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# CERTAIN ILLUSIONS ABOUT SPEECH: WHY THE FREE-SPEECH CRITIQUE OF HOSTILE WORK ENVIRONMENT HARASSMENT IS WRONG

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Can antidiscrimination laws punish hostile work environment harassment without infringing freedom of speech and expression? Consider the following examples of nude pictures displayed in different workplaces.

Joan is the only woman welder at a shipyard. Her coworkers have posted sexually explicit centerfolds, calendars, and cartoon depictions of nude women from *Playboy*, *Hustler*, and similar magazines throughout common areas—the break room, the cafeteria, the halls, and the equipment room.<sup>1</sup> Some of the posters could be construed as political statements about the proper role of women: In one of the photos, a woman wears just an apron; in another, a woman wears a skimpy nurse's outfit. The pictures unnerve Joan, and she asks her supervisors to have the pictures removed. They tell her she's nuts if she thinks men in a shipyard will take down their girlie pictures. Get used to it, they tell her. She sues, alleging that the pictures have created a sexually hostile work environment.

The Museum of Modern Art is running an exhibition on "*Playboy: Transforming the Body in American Society*," which features enlarged versions of *Playboy* centerfolds to document changes in American visions of female beauty. A woman security guard objects to being assigned to the gallery in which this exhibition is being held. MoMA refuses to reassign her, and she

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

sues, alleging that the pictures have created a hostile work environment.

Librarians have sued the Minneapolis Public Library for failing to correct a hostile work environment. The librarians claim that male patrons have been using the library's Internet kiosks to surf pornography sites. The librarians can see the computer screens from the reference desk. At least once a day, they see raunchy pictures of various sex acts (and those are the *tame* ones). Often, the patrons use the library's color printers to print these pictures, but then forget to retrieve them. When the librarians clean out old print jobs, they see these images. The librarians must also enforce time limits on Internet use; sometimes patrons will react aggressively when the librarians ask them to relinquish a computer. One patron yelled at a librarian, and another threw a chair across the room after being asked to sign off. The librarians have complained to the directors of the library. The library directors have been unwilling to install Internet filters, claiming that the First Amendment prevents them from doing so. Disgusted, the librarians have filed a complaint with the EEOC.

In each of these examples, the meaning of the expression changes in each of the three workplaces—though the surface content of the depictions is the same. These examples suggest that our reaction to whether expression should properly form the basis of a harassment claim has less to do with what is said or displayed than with the context in which the words are uttered or the images are displayed. I advance that thesis here.

Part I argues that the First Amendment status of expression in the workplace is determined by context, not by bright-line rules. Workplaces have varying missions, and a workplace's mission affects how workers encounter expression. The social benefits of expression and the social costs of regulating it are also affected by a workplace's mission.

Some workplaces are organized primarily to make money by designing, making, or selling a product or providing some service. Any expressive aspects of the product or service (the Volkswagen Bug's evocation of nostalgia) are directed towards something other than thought, deliberation, or debate among consumers of the product or service. A few examples would be food, clothing, or car retailers, manufacturers, pharmaceutical companies, construction companies, and accounting firms.

Other workplaces have a communicative or expressive mission. They are organized around the purpose of communicating an idea or message, sparking conversation, argument, or thought among patrons, or providing a place for patrons to engage in conversation. A “communicative workplace,” in other words, produces or supports the production of expression that is itself ordinarily protected by the First Amendment. Museums and art galleries,<sup>2</sup> newspapers<sup>3</sup> and magazines,<sup>4</sup> and concert halls<sup>5</sup> would all be communicative workplaces. In Part I, I argue that some expression in communicative workplaces may merit different treatment under the First Amendment because it contributes to public discourse.

All workplaces do some business through expression that does not implicate First Amendment values, and communicative workplaces are no exception. These non-discursive aspects of all workplaces explain why no employer—not a museum, not a newspaper<sup>6</sup>—could claim First Amendment protection against an employee’s breach of contract suit. These aspects of all businesses also explain why a museum guard suing for harassment over pornography in the employees’ lunchroom should be treated differently from a guard who sues over the same pictures displayed in the museum gallery as part of an exhibit.

Generally, harassment claims arising out of direct communications between supervisors and subordinates pose little if any First Amendment problem, whether they arise in communicative or ordinary workplaces. The same is true for harassment claims based on direct interactions among coworkers. Environmental harassment claims or claims based on harassment by a business’s customers may engender greater First Amendment worries when the customers are engaging in or responding to First Amendment activities within the realm of public discourse. The First Amendment would (and should) prohibit a museum employee’s hostile work environment suit based on patrons’ tasteless comments about an exhibit. Within the realm of public discourse, the First Amendment requires government regulations

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2. See, e.g., *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 197-99 (E.D. N.Y. 1999).

3. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

4. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

5. See *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90 (1989) (subjecting volume limits on a concert to First Amendment scrutiny).

6. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991) (holding that the First Amendment did not exempt a newspaper from liability under generally applicable laws for breach of contract).

on expression to be neutral about substantive issues, including race and sex equality. Within ordinary workplaces, however, the law should strike a different balance between expression and equality. Most employee speech within ordinary workplaces has only a marginal relationship to public discourse. The government's interest in ensuring equal opportunity in ordinary workplaces generally outweighs employees' interests in engaging in unfettered debate at work.

My contextual approach is open to the criticism that allowing First Amendment protection to hinge on something as amorphous as "contextual meaning" could discourage a good deal of speech because people fear coming too close to the line between protected and punishable speech. Part II will refute the "chill" argument. The First Amendment is just not about bright-line rules. Bright-line rules play an important role only with regard to a tiny amount of expression and their importance is overstated even there. Courts routinely deploy "reasonable person" standards and analyze the meaning of statements in context in defamation and other dignitary tort cases—even when unquestionably political, nationally published speech is at issue. Hostile environment's standards closely resemble those of other dignitary torts. Moreover, the chill argument assumes that all employers have the same incentives to avoid hostile work environment liability by stifling potentially offensive speech by employees and customers. This assumption is overly simplistic. Organizations that participate in, promote, or support public discourse have few incentives to adopt policies unfriendly to speech.

#### I. HOW DOES WORKPLACE CONTEXT AFFECT THE CHARACTER OF "SPEECH" UNDER THE FIRST AMENDMENT?

"Speech" in the First Amendment context is a term of art that has both a broader and narrower meaning than when used conversationally.<sup>7</sup> It is broader because it encompasses more than verbal conduct. Pictures and symbols, not just words, are protected,<sup>8</sup> as well as some expressive conduct such as the wearing of an armband and flag burning.<sup>9</sup>

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7. Frederick Schauer, *The Speech-ing of Sexual Harassment*, in MacKinnon and Siegel, eds., *Directions in Sexual Harassment Law* at 547-48 (2003) (forthcoming) (manuscript on file with author).

8. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection

“Speech” also has a narrower meaning than it does in ordinary usage.<sup>10</sup> Words used to contract fall within the category of “verbal actions” known as “performatives.” Performatives are utterances or writings that do not describe, report, or assert something and are not falsifiable. The words are part of some *action* that itself would not be described as “saying” something.<sup>11</sup> Speech is a performative when *to say* something is *to do* something beyond the act of uttering the words themselves.<sup>12</sup> Other such examples of verbal actions include the vow to marry and a will that bequeaths an estate. The First Amendment protects none of these verbal “actions.”

The range of utterances, writings, and depictions that the government may freely regulate is not limited to performatives. We often perceive regulable utterances, writings, and depictions as *action* rather than as *speech*, much in the same way that we see performatives as doing, not merely saying, something. Incitement, graffiti on private property, and product warning and content labels, are all examples of this sort of non-performative but regulable utterance.<sup>13</sup> Indeed, First Amendment speech could be characterized as the *exception* to the more general rule that “linguistic behavior—speech in the ordinary language sense—is subject to control on the same standards as is any other behavior.”<sup>14</sup> At the very least, “for a vast range of verbal, linguistic, or pictorial conduct” the First Amendment is just not “part of the picture.”<sup>15</sup>

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does not end at the spoken or written word.”); *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff’d 475 U.S. 1001 (1986) (recognizing generally that nonverbal expression, such as pornographic pictures, is protected by the First Amendment).

9. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 505 (1969) (stating that wearing an armband is speech); *Texas v. Johnson*, 491 U.S. 397 (1989) (stating that flag burning is speech).

10. Kent Greenawalt, *Speech, Crime, and the Uses of Language* 58 (Oxford U. Press, 1989) (stating that “situation-altering” utterances like agreements, promises, orders, and manipulative threats “are outside the scope of a principle of free speech,” because they “are ways of doing things, not of asserting things, and they are generally subject to regulation on the same bases as most noncommunicative behavior”); Schauer, *Speech-ing* at 2 (cited in note 7) (explaining “the domain of application of the First Amendment . . . is not coextensive with the forms of behavior that would count as ‘speech’ in ordinary non-technical English”).

11. J. L. Austin, *How to Do Things with Words* 6, 12-13 (Harvard U. Press, 1962).

12. *Id.* at 12-13.

13. See Schauer, *Speech-ing* at 4 (cited in note 7).

14. *Id.* at 5 (footnote omitted).

15. *Id.* at 605; see also Robert Post, *Sexual Harassment and the First Amendment*, in MacKinnon and Siegel, eds., *Directions in Sexual Harassment Law* 3 (2002) (forthcoming) (noting that “the First Amendment does not even attempt to protect all of the ‘communication’ that occurs through the explicit use of words and language”).

## A. WORK'S INEVITABLE ECONOMIC SPHERE

All employment relations involve some expression that does not and should not receive First Amendment scrutiny. Employment contracts, disclosures of safety conditions, and union-management interactions are all highly regulated. But regulations of these utterances and writings at work do not strike us as regulations of "speech," because, in each case, the speech being regulated is instrumental to accomplishing some end that is not itself protected by the First Amendment.

When we speak of workplace harassment, we easily forget that the cause of action arises from more general employment discrimination statutes that regulate an economic relationship between employers and employees. Title VII, the ADA, the ADEA, and parallel state laws prohibit employers from making employment decisions based on race, sex, national origin, color, religion, disability, and age. They also prohibit employers from using these characteristics to impose discriminatory terms and conditions of employment or to segregate workplaces. These laws require, in other words, that an employer ignore characteristics that he personally might find highly salient, so long as the employee is the "best qualified" worker.

All workplaces share an important characteristic. All are instrumental organizations; that is, they are created and operated to achieve some goal. Of course, different workplaces are constituted to achieve different goals. This point is obvious: workers at the St. Paul Ford Explorer plant are organized to make SUVs, and they combine their energies to make these behemoths. Other organizations are defined by an ideological mission or message. The organization's ideological mission or message, however, does not change the fact that it is also an instrumental organization.<sup>16</sup> The League of Women Voters, for example, dedicates itself to promoting voting, regardless of a voter's affiliation. The League avoids partisan activities, and it encourages its members to provide fora for debates among candidates of all parties. The National Abortion Rights Action League is quite similar. It hires people to solicit funds to support abortion rights, and it pays lobbyists to voice particular positions about certain state and federal initiatives. NARAL would certainly fire a canvasser who toed a pro-life line when soliciting funds or a lobbyist

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16. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 U.C.L.A. L. Rev. 1713, 1768-70 (1987) (explaining how speech in workplaces is organized toward a specific end).

who encouraged members of Congress to support legislation that limited abortions.

Work's instrumental nature pervades interactions among coworkers, supervisors, and subordinates, whether a workplace's mission is like NARAL's or is oriented toward producing a good or service outside of the First Amendment's ambit. The inevitable instrumental aspects of work, along with the responsibility to get work done, color how we interpret events in the workplace. Were we to come across a commode in the hallway of our workplace, we would suppose a plumber had forgotten to finish fixing the restroom. In the gallery of a museum, we would see the same commode as "art."<sup>17</sup> If an employer calls a meeting to speculate about the dire effects of proposed unionization, the employer's remarks seem more threatening<sup>18</sup> than if the employer speculates on *The News Hour*.

The Court has often countenanced federal regulation of both employer and employee speech in the labor context and restrictions on expression in government workplaces. These decisions demonstrate two points. First, at least some expression in all workplaces lies beyond the First Amendment, because the expression accomplishes some end that does not implicate First Amendment values. Second, workplace expression has an economic cost, and the government may legitimately regulate expression in the workplace to prevent economic disruption. Both of these points affect whether the First Amendment permits government to impose liability on employers for hostile work environment harassment.

Discriminatory workplace harassment harms its targets economically. Harassment increases the cost of work by subjecting "members of one [group] . . . to disadvantageous terms or conditions of employment,"<sup>19</sup> thus making "it more difficult" for members of that group "to do the job."<sup>20</sup> In this respect, harass-

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17. See Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1253-54 (1995). Post argues that the Duchamp urinal is transformed from bathroom appliance to art entitled "The Fountain," "because artists and spectators share conventions that establish the medium of art exhibitions, and these conventions can by themselves generate forms of human interaction that are acknowledged as 'ideas' within the jurisprudence of the First Amendment." This is true for museum workers, too. The commode in the back hallway is an accident or obstruction. The commode in the gallery is art. Though we can argue whether it is *really* "art," that fact itself perhaps proves it is.

18. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-19 (1969) (upholding the NLRB's restrictions on an employer's comments about the potential harms of unionization as consistent with the First Amendment).

19. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

20. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).



ment law's restrictions on workplace expression resemble other regulations of workplace expression that are designed to prevent or limit economic disruption.<sup>21</sup> That the cost of harassment is caused by expression may matter in some cases. By itself, however, the fact that expression causes the economic harm does not imply First Amendment protection for that expression any more than does a scam artist's fraudulent pitch.

#### B. WHY ISN'T QUID PRO QUO HARASSMENT PROTECTED SPEECH?

Title VII and other antidiscrimination laws generally punish two types of workplace harassment. The first is *quid pro quo* harassment, in which a supervisor (or someone with similar powers) explicitly or implicitly threatens to fire an employee or withhold some job benefit if the employee does not consent to sexual conduct, and the supervisor carries out that threat (either by withholding some job benefit or by exacting acquiescence to sexual demands).<sup>22</sup>

The second is hostile work environment harassment. Hostile work environment harassment does not involve threats carried out, implicit or otherwise. It occurs when—through conduct or speech—a supervisor, coworker, or a third party (such as a client of the employer) harasses another because of a prohibited characteristic.<sup>23</sup> The harassment has to be severe enough to “alter the terms or conditions” of the victim's work environment.<sup>24</sup> A plaintiff can, in some cases, claim that she is subjected to a hostile work environment even when she is not insulted or demeaned directly, if the work environment is permeated with insulting or demeaning gender- or race-based conduct or expression.

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21. Of course it is wrong to say that the government can, consistent with the First Amendment, pass a law that requires employers to restrict their employees' expression just because the government, acting as employer, may permissibly fire an employee for expressive conduct that seriously disrupts a governmental workplace. My point here is much narrower: The Court's reasons for permitting restrictions on government employees' speech partially explain why a cause of action for hostile work environment harassment generally poses few First Amendment problems.

22. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 751 (1998) (“Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.”).

23. *Id.*

24. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (holding that comments, conduct, or requests for sexual favors must be severe or pervasive enough to alter the terms and conditions of work environment both in the plaintiff's eyes and in the eyes of a reasonable person).

Employers are not automatically liable for all forms of harassment of their employees. When supervisors harass their subordinates, Title VII will not hold employers vicariously liable for hostile work environment harassment if the employer provided adequate measures to prevent and remedy harassment and the victim failed to take advantage of them.<sup>25</sup> Harassment of employees by coworkers or other third parties, such as an employer's customers, is treated differently. In those cases, Title VII holds employers liable for such harassment if the employer knew or should have known about the harassment but failed to prevent or correct it.<sup>26</sup> This standard comes from the common law principle that a master may be liable for negligently failing to protect servants from torts.<sup>27</sup> "Environmental harassment" cases most often fall into the second category because they usually involve claims that coworkers or third parties have created the hostile work environment.

No one who has criticized sexual harassment law on free speech grounds has ever claimed that the First Amendment prohibits the government from barring quid pro quo harassment. This fact is interesting because quid pro quo harassment is, as a formal matter, perpetrated by "speech"—verbal or written threats to withhold job benefits. Critics of the hostile work environment cause of action quickly concede that threats are not "speech" under the First Amendment<sup>28</sup> because they are "performatives."<sup>29</sup>

This concession significantly complicates, and ultimately undermines, the First Amendment attack on hostile work environment liability. The difference between regulable performatives and protected "speech" is neither sharp nor logically derived. The difference is a function of social context.<sup>30</sup> The same statement can be a performative in one context but "speech" in another. If I say, "I'd really like a steak," to my companion while we are marooned on a desert island, I am wistfully describing a desire unlikely to be fulfilled. If I say it to a waiter, I make a con-

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25. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

26. *Id.* at 758-59.

27. See Restatement (2d) of Agency § 213(d).

28. See, e.g., Eugene Volokh, *Comment, Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. Rev. 1791, 1800 (1992) (stating that "quid pro quo harassment . . . would seemingly be as unprotected by the First Amendment as any other form of threat or extortion").

29. Schauer, *Speech-ing* at 663 (cited in note 7).

30. Post, *Sexual Harassment and the First Amendment* at 604 (cited in note 15) (arguing that constitutional treatment of superficially identical communication depends on "the social matrix within which meaning is embedded").

tract by accepting the restaurant's implicit offer to sell a particular cut of meat, as described on the menu and at the listed price. At a political rally, I might refer to the state of the American economy (remember Mondale's "Where's the beef"?).

These are not unique examples. The Ninth Circuit closely divided over whether "Wanted" and "Guilty" posters featuring the names, pictures, and whereabouts of several abortion providers were actual, unlawful threats or political advocacy.<sup>31</sup> Cases like this one are difficult, because often nothing about the utterance itself—not the syntax, the punctuation, or the word use—distinguishes protected, political speech from verbal actions and regulable utterances.<sup>32</sup> The distinction between threats and political bluster depends on conventions that are often only implicitly understood—the cultural understandings of the people who are communicating, where the exchange takes place, the relationship between the parties, and the intended purpose of the words.<sup>33</sup> Think of a protester at a peace rally who waves the banner: "George W. Bush: WANTED for Crimes against the People of Iraq." We know instinctively that she has made a protected, political statement about the war in Iraq, not put a bounty on the President's head. In form, this poster's message mimics the "Guilty" posters that the Ninth Circuit held to be true threats. Both posters identify a particular person and that

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31. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc) (splitting 6-5 over whether a reasonable person would perceive "Guilty" posters as making a true threat), vacating *Planned Parenthood v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001) (2-1 decision) (holding that the posters were protected political advocacy, not punishable threats).

32. Austin, *How to Do Things With Words* at 11, 53-66 (cited in note 11) (explaining how the distinction between performative and constative utterances cannot be satisfactorily reduced to grammatical and syntactical differences); see also *RAV v. City of St. Paul*, 505 U.S. 377, 385 (1992) (explaining that fighting words are not necessarily devoid of expressive content; "sometimes they are quite expressive indeed"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573-74 (1942) (finding that arguably political statements—saying the marshal was "a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists"—nonetheless consisted of unprotected fighting words).

33. Austin, *How to Do Things With Words* at 26-32 (cited in note 11) (describing performatives as dependent on "an accepted conventional procedure having a certain conventional effect, the procedure to include the uttering of certain words by certain persons in certain circumstances.") See also, e.g., *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir. 2000) (finding defendant's placement of a Ryder truck in the driveway of an abortion clinic was a threat because after the Oklahoma City bombing, a reasonable person would perceive the truck as expressing the intent to harm workers in the clinic); *Rice v. Paladin Enters.*, 128 F.3d 233, 249 (4th Cir. 1997) (denying summary judgment based on a First Amendment defense by the publisher of a murder for hire book used by a hired killer because the book gave detailed, precise instructions, the publisher stipulated that it intended it to help criminals commit crimes, and the book contained "not even a hint" that the author was engaging in "abstract advocacy").

person's "crime." The president, however, is often the subject of impassioned hyperbole—Robert Watts was neither the first nor the last to wish a president dead.<sup>34</sup> Identifying the president does not really single him out, but identifying an otherwise anonymous abortion doctor does. Remove the particular doctors' names from the "Guilty" posters, so that they read, "Abortion Doctors: WANTED for MURDER!", and they become protected speech.<sup>35</sup> Performatives, in short, are dependent on cultural norms and contextual clues for their meaning.

Courts sift through many contextual factors to determine whether government may regulate some statement or expression as a threat or solicitation, or whether it is protected speech. These factors include whether expression is targeted to a specific person or to a group, whether it is communicated in public rather than in private, whether the speaker has authority to direct the actions of the listeners, and whether the expression urges some specific purpose or more general goals.<sup>36</sup>

Verbal interactions between supervisors and subordinates and among coworkers often share many of the characteristics of unprotected speech. Expression among workers is often targeted to a specific person or to small, identifiable groups of people; interactions take place in a quasi-private space not generally open to the public; and often a speaker at work has authority to direct the actions of those addressed, or at least to affect another's ability to perform his job. A supervisor or coworker's threatening remarks are more likely to be taken seriously rather than lightly dismissed as "popping off."

Two propositions follow from this observation. First, when people engage in expression at work they generally expect their discussions with their bosses and coworkers to have an "instru-

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34. See *Watts v. United States*, 394 U.S. 705, 705-06 (1969) (per curiam) (holding as a matter of law that defendant's statement, "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." was political hyperbole); *Rankin v. McPherson*, 483 U.S. 378 (1987) (a clerk in the constable's office wished that the next person who tried to shoot President Reagan would "get him"); see also *Planned Parenthood*, 290 F.3d at 1072 (observing that the Supreme Court in *Watts v. United States* had "considered context and determined that Watts's statement was political hyperbole instead of a true threat").

35. See *Planned Parenthood*, 290 F.3d at 1078-80 (relying on the fact that "Guilty" posters and the Nuremberg Files web page identified particular abortion doctors in finding that they were true threats).

36. See Greenawalt, *Speech, Crime, and the Uses of Language* at 228-29, 232-33, 243-45, 249-52 (cited in note 10); cf. Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 Va. L. Rev. 263, 266 (1978) (noting that the truth or falsity of an allegedly defamatory statement "must turn on the use of language" and on whether the speaker "violates society's linguistic conventions").

mental” overlay—that is, they expect their conversations at work to be about work or, at least indirectly, to affect their work. Second, most discussions and interactions within the workplace can, in fact, affect a worker’s productivity and make it harder for her to do her job.

If these propositions are true, then the reasons for not insulating quid pro quo harassment from liability imply that hostile work environment harassment should not be protected either, with one caveat. It is possible that expression claimed to create a hostile work environment might contribute to public discourse in a way that quid pro quo demands do not. If that is true in a particular case, that may be a reason to protect the expression under the First Amendment.

The Court has taken these two propositions about workplace speech for granted when it has reviewed restrictions on government employees’ expression<sup>37</sup> and restrictions on employer speech in the labor relations context.<sup>38</sup> These assumptions have thus shaped the boundaries of appropriate employee expression at work and permissible disciplinary responses by employers. In *NLRB v. Gissel Packing Company*,<sup>39</sup> for example, the Court relied on these factors to create a very broad definition of unlawful threats of reprisal against employees seeking to unionize. *Gissel* held that an employer’s statements about the potentially damaging effects of unionization were unlawful threats unless they were based on “objective fact[s]” about the “demonstrably probable consequences” of unionization or unless they “convey[ed] a management decision already arrived at to close the plant in case of unionization.”<sup>40</sup> In other words, an employer must be able to prove its predictions about the effects of unionization before it can worry aloud to its employees. Undocumented, idle predictions are threats.

The Court defined threats broadly for two reasons. First, the “context of [the] labor relations setting”<sup>41</sup> and the employees’ economic dependence made it more likely that workers would “pick up intended implications”—that is, veiled threats—

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37. See, e.g., *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979) (holding that the rights of employees to comment on matters of public concern “must be balanced against the interests of the state as employer, in promoting the efficiency of public services it performs through its employees” and citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

38. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969).

39. 395 U.S. 575 (1969).

40. *Id.* at 618.

41. *Id.* at 617.

from an employer's comments. A "more disinterested ear"<sup>42</sup> might dismiss similar comments. Second, the Court noted that most workers would not expect to engage in free-spirited debate about general political issues and would not take the employer's comments about unionization as such. "[W]hat is . . . at stake is the establishment of a nonpermanent, limited relationship [among] the employer, his economically dependent employee and his union agent"—that is, the formation of a relationship among a particular set of workers, a particular union, and a particular company, in which the workers have a direct economic stake. These facts made it unlikely that a worker could hear the employer's comments objectively. Company executives would be freer to talk in hearings before Congress because an "independent voter" could "listen more objectively."<sup>43</sup> The same would be true if company executives were being interviewed by the *New York Times*. A newspaper reader expects to encounter spirited debates on matters of public interest, and is free to believe or question a newspaper's content. The Court, in other words, recognizes that expression in the workplace often has a different character, or even a different meaning, than expression in the public square. Workers often orient themselves differently to workplace speech and to speakers in the workplace than they do to expression they encounter on television, on street corners, and in the newspaper.

Let us now examine in more detail expression as it occurs in various workplace contexts.

### C. EXPRESSION IN "ORDINARY" WORKPLACES

Workplaces and public places have varying relationships to public discourse. The public library and the Chicago Art Institute are directly connected to public discourse, while Macy's is not. Though every public accommodation or forum is indeed someone's workplace, not all workplaces are public accommodations, and not all public accommodations relate to public discourse. The traditional ones—inns, trains, buses, and the like—do not. Let's begin our examination of workplace expression with some run-of-the-mill workplaces—a manufacturing plant, a company designed to provide some service like construction or accounting, or a company like 3M, Microsoft, or Genentech that researches, develops, or creates new products. Though fairly di-

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42. *Id.*

43. *Id.* at 617-18.

verse, these workplaces are similar in two respects. First, the goal of the company is to develop, produce, or sell some thing or service outside of the scope of the First Amendment. Second, the workplace premises are not public accommodations or otherwise open to members of the public.

1. *Robinson v. Jacksonville Shipyards* and the issue of “protected” but harassing speech

The plaintiff in *Robinson v. Jacksonville Shipyards*<sup>44</sup> was one of a few skilled women craftworkers employed at a shipyard.<sup>45</sup> She complained that the girly calendars, pornographic centerfolds and sexually graphic cartoons and graffiti in most areas of the shipyard, t-shirts her coworkers sometimes wore, and graphically sexual remarks her coworkers made<sup>46</sup> created a sexually hostile work environment. The district court agreed that the pictures, comments, and graffiti changed the terms, conditions, and privileges of her employment because of her sex. They violated Title VII because they were “sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment,”<sup>47</sup> both in her eyes and in the eyes of a reasonable person.<sup>48</sup>

*Robinson* raised interesting First Amendment issues for two reasons. First, most of the pictures, cartoons, and graffiti were not posted with the purpose of insulting her directly.<sup>49</sup> While a few scribbled remarks referred to her,<sup>50</sup> many of the pictures had been posted before she began working at the shipyard. She objected to them because she found them offensive and because they made it harder for her to do her job. Second, her Title VII claim rested on utterances, writings, and pictures that the First Amendment ordinarily would protect if they had been expressed outside of the workplace.<sup>51</sup> Jacksonville Shipyards defended it-

44. 760 F. Supp. 1486 (M.D. Fla. 1991).

45. *Id.* at 1491.

46. *Id.* at 1496-99.

47. *Id.* at 1523.

48. *Id.* at 1524-25. See also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

49. *Robinson*, 760 F. Supp. at 1522-23. Some of the graffiti was directed at her, but most of the pictures were not.

50. *Id.* at 1498-99 (detailing references to “boola-boola” jokes about her and sexual graffiti written above the hook upon which she hung her jacket).

51. *Sable Communications of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1990) (“[S]exual expression which is indecent but not obscene is protected by the First Amendment”); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (same); *Cohen v. California*, 403 U.S. 15 (1971) (holding that wearing a “Fuck the Draft” jacket was protected expression).

self on this ground, arguing that the postings were protected speech.

The *Robinson* court rejected the free speech defense. The court reasoned that behavior that is tolerable or even appropriate in some contexts can be abusive in the workplace<sup>52</sup> and that this case represented one such instance. The defendants, however, also argued that the pictures, despite their offensiveness, were protected by the First Amendment. Though the case did not state as much, the defendants appeared to rely on the First Amendment principle that generally prohibits the government from regulating expression because it causes offense.<sup>53</sup> To hold the shipyard liable for the speech's offense would be a classic content or viewpoint restriction. The court, however, dismissed this proposition, holding that "the pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."<sup>54</sup> The court quoted *Roberts v. United States Jaycees*:<sup>55</sup> "Potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."<sup>56</sup>

The court's assertion that the pictures amounted to discriminatory conduct, however, simply assumed that conclusion. It is true that if these pictures and graffiti appeared elsewhere, they would have been protected. The court's assertion does not explain why they could be regulated in the workplace context. The citation to *Roberts* compounded rather than resolved the problem. In *Robinson* the very offensiveness of the pictures is what caused the discrimination; the communicative impact of the speech and the "special harm" it causes are identical. The *Robinson* court therefore cannot say that the harm—the discrimination—from the pictures is distinct from their offensiveness. Or can it?

It is too quick to say that the First Amendment does not allow government to restrict speech because it causes offense. The scope of permissible restrictions varies greatly depending on where expression occurs. Had Matt Fraser exhorted college stu-

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52. *Robinson*, 760 F. Supp. at 1525-26 ("[T]he whole point of the sexual harassment claim is that behavior that may be permissible in some settings . . . can be abusive in the workplace"). (ellipses in original) (citations omitted).

53. *Cohen*, 403 U.S. at 24-25.

54. *Robinson*, 760 F. Supp. at 1535.

55. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

56. *Robinson*, 760 F. Supp. at 1535 (quoting *Roberts*, 468 U.S. at 628).



dents, not high school students, to vote for a student council candidate because he “doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds,” Fraser’s speech would have been protected.<sup>57</sup> Had Frank Snepp written about his experiences as a Department of Labor employee, rather than as a CIA agent, the Court probably would not have enforced his pre-clearance agreement.<sup>58</sup>

It is therefore not surprising that *Playboy* centerfolds might represent protected expression in one place but support a cause of action for harassment in another. The First Amendment would surely protect centerfolds displayed in a museum gallery. But if someone in the gallery of a *courtroom* held up a centerfold for all to see, a judge could hold that person in contempt because that expression could disrupt courtroom proceedings.

Because context drives the scope of permissible regulations of expression, the function of the workplace must also affect the scope of First Amendment protection. The CIA has greater leeway to limit its employees’ speech to protect national security than does the Department of Labor because secrecy is the CIA’s essence but not the Labor Department’s. Similarly, the First Amendment would bar a museum guard’s suit if she complained that an exhibition of female nudes created a hostile work environment, but not a shipyard worker’s suit over similar postings on the walls of her workplace. Exhibitions are the museum’s mission but not the shipyard’s.

## 2. Dignitary harms in public discourse

Legal actions for offense or disruption caused by utterances or writings are commonplace. Defamation, libel, slander, intentional infliction of emotional distress, and false-light all provide recovery for harm caused by speech or writings claimed to be offensive.

When faced with conflicts between suits for dignitary torts and the First Amendment, the Court has not always favored the First Amendment. The Court has been primarily interested in ensuring “uninhibited, robust, and wide-open” debate<sup>59</sup> in particular arenas of life. In *New York Times v. Sullivan*, the Court

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57. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-86 (1986) (holding that a high school could punish a student for lewd speech because a “high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students”).

58. See *Snepp v. United States*, 444 U.S. 507, 509 n.3, 510 (1980) (per curiam).

59. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

held that public figures and officials who sue a newspaper for libel must prove that the alleged falsehood was published with knowledge that the item was false or with reckless disregard for the truth.<sup>60</sup> The Court created this “breathing space”<sup>61</sup> so that the press will not self-censor to avoid liability.<sup>62</sup> *Hustler Magazine v. Falwell*<sup>63</sup> extended the “actual malice” rule to intentional infliction of emotional distress claims by public figures. Presumably, other tort actions by public figures objecting to comments about them would also face the “actual malice” standard.<sup>64</sup>

The court cases that have created and sustained the “breathing room” provided by the *New York Times*’s actual malice standard have generally been cases in which a *public* person has objected to his or her treatment in the *press*. In *New York Times*, the plaintiff was an Alabama sheriff who had been mentioned in an advertisement in the *Times*. This allegedly libeled official had been an outspoken opponent of integration and had trumpeted his segregationist views. In *Hustler*, Jerry Falwell, the founder and leader of the “Moral Majority”<sup>65</sup> and an active political commentator,<sup>66</sup> complained that a Campari ad parody in *Hustler Magazine*, which portrayed him as having lost his virginity to his drunken mother in the family’s outhouse, was intentional infliction of emotional distress.

*New York Times* does not mean that public officials and figures are not hurt by insult and invective.<sup>67</sup> Rather, *New York Times* bars legal actions for their injuries because the Constitution elevates the importance of debate about public matters and public figures over any state interest in protecting public figures’ dignity.<sup>68</sup> The similarities between *Hustler* and *New York*

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60. Id. at 279-80.

61. Id. at 272.

62. Id. at 279.

63. 485 U.S. 46, 56 (1988).

64. But see *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572-75 (1977) (finding that the tort for recovery of economic advantage was distinct from dignitary torts for First Amendment purposes).

65. The Moral Majority lobbied for school prayer and instruction on creationism in public schools, and fought the Equal Rights Amendment, abortion rights, and rights for gays and lesbians. Columbia Encyclopedia 6th Ed.2001, at <<http://www.bartleby.com/65/c-/E-MoralMajo.html>> (last visited April 25, 2003).

66. See *Falwell*, 485 U.S. at 47 (observing that Falwell was “active as a commentator on politics” in the 1980s).

67. See Frederick Schauer, *Uncoupling Free Speech*, 92 Colum. L. Rev. 1321, 1321 (1992) (“[R]obust free speech systems protect speech not because it is harmless, but despite the harm it may cause.”).

68. See id. at 1322 (“[E]xisting understandings of the First Amendment presuppose

*Times*—both involved press publications and criticisms of well-known people active in state and national politics—are no coincidence. These facts, as well as the fact that the offending ad parody in *Hustler* was well within the tradition of political satire, were crucial to the Court's application of the actual malice standard to the plaintiffs' claims of libel, defamation, and intentional infliction of emotional distress.<sup>69</sup>

In *Hustler*, the Court recognized that Falwell was bound to attract criticism, some of it intemperate and possibly juvenile and scatological, because he had put himself out on the national political stage as a moral leader and had publicly advocated controversial ideas. “[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures.”<sup>70</sup> Public figures become subjects of discourse as well as participants by choosing to enter the fray. The attention they receive will not always be positive, and some of it might be quite vicious. Intemperate, hyperbolic, colorful criticism grabs listeners' attention and telegraphs the speaker's emotions.<sup>71</sup> “The distortion of language to emphasize a point”—presenting Jerry Falwell as a white-trash hypocrite who screws his mother—“is present in varying degrees in virtually all human dialogue.”<sup>72</sup> First Amendment “protection cannot” therefore “turn on whether a speaker's metaphor fits the plain and natural meaning of the words used.”<sup>73</sup> For these reasons, speech about public figures receives extra protection from tort suits.<sup>74</sup>

The Court's immunization of most public criticisms of public figures from tort actions does not deny the outrage, trauma, and hurt Falwell and other plaintiffs suffer.<sup>75</sup> Indeed, the *Hustler*

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that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection”).

69. The court explained in *Falwell*:

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'

485 U.S. at 51 (citation omitted).

70. *Id.* (citing *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944) (Frankfurter, J.)).

71. Schauer, 64 Va. L. Rev. at 284 (cited in note 36).

72. *Id.* at 285.

73. *Id.*

74. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337-39 (1974) (describing how public figures and officials, unlike private individuals, have the ability to “secur[e] access to channels of communication sufficient to rebut falsehoods concerning” them and have “voluntarily placed” themselves “in the public spotlight”).

75. Cf. Schauer, 92 Colum. L. Rev. at 1323 (cited in note 67) (“[T]he harms ensuing

ad-parody probably did outrage and traumatize Falwell. But neither does the law allow Falwell recovery for his injuries because it might chill debate that is more important to the community than permitting recovery for that trauma. Whether Jerry Falwell was a hypocrite or a sincerely moral person affected people's opinions about his and the Moral Majority's involvement in national politics. It is impossible to talk about politics without talking about specific public and political figures, their character, and their trustworthiness.

### 3. Offense outside of public discourse and workplace harassment

The reasons behind Falwell's and Sullivan's defeats do not apply to most tort actions based on expression. In most cases, a private person (as opposed to a public official or public figure) may sue others who have negligently defamed her.<sup>76</sup> Employers may be sued for defamation when they give terrible references about former employees.<sup>77</sup> As a result, many employers now decline to give substantive references for former employees.<sup>78</sup> While this trend is unfortunate, it is hardly a First Amendment issue, at least as currently conceived by First Amendment doctrine.<sup>79</sup>

Nor do the reasons behind Falwell's and Sullivan's defeats apply more generally to the workplace. The First Amendment restricts public officials and public figures from recovering for defamation or intentional infliction of emotional distress because allowing them to recover would diminish public discourse, and we believe public discourse is more important than complete tort recovery.<sup>80</sup> The decision to ignore injuries caused by individual torts to create "breathing room" for more valuable speech

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from factually erroneous statements about identified individuals are hard to deny").

76. See *Gertz*, 418 U.S. at 347 ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability" for defamation); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 763 (1985) (holding that states may impose liability for negligence if defamatory statement was about a private person and was not about a matter of public concern).

77. See, e.g., *Jensen v. Hewlett-Packard Co.*, 14 Cal. App. 4th 958, 965 (Cal. App. 1993); *Marshall v. Brown*, 141 Cal. App. 3d 408, 412-13 (Cal. App. 1983); Cal. Lab. Code, § 1050 (misdemeanor to misrepresent the facts regarding a former employee to prevent the employee's further employment), § 1054 (treble damages for misrepresenting employment facts).

78. See Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 Yale L. & Policy Rev. 45, 45-48 (1995).

79. *Dun & Bradstreet*, 472 U.S. at 763.

80. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

would sit uncomfortably in the highly regulated, instrumental domain of most ordinary workplaces.

Unlike defamation or emotional distress claims brought by public figures, liability for workplace harassment does not threaten public discourse. Public figures are the currency through which we discuss public affairs; private employees are not. The hostile work environment cause of action does not raise the classic First Amendment worry—that government will suppress speech critical of it or with which a majority disagrees<sup>81</sup> or impinge on public discourse generally.<sup>82</sup> The purpose is to allow women and minorities to go as far and make as much money as white men, and to equalize the yield from working by equalizing the cost of working for all, regardless of their membership in a protected class. Though expression may create liability, that liability rests on economic concerns, not concerns grounded in the social mores of a particular community or political faction.

This economic harm arises in part from injury to the plaintiff's personality, much as defamation, libel, slander, and intentional infliction of emotional distress do.<sup>83</sup> The *Robinson* court recognized this kind of insult to personality:

When the pre-existing state of the work environment receives weight in evaluating its hostility to women, only those women who are willing to and can accept the level of abuse inherent in a given workplace—a place that may have historically been all male or historically excluded women intentionally—will apply to and continue to work there. It is absurd to believe that Title VII opened the doors of such places in form and closed them in substance. A pre-existing atmosphere that deters women from entering or continuing in a profession or job is no less destructive to and offensive to workplace equality than a sign declaring “Men Only.”<sup>84</sup>

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81. New York Times' “actual malice” standard for defamation of public officials in large part grows out of the concern that the government will attempt to ban seditious libel.

82. See *Hustler*, 485 U.S. at 55-56 (describing the importance of insulting political cartoons about public officials and figures to public discourse and expressing concern that juries might impose liability for speech that ran counter to community mores).

83. See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 509-511 (1997) (describing a hostile work environment as “fundamentally an injury to dignity,” and comparing the hostile work environment cause of action to dignitary torts). But see Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 S. Ct. Rev. 1, 9-11 (arguing that *Harris v. Forklift Systems* refused to narrow hostile work environment to fit the boundaries of intentional infliction of emotional distress).

84. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991). *Robinson's* analogy to “Men Only” signs implicitly categorizes the pornography at

Even if the explicit or implicit message of posters, jokes, or graffiti is not “men only,” insults, derogatory jokes and pornography undermine the conditions necessary for equal employment opportunity. One can view posters, jokes, and graffiti as creating a particular workplace community and defining community members as men who fuck women, rather than work with (or, heaven forbid, for) them. Disrupting discourse that defines the community or sub-community, or at least declaring it illicit from the employer’s point of view, allows the workplace community to be redefined to include women. In that sense, the hostile work environment cause of action serves as the inverse of the First Amendment. It is a rule that forces men to suspend the norms of the particular community they would like to constitute to permit competing community visions to take hold.

4. Workplaces must enforce civility norms to be productive, while public discourse requires their suspension

Civility among workers is necessary to maintain conditions of equality. Expression that denegrates members of a protected class may thwart equal opportunity even if it does not explicitly communicate an exclusionary message. Antidiscrimination laws and the hostile work environment cause of action enforce a kind of civility norm within the workplace—the norm of equal opportunity regardless of race, sex, national origin, color, and disability. In particular, the hostile work environment cause of action regulates workplace interactions to maintain conditions conducive to equal opportunity.

*O’Shea v. Yellow Technology Services, Inc.*<sup>85</sup> illustrates the importance of civility to equal opportunity. Maurine O’Shea alleged that a coworker’s derogatory comments about women—both about her and about women generally—undermined her productivity.<sup>86</sup> O’Shea “overheard [her coworker] making fun of his wife” and other women, saying that “women talk too much and are less intelligent than men,” and that “Playboy is superior to a wife because . . . with Playboy you get variety.”<sup>87</sup> He also described a dream he had about a naked woman jumping on a trampoline, describing this woman’s breasts in detail.<sup>88</sup> Over-

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the shipyard as performatives. The court’s analogy assumes women would read the porn as the equivalent of being told to work elsewhere.

85. 185 F.3d 1093 (10th Cir. 1999).

86. *Id.* at 1098-1100.

87. *Id.* at 1098.

88. *Id.*

heard remarks such as these might be characterized as “environmental harassment,” in contrast to insults particularly directed at one person. This coworker, O’Shea alleged, also told other workers that O’Shea “was incompetent and unable to do her job,” that she was “overemotional and hysterical,” and that women were generally “incompetent, stupid, and scatter-brained.”<sup>89</sup>

When O’Shea complained, her coworkers ostracized her.<sup>90</sup> Before this coworker joined O’Shea’s team, O’Shea’s supervisor had described her as “a very competent systems programmer,” “a team player,” and “cooperative.”<sup>91</sup> After her coworker began denegrating her and other women and complaining to other coworkers that O’Shea was “going to file a sexual harassment suit against him,” her coworkers “cut off contact with her” and “treat[ed] her poorly.”<sup>92</sup> “[M]ale programmers never invited [her] to lunch outside of the office unless she invited herself,” and they shifted their discussions about work-related technical matters to sports to exclude her from conversation.<sup>93</sup> They ignored her when she tried to discuss mutual work projects with them. When she complained about being ostracized, her supervisor (who was also a woman) held a meeting with the men involved. The meeting compounded the rift.<sup>94</sup> Ultimately, some of her coworkers “stonewalled” her, refused “to communicate with her,” and “respond[ed] to her questions . . . with monosyllabic answers.” They refused to give her computer files she needed to get work done.<sup>95</sup> Over time, she was seen as the problem because she was increasingly paranoid and insecure.<sup>96</sup>

*O’Shea* highlights the connection between collegial relations with coworkers and on-the-job productivity: work interactions that are ostensibly social (kibbitzing, going to lunch, etc.) also affect an individual’s job performance.<sup>97</sup> *O’Shea* also illustrates

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89. *Id.*

90. *Id.* at 1099-1100.

91. *Id.*

92. *Id.* at 1099.

93. *Id.* at 1099-1100.

94. *Id.* at 1100.

95. *Id.* at 1099-1101.

96. *Id.*

97. Robert Post has described “the unique power” of “[o]utrageous speech . . . [to] call[] community identity into question [and] . . . to focus attention, dislocate old assumptions, and shock its audience into the recognition of unfamiliar forms of life.” Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 601, 632, (1990).

that work roles affect worker's interactions and that people at work do not encounter each other on an equal footing.

Work roles inhibit the expression of individual personalities and restrict how people interact. Hierarchy and power shape the dynamics of discussion in the workplace.<sup>98</sup> Arguing with a boss feels different than arguing with a friend, whether the argument is about politics or business, because a boss wields power—to fire, set salaries, and determine readiness for promotion. For instance, any law teacher who has ever argued with a first-year student is aware of the feeling of arguing with someone not her equal. The disparity arises in part from the fact that the teacher possesses more knowledge, but also from the fact that the teacher has power over the student.

Arguments with coworkers at work also have a different dynamic from arguments outside work. The very fact of being at work restricts the intensity, style, and tone of arguments because the desire to remain employed almost always mediates behavior at work. Our economic dependence on work restricts what we can discuss, how we talk about things, and the positions we are willing to advocate while we are at work. In this way, a workplace resembles Robert Post's description of a community:<sup>99</sup> for a workplace to be productive, members must agree with the norms and ends of the workplace and place them above their private interests. At least, individuals must be willing to behave as if they agree with the norms and aims of the workplace.

Current work norms usually require us to favor work over kibbitzing and conducting our personal affairs. Consequently, much workplace expression is instrumental to doing work. People may talk about a number of things at work, but it is work that brought them there and constitutes, at least initially, the basis for their discussions. At work, talk about things other than work is incidental to work and, at a moment's notice, may legitimately be disrupted by the superior demands of work. (Things are trickier when a workplace's mission is the production of discourse, but more on that point in section D.)

In the government-employee speech cases, the Court has repeatedly recognized that employees' expression takes a back-

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98. Post, *Sexual Harassment and the First Amendment* at 611 (cited in note 15).

99. *Id.* at 614-15 (cited in note 15) (“[T]he workplace has constitutionally been understood as a site of community, not democracy.”); Post, 103 *Harv. L. Rev.* at 632-35 (cited in note 97) (contrasting the public sphere, in which the Constitution requires the suspension of civility norms, with communities and the private sphere, both of which require civility norms to exist).



seat to doing work. First Amendment doctrine has thus made way for the practical necessities of controlling “expression” in this work context. Quite simply, governmental organizations have a strong interest in “promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.”<sup>100</sup>

To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.<sup>101</sup>

Consequently, government employers face few constraints when firing employees for expression that disrupts the workplace, if that expression does not address matters of public concern.

Even when political speech is involved, government employers can fire employees who disrupt the workplace. In *Rankin v. McPherson*,<sup>102</sup> the Supreme Court held that a clerical worker in a county constable’s office could not be fired for remarking to a coworker, within the deputy constable’s earshot, that she hoped that the next person who tried to shoot President Reagan would “get him.” This case is often cited as an example of the limits on government employers’ power to regulate employees’ speech. *Rankin*, however, is based on the assumption that government *can* sometimes regulate its employees’ political speech. A government employer may do so if the “balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”<sup>103</sup> tips in favor of the government employer’s interest. Factors in this analysis include “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.”<sup>104</sup>

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100. *Connick v. Myers*, 461 U.S. 138, 150-51 (1983).

101. *Id.*

102. 483 U.S. 378 (1987).

103. *Id.* at 384 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

104. *Id.* at 388.

McPherson could not be fired for her remark because no one could interpret it as seriously advocating or validating violence against the president. The constable's office could not show that McPherson's comment disrupted work or that it evinced a "character trait that made" her "unfit" to work.<sup>105</sup> Instead, McPherson was fired because the remark rankled Rankin.<sup>106</sup>

The First Amendment does not absolutely shield employees who speak out on matters of public concern.<sup>107</sup> The Court in *Rankin* took pains to explain that when an employee's speech on a matter of public concern *does* disrupt a government office, a government employer can fire the employee.<sup>108</sup> *Rankin* cited *McCullen v. Carson*, an Eleventh Circuit case, for this proposition. In *McCullen*, the Jacksonville sheriff's department fired McCullen, a clerical employee, who had said on local television news that he worked for the sheriff's office and, in his spare time, recruited for the Ku Klux Klan.

The Eleventh Circuit found that public outrage and internal dissension within the police department justified McCullen's dismissal even though he was a records clerk and could not arrest anyone. Keeping him would have enraged Jacksonville's Black community and made law enforcement more difficult and dangerous. "Efficient law enforcement requires mutual respect, trust, and support" between the community and the police.<sup>109</sup> Employing someone who declared himself a member of the Klan would have created the impression that the police department did not treat individuals impartially.<sup>110</sup> "Jacksonville's black community . . . would categorically distrust the Sheriff's office if a known Klan member were permitted to stay on in any position."<sup>111</sup> McCullen's presence also threatened the department's "esprit de corps,"<sup>112</sup> as his very presence angered African American members of the police force.<sup>113</sup> *McCullen* shows that

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105. *Id.* at 389 n.14 (explaining that Constable Rankin testified that "[he] did not base [his] action on whether the work was interrupted or not").

106. *Id.* at 390 ("[I]t is undisputed that [Rankin] fired McPherson based on the *content* of her speech . . . and because [Rankin] believed that she 'meant it.'").

107. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that the rights of an employee to comment on matters of public concern must be balanced against the interests of the government employer in providing efficient public services); accord *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

108. *Rankin*, 483 U.S. at 389, 391 n.18 (citing *McCullen v. Carson*, 754 F.2d 936 (11th Cir. 1985)).

109. *McCullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985).

110. *Id.* at 938.

111. *Id.* at 939.

112. *Id.*

113. *Id.*

the need to maintain civility norms within some workplaces can make speech's offense a legitimate basis for regulation.<sup>114</sup>

Let us now leave the work context for the public square. Within the realm of public discourse, the First Amendment requires that we suspend our normal rules of civility. The First Amendment supports the expression of plural views by allowing speakers to communicate their ideas and vie for others' attention and sympathy, even if the government disagrees with them.<sup>115</sup> Standing alone, government neutrality about the *substance* of opinions is not enough to support vibrant public discourse. Government must also remain (mostly) neutral about *how* opinions are expressed. If government can punish the manner of communication, it is harder to express opinions that differ from prevailing community viewpoints.<sup>116</sup>

Consider flag burning. A flag-burner can certainly communicate the same idea by shouting, "Down with the United States!" The shout, though, lacks the extreme outrage of burning our nation's symbol. Were the government to bow to veterans' groups outraged by flag-burning, protesters could not convey an important aspect of their message. Civility norms are not universal—some are mortally offended by flag burning (Justice Stevens, for example<sup>117</sup>), while others are not. The government, therefore, cannot enforce civility norms within the public sphere without enforcing the norms of *some* community. Enforcing the norms of one community—say, banning flag burning, thereby enforcing the norms of veterans as against war protesters—"support[s] some communities and repress[es] others."<sup>118</sup>

Within the realm of public discourse, plaintiffs face a heavy, often insurmountable, burden when suing for defamation or intentional infliction of emotional distress. *New York Times v. Sullivan*,<sup>119</sup> *Hustler v. Falwell*,<sup>120</sup> and *Gertz v. Robert Welch*<sup>121</sup> held that community standards of offensiveness (on which intentional infliction of emotional distress is explicitly based and defamation

114. Sometimes government agencies can even make political affiliation a condition of employment. "[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (citing *Elrod v. Burns*, 427 U.S. 347, 366 (1976)).

115. Post, 103 Harv. L. Rev. at 629-30 (cited in note 97).

116. *Id.* at 638-42.

117. See *Texas v. Johnson*, 491 U.S. 397, 436 (1989) (Stevens, J., dissenting).

118. Post, 103 Harv. L. Rev. at 629-30 (cited in note 97).

119. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

120. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

121. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

implicitly based) cannot be used to punish speech when it is about matters of public importance and where the person claiming harm is a public figure. As the Court explained in *Falwell*, the *New York Times* standard protects a “world of debate about public affairs.”<sup>122</sup> Thus, in *Garrison v. Louisiana*, the Court held that a person who vilified a public official could be held liable for defamation only if he acted with actual malice.<sup>123</sup> Likewise, in *Lewis v. City of New Orleans*, the Court held that cursing a police officer cannot be grounds for arrest.<sup>124</sup>

Most of these cases involve expression that is addressed to a number of persons. This is no accident. Attending a live speech, reading something in a newspaper or magazine, or hearing a speech on the radio or television buffers the audience from the speaker and his message. This buffer permits the audience to reflect on what is said rather than simply react to what is said. A person can read and digest information in a newspaper or magazine, and audience members can leave or tune the speech out. The one exception, *Lewis v. City of New Orleans*, involves a public officer who is required by his official role to react in an impersonal way to members of the public. Police officers are the government officials closest to such protests, and are therefore the most likely to be the objects of offensive acts. Allowing police officers, through arrest or suit, to penalize offensive expression they encounter on the job could suppress an enormous amount of expression, from parades to anti-government tirades.

Many ordinary workplaces have little in common with these cases. Expression within ordinary workplaces rarely resembles public discourse. People in public places can more easily avoid derogatory or graphic jokes or degrading graffiti or images than workers can. More importantly, workers may orient themselves differently to expression in the workplace than they do to expression that appears in a newspaper or magazine or is shouted from the steps of a courthouse.<sup>125</sup> By no means was the *Robinson* plaintiff a “reader,” “viewer,” or “spectator” of the pornographic images and graffiti at the shipyard—she encountered that expression differently than someone who is leafing through

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122. *Falwell*, 485 U.S. at 53.

123. *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964).

124. 415 U.S. 130, 131-32 (1974).

125. See *Cohen v. California*, 403 U.S. 15 (1971) (holding that state could not ban Cohen from wearing his “Fuck the Draft” jacket because others were free to avert their eyes if his message offended them).

a magazine. Nor was O'Shea a "member of an audience" when her coworker ruminated about *Playboy's* superiority.

Thus, if the line between the private sphere and the realm of public discourse marks the shift from the commitments of a particular community to values such as "neutrality, diversity, and individualism,"<sup>126</sup> ordinary workplaces usually stand outside of the realm of public discourse.<sup>127</sup> Such workplaces are rarely characterized by employees' unfettered debate on a broad range of topics. Outside academia, few workplaces are dedicated to fostering freewheeling expression of plural viewpoints.

Some commentators have argued that work is an increasingly important locus for public debate. It is a mistake, Cynthia Estlund argues, to treat the workplace as entirely outside of the realm of public discourse.<sup>128</sup> Work, she says, has become a central place for discourse on public issues because Americans spend so much time at work<sup>129</sup> (and increasingly less time in other group settings).<sup>130</sup> Work also provides a unique opportunity for people to talk with "individuals from diverse backgrounds and perspectives," people of other races and ethnicities, religions, education levels, and class backgrounds.<sup>131</sup> Hierarchical relationships, she concedes, may darken this rosy view of the workplace as a cross-class and cultural meeting place.<sup>132</sup> She also

126. Post, 103 Harv. L. Rev. at 680 (cited in note 97).

127. Hanna Pitkin's discussion of Hannah Arendt's distinction between the public realm and the social and private realms illustrates this point. Pitkin contrasts the public realm, in which "a plurality of perspectives" may and should flourish (Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, 9 Pol. Theory 327, 333 (1981)) and Arendt's conception of public action, which "stresses the urge toward self-disclosure at the expense of all other factors, and therefore is highly individualistic" (id. at 336 (quotations omitted)) with the private sphere, which is "governed by necessity" and the need to provide the necessities of life. Id. at 331. The private and social spheres are the spheres "for labor" and other "activities 'related to the maintenance' of life." Id.

128. See Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687, 720 (1997) ("I will argue for a . . . conception of . . . freedom of expression in which the core domain of public discourse is surrounded by satellite domains of discourse . . . such as the workplace.").

129. Id. at 733 (arguing that "most adults spend much of their waking life at work, and much of the time and space that individuals have for political discussion outside their families is at work").

130. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000) (documenting the decline in civic and social group participation among Americans).

131. Cynthia L. Estlund, *The Architecture of the First Amendment and the Case of Workplace Harassment*, 72 Notre Dame L. Rev. 1361, 1375 (1997); see also Estlund, 75 Tex. L. Rev. at 727 (cited in note 128) ("In the workplace individuals interact with others—initially strangers, often from diverse cultural, ethnic, political, and religious backgrounds—in a constructive way toward common aims.").

132. Estlund, 75 Tex. L. Rev. at 728-29 (cited in note 128).

admits that work requires civility rules to function and to promote equality among workers.<sup>133</sup>

Despite these caveats, Professor Estlund argues that the First Amendment should presumptively shield expression at work from hostile work environment liability. The presumption could be overcome if the contested expression falls within “established categories of unprotected speech,”<sup>134</sup> if the expression was “directed at a listener whom the speaker knows” will “be offended on the basis of the listener’s” membership in a protected class,<sup>135</sup> or if it was expressed in a “grossly and manifestly offensive”<sup>136</sup> way that offended coworkers could not avoid.<sup>137</sup> Except in these cases, Professor Estlund would suspend government-enforced civility rules at work in favor of expression.<sup>138</sup>

It is not clear that this proposal would create more protection for speech than existing law. Cases establishing liability for environmental harassment that the plaintiff could have avoided are rare, if they exist. And at any rate such liability would be unjustified under current law—something easily avoidable cannot be severe and pervasive. Her suggestion that actionable environmental harassment be “grossly and manifestly offensive”<sup>139</sup> arguably compounds, not cures, any vagueness problems. Adding adverbs to the constitutionally suspect adjective “offensive” hardly helps. Is *Playboy* in, but *Hustler* out? The terms “hostile and abusive” are at least somewhat narrower than “offensive,” and the current legal standard also gives us a benchmark—the reasonable person. “The reasonable person” standard is a notoriously squishy standard. But a squishy benchmark is better than none, and “grossly and manifestly offensive” has no benchmark.

Professor Estlund’s proposal suffers from other problems. Her suggestion that expression that falls within “established categories of unprotected speech” would remain unprotected in the workplace is too quick. She appears to assume that the phrase “categories of unprotected speech” designates a particular set of things and that this set can be easily imported from the realm of public discourse—sidewalks and parks—into the workplace. Whether expression is protected or unprotected is a judg-

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133. Id. at 751.

134. Id. at 752.

135. Id.

136. Id.

137. Id.

138. Id.

139. Id.

judgment based largely on context. Put Officer McPherson in front of the police department wearing a sandwich board emblazoned with "Hinckley: Next time, don't miss!", and the Court might have blessed her firing. Had abortion doctors featured on previous "Guilty" posters not been murdered, the American Life Coalition's posters might have been protected speech.<sup>140</sup>

In the workplace, the very question that must be answered is how the particular workplace context alters the social meaning and effect of expression. Because context drives the conclusion that speech is or is not protected, it is nonsensical to propose that "established categories of unprotected speech" be applied to the workplace context.

Significantly, too, Professor Estlund's proposal underestimates the importance of workplace civility rules and the discrimination that would result from their suspension. She does concede that her picture of the workplace as a locus for debate is probably idealized because many workplaces are hierarchically organized. Her portrayal *is* idealized, but hierarchy is not the culprit. However a workplace is organized, pluralistic expression does not typify most work relationships. Work responsibilities pervade and complicate interactions with coworkers and subordinates and inhibit open and frank exchanges.

Indeed, work structures based on teamwork, rather than top-down management, seem to make civility among workers *more*, not less, important. In the last decade or so many workplaces have moved toward "flatter" organizational structures<sup>141</sup> with looser, more fluid job roles and responsibilities to facilitate greater teamwork and creativity.<sup>142</sup> Increasingly, employees must cooperate on projects and assignments. Employees have begun "to think of their organizational identity as being determined at least in part by the teams of which they are members."<sup>143</sup> Failing

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140. Cf. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1048, 1062, 1066, 1080-81 (9th Cir. 2002) (en banc) (citing the fact that abortion doctors who had been featured on previous "Wanted" posters were murdered as contributing to the "Guilty" posters' threatening nature).

141. Catherine Casey, *Work, Self and Society* 108 (Routledge, 1995). ("The new technologies, and the new culture [of teamwork and family], have departed from specialization of knowledge and function, characteristic of industrialism . . . to a multiplicity of knowledges and roles. Specialization and demarcation are giving way to generalization and flexibility.")

142. See Michael J. Piore and Charles F. Sabel, *The Second Industrial Divide* 273, 282 (Basic Books Inc., 1984).

143. Susan Albers Mohrman and Susan G. Cohen, *When People Get Out of the Box*, in Ann Howard, ed., *The Changing Nature of Work* 365, 371 (Jossey-Bass Inc., Pubs., 1995).

to get along with one's coworkers "carries" a "big penalty, because the collective [team] product is evaluated," not one individual's part.<sup>144</sup> Getting along with others and being a "good team player" is essential to a worker's ability to succeed, even in traditional factory settings and corporate offices. Teamwork "requires the deliberate creation of a substitute, discursive social cohesion that is necessary for production to occur. . . . Relationship to a product, to team-family members and to the company displaces identification with occupation and its historic repository of skills, knowledge[] and allegiances."<sup>145</sup>

As *O'Shea* demonstrates, even low-level environmental harassment has the potential to isolate and undermine workers. Professor Estlund admits as much. The very qualities that make work seem attractive to her as a forum for discussion—that work is "a collection of individuals who must form relationships and cooperate toward common aims despite potentially diverse backgrounds"<sup>146</sup>—make "unconstrained speech" "potentially explosive."<sup>147</sup> Unconstrained debate can disrupt diverse work forces more than homogenous ones. Professor Estlund concedes that uninhibited debate can "inflict greater harms within the workplace than in the public square, partly because of the close and ongoing personal engagement that the workplace compels."<sup>148</sup> As Jack Balkin has observed, "[f]ew audiences are more captive than the average worker."<sup>149</sup> Indeed, Professor Estlund explains that an effort to make the workplace a locus for uninhibited discussions free from civility constraints could backfire: It could "poison the workplace as a forum for pluralistic exchange and destroy the possibility of constructive engagement."<sup>150</sup> In short, harassment and a worker's complaints about harassment jeopardize a person's status as a team member, keep her from getting work done, and imperil her job.

If uninhibited discussions can "destroy the possibility of constructive engagement,"<sup>151</sup> why does Professor Estlund want to make workplaces presumptively part of public discourse? She hopes, first, that if work is made a place for discussion and de-

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144. *Id.* at 373.

145. Casey, *Work, Self and Society* at 109 (cited in note 141).

146. Estlund, 75 *Tex. L. Rev.* at 735 (cited in note 128).

147. *Id.*

148. *Id.*

149. J. M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *Duke L.J.* 375, 423 (1990).

150. Estlund, 75 *Tex. L. Rev.* at 735 (cited in note 128).

151. *Id.*



bate, then workers will encounter diverse viewpoints and ideas, become more tolerant of others, and become more engaged members of our democracy.<sup>152</sup> Second, she hopes that making work a “satellite domain of public discourse” will increase workers’ powers of self-governance within the workplace.<sup>153</sup> Enhancing workers’ rights to self-governance by reducing legal protections for equal opportunity is a baffling proposition—federal law specifically prohibits labor organizations from engaging in discrimination. I am also skeptical that encountering different viewpoints at work makes people more tolerant of differences. Would overhearing dirty jokes (seemingly protected under Estlund’s proposal) make women more tolerant of men? Would being endlessly proselytized by a coworker make someone more tolerant of religion? If these interactions make work harder to do—the central inquiry in hostile work environment cases—it seems unlikely. Reducing legal protections for equal employment opportunity for uncertain gains in tolerance seems a bad trade-off.

##### 5. Liability for harassment based on political speech in ordinary workplaces

Within ordinary workplaces, should harassing statements that touch on matters of public concern merit special treatment? The fact that speech addresses matters of public concern does not itself insulate it from common law dignitary torts. *Gertz*<sup>154</sup> and *Dun & Bradstreet*<sup>155</sup> held exactly that: “[T]he fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*.”<sup>156</sup> *New York Times* represents “an accommodation between [First Amendment] [concerns] and the limited state interest present in the context of libel actions brought by public persons.”<sup>157</sup> The state has a stronger interest in redressing private individuals’ reputational harm, in part because they have not entered the fray of public discourse.<sup>158</sup>

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152. *Id.* at 694-95.

153. *Id.* at 694, 724-27 (“[T]he Constitution should guard against the law’s suppression of employee voice on workplace issues.”).

154. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343, 348-49 (1974).

155. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (citing *Gertz*, 418 U.S. at 343).

156. *Id.* at 756.

157. *Id.* (“[W]e found [in *Gertz*] that the state possessed a ‘strong and legitimate . . . interest in compensating private individuals for injury to reputation.’”).

158. *Gertz*, 418 U.S. at 344 (“[T]here is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who

A kind of cost-benefit analysis underlies First Amendment dignitary tort cases. Speech about public officials or figures receives the highest level of protection because the ability to express opinions about such persons and their affairs is the essence of self-government. To deter as little of this expression as possible, the First Amendment requires public officials and figures to endure injuries from defamation or infliction of emotional distress, unless the defendant acted with actual malice.<sup>159</sup>

When expression about matters of public concern injures or defames a private person, the First Amendment permits recovery if the defendant was negligent about a statement's truth.<sup>160</sup> The First Amendment does not require private persons to bear as much of the cost of expression, and it imposes a greater responsibility on defendants to verify their statements. The implicit cost-benefit calculus is obvious: We can generally talk about politics and current affairs without discussing a private individual who cannot respond to criticism as easily as public figures. The First Amendment therefore permits private individuals to recover more readily for their injuries and requires speakers to check their facts. Statements that have little to do with public affairs and defame a private individual receive almost no First Amendment protection—the only restriction is that the state may not impose strict liability. Here, too, cost-benefit analysis is at work. Private gossip about private persons has little connection to public discourse, and so permitting private individuals' recovery hardly impairs our ability to govern ourselves.

In ordinary workplaces, how do these principles apply to expression about matters of public concern that creates a hostile work environment? The government's purpose in prohibiting workplace harassment is to guarantee equal economic opportunity regardless of a person's membership in a protected class. This equality interest is stronger (and has a firmer constitutional basis) than the more general interest in protecting people from torts to personality. For several reasons discussed here, expression in ordinary workplaces also has an attenuated connection to public discourse. Much workplace expression is instrumental to

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decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.”).

159. See *id.* at 342 (observing that the actual malice standard “exact[s] a . . . high price from the victims of defamatory falsehood” who will often “be unable to surmount” it).

160. *Id.* at 347. If the defamatory statement expressed an opinion and is not capable of being falsified, however, a private person cannot recover. Cf. *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1990).

ends having nothing to do with First Amendment values, and most people work for reasons unrelated to public discourse.

Even when workplace expression is about matters of public concern, the workplace context often means that speakers and listeners relate to each other very differently than they do in public. Workplace expression is more likely to be face-to-face or in small groups. It is harder to avoid, and workers often have ongoing relationships that require them to get along. These features make workplace expression resemble regulable utterances (like threats or fighting words) more than street-corner debates and letters to the editor. Remember, too, that a slip of the lip does not a federal case make. Hostile work environment liability punishes only that small subset of workplace expression that is so abusive that it transforms some protected characteristic of the plaintiff into a cost of employment, thereby creating a hostile work environment.<sup>161</sup>

Even when expression does concern matters of public interest, hostile work environment liability is consistent with current First Amendment doctrine. Governmental interests in protecting the dignity or personality of individuals or their privacy interests may outweigh an individual's interest in expressing her opinions freely when the expression occurs outside public discourse. Outside public discourse, government must be able to "authoritatively . . . construe its own civility rules" because "[t]hese rules are deeply important to the maintenance of community identity."<sup>162</sup>

6. Hostile work environment liability for expression in ordinary workplaces does not threaten First Amendment values

Work's instrumental nature, its dependence on behavioral norms, employees' economic dependence on work, and the inevitable constraints on workers' interactions mean that expression at most workplaces differs from expression in the public square. Sometimes the work context gives expression a different meaning than it would have in the public square. Sometimes expression is more threatening in the workplace. Sometimes expression impedes a coworker's progress or excludes a worker from work teams.

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161. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

162. Post, 103 Harv. L. Rev. at 665 (cited in note 97).

Because of the relationship of speech to the economic and instrumental aspects of work, the Supreme Court has allowed expression in the workplace to be regulated more freely than expression in public discourse. Thus, government cannot legitimately regulate speech in the public square on the ground that it has the potential to disrupt, unsettle, or agitate an audience, except in the very narrow case of incitement. In contrast, the Court has held in a variety of work contexts that government can, consistent with the First Amendment, regulate speech that disrupts the workplace or interferes with work. In ordinary workplaces, at least, liability for expression that creates a hostile work environment poses no threat to First Amendment values. Communicative workplaces are another story. I turn to that now.

#### D. THE EXPRESSIVE WORKPLACE, PUBLIC DISCOURSE, AND THE IMPORTANCE OF CONTEXT

Every public accommodation is someone's workplace.<sup>163</sup> Interactions among patrons of a public accommodation could therefore be described as occurring "in" a workplace. Eugene Volokh worries that robust protection against hostile work environments will erode freedom of speech in places people generally use for debate and discussion. Professor Volokh's concerns seem particularly reasonable if employers can be liable for failing to protect their employees from harassment by third parties.

It is true that most, if not all, public accommodations and public fora are workplaces. It is not true that all workplaces are fora. Nor is it true that all workplaces are situated the same way relative to protected expression. To see this point, compare the facts in *Robinson v. Jacksonville Shipyards* to a museum security guard's objection to *Playboy* centerfolds displayed in the "Imagining the Body—1950 to 2000" exhibit. Can the museum guard sue for harassment because she has to look at these crude centerfolds all day long and listen to stupid, sexist, and lewd comments by patrons? Can she force the art museum to cease the exhibition or to monitor its patrons' comments for offensiveness?

Even if the centerfolds are exactly the same, the museum has a significantly stronger First Amendment defense than the shipyard.<sup>164</sup> Quite simply, the exhibition creates and facilitates

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163. Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & Contemp. Probs. 299, 325 (2000).

164. See, e.g., *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184,

public discourse in a way that the porn posted at the shipyard does not. The museum invites members of the public to its exhibit to engage the images critically. The shipyard does not. Furthermore, without security guards, the museum cannot hold exhibitions. To protect the dignitary interest of someone in the museum guard's position would neuter public discourse because such a person is necessary to the production of public discourse. A museum simply could not function as an art museum if guards' harassment suits were sustained. The normative significance of the museum in public discourse implies rejection of such suits. That normative significance may be so obvious that we expect security guard applicants to know what they are getting into. But "assumption of risk" is just one inexact way of stating the normative inquiry, and it proves too much. A guard cannot sue, but a shipyard worker can—even she had been warned that her workplace would be spiced with porn.<sup>165</sup>

The problem with hostile work environment suits over museum exhibits is quite simple. An art museum could not function as a center for public discourse if it feared these suits based on its exhibits. Imagine a museum trying to vet the inoffensiveness of its displays. Not only would it be impossible—in a large and diverse workforce, someone could object to nearly any art object—but such vetting would undermine the very purpose of a museum. At their best, museums expand visitors' knowledge, introduce visitors to new things and experiences—sometimes beautiful, sometimes uncomfortable—and challenge visitors' complacency. A museum that had to stage exhibitions in the shadow of potential liability to its employees could mount only the most banal exhibits of Impressionist landscapes—even Renoir nudes would be out. To preserve museums as places for public discourse, therefore, a guard must suspend civility norms relative to exhibits just as any other viewer must.<sup>166</sup>

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205 (E.D. N.Y. 1999) (granting an art museum's motion for preliminary injunction on First Amendment grounds against New York City's attempts to cancel the museum's public funding and its building lease because of the "Sensation" exhibit, which featured the painting "The Holy Virgin Mary," on which the artist had smeared elephant dung); *Cuban Museum of Arts & Culture, Inc. v. City of Miami*, 766 F. Supp. 1121 (S.D. Fla. 1991) (granting the museum's motion for a permanent injunction against the city on First Amendment grounds; the city had sought to evict the museum from a city building unless the museum stopped exhibiting works by artists who had not renounced the Castro regime).

165. See, e.g., *Petrosky v. N.Y. State DMV*, 72 F. Supp. 2d 39, 58-59 (N.D.N.Y. 1999) (denying the defendant's motion to dismiss the plaintiff's hostile work environment claim though the plaintiff had been warned when she began work that other workers used vulgar and lewd language).

166. The security guard has some other options to engage the exhibit critically. She

If the museum guard's suit must fail for First Amendment reasons, does the shipyard worker's fail, too? No.

Superficially both involve the same "expression," but the cases could not be more different. The shipyard is not open to the public. Few people—employees, invited business guests (such as suppliers and special customers) and government inspectors—will see the extensive porn exhibit. The shipyard admits employees and business guests for business-related reasons. Federal regulations require the shipyard to admit government inspectors. None come specifically to see the porn. The shipyard, in other words, is not a public accommodation. Those who display the porn do not have a dialogic relationship with those who see the pictures, and they did not post the porn to spark discussions about it. The "display" of pornography at the shipyard is just not part of public discourse. Nor does the shipyard produce public discourse. Enforcing civility norms at the shipyard does not interfere with ship building or with public discourse. Nothing about the shipyard's mission or its relationships with its business invitees cloaks them with political, and therefore First Amendment, significance.

Consider a factual variation: A librarian objects to patrons who regularly surf Internet porn sites on library computers. She can clearly see these images from her reference desk. She also cleans out forgotten printouts from the printer bins. More and more, she finds obscene printouts, which thanks to fancy printers, are in vivid Technicolor. She demands that the library install Internet filters to stop patrons from looking at porn. The available filters cannot block only obscene images and may also block sites with debates about pornography. Facts like these gave rise to a hostile work environment claim filed with the EEOC by librarians at the Minneapolis Public Library. The EEOC ruled that the library administration was liable for the hostile work environment caused by the patrons.<sup>167</sup>

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can visit the museum and view the exhibit on her own time. She can start a debate about the centerfolds—whether they are an appropriate subject for an art exhibit, whether the museum exhibit subverts or reenforces the images' subjugation of women, or whether viewers should take the exhibit ironically or seriously. She could also hand out fliers proclaiming her criticisms about the exhibit and the effect it has on society's views of women.

167. See Steve Brandt, *EEOC: Library Internet Porn Created Hostile Environment* B4 Mpls. Star Tribune (May 25, 2001); see also Kevin Diaz, *Odd Alliances, New Foes in Minneapolis Porn Case*, Mpls. Star Tribune A1 (June 5, 2001) (stating that the May 24, 2001 preliminary ruling by the EEOC recommended a settlement of \$75,000 for each employec).

This case is different from and harder than *O'Shea* and *Robinson*. In part, it's harder because the librarian does not work with the patrons. By contrast, the plaintiffs in *Robinson* and *O'Shea* had to work with the people who were displaying porn or denegrating women. The patrons frequent the librarian's workplace, but her job does not depend on their cooperation. It is also harder because libraries are places where people seek information and entertainment, and we think they should do so freely and anonymously. Indeed, federal laws guarantee the privacy of library patrons when they borrow books. The library probably carries *Penthouse*, *Playboy*, *The Joy of Sex*, and books on sexual fetishes. Presumably patrons check out those materials and read them in the library without upsetting librarians. If the librarians *were* upset, that would hardly justify stopping those subscriptions or acquisitions. If the librarians complain because they see the pictures over the patrons' shoulders or when they pick up forgotten printouts, that complaint resembles the museum security guard's. The hostile work environment cause of action would encroach upon public discourse by forcing the library to block access to web sites containing protected speech.

The Minneapolis Library case involved more, though. The library told the librarians to enforce time limits on Internet terminals to ensure that all who wanted to use them could. Patrons looking at porn sites balked. Often, librarians had to ask patrons directly to relinquish the terminals. When they did so, patrons often met the requests with abuse.<sup>168</sup> Patrons yelled, threatened, cursed, and spat at the librarians. One patron even threw a chair.<sup>169</sup> Some patrons also masturbated while web-surfing; others were obviously sexually aroused when librarians asked them to relinquish the computer.<sup>170</sup> These facts turn an "environmental harassment" case based on arguably protected speech into a case of one-on-one insults, invective, and physical threats beyond the First Amendment's purview. Although the library knew about these frightening and disturbing incidents, it appar-

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168. See James Rosen, *Push to Block Internet Porn Picks up Steam; Libraries, Schools that Don't Shield Kids Could Lose Funding*, Mpls. Star Tribune A1, A9 (July 17, 2000).

169. See Paul Levy, *Library Limits Porn Access Via the Internet*, Mpls. Star Tribune A1, A16 (May 6, 2000).

170. See Rosen, *Push to Block Internet Porn Picks up Steam; Libraries, Schools that Don't Shield Kids Could Lose Funding* at A9 (cited in note 168); see also Levy, *Library Limits Porn Access Via the Internet* at A16 (cited in note 169) (describing an incident involving a library employee who had to remind patrons that masturbation was not allowed in the library).

ently did nothing to protect the librarians or to stop the abuse.<sup>171</sup> Holding the library liable for failing to protect its librarians from verbal and physical abuse presents no real First Amendment problem.

A problem does arise, however, if the only way to stop the patrons from bullying the librarians is to block access to porn sites because the library concludes that access to these materials is causing the patrons to act abusively. Whether the library could be required, consistent with the First Amendment, to impose filters to block access to pornography is a difficult question. Two district courts have held that libraries cannot.<sup>172</sup> Libraries are public fora, both courts concluded, and less restrictive means exist to protect children and librarians from pornography. Even though one of these decisions dealt with the Children's Internet Protection Act, not with workplace harassment, its observations are particularly relevant:

[The] proper method for a library to deter unlawful or inappropriate patron conduct, such as harassment or assault of other patrons, is to impose sanctions on such conduct, such as either removing the patron from the library, revoking the patron's library privileges, or, in the appropriate case, calling the police.<sup>173</sup>

It should also worry us that a First Amendment principle that allowed libraries to use Internet filters to protect librarians from violently aroused patrons would also seemingly justify suppressing certain books—Franz Fanon's *The Wretched of the Earth* comes to mind—if patrons routinely became violently aroused upon reading them in the library.

The social context of expression determines whether we encounter the expression as "speech" in the First Amendment sense or as utterances that may be regulated. If expression happens in a context in which our interactions with others are primarily instrumental—ordinary workplaces—we are likely to see

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171. See Levy, *Library Limits Porn Access Via the Internet* at A1 (cited in note 169) (reporting that complaints were lodged with the Minneapolis Public Library during the two years before the filing of the complaint, without action; only when the complaint was filed did the library create an Internet policy to abate the abuse).

172. *American Library Ass'n, Inc. v. United States*, 2002 U.S. Dist. LEXIS 9537 (E.D. Pa. May 31, 2002) (striking on First Amendment grounds the Children's Internet Protection Act requirement that federally funded public libraries use Internet filters that exclude access to pornographic web sites); *Mainstream Loudoun v. Bd. of Trustees of Library*, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998) (permanently enjoining on First Amendment grounds the library's policy of requiring use of internet filters).

173. *American Library*, 2002 U.S. Dist. LEXIS 9537 at \*211.



that expression as more conduct-like, even if in different context we have no doubt that the expression is speech. In other arenas that foster, support, and encourage debate, discussion, and the expression of a plurality of opinions (such as an art museum or a library), we might come to a different conclusion.

It is telling that we would not dispute restricting Internet access if elementary school students were using school computers to surf porn sites.<sup>174</sup> Change the elementary school library to a university library, and we have much hand-wringing.<sup>175</sup> If a high school, however, wanted to block Internet access to porn, we would feel uncomfortable about it, but the regulation would likely be upheld.<sup>176</sup> These examples demonstrate how the scope of regulation allowed by the First Amendment varies according to the purpose of the institution. Elementary schools inculcate values in young children; universities should challenge those values and expand students' world-views;<sup>177</sup> high schools fall somewhere in the middle.

As with schools, so with workplaces. Whether an institution is educational or commercial, its mission and its relationship to public discourse matter. In ordinary workplaces, where much expression is instrumental to achieving ends having little to do with the First Amendment, government may regulate a broad

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174. Cf. *Bd. of Ed. v. Pico*, 457 U.S. 853 (1982) (plurality opinion favoring greater rights of access to books for junior high and high school students).

175. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, . . . otherwise our civilization will stagnate and die."); *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 671 (1973) (striking University of Missouri's decision to expel student because of the publication of a political cartoon that depicted a police officer raping the Statue of Liberty and holding that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech").

176. The Court has usually upheld restrictions on the speech of high school students if the speech concerned sex, though these decisions have sparked angry dissents. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (upholding the suspension of a high school student for making a sexually suggestive speech at a school event); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 272 (1988) (upholding a school's decision to ban articles on teen pregnancy in the school newspaper because a school may "disassociate itself . . . from [vulgar and indecent] speech" that would interfere with its work of teaching students "cultural values . . . and helping [students] to adjust normally to [a cultural] environment") (quotations and citations omitted). On the other hand, the Court has usually struck down politically motivated restrictions on student speech. See *Bd. of Ed. v. Pico*, 457 U.S. 853 (1982) (fractured Court striking down a school district's removal of books based on the district's political disagreement with the books' contents).

177. Indeed, the Court generally equates college newspapers with their adult counterparts. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 671 (1973).

swath of expression. In expressive workplaces that foster, support, and encourage debate, discussion, and plural opinions, the First Amendment insulates much more.

## II. WHAT CHILL? COMPARING HOSTILE WORK ENVIRONMENT SUITS WITH DIGNITARY TORTS

The free-speech critique condemns the hostile work environment cause of action as irremediably and unconstitutionally vague.<sup>178</sup> As explained above, the hostile work environment cause of action inquires whether harassing conduct is so severe and pervasive that it alters the terms and conditions of the plaintiff's employment by creating objectively and subjectively abusive working conditions.<sup>179</sup> Professor Volokh accuses this standard of telling employers nearly nothing about their legal obligations.<sup>180</sup> Courts assess harassment case by case. In the face of this legal uncertainty, he argues, smart employers will clamp down on speech within the workplace, disciplining workers for discussing politics, religion, and current affairs, or for putting up posters about those topics.<sup>181</sup> Critics argue that environmental harassment, as distinguished from face-to-face harassment, should not be actionable,<sup>182</sup> because environmental cases represent most of the situations that implicate protected speech.<sup>183</sup> Professor Volokh has catalogued many worrisome hostile work environment complaints. He recounts that workers have charged that pictures of the Ayatollah Khomeini tacked on the wall of a coworker's cubicle and coworkers' discussions about Christianity amount to religious harassment; others have claimed that overheard jokes about sex create sexually hostile work environments.<sup>184</sup>

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178. Eugene Volokh, *What Speech Does 'Hostile Work Environment' Harassment Law Restrict?*, 85 *Georgetown L.J.* 627, 634-36 (1997); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 *Ohio St. L.J.* 481, 501-03 (1991).

179. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

180. Volokh, 85 *Georgetown L.J.* at 636 (cited in note 178); Browne, 52 *Ohio St. L.J.* at 483 (cited in note 178) ("[T]he vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden").

181. Volokh, 85 *Georgetown L.J.* at 636 (cited in note 178).

182. Volokh, 39 *U.C.L.A. L. Rev.* at 1843-47 (cited in note 28); cf. Estlund, 75 *Tex. L. Rev.* at 750 (cited in note 128) (arguing that harassment that is not face-to-face should only be actionable if it is "manifestly and grossly offensive" and cannot be avoided by workers).

183. Volokh, 39 *U.C.L.A. L. Rev.* at 1843-47 (cited in note 28).

184. Volokh, 85 *Georgetown L.J.* at 631-32 (cited in note 178).

## A. THE REPORTS OF TITLE VII'S BREADTH ARE GREATLY EXAGGERATED

These charges appear damning. And they would be, except for a few stubborn facts. There are few (if any) actual cases that have allowed complaints based on overheard comments or jokes or displayed images to proceed to trial, and few cases in which complaints based on comments or discussions about current affairs, religion, or politics (broadly construed) have made it past summary judgment. Indeed, on close examination, most of the cases Professor Volokh cites are far less troubling than he suggests. Some of the cases dismissed the plaintiff's claims.<sup>185</sup> Others involve facts far more serious than Professor Volokh's descriptions suggest.<sup>186</sup> Another case pre-dates the Court's decision in *Harris v. Forklift Systems, Inc.*, which would have

185. In the case involving the picture of the Ayatollah Khomeini, the plaintiff did not sue for harassment, and the court dismissed the plaintiff's claim that she was fired because of her national origin. See *Pakiezezi v. First Nat'l Bank of Boston*, 831 F. Supp. 901 (D. Mass. 1993). The court found that a coworker's posting of the Ayatollah's picture did not support the plaintiff's claim that her employer harbored anti-Iranian feelings; the court observed that the fact that the employer had the picture removed supported the opposite conclusion. *Id.* at 909. The court in *Tunis v. Corning Glass Works*, 747 F. Supp. 951 (S.D.N.Y. 1990), dismissed the plaintiff's hostile work environment and gender discrimination claims, which were based on her coworkers' posting of a few nude photos and their use of gender-specific job titles. *Id.* at 958-59. The court did mention that the use of gender specific job titles could be discriminatory because such titles could give the impression that the jobs were closed to women. *Id.* at 959. But contrary to Professor Volokh's claim (see Volokh, 85 Georgetown L.J. at 631 (cited in note 178)), the court did not say—even in dictum—that the use of such titles could amount to harassment. Finally, *Bowman v. Heller*, 420 Mass. 517 (Mass. S. Jud. Ct. 1995), which Professor Volokh describes as a harassment suit based on political speech (see Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 Nw. U. L. Rev. 1009, 1014 n.20 (1996)), is far more speech-friendly than he admits. In this case, a woman ran against the president of her union. One of the incumbent's supporters circulated a picture to a few of his friends that superimposed the plaintiff's face on photos of nude women masturbating. (Predictably, these friends circulated it more widely.) The plaintiff sued for sexual harassment and intentional infliction of emotional distress. Professor Volokh does not mention that the appellate court *vacated* the trial court's finding of sexual harassment. 420 Mass. at 519 n.4. Nor does he mention the appellate court's careful analysis of the First Amendment issues raised by the plaintiff's emotional distress claim. The court specifically found that the plaintiff was not a limited public figure and that the photo was not about a matter of public concern. *Id.* at 525-26.

186. For example, two harassment cases Professor Volokh describes as being religious environmental harassment cases were actually cases in which the plaintiffs were themselves insulted and demeaned based on their religion. In *Turner v. Barr*, 806 F. Supp. 1025 (D.D.C. 1992), a white, Jewish Deputy U.S. Marshal claimed his suspension from duty for a prisoner's escape was actually racial and religious harassment because no African American marshals had been suspended for prisoners' escapes. *Id.* at 1028-29. He also claimed that he was insulted on several occasions because of his race and religion: he was told he would be better at handling money and working in the jewelry business than being a marshal; on other occasions, his African American coworkers called him a "white ass" and told him to get his "white-ass" out of the office because it was "a black office, for blacks, supervised by blacks." *Id.* at 1028. In *Peck v. Sony Music Corp.*, 1995 WL 505653 (S.D.N.Y. Aug. 25, 1995), the plaintiff claimed that her coworker

in *Harris v. Forklift Systems, Inc.*, which would have precluded its claims.<sup>187</sup> Another is a retaliation case in which the court observes that the conduct about which the plaintiff complained would *not* state a claim for harassment.<sup>188</sup>

I reviewed more than three hundred electronically reported district court rulings in hostile work environment cases from January 1999 to November 2001.<sup>189</sup> Few (if any) cases involved any expression that could be characterized as remotely political. And none survived defendants' motions for summary judgment. Indeed, most cases based on "environmental harassment" — overheard dirty or racist jokes, sexual banter, or sexist or racist remarks—are dismissed at or before summary judgment. Courts routinely find, as a matter of law, that a reasonable person would not find overheard comments to be hostile or abusive enough to alter a plaintiff's working conditions if the plaintiff is not actually their subject.<sup>190</sup> For example, one court dismissed a complaint by a car-saleswoman who alleged that her dealership created a hostile work environment when it held a weekend-long sales promotion featuring scantily clad women lounging in a hot-tub. The environmental harassment claims that have progressed past summary judgment generally have involved the widespread display of pornography, pornographic cartoons, and sexually explicit graffiti—*Robinson v. Jacksonville Shipyards* is the paradigmatic example.

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"screamed" at her on many occasions that she would go to hell if she did not repent. Id. at \*2. He also told her weekly that she was a sinner and had to repent. Id. When she apparently did not repent, this coworker held a prayer meeting with another coworker at the plaintiff's desk to urge her to repent. Id.

187. Had the court in *Brown Transport Corp. v. Penn. Human Relations Comm'n*, 133 Pa. Cmwlth. 545 (1990), applied *Harris's* holding that harassment must be "severe or pervasive" enough "to alter the conditions of the victim's employment and create an abusive working environment," it should have dismissed the plaintiff's complaint. The court found that the bible verses on the plaintiff's pay stubs and religious editorials in the company newsletter never "hinder[ed] [the plaintiff's] job performance." Id. at 557.

188. In *Carlson v. Dalton*, 1994 WL 735488 (EEOC Apr. 26, 1994), the plaintiff claimed that she was retaliated against because she complained about a prayer session held in her department at the Naval Supply Center. This EEOC opinion did not address the merits of the claim but whether the plaintiff's complaint could proceed after she had rejected a settlement offer. The opinion specifically stated that "nothing in this decision is intended to suggest that a one-time offer of a prayer at work . . . would rise to the level of hostile environment harassment." Id. at \*6.

189. I drew my universe of cases from a "key search" I performed on Westlaw in November 2001. As my key terms, I selected first "employment law," then "discrimination," and then "harassment." On the "search page," I selected "US district court" cases. I then entered "sy,di(harassment) & date(>1998)" as my search terms.

190. *Temple v. Auto Banc of Kan., Inc.*, 76 F. Supp. 2d 1124, 1130 (D. Kan. 1999).

My review also revealed only two possible cases of “environmental harassment” that survived defendants’ motions for summary judgment between 1998 and 2001. In *Underwood v. Northport Health Services, Inc.*,<sup>191</sup> a white plaintiff was ridiculed by African American coworkers and subordinates and falsely accused of being racist. Her employer ultimately demoted her because she had poor relationships with her coworkers. The court denied the employer summary judgment because the racial ridicule undermined the plaintiff’s work and paved the way for her demotion. The plaintiff in *LaRocca v. Precision Motorcars, Inc.*<sup>192</sup> claimed that his coworkers created a hostile work environment by denigrating his and others’ national origin. The court denied the employer’s summary judgment motion because the plaintiff was himself repeatedly insulted. These cases arguably involved “direct” harassment, to use Professor Volokh’s terminology, not “environmental” harassment, because the plaintiff was the subject of the “overheard” remarks. In the vast majority of the cases I reviewed, when a plaintiff complained of verbal harassment, district courts granted summary judgment for defendants, unless the plaintiff was also the victim of offensive touching or fondling or the subject of a pattern of frequent, targeted, and repeated insults and verbal abuse.<sup>193</sup>

For the sake of argument, assume, as Professor Volokh does, that each individual photograph, cartoon, or scrawl at the Jacksonville Shipyard would ordinarily be protected by the First Amendment. The government, it is true, generally cannot ban or suppress the creation, distribution, display, or viewing of pornography unless it is obscene.<sup>194</sup> Even so, a hostile work environment claim based on the pervasive display of pornographic pictures, cartoons, and graffiti does not necessarily create a First Amendment problem.

As an initial matter, offense is not harassment. One pornographic image or an off-color joke does not by itself create a hostile work environment. Harassment must be pervasive or severe to be actionable. To be severe or pervasive, harassment must be frequent, humiliating, physically threatening, or serious enough

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191. 57 F. Supp. 2d 1289 (M.D. Ala. 1999).

192. 45 F. Supp. 2d 762 (D. Neb. 1999).

193. See, e.g., *Franklin v. King Lincoln-Mercury-Suzuki, Inc.*, 51 F. Supp. 2d 661 (D. Md. 1999) (denying summary judgment for defendant on plaintiff’s hostile work environment claim because the plaintiff was nicknamed “M&M” (for “mental masturbation”), subjected to lewd remarks (“why order out when you can have fresh meat here?”) and sexual gestures).

194. *Sable Communication. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

that it actually interferes with someone's ability to do work.<sup>195</sup> *Harris v. Forklift* squarely holds that: A "mere utterance of an . . . epithet which engenders offensive feelings in a employee does not sufficiently affect the conditions of employment to implicate Title VII."<sup>196</sup> The Court expanded this point in *Faragher v. City of Boca Raton*<sup>197</sup> and *Clark County School District v. Breeden*.<sup>198</sup> "A recurring point in [the Court's harassment] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"<sup>199</sup>

It is true that in the harassment context, some courts have held that a *supervisor* can create an abusive work environment if he calls a subordinate a "n—r."<sup>200</sup> Courts facing such fact patterns have not ruled uniformly, however. Courts have been significantly less likely to hold that *coworkers* have created hostile and abusive work environments when they have called a fellow worker the same epithet or when the epithet was not directed at the plaintiff.<sup>201</sup> Those cases that confront analogous gender-specific epithets suggest that "n—r" is the sole exception that proves the general rule. In *Faragher v. City of Boca Raton*,<sup>202</sup> the

195. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

196. *Harris*, 510 U.S. at 21-22. Last year the Court reaffirmed this point in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (per curiam). In that case, Ms. Breeden complained to her employer that her coworkers harassed her during a meeting with her when they had laughed at a sexual insult that was recounted in a job applicant's file. After she complained, her employer proposed transferring her to an undesirable job, in retaliation, she claimed, for her complaint. *Id.* at 271-73. The Court held that the incident could not create a hostile work environment, and that her belief that it was harassment was so off-base that Title VII did not shield her from retaliation. *Id.* at 270-71.

197. 524 U.S. 775, 788 (1998).

198. 532 U.S. 268 (2001) (per curiam).

199. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Breeden*, 532 U.S. 271.

200. I trust the reader can mentally fill in the ellipses. See, e.g., *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (finding that supervisor had created a hostile work environment by calling plaintiff "n—r" on more than one occasion because "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'n—r' by a supervisor in the presence of his subordinates") (ellipses added); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358-59 (11th Cir. 1982) ("[U]se of the terms 'n—r-rigged' and 'black-ass,' as well as other racially abusive language was 'repeated,' 'continuous,' and 'prolonged' despite [plaintiff's] objections, and that the language made [plaintiff] feel unwanted and uncomfortable in his surroundings") (ellipses added); *Bailey v. Binyon*, 583 F.Supp. 923, 927 (N.D. Ill.1984) ("The use of the word 'n—r' automatically separates the person addressed from every non-black person; this is discrimination *per se*") (ellipses added).

201. See, e.g., *Eruanga v. Grafton Sch., Inc.*, 181 F. Supp. 2d 514, 523-24 (D. Md. 2002) (finding no hostile work environment when supervisors' use of word n—r was reported to plaintiff by others and not directly heard by him).

202. 524 U.S. 775, 788 (1998).

Supreme Court clarified that the hostile work environment did not prohibit “the sporadic use of abusive language, gender-related jokes, [or] occasional teasing.” Such “isolated incidents” do not create discriminatory “terms and conditions of employment.”<sup>203</sup>

Second, holding a defendant liable for harm caused by an entire course of conduct, though each isolated incident would not create liability, is not unique to the hostile work environment cause of action. The same logic underlies intentional infliction of emotional distress claims: one insult almost never causes legally cognizable anguish, but many such slurs can.<sup>204</sup> The First Amendment does not bar these claims.

Critics might reply that the actual state of harassment law is beside the point if employers actually do squelch protected expression out of a fear of Title VII liability. Professor Volokh has documented that many employers zealously police their workplaces for offensive expression. It does not follow, however, that the hostile work environment cause of action is unconstitutionally vague. The next section argues that Title VII provides sufficient guidance to employers and is not unconstitutionally vague.

It is possible that employers might over-regulate employees’ or patrons’ expression out of an irrational fear of liability under Title VII. But employer over-regulation is only a constitutional concern if Title VII is itself unconstitutionally vague or over-broad; or if workplace expression is so crucial to public discourse that a special rule to protect against erroneous hostile work environment judgments is necessary to ensure that all protected speech is insulated from liability. The *New York Times* actual malice requirement is this kind of rule, and it buffers speakers and publishers against defamation suits by public officials and figures. I will argue that such a rule might be appropriate in expressive workplaces to insulate them from environmental harassment claims based on patrons’ expression or the overall mission of the workplace itself. Additionally, the likelihood that an employer will over-regulate expression in the workplace will vary depending on a workplace’s mission. In workplaces that are most connected to public discourse—expressive workplaces and

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203. *Id.*; see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (holding that a “mere offensive utterance” is not severe or pervasive harassment).

204. See *McLure v. Tiller*, 63 S.W.3d 72, 82 (Tex. App. 2001) (“Although a single act, taken alone, may or may not rise to the level of ‘extreme and outrageous’ conduct, this Court has previously determined that it is possible that several acts taken together can amount to such harassment as to be more than petty oppression”).

public accommodations such as restaurants, bars, and cafes—employers have the fewest incentives to check patrons' expression.

#### B. LEGAL UNCERTAINTY IS A FACT OF LIFE, EVEN UNDER THE FIRST AMENDMENT

The threat of liability almost always encourages actors to take steps to avoid it. Some employers wishing to avoid liability for discrimination will limit their employees' expression, possibly even more than the law requires, and perhaps because of uncertainty about what the law requires. If true, this fact does not itself make antidiscrimination laws unconstitutional. To argue that uncertainty is unconstitutional, the free-speech attack has made three false assumptions. First, the free-speech attack assumes that the First Amendment always protects expression and always protects it in the same way, without regard to context or content. As we have seen, however, not all expression relates equally to the First Amendment. Second, the free-speech attack also assumes that the First Amendment's concern with inhibiting expression is always the same regardless of the context in which expression occurs. This, too, is wrong. The First Amendment is far more worried about chilling effects in the arena of public discourse.<sup>205</sup> Third, the free-speech attack has assumed that all employers would prefer to avoid the risk of hostile work environment liability by stifling expression in the workplace, auto-dealerships the same as bookstores and art galleries. This assumption is just silly.

1. No one, not even *The New York Times*, is spared from legal uncertainty

Legal uncertainty is a fact of life. The First Amendment does not spare newspapers, museums, libraries, book publishers, or speakers declaiming on public corners from legal uncertainty.<sup>206</sup> Speakers, writers, and publishers face potential liability every day, even when they are publishing stories that unquestionably address political matters. *New York Times* does not bar liability; it permits public officials and figures to recover for defamation if the defendant acted with "actual malice." "Actual malice" test is a term of art for *recklessness*—the defendant

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205. *Hustler Magazine v. Falwell*, 485 U.S. 46, 53, 55 (1988) (explaining that concerns about chill are particularly acute "in the area of public debate about public figures").

206. Post, *Sexual Harassment and the First Amendment* at 9 (cited in note 15).



knew or should have known that a statement was false and published despite that knowledge. This is a difficult but not insurmountable test.

The “actual malice” standard does not apply to all cases. Private persons may recover against newspapers for defamation, intentional infliction of emotional distress, false-light, or public disclosure of private facts, even if the newspaper was reporting on matters of public concern. If newspapers and magazines can publish and flourish in the face of potential liability, there is no reason to expect that expressive workplaces (which may include newspapers and magazines) would react differently to the (remote) possibility of hostile work environment liability.

Political speech is not completely immune from liability for defamation or intentional infliction of emotional distress because the state has an interest in protecting personal reputations, even though doing so may impinge on “speech.” As the Court explained in *Milkovich v. Lorain Journal*:<sup>207</sup>

The numerous decisions . . . establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court’s recognition of the Amendment’s vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the ‘important social values which underlie the law of defamation,’ and recognized that ‘[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.’ . . . ‘The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.’<sup>208</sup>

*New York Times* and *Hustler* do not ban dignitary tort suits to save protected speech. Rather, they simply elevate the threshold for liability to shift the risk, or cost, of error involved in publishing potentially defamatory or otherwise tortious material from the media to the defamed person.<sup>209</sup> At common law, defamation was a strict liability tort; after these decisions recovery for defamation and intentional infliction of emotional distress must satisfy a higher, constitutionally mandated standard for liability.

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207. 497 U.S. 1 (1990).

208. *Id.* at 22-23.

209. See Schauer, 92 Colum. L. Rev. at 1321-23 (cited in note 67).

2. The legal standards for hostile work environment provide appropriate “breathing room” for expression in ordinary workplaces

Hostile work environment doctrine incorporates “breathing room” for employee and employer speech in a couple of ways that are similar to defamation’s actual malice test. First, the standard for finding actionable harassment is relatively high. A plaintiff flattened by one callous or crude remark by a supervisor or coworker will not prevail.<sup>210</sup> Harassment must be not only offensive, but severe, repeated, and pervasive before a court will impose liability. Second, a plaintiff must also prove that an employer is liable for the harassment. Employers are vicariously liable only for harassment by *supervisors*. Even then, they may escape liability if they provided adequate channels for reporting and remedying harassment, and the plaintiff unreasonably failed to avail herself of these opportunities.<sup>211</sup>

Establishing employer liability for “environmental harassment” and harassment by coworkers and third parties is significantly more difficult. This fact is significant because critics have identified “environmental harassment” and harassment by coworkers and third parties as presenting the greatest risk to free speech.<sup>212</sup> The standard for employer liability in these cases is negligence—that the employer knew or should have known of the harassment and failed to take appropriate corrective action.<sup>213</sup> Put differently, “a victim of coworker harassment must show either actual knowledge on the part of the employer or conduct sufficiently severe and pervasive as to constitute constructive knowledge to the employer.”<sup>214</sup>

In practice, courts require the plaintiff to notify the employer that she believes she is being harassed on the basis of sex or some other protected characteristic; notifying an employer that another coworker is generally harassing her is not enough.<sup>215</sup> Absent notification, courts will find constructive knowledge only if harassment is public and constant, or if the acts of harassment are “so egregious, numerous, and concen-

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210. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (an offensive epithet is not enough).

211. *Ellerth*, 524 U.S. at 765; *Faragher v. Boca Raton*, 524 U.S. 775, 804-08 (1998).

212. Volokh, 39 U.C.L.A. L. Rev. at 1845-47 (cited in note 28); Volokh, 85 Georgetown L.J. at 635-36 (cited in note 178).

213. *Ellerth*, 524 U.S. at 759.

214. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002).

215. See, e.g., *McGuire v. Kansas*, 2001 U.S. Dist. LEXIS 12973, \*16-17 (D. Kan. 2001).

trated” that they amount to a “a campaign.”<sup>216</sup> Occasionally, an employer may have constructive notice if it knows that a particular employee has repeatedly and seriously harassed others before.<sup>217</sup>

A negligence standard for employer liability does falls short of the “actual malice” or recklessness standard of *New York Times* and *Falwell*. It is, however, not without fault. Also, in practice, courts tend to use more of a “negligence plus” standard, often refusing to find that the employer liable unless the complainant actually reported the harassment.<sup>218</sup>

The effect of *New York Times*’ recklessness standard is to “protect some falsehood in order to protect speech that matters.”<sup>219</sup> Applied to hostile work environment actions, such a standard would shield expression that would otherwise be severe and pervasive harassment to protect expression that matters. It has no place in ordinary workplaces. *New York Times* extends its special protection to select expression about public officials and figures within the realm of public discourse.<sup>220</sup> But, as I have argued in Part I, expression in ordinary workplaces rarely if ever resembles expression within the realm of public discourse, where freewheeling debate is the ideal and the cure for offense is giving as good as you get. Communication among workers occurs among private persons, not public figures, and against the backdrop of numerous restraints and civility norms—workers depend on one another and continuously interact in close quarters.

We should also remember that the government has a compelling interest in ensuring equal employment opportunities irrespective of race, sex, or national origin. Surely, if the government’s interest in protecting private individuals from reputational harm justifies a negligence standard for defamation suits, the government’s interest in workplace equality justifies hostile work environment’s similar liability standards. The gov-

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216. *Ford v. West*, 222 F.3d 767, 777 (10th Cir. 2000); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 675 (10th Cir.1998); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1346 (10th Cir. 1990); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986).

217. *Ciszewski v. Engineered Polymers Corp.*, 179 F. Supp. 2d 1072, 1097-98 (D. Minn. 2001); see also *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 784 (10th Cir. 1995).

218. See, e.g., *Rutledge v. Macy’s E., Inc.*, 2001 U.S. Dist. LEXIS 18684 (D. Me. 2001) (finding that, based on the plaintiff’s reports of sporadic harassment, the employer could not have expected that further harassment would occur).

219. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

220. *Id.* at 347-48.

ernment's interest in workplace equality is at least as great as its interest in protecting individual reputation.

Given these considerations, the actual malice standard's preference for free speech over other interests would be out of place in most workplaces. In ordinary workplaces, the hostile work environment's negligence standard strikes the right balance between the government's interest in promoting equal employment opportunities and employer prerogatives to manage workplaces and workforces.<sup>221</sup>

### 3. Some expression in "communicative" workplaces deserves additional protection from hostile work environment liability

Not all workplaces are ordinary workplaces. Some that I have called "communicative" or "expressive" generate expression that contributes to public discourse (such as museum exhibits and newspapers) or facilitate the public discourse of their patrons (museums and libraries and perhaps restaurants). Employee suits for environmental harassment based on an organization's or its patrons' expression could suppress a great deal of public discourse. In these workplaces, the law should protect some harassment "to protect speech that matters."<sup>222</sup> If a worker in an expressive workplace were to bring a hostile environment claim based on the theory that some expression linked to public discourse—a picture in a gallery or a patron's gruesomely graphic discussion of the picture—*New York Times'* actual malice standard should apply. In effect, *New York Times* and *Falwell* would entirely bar most, if not all, claims of harassment arising in this context, as they would be based on harassing expressions of *opinion*, not false facts.

## C. HOSTILE WORK ENVIRONMENT'S REASONABLE PERSON STANDARDS ARE NOT UNCONSTITUTIONALLY VAGUE, AND THEY MIRROR THE ELEMENTS OF OTHER DIGNITARY TORTS

Critics have argued that hostile work environment's "reasonable person" standard of abusiveness and its inquiry into a plaintiff's subjective reactions are unacceptably vague. These ob-

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221. Cf. Post, *Sexual Harassment and the First Amendment* at 620 (cited in note 15) ("[T]he value of equality presents stronger constitutional claims within the context of the workplace than within the context of public discourse.").

222. *Gertz*, 418 U.S. at 341.

jections are groundless. These elements of a hostile work environment cause of action mirror those of other dignitary torts. The cause of action for hostile work environment generates no more legal uncertainty than do those torts.

Several contextual inquiries underlie the absence of malice standard. Courts must determine whether a statement is defamatory, whether it is fact or opinion, and whether it is true or false.<sup>223</sup> To determine whether a statement is defamatory, courts ask whether statements in an article or speech, read “*in context and looking at the impression that they were likely to engender in the minds of the average reader*” or listener, are “capable of a defamatory meaning.”<sup>224</sup> In other words, the question is whether the statements “lower[] the . . . reputation” of some individual “in the eyes of the community,” causing “others to avoid associating with” that person.<sup>225</sup> Courts evaluate potentially defamatory statements “in the light of what might reasonably have been understood . . . by the persons who [heard] it.”<sup>226</sup>

Whether a potentially defamatory publication is fact or opinion also matters. Statements of opinion sometimes receive greater First Amendment protection. But the distinction between fact and opinion is not clear-cut. As with the inquiry into an article’s defamatory impact, the distinction between fact and opinion turns on context and an ordinary reader’s reactions. Would a reader understand a statement to be the writer’s opinion or a factual assertion? Whether a speaker or writer prefaced a statement with “I think” does not complete the inquiry, as Judge Henry Friendly once acidly observed.<sup>227</sup> Instead courts

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223. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

224. E.g., *Tucker v. Fischbein*, 237 F.3d 275, 283 (3d Cir. 2001) (emphasis added) (applying Pennsylvania defamation law); see also Cal. Civ. Code Ann. § 45 (West, 1982) (providing that “[l]ibel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation”); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (observing that under California law “[t]he test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text,’ though California courts recognize that ‘[w]hile a drop of poison may be lethal, weaker poisons are sometimes diluted to the point of impotency’”) (quoting *Washburn v. Wright*, 261 Cal. App. 2d 789, 795 (1968)); *Bakal v. Wear*, 583 A.2d 1028, 1029 (Me.1990) (explaining that under Maine law a statement is defamatory “‘if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him’”) (quoting Restatement (2d) Torts § 559 (1977)).

225. *Tucker*, 237 F.3d at 283.

226. *Marston v. Newavom*, 629 A.2d 587, 592 (Me. 1993) (quotations omitted).

227. “It would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’” *Cianci v. New Times Publ. Co.*, 639 F.2d 54, 64 (2d Cir. 1980) (quoted in *Milk-*

ask, among other questions, whether a speaker or writer employ “loose, figurative, or hyperbolic language which would negate the impression that [he] was seriously maintaining” a proposition?<sup>228</sup> What was the general tenor of the article? Playful or deadly serious?

The jury read as parody, not fact, *Hustler*’s publication of Jerry Falwell’s “confession” that his mother had deflowered him in the family outhouse and that he could preach the gospel only when he was stone-drunk. The “interview” appeared in a self-proclaimed “ad-parody,” with a small-print disclaimer that the ad was not meant to be taken seriously. The farcically worded “ad” also appeared in *Hustler*, a publication with which Falwell was unlikely to interview. No one could have taken it seriously.

By contrast, the Court found the statements at issue in *Milkovich v. Lorain Journal Co.* to be largely factual.<sup>229</sup> Mike Milkovich coached a high school wrestling team that was suspended from the state wrestling tournament by the state athletic association for fighting with another team at a match. The wrestlers’ parents sued to overturn the suspension, and Milkovich testified in that suit. The *Lorain Journal* published a column implying that Milkovich had lied under oath. The columnist wrote conversationally and used the first-person to report his impressions of Milkovich’s testimony. The Court found that the gist of the column gleaned from the column’s caption and body was that Milkovich had “lied at the hearing after . . . having given his solemn oath to tell the truth.”<sup>230</sup> This accusation was a factual proposition—the writer did not use “the sort of loose, figurative, or hyperbolic language” that “would negate the impression” that Milkovich had perjured himself.<sup>231</sup> The implication “that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.”<sup>232</sup> Whether Milkovich perjured himself could be determined by examining “a core of objective evidence”—Milkovich’s “testimony before the [state athletics] board [and] his subsequent testimony before the trial court.”<sup>233</sup>

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*ovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)).

228. *Milkovich*, 497 U.S. at 21.

229. *Id.* at 21-22.

230. *Id.* at 5.

231. *Id.* at 21.

232. *Id.* at 21.

233. *Id.* at 21.

Determining the truth or falsity of defamatory statements also requires contextual judgment. For example, when Clint Eastwood sued the *National Enquirer* for touting its “interview” with Clint Eastwood as “exclusive” when Eastwood had never spoken to anyone at the *Enquirer*, the court took those facts as the starting point for its analysis.<sup>234</sup> The *Enquirer* contended that in the tabloid trade the phrase “exclusive interview” meant only that the *Enquirer* was the sole American tabloid to run the interview, not that it had actually interviewed Eastwood.<sup>235</sup> The court, however, found that the article’s use of the “simple past tense” (“Eastwood said”) rather than the past perfect (“Eastwood has said”) along with “scene-setting language” (“[Eastwood] said with a chuckle”) “suggested that the writer,” an *Enquirer* editor, “had conversed” with “the movie star.”<sup>236</sup> The court concluded:

We are not suggesting that any one of these things is dispositive (or, conversely, that the *Enquirer* would have solved the problem with a single alteration). Rather, we look to the *totality* of the *Enquirer*’s presentation of the interview and find that the editors falsely suggested to the *ordinary reader of their publication*—as well as those who merely glance at the headlines while waiting at the supermarket checkout counter—that Eastwood had willingly chatted with someone from the *Enquirer*.<sup>237</sup>

Here, too, the “ordinary reader’s” reaction to all of the article’s contextual clues—the headline, the “exclusive” baby picture of Eastwood’s son that accompanied the article, and the verb tense used to relate Eastwood’s remarks—is the judicial benchmark.

Finally, when the plaintiff is a public figure or official, a defendant’s liability turns on the presence of “actual malice”—“knowledge that [a statement] was false or with reckless disregard of whether it was false or not.”<sup>238</sup> Sometimes tort liability for statements concerning matters of public interest is also evaluated under the actual malice standard. Who is a public figure<sup>239</sup> and whether a statement is a matter of public concern<sup>240</sup> are also fact- and context-based questions.

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234. *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1255-56 (9th Cir. 1997).

235. *Id.* at 1256.

236. *Id.* at 1250, 1256.

237. *Id.* at 1256 (emphasis added). See also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (“Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.”).

238. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

239. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (holding public figure

Unsurprisingly, the inquiry into “malice” also requires contextual analysis—did “the author in fact entertain[] serious doubts as to the truth of his publication or act[] with a high degree of awareness of . . . [its] probable falsity”?<sup>241</sup> Faced with the seemingly simple case of quotation marks deliberately placed around words the plaintiff never spoke, *Masson v. New Yorker Magazine* rejected a per se finding of malice or recklessness:

[The] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.<sup>242</sup>

Instead the Court’s inquiry proceeded in three steps. First, would “a reasonable reader . . . conclude that the quotation purports to be a verbatim repetition of a statement by the speaker”? Second, did the quotation differ materially from what the person actually said? Third, did the writer recklessly change the meaning of the quotations?<sup>243</sup>

The Court dissected each quotation in Malcolm’s *New Yorker* article against Masson’s remarks on tape, painstakingly comparing the *fair reading* of Masson’s tape-recorded statements with Malcolm’s quotations.<sup>244</sup> The Court analyzed, for example, whether Malcolm’s quotation that Masson planned to use the Freud house for “sex, women, fun” differed substantially from Masson’s tape-recorded remarks that “he and another analyst planned to have great parties at the Freud house and, in a context that may not even refer to Freud house activities, to ‘pass women on to each other’”; or whether Malcolm’s quote that Masson had changed his middle-name to Moussaieff because “it sounded better” was “in context” materially different from Mas-

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inquiry asks whether person has “assume[d] special prominence in the resolution of public questions”).

240. Cf. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (holding in the government employee speech context that “whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record”).

241. *Masson*, 501 U.S. at 510 (citations omitted).

242. *Id.* at 517 (citations omitted).

243. *Id.* at 519-20.

244. *Id.* at 522 (asking whether quotations “fairly read” differed materially from tape-recorded remarks).



son's tape-recorded explanation that he "just liked" the name better.<sup>245</sup>

The Court also scrutinized the particular factual circumstances surrounding Malcolm's drafting of the article and the *New Yorker's* publication of it to determine whether there was sufficient evidence for the jury to consider the issue of malice. Noting that Malcolm had taped the interviews and that she was not working under a "tight deadline," the Court concluded that she had enough time to compare her quotes against the tapes for accuracy.<sup>246</sup> She had also told her *New Yorker* editor that all of the story's quotations came from the tapes, and a comparison of her "typewritten notes, . . . manuscript, [and] . . . galleys" tended to show that she knew she was altering the quotations.<sup>247</sup>

The factual and contextual issues underpinning a defamation case closely resemble those in hostile work environment suits. Both causes of action rest on the reactions of a "reasonable" person. Defamation asks how a reasonable person would have understood a statement and whether such a person's estimation of the plaintiff would drop. Hostile work environment asks whether a reasonable person would find the work environment to be "hostile and abusive."<sup>248</sup> Both dissect the context in which the statements were made. In defamation courts analyze the publication in which the statement appears,<sup>249</sup> the context of the statement within the story, and whether the statement would be understood as ironic or as hyperbole. In hostile work environment cases, courts consider "all [of] the circumstances."<sup>250</sup> Among many considerations, the court may analyze what a co-worker or supervisor said or did to the plaintiff, whether the harasser was a supervisor or coworker, whether the comments were frequent or sporadic, whether they were made jokingly or with a threatening or humiliating tone, or whether they were said in private or in front of other workers.

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245. *Id.* at 523-24 (internal quotations omitted).

246. *Id.* at 521.

247. *Id.*

248. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). Hostile work environment additionally requires that the plaintiff subjectively finds her work environment to be hostile and abusive.

249. For example, someone reading a story in the *New Yorker* would probably understand quotation marks to designate the actual words of the person quoted. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513 (1991). By contrast, someone reading the *National Enquirer* likely takes quotation marks with a grain of salt. See, e.g., *Eastwood v. National Enquirer*, 123 F.3d 1249 (9th Cir. 1997).

250. *Harris*, 510 U.S. at 23.

In evaluating an employer's liability for harassment by a plaintiff's coworkers, courts use a standard that parallels the "absence of malice" standard for liability. Employer liability for coworker harassment turns on whether the employer knew or should have known that the plaintiff was being harassed and whether the employer failed to take appropriate corrective action.<sup>251</sup>

Some commentators have argued that the hostile work environment cause of action is constitutionally suspect because it depends on the "reactions of listeners" and therefore violates the constitutional maxim against the "heckler's veto." This criticism is a non sequitur. The plaintiff's subjective reaction is an *additional* element of the hostile work environment, not the threshold. The threshold requirement is whether a reasonable person would find the workplace hostile and abusive—just as a statement is defamatory if it casts a person in disrepute in the eyes of an average or reasonable reader. If a plaintiff subjectively perceives her workplace as hostile or abusive, her complaint will nevertheless fail if a reasonable person would not find the workplace to be so. On the other hand, a plaintiff's complaint will fail if she cannot prove that she perceived her workplace to be hostile or abusive, even if it objectively is so.

Reliance on a "reasonable person" standard to determine whether a work environment is hostile or abusive could be described as a "listener-reaction" standard. But the use of the "reasonable person" standard to determine hostile work environment is no different in this respect from defamation, intentional infliction of emotional distress, and other personality torts such as public disclosure of private facts.<sup>252</sup> Each of these torts uses a "reasonable" person or reader standard to determine offensiveness and the effect of a publication on a plaintiff's community standing.

#### D. EMPLOYERS IN COMMUNICATIVE WORKPLACES AND IN PUBLIC ACCOMMODATIONS HAVE FEW INCENTIVES TO SQUELCH THEIR PATRONS' EXPRESSION

The previous sections demonstrate that Title VII's liability standards are quite similar to the liability standards that govern

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251. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758-59 (1998).

252. See, e.g., *Flowers v. Carville*, 112 F. Supp.2d 1202 (D. Nev., 2000) (holding that standard for recovery for public disclosure of private facts is whether "a public disclosure of private facts has occurred which would be offensive and objectionable to a reasonable person of ordinary sensibilities") (quotations omitted).

defamation and intentional infliction of emotional distress. There is no conceptual reason, therefore, that Title VII should create a greater risk of chill than these reputational torts do.

There are practical reasons as well why employers in “expressive” or “communicative” workplaces are unlikely to overreact to the risk of Title VII liability. The argument that employers will censor workplace expression is straightforward: Profit-maximizing employers see the risk of Title VII liability as a cost to be avoided, and censoring workplace expression is a cheap way to avoid liability. This argument, however, assumes that all employers share the same inclinations to steer far clear of Title VII liability by curbing expression in the workplace. But that is not the case. Indeed, employers in workplaces with the closest connection to public discourse have the weakest incentives to overreact to the threat of liability. Employers in “expressive workplaces”—museums and libraries, for example—and in public accommodations, such as restaurants, bars, and cafes, have little if any incentive to over-regulate patrons’ expression to avoid the risk of liability. No rational business or organization that devotes itself to public discourse or that provides a place for people to socialize would censor its patrons’ speech, because it would defeat the organization’s reason for existence.

Let’s begin with expressive workplaces. Many organizations maximize something other than profit. A successful museum, for example, attracts a lot of patrons and expands its donor base so that it can expand its collection and stage larger and more elaborate exhibits (which in turn attracts more patrons and more donations). A museum will only succeed if it caters to its patrons by making the museum a fun and exciting place for them to learn and talk about art, history, or science. Actively policing patrons’ expression or staging only the most inoffensive exhibits vitiates these goals.

Much the same can be said about libraries. A good library has lots of patrons as well as lots of books. Libraries attract patrons by providing materials on a wide range of topics and by providing a pleasant place to think, read, and do research. Monitoring the materials that patrons use and read impedes those purposes. Significantly, Title VII liability was not enough to make the Minneapolis Library monitor and restrict patrons’ Internet access, though librarians did claim harassment. The library brushed off the librarians’ complaints because of its institutional commitment to free access to information. The Minneapolis Library’s stance is not unusual: the American Library

Association has consistently fought governmental restrictions on patrons' free access to information, most recently, federal requirements that libraries install Internet filters as a condition of government funding.<sup>253</sup> Expressive workplaces that are profit-maximizing—art galleries or commercial movie theaters, for example—have similar incentives. Their ability to turn a profit depends on the expression they sell, and they are unlikely to change that expression because an employee might find it offensive.

Public accommodations like bars and restaurants may not have the same institutional commitment to public discourse that expressive workplaces do. But they still have little economic incentive to overreact to the risk of harassment liability by policing the politeness of patrons' banter. People go to restaurants, bars, and cafes rather than ordering take out or having a glass of wine or cup of coffee at home because restaurants, bars, and cafes are fun places to hang out, talk with your friends, and people watch. It is hard to imagine that a restaurant would give a customer the boot because a waitress was offended by a conversation she overheard, unless perhaps, the waitress overheard a customer make an extremely crude remark about her. Hooters, to take an extreme example, strenuously defended its policy of hiring only women for its "front of the restaurant" positions against a class-action, sex discrimination suit. Hooters thought that male wait staff would have destroyed its restaurants' "t and a" atmosphere.<sup>254</sup> Hooters refused to back down, and it settled the suit only after the plaintiffs agreed that being a woman was a bona fide

253. See, e.g., *Am. Library Ass'n, Inc. v. United States*, 2002 U.S. Dist. LEXIS 9537 (E.D. Pa. May 31, 2002) (striking on First Amendment grounds the Children's Internet Protection Act requirement that federally funded public libraries use Internet filters that exclude access to pornographic web sites). The American Library Association also fought the Communications Decency Act of 1996, which had sought to limit minors' access to "indecent" materials on the Internet. See *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (striking Act as a violation of the First Amendment).

254. See Martha Carr, *Hooters Girls serve up lawsuits; Tavern accused of pregnancy bias*, Times Picayune Sec. MONEY at 1 (October 22, 2000) ("Atlanta-based Hooters of America paid \$3.75 million to settle a sexual discrimination case that claimed men were denied jobs as waiters. Hooters' defense was that the primary function of its waitresses was not food service but 'providing vicarious sexual recreation.' In exchange for the payment, Hooters was granted by court order a Bonafide Occupational Qualification that allows the company to hire only female waitresses"); *Area Hooters franchisee sued; Harassment allegations isolated, firm says of ex-waitresses' case among Hooters' past legal troubles*, Dallas Morning News 2F (Mar. 31, 2001) (reporting that Hooters "has made a niche for itself using scantily clad 'Hooters Girls' to serve chicken wings and burgers to its mostly male customers. The chain features a girl of the week on its Web site and unabashedly declares, 'Sex appeal is legal and it sells.'").

fide occupational qualification for waiting on customers at Hooters. If a class-action BFOQ suit did not faze Hooters, an individual hostile work environment suit is unlikely to.

Though Hooters might be an extreme example, it illustrates my general point. Customers are restaurants' bread and butter, if you will. Public accommodations that serve the public by providing a place to talk and relax are unlikely to react out of proportion to the risk of potential harassment liability.

It is true that employers in ordinary workplaces are more likely to over-react to the threat of hostile work environment liability. But even here, the chill argument is overblown. Ordinary workplaces can be sufficiently invested in old, comfortable ways that they resist and resent having to change a workplace environment. Even after *Robinson* and *Harris*, some formerly all-male workplaces have balked at taking down girly-posters and stopping sexual horseplay.<sup>255</sup> Moreover, the connection between workplace expression and public discourse is far more tenuous in ordinary workplaces, and so the damage done by overzealous employers is slight.

#### E. CONCLUSION

Legal uncertainty does not itself unconstitutionally inhibit speech. A certain level of uncertainty is a fact of life for all participants in public discourse. Employers do face some legal uncertainty with regard to liability for workplace harassment (though courts have offered more guidance on this point than critics realize or admit). Not all employers will react identically to the threat of liability. Employers have varying incentives to promote or restrict expression depending on the workplace's mission and values. Furthermore, hostile work environment's doctrinal vagueness is comparable to the vagueness that accompanies the doctrines underlying dignitary torts and their relationship to the First Amendment.

In ordinary workplaces, the negligence standard for employer liability for hostile work environments created by co-workers and for environmental harassment strikes an appropri-

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255. See, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001) (finding a hostile work environment in a fire department where firefighters posted pornography and viewed pornographic films in violation of fire department policy but with the tacit approval of department superiors, and in the face of complaints by a woman firefighter); *Petrosky v. N.Y. State DMV*, 72 F. Supp. 2d 39, 45 (N.D. N.Y. 1999) (noting that when plaintiff was hired, supervisor reportedly told her she would just have to tolerate her co-workers' foul language).

ate balance between workplace expression and the important government interest in ensuring equal employment opportunities. There is a more substantial risk within communicative workplaces that environmental harassment suits claiming harassment due to an organization's or its patrons' expression could squelch a great deal of public discourse. In environmental harassment cases arising in this context, courts should scrutinize whether the expression at issue touches on matters of public concern and is related to the organization's expressive mission. If the answer to these questions is yes, *Falwell* protects employers from liability.

### III. ABANDONING THE QUIXOTIC QUEST FOR BRIGHT LINES

No bright-line rule dictates what is and what is not protected speech in the workplace, and the validity of First Amendment objections to hostile work environment claims depends wholly on workplace context. Workplaces have varying missions. That fact affects how workers encounter expression within the workplace, which in turn affects whether such expression merits First Amendment protection. In other First Amendment areas, the Supreme Court has closely examined context and the speakers' and recipients' orientation toward speech. Courts reviewing hostile work environment causes of action should do the same.

"Communicative" workplaces, which are organized around producing or supporting expression that is part of public discourse, must be distinguished from workplaces that provide services or manufacture products outside the First Amendment's ambit. In communicative workplaces, expression that relates to the communicative mission of that workplace will often merit First Amendment protection from hostile work environment suits.

Some expression in "communicative" workplaces should be treated differently under the First Amendment than expression in "ordinary" workplaces. A museum deserves First Amendment protection against hostile work environment suits claiming that the museum's exhibits constitute harassment or that patrons' speech about the exhibits constitute "environmental" harassment. Similarly, a writer for *Hustler* should not be able to claim that *Hustler's* content or discussions about the magazine's editorial decisions are harassing. A contrary rule would constrict

important arenas for public discourse. On the other hand, a hostile work environment claim based on harassment by coworkers that is unrelated to the communicative mission of the workplace poses few First Amendment worries. Similarly, harassment claims in ordinary workplaces that arise out of direct communications among supervisors and subordinates pose few if any First Amendment problems. The same is true for harassment claims based on direct interactions among coworkers in ordinary workplaces.

Critics' attacks on hostile work environment harassment have been premised on an overly simplistic view of when, why, and how the First Amendment protects expression. All-or-nothing assertions about the protected or unprotected status of workplace speech will not produce useful doctrine. A successful defense of the hostile work environment cause of action must avoid the same pitfalls. Both sides must abandon quixotic aspirations for bright-line rules in this area of law.

Abandoning the search for bright-line rules does not itself imperil free speech. Rumors that the hostile work environment cause of action and other contextual inquiries unconstitutionally chill workplace speech are greatly exaggerated. Critics overstate the risk that employers will react to the threat of liability for hostile work environment by restricting speech. Workplaces do not have identical incentives to limit speech; communicative workplaces have little incentive to undermine their very mission of generating expression. Moreover, the standards for hostile work environment liability—both the “reasonable” person standard for determining whether harassment exists and the standards for employer liability—mirror those of dignitary torts. These standards are completely consistent with *New York Times* and subsequent cases.

Abandoning the quest for bright-line rules permits scrutiny of the actual speech issues involved in harassment cases. Refusing to acknowledge that First Amendment protection depends on culture and context, not bright-line rules, impoverishes our understanding of the First Amendment and leaves us unprepared to meet the challenges of freedom of expression in our society.