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Workplace Harassment and the First Amendment: A Reply to Professor Volokh

David Benjamin Oppenheimer†

When the government assesses damages against an employer based on the speech of the employer's employees, the employer is entitled to the protections of the First Amendment to the United States Constitution. On this proposition Professor Volokh and I are in complete agreement. We disagree, however, on the question of whether current developments in the law of workplace harassment conflict with the right of free speech. As he has eloquently stated, he believes that recent decisions under Title VII of the 1964 Civil Rights Act¹ threaten our Constitutional right to be free from state interference with the expression of ideas.² I believe that Title VII law, while prohibiting much workplace harassment, has steered clear of any Constitutional violation. While Title VII imposes tort liability³ on employers for sex and race-based on-the-job harassment, our traditional rules protecting freedom of speech remain intact.

Private employers are, of course, generally free to impose restrictions on employee speech without governmental interference. Thus, employers may insist that employees treat one another with courtesy and respect, and refrain from uttering unwanted slurs, suggestive comments, or rude statements; such rules imposed privately by employers are of no interest to the

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3. For discussions of Title VII violations as torts, see Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (referring to Title VII as creating an employment tort); Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 576 (10th Cir. 1990) (referring to sexual harassment as a tort); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1346 (10th Cir. 1990) (same); Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979) (same); Cheryl Kause Zemelman, The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility, 46 STAN. L. REV. 175, 196 (1993) (discussing Title VII violations as torts); David B. Oppenheimer, Negligent Discrimination, 141 U. PA. L. REV. 899 (1993) (same); Cf. Gillian K. Hadfield, Rational Women: A Test for Sex-Based Harassment, 83 CAL. L. REV. 1151, 1166 (criticizing current analysis of sexual harassment law as encouraging a “tort-like inquiry”).

state. The problem arises when employers who have chosen to refrain from enacting or enforcing such rules are sued by employees who have been harmed by harassment suffered on the job. The state's involvement, and thus the concern of Constitutional law, is the enactment of legal standards and the operation of a legal system in which employers are ordered by the state to compensate employees injured by workplace harassment. Where the harassment is verbal, rather than physical, the state is in the position of restricting verbal conduct⁴; the potential for interference with freedom of expression is obvious.

Despite the potential for Constitutional infirmity, in reality employers are well protected. To begin with, Title VII prohibits workplace harassment only under circumstances where the harassment has verifiable effects on employees.⁵ Title VII broadly prohibits employers from discriminating against individuals with respect to the conditions of their employment based on their race, color, religion, sex, or national origin.⁶ The Supreme Court has interpreted the Act to prohibit conduct, including solely verbal conduct creating a hostile work environment, only when the plaintiff can establish five elements. The elements are (1) that the conduct was unwelcome; (2) that it consisted of physical or verbal acts; (3) that the acts constituted sexual or racial intimidation, ridicule or insult; (4) that the acts were sufficiently severe or pervasive to alter the conditions of the plaintiff's employment, creating a work environment that the plaintiff subjectively experienced as abusive; and (5) that a reasonable person in the plaintiff's position would also have experienced the acts as sufficiently severe or pervasive to alter the conditions of his or her employment, creating an abusive work environment.⁷ If any of these elements are absent, the government will not assess liability and damages.

It is, of course, axiomatic that the right of free speech is not absolute. Some speech simply falls outside the purview of the First Amendment. Obscenity, for example, is not protected.⁸ Blackmail, extortion, and fraud are carried out through words alone, yet those words have no Constitutional shield. The same is true for "fighting words"—words used to provoke violence.⁹ Some commentators describe these as categories of "no-value" speech. Workplace harassment, like fighting words, is conduct, or language, which provokes actual injury, in the form of an injurious and ver-

⁴. See R.A.V. v. City of St. Paul, 505 U.S. 377, 389-390 (1992) (dictum) (laws directed against conduct may be violated by words alone. The Court points to Title VII and the EEOC's Guidelines on sexual harassment as an example of a permissible regulation of conduct that incidentally sweeps up certain speech; the regulation is not impermissible because it is not directed at speech.).
ifiably altered work environment. The wrong is not simply in engaging in the harassment, but in causing foreseeable injury to another—injury not only subjectively experienced by the plaintiff, but objectively injurious to a reasonable person. Unwelcome conduct, whether words or deeds, which constitutes intimidation, ridicule or insult and is objectively sufficiently severe or pervasive to alter the conditions of its workplace, making it abusive to employees, may be properly regarded as outside the protection of the First Amendment.

Moreover, even if verbal workplace harassment is entitled to some Constitutional protection under the First Amendment, protected speech is subject to government regulation. Some speech is considered to be sufficiently low in value that it may be regulated, although not altogether banned. The key to determining whether speech is "low-value" is a balancing test, in which the Court asks both how harmful the speech is, and how important it may be in promoting core democratic values. Under this reasoning, speech deemed "indecent" may be banned from the airwaves at certain hours. During union election campaigns, the time, place and manner, and even the content of speech by employers may be regulated; certain speech during campaigns is simply prohibited. Persons deemed "captive audiences" such as public transit riders, school students, medical patients and persons enjoying the privacy of their own homes may be protected from unwanted speech, even when the speech is political, thus implicating the core values of the First Amendment.

Women and minority group members in the workplace are a captive audience in much the same way as school students, medical patients, or employees facing a union election. For example, unlike the targets of street harassment, they cannot simply walk away from on-the-job harassment. They look to their employer to protect them, just as they expect protection from other unsafe working conditions. Having forfeited a certain amount of autonomy in exchange for their employment, they take in exchange an increased expectation of protection. It is because of this exchange that the law of torts describes the employer/employee relationship as a "special rela-

13. Id. at 618. See also NLRB v. Retail Store Employees Local 1001, 447 U.S. 607, 616 (1980) (First Amendment not violated by NRLB prohibition of consumer picketing urging boycott of a secondary employer in a labor dispute).
18. See Lehman, 418 U.S. at 299, 304; Madsen, 114 S. Ct. at 2530; Frisby, 487 U.S. at 685.
tionship"—one in which the employer has a higher duty of care than would a stranger.\textsuperscript{19} Professor Volokh complains that "one should explain just where the line is drawn between those captives who can't be protected and those who can."\textsuperscript{20} One response is that the Court has supplied that answer in \textit{Gissell} and the cases that follow it, right through to the dicta in \textit{R.A.V.} Workers may be protected from harmful speech within the workplace when it interferes with an important governmental policy, such as labor peace or equal employment opportunity. But to some extent Constitutional analysis simply doesn't permit such bright lines as Professor Volokh would impose. It is in the very nature of balancing competing important interests that the lines may be hard to draw. What is easy is the conclusion that the kind of speech condemned in Title VII decisions—speech that creates a sufficiently hostile or offensive work environment that it interferes with the right of women and minority group members to equality in the workplace—belongs in the category of no-value or low-value speech.

Furthermore, the First Amendment is not the only Constitutional protection at stake when we consider the legitimacy of governmental regulation of workplace harassment. It is a sad truth that women and minority employees stand in much the same position as patients at an abortion clinic. Their rights are imperiled, and require the state's protection. For African Americans and other racial and ethnic minority employees in particular, there is a well established Constitutional, as well as a statutory, source of their right to be free from harassment. The Thirteenth Amendment, prohibiting slavery, has long been recognized to protect against not only slavery itself, but the badges and incidents of slavery,\textsuperscript{21} such as racial discrimination in employment.\textsuperscript{22} The prohibition applies not only to the States, but to private persons as well. As a result, racial and ethnic minority group members have a particularly strong entitlement to the state's protection from harassment.\textsuperscript{23}

Considering these traditional and well recognized limitations, governmental regulation of workplace harassment should not be seen as breaking new ground. There are persuasive arguments that racial and sexual harass-

\textsuperscript{19} RESTATEMENT (SECOND) OF AGENCY § 492 (1957); See, e.g., Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 218-19 (Cal. 1970) (in permitting employee's tort action against employer for racial harassment by supervisor, California Supreme Court explains that "plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants"). \textit{Id.} at 218 n.2.

\textsuperscript{20} Volokh, \textit{supra} note 2, at 315.


\textsuperscript{23} Professor Volokh and I disagree on the scope of the \textit{Jones} decision. As I read it, it affirms the position that the Congress may prohibit the badges and incidents of slavery under the Thirteenth Amendment. While this does not operate as a "repeal" of the First Amendment, see Volokh, \textit{supra} note 2, at 315, it does provide a heavy counter-balance when balancing First Amendment rights to engage in low value speech against Thirteenth Amendment rights to be free from racial discrimination.
ment, like obscenity and fighting words, is outside the scope of the First Amendment’s protection; that even if harassment is entitled to protection in some environments, it may be banned in the workplace; and that countervailing Constitutional interests in protecting minority workers justify regulating harassment on the job.

Nor should the government’s regulation of workplace harassment appear extraordinary. That the state is entitled to regulate such conduct as tortious, even when it takes the form of speech, is well established. Many torts empower the government to assess liability for verbal conduct. The tort of assault, for example, can be carried out through words alone.24 A threat of violence, accompanied by the capacity to carry it out, is sufficient to impose liability even where no physical touching occurs. Nonetheless the state may award damages against the assault tortfeasor without violating his or her First Amendment rights. The same is true of the torts of intentional infliction of emotional distress,25 invasion of privacy, defamation, and misrepresentation.26 In each case the defendants’ speech alone may properly be the basis of a finding of liability.27

These traditional expressive torts are not entirely outside the protections of the First Amendment. Each is protected from abuse by the shield of Constitutional privilege.28 As a result, the tortfeasor accused of a verbal tort is entitled to a requirement that the plaintiff prove actual fault and actual damages; strict liability may not be imposed, nor may damages be presumed.29 As I demonstrate below, the Supreme Court and Circuit Courts of Appeals have applied these requirements to limit the effect of hostile work environment law under Title VII, just as they have to defamation, invasion of privacy, and infliction of emotional distress.

It bears repeating that to prove a violation of Title VII the plaintiff must prove a good deal more than “mere words.” She must prove that she

24. See Restatement (Second) of Torts § 21 (1965).
25. See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (permitting intentional infliction of emotional distress actions, but limiting them, at least in the case of public figures, to cases in which there is a false statement of fact made with actual malice.).
26. See Restatement (Second) of Torts §§ 46 (intentional infliction of emotional distress), § 652A (invasion of privacy), § 558 (defamation), § 525 (misrepresentation).
27. A number of early workplace harassment cases were brought as common law tort claims, well before a cause of action under Title VII was recognized. See Alcorn v. Anbro Eng’g, Inc., 468 P.2d 216, 218-219 (Cal. 1970) (employee brought intentional infliction of emotional distress claim against employer for racial harassment on the job); Argarwall v. Johnson, 603 P.2d 58 (Cal. 1979) (employee racially harassed in his employment brought action for defamation and intentional infliction of emotional distress); Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987) (employee sexually harassed on the job brought action for assault and battery and intentional infliction of emotional distress). Cf. Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (employee terminated in retaliation for refusing supervisor’s sexual advances brought action for breach of contract); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (African American restaurant patron removed from buffet line because of his race brought action for assault and battery).
29. For a discussion of Gertz, see text accompanying infra notes 57-62.
suffered an actual injury, and that a reasonable person would have similarly experienced the wrongful conduct as injurious. Despite these protections, Professor Volokh is concerned that over-careful employers will prohibit conduct which falls outside the scope of Title VII, and thus censor speech that could not be regulated by the government. If we examine the practice of employment discrimination law, however, a different picture emerges.

Courts assessing Title VII workplace harassment claims consistently hold plaintiffs to a heavy burden in hostile work environment cases involving verbal harassment. Four cases from the U.S. Circuit Courts of Appeals illustrate just how difficult it is for a plaintiff to prove a verbal harassment case, and thus how well protected employers are from actions that abuse their First Amendment rights. These cases fall into two categories—those that find the harassment insufficiently pervasive to have affected the work environment, and those that find the employer insufficiently aware of the harassment to be held responsible.

An example of the first category is the decision in *Hicks v. Gates Rubber Company*, a verbal harassment case in which the Tenth Circuit considered an appeal following summary judgment for the employer. The plaintiff, a black security guard, was supervised by an employee who referred to African Americans as “niggers” and “coons.” In a comment directed specifically at the plaintiff, he referred to “lazy niggers and Mexicans.” Another security guard referred to the plaintiff as “Buffalo Butt.” The circuit court affirmed the district court’s finding that the harassment was “essentially occasional and incidental,” not rising to the level of pervasive harassment required to trigger a Title VII violation.

Similarly, in *Rabidue v. Osceola Refining Co.* the Sixth Circuit affirmed a defense judgment in a sexual harassment case in which there was substantial verbal harassment. Rabidue was harassed by Douglas Henry, a supervisor, with the knowledge of senior management. The court described Henry as “an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff.” He “routinely referred to women as ‘whores,’ ‘cunt,’ ‘pussy’ and ‘tits.’” Regarding the plaintiff, “Henry specifically remarked ‘all that bitch needs is a good lay’ and called

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30. See Volokh, supra note 2, at 310-311.
31. 833 F.2d 1406 (10th Cir. 1987).
32. Id. at 1409.
33. Id.
34. Id. at 1412-13. The court reversed the grant of summary judgment on a related claim of sexual harassment on evidence that there had been extensive unwanted physical touching. Id. at 1313-17.
35. 805 F.2d 611 (6th Cir. 1986).
36. Id. at 614, 622.
37. Id. at 615.
38. Id. at 624 (Keith, J., concurring in part and dissenting in part).
her 'fat ass.' Nonetheless, the court found that the evidence did not demonstrate that Henry's "vulgarity substantially affected the totality of the workplace."40

In a hostile work environment case, even when the harassment is found to be sufficiently pervasive to affect the conditions of employment, if the employer has not clearly been notified of the wrongful conduct it will escape liability.41 For example, in Kotcher v. Rosa and Sullivan Appliance Center,42 the Second Circuit rejected the plaintiff's argument that her employer was vicariously liable for harassment committed by its store manager under the law of agency.43 Store manager Herbert Trageser had sexually harassed the plaintiff and another woman employee, both of whom he directly supervised. He repeatedly commented on their breasts and other parts of their bodies, and pretended to masturbate and ejaculate onto them.44 Although the court agreed that this conduct was actionable against Trageser, it refused to hold the employer responsible unless the plaintiffs could demonstrate that the employer failed to take adequate steps after being made aware of the harassment.45

The First Circuit reached a similar result in Klessens v. United States Postal Service.46 Klessens testified that shortly after she started working for the Postal Service, a co-worker began making sexually explicit remarks to her about her body, and told her "if I don't get laid I'm going to take hostages."47 Another co-worker made sexually lewd statements to her, telling her she was a "nice piece of ass" despite her "small tits," and told her at length of his own sexual "exploits."48 She complained to her supervisor, who responded by making further "jokes" with her, in front of one of her antagonists, also about "getting laid."49 She then complained to her supervisor's supervisor, who declined to assist her, but commented "OK, Bill has done this before, he wrote a letter to another female that worked there, saying that he wanted to slip his tongue so far up her ass . . . ."50 The district court found the plaintiff failed to prove the existence of an offensive

39. Id.
40. Id. at 622.
42. 957 F.2d 59 (2d Cir. 1992).
43. Id. at 64.
44. Id. at 61; see also Kotcher v. Rosa & Sullivan Appliance Center, 65 Fair Empl. Prac. Cas. (BNA) 1714 (N.D.N.Y. 1992) (district court opinion below).
45. Kotcher, 957 F.2d at 64.
47. Id. at *2.
48. Id. at *3.
49. Id. at *3.
50. Id.
or abusive work environment.\textsuperscript{51} The circuit court found that this was a "close" question, but further found that Klessens clearly failed to notify the Postal Service of her harassment, thus requiring the dismissal of her claim.\textsuperscript{52}

\textit{Klessens} and \textit{Kotcher} illustrate an important distinction between hostile work environment claims and quid pro quo claims. In a quid pro quo case, where an employee's employment status is conditioned on her acceptance of sexual demands, employers are held strictly liable for the acts of their supervisors, even when the employer itself has done nothing wrong.\textsuperscript{53} By contrast, in hostile work environment cases, the prevailing view is that employers should only be subjected to direct liability; vicarious (or strict) liability has been rejected.\textsuperscript{54} The justification for the distinction is based on an interpretation of the law of agency that only treats supervisors as agents, thus capable of binding their principals, if they are top management officials or are exercising their authority to hire, fire or promote subordinate employees. Although I believe this division is ill-advised as a matter of agency law,\textsuperscript{55} it does have the effect of providing employers with substantial added protection from liability for verbal hostile work environment harassment.

The rejection of strict liability in hostile work environment cases, and the requirement that the harassment be sufficiently pervasive to actually have an effect on the conditions of employment, satisfy two of the three requirements mandated by the Supreme Court for defamation liability in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{56} In \textit{Gertz} the Court held that despite the protections provided by the First Amendment, injurious speech, even when it concerns an issue of public or general interest, may be the basis of civil liability. But in order to protect the right of free expression, the Court limited liability by requiring findings of falsehood, fault and injury; strict liability in cases subject to a Constitutional privilege is not permitted,\textsuperscript{57} nor may any liability be assessed in the absence of proof of injury.\textsuperscript{58} Professor Volokh concedes that "[i]f harassment law confined itself to false statements of fact or to other similarly unprotected forms of speech [such as threats or obscenity or fighting words], I'd have little difficulty with it."\textsuperscript{59} In other words, he has no objections to the existing exceptions, but would resist adding an analogous exception for harassment unless it was premised on false statements. Yet the falsity requirement of \textit{Gertz} merely shifts the

\begin{itemize}
\item \textsuperscript{51} \textit{Id.} at *5-6.
\item \textsuperscript{52} \textit{Id.} at *13.
\item \textsuperscript{54} See Verkerke, \textit{supra} note 41; Oppenheimer, \textit{supra} note 41.
\item \textsuperscript{55} See Oppenheimer, \textit{supra} note 41.
\item \textsuperscript{56} 418 U.S. 323 (1974).
\item \textsuperscript{57} \textit{Id.} at 347-48.
\item \textsuperscript{58} \textit{Id.} at 349-50.
\item \textsuperscript{59} See Volokh, \textit{supra} note 2, at 317-318.
\end{itemize}
burden of proof of defamation law’s defense of truth; it is the requirements of actual fault and injury that effectively protect the free speech interests in defamation cases. 60

The Meritor case and the four cases from the Circuit Courts of Appeals illustrate how the second and third prongs of the Gertz rule have been applied, in effect, to verbal workplace harassment cases. The predicate of actual injury is satisfied by the requirement that the plaintiff prove the harassment was sufficiently severe or pervasive that it actually altered the conditions of her employment. Fault is required by rejecting the imposition of strict liability on the employer. By satisfying the requirements of Gertz, the current law of hostile work environment harassment meets any legitimate concerns about the effect of Title VII on free expression. These cases also illustrate how difficult it is for a plaintiff to prevail in a workplace harassment case, and how well protected employers are from non-meritorious harassment actions. Further, they demonstrate the courts’ failure of vigilance on the issue; in each case liability could have been assessed without any impact on the right of free expression. They may thus help explain why on-the-job harassment continues to be a common problem, affecting many African Americans and other minority group members, and by some estimates over half of all working women. 61

Professor Volokh relies on a few well-chosen stories and portions of a few district court and state court decisions to illustrate his arguments. Some of his anecdotes are distressingly incomplete. Consider, for example, his two illustrations concerning religious harassment. The first, the Brown case, 62 was largely concerned with the question of whether a Jewish employee was terminated because of his religion; the findings of harassment occupied a single paragraph. 63 The second, the Sapp’s Realty case, 64 concerned an employee either fired or constructively discharged from her job 65 after she complained that her supervisor was constantly trying to convert her to his religion, and constantly demeaning other religions. 66 In both of

60. If the critical issue in harassment cases became the truth or falsehood of the harasser’s speech, the supervisor in the Rabidue case could defend himself by proving that Ms. Rabidue really did need “a good lay.” Such a test is patently ridiculous.
61. See BARBARA A. GUTEK, SEX AND THE WORKPLACE 46 (1985) (reporting that 53.1% of working women have experienced sexual harassment); Alex Kozinski, Forward to BARBARA LINDEMANN & DAVID D. KADEE, SEXUAL HARASSMENT IN EMPLOYMENT LAW at vi. (1992) (asserting that every woman who has spent substantial time in the work force has been the object of sexual harassment).
63. Brown at 558.
64. Sapp’s Realty, Ore. Comm’r of Bureau of Labor and Indus., Case No. 11-83 (Jan. 31, 1985); See Volokh, supra note 2, at 2.
65. When told she was fired, she responded that he couldn’t fire her because she quit. The supervisor insisted she couldn’t quit because she was fired. Sapp’s Realty at pp. 42-43.
66. For example, he told her that Catholic nuns were used as harems for priests, that the children of nuns were killed at birth, and that the Catholic Church was the devil. Id. at 29.
these cases the principle purpose of the evidence of harassment was to prove the motivation for the termination.

While I agree with Professor Volokh that the Murfreesboro City Hall story is outrageous, disputes over displays of public art pre-date concern about workplace harassment by many years. The censorship zealots will always find some rationale for their complaints, but the suggestion that Title VII required censorship of the painting is absurd. Neither the city attorney nor Professor Volokh can point to any court decision under Title VII in which an employer was found liable for displaying art work. The closest he comes, in a case that merits further discussion, is the Jacksonville Shipyards case.  

In Jacksonville Shipyards, three women craft workers testified about pervasive on-the-job sexual harassment. The harassment included posting many pictures of nude women, in some cases engaged in intercourse or masturbation, taken from various magazines (Playboy, Penthouse, Hustler, Cheri, Chic); posting calendars depicting nude women displaying their genitals; leaving pictures of nude women at the women’s work areas; making sexual statements to and about the women employees (“the more you lick it, the harder it gets,” “black women taste like Sardines”); making requests of them that they disrobe; solicitations for sexual acts (“lick me you whore dog bitch”); unwanted touching of various parts of their bodies (including the breasts); posting “Men Only” signs at the women’s work areas; and failing to respond seriously to sexual harassment complaints (demanding that a woman apologize for using profanity in her complaint, responding to a complaint by putting an arm around the complainant and saying “Let me blow in your ear and I’ll take care of anything that comes up,” and demanding an apology be accepted as a resolution. The women, all performing traditionally male jobs, were vastly outnumbered by the male workers; the ratio varied from 2 out of 960, to 7 out of 1,017. The shipyard had a long-standing policy of prohibiting employees from bringing newspapers or magazines to the workplace, and of prohibiting the posting of any political or commercial materials. It made an exception, however, for posting depictions of nude women or possessing magazines which included depictions of nude women.  

Plaintiff Lois Robinson, a welder, had missed many days of work due to the harassment, but because she could not specify which days were lost, her recovery was limited to $1.00 in nominal damages. It was in this context that the Court ordered the company to adopt an anti-harassment  

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68. Robinson at 1494-1499.
69. Id. at 1493.
70. Id. at 1494.
71. Id. at 1541.
policy which included a ban on sexually suggestive pictures in the workplace, essentially requiring it to treat such materials in the same manner as it treated other pictures.\footnote{Id.}

One may argue that this district court injunction was overbroad. But it is worth keeping in mind that it is the most draconian court decision under Title VII that Professor Volokh can muster. If this is the worst he can come up with, we should ask whether there is really a problem serious enough to require dismantling a significant portion of the 1964 Civil Rights Act.

In sum, Professor Volokh's concerns are not well founded. As applied by the courts, Title VII's prohibition on workplace harassment does not infringe on legitimate rights of free expression. And, given the high barriers imposed on Title VII plaintiffs, it should not have the effect of chilling permissible speech.