WORKPLACE CENSORSHIP: A RESPONSE TO PROFESSOR SANGREE

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I. INTRODUCTION

Professor Suzanne Sangree is to be commended for her candid recognition that "prohibitions on hostile environments constitute state regulation of the content of speech"; yet she underestimates the substantial First Amendment concerns that this regulation raises. Under Title VII as currently interpreted, employers must "prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers." Employers must prohibit employees from displaying sexually suggestive materials, because those materials "may communicate to male co-workers that it is acceptable to view women in a predominantly sexual way." Even "[w]ell-intentioned compliments" may result in liability. Responding to the law, employers forbid off-color jokes, discipline employees for sexist comments and foul language, and require attendance at

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2. See generally Kingsley R. Browne, Title VII as Censorship: Hostile Environment Harassment and the First Amendment, 52 OHIO STATE L.J. 481, 481 (1991) (examining "the extent to which the broad definition of 'hostile work environment' . . . establishes a content-based—even viewpoint-based—restriction of expression that is inconsistent [with the] [F]irst [A]mendment").


5. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).
diversity-training sessions in which employees learn to sanitize their speech to avoid offending women and minorities. When employers receive complaints of sexual harassment, they must act on them knowing that good-faith attempts to deal with the problem may later be deemed inadequate.

II. THE HOSTILE-ENVIRONMENT STANDARD IS UNCONSTITUTIONALLY VAGUE

A fundamental principle of First Amendment jurisprudence is that a law regulating speech must give reasonable notice of what is prohibited: "[u]ncertain meanings inevitably lead citizens to steer far wide of the unlawful zone." As speech restrictions go, the hostile-environment standard is uncommonly vague, forbidding speech that creates "an environment that a reasonable person would find hostile or abusive." As Justice Scalia observed in his concurrence in Harris v. Forklift Systems, Inc., the standard lets "virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."

Professor Sangree tells us that three elements of the hostile environment cause of action eliminate vagueness concerns:

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6. See, e.g., Effective Sexual Harassment Policies, AM. LAW., Oct. 1994, at 86 (describing sexual harassment training and policies of law firms, which bar sexual jokes, leering, and visual displays of degrading images or stereotypes); Kishore Jayabalan, Typecasting "Diversity"; Sensitivity and Sense: My Problem with Workplace Stereotypes, WASH. POST, Dec. 4, 1994, at C5; Penny Lunt, Sexual Harassment: Not Always Obvious, Always Dangerous, ABA BANKING J., June 1994, at 132 (quoting a manager of employee relations programs at a major bank as telling employees, "If someone you respected were standing next to you—a parent, a child, your clergyman—would they be offended by your behavior? If so, then it is probably not appropriate.")

7. Intlekofer v. Turnage, 973 F.2d 773, 778-80 (9th Cir. 1992) (noting that the employer "must take some form of disciplinary action"; oral warnings and counseling are adequate as a first step only if they are "disciplinary" in nature).


10. Id. at 372 (Scalia, J., concurring).
(1) the requirement that the speech be “unwelcome”; (2) the rule that the employer must ordinarily have actual or constructive notice of the speech in order to be held liable; and (3) the fact that the employer avoids liability by taking “prompt and effective remedial action”\textsuperscript{11} to end the harassment.\textsuperscript{12} Contrary to Professor Sangree's view, these factors do nothing to mitigate the vagueness of the standard.

The factors cited by Professor Sangree alert the employer that it faces a decision whether or not to censor the speech of its employees. They do nothing to guide the employer in making the decision, unless the rule is that the employer must censor all speech that women do not want to hear. Of course, such a requirement might no longer suffer from vagueness, but it would be fatally overbroad. However, if the employer's obligation is to censor less than all unwelcome speech, Professor Sangree does not tell us how the employer should respond to the employee who complains that she heard something that she would rather not have heard.

Professor Sangree apparently does not believe that an employer is obligated to censor all unwelcome speech, but her own description of the requirements of the standard demonstrates its fatal vagueness. She says that the degree of speech regulation required by Title VII differs from workplace to workplace.\textsuperscript{13} For example, whether a particular display of pornography in a workplace violates Title VII turns on such factors as the level of female employment at each level of the work force, whether there is a history of harassment in that particular workplace, and whether pornography had been used in that workplace to harass women in the past.\textsuperscript{14} Presumably, a similarly \textit{ad hoc} analysis would apply to sexist comments as well, since Professor Sangree emphasizes that the inquiry in each case is context-specific.

Like most defenders of workplace speech regulation, Professor Sangree dismisses free speech concerns because she views the issue from a litigation perspective. She is apparently confident that out of the crucible of litigation the correct result will

\begin{footnotes}
\item[11] Sangree, supra note 1, at 503.
\item[12] Id. at 498-503.
\item[13] See id. at 470 n.31.
\item[14] Id.
\end{footnotes}
be reached. If the environment is sufficiently offensive, the court will find the employer liable; if the environment is offensive, but not "too offensive," there will be no finding of liability. Thus, the First Amendment is safe. However, as discussed below, even a justified faith in judges and juries would not substantially reduce First Amendment concerns since employers must cope with this vague standard long before they go to court. Moreover, one of the primary reasons for the First Amendment is the concern that judges and juries will punish the expression of unpopular ideas.

III. THE SYSTEM OF VICARIOUS EMPLOYER LIABILITY LEADS TO OVERCENSORSHIP

If the only censorship occasioned by hostile-environment law occurred in the courtroom, then faith in judges and juries might lead one to forgive the vagueness of the standard. If judges and juries "know it when they see it," employers may be somewhat insulated from inappropriate judgments of liability. Yet most of the censorship occurs not in the courtroom where the employer is held liable, but in the workplace where the employer is attempting to avoid liability. Thus, the question is whether employers have adequate prior notice of what they should censor.

The "totality of the circumstances" standard makes it impossible for an employer to know at the time whether it has an obligation to censor speech. Judges and juries have the benefit

15. This same litigation perspective leads Professor Volokh to believe that improper speech regulation could be avoided by requiring that the offensive speech be consciously directed toward a particular person who the speaker knows does not welcome it. Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 U.C.L.A. L. Rev. 1791, 1845-47 (1992). Although such a rule would reduce the number of plaintiffs who prevail at trial, it would do little to decrease the pressure on employers to censor their workers. Since a plaintiff may always argue that the speaker intended to offend—for example, that pinups were posted for the purpose of annoying the plaintiff or that an overheard joke was deliberately spoken within earshot of the plaintiff—the employer has the same incentive to censor that it would have in the absence of an intent requirement.

of hindsight. They can examine the proof at trial, employ "a context specific doctrine," and decide whether the cumulative effect of the speech creates a hostile environment. The employer, on the other hand, must make its judgment one incident at a time, in ignorance of what the "totality of the circumstances" might be at trial.

Imagine a particular kind of statement that is not egregious enough to create a hostile environment if spoken once, but would create liability if spoken ten times. An employee makes the statement once, and a female co-worker complains. Would the rational employer tell the offending employee that he can make the statement only eight more times or would the employer tell the employee never to make the statement again? In any ensuing litigation, the employer will be faced with the totality of offensive statements by all its employees. It cannot afford to let any offensive speech go uncensored.

Professor Sangree rejects the argument that employers are driven to overcensor. She argues that employers' concerns about employee morale will prevent overcensorship and that the persistence of harassment in the workplace demonstrates that employers must be underregulating rather than overregulating. Neither of these arguments is persuasive.

The notion that overregulation will be inhibited by employer concerns about morale is at best naive. Employers are unlikely to risk hundreds of thousands of dollars in liability out of abstract concerns about employee morale. Anyone having passing familiarity with the measures that employers are taking today would realize that employers are more concerned about liability than they are about morale.

17. Sangree, supra note 1, at 558.
18. The fact that the reader is probably wondering how one could possibly quantify such an example underscores the unpredictability of the standard. The difficulty of such assessment is exacerbated by the view that "the work environment may exceed the sum of the individual episodes." Burns v. McGregor Elec. Indus., 955 F.2d 559, 564 (8th Cir. 1992) (quoting Robinson, 760 F. Supp. at 1524).
19. Sangree, supra note 1, at 551-54.
20. Id.
The fact that harassment persists notwithstanding the law does not mean that employers are not overcensoring, any more than the fact that murders continue to be committed means that laws against murder do not discourage murder. No matter what efforts employers make, they are not going to be completely effective at preventing employees from offending each other. Moreover, some employers may not care whether they are violating the law. To measure the overcensorship effect of the law, one should look not to the behavior of those who are willing to violate the law but rather to the actions of those who attempt to comply with it. Thus, the relevant question is how well-counseled employers who wish to avoid liability behave, or, put another way, what kind of advice lawyers give to help their clients avoid a sexual harassment claim.\(^{22}\)

To illuminate the way in which the standard operates to cause overcensorship, consider the following example. An employer tells its lawyer that a female employee has complained about a cartoon on a co-worker's desk. The cartoon is not obscene or even sexual, but it makes fun of women, and the female employee is genuinely offended by it. The employer tells the lawyer that he thinks that the cartoon is funny and that the woman is overreacting. The lawyer recognizes that the cartoon, standing alone, does not constitute actionable harassment. Does the lawyer tell the employer to: (1) tell the woman that the employer thinks the cartoon is funny and that she is overreacting; (2) tell the woman that, even if the cartoon is offensive to her and to women generally, her co-worker has a

\(^{22}\) See Michelle Quinn, Sex Harassment Claims Increasing: Firms Clamor to Protect Themselves from Lawsuits, S.F. CHRON., Dec. 8, 1994, at D1 (describing lawyers' advice to "admonish people when they tell offensive jokes").

Professor Sangree argues in her reply that "fears that persons might overreact to laws because of paranoia about litigation cannot provide a legitimate basis for striking the laws down." Suzanne Sangree, A Reply to Professors Volokh and Browne, 47 RUTGERS L. REV. 595, 595 (1994). While she is certainly correct that psychotic responses to laws do not render the laws invalid, if one is led to censorship because of a fear induced by a vague and unpredictable standard, the law is subject to invalidation under the vagueness doctrine.
First Amendment right to display it; or (3) tell the co-worker to remove the offending cartoon? Because the cartoon may later be relied upon in a hostile-environment suit—as may the employer's reaction to the woman’s complaints—it would be the rare lawyer who would counsel the employer to allow the cartoon to be displayed.\(^{23}\)

IV. EQUALITY NEITHER TRUMPS NOR ENTAILS FREE SPEECH

Professor Sangree suggests that, at bottom, her disagreement with Professor Volokh and me is a “philosophical” one; it is a simple difference in our “values.”\(^{24}\) We reach our conclusions because we value the right of workers to engage in free speech in the workplace more than the interest in “eradicating sex discrimination from the workplace”,\(^{25}\) she reaches her conclusions because she has different priorities. Who is to say who is right and who is wrong if it is just a question of personal preference?

If the debate over free speech in the workplace is just over personal value judgments, we are wasting our time. The debate might make lively conversation at a cocktail party, but it does not belong in a law review, since the authors' personal policy preferences are of little or no interest to readers. The

\(^{23}\) Thomas R. Haggard & Mason G. Alexander, Jr., Tips on Drafting and Enforcing a Policy Against Sexual Harassment: Labor Relations, INDUS. MGMT., Jan. 1994, at 2 (advising employers to adopt policies prohibiting “explicit sexual propositions, suggestive comments, sexually oriented kidding or teasing, practical jokes involving sex or excretory functions, sexually-oriented jokes, comments and questions about sexual attributes or activities, foul or obscene language or gestures, display of foul or obscene pictures or printed material”).

\(^{24}\) A broad definition of sexual harassment is also provided to employees directly. For example, BNA distributes a pamphlet called Preventing Sexual Harassment: A Fact Sheet for Employees. This document, prepared by an employment lawyer at a major law firm, advises employees that a sexually hostile work environment can be created by, among other things, “telling off-color jokes,” “displaying sexually suggestive pictures,” and “using demeaning or inappropriate terms, such as ‘Babe.’” BUREAU OF NATIONAL AFFAIRS, PREVENTING SEXUAL HARASSMENT: A FACT SHEET FOR EMPLOYEES (1994) (on file with author).

\(^{25}\) Sangree, supra note 1, at 467.

\(^{25}\) Id.
reason that the debate belongs in a law review is that the question is a legal one: whether the Constitution permits—not whether Professor Sangree or I like—the kind of regulation that we are discussing.

Professor Sangree’s perspective demonstrates the cogency of Justice Stewart’s warning that as long as the First Amendment is viewed “as no more than a set of ‘values’ to be balanced against other ‘values’ that Amendment will remain in grave jeopardy.”26 Unfortunately, the First Amendment is seldom viewed as a real constraint on policy choices. Instead, proponents of policies restricting speech balance free speech against their desired policy goals, and consistently the result is that their policy goals either outweigh speech, or, coincidentally, are coextensive with the First Amendment. Unfortunately, it is rare for people to advocate standards for speech regulation that differ from the standards they would favor if there were no First Amendment.

I am willing to concede that some of the speech that I believe cannot be regulated constitutionally is harmful, just as I am willing to concede that the world would be a better place without it. Yet those favoring suppression of speech can always make a credible showing of harm, since no one seeks to prohibit speech that he views as harmless or having substantial value. The essential function of the First Amendment is to prevent us from declaring speech harmful or worthless even when we believe we have good reason to do so; if the First Amendment prevented only irrational censorship, it would hardly be necessary. A genuine commitment to free speech requires the acknowledgment that living with speech we dislike is a central, and intended, cost of the First Amendment.27 Thus, we must


Professor Sangree illustrates the cogency of this concern when she suggests that a court should simply decide whether it believes employee speech or protection of female employees to be “more important.” See Sangree, supra note 22, at 598. Presumably, that is the more exact inquiry that a legislature would make if there were no First Amendment.

27. Professor Sangree asserts that speech regulation is justified under the “captive audience” doctrine. However, that doctrine has never been used to justify viewpoint-based restrictions on speech. See Browne, supra note 2, at 516-20; see also Laurence H. Tribe, American Constitution-
endure advocacy of illegal conduct, Nazis marching in Skokie, and being pestered in airports. We might reasonably believe that the quality of our lives would be better without this expression, but the First Amendment prevents us from acting on that belief by suppressing speech.

Professor Sangree moves from the argument that interests in workplace equality outweigh free speech concerns to the argument that "[p]rohibiting such speech enhances First Amendment free speech principles." This apparent contradiction rests on the following chain of logic: (1) discrimination laws foster equality; (2) equality is necessary for democracy; (3) the First Amendment has "underlying democratic aims;" (4) therefore, discrimination laws advance the First Amendment; (5) offensive speech violates the discrimination laws; (6) therefore, offensive speech undermines the First Amendment; (7) as a result, "[p]rohibiting such speech enhances First Amendment free speech principles."

Professor Sangree's reasoning is an example of what Isaiah Berlin referred to as "the conviction that all the positive values

AL LAW § 12-19, at 950 n.24 (1988) (noting that "the concept of a 'captive audience' is dangerously encompassing, and the Court has properly been reluctant to accept its implications whenever a regulation is not content-neutral"). Moreover, application of the captive audience doctrine to prohibit one worker from speaking to another would be a dramatic extension of the doctrine and could provide the state with greater power to regulate speech of people in their homes, where they are captives, than it would have to regulate it on the street, where they are not. Browne, supra note 2, at 519-20.

28. Sangree, supra note 1, at 481.

29. Throughout her article, Professor Sangree makes her case easier by collapsing categories. For example, she asserts that speech regulation is appropriate because the state interest in eradicating sex discrimination is "very important," if not compelling." Id. at 532. Whether or not that is true, it is largely beside the point. Given that most sex discrimination will still be unlawful even if offensive speech is not prohibited, the issue is whether the state interest in prohibiting offensive speech is compelling.

Similarly, in attempting to buttress her claim that it is necessary to censor speech, Professor Sangree quotes statistics indicating that sexual harassment is pervasive. Id. at 554 n.458. In order for those statistics to be persuasive, however, she would have to show that they reflect the number of victims of sexual harassment who would go without a remedy if they could not rely on otherwise protected speech to make out their claims.
in which men have believed must, in the end, be compatible, and perhaps even entail one another. That conviction, argued Berlin:

more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society.

When values are acknowledged to be pluralistic, the extent to which any individual value will be pursued is limited, since pursuit of one value produces costs in other values. For example, if one acknowledges that liberty and equality may conflict, then one must acknowledge that pursuit of equality may produce costs in liberty. When all positive values are viewed as entailing one another, however, every step toward one value is a step toward all others, leaving little reason to limit pursuit of the favored value. If one believes that equality entails all other positive values, such as liberty and justice, then pursuit of equality necessarily advances the cause of liberty and justice. Thus, we can, with no sense of irony, censor speech in the name of free speech.


31. Id.


33. Just as Professor Sangree urges that speech be suppressed in the name of free speech, the Federal Aviation Administration apparently believes that sexual harassment should be engaged in to suppress sexual harassment. See Male Air Traffic Controller Alleges Sexual Harassment in “Reverse Tailhook,” DAILY LAB. REP. (BNA), Sept. 9, 1994, at D18 (describing a lawsuit by a male FAA employee who alleges that male employees at a cultural diversity workshop were forced to run a “gauntlet” of female employees who fondled the male employees; female participants later used charts depicting penises in varying states of arousal to describe the men in the exercise). The purpose of the exercise, according to the professional organizer of the workshop, was to jar male participants into understanding what women face in the workplace. Jean Marbella, Diversity Training Is Raising Issues Along With Consciousness, BALTI-
Contrary to Professor Sangree's view, free speech and equality are not always, and perhaps not even usually, fully compatible. For example, a statute guaranteeing a right of reply to political candidates who are attacked by a newspaper is easily justified in terms of equality, as is a limitation on expenditures in political campaigns. Had the Supreme Court accepted Professor Sangree's reasoning, it would have viewed such statutes as furthering First Amendment interests; instead, it held that they violated the First Amendment.34 Similarly, speech advocating the violent overthrow of the government does not "further the underlying democratic aims of the First Amendment," but the state may not prohibit such speech unless it is an incitement to imminent lawless conduct.35

V. PROFESSOR SANGREE OBSCURES THE DISTINCTION BETWEEN SPEECH AND CONDUCT

According to Professor Sangree, the argument that hostile-environment harassment regulation is unconstitutional necessarily implies that all of discrimination law is unconstitutional as well.36 She states that discrimination "always carries a political message, usually it concerns men's domination of women."37 Since discrimination carries a message, she reasons, a law that prohibits messages is equivalent, for First Amendment purposes, to a law that prohibits discrimination.38 If the

MORE SUN, Oct. 9, 1994, at 1D.

35. Sangree, supra note 1, at 527.
36. Id. at 465.
37. Id. at 521.
38. Professor Sangree repeatedly labels the speech at issue in hostile-environment cases "coercive," apparently to bring its regulation under precedents such as NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), that have allowed regulation of coercive speech. Professor Sangree, however, never says what the speech coerces. In one place she refers to coercion to submit to gender discrimination and in another she seems to refer to coercion to endure the speech. Sangree, supra note 1, at 513. Labeling speech "coercive" on that ground begs the question. In contrast, in Gissel, the threatening speech risked coercing employees into voting against a union; in extortion cases, the coercion may involve paying money; in quid pro quo cases, sex may be coerced. It is the forced transac-
latter is permissible, so must be the former.

Professor Sangree does not explore the full ramifications of her argument, which ultimately is either a profoundly anti-speech position or a profoundly libertarian one. Her argument of equivalence implies that all laws are subject to First Amendment analysis or none of them are. Presumably, the ordinary motorist defending a speeding ticket may assert a First Amendment defense, and it is simply up to the court to balance the importance of regulating speeding against the motorist's expressive interests and to come up with its answer. By the same token, we might conclude that a law prohibiting assassination of the President regulates expression, since political assassination carries with it a message of severe criticism. Nonetheless, we have no trouble distinguishing between laws prohibiting assassination and laws prohibiting criticism of the President. Yet Professor Sangree's argument would imply that if political assassination can be regulated, so can political criticism.

The distinction that seems to give Professor Sangree the most trouble is that between quid pro quo harassment and hostile-environment harassment, a distinction that is well-recognized in the law. She asserts that Professor Volokh and I "artificially distinguish" between the two forms of harassment,\(^\text{39}\) and argues that the two forms cannot be distinguished on the basis that quid pro quo harassment entails threats. The example she gives to illustrate her point is a supervisor who requests sex from a subordinate and then after being rejected retaliates against her with an adverse employment action.\(^\text{40}\) In such circumstances, she argues, there is no threat, but a quid pro quo action would nonetheless exist. Her conclusion is correct, but not because quid pro quo actions regulate speech. What Professor Sangree fails to appreciate is that in her example it is not the request for sex—which is expression—that violates Title VII; it is the retaliatory employment action—which is not expression. Professor Sangree similarly confuses the issue when she asserts that Title VII is

\(^{39}\) Sangree, supra note 1, at 511.

\(^{40}\) Id. at 512.
violated when an employer "denies a woman a job by telling her 'Sorry, we are only hiring men.'"41 Contrary to her view, it is not the message that violates Title VII; it is the refusal to hire.42 If the refusal to hire is based upon sex, the law is violated no matter what the employer says or does not say.

Professor Sangree's failure to appreciate the essential distinction between speech and conduct is similarly reflected in her reliance on *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,43 a case she asserts most closely presents the issue "whether hostile environment law is a valid incidental regulation of speech."44 In *Pittsburgh Press*, the Court examined a city ordinance that prohibited newspapers from carrying "help-wanted" advertisements in sex-designated columns in circumstances where it would be unlawful for the employer to restrict the position to a single sex. The Court, relying upon the fact that commercial speech receives less protection under the First Amendment and the illegality of the transactions, upheld the restriction. The Court reasoned that the restriction was on the same footing as a prohibition of advertisements proposing a sale of narcotics or soliciting prostitutes.45

The Court, unlike Professor Sangree, recognized a difference between speech that facilitates discriminatory conduct and speech that merely expresses prejudiced views. It distinguished the allegedly libelous advertisement at issue in *New York Times Co. v. Sullivan*,46 which "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses," from advertisements for illegal commercial activity.47 The Court emphasized that none of the want ads "expresses a position on whether, as a matter of social policy, certain posi-

41. *Id.* at 522.
42. *See* 42 U.S.C. § 2000e-2(a) (1988) (making it an unlawful employment practice "to fail or refuse to hire . . . any individual . . . because of such individual's . . . sex").
44. Sangree, *supra* note 1, at 526.
47. *Pittsburgh Press*, 413 U.S. at 385 (quoting *Sullivan*, 376 U.S. at 266).
tions ought to be filled by members of one or the other sex” and that “nothing in [its] holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment.”

The distinction observed by the Court in *Pittsburgh Press* between expressing views and illegally acting on them is one that neither Professor Sangree nor lower courts have observed in hostile-environment cases. Consider the example that Professor Sangree gives of the female employee overhearing her supervisor commenting that he believes that women should stay home and take care of their children and that their failure to do so has resulted in various social ills. The statement was apparently not directed toward the female employee, but she felt “personally attacked” by the comments. According to

48. *Id.*

49. *Id.* at 391. Professor Sangree asserts, *supra* note 1, at 506 n.188, that the Supreme Court in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), rejected the argument that hostile-environment regulation violates the First Amendment. Even taking the *R.A.V.* dictum at face value, she reads too much into it. In the first place, the Court said that “a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.” *Id.* at 2546 (emphasis added). Therefore, for the dictum to apply, the speech at issue would have to fall into one of the categories of otherwise proscribable speech, such as fighting words or obscenity. The bulk of the speech at issue in hostile-environment cases does not fall into these categories. Browne, *supra* note 2, at 526-29. In the second place, whether or not some of the speech involved in a given case is potentially regulable, the vagueness problems previously discussed still remain.

50. The distinction that Professor Sangree finds so illusory between prohibiting the expression of bigoted views and engaging in bigoted actions is one that the Supreme Court has had less trouble with. Compare *R.A.V.*, 112 S. Ct. at 2541 (unanimously holding unconstitutional a city ordinance defining as disorderly conduct the display of a symbol “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”) with *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (unanimously upholding a state law enhancing a criminal sentence if the victim was selected because of race or other proscribed basis).

51. Sangree, *supra* note 1, at 548.
Professor Sangree, these statements "place one more formidable barrier in front of women seeking to prosper in a male dominated world"\(^{52}\) and therefore are barred by Title VII: "Once Joe is notified that such statements are unwelcome to Alice, he must refrain from saying them so that she will not hear—despite Joe’s belief in political theory."\(^{53}\) This is pure political speech, yet Professor Sangree would censor it in the name of free speech.\(^{54}\)

VI. PROFESSOR SANGREE OVERSTATES THE DEGREE TO WHICH SPEECH REGULATION IS NECESSARY

Professor Sangree criticizes Professor Volokh and me for focusing on particular facts of cases without discussing the entirety of the circumstances presented in each case.\(^{55}\) I explained in my article why that was appropriate: a judgment that rests even in part on protected speech is constitutionally invalid.\(^{56}\) Thus, the issue is not whether all of the speech for which liability was imposed was constitutionally protected, but rather whether any of it was.\(^{57}\)

By way of demonstrating the inappropriateness of focusing on isolated facts, Professor Sangree points out that other facts

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52. Id. at 549.
53. Id.
54. Because employers are obligated to protect their employees against harassment from customers as well as from co-workers, presumably Professor Sangree would require a restaurant owner to prohibit customers from discussing books dealing with racial differences in intelligence, see RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994), or sex differences in the brain, see ROBERT POOL, EVE’S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES (1994), in front of black or female employees.
55. Sangree, supra note 1, at 475 n.59.
57. Had I found cases as stark as the case of Joe and Alice, see Sangree, supra note 1, at 548-50, my description of how hostile-environment regulation suppresses political speech could have been much shorter. See Browne, supra note 2, at 491-501. I could have simply described the facts of the case and declared "Q.E.D." I hope that no court would accept Professor Sangree’s argument that Title VII is violated if Joe expresses his views one more time within earshot of Alice.
in the cases demonstrate the egregiousness of the harassment. For example, Professor Volokh and I were both critical of the fact that the finding of liability in Arnold v. City of Seminole was based in part on statements to the effect that women should not be police officers. Professor Sangree notes that there were many other egregious facts in the case, including physical assaults, false disciplinary charges, and placement of a snake in the plaintiff's car. In that context, she argues, statements about the worth of women as police officers "should clearly not be protected by the First Amendment as core political speech."

If the speech in Arnold was political speech, it was political speech irrespective of what other harassment was involved. Although Professor Sangree argues that a more narrow interpretation of Title VII to comply with the First Amendment would vastly undercut its purpose, it is not clear why this is so. In Arnold, as in most other serious sexual harassment cases, there was ample unprotected conduct to support liability. Allowing evidence of sexist attitudes in such cases simply invites the trier of fact to impose liability based on a disagreement with those attitudes, as well as sending a message to employers that they need to prevent their expression. That, of course, is the purpose of harassment law, but it is a purpose that conflicts with the First Amendment.

VII. CONCLUSION

As Justice Holmes observed, the impulse to censor is a natural one: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." Advocates of workplace censorship are confident in their premises, and courts have given them little reason to doubt their power. The result has been as Holmes would have predicted.

59. Id.
60. Sangree, supra note 1, at 543.
61. Id. at 544.
62. Id. at 535.