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DEBATE

Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment

Eugene Volokh†

Artist Maxine Henderson's painting, shown on the opposite page, was hanging in the City Hall of Murfreesboro, Tennessee.¹ An employee who saw the painting filed a sexual harassment complaint, saying the painting created a hostile environment:

"I personally find 'art' in any form whether it be a painting, a Greek statue or a picture out of Playboy which displays genitals, buttocks, and/or nipples of the human body, to be pornographic and, in this instance, very offensive and degrading to me as a woman.

Even if I wanted to personally take time to appreciate this kind of 'art,' I reserve the right for that to be my choice and to not have it thrust in my face on my way into a meeting with my superiors, most of whom are men."²

The city took the painting down, and the City Attorney had this to say:

"I feel more comfortable siding with protecting the rights under the Title VII sexual harassment statutes than I do under the First Amendment... We wouldn't permit that type of drawing or picture to hang in the fire hall. As far as I'm concerned, a naked woman is a naked woman."³

† Acting Professor, UCLA Law School (volokh@law.ucla.edu). I'd like to thank the Federalist Society and the Berkeley Journal of Employment and Labor Law for putting together this discussion, and David Oppenheimer for his thoughtful and thought-provoking comments.

¹ For those reading the article online, the painting depicts "a partially clad woman, [with] her arm over her breast, and legs crossed." Jennifer Goode, It's Art Vs. Sexual Harassment, THE TENNESSEE, Mar. 1, 1996, at 1A (quoting the City Attorney). A nipple is showing.

² Id.

³ Id.

I

THE SPEECH HARASSMENT LAW RESTRICTS

Hostile environment harassment law is a speech restriction. It can restrict religious proselytizing:4  

* A state court has found that it was religious harassment for an employer to put religious articles in its employee newsletter and Bible verses on its paychecks.5

* A state administrative agency found that an employee was religiously harassed by a Seventh Day Adventist coworker who constantly talked about religion with everyone. There was no allegation that the coworker used any religious slurs, though he did "[make] negative comments to [plaintiff] about her Lutheran faith" and did "criticize[ ] . . . [plaintiff's] personal life style." One of the reasons the agency gave for its conclusion was that plaintiff was "depressed . . a great deal" by what she described as "Seventh Day Adventism's 'pessimistic doomsday' outlook."6

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5. Brown Transp. Corp. v. Commonwealth, 578 A.2d 555, 562 (Pa. Commw. Ct. 1990). Professor Oppenheimer criticizes my description of Brown Transport as "distressingly incom-plete," because the case was supposedly "largely concerned with the question of whether a Jewish employee was terminated because of his religion; the findings of harassment occupied a single para-graph. . . . [T]he principal purpose of the evidence of harassment was to prove the motivation for the termination." David B. Oppenheimer, Workplace Harassment and the First Amendment: A Reply to Professor Volokh, 17 BERKELEY J. EMP. & LAB. LAW 320, 328 (1996).

I'm frankly puzzled by this argument. The court squarely held that the "testimony supports the [Pennsylvania Human Relations Commission]'s conclusion that [Brown Transport's] conditions of em-ployment constituted religious harassment." 578 A.2d at 562. That's a holding of the case; that's what a competent lawyer would look to as precedent in determining what may constitute harassment and what may not.

It seems to me entirely irrelevant whether the holding was embodied in one paragraph or in many; in either case, it's the holding. Nor do I see how Professor Oppenheimer can dismiss this by theorizing about "the principal purpose of the evidence of harassment." It strikes me that, when harassment is charged, at least one significant purpose of the evidence of harassment is precisely to prove harassment.

I don't dispute that the plaintiff alleged discrimination and retaliation for complaining about the Bible verses, as well as harassment. I discussed only the harassment claim, because that's the only claim relevant to my article. The court held for the plaintiff on this claim, and nowhere did it so much as hint that its holding on this claim would have been different had it held otherwise on the other claims; in fact, the elements of a harassment claim are quite different from the elements of a discriminatory firing or retaliation claim. The discussion of the harassment claim, it seems to me, is all that's needed to support my point.

6. Sapp's Realty, Or. Comm'r of Bureau of Labor and Indus., Case No. 11-83, at 47-48, 66-68, 71 (Jan. 31, 1985); see Volokh, Freedom of Speech and Workplace Harassment, supra note 4, at 1804 (describing the case).

Professor Oppenheimer makes a similar criticism of my discussion of this case as he does with regard to Brown Transport, see supra note 5. I find the criticism equally perplexing here. The Commiss-ioner of Bureau of Labor and Industries concluded that plaintiff was religiously harassed and that
Harassment law can restrict arguably bigoted political or social statements:

* "[T]he law," a federal appeals court said, "require[s] that an employer take prompt action to prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well." 7

* A federal district court has ordered an employer and its employees to "refrain from any racial, religious, ethnic, or other remarks or slurs contrary to their fellow employees' religious beliefs." 8

* Coworkers' use of job titles such as "foreman" and "draftsman," one federal court has mentioned, may constitute sexual harassment. 9 A Kentucky human rights agency has gotten a company to change its "Men working" signs (at a cost of over $35,000) on the theory that the signs "perpetuat[e] a discriminatory work environment and [are] unlawful under the Kentucky Civil Rights Act." 10

* The EEOC has charged a company with harassing a Japanese-American employee by using images of samurai, kabuki, and sumo wrestling in its ad campaign to refer to its Japanese competitors, as well as referring to the competitors as "Japs" and "slant-

plaintiff was constructively discharged. Sapp's Realty at 74-77. I focused on the harassment claim rather than the constructive discharge claim because this is an article about harassment, and because the opinion nowhere suggested that the harassment claim was in any way dependent on the discharge claim or subordinate to it. It discussed the two causes of action as what they are—two separate claims, albeit ones arising from common facts. Id. at 77-80 (discussion of legal aspects of harassment claim); id. at 80-86 (discussion of legal aspects of constructive discharge claim). One can't, it seems to me, explain away findings on one cause of action simply by pointing out that the plaintiff also won on other causes of action.

9. Tunis v. Corning Glass Works, 747 F. Supp. 951 (S.D.N.Y. 1990), aff'd without opinion, 930 F.2d 910 (2d Cir. 1991). Though the court ultimately held for the employer, it did so only because the employer took prompt action to remedy the situation. The judge strongly implied that an employer which continued to let its employees use gender-based language could be held liable. Id. at 959.
10. Andrew Wolfson, All Worked Up . . . Phone Company Called to Task over Gender-Biased Signs, LOUISVILLE COURIER-J., Mar. 3, 1994, at 1B.
eyed” in internal reports.11 The case eventually settled “for undisclosed monetary terms and other commitments.”12

* A district court has characterized an employee’s hanging “pictures of the Ayatollah Khome[n]i and a burning American flag in Iran in her own cubicle” as “national-origin harassment” of an Iranian employee who saw the pictures.13

Harassment law can restrict sexually-themed jokes, even if they aren’t at any particular employee’s expense:

* A district court found a hostile environment based in large part on “caricatures of naked men and women, animals with human genitalia, . . . a cartoon entitled ‘Highway Signs You Should Know’ [which showed] twelve drawings of sexually graphic ‘road signs’ (. . . for example, ‘merge,’ ‘road open,’ etc.),” and so on. The court noted that “[m]any of the sexual cartoons and jokes . . . depicted both men and women,” but concluded that “widespread verbal and visual sexual humor—particularly vulgar and degrading jokes and cartoons . . . may tend to demean women.” The court ultimately held that “every incident reported by [plaintiff]”—the cartoons and jokes as well as the other conduct—“involves sexual harassment.”14

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11. EEOC v. Hyster Co., No. 88-930-DA (D. Or. filed Aug. 15, 1988); see Volokh Freedom of Speech and Workplace Harassment, supra note 4, at 1806 (describing the case). There was no allegation that any of the epithets were used to refer to the complainant (though it’s understandable that he’d be offended by them). Moreover, the EEOC charge treated the ads and the epithets equally; nothing in the charge indicated that a hostile work environment couldn’t be found on the basis of the ads alone. Id. at 1806 n.74. Even if slurs used to refer to foreign businesses somehow deserve less protection, the ads seem well within the bounds of civil discourse. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71-72 (1983) (holding that even commercial speech may not be restricted based on its offensiveness). Cf. Street v. New York, 394 U.S. 576, 586 (1969) (holding that full First Amendment analysis is required if liability is premised even in part on protected speech); Thomas v. Collins, 323 U.S. 516, 528-29 (1945) (same).


14. Cardin v. Via Tropical Fruits, Inc., No. 88-14201, 1993 U.S. Dist. LEXIS 16302, at *24-*26 & n.4, *45-*46, *61 (S.D. Fla. July 9, 1993). In a similar vein, a jury recently awarded $250,000 in compensatory damages, punitive damages, and attorney’s fees for sexual harassment consisting entirely of “a series of sex-based remarks and jokes that contributed to a work environment hostile to women.” Leah Beth Ward, Zaring Jury Returns Split Decision, CINCINNATI ENQUIRER, Apr. 1, 1995, at B7; see also Complaint and Jury Demand, Black v. Zaring Homes, Inc., No. C-1-94-471, at 12 (S.D. Ohio filed Jul. 11, 1994). One of the allegations was that a female vice president “kept a menstrual chart showing when certain female employees were having their cycle.” In the vice president’s view, “the chart was a ‘hilariously funny’ response to a male’s comment that when women take their purses to the bathroom, they are on their menstrual cycle.” Leah Beth Ward, Zaring Suit Puts Gender-Based Remarks on Trial, CINCINNATI ENQUIRER, Feb. 26, 1995, at E1.

See also, e.g., Nurses Sue Ex-Boss over Bawdy Jokes, S.F. CHRON., Mar. 31, 1993 (two female ex-nurses sued “claiming the bawdy jokes told by another female nurse amounted to sexual harassment.”); Complaint, Larson v. University of Colorado, No. 94-M-1358, at 3, 11 (D. Colo., June 9, 1994) (listing as alleged harassment, among other things, various “written statements, rife with innuendo, sexual con-
Coworkers lodged harassment complaints against a library employee who posted a *New Yorker* cartoon in his work area. The cartoon, published in the wake of Lorena Bobbitt’s amputation of her husband’s penis, showed one fully dressed man saying to another: “What’s the big deal? I lopped off my own damn penis years ago.” Supervisors ordered that the cartoon be taken down. And, of course, as the introductory example shows, harassment law can apply to “legitimate” art:

* In 1991 a professor at Penn State complained that Goya’s *Naked Maja* constituted sexual harassment; the school administration removed the painting from the professor’s classroom, citing as one reason the risk of harassment liability.

* A federal court imposed liability based on workplace pornography, and then entered an injunction barring any “sexually suggestive, sexually demeaning, or pornographic” materials from the workplace:

> A picture will be presumed to be sexually suggestive if it depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.

Much art would qualify under this definition.

* At the University of Nebraska at Lincoln, a harassment complaint was filed against a graduate student who had on his desk a 5" x 7" photograph of his wife in a bikini. The employer ordered that the photo be removed.

* The 1994 *Artistic Freedom Under Attack*, a People for the American Way report, lists several other incidents where employees claimed that public art involving nudity constituted workplace harassment. In each case the work was taken down, though in two instances it was later reinstalled.
Harassment law bars any speech that is "severe or pervasive" enough to create a "hostile or abusive work environment" based on race, sex, religion, national origin, or several other categories, for the plaintiff and for a reasonable person. This isn't limited to pornography or slurs, or to nonpolitical speech, or even to bigoted speech. It can cover any speech that a judge or jury concludes is "severe or pervasive" enough to create a "hostile or abusive" environment.

What these words mean is, of course, far from clear, which might be one reason we see some of the results described above. A law that turns on vague terms such as "severe or pervasive" and "hostile or abusive" requires people "to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked. Those . . . sensitive to the perils posed by indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe." Some factfinders will conclude that religious articles in the newsletter plus Bible verses on paychecks equal a hostile environment; others won't; but the wise employer is well-advised to err on the side of caution. And this caution seems to be exactly what the law is aimed at producing: "Prevention," the EEOC sexual harassment guideline points out, "is the best tool for the elimination of sexual harassment."

What's more, though the law facially imposes liability only when the speech is "severe or pervasive," in practice employers can effectively defend themselves only through zero-tolerance policies. An employer is liable based on the aggregate of its employees' speech. If one employee puts up an offensive political poster, that's probably not enough to create a hostile environment. But if one employee puts up one poster, another puts up another, a third occasionally says bigoted jokes in the lunchroom, and a fourth sometimes makes offensive political statements in a water-cooler conversation, that might well add up to liability.

An employer can't just tell its employees "You can generally make these statements, but not when they in the aggregate are so severe or pervasive as to create a hostile environment." To be safe, it has to prohibit any individual statement that might contribute to a hostile environment.

20. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993). The other categories include at least age and disability, Eggleston v. South Bend Comm. School Corp., 858 F. Supp. 841, 847-48 (N.D. Ind. 1994), and, in some states, sexual orientation, e.g., Leibert v. Transworld Sys., Inc., 39 Cal. Rptr. 2d 65 (Cal. App. 1995). This is the definition of hostile environment harassment, which is the subject of this article. I don't discuss quid pro quo sexual harassment (in which a supervisor demands sexual favors by threatening demotion or dismissal, or by promising some benefit); quid pro quo harassment law seems to me to be entirely constitutional.


22. 29 C.F.R. § 1604.11(f) (1994).
This is why, for instance, some employment lawyers are in fact advising clients to bar all suggestive jokes in the workplace. One writes, in an article entitled Avoid Costly Lawsuits for Sexual Harassment: “Suggestive joking of any kind simply must not be tolerated . . . . At the very least, you must insist that supervisors never engage in sexual joking or innuendo; that also goes for employees who hope to be promoted into supervisory positions . . . . Nip These Activities in the Bud . . . . Don’t let your employees [p]ost pin-up photographs on the walls, [or] tell sexual jokes or make innuendos.” Another writer, in a piece called Not Sure What Constitutes Sexual Harassment? Take A Look, simply says that “If you think there’s any chance that what you are doing is unwelcome or offensive, knock it off.” And some employers are in fact enacting such broad policies.

Of course, not all harassment claims pose constitutional problems: Quid pro quo harassment, unwanted physical touching, and discriminatory job assignments don’t implicate the First Amendment. And, for reasons I explain elsewhere, I think one-to-one speech—statements made only to the offended party—can be restricted, as well: When the only listener is one who doesn’t want to hear, the speech can be restrained without interfering with the speaker’s ability to reach other, willing, listeners.

But one-to-many communication—posters, newsletters, conversations in the lunchroom involving willing (or at least potentially willing) listeners—is, in my view, fully protected by the Free Speech Clause from government-imposed restrictions such as those created by workplace harassment law. It’s odd to see that 55 years after Cantwell v. Connecticut, the Free Speech Clause would permit the imposition of liability for religious proselytizing; that 20 years after Erznoznik v. City of Jacksonville, the Free Speech Clause would let the government punish people for displaying serious paintings; that a modern court of appeals could proudly proclaim that a speech restriction properly “inform[s] people that the expression of racist or sexist attitudes in public is unacceptable,” thus teaching


25. See, e.g., Rosalind Rossi, Sexual Harassment Ban Spelled Out, CHICAGO SUN-TIMES, June 23, 1994, at 20. Other employers, of course, might well underreact to harassment claims, and tolerate much more harassment than the law allows. My only claim is that harassment law is, quite predictably, leading some employers to over suppress speech.


27. 310 U.S. 296 (1940) (holding that religious proselytizing is protected speech).

28. 422 U.S. 205 (1975) (striking down local ordinance that prohibited any drive-in movie theater from exhibiting films that contained nudity).
people "that such views are undesirable in private, as well." In my view, this can't be right.

II

ARGUMENTS FOR RESTRICTION

There's a traditional—and, I hasten to add, eminently respectable—mode of argument in favor of speech restrictions. "It is, of course, axiomatic that the right of free speech is not absolute," the argument goes (and so far I certainly agree). The speech in the case at issue is harmful, and even if it's in theory protected, "protected speech is subject to government regulation." The state may impose various permissible speech restrictions. "Considering these traditional and well recognized limitations, governmental regulation of [a particular kind of speech] should not be seen as breaking new ground." Professor Oppenheimer makes this argument specifically about harassing speech in the workplace, but the same sort of argument can be and has been made about Ice T's Cop Killer, speech defending the legitimacy of rioting, sexually explicit discussions on the Internet, or whatever other sorts of speech may be out of favor.

The difficulty, though, is that we're all repeat players in the free speech game. Today's restrictive proposal that we like will be followed by another we don't like. And as the argument I quote above shows, precedents do matter: Any time one recognizes a new exception to free speech protection, one strengthens the argument that a future proposed exception "should not be seen as breaking new ground."

Much of the speech protection we now enjoy stems from the Supreme Court's concern about this problem. The Court rejected the proposed exception for flagburning in large part because the government's theory—that the law could protect certain venerated symbols—had "no discernible or

30. Oppenheimer, supra note 5, at 321.
31. Id. at 322.
32. See id. at 323 (speaking specifically about hostile environment restrictions). Cf. Sex and God in American Politics; What Conservatives Really Think, Pol'y Rev., Summer 1984, at 12, 24 ("I don't think the advocacy of homosexuality really falls under the First Amendment any more than the advocacy or publication of pornography does." (quoting Irving Kristol)); Thomas D. Elias, TV and Radio Stations Should Be Stripped of Their Licenses If They Aren't More Responsible in Covering Civil Unrest, L.A. DAILY J., Jan. 26, 1993, at 6 (analogizing "irresponsible" coverage of the L.A. riot to "shouting 'fire' in a crowded theater"); John Hartsock, States News Service, Mar. 21, 1988 ("Just as you can't do certain things over the television and radio airwaves, you shouldn't be able to do them over the phone." (quoting a spokesman for Rep. Thomas Bililey who was discussing the anti-phone-sex-service law ultimately struck down in cable Communications Inc. v. FCC, 492 U.S. 115 (1989))); Murray J. Laulicht & Eileen A. Lindsay Laulicht, First Amendment Protections Don't Extend to Genocide, N.J. L.J., Dec. 9, 1991, at 15 ("There is no principled reason to permit the banning of material that appeals to a depraved interest in sex but not the banning of material that appeals to a depraved interest in violence and mass murder.")
defensible boundaries."\(^{33}\) The Court extended protection to profanity partly because the "principle contended for by the State" to justify suppression was "inherently boundless" and "no readily ascertainable general principle exist[ed]" to keep a ban on a few profanities from growing into more thorough linguistic cleansing.\(^{34}\) Part of the reason the Court concluded that entertainment—even entertainment in which the Justices could "see nothing of any possible value to society"—is protected was that "[t]he line between the informing and the entertaining is too elusive for the protection of [the] basic right [to freedom of the press]."\(^{35}\) The Court's caution strikes me as wise, and worth emulating.

Professor Oppenheimer makes a number of arguments for the proposition that harassing speech should be unprotected. In my view, these arguments don't conform with existing free speech caselaw, something that I'll explain briefly below and that I discuss in more detail elsewhere.\(^{36}\)

But more importantly, even if we set the existing doctrine aside, the analytical framework Professor Oppenheimer suggests strikes me as deeply threatening to free speech generally, far outside the workplace harassment context. It's all well and good to talk, as he does, of harm, of the importance of protecting captive audiences, of the countervailing force of other constitutional provisions, and of the need for compensation through tort law. But each of these principles, if read as broadly as he describes, would—as I argue below—eviscerate huge areas of free speech protection.

If one wants to support a new speech restriction without putting at risk the existing scope of Free Speech Clause protection, one has to provide a limiting principle, a "discernible [and] defensible boundar[y]," a robust explanation of why this speech is different: Why this speech deserves to be unprotected, but why at the same time the Free Speech Clause should continue to protect other sorts of speech. This, it seems to me, is the challenge facing those who argue that speech which creates a hostile work environment ought to be unprotected. It's a challenge that I don't believe they've met.

**A. Harm**

Professor Oppenheimer begins by arguing that harassing speech may be properly regarded as outside the protection of the First Amendment because—like other unprotected speech—it "caus[es] foreseeable injury" "in the form of an injurious and verifiably altered work environment."\(^{37}\) Thus,
"like obscenity and fighting words," harassing speech isn't constitutionally protected.\textsuperscript{38}

The trouble, though, is that lots of speech is harmful. The boycott in \textit{NAACP v. Claiborne Hardware}\textsuperscript{39} caused quite tangible harm to businesses and to their employees. Vicious parodies meant to inflict emotional distress on public figures may foreseeably—in fact, intentionally—cause psychological harm.\textsuperscript{40} True but unfair statements of fact about people, or unflattering opinions about them, can cause devastating harm to their reputation.\textsuperscript{41}

Abstract advocacy of the propriety of violence—for instance, of killing policemen or of rioting against the perceived oppressors—can also cause harm: As even Justice Brandeis recognized, "Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind . . . increases it. Advocacy of lawbreaking heightens it still further."\textsuperscript{42}

The Free Speech Clause case law protects these forms of harmful speech. One can argue that this is wrong—that the law shouldn’t allow speech that causes harm, and that \textit{NAACP v. Claiborne Hardware}, \textit{Hustler v. Falwell}, and \textit{Brandenburg v. Ohio} were wrongly decided. But if one approves of the protection given to harmful speech, one can’t then just argue that speech which "caus[es] foreseeable injury to another" is unprotected. One has to explain why harassing speech is different.

\section*{B. Captive Audience}

Likewise, it’s not generally the law that "captive audiences . . . may be protected from unwanted speech" even through content-based restrictions,\textsuperscript{43} and it’s good that this isn’t the law. People often can’t avoid offensive speech, in large part because in almost every environment there are employees who can’t leave their posts. When people are allowed to wear jackets with profanities on them, employees of places where these people go have

\begin{thebibliography}{9}
\bibitem{38} \textit{Id.} at 324.
\bibitem{39} 458 U.S. 886 (1982).
\bibitem{40} \textit{See} Hustler Magazine \textit{v. Falwell}, 485 U.S. 46 (1988).
\bibitem{41} \textit{See} Philadelphia Newspapers, Inc. \textit{v. Hepps}, 475 U.S. 767 (1986); Milkovich \textit{v. Lorain Jour-}
\textit{nal Co.}, 497 U.S. 1, 19 (1990) (acknowledging that opinion is constitutionally protected, so long as it doesn’t imply false factual allegations).
\bibitem{42} Whitney \textit{v. California}, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (arguing that advocacy of illegal conduct should be protected despite this); \textit{cf.} David Crump, \textit{Camouflaged Incitement}, 29 \textit{GA. L. REV.} 1, 76-78 (1994) (suggesting that rapper Ice-T’s song \textit{Cop Killer} should be considered constitutionally unprotected); Chuck Philips, \textit{North Steamed at Ice T: He Wants Time Warner to Face Sedition Charges Over Rap Song}, \textit{L.A. TIMES}, July 2, 1992, at D1 (describing Lt. Col. Oliver North’s similar views); Elias, \textit{supra} note 32.
\bibitem{43} \textit{Id.}
\end{thebibliography}
no choice but to see them. Strikebreakers are captive to picketers who march around with signs saying “Scab!”; they have to see the offensive speech every morning and every evening, and even more often if their desks face the street.

Traffic police, pushcart vendors, and people who have to come and go from nearby buildings are “captive” to street demonstrations. Gardeners in UCLA’s Sculpture Garden can’t avoid seeing the sculptures of nudes that stand there. In many (though not all) harassment cases, the employees are no more captive than the people in these scenarios. Even closer to the harassment law context, imagine a law that barred workplace speech that was harshly critical of returning veterans: Coworkers are as captive to antiveteran speech as they are to sexist, racist, or religiously bigoted speech.

If restrictions on jackets, pickets, demonstrations, sculptures, and antiveteran comments would be unconstitutional, why is existing workplace harassment law different? The analogies given by Professor Oppenheimer, “public transit riders, school students, medical patients and persons enjoying the privacy of their own homes” don’t help. In all these cases, the restrictions were either content-neutral (an important limiting principle), or involved the government acting as high school educator or as proprietor, not as sovereign (another limiting principle). The Court has in fact specifically held that even the presence of a captive audience in the home couldn’t justify a content-based speech restriction on residential picketing.

For those interested in these cases, I discuss them in much more detail elsewhere. Suffice it to say that if one wants to defend harassment law on “captive audience” grounds, one should explain just where the line is drawn between those captives who can’t be protected and those who can.

C. Countervailing Constitutional Considerations:

Neither is it plausible to distinguish harassment law on the grounds that the Thirteenth Amendment “is a well established Constitutional . . . source of their right to be free from harassment.” If Professor Oppenheimer is suggesting that the Thirteenth Amendment by itself prohibits

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44. See Cohen v. California, 403 U.S. 15, 16 (1971) (upholding the right to wear a jacket with “Fuck the Draft” written on it.)
45. Oppenheimer, supra note 5, at 322.
47. Volokh, Freedom of Speech and Workplace Harassment, supra note 4, at 1832-43.
49. Id. Note that even Professor Oppenheimer doesn’t suggest that the Thirteenth Amendment prohibits sexual harassment or religiously bigoted harassment; his argument is limited to harassment of “African Americans and other racial and ethnic minority employees.” Id.
harassing speech, there’s nothing at all well-established about that. In fact, it strikes me as remarkable to argue that the Thirteenth Amendment, which speaks about slavery with not a word about speech, in effect partially repeals the First: That racist advocacy constitutionally protected before 1866 became constitutionally prohibited (or even subject to a new constitutional balancing test\(^5\)) after. I certainly know of no court decision that has accepted such a theory.\(^5\)

Professor Oppenheimer might instead be arguing that section 2 of the Thirteenth Amendment gives Congress the power to ban harassing speech, even if section 1 of the Amendment doesn’t ban this speech by itself.\(^5\) This, though, strikes me as an even more dangerous (and far from well established) proposition.

I agree that, under *Jones v. Alfred H. Mayer Co.*,\(^5\) the Thirteenth Amendment gives Congress the power to ban the “badges and incidents” of slavery, including employment discrimination. But the point of the Bill of Rights is to constrain Congress even when it’s acting within its enumerated powers. Congress, after all, has power over vast areas. A law restricting interstate sales of the *New York Times* is within Congress’s Commerce Clause power; a tax on income from Socialist speeches is within the Sixteenth Amendment “power to lay and collect taxes on incomes, from whatever source derived”; a law restricting speech in Washington, D.C. is within the Federal District Clause power; a law barring pro-abortion pamphlets from the mail is within the Post Office Clause power. But this certainly doesn’t mean that these speech restrictions pass muster under the Free Speech Clause.\(^5\) Likewise, section 2 of the Thirteenth Amendment may give Congress the power to regulate workplace conduct, but this tells us nothing about whether the First Amendment nonetheless protects speech from this sort of regulation.

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5. Id. at 323 n.23.

51. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which held that section 2 of the Thirteenth Amendment gives Congress the power to restrict the “badges and incidents” of slavery, was careful to reserve the question whether “the Amendment itself did any more than” abolishing slavery, and didn’t even hint that the Amendment might go so far as barring certain kinds of racist speech. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288-90 (1976), also cited by Professor Oppenheimer in his discussion of the Thirteenth Amendment, likewise spoke only of Congress’s power. Professor Oppenheimer doesn’t point to any case holding that section 1 of the Thirteenth Amendment by itself prohibits even employment discrimination, much less a case holding that it prohibits harassing speech.

52. Oppenheimer, supra note 5, at 323 n.23 (stressing that “Congress may prohibit the badges and incidents of slavery under the Thirteenth Amendment”).


D. Torts

Nor can I agree that "the state's entitlement to regulate workplace harassment" as tortious, even when it takes the form of speech, is well established," so long as "the plaintiff proves actual fault and actual damages." Actually, the Constitution often protects from tort liability speech that causes damage and is said with actual fault (which Professor Oppenheimer equates with "rejection of strict liability").

For instance, as I mentioned above, if I injure somebody's reputation by truthful speech or by expressing an opinion that doesn't imply any particular facts, I'm immune from a libel action. It doesn't matter that I've actually damaged the person; it doesn't matter that I spoke knowing that my statements would cause harm. So long as I don't make any false statements of fact—which the Court has viewed as constitutionally unprotected, in the tort context or not—I'm free from liability.

Likewise, if I interfere with someone's prospective business advantage—something that would normally be a tort—by criticizing them and urging that people not patronize their business, I'm generally immune from a libel action (again so long as the speech isn't a threat or a false statement of fact or something similarly unprotected). Actual damage is irrelevant; negligence, knowledge, and intention are irrelevant. Similarly, if I say things that intentionally inflict emotional distress—with demonstrable damages—on a public figure, I can't be held liable. (The rule for private figures isn't clear.)

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55. Oppenheimer, supra note 5, at 324.
56. Id. at 324.
57. Id. at 327.
58. See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990) (holding defamation liability generally allowed only when a statement is provable as false); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (holding that plaintiff must show falsity to recover damages for defamation in suit involving a speech on a matter of public concern). These cases speak only of speech on matters of public concern. It's possible that, for instance, the burden of proof of falsity—the matter at issue in *Hepps*—might be different for speech on matters of private concern. But the Court has never suggested that, even as to statements of purely private concern, libel liability may be imposed on true statements or on pure opinion. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (stressing that the legitimacy of libel law rests on correcting the harm caused by "defamatory falsehood"); id. at 339-40 (stressing that "false statements of fact" lack constitutional value).
60. See e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-914 (1982).
62. Professor Oppenheimer's list of torts that supposedly share with Title VII the capacity to cause the government to assess liability for verbal conduct, Oppenheimer, supra note 5, at 324, shows only that tort law can impose liability for threats (assault) and false statements of fact (defamation, misrepresentation, and intentional infliction of emotional distress on public figures). The First Amendment status of intentional infliction of emotional distress on private figures and invasion of privacy is uncertain,
Professor Oppenheimer points out that harassment law "satisf[ies] two of the three requirements mandated by the Supreme Court for defamation liability in Gertz v. Robert Welch, Inc.": the requirements of fault and injury. But it fails to satisfy the absolutely crucial third requirement—falseness. Gertz held that defamation law was constitutional precisely because it punished only false statements, and false statements of fact have "no constitutional value." If harassment law confined itself to false statements of fact or to other similarly unprotected forms of speech, I'd have little difficulty with it. But sexually suggestive art, religious proselytizing, bigoted political statements, sexual jokes, and the many other kinds of speech that harassment law can restrict fall well outside of these narrow unprotected categories.

III
THINKING AHEAD

Rebuttals, of course, are not proof. I've presented the full case for my position elsewhere, and in this article, I only respond to Professor Oppenheimer's specific arguments. I hope my responses can persuade people that

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see Hustler, 485 U.S. at 56, but it's certainly far from settled that "the state may award damages [in such case] without violating" the First Amendment. Florida Star v. B.J.F., 491 U.S. 524, 537 (1989).
63. Oppenheimer, supra note 5, at 327.

I don't quite understand Professor Oppenheimer's claims that "the falsity requirement of Gertz merely shifts the burden of proof of defamation law's defense of truth," and that "it is the requirements of actual fault and injury that effectively protect the free speech interests in defamation clauses." Oppenheimer, supra note 5, at 327-328. Surely the libel cases stand clearly for the proposition that falsehood is a critical element of libel—that the government can't use libel law to punish, for instance, statements of opinion. See Gertz, 418 U.S. at 339-40 (distinguishing punishable false statements of facts from opinions, which must be corrected not by "judges and juries but [by] the competition of other ideas"); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 13-14 (1970) (setting aside libel judgment based on a statement that the Court concluded was "no more than rhetorical hyperbole, a vigorous epithet," as opposed to an allegation of fact); Milkovich v. Lorain Journal Co., 497 U.S. 1, 16 (1990) ("We have also recognized constitutional limits on the type of speech which may be the subject of state defamation actions," giving rhetorical hyperbole as an example of the type of speech that's immune from liability).

65. Cf. Jew v. University of Iowa, 749 F. Supp. 946, 961 (S.D. Iowa 1990) (rejecting free speech defense in harassment case because speech was allegedly slanderous and therefore unprotected, but suggesting that "[f]ree speech ... considerations might preclude Title VII liability if the [rumors spread by the other employees] were true").

Professor Oppenheimer argues that it would be "patently ridiculous" for "the critical issue in harassment cases [to be] the truth or falsehood of the harasser's speech," Oppenheimer, supra note 5, at 328 fn. 60, but it's only patently ridiculous if one sees no distinction between false statements of fact and other statements. I do see such a distinction: False statements of fact, fighting words, threats, and the like are unprotected speech, and I'm not particularly troubled when the law punishes them. (I likewise approve of harassment law punishing certain one-to-one statements, see supra note 26 and accompanying text.) I am troubled, though, when harassment law punishes other statements that don't fall into the narrow unprotected categories.

Cf. Hustler, 485 U.S. at 56 (similarly limiting intentional infliction of emotional distress claims by public figures to speech that "contains a false statement of fact which was made with 'actual malice' ").
66. See generally Volokh, Freedom of Speech and Workplace Harassment, supra note 4.
the case for reading harassment out of the First Amendment is not an easy case to make; but there certainly may be some arguments or some distinctions that I haven't disposed of here.

Regardless, however, of the ultimate conclusion one comes to, it seems to me we must keep in mind one basic command: Think ahead. The problem of harassment isn't just a skirmish along the peripheries of free speech jurisprudence. The precedents set here can extend far outside the workplace, and far outside "harassment" as most people understand it.

Just as Professor Oppenheimer uses the fighting words and obscenity exceptions as analogies to justify the restriction of harassing speech in the workplace, so workplace harassment law is already being used to justify the restriction of other forms of speech, from the college campus to the street corner to the airwaves. If it's permissible to restrict sexually suggestive speech at work because it "communicates to male coworkers that it is acceptable to view women in a predominantly sexual way," why is it improper to restrict such expression on television, where it doubtless causes much more harm to sexual equality? If paintings of nudes can be taken down wherever there are employees present, why can't they be banished from all public places given that there will always be some employees in any public place? If religious proselytizing or religiously bigoted speech is forbidden by workplace discrimination law, why isn't it equally forbidden by educational discrimination law or public accommodation discrimination law?

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67. See, e.g., Richard Delgado & David H. Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation, 82 CAL. L. REV. 871, 886 (1994) (suggesting that campus speech codes are proper in part because they are justified by "recognized First Amendment exception[s], such as fighting words or workplace harassment"); Cynthia Grant Brown, Street Harassment and the Informal Ghettoization of Women, 106 HARV. L. REV. 517, 544 (1993) (suggesting that some restrictions on speech in public places are permissible by analogy to "verbal sexual harassment in the workplace that falls under Title VII"); Thomas Skill et al., Sexual Harassment in Network Television Situation Comedies: An Empirical Content Analysis of Fictional Programming One Year Prior to the Clarence Thomas Senate Confirmation Hearings for the U.S. Supreme Court, presented to the Mass Communication Division of the Speech Communication Association November 1994 National Meeting in New Orleans, at 18 ("This current study has established that sexual harassment [as the authors define it] is prevalent in the popular media. . . . Ultimately, the escalation of this debate will surely test the relationship between the right to free expression and the expectation of socially responsible behavior.").


69. See Skill et al., supra note 67.

70. Cf. MICH. COMP. LAWS § 37.2103(i) (1995) (prohibiting "verbal . . . conduct or communication of a sexual nature" that creates an "intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment"); MINN. STAT. § 363.01 (1995) (same); N.D. CENT. CODE § 14-02.4-02 (1995) (prohibiting "verbal . . . conduct or communication of a
Maybe there's a good answer to these questions. Maybe there's some reason why most offensive or even harmful speech is protected, but speech that is "severe or pervasive" enough to create a "hostile or abusive work environment" based on race, sex, religion, and so on is unprotected. But before one reformulates the doctrine to allow the suppression of such speech, one ought to think both about how broad the category might be—remember Murfreesboro City Hall—and about what else the new doctrine might end up covering.

sexual nature” that “has the purpose or effect of substantially interfering with an individual’s employment, public accommodations, public services, educational, or housing environment); State Division of Human Rights v. McHarris Gift Center, 418 N.E.2d 393 (N.Y. 1980) (addressing claim by customers that a gift shop’s display of items containing Polish jokes sent message that Polish customers were unwelcome; majority rejected this claim, but three-judge dissent would have accepted it; no discussion of constitutional issue).