

CAMPUS SPEECH CODES AND WORKPLACE HARASSMENT

THIS CHAPTER addresses two particular problems concerning abusive speech: campus speech codes and harassment at work. Thus far, American courts have treated these subjects differently. Is this variation in constitutional assessment appropriate? I discuss campus speech codes and then the law of workplace harassment, offering a few final observations about speech codes.

CAMPUS SPEECH CODES

Many members of university and college communities believe there has been a dispiriting increase in hostile speech against minorities, women, and gays over the last decade. Some institutions have responded to incidents on their own campuses by adopting speech codes that set limits of acceptable discourse for academic life. The codes rely substantially on consultation and mediation, but are backed by serious penalties like suspension and expulsion for gross or repeat violations. These codes range widely in what they cover. Some limit themselves to expressions that arguably could be made criminal or tortious by the state more generally. The Stanford University Code of 1990, for example, provides:

Speech or other expression constitutes harassment by personal vilification if it:

- a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
- b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
- c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.¹

Other codes reach much deeper into what constitutes the expression of ideas in an ordinary manner, prohibiting the expression because the ideas are deemed obnoxious. As originally adopted, the University of Michigan Policy on Discrimination and Discriminatory Harassment made people subject to discipline if, in educational and academic centers, they engaged in:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
 - a) involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - b) has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - c) creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.²

Are speech codes for universities and colleges significantly different from criminal provisions for society at large? Or, are the same considerations relevant to more or less the same degree? That, perhaps, is the overarching question in evaluating university speech codes.

Three preliminary observations are in order. First, many universities are run by states; others are private. Thus far in the United States, despite very extensive government involvement in the financing of private university research and teaching, private universities have not been regarded as "state actors." Crucial to our purposes, constitutional limits do not apply to private educational institutions. Unless restricted by federal or state statutes, they may regulate their internal life as they see fit. The situation is different for public colleges and universities. All their actions, including the formulation and application of speech codes, are subject to federal and state constitutions. A student against whom a campus speech code is applied has a possible legal claim that the university has acted in an unconstitutional manner.

This difference in legal status leads to a second preliminary observation. When one asks whether university regulation of student and faculty speech is like state regulation of citizen speech, one is asking a question that is both about constitutionality and wise choice. For private universities, the issue over possible regulation is mainly one of wise choice, though some communications may violate statutory rules against discrimination. State universities must also worry about constitutionality. If

it is clear that a particular code will be declared invalid by the courts, most state universities will see little point in suffering the upset and bad publicity that accompanies such unsuccessful efforts.³

My third observation concerns the way the constitution is regarded. Sensible participants at state universities need to take a substantially predictive approach. They do not want their endeavors to backfire, as is likely to happen if courts tell them they have violated the constitution. They need to look at what the Supreme Court has said as a guide to what it and other American courts will decide. Private universities can look at constitutionality a bit differently. For them the "Constitution" may be one guide to what they as semi-public institutions should do; but they can ask about the Constitution as it *should* be interpreted, rather than the Constitution as it has recently been interpreted by the Justices who happen to be sitting.

Legislators looking at constitutional law may ask themselves yet another question: should they adopt legislation imposing the standards applicable to state universities on private universities? That will depend on whether they have reasonable confidence in the Supreme Court's development of constitutional principles *and* think these principles should be applied to private institutions.

Are universities different in a relevant way from general society? They can hardly be less devoted to the pursuit of understanding and to free discourse. Institutions connected to specific religious ideals may choose to restrict direct challenges to those ideals, but even they encourage free discourse in other domains.⁴ The basic reasons for free speech apply powerfully to life at universities. For the typical university, any basis for a less permissive approach to speech would have to lie in a greater need to curb the harm speech can cause. Most universities are self-contained communities, with a more direct concern over the lives of their (mostly young) students than the state has for its citizens. In this respect, the university fits someplace between the general society and a secondary school. It has some responsibility to assure mutual respect among its members and foster conditions in which students may learn and develop. In exercising care for its students, perhaps the university can prohibit speech that would have to be allowed in the general public.

When one sees the issue in this framework, one quickly realizes that "the university" is not a single locus of speech. Criticizing Jews in a classroom discussion or in the middle of campus is not the same as reviling a Jewish student in his room or posting an anti-Semitic sign opposite his door. Jonathan Cole's remark that "free speech is at the heart of university life"⁵ is especially true in the classroom and other public settings. A student's room is not a place where others are free to say things that deeply offend him or her.

The fundamental reasons for restricting speech that demeans on the basis of race, gender, national origin, religion, and sexual preference are the same as those we have looked at in the previous chapter. In a particularly influential article, Charles Lawrence has suggested that racism is “both 100% speech and 100% conduct,” that “all racist speech constructs the social reality that constrains the liberty of non-whites because of their race.”⁶ Lawrence writes of the immediate injurious impact of racial insults, of the absence of an opportunity for responsive speech or intermediary reflection on the ideas conveyed. The consequence for those who are the victims of such speech is an instinctive, defensive psychological reaction, leading to silence or flight rather than fight.⁷

Members of university communities have generally been more sensitive to such arguments than the public at large.⁸ Part of the reason may be that academics, who tend to be further to the left politically than the general population, are especially concerned with racism, sexism, and related phenomena. As some have pointed out, restriction of speech fits comfortably with attitudes of “political correctness,” favoring values of racial and gender equality and respect for alternative lifestyles.⁹ One can certainly believe that some hate speech should be forbidden on campuses without thinking that most controversial “right-wing” views should be labelled unacceptable. Nonetheless, those with little tolerance for others they see as insensitive to historical oppression and unjustified inequality often find slight value in speech that they believe continues that oppression.

Lawrence develops the interesting argument that *Brown v. Board of Education*, the decision requiring desegregation of public schools, was based fundamentally on the perception that legally enforced segregation conveyed a demeaning message about blacks.¹⁰ Based on this understanding, segregation itself was a kind of speech. University students who “are forced to live and work in an environment where, at any moment, they may be subjected to denigrating verbal harassment and assault” are not so unlike black children stigmatized by the message of segregation.¹¹ Given the equal protection value of eliminating messages of racial inferiority, Lawrence argues that the evils of the private deprivations of liberty caused by hate speech should be balanced against the deprivations of liberty that arise out of state regulations that seek to avert the private deprivations.¹² Even if one values free speech, as Lawrence does, this idea of a balance is bound to authorize more regulation of speech than would be possible if one assumes there is a very heavy presumption against regulation—the more standard approach to free speech questions.

People have different visions of the fundamental mission of education; private universities and colleges, and perhaps public ones to a degree, can reasonably define themselves in various ways. Three different concepts of

the objectives of public institutions of higher learning have emerged from Robert Post’s study of judicial opinions.¹³ The most traditional is “civic education.” Viewing public education as an instrument of community life, it would permit substantial limitations on speech. The second concept, “democratic education,” is much less favorable to restriction. It conceives of education as preparing students to be autonomous citizens, and entails liberties for students similar to those that citizens have, including a right to harsh and obnoxious expression. A third concept, “critical education,” sees the university as devoted to the unfettered search for truth. Those who accept this view would not permit any ideas to be suppressed because of their unacceptability, but they might impose requirements of reason and civility, forbidding harassing or personally degrading remarks.

That various private institutions, as a matter of law and sound judgment, may define their missions with different emphases is clear. They may assign civility and a socially unified community more or less importance. As I have mentioned, some may even begin from a commitment to a particular, typically religious, perspective. Universities with great intellectual standing and wide diversity need to be especially generous to free expression; but what is right for Columbia or Stanford may not be right for Brigham Young or Liberty Baptist College. It is arguable that some range of approaches is apt for public institutions as well—that some variations may be desirable or that, at least, the law should leave latitude for different judgments.

In light of different educational missions, we need to identify the genuine points of disagreement between those who want to restrict speech and those who do not. Nadine Strossen, now the President of the American Civil Liberties Union, wrote an article supporting free speech on campus in response to the article by Charles Lawrence mentioned above.¹⁴ Marshalling the arguments against regulation and urging that any viewpoint regulation is unacceptable, Professor Strossen notes that the ACLU accepts bans on assaultive, intimidating, and harassing language,¹⁵ and further indicates agreement with Lawrence that targeted harassment that seriously interferes with the learning environment may be restricted.¹⁶ What mainly divides Strossen’s “traditional civil libertarian position” from those who urge more extensive restriction is the status of deeply obnoxious ideas that are not adjuncts of harassment and the degree of danger of code formulations whose precise scope is indeterminate.

The language of the University of Michigan code, a crucial part of which I have quoted, was broad in its scope and seemed to reach into the realm of obnoxious ideas civilly expressed. That coverage was confirmed by an interpretive guide that was later withdrawn. According to the guide, sanctionable conduct included: “A male student makes remarks in

class like 'Women just aren't as good in this field as men', thus creating a hostile learning atmosphere for female classmates."¹⁷ The guide further said that someone is a "harasser" who comments "in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs."¹⁸ A graduate student in the School of Social Work was required to answer in formal disciplinary procedures for his assertions, in and out of class, that homosexuality was a disease and that he intended to develop a counseling plan to change gay clients' sexual orientation to "straight." A divided hearing panel finally determined that he had not harassed students on the basis of sexual orientation.¹⁹

A federal district court had little difficulty deciding that the Michigan code was both unconstitutionally overbroad—reaching too much protected speech; and unconstitutionally vague—too uncertain in its coverage.²⁰ In a subsequent case, another court held that the somewhat narrower Wisconsin code was also invalid.²¹ Robert Sedler, who litigated the Michigan case, has suggested that any speech code for a public university, or college, is likely to run afoul of recent free speech jurisprudence and to be declared unconstitutional.²² As Sedler recognizes,²³ *R.A.V.*²⁴ makes the prospects for state university codes much worse than they were previously. If the Supreme Court sticks to *R.A.V.*'s rigid approach to content discrimination, all the codes that implicitly treat hate speech (focused on categories such as race, religion, and gender) differently from unregulated virulent personal insults are likely to be declared invalid. Even a code that limits itself to fighting words will not be acceptable if it covers only categorical hate speech. Indeed, one concurring Justice in *R.A.V.* hinted that the five member majority may have reached out in the way that it did partly in order to indicate its disapproval of campus speech codes.²⁵ Apart from possibly persuading some members of that majority to change their minds, the practical hope for state universities that want to regulate rests in formulations that are narrow—not reaching too much expression—and noncategorical—treating vicious, deeply distressing remarks similarly, independent of whether they demean in relation to categories like race.

R.A.V. does not directly affect private universities; they are not constitutionally bound to behave as are most state agencies. One may well think, as I argued in the last chapter, that *R.A.V.*'s rigid approach to regulations of categorical hate speech is indeed *too rigid* as a matter of constitutional interpretation. A private university may reasonably decide that Justice Scalia's opinion carries no strong moral force for what it should do.

Speech codes certainly should not be embraced with enthusiasm. If a peaceable, respectful, and nonoppressive campus life can be maintained

without a code, that is far preferable to introducing a regime of formal regulation. A speech code is a response to some kind of breakdown in civil life. If one seems necessary, the choice whether to cast it in terms of categories of hate speech or to cover all extremely abusive remarks is difficult, subject to considerations raised in the last chapter and to particular experiences in the university involved.

If major diverse universities are to discipline hateful remarks, the compass of those forbidden remarks should be narrow. As I have mentioned, the locus of remarks matters. Even more importantly, expressing ideas is not the same as provoking a fight or seeking to injure. Campus speech codes, if they must exist, should be directed primarily and carefully at the intentionally injurious use of speech.

Should Congress (or a state legislature) enact a law subjecting private colleges and universities to the same standards as apply constitutionally to public colleges and universities? This issue was sharply posed by a bill in Congress, the Collegiate Speech Protection Act,²⁶ that made for strange bedfellows. Sponsored by Henry Hyde, a conspicuous conservative and a vociferous opponent of "political correctness," it was supported by the American Civil Liberties Union. Even if one favors robust latitude for speech, there are good reasons to oppose this step. One is the appropriate diversity that exists among colleges and universities. If public and major private institutions do not restrict speech much, or at all, beyond what the state may do in respect to ordinary citizens, there should be room for colleges and universities that perceive their functions differently, that seek to create a fairly close community of people with similar outlooks. Further, as Frank Michelman, argues, even if one focuses on the conditions of democracy and the autonomy of citizens, whether regulation of racist speech is helpful or unhelpful is genuinely uncertain.²⁷ Some universities may reasonably decide, from these perspectives, that more restriction is appropriate than courts will allow for public institutions. Overall, he says, democracy may best be protected if universities have a range of choice, at least if their own internal governance on these matters is fairly democratic²⁸ (a condition that is certainly not met at many institutions). It does not follow, of course, that private institutions should have *carte blanche*. Were the conditions of free discourse to be seriously undermined at major private colleges and universities, the government would properly step in to correct things.

WORKPLACE HARASSMENT

In the United States, the law of employment discrimination has been developing outside the mainstream of ordinary free speech jurisprudence. At the workplace, words of supervisors or fellow employees that con-

demn on the basis of race, gender, or religion may be deemed harassment. Employers that permit an environment in which harassment occurs are guilty of employment discrimination. Courts can impose a range of remedies including injunctions against offensive behavior.

Basic Standards

The law of workplace harassment has grown mainly out of the federal statute, Title VII, which prohibits discrimination in conditions of employment by race, religion, national origin, and sex.²⁹ Most states have analogous statutes against discrimination, and these have also been a source of decisions on harassment. The simple theory is that various kinds of harassment at work can become bad enough so that an employee suffers discrimination in employment. The employer is directly responsible if upper management engages in harassment; alternatively, and more commonly, the employer is responsible because higher officials learn, or should have learned, about the harassment and have failed to take effective steps to stop it.

The great majority of cases have involved sexual harassment, but harassment based on race, religion, or national origin is also impermissible.³⁰ I shall concentrate primarily on sexual harassment, assuming that the victim is a woman. Some important forms of sexual harassment have no obvious parallel in the other categories: e.g., “Have sex with me or I will make sure you are never promoted.” Other forms do have parallels—“Women are too stupid to handle this job”—and what I say about those forms applies to the other categories of harassment as well as sexual.

The elements of a Title VII violation are: (1) the employee belongs to a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex (or other relevant category); (4) it affected a condition of employment; (5) the employer knew or should have known of the harassment and failed to take prompt remedial action; and (6) the employee acted reasonably under the circumstances.³¹ An example of a case in which the alleged harassment did not fit these requirements involved a woman who asserted that her male supervisor spoke about his homosexuality and tried to draw her into conversations about sexual preference.³² The court said that since such comments did not single the woman out because of her sex and might be as disturbing to men as to women, they could not constitute harassment forbidden by the statute.

Sexual harassment takes two discrete forms, only one of which generates serious First Amendment questions. One form is called *quid pro quo* harassment; it typically involves conditioning someone’s employment position on her sexual involvement. When a supervisor says, “I am going to

fire you unless you make love to me,” that amounts to *quid pro quo* harassment. As I have explained briefly in chapter 1, this kind of threat alters the situation of the listener. It presents her with a new and potentially disturbing choice—whether to engage in unwelcome sexual relations or lose her job. Such situation-altering utterances³³ are not the sort of speech that warrants protection under a guarantee of free speech. A similar conclusion is warranted if speech is not explicitly *quid pro quo*, but the superior humiliates the employee so she will agree to sexual involvement.

The second form of harassment, the one that concerns us here, is “hostile environment” harassment. It exists when men treat a woman so badly because of her gender that the working environment becomes hostile or abusive. Contrary to what some other federal courts had suggested, the Supreme Court has indicated recently that when conduct is severe or pervasive enough to create an abusive working environment, the conduct violates the statute even if it has not affected the employee’s psychological well being.³⁴ The standard is whether “the environment would reasonably be perceived, and is perceived, as hostile or abusive”;³⁵ a court can make that determination only by looking at all the circumstances.

The Supreme Court did not speak directly to the perspective from which reasonableness should be gauged. In a case involving pathetic but disturbing love letters sent by one employee to another, the Ninth Circuit Court of Appeals said that the standard for what conduct amounts to harassment is that of a reasonable woman (or victim) rather than of a sex-blind reasonable person.³⁶ Noting that sex-blind standards tend to be male-biased and that Title VII is not a fault-based tort scheme but is designed to prevent abusive conditions of employment, the court defended its decision to classify “conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.”³⁷ The Supreme Court has not followed this lead, instead speaking of an environment “reasonably . . . perceived” as hostile or abusive.³⁸ Probably this language is better understood as avoiding the issue of whether a standard should focus on a “reasonable woman” or a “reasonable (sex-blind) person,” rather than resolving the issue in favor of the latter approach.

Free Speech and Harassment

Hostile environment harassment may or may not involve expression. If a boss continually fondles his secretary, that would amount to harassment and would present no free speech issue. In most cases, however, expressions of various sorts make up at least part of the claim that a woman has been harassed. Men may request a sexual relationship or direct sexually

explicit or degrading speech at the female employee, or they may engage in sexually explicit or degrading speech that is not directed at the woman but is seen or heard by her.³⁹ One writer has suggested that such speech conveys either a hostility message—women are not welcome in the workplace or are generally deserving of scorn; or a sexuality message—women, or this woman, are viewed in a sexual light.⁴⁰ These two messages are not, of course, always distinct, and some comments may convey both messages. Many expressions are very crude, such as the verbal comment, “You are a dumb ass woman,”⁴¹ or blatantly pornographic calendars in the workplace.

Other expressions fall more nearly within the range of the ordinary, such as a civil comment that, “women are not suited for the kind of work we do.” Such civil comments do not figure prominently in cases where courts have found sexual harassment at the workplace, though isolated remarks may fit into this category. In one case, a state court found that the printing of bible verses on paychecks and the inclusion of Christian religious content in the company newspaper constituted religious harassment of an offended Jewish employee.⁴²

No one doubts that speech of various sorts can create a working environment that a woman reasonably experiences as hostile. Furthermore, no one doubts that even civil expressions, as in a company newsletter, can contribute to such an environment. Were all workplace speech held irrelevant to harassment, men could make working conditions extremely hostile for women, and drive many of them from their jobs. If women are to be treated equally in the workplace environment, restricting harassing language is very important. On the other hand, expressions of opinion and feeling are normally protected against government restriction by the First Amendment, even when the speech disturbs others. This is the constitutional problem about hostile environment harassment. It is most sharply posed by civil expressions on serious topics that may nonetheless contribute to an abusive work environment. Although such expressions form at most a very small part of claims of harassment that have been pressed thus far, I pay substantial attention to them. If one can arrive at an understanding of how they should be treated, one is in a better position to evaluate the place of the more rude and vulgar fare that composes actual harassment claims.

First, we need to answer a preliminary question: Why does restriction of speech by private employers raise any First Amendment question? After all, private employers are free to restrict what their employees say to one another without constitutional limit; why can't the government require private employers to do what they may do on their own? Especially if the employer claims no interest in expressing itself, where is the consti-

titutional difficulty? The answer is straightforward. The government cannot ordinarily restrict speech. If its law requires someone (the private employer) to restrict the speech of someone else (the employee), it (the government) is restricting the speech indirectly. The law requiring such restriction is, therefore, subject to constitutional limits.⁴³

Second, I want briefly to address another preliminary matter: the use of expression in a claim of harassment. Speech may be presented either as constituting or contributing to harassment, or as *evidence* of the significance of independent behavior that may be harassing. As the Supreme Court has recently reaffirmed, no principle of free speech precludes the use of what someone has said in order to understand their actions.⁴⁴ Suppose male road construction workers urinate in the gas tank of a female co-worker, and subsequently claim that their “practical joke” had nothing to do with gender, only with the personality of their victim.⁴⁵ Proof that the same workers had “incessantly referred to the [victim and others] as ‘fucking flag girls’”⁴⁶ could amount to significant evidence that the victim's gender was an important basis for the “joke” and was reasonably perceived to be so by her. The use of expression that raises the primary constitutional question is not this evidentiary use to interpret other behavior; it is *counting the expression itself* as part of what amounts to harassment.⁴⁷

Constitutional Factors

Most speech that has contributed to findings of a hostile workplace is constitutionally protected in some sense. The sense is that the government could not treat similar remarks as criminal or tortious if they were uttered in a public place before a general audience. Either the law of workplace harassment is out-of-kilter with general First Amendment doctrine or there is something special about the remarks in context. I will explore various reasons why the First Amendment may not apply, or may not apply with full force, to abusive categorical remarks in the workplace, finding some of these reasons to be markedly stronger than others. I will then draw conclusions about how much workplace speech should be protected and what the significance of that protection should be.

A FORMALIST ARGUMENT FOR A RELAXED STANDARD OF REVIEW

One way to look at the law of workplace harassment is that it is not *really* about speech at all, it is about discrimination. Language in *R.A.V.* suggests the following possibility.⁴⁸ Title VII is not directed at expression; it forbids all discrimination according to membership in the named categories. If a law is not directed at speech, but speech is one means by which

the law can be violated, the harm of content regulation of expression is avoided. The appropriate mode of analysis becomes the familiar approach of *United States v. O'Brien*,⁴⁹ which deals with situations in which speech violates laws not directed at expression. Although *O'Brien* involved symbolic speech (burning draft cards), it should not matter whether the speech actually engaged in is symbolic or ordinary verbal comments. If the government is not aiming at expression, it may prohibit violative speech by satisfying the relatively easy *O'Brien* test.

Whether the Justices who joined the Court's opinion in *R.A.V.* are actually persuaded by this argument, with each of its necessary steps, is unclear. In that opinion, Justice Scalia distinguished the law of workplace harassment from the hate speech ordinance that was being struck down, but his language was too elliptical to clarify a general approach to harassment.⁵⁰ It is plain that both the majority and the concurring Justices, who implicitly presented Title VII law as an instance of appropriate classification by content,⁵¹ are favorably disposed to restriction of verbal harassment. This disposition is confirmed by the autumn 1993 case in which the Supreme Court formulated the basic standard for a hostile work environment.⁵² The claimed harassment consisted almost entirely of verbal abuse by the company's president directed toward a female manager, yet the Court did not evince any First Amendment worries.

Workplace harassment, nevertheless, is not like the problem the Court formulated for itself in *United States v. O'Brien*. The government's interest in preserving draft cards, or so the Court said, had nothing to do with the message of draft card burning. Comments that harass at work are restricted precisely because they convey a disturbing message. The government is regulating the content of messages because the content of some messages amounts to or promotes discrimination. The regulation of speech is far from incidental; speech is restricted because of its communicative impact. As Eugene Volokh has suggested,⁵³ the relation between the tort of intentional infliction of emotional distress and instances of distressing speech is a much closer analogue to the relation between a law against discrimination and instances of abusive remarks than is the relation of statute and violation considered in *O'Brien*. The Court has assumed, correctly, that when distressing remarks at the heart of a tort action are claimed to be protected by the First Amendment, *O'Brien* does not dispose of the problem; a court must employ other First Amendment approaches to see if restriction is permissible.⁵⁴

There are various policy arguments why workplace speech is appropriately subject to greater regulation than speech in public. I shall look at a number of these in turn, beginning with the assertion that workplaces are for work, not public discourse.

WORKPLACES ARE FOR WORK

Can it plausibly be said that restrictions on workplace speech are not significant because of the purpose of workplaces, and because people can indicate their views elsewhere? In our society, only a small percentage of people are active in true political spheres. For many people, the workplace is a main locus of discussion about public affairs and matters of personal significance. Free speech has strong relevance for workplace communication, as it does for communication among families and friends. The scope of free speech is not limited to discourse in some public space.

The constitutional status of personal conversation is not entirely settled. Addressing a case in which an off-duty policeman flirted with a local college student and gave her a ride on his motorcycle, Judge Richard Posner wrote for the Seventh Circuit that "[c]asual chit-chat" among two or a few people is not protected by the First Amendment because it is not sufficiently related to the free marketplace of ideas.⁵⁵ Earlier the Supreme Court had unanimously concluded that a teacher's criticizing school policies in a private meeting with the principal was constitutionally protected.⁵⁶ The "marketplace of ideas" definitely includes private discussions as well as public ones. Discussions within workplaces about whether women are suited for particular jobs are as much within this marketplace as are speeches or letters to newspapers on that topic. What of serious conversations about more personal matters? These matters are of great importance in people's lives. Moreover, one of our primary sources of understanding about general subjects is our conclusions about things that bear directly on our lives. Our belief, for example, about whether people are widely dishonest will be based largely on our distillation of our own personal interactions. Thus, discussions of our personal affairs with others are crucial to our arriving at general opinions. In human life, personal and general subjects are intermingled, and the First Amendment should protect our explorations of both.

One version of the "workplace argument" is that work, as Rodney Smolla has put it, involves "statements of transaction" and that the application of the First Amendment, therefore, is less strict for the workplace.⁵⁷ Smolla's core idea of "statements of transaction" is very close to what I have called situation-altering utterances, remarks that do something rather than tell something. Comments such as "Plug that hole" or "Please type this" are situation altering or transactional. Smolla is right that free speech has little to do with these, which are common in settings of work. What does not follow is that other speech that occurs in the workplace should suffer a reduced status. My secretary and I have now

known each other for about a decade. We chat about various personal matters and contemporary events. There is no evident reason why those conversations should enjoy lesser protection because we also have transactional conversations and because the basis for our relationship is work. Of course, "ordinary remarks" can sometimes convey subtle messages about how business will be transacted, but these problems are not properly dealt with under some general principle that all speech in "transactional settings" deserves less protection.⁵⁸

SPEECH THAT DISCRIMINATES

A close cousin of the argument about transactional speech is an argument that some speech not only favors discrimination, it directly discriminates. This suggestion, made by Marcy Strauss,⁵⁹ has substantial merit; but it does not cover all workplace speech that is regarded as harassment. Suppose a plant manager said to a worker, "You needn't apply for the supervisor's position because we would never promote a woman to that." Whether or not the manager is accurately stating what would be done if the woman went ahead and applied, his speech is already a form of discrimination in employment. It tells the woman that any application would be useless and it would, in fact, discourage most women from bothering to apply. It is discrimination not mainly because of any message about the inferiority of women, but because it already treats women differently from men in the promotion process. Although the example is not quite so stark, something similar is involved if a boss says, "I am not going to treat you equally with other workers because you are a woman." The employee is being informed that she should bring different expectations to the job than would a male employee. She is already suffering discrimination. But suppose the boss says, "I think women belong at home and certainly shouldn't be doing this work, but now that you are here, I will do my best to treat you as I would any other employee." Here the woman may be disturbed to be working for such a man, but what disturbs her is her knowledge of his opinions, not an incipient difference in treatment from men.

The significance of what co-workers say will depend on their relation to a woman worker. If they actually work with her *and* they make clear they will not work cooperatively with her, their words amount to differential treatment on the basis of sex. (At least if supervisors have not acted reasonably to stop the behavior, the responsibility for this differential treatment may be placed on employers.) If the male co-workers express opinions but these have no evident bearing on working relations, that kind of differential treatment has not occurred. Again, the woman may be disturbed by having to work with men who find her presence congenial, but that is because their expressed opinions distress her.

We now face a crucial question about workplace harassment. If it is true that people are uncomfortable and find work more difficult when they are reminded that fellow employees do not respect them and resent their presence, why shouldn't comments to this effect also be regarded as a form of discrimination? With slightly fuller development, the argument might look like this.⁶⁰ Demeaning comments can affect working conditions in a negative way. They put women in the position of having to leave jobs or to accept unfavorable working conditions. This is a "discriminatory" harm that properly concerns the government. Workers can be required to act reasonably to avoid this harm. Acting reasonably may involve not speaking words that cause the harm, even when one's speaking of the words would constitute an honest expression of opinion.

This argument might be proposed as limited to the workplace (and perhaps similar) settings or as a general approach to speech. Acceptance of the argument as a general approach would radically alter First Amendment analysis. Words spoken or written could be treated as discriminatory if they predictably made living in the society significantly more uncomfortable for members of some groups. Speakers would no longer have a nearly absolute freedom to express their honest opinions on sensitive topics in an emotionally powerful way. I shall assume that the argument is not to be taken in this broad way, but rather as claiming that the closeness of relations at work and the cost of a woman's leaving her job make demeaning language discriminatory in that context. In this view, the balance of freedom to speak and power to regulate to avoid harm is quite different for words at workplaces than for words spoken by members of the public in their general relations.

I shall return to this fundamental issue below. Here I conclude that the issue is obscured if all demeaning speech is simply regarded as indistinguishable from active discrimination that involves an actual or prospective difference in treatment. Basic notions of freedom of speech require drawing some line between comments that are fundamentally expressions of opinion and feeling and those that actively discriminate. This effort at classification is by no means simple in workplace settings, but treating all sexist speech as actively discriminating would be a mistake.

TIME, PLACE, AND MANNER

The First Amendment permits regulation of the time, place, and manner of public speech such as demonstrations. But, with limited exceptions,⁶¹ a fundamental principle of acceptable regulation is content neutrality; the government cannot prefer some messages over others. Furthermore, no time, place, and manner discussion has suggested that ordinary conversations can be restricted by the government because people are free to express themselves in other settings. Since restriction of workplace ha-

nessment is far from content neutral and much of what is covered is conversational discourse, standard time, place, and manner principles do little to support restriction. Insofar as focus on time, place, and manner draws attention to special features of the workplace setting, these are better considered under different headings.

CAPTIVE AUDIENCES, CAPTIVE SPEAKERS, AND PERSONAL PRIVACY

One of the most fruitful inquiries about workplace speech focuses on the fact that employees are a kind of captive audience. Workers cannot simply walk away from speech they do not like. No doubt, they can quit, but many workers are not assured of finding comparable employment. Also, women recognize that sexism is a pervasive problem and that frequent resignations will not enhance their employability. They have a strong incentive to "stick it out."

Since workers are a "captive audience," can they be protected in ways that would not be appropriate were they free to walk away? Various Supreme Court cases lend some support to this theory. In *Rowan v. United States Post Office*,⁶² the Court upheld a statute that allowed householders effectively to stop the unwanted receipt of sexually oriented ads through the mail. A regulation prohibiting the use of highly vulgar language on radio was held permissible in *FCC v. Pacifica Foundation*.⁶³ In *Frisby v. Schultz*, the Court sustained a law that forbade picketing outside residences.⁶⁴ These cases protect people in their own houses, but some extension to the workplace may be warranted.

Captive audience arguments need to be understood in two dimensions. One relates to what goes on in the workplace generally: calendars and notices on walls, conversations overheard, and so on. Here the captive audience concern runs up against a countering "captive speaker" concern. When people are working, the only place they can express themselves is within the workplace. The speakers are no more free to go elsewhere than the audience. If I spend most of the day in the office and I like to look at provocative pictures of nude women, there is no substitute for my hanging such pictures on my office wall or putting them on my desk. Perhaps my claim to be free of government regulation is diminished somewhat by the fact that my employer could insist that I not display pictures, but I am no less a captive at work than other workers who may enter my office and be offended.

A narrower captive audience, or personal privacy, argument concerns remarks directed at a particular person. I would like to approach this argument obliquely by asking whether, more generally, freedom of speech involves the right to address remarks to someone who is your only audience and has let you know that she wants you to stop. This is arguable.

If I hang up on a telephone caller and tell him not to call back, he has

no First Amendment right to keep calling. Statutes make it criminal for people to place telephone calls for the purpose of harassing others, and there would be no constitutional difficulty in a law that forbids calling someone who has let you know they definitely do not want you to call. I believe this absence of a right to impose on an unwilling listener should be viewed more extensively. If I am walking on a sidewalk and someone starts talking to me and I say "please stop," and he continues, following me wherever I turn, I probably now have a right to get a police officer to stop him from bothering me. If I do not now have that right, the creation of such a right would not violate principles of free speech and the First Amendment. As the Supreme Court said in *Rowan*, "no one has a right to press even 'good' ideas on an unwilling recipient."⁶⁵ I am inclined to think the constitutional principle is the same if I have let someone know at our last meeting that I really do not want to be addressed by him again. He has no constitutionally protected right to speak to me when we next meet each other on the street.

How does this analysis apply to the workplace? The worker cannot go anyplace else, nor can she foreclose communication entirely, because speech with others is essential to work. But suppose she has said she does not want to hear certain kinds of remarks. A legislature may protect her interest in being free of specific communications directed at her that the speaker has been told are deeply offensive to her. That interest may be viewed as canceling any right the speaker would otherwise have to speak the remarks to her.

A problem remains with this analysis. It would be one thing to give all workers a right to be free of remarks (not directly related to work) they have told others are deeply offensive to them. But the law that has developed out of Title VII is not content neutral in this way. It gives people a power to stop harassing and offensive speech only when it fits into particular categories.⁶⁶ Whether this kind of content distinction is warranted depends on the reasons that support it, a subject to which I will shortly turn.

LOW VALUE SPEECH

Another argument for restriction is that "low value" speech is mainly involved. Here one must distinguish among kinds of speech. Some photographs on display fit the Supreme Court's definition of obscenity or are sexually explicit enough to fall within a category that is less than obscene but without full value in the Court's jurisprudence. Some comments may amount to fighting words or are so personally abusive they might constitute grounds for a tort action for intentional infliction of emotional distress. These comments also have less than full value. What of a vulgar sexual remark, such as "Hey bitch, your ass is looking sexy today"? This

hardly seems a serious expression on any public or personal matter (though, in context, this could represent the beginning of a serious invitation to sexual involvement). The remark does, however, crudely express both the ideas that women are primarily sexual objects and that this woman is sexually attractive. The Supreme Court has rightly suggested that crude speech sometimes expresses intensity of feeling better than polite discourse, and that the First Amendment protects crude, as well as genteel, speech.⁶⁷ But in this instance, crudeness may be used to demean the listener. A plausible claim of "low value" speech for comments like this must rest not alone on crudeness and offensiveness but on the purpose to demean.

Some expressions that might contribute to a hostile environment are serious remarks like, "women are not fit to be firefighters." At least if these reflect ideas honestly held, they are not low value speech in the relevant sense. They may be badly misguided and retrogressive, but the constitutional categories of low value speech do not make judgments about the specific ideas asserted. Part of the basic notion of free speech is that the state cannot relegate expressions to a domain of less protection based on a negative judgment about the content of the ideas.

An aspect of the expression of such ideas that the cases reveal, however, can lead to a plausible claim of "low value." Often, the idea of female or racial inferiority is repeated day after day to just the person who will be hurt by it. One feature of the status of the unwilling listener is that ideas are usually of little benefit when they are repeated to listeners who definitely do not want to hear them. Repetition is commonly, though not always, a sign that the speaker is less interested in persuading the listener or indicating his own opinion than he is in putting down the listener. Humiliating people is less deserving of protection as speech than the genuine expression of thoughts and feelings.

As with some previous arguments for lesser protection, the argument about "low value" speech faces the content discrimination problem put by *R.A.V.* Even if the scope for regulation is otherwise expanded because speech has low value, can the law engage in content discrimination?

WORKPLACE ETIQUETTE AND EQUALITY

I have put a very serious argument about workplace speech under the "light" title of "workplace etiquette." The argument is that the law can assure appropriately civil communication among people at the workplace. So far, I have compared the government's power to control speech in the public space with its power to control workplace speech. But this is not the only relevant comparison. One might begin by asking what speech the government can control in its own workplace. Cases establish that the government's power to censor its employees, or to make speech

the basis of discharge, is less than that of private employers.⁶⁸ The government cannot forbid speech about general ideas or about how the workplace is operating, but it *can* forbid speech that interferes significantly with working relations. No one doubts that the government as employer could discipline or fire employees for continually demeaning subordinates or co-workers. Assuring a modicum of civility and mutual respect is essential for smooth work. Furthermore, since the government may not, constitutionally, discriminate on the basis of race, gender, or religion, it has a basis to forbid comments that demean people in those terms as an aspect of its power to prevent a discriminatory workplace. An I.R.S. supervisor who continually told an employee, "Hey bitch, your ass is looking sexy today," could be fired. Reflection on this example reveals a large gap between what the government can restrict as an employer and what it can restrict for citizens in the public space.

Is there good reason to suppose that the government should possess the same power over private employers that it exercises as an employer, rather than its more limited power in regulating the general behavior of citizens? The government has some interest in effective working conditions; but this concern can largely be left to the judgment of private employers. The government has a greater interest in equality in the workplace, since that equality is so central for genuine equality of citizenship. The government appropriately assures equality in the workplace, and restriction of categorical harassment is an important means of doing that. When one asks how severe an infringement of speech this power involves, it is significant that both the government and private employers will often restrict demeaning speech in their own workplaces. Employees have no *right* in any workplace to demean subordinates and co-workers. A lot of abusive speech does occur, but it could be the basis for discipline or discharge. We might think of showing a minimum of respect for fellow employees as a normal condition of employment. What Title VII does is to enforce this minimum in respect to categories of abuse that are of special concern for federal and state governments.

Standards of Review and Applications

As we have seen in previous chapters and with respect to campus speech codes, it matters what constitutional standard of review a court uses, although one suspects that on some occasions the Supreme Court decides the outcome and then formulates a standard of review accordingly, rather than vice versa. The previous discussion of workplace harassment shows why the task here is not easy, because different kinds of speech may count toward a finding of a hostile work environment.

I shall first consider the standard of review for restricting various kinds

of speech that constitute workplace harassment. I have suggested that speech that dominantly *does* something, agreements, threats, etcetera, rather than *says* something is not the sort of speech that the First Amendment protects. I have also suggested that speech *mainly* designed to humiliate has slight expressive value and should be placed in the category of speech that “does” rather than “says.” It follows for this chapter that abusive comments directed at an employee and intended to intimidate her, to drive her from her job, or to make her acutely uncomfortable should not enjoy significant protection. If this speech, a high percentage of what figures in actual harassment cases, is viewed in isolation, the government should be able to restrict it upon a modest showing of need.

Other kinds of speech may be deemed of low value. Provocative nude calendars fit into this category; so also does crude sexual innuendo. Low value speech may be regulated on some lesser showing than a compelling interest.

Finally there is speech about ideas and feelings whose content cannot be relegated to a category of low value. An honest remark that “they made a mistake allowing women to be construction workers” would be of this kind. For this speech, does the government need to satisfy a compelling interest? I think the answer is “yes,” *if* the speech is uttered occasionally, and in a genuine attempt to convey one’s thoughts and feelings, to someone who has not labelled herself an “unwilling listener.”

Repetition in the face of complaint is another matter. Suppose a construction worker tells a newly hired female co-worker each day when she arrives at work, “You know, they never should have allowed women in these jobs,” and continues to do so after, she complains that the comments disturb her. I have suggested that people have no constitutional right to impose speech on those who have expressed their unwillingness to hear it (when *only* unwilling listeners are involved). Exactly how to conceptualize this conclusion is complicated. One might view preventing such privacy-intrusive speech as itself satisfying a compelling interest or one might view the privacy of the listener as removing the speech from the category that requires any compelling interest for regulation. In either event, the practical point is that the government need not show any independent compelling interest to regulate. Its aim to protect the listener’s privacy is enough.

Furthermore, when someone offers opinions day after day to an unwilling listener, as in the construction example, an outsider may often draw the inference that the person is *aiming* to annoy the listener, or, at the least, is grossly indifferent to the listener’s feelings. Although the point is debatable, when no genuine communicative purpose is likely to be served in a situation, gross indifference to the previously expressed feelings of the only listener should be sufficient to put speech into the

same category as speech that is actually designed to annoy. Sometimes an inference of gross indifference is not warranted. A nonsmoker concerned with a smoking listener’s health or a devout religious person concerned with a listener’s salvation may continue to pester the listener in the hope of finally “getting through.” Most repeated statements to women that women are ill-fitted for a kind of work are not of this type. In context, they do warrant an inference of a purpose to annoy or of gross indifference.

If my analysis so far is sound, some speech that might contribute to workplace harassment should be subject to a compelling interest test, but the vast majority of what is actually spoken should not be subject to such a strict test. *One* possible conclusion would be that so low a percentage of actual speech in the circumstances might qualify for stringent protection that the courts should employ a lower standard for all possibly relevant speech; but that conclusion would be mistaken. If some speech deserves a status of full value under the constitution, it should be given that status. Courts can assess speech in particular cases to judge whether it has that status.

A more principled argument can be made that no speech contributing to unequal working conditions has full value.⁶⁹ This argument is a close analogue of the argument, already examined, that all such speech discriminates. Speech honestly expressing opinions and feelings can help make a woman experience her working environment as hostile, because she is told that those around her devalue her. Since women often cannot leave one job for another job that is equally good and is without hostility, society has a serious interest in preventing hostile comments. All hostile comments *do* something as well as *say* something even when they express honest opinions. Supervisors and co-workers have a responsibility to speak reasonably and not to inflict these negative feelings on women. The proper constitutional analysis is to balance expressive interest against likely harm contextually, *not* to assume that some category of speech enjoys nearly absolute protection. A supplementary reason for this approach is that divining whether speakers intend to humiliate or are merely insensitive is too difficult an inquiry for courts.

As I mentioned with respect to the “hostile speech is discrimination” argument, adopting the argument as a general approach to First Amendment problems would significantly reduce constitutional protection. Various forms of speech would be vulnerable to plausible claims that they do more harm than good and that a reasonable speaker would refrain from them.⁷⁰ The argument has much greater persuasiveness if limited to the workplace, with all its special features. Nevertheless, the wiser course is for courts to use standard free speech analysis insofar as they can, even for the workplace. Thus, I conclude that focus on whether *the speaker is*

aiming to do something or express something should be of importance *and* that when the speaker is mainly aiming to express something (to an audience that is not clearly unwilling), the government should need a compelling interest to regulate.

I have thus far omitted two other major issues. The first involves the relatively straightforward problems of overbreadth and vagueness. Will any actual standard to restrict workplace harassment cover too much protected speech to be acceptable? For this overbreadth question, the critical question is how much covered speech is finally protected. I have argued that relatively little speech in most actual cases is even subject to the compelling interest standard; and the government may have a compelling interest in restricting some speech to which that test applies. Although ordinary workplace harassment standards will pick up some speech that enjoys constitutional protection, that speech is not enough to invalidate the standards on overbreadth grounds. As for the vagueness worry, the standards developed in federal and state regulations and by courts are undoubtedly vague and open-ended; but they may be about as precise as the subject allows. Thus, they should not be held unconstitutionally vague.⁷¹

The second major issue is more complex and concerns the Court's opinion in *R.A.V.* That opinion declared invalid a content-based distinction among speech of extremely low value—fighting words. It said that to support a content distinction the government must establish that a law is narrowly tailored to serve a compelling interest. If this aspect of *R.A.V.* is applicable to workplace harassment, existing regulation of that is subject to a compelling interest test, even when the speech involved has very low value. As we have seen, the *R.A.V.* opinion suggests that workplace harassment law is not subject to its strictures, but, as we have also seen, its apparent reasons for distinguishing workplace harassment from the St. Paul ordinance are not persuasive.

Four Justices in *R.A.V.* did not think a compelling interest test was appropriate to that ordinance cast in terms of categories of speech, and I concluded in chapter 4 that their position was more sound than the Court's. For similar reasons, I do not think the effective choice to engage in categorical regulation of workplace harassment should be subject to a compelling interest test. Suppose, however, that the opposite conclusion were reached. The government's interest in stopping employment discrimination is a compelling one,⁷² and stopping harassing speech contributes significantly to that objective. But is categorical regulation *necessary* (the inquiry that doomed the St. Paul ordinance in the Court's opinion in *R.A.V.*)? It may help here to distinguish the federal from the state government. Perhaps under the Commerce Clause, the federal government *could* legislate against all harassment (including purely personal

harassment) that creates a hostile work environment, but that would involve a substantial interference in the domain of state and local government. Furthermore, given the Fourteenth and Thirteenth Amendments, the federal government's interest in stopping categorical harassment (by groups) is much greater than its interest in stopping harassment that is based more personally. For these reasons, a law limited to categorical harassment should be regarded as narrowly tailored to serve a compelling interest. Although states may have more pervasive authority over working conditions within their boundaries, the same conclusion applies to them because of the stronger social interest in combatting categorical discrimination, and the categorical harassment that produces it in many contexts. Thus, I conclude that statutes limiting regulation to categorical harassment should be regarded as constitutionally permissible. The standard of review to be applied for particular speech should depend on the kind of speech involved.

It is time now to turn with a little more precision to contexts of speech. The government's interest in stopping discrimination is great enough to restrict anything that falls outside the genuine concerns of free speech, such as remarks intended to intimidate or humiliate, and also to anything classifiable as low value speech (for reasons other than the content of the ideas expressed). I shall, therefore, concentrate on words, posters, symbols on desks, that would be full value speech in most contexts.

Suppose a male boss thinks women do not belong in his workplace; he is angry and irritated that women are there; and he wants to express his anger to the very people who are misguidedly occupying the positions for which they are not suited because of their gender. He expresses his attitudes to his female subordinates. Some of them are distressed by the remarks, and they wonder whether a boss who expresses such views can possibly deal with them fairly on the job.

An important argument for regulation here focuses on the special relationship of power between boss and subordinate. In this particular case, maybe nothing that a boss says can be treated as pure opinion⁷³ (unless, perhaps, the boss is very careful to explain that he will not treat the women unequally as workers); female workers are bound to draw implications for how they will be treated. This natural implication about the boss's subsequent behavior is sufficient to curb continued statements of this sort. (*One* initial statement might be viewed as clearing the air and putting the relationship on an honest footing.)

Suppose the speaker is a co-worker. The power rationale does not apply here directly. Does it apply if the boss knows what the co-worker says and fails to stop him? I do not think it can reasonably be said that a failure to reprimand inevitably connotes approval. I argued in chapter 4 that the state's failure to stop hate speech is not an approval of hate

speech; similarly, higher management might accept some hostile give and take in the workplace without approving of views expressed or even approving of such active expression of opinions. However, in some circumstances inaction may seem to connote approval; when this occurs, the power rationale kicks in. Moreover, as I have said, co-workers who work directly with the woman do have a kind of power over her. They may fail to work cooperatively with her. If the remarks are reasonably taken as indicating a refusal to cooperate in working relations, they can be restricted on this basis.

The “captive audience—privacy to avoid distressing speech that is directed at you” rationale applies to both bosses and co-workers. One worker’s interest in not having someone speak deeply offensive things directly to her, after she has told the speaker that she definitely does not welcome such remarks, is strong enough so that the speaker may be told to stop such remarks. To be clear, I am not suggesting that the listener herself has some constitutional right to be free of such remarks, only that a legislative resolution in her favor does not violate the Constitution. I also am not addressing at all (yet) a multiperson audience; the speaker *may* have a First Amendment right not to be forbidden by the state to say what he thinks to a five person audience, even though aware that one member of the audience does not want to hear such remarks. I have talked only of the situation where *one* listener, or *all* relevant listeners have said they do not want to hear the remarks. Finally, I am not addressing public bodies at all; school board members (at board meetings) cannot say they do not want to hear speech relevant to school.

The most difficult questions about restriction concern “overheard” conversations and remarks made to multimember audiences in which some individuals have not indicated any objections to hearing such remarks. If the point of a male conversation is to be overheard by women workers, all the previous analysis applies. But suppose men on the job, overheard by women, express genuine ideas to each other that are deeply offensive to the women. Bosses have a responsibility to be careful not to continually say offensive things that are overheard, and co-workers can be required to use reasonable discretion; but in principle communications of real ideas not directed at those they offend should be regarded as protected free speech. When remarks are directed at a group, the speaker need not restrict himself to avoid what one member of the group finds offensive; but in the workplace environment co-workers and bosses can be expected to show a reasonable sensitivity to the composition of the groups to which they speak. To take an obvious example, the captain of a firehouse should not indulge his sexist sentiments when he is addressing all the firefighters in the morning.

Relevance and Remedy

I have not endeavored here to apply these general observations to the facts of individual cases. With a few exceptions, the adjudicated cases making a determination of harassment overwhelmingly involved nonverbal behavior and verbal behavior to which something less than the compelling interest test applies. Thus, the inattention of the courts (and lawyers?) to First Amendment aspects is both understandable and not of great practical moment. Closer attention is desirable, however, because future cases are likely to reach deeper into workplace speech, especially after the Supreme Court’s clarification that the threshold needed to establish a hostile work environment need not be very high.

Only a small percentage of what might count as harassing speech warrants application of the compelling interest test, and, only a proportion of that speech should be judged to be constitutionally protected. Nevertheless, that constitutionally protected speech might be significant in the conclusion that a hostile environment exists. What should a court and jury do in such a circumstance?

Two conclusions can be stated quickly. First, if the use of protected speech is to cast light on the significance of other behavior, its evidentiary use is appropriate. Second, since the nature of speech (e.g., whether it is mainly designed to intimidate or humiliate) will often be apparent only in context, and further will be disputed by the parties, there cannot be a rule against the introduction of all evidence of protected speech. The status of speech as protected or not will emerge only as the facts are presented and determined. (This problem could conceivably underlie an argument that all possibly protected speech should be excluded from consideration, but I shall pass over that option here.)

How should protected speech affect a determination of a hostile environment? To address this question, we must understand that (1) some protected speech could seriously disturb women, *and* (2) that in some cases everything *but* protected speech might fall short of making the environment sufficiently hostile, while everything including protected speech might make the environment sufficiently hostile. In the extreme case, a string of protected remarks might all by itself make the environment hostile.

If the First Amendment is to be given its proper effect, a finding of a hostile working environment cannot be based exclusively or dominantly on protected remarks. Should that unfortunate combination of protected speech and deeply disturbing effects ever arise, no finding of a violation of Title VII should be made. (I believe this combination is most unlikely when sexual and racial harassment are involved, but I can imagine it occurring with protected religious speech.)

What of the more common situation when most of the incidents claimed to contribute to a hostile environment are not protected speech, but some incidents are protected speech? My initial inclination when thinking about this problem was that no incident of protected speech could count toward a finding of a hostile environment and that a jury should be so instructed. Using this approach, a victim would have to make her case on the basis of incidents other than protected speech. This outcome seems to fit naturally with the idea that liability should not be based even in part on constitutionally protected behavior.

There is an alternative approach, however, that I think makes greater sense. Congress could forbid all unprotected harassing speech, but it has (implicitly) chosen to intervene only when a hostile environment is created. If such an environment does exist, even one produced *partly* by protected speech, imposing consequences for unprotected behavior is appropriate, as is restricting any future unprotected behavior. On this view, incidents of protected speech could count as contributing to a hostile environment.

A conclusion that the First Amendment protects *some* workplace speech that disturbs women has important practical implications for remedies. One obvious consequence is that courts need to be careful in formulating remedial orders. The orders would have to cover only unprotected speech. They could not simply sweep within their ambit all speech that might have a negative effect on the working environment.

Another possible effect concerns situations in which employers directly forbid workers from engaging in speech they think might create a hostile work environment. Some commentators have worried,⁷⁴ with good reason, that an employer not very concerned with free expression may forbid much more speech than the government could forbid directly. I have noted that private employers have wide scope deciding what speech to allow. However, *if* a worker can get an employer to acknowledge that its restrictions derived from a fear of a suit for violation of Title VII, then perhaps the worker can succeed in resisting the employer's attempt to restrict. The potentiality of such a suit will rarely, if ever, be realized; but it might offset to some extent the employer's inclination to restrict everything that could conceivably lead to a finding of harassment.

CAMPUS SPEECH CODES REVISITED

How do campus speech codes look in light of the law and analysis of workplace harassment? Should one think of a college campus as a kind of workplace or as at least very similar to a workplace?⁷⁵ Of course, for some people, faculty and administrators, a college or university *is* a workplace, but the focus here is on students, the primary intended beneficiaries of speech codes.

Although being a student does not involve gainful employment, it certainly involves work, i.e., the often difficult task of disciplined study. Some kinds of students, medical students and social work students, for example, engage in cooperative efforts that are essentially the same as those done for pay by others. Many students engage in such efforts as part of extra-curricular activities, as writers and editors of student newspapers, say, or players on sports teams. Hierarchical relations of authority exist within colleges and universities. The most common authorities for students are faculty members.

Faculty may or may not control individual success in the manner of supervisors at work; this will depend substantially on whether they make individualized evaluations while aware of the names of the students they are evaluating. Faculty almost always have a significant influence on the conditions of learning. Coaches of athletic teams and student supervisors in activities like newspapers occupy roles that more nearly resemble that of a boss at an ordinary job. Students see the same people day after day, and they live in conditions where it is not easy to avoid others they do not wish to see. Students typically live in shared quarters with common spaces in which no one student can control what is communicated. Although speech that indicates that supervisors will discriminate directly in "work" activities or that "co-workers" will withhold needed cooperation is less frequent on campuses than in workplaces, ample opportunity arises to influence the "working conditions" of students. Students, in general, may change universities more easily than workers can change jobs; but students nonetheless have a large investment in a decent learning environment at the school they currently attend. Women and members of minorities say they are affected by sexist and racist remarks inside and outside of class, and we have reason to believe that such remarks may have some negative influence on learning.

Universities have an interest in assuring decent conditions of learning for all students. Probably at all universities, continuous intense verbal abuse of one student by another would be the basis for discipline. Governments have a special interest in seeing that educational conditions are not unfairly skewed in favor of some groups at the expense of others, given the relevance of educational success for the acquisition and effective performance of many jobs. In short, universities and governments have an interest in equal educational opportunity that encompasses the restriction of categorical verbal harassment. On the other hand, as we have seen in the initial discussion of speech codes, the First Amendment has intense relevance for much campus speech that students might find disturbing.

What conclusion may be drawn from these comparisons of universities and workplaces? Briefly I think the following approaches are warranted, once one recognizes that the conditions of campus life and the reasons for speech codes bear some relation to the notions behind workplace harass-

ment law. First, Congress or state legislatures might put campus speech harassment on a formal footing that is like workplace harassment by adopting laws that forbid categorical discrimination in university education.⁷⁶ Second, state universities should be able to forbid *directed* verbal harassment of students, and if they choose to adopt special measures that precisely cover categorical directed verbal harassment, that should be accepted as an appropriate means to combat categorical discrimination in education. Third, in light of the centrality of ideas in educational settings, honest expressions of opinions on various subjects should be protected. This privilege to speak should extend to coarse remarks in informal settings when the speaker is not intentionally trying to humiliate a listener and when the listener has not indicated previously to the speaker that she does not wish to entertain such remarks. The privilege should extend to expressions about personal subjects, such as interracial dating, as well as to more common academic and public subjects. Fourth, courts should look not only to the concept of government as regulator of citizens but also to the concept of government as employer, in order to understand the proper relation of a state university to its students. Fifth, courts must address problems of overbreadth and vagueness in considering campus speech codes; but they should not assume that any speech code is bound to fail these constitutional tests, any more than they assume that workplace harassment standards fail these tests.