracy against First Amendment speech and free exercise challenges); citing Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872, 879 (1989) (rejecting Free Exercise challenge to anti-drug regulation impacting upon religiously-inspired use of peyote), reaffirmed in City of Boerne v. Flores, 521 U.S. 507, 533-534 (1997). This rule is not limited to the advocacy of violence; "it has never been deemed an abridgment of freedom of speech or of the press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (upholding as constitutional injunction barring labor picketing deemed to be coercive); New York v. Ferber, 458 U.S. 747, 761-762 (1982) (following Giboney); see also, Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985, 999 (2d Cir. 1997 ("When a trade organization becomes so closely brigaded with illegal activity as to become inseparable from it, the government is justified in withholding benefits based on association with such an organization"; following Giboney); IDK, Inc. v. County of Clark, 836 F.2d 1185, 1194 (9th Cir. 1988) (same; escort service asserting associational rights); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) ("Speech is not protected by the First Amendment when it is the very vehicle of crime itself") (advisor counseling tax fraud in advancing agenda of anti-tax society) (quoting United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970). Such communications which may be regulated as an integral component of an act include the exchange of information about securities, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), the exchange of price and production information among competitors, American Column & Lumber Co., 257 U.S. 377 (1921), and employers'' threats of retaliation for the labor activities of employees, NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61-62 (1973).

> conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited.[223]

However, it seems that using *Brandenburg*, *Gompers*, and *Giboney* as a template, the basic paradigm can be removed from the context of subversive advocacy without doing violence to its elements. Thus, to establish a verbal act, I would posit, the following must be shown:

1. Speech designed to have direct impact without further debate

In the subversive advocacy context, the immediacy requirement provides this need–there is no time for the audience members to think through the speaker's statements, because they have been whipped up into a frenzy and made into a mob. More commonly, this requirement would be fulfilled by performative speech–speech that constitutes a crime or by recognized convention, understood by the speaker at the time of utterance, creates civil or criminal liability itself, such as a contract which creates legal obligations by memorializing the respective promises of the parties, or another legal instrument that alters status through the use of words. Conspiracy, under this rubric, is nothing more than a contract to commit a wrongful act.[224]

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[223] Brown v. Hartlage, 456 U.S. 45, 55 (1981) (upholding state statute prohibiting the sale and purchase of votes) (citing, Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-564 (1980); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973)). See also Jews for Jesus v. Jewish Relations Council of New York, Inc., 968 F.2d 286, 295-296, 297 (2d Cir. 1992) ("if discrimination engaged in by 'primary' actors using words can be constitutionally outlawed, so too can discrimination engaged in by third parties who use speech or other expressive conduct to coerce a 'primary' actor to violate an anti-discrimination statute"; upholding application to boycotts "with the object of coercing the [boycott target] to deny plaintiffs accommodations for reasons prohibited by the anti-discrimination statute")

[224]See, e.g., Rowlee, supra, 899 F.2d at 1278-1280.

Likewise, credible threats or other coercive speech fits in this class–a "true threat"[225] does not allow for debate, it extorts compliance based on feared, imminent action. Thus, a threat which is reasonably understood by the auditor as a promise of imminent future violence and is intended to be so understood is unprotected while the exact same use of words or symbols may be constitutionally protected where it is understood and intended as not directed to a specific target, and not conveying an assurance of violence to come.[226]

Similarly, fraud–obtaining consideration through false factual representations–does not induce exchange of ideas or debate, but rather is based on a relationship in which one party purports to have access to information that is not readily accessible to the gull, and exploits the relationship of trust that is created. In a sense, the fraudster creates a fiduciary duty, only to exploit it.

In each of these examples, persuasion by the process of exchange of ideas, dialectic or discussion does not take place; what appear to be statements of fact are made, if at all, to induce action by the auditor that is tainted by illegality resulting from the intended result of the speech. Whether the auditor joins in the intent or is the hapless victim, the speaker's liability is fixed because a change of circumstances is the natural and anticipated result of the auditor's reasonable reliance on the statements made.

2. Specificity

In order for a verbal act to take place, the actor must be addressing a specific set of

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[225] See generally Watts v. United States, 394 U.S. 705 (1969)(distinguishing between protected political hyperbole in the form of ostensibly threatening statements and unprotected verbal act of "true threat"); Kelner v. United States, 534 F.2d 1020 (2d Cir. 1976) (same; specifying elements); United States v. Baker, 890 F. Supp. 1375 (E.D.Mich. 1995), aff''d, 104 F.3d 1492 (6th Cir. 1997) (same; following Kelner); United States v. Dinwiddie, 76 F.3d 914 (8th Cir. 1996) (same; threats against abortion clinic staff); see also *R.A.V*. 505 U.S. at 388.

[226] *Id.; compare R.A.V., supra with* Virginia v. Black. 538 U.S. 343 (2003).

circumstances in which the verbal act will have results that are both discernible and foreseeable. That is, the speaker who employs undirected advocacy to the world at large, such as Valerie Solanas, or Karl Marx, cannot be guilty of a verbal act–there is no context to create a link with any alteration of circumstances such that the ensuing results can be attributed to them, and not to the reader or auditor, who is irrebuttably presumed to have the ability to evaluate and reach an independent decision as to whether or not to bring into reality the ideas expressed by the speaker.[227] Or, as British criminal law authority Glanville Williams has stated:

> A crime must be a specific intentional act, and I know of no case that says a man can be an aider or abbettor if he knows nothing of the act or of the date or the person against whom the criminal offence is committed. It will not do to say "You gave the means of doing it."[228]

The point is that, for speech to be bound up in another act such as to be "brigaded with action," it must, at a minimum, be as inextricably intertwined with that act as would be needed by another otherwise innocuous, protected act. Similarly, an attempt may be made through speech, but liability only eventuates when the illegal action is "dangerously close to fruition" or where the speech constitutes a "substantial step" towards the consummation of the illegal act.[229] Thus, at a minimum, the common law requirement of specificity should be accorded constitutional status in

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[227]FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW (11th ed. 1912); for a more detailed analysis see FIRST AMENDMENT FIRST PRINCIPLES at 224-226.

[228]GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (1953) at 198, *quoting with approval* Bowker v. Premier Drug Co., 1 K.B. 230-231 (1928); for Williams's masterly and detailed exposition of the need for specificity and intent to constitute accessorial liability, see *id.* at 187-203.

[229]People v. Hernandez, 93 N.Y.2d 261, 689 N.Y.S.2d 695 (1999) ("dangerously close to fruition"); United States v. Porter, 2000 U.S. App. LEXIS 1865 (2d Cir. 2000)(under federal law, a criminal attempt involves committing an act constituting a "substantial step" toward the fulfillment of the elements of the offense).

the case of speech that purportedly is part of a criminal act. For such circumstances to exist, then, only "directed" advocacy can be involved–speech made in and tailored to a specific context, where it is likely, because of the relationship between speaker and listener, to have a concrete effect on the real world.[230]

2. The Concrete Impact Must Be Intended

Here, the *Brandenburg* rule needs no translation: a verbal act cannot exist where the speaker had no such intention. If I do not mean to enter into a contract, or to defraud an investor, or to foment a riot, I cannot be held responsible, because the act is not my own. I have only spoken without intending any real world consequences. Otherwise, Oliver Stone could be held responsible for copycat criminals who missed the entire point of his film *Natural Born Killers.*

The First Amendment protects speech whose auditors bring to it their own preconceptions and inclinations, and interpose their own value systems and beliefs for those of the speaker.[231] This is the primary distinction between the protected cross-burning in *R.A.V. v. City of St. Paul* and the unprotected harassment through implied threat permissibly proscribed in *Virginia v. Black*:[232] The

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[230]Another good example may be found in cases of "enticement" or "invitation" where pedophiles target a specific child and seek to procure action that would lead to criminal sexual conduct. These efforts may be viewed as attempts, or as offers, similar in performative nature to the offer whose acceptance forges a legally enforceable contract. Like an offer, such speech is specific in target, and shifts the dynamic toward the offeree to bring about the consummated offense. See People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467 (2000); United States v. Kufrovich, 997 F. Supp.2d 246 (D. Conn. 1997).

[231] FIRST AMENDMENT FIRST PRINCIPLES at 182-189; 237-245.

[232]538 U.S. 343 (2003)("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms

Court declined to strip the burning of a cross with intent to intimidate specified observers of its long-established message: violence would follow, directed at *that* audience member at *that* locale in the near future. Notably, the Court struck down the portion of the statute in which the burning of a cross was deemed to constitute evidence of intent to intimidate; the state is still required to prove that such intent existed, beyond a reasonable doubt.

In the case of hostile work environment harassment, the requirement that the harassive speech be pervasive or severe, and work a change in the terms and conditions of employment, covers some of the ground required. A concrete harm is required, as is the case in *Brandenburg*; Title VII is not violated unless "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[233] The speech must reach the level where it essentially subverts the contract between employer and employee, and renders it different from that enjoyed by other employees.

Likewise, the Court has affirmed that no cause of action is made out unless there is an intent to discriminate, that is, the harasser must select his or her victim–whether the victim and the harasser are both of the same gender–and do so with the intent of changing the terms and conditions under which the victim is employed, based upon sex, race, religion or national origin.[234] Again, this corresponds with the requirement in *Brandenburg* that the speaker must intend the concrete harm

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of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment"). It remains, of course, to be seen if the Court will use this case as a bridgehead to an erosion of the specificity requirement, which was nowhere near as clear in *Black* as in other true threat cases. *Compare, e.g., Watts, supra.*

[233]*Oncale*, 523 U.S. at 80, *quoting, Harris*, 510 U.S. at 23 (Ginsburg, J., concurring).

[234]523 U.S. at 80-81.

which she is advocating to take place, and to advocate it in circumstances in which is likely to take place.

The one distinguishing factor from *Brandenburg* is temporal imminence. However, in the case of a hostile work environment, the slightly broader specificity factor, in the form of a relationship context allowing for concrete harm without intervening causation exists. Whether conceptualized as *respondeat superior* because of the employer's active ratification or as a result of passive tolerance, hostile work environment is about the subordination of some employees by others, based on membership in a protected class. It is about perpetuating a power system by keeping the subordinate caste in social subjugation, and the employer's involvement, whether explicit or tacit, is a key element to the cause of action.

The courts have been grudging in watering down the requisite levels of severity or of pervasiveness, resisting almost instinctively the standard's inherent flexibility. As a result, plaintiffs have been required to show a concrete impact, which has the effect of altering the victim's relationship with management and co-workers in a manner that is both objectively perceivable and subjectively recognized–the same terms and conditions of the employment contract do not apply.[235]

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[235] *See* Arraleh v. County of Ramsey, 2006 U.S. App. LEXIS 22738 (8th Cir. September 7, 2006) at **23-24; *compare id.* at 30-31 (Heaney, J., dissenting)(triable issue of fact where testimony established that plaintiff was "subjected . . . to a stricter code of conduct than was applied to white coworkers." *See also* Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006) (finding triable issue of fact existed as to whether "English only" policy could create a hostile work environment based on EEOC Guidelines stating that such rules may create discriminatory atmosphere, and "adversely impact employees with limited or no English skills . . . by denying them a privilege enjoyed by native English speakers: the opportunity to speak at work . . . .English-only rules create barriers to employment for employees with limited or no English skills . . . English-only rules prevent bilingual employees whose first language is not English from speaking in their most effective language, and . . . the risk of discipline and termination for violating English-only rules falls disproportionately on bilingual employees as well as persons with limited English skills."); see generally Williams v. Arrow Chevrolet, Inc., 121 Fed. Appx. 148 (7th Cir. 2005) (canvassing holdings of the Supreme Court, Sixth, Seventh

These courts have sometimes gone embarrassingly out of their way to emphasize that speech, however offensive, that does not have this impact cannot create a hostile work environment.[236] Thus, where an employee participates in sexual banter, or complains about general workplace offensiveness that does not exclude her, no hostile work environment can be established.[237] By contrast, where concrete impact can be shown, and traced to the discriminatory animus, a hostile work environment can be shown.[238]

This does not mean, of course, that the line will always be clear: where emotional isolation, *de facto* segregation and alienation are at issue, the questions get progressively harder. Yet, the Supreme Court has made clear that emotional impact is one form of compensable injury sufficient to establish a violation of Title VII, but that no pathological or traumatic psychological condition

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and Tenth Circuits); *supra* text at nn. 38-98.

[236]*See, e,g., Williams, supra* note 234 at **7-8; *Comparing* Elmahdi v. Marriott Hotel Servs., Inc., 339 F.3d 645, 653 (8th Cir. 2003) (finding no abuse or hostility where plaintiff suffered immature jibes about the sexuality of African men, such as himself), and Hafford v. Seidner, 183 F.3d 506, 514 (6th Cir. 1999) (mocking Muslim greeting and accusing plaintiff, a prison guard, of inciting a "holy war" did not amount to hostile work environment), *with* Shanoff v. Ill. Dep't of Human Servs., 258 F.3d 696, 705-06 (7th Cir. 2001) (finding hostility where supervisor made statements such as "I hate everything that you are" and "I know how to put you Jews in your place"), *and* Venters v. City of Delphi, 123 F.3d 956, 976 (7th Cir. 1997) (accusations by born-again Christian supervisor that plaintiff had had sex with animals and should commit suicide created hostile environment).

[237]*See, e.g.,* Romaniszack-Sanchez v. International Union of Operating Engineers, 121 Fed. Appx. 140 (7th Cir. 2005)

[238]*See, e.g.,* McGinest v. GTE Service Corp., 360 F.3d 1103 (9th Cir. 2004) (hostile work environment claim made out where plaintiff's "ability to perform his job was directly affected by the refusal of his coworkers to work under his direction on occasion" and other concrete affects could be shown).

need be caused by the hostile work environment for liability to attach.[239] While the requisite concrete impact–a change in the terms and conditions of employment–is therefore less than ideally clear, it is not unprecedentedly so compared to other causes of action sounding in tort, such as intentional infliction of emotional distress.[240] Intentional infliction of emotional distress, like a hostile work environment, is a cause of action that could subject otherwise protected speech to liability; like hostile work environment doctrine it is hedged around by a high threshold of intent and impact designed to protect speech and limit the cause of action to speech brigaded with action.[241]

Embrace of the seemingly old-fashioned dichotomy between speech and action may seem simplistic to some; speech is an act of a kind, after all, and sometimes has consequences such as (or even worse than) the swinging of a fist. But the distinction is in fact based on a meaningful difference. Speech–that is, purely communicative acts that merely convey ideas, information or images–may cause harm, but solely through the independent action of another person who evaluates the ideas, information or images received, and who chooses to act after brining in a separate and

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[239]*See Harris*, 510 U.S. at 21-22; *supra* text at notes 41-46.

[240]*See, e.g.,* Stuto v. Fleischman, 164 F.3d 820, 828 (2d Cir. 1999) (applying New York State law); Rivas v. Suffolk County, 326 F. Supp. 2d 355, 360 (E.D.N.Y. 2004).

[241]In New York law, the requisite showing that conduct be "so outrageous, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized society" as well as intentional and causative of harm. *See* Howell v. New York Post Co., 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993) (newspaper's publication of plaintiff's photograph depicting her in psychiatric facility in company of notorious crime victim/criminal which revealed to public her institutionalization deemed insufficient, even where photographer obtained photograph by act of trespass); Lewittes v. Bloom, 18 A.D.3d 261, 795 N.Y.S.2d 13 (1st Dept. 2005); Rall v. Hellman, 284 A.D.2d 113, 726 N.Y.S.2d 629 (1st Dept. 2001)(impersonation of writer-cartoonist and uttering statements designed to bring him into disrepute insufficient).

independent component–that person's own judgment. Even if it is foreseeable that someone who comes into contact with the speech will react to it in a particular way–either by performing unlawful conduct in agreement with the message conveyed in the speech or by performing such conduct in revulsion from the message–the resultant harm depends on an independent actor's own internalization of the speech and arrival at a decision about the appropriate response. This is plainly a different set of circumstances from that addressed by the *Brandenburg* test, or by the verbal act concept from which it derives.

The debate over the First Amendment and hostile work environment will inevitably continue, especially as the issue has not been addressed by the courts full on. Moreover, much of the scholarship in the field seeks to relegate the doctrine to the scrap-heap entirely, or to bowdlerize the First Amendment in the name of equality. But if the legal academy can accept that the "bright line" approach of the First Amendment and the standard of Title VII each partake a little of the essence of the other–the rule is not as pellucid, the standard not as indeterminate–as makes for theoretical comfort, we can begin to harmonize the statutory proscription to the Constitutional provision. Each, after all, serves the same goal: the protection of ideas and debate, but not of discriminatory acts.