

December 1995

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Recommended Citation

Linda S. Green, *Sexual Harassment Law and the First Amendment - The Kenneth M. Piper Lectureship Series*, 71 Chi.-Kent. L. Rev. 729 (1995).

Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol71/iss2/12>

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SEXUAL HARASSMENT LAW AND THE FIRST AMENDMENT

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I. INTRODUCTION

Current employment discrimination law, which includes the principle that intimidation and harassment on racial or gender grounds deprive persons of equal employment opportunity, is under sustained attack. This body of law provides that both quid pro quo harassment and harassment that creates a hostile working environment are unlawful. Proscribing harassment under certain circumstances is necessary to protect relatively powerless groups in a subordinated status as well as emerging groups who, during transition phases, often endure a token, isolated status. Nonetheless, political and constitutional opposition to harassment regulation threatens the well-established and important principle that harassment under certain conditions is unlawful. The political opposition is related to a larger movement of opposition to equality measures that threaten historical privilege. The constitutional objections are the understandable byproduct of an inexorable, though incomplete, evolution of First Amendment doctrine towards speech equality. Both pressures have forced the reconsideration of the legitimacy of settled harassment law as well as the re-examination of the underlying assumptions of equal employment law.

First, I will discuss the parameters of the law of sexual and racial harassment in the workplace and suggest that its parameters are quite conservative and limited. Indeed, there is a strong argument that much speech with sexual and racial content is unregulated and open to private regulation without governmental compulsion. Then, I will explain the First Amendment concerns that have arisen in connection with the regulation of harassment in the workplace and suggest that the First Amendment problems raised have been grossly overstated. The law of sexual harassment in employment, as interpreted by the Supreme Court, leaves a great deal of speech free of regulation and

* Professor of Law, University of Wisconsin Law School. J.D., University of California at Berkeley, 1974. I would like to thank Professor Marty Malin and Dean Richard Matasar for this intriguing invitation. I am also very delighted to appear with Nadine Strossen and Gilbert Casellas, whose words are very important in any discussion of sexual harassment and the First Amendment. I look forward to this exchange and know that we all will profit thereby.

suppression. Moreover, the regulation of sexually harassing speech in the workplace does not conflict with First Amendment doctrinal developments.

I conclude by noting that the concern and opposition to the regulation of sexual (and racial) harassment is part of the much larger bundle of second generation equality issues. The question is no longer whether groups may be excluded but rather the rapidity of their inclusion and the terms and conditions under which that inclusion occurs. The enterprise of equal employment opportunity will achieve minimal success if women and minorities must endure the signs, symbols, and words of second class status as a condition of entrance.

II. THE LAW OF HARASSMENT IN THE WORKPLACE

Numerous cases have established that Title VII's prohibitions against discrimination in the terms and conditions of employment include a prohibition against harassment. In the racial context, as early as 1970, the Equal Employment Opportunity Commission (EEOC) concluded that Title VII grants an employee the right to a "working atmosphere free of racial intimidation."¹ An important early case was the Fifth Circuit's *Rogers v. EEOC*,² which involved Hispanic employees and has been followed in several other circuits³ and by district courts as well.⁴ These courts have further concluded that isolated or casual incidents do not rise to the level of actionable harassment.⁵ Instead, the "harassment 'must be sufficiently pervasive . . . to . . . create an abusive working environment'"⁶ and establish a "concerted pattern of harassment"⁷ in order to violate Title VII. In the context of sexual

1. EEOC Dec. No. 71-969, EEOC Dec. (CCH) ¶ 6193 (1970). See also EEOC Dec. No. 74-84, EEOC Dec. (CCH) ¶ 6450 (1975); EEOC Dec. No. 72-0779, EEOC Dec. (CCH) ¶ 63212; EEOC Dec. No. 72-0591, EEOC Dec. (CCH) ¶ 6314; EEOC Dec. No. 70-09, EEOC Dec. (CCH) ¶ 6026 (1969).

2. 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

3. *Snell v. Suffolk County*, 782 F.2d 1094, 1102-03 (2d Cir. 1986); *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1253 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982); *Friend v. Leidinger*, 588 F.2d 61, 68-69 (4th Cir. 1978) (Butzner, J., concurring in part, dissenting in part) (derogatory references created intimidating and harassing working condition); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), cert. denied, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976).

4. See, e.g., *Lucero v. Beth Israel Hosp. and Geriatric Ctr.*, 479 F. Supp. 452, 454 (D. Colo. 1979).

5. *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977); *Winfrey v. Metropolitan Util. Dist.*, 467 F. Supp. 56, 60 (D. Neb. 1979).

6. *Snell*, 782 F.2d at 1103 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

7. *Snell v. Suffolk County*, 611 F. Supp. 521, 526 (E.D.N.Y. 1985).

harassment, there have been similar doctrinal developments. In the 1982 case of *Henson v. City of Dundee*,⁸ the Eleventh Circuit relied on judicial decisions in racial harassment cases to conclude that harassment on the basis of sex violates Title VII.⁹

More recent cases have clarified and strengthened the law of sexual harassment. In 1986, in *Meritor Savings Bank, FSB v. Vinson*,¹⁰ the Supreme Court held that conduct that created a "hostile . . . environment" for women violated Title VII.¹¹ More recently, in *Harris v. Forklift Systems, Inc.*,¹² the Supreme Court held that Title VII is violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" ¹³ Other cases have held that quid pro quo harassment—demands of sexual favors in return for employment benefits—also violates Title VII.¹⁴ These two theories of sexual harassment law provide additional frameworks for assessing whether some employees experience different terms and conditions of employment than other employees.

The law of sexual and racial harassment must address the manner in which harassment crosses the line and becomes illegal conduct. In that process of evidentiary examination, a court must consider the particular manner in which the work environment became illegally tainted—whether through threatening words; a discharge letter substantiating the charge of a quid pro quo violation; or symbols, signs, or slogans. This process involves an examination of all facts and circumstances, including the words that have produced the discriminatory alteration of the work environment. There should be no more objection to this inquiry into the words that "alter[ed] the conditions of . . . employment"¹⁵ than to an inquiry into the words that evidence a conspiracy to murder or a defendant's intent to murder.¹⁶ The object in the latter case is to find and punish those who commit murder, not to suppress speech. Likewise, the object of sexual harassment law is to

8. 682 F.2d 897 (11th Cir. 1982).

9. *Id.* at 901.

10. 477 U.S. 57 (1986).

11. *Id.* at 66-67.

12. 114 S. Ct. 367 (1993).

13. *Id.* at 370 (citations omitted).

14. *Meritor*, 477 U.S. at 65; *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987); *Jones v. Flagship Int'l*, 793 F.2d 714, 719, 721-22 (5th Cir. 1986).

15. *Harris*, 114 S. Ct. at 370.

16. *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

eliminate discriminatory and debilitating terms and conditions of employment, not to suppress speech.

The primary focus of harassment doctrine is the result of the harassment, not the particular content of the speech or the viewpoints expressed. Several important cases illustrate this point. To reiterate, in *Harris*, the Court focused on the "alter[ation of] the conditions of . . . employment"¹⁷ and the "creat[ion of] an abusive working environment."¹⁸ In *Meritor*, the Court noted that Title VII was broad, prohibiting "the entire spectrum of disparate treatment," including conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive work environment.¹⁹ The mere offensiveness of the conduct is not dispositive; the requisite harm to the individual and workplace must occur.

Other cases also signal a singular concern with actionable work environment effects. For example, the judicial treatment of cases involving "sensitive" workers demonstrates that conduct perceived to be offensive does not necessarily violate Title VII. For example, an epithet alone is not enough to trigger the prohibition.²⁰ Rather, cases hold that "'an employee may not be unreasonably sensitive to his working environment.'"²¹ Furthermore, sexual harassment need not include words with sexual content; it is the result of the words and conduct that leads to the conclusion that sexual harassment has occurred. Thus, mere offensiveness, speech content, and victim viewpoint have not been dispositive in sexual harassment cases.²² Instead, the severity of the harassment is determined by "all the circumstances"²³ and on the basis of "'the record as a whole' and 'the totality of the circumstances.'"²⁴

Thus, a careful reading of sexual harassment law suggests that it permits wide latitude in the expression of harassing speech. Short of evidence of a quid pro quo violation or the requisite degree of workplace environmental alteration, even speech intended to harass does not violate the law. In fact, one can make a strong case that the law of

17. *Harris*, 114 S. Ct. at 370.

18. *Id.*

19. *Meritor v. Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); see also *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), cert. denied, 114 S. Ct. 2693 (1994).

20. *Meritor*, 477 U.S. at 67.

21. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989) (quoting *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)).

22. See, e.g., *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993).

23. *Id.*

24. *Meritor*, 477 U.S. at 69 (quoting 29 C.F.R. §1604.11(b) (1985)).

sexual harassment falls far short of what might be necessary to protect women and other emergent groups from environments that resemble trials by ordeal.²⁵

In this respect, there is much to learn from the context in which the egregious cases of sexual and racial harassment arise. These are phenomena associated with a numerically dominant group in the workplace and a much smaller group, or an individual, with racial or gender characteristics that the dominant group does not share.²⁶ While there is much evidence that these disproportions themselves produce different terms and conditions of employment aside from overt harassment,²⁷ and there are good arguments that an appropriate remedy ought to be increased proportionality,²⁸ that question is beyond the scope of this inquiry. Rather, it seems beyond dispute that the law of racial and sexual harassment properly reflects a concern with the phenomena of group domination in the workplace that causes nondominant groups or individuals to experience different terms and conditions of employment.

The evidence demonstrates that the phenomenon of sexual and racial harassment is associated with a particular job category or with the presence of numerically dominant groups in a workplace and the introduction or hiring of a person different from the dominant group. In numerous reported cases involving racial and sexual harassment,²⁹ this disproportionate relationship between dominant groups and emergent subordinate groups seems to occur repeatedly.³⁰

25. In *Harris*, Justice O'Connor noted that the Court would not interpret Title VII to make all harassing conduct illegal:

We reaffirm today . . . a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. . . . [The] "mere utterance of an epithet which engenders offensive feelings in a [sic] employee," . . . does not sufficiently affect the conditions of employment to implicate Title VII.

114 S. Ct. at 370 (citations omitted).

26. See MARY P. KOSS ET AL., *NO SAFE HAVEN* 144-45 (1994).

27. ROSABETH M. KANTOR, *MEN AND WOMEN OF THE CORPORATION* 209-10 (1977); see also Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics*, 6 *BERKELEY WOMEN'S L.J.* 81 (text accompanying notes 3-6) (1990-91).

28. Linda Greene, *Equal Employment Opportunity Law Twenty Years After the Civil Rights Act of 1964: Prospects for the Realization of Equality in Employment*, 18 *SUFFOLK U. L. REV.* 593, 608-12 (1984) [hereinafter Greene I]; Linda S. Greene, *Title VII Class Actions: Standing at its Edge?*, 58 *U. DET. J. URB. L.* 645, 654-59, 691-94 (1981) [hereinafter Greene II].

29. A more comprehensive and representative study might draw upon cases in which employers report incidents of sexual harassment whether or not they decided to file charges or lawsuits based on these incidents.

30. For example, see *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part), in which the plaintiff, for seven years, was the sole woman in a salaried management position. See also *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1507 (9th Cir. 1989) (undocumented alien maids); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012

Under these circumstances, there is a great risk that harassment will occur. The differential treatment is the product of dynamics associated with differential status in the workplace. This observation does not necessarily mean that Title VII must be interpreted to forbid all words that might create the risk of harassment. It is necessary, however, to recognize that when token individuals, different from the dominant group, enter the workplace environment, that environment changes and the changes place the new entrants at risk. To the extent that Title VII does not recognize the claim of tokenism as a cause of action, a void exists in that the law does not recognize that certain new job entrants experience different terms and conditions of employment.³¹ In essence, these costs of "equality" are privatized—borne by those recently hired for whom true equality is deferred until proportions as well as power relationships in the workplace change.

So, while there are important employment discrimination-suppression reasons to permit a more sweeping definition of redressable sexual and racial harassment, the law does not go that far. Thus, the meaningful enforcement of existing rules as well as the mitigation of tokenism's "inequality" turns on employers' efforts and employees' access to lawyers who have the resources to bring cases and await temporally remote fee awards. In addition, the enforcement of existing sexual harassment principles turns on the presence of courageous women willing either to shoulder economic risk by leaving employment to sue for constructive discharge or to stand firm and endure emotional distress and debilitation as a cost of the right to experience meaningful employment equality. Either choice presents women with a modern version of Scylla and Charybdis. Whatever the Supreme Court eventually decides with respect to the constitutionality of sexual harassment law, we must incorporate an understanding of

(8th Cir. 1988) (female construction workers); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1408-09 (10th Cir. 1987) (only black woman on security force and one of only two black guards); *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1144-45 (4th Cir. 1986) (only black woman teller), *aff'd in part, vacated in part*, 491 U.S. 164 (1989); *Snell v. Suffolk County*, 782 F.2d 1094, 1096 (2nd Cir. 1985) (sixteen black and Hispanic correction officers); *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1393 n.2 (8th Cir. 1983) (14 out of 206 uniformed police personnel were black); *Katz v. Dole*, 709 F.2d 251, 253 (4th Cir. 1983) (only female air traffic controller); *Henson v. City of Dundee*, 682 F.2d 897, 899-901 (11th Cir. 1982) (one of two female police dispatchers); *DeGrace v. Rumsfeld*, 621 F.2d 796, 799 (1st Cir. 1980) (first and only black firefighter); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 173 (D.C. Cir. 1976) (restricting number of black bus drivers); *Tunis v. Corning Glassworks*, 747 F. Supp. 951, 953-54 (S.D.N.Y. 1990) (female engineer); *Morris v. American Nat'l Can Corp.*, 730 F. Supp. 1489, 1490 (E.D. Mo. 1989) (only female in department); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 607-08 (W.D. Tex. 1988) (young females workers and adult male supervision); *Johnson v. Ryder Truck Lines*, 12 Fair Empl. Prac. Cas. (BNA) 895, 900 (W.D.N.C. 1975) (first black longline driver).

31. *Greene I*, *supra* note 28, at 608-11; *see generally Greene II*, *supra* note 28, at 645.

domination, proportions, and tokenism into our thinking about equal employment opportunity.

III. WORKPLACE HARASSMENT AND THE FIRST AMENDMENT

While the law of racial and sexual harassment in the workplace began to evolve just a few years after Title VII's effective date,³² it is not surprising that a First Amendment debate over its constitutionality has already arisen. The claim that the First Amendment protects racist hate speech is not a new one³³ although the Supreme Court's explicit embrace of the principle only dates back to 1969 and the case of *Brandenburg v. Ohio*.³⁴ In *Brandenburg*, the Court held that a Ku Klux Klan rally and its related accoutrements, including the required burning cross, were protected speech unless they produced the risk of imminent violence.³⁵ The facts, however, of *Brandenburg* are quite remote from the harassment circumstances in which employees find themselves—captive in an environment on which they depend for their livelihood. Certainly, there is a strong argument that *Brandenburg's* facts did not require the Court to address either *Chaplinsky v. New Hampshire's*³⁶ "face to face" concept of fighting words³⁷ or the more extreme circumstances of *Beauharnais v. Illinois*,³⁸ in which the criminalization of hate propaganda was based on a legislative record of historical racial violence in the state of Illinois.³⁹

Other developments—including the Court's repeated decisions striking down convictions that were based upon language prosecutors contended to be offensive⁴⁰ as well as the Court's avoidance of a decision on the merits regarding the Skokie ordinances⁴¹—left doubt

32. See *supra* note 2.

33. See *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952).

34. 395 U.S. 444 (1969).

35. *Id.* at 447-49.

36. 315 U.S. 568 (1942).

37. *Id.* at 573.

38. 343 U.S. 250 (1952).

39. *Id.* at 258-62.

40. See *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Cohen v. California*, 403 U.S. 15 (1971).

41. *Smith v. Collin*, 439 U.S. 916 (1978). Justices Blackmun and White dissented from the denial of certiorari. *Id.* Blackmun wrote that the Supreme Court ought "to resolve any possible conflict that may exist between the ruling of the [lower court] . . . and *Beauharnais*." *Id.* at 919 (Blackmun, J., dissenting). Justice Blackmun added

I also feel that the present case affords the Court an opportunity to consider whether, in the context of the facts . . . there is no limit whatsoever to the exercise of free speech. . . . [These facts] just might fall into the same category as one's "right" to cry "fire" in a crowded theatre, for "the character of every act depends upon the circumstances in which it is done."

about the legitimate suppression of hate speech without explicitly rejecting the Court's prior cases that arguably approved such suppression in certain circumstances.⁴² In fact, the earliest reported case in which a court heard a First Amendment defense to an order restricting sexually harassing speech was the 1991 case of *Robinson v. Jacksonville Shipyards, Inc.*⁴³ Although the Court let the various Skokie cases go by without elaboration on the tension between *Beauharnais* and *Chaplinsky* on the one hand and more recent cases that offer more protection to speech that is extremely offensive to some on the other,⁴⁴ cases in the interim period rejected regulation in other contexts aimed at the content of speech—flag burning,⁴⁵ picketing,⁴⁶ pornography,⁴⁷ adult theatres,⁴⁸ demonstrations⁴⁹—and moved inexorably in the direction of prohibitions against viewpoint- and content-based legislation.⁵⁰

Id. (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

42. In fact, in the context of Skokie's petition to stay the Seventh Circuit decision striking down its ordinances, Justices Blackmun and Rehnquist urged the Court to settle the doubt created by prior cases by specifically addressing the tension between *Beauharnais* and the lower court decision, *Smith v. Collin*, 436 U.S. 953 (1978) (Blackmun, J., dissenting), a tension the Seventh Circuit recognized even as it struck down the Skokie ordinances, *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *order denied*, 436 U.S. 953 (1978).

43. 760 F. Supp. 1486, 1534-37 (M.D. Fla. 1991).

44. See *supra* notes 40-41; see also *Gooding v. Wilson*, 405 U.S. 518 (1972). Justice Brennan's opinion in *Gooding* raised doubts about whether *Chaplinsky's* two categories of fighting words—words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)—were narrowed by *Gooding*. Brennan arguably limited the *Chaplinsky* formula to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Gooding*, 405 U.S. at 524.

45. See, e.g., *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive . . .").

46. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[G]overnment has no power to restrict expression because of its . . . content.").

47. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324, 328 (7th Cir. 1985).

48. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43, 48 (1986) (adult theatre restriction not based on content); *Young v. American Mini Theatres*, 427 U.S. 50, 52, 64 (1976).

49. See *Boos v. Barry*, 485 U.S. 312, 341, 353 (1988).

50. That evolution has not been a complete one as evidenced in past cases nor is the principle free from controversy. The division between the Supreme Court majority and dissenting opinions in recent flag burning cases shows the disagreement over the content-neutral regulation principle. See *United States v. Eichman*, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting); see also *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Rehnquist, J., dissenting); *Id.* at 436 (Stevens, J., dissenting). That disagreement is demonstrated in *R.A.V. v. City of St. Paul*, in which both the majority and Justice White's concurring opinions express support for content discrimination under certain circumstances. 505 U.S. 377, 382-83 (1992); *Id.* at 397, 399 (White, J., concurring).

These developments do not doom the regulation of sexual harassment. I have shown that current sexual harassment case law embodies concern for the discriminatory effects of speech and conduct on women in the workplace. To the extent that much of First Amendment doctrine centers on ferreting out regulation aimed at content and viewpoint, the core First Amendment concerns are not squarely implicated by the regulation of sexually harassing speech under existing Supreme Court doctrine. Rather, cases have established the appropriateness of a more relaxed examination of regulation “unrelated to [an interest in] the suppression of free expression.”⁵¹ The maintenance of a nondiscriminatory workplace is certainly such an interest.

But one might appropriately inquire under applicable standards whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Here, we come full circle again to the limited protection sexual harassment principles provide. Sexual harassment law does not provide a blanket prohibition of speech—whether it be sexual in nature or otherwise—because of the content of the speech. Rather, the central inquiry is whether terms and conditions of employment are different for those subject to harassment. Only when speech or conduct creates a pervasive hostile environment, or requires submission to harassment as a quid pro quo condition of employment, promotion, retention, or other beneficial employer actions, does expressive freedom yield to the policy of equal employment.

Justice Scalia’s 1992 majority opinion in *R.A.V. v. City of St. Paul* said as much when it noted that a law not directed at speech but at conduct may also prohibit speech with particular content as an incident of regulation (pursuant to a statute which is aimed at conduct):⁵²

Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy[.] . . . so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.⁵³

Three of the remaining four Justices wrote to express disagreement with the majority opinion’s implied rejection of a categorical approach to speech regulation that treats some speech as more worthy of

51. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

52. *R.A.V.*, 505 U.S. at 389-90.

53. *Id.* (citations omitted); see also *id.* at 409-10 (White, J., concurring).

protection than other speech. Justice White asserted that “[t]he categorical approach is a firmly entrenched part of our First Amendment jurisprudence.”⁵⁴ Thus, he noted that

fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. Therefore a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace.⁵⁵

In addition, Justices White, Blackmun, O’Connor, and Stevens wrote to affirm the constitutional legitimacy of regulatory measures that address hate speech. Such “selective regulation reflects . . . [a] judgment that harms based on race, color, creed, religion, or gender are . . . pressing public concerns”⁵⁶ Thus, these Justices concluded that a more narrowly drawn ordinance that proscribed “a subset of fighting words, those that injure on the basis of race . . . or gender,” would be constitutional.⁵⁷ Moreover, Justice Stevens (joined by Justices White and Blackmun) reiterated the importance of content-based distinctions in First Amendment doctrine by arguing that First Amendment jurisprudence provides ample evidence that the permissibility of First Amendment regulation turns less on categories than on the “content and character” of the expressive activity.⁵⁸ For Stevens, the content of the expression, a burning cross, and the character of the regulation, a prohibition applicable only to “confrontational and potentially violent situations,” resulted in regulation sustainable under the First Amendment.⁵⁹

The *R.A.V.* opinions reflect a softening of the implication drawn from prior cases, as well as mistakenly from *R.A.V.*, that First Amendment doctrine generally condemns the regulation of speech unless violence is an imminent risk. *Chaplinsky* did not so limit its nonprotected speech—words that by their very nature inflict injury were included. Yet, subsequent cases suggest that *Chaplinsky* may have been modified to exclude such a category of speech. By drawing such a line, we are deciding that what constitutes fighting words in the context of harassment is largely determined by the willingness of group members to meet vilification with violence. Should we encourage physical vio-

54. *Id.* at 400 (White, J., concurring). Justices Blackmun and O’Connor joined this part of the opinion. *Id.* at 397.

55. *Id.* at 401 (citations omitted).

56. *Id.* at 407.

57. *Id.*

58. *Id.* at 428-29 (Stevens, J., concurring).

59. *Id.* at 432.

lence as a condition of protection by insisting on its imminence as a constraint on verbal harassment?

Perhaps we have read *Chaplinsky* too literally. *Chaplinsky* may also be read as *R.A.V.*'s concurring Justices seem to have read it—not only as a statement that the government may sanction speech likely to produce violence, but also as an argument in favor of the principle that the government may seek to prevent other provable harms that cause great harm to society.⁶⁰ We may all agree instinctively that violence is proscribable, but it is difficult to reach that conclusion via a First Amendment doctrine that protects expressive conduct. We reach the conclusion that violent expressive conduct may be suppressed because we conclude, on other grounds, that violence is so harmful to society that free speech claims must yield to regulation.

Thus, *Chaplinsky* retains its hold on our thinking and probably survives changes in First Amendment doctrine because it is a metaphor for a principle more fundamental than antiviolenence. It is a metaphor for a principle that, although there are certain risks that are permissible, we should always be open to the argument that words may cause harms the government is entitled to prevent, and that acceptable means to prevent these harms may include action on the basis of words. The risk in the context of sexual or racial harassment in the workplace is the risk that new verbal terrorists, like the Klan, will drive women and minorities from the workplace or render them so tentative, constrained, and ineffective as to make their presence irrelevant in the workplace. The fact that words and expressive conduct are the instrumentalities of subordination may require greater caution, but it cannot mean the abdication of the workplace to those who would figuratively post "male only" and "white only" signs over the entrances of our plants and office buildings.

A reluctance to recognize and value the harms of sexual harassment is a byproduct of a more general questioning of and ambivalence over further efforts to achieve more meaningful inclusion. The First Amendment concerns raised in the context of sexual harassment regulation are legitimate and important ones, but their constitutional valence adds weight to the growing chorus of objections to continued equality efforts. We may observe a trend in discursive strategies that transforms all discussions of inclusion of historically excluded people

60. See *id.* at 436 (noting that crossburner has many constitutional opportunities "so long as the burning is not so threatening and so directed at an individual as to 'by its very [execution] inflict injury.' Such a limited proscription scarcely offends the First Amendment.").

into a discussion about the harm to historically privileged people. Closely related is the discourse of innocence in the context of remedies of past exclusion and discrimination. These charges create new "victims" who assert rights violations rather than stake questionable claims of historical privilege. These sound-bite discursive strategies provide effective ideological cover to proponents of a limited version of equality that tolerates token entry but nonetheless requires submission to subordinating practices.

For this reason, it is wholly inadequate to address the question of workplace harassment solely through the doctrinal frameworks of the First Amendment or employment discrimination law.⁶¹ These doctrinal choices are embedded in a matrix of assumptions about workplace transformation and the reallocation of power in that setting. Just as our understanding of equality law generally has been greatly enhanced by our recognition that sexual and racial discrimination are practices against groups—not merely individuals—our understanding of the phenomenon of sexual harassment is also enhanced by our awareness of the group power dynamics involved.

The constitutional objections to efforts to redress these power imbalances are unfounded. While there is much disagreement about the coherence of First Amendment law, the principle that regulation aimed at objectives other than the suppression of speech may survive constitutional scrutiny is a clear one. The majority opinion in *R.A.V.* endorses this proposition in the context of Title VII sexual harassment rules; this dicta is consistent with prior precedent. First Amendment law provides shelter to these antiemployment discrimination measures.

The controversy over the regulation of racial and sexual intimidation and harassment in the workplace presents an opportunity to rethink the underpinnings of employment discrimination law and the meaning of equality during these transitional times. The question is whether women and minorities will enter new workplaces and new occupations under the assumption that they must tolerate the subordinated status that intimidation and harassment maintain. Equality in the workplace must mean more than mere entry. It must also encompass dignity and respect irrespective of gender or race. The limited proscriptions of sexual and racial harassment law are modest steps in this direction.

61. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434.