Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law

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When does "religious harassment" law violate the Free Speech Clause? Quite a bit has been written on this subject; I have in the past chimed in on it myself. Rather than repeat all that has already been said, I'd like to contribute just a few points to the debate.

I. RELIGIOUS HARASSMENT LAW AND RACIAL/SEXUAL HARASSMENT LAW: A COMMON FATE

Let me begin by suggesting that the free speech problems of religious harassment law mostly mirror the free speech problems posed by racial and sexual harassment law.

Religious harassment law is structurally almost identical to racial and sexual harassment law: both punish speech when it's "severe or pervasive" enough to create a hostile, abusive, or offensive work environment based on religion, race, or sex, for the plaintiff and for a reasonable person.[1] And cases dealing with each body of law generally borrow heavily from each other.[2]

What's more, both religious harassment law and racial and sexual harassment law sometimes punish speech that's at the core of First Amendment protection, and sometimes punish speech that is constitutionally unprotected. A simple table might help illustrate this:

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1. 29 C.F.R. § 1604.11(a) (1999); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993); *see generally* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 628 (1997), *available in substantially updated form at* http://www.law.ucla.edu/faculty/volokh/harass/breadth.htm.

2. *See, e.g.*, Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (borrowing from sexual harassment law to decide a religious harassment case).

Religious harassment law may punish	*Racial/sexual harassment law may punish*
Statements expressing offensive religious opinions (whether in favor of one s own religion or against another s)[3]	Statements expressing offensive political opinions (whether claiming the superiority of one s own race or gender or denigrating another)[4]
Jokes expressing religiously offensive ideas[5]	Jokes expressing racially or sexually offensive ideas[6]

3. *See, e.g.*, Brown Transp. Corp. v. Commonwealth, 578 A.2d 555, 562 (Pa. Commw. Ct. 1990) (holding that religiously themed newsletter articles and Bible verses on paychecks created a hostile environment), *limited in irrelevant part by* Hoy v. Angelone, 720 A.2d 745 (Pa. 1998); Hilsman v. Runyon, Appeal Nos. 01945686, 01950499, 1995 WL 217486, at *3 (E.E.O.C. Mar. 31, 1995) (concluding that a claim that an employer "permitted the daily broadcast of prayers over the public address system" over the span of a year was "sufficient to allege the existence of a hostile working environment predicated on religious discrimination"); Sapp's Realty, Inc., Case No. 11-83, at 47-48, 66-68 (Or. Bureau Labor & Indus. Jan. 31, 1985) (on file with author), *described in more detail at* Volokh, *infra* note 8, at 1804; Dean J. Schaner & Melissa M. Erlemeier, *When Faith and Work Collide: Defining Standards for Religious Harassment in the Workplace*, EMPLOYEE REL. L.J., Summer 1995, at 7, 26 (giving "repeated, unwanted 'preaching' episodes [by a fundamentalist Christian employee] that offend coworkers and adversely affect their working conditions" as a "bright-line example[]" of actionable harassment, and saying that an employer in such a situation would be "well advised to take swift remedial action"); *id.* at 18 ("The *Sapp's Realty* and *[Brown] Transport* decisions [two cases which impose liability based on religious proselytizing] teach an important lesson: Pay particular attention to the 'preaching employee' at work and ensure that the preacher is not offending his or her coworkers."); Joel Turner, *Board OKs Policy on Harassment*, ROANOKE TIMES & WORLD NEWS, Sept. 11, 1996, at C3 (discussing an educational harassment policy that defined religious harassment as including "students . . . criticiz[ing] or belittl[ing] other students' forms of religious worship"); Dealing with Harassment at MIT, http://web.mit.edu/communications/hg/2.html (Jan. 8, 2000) ("[R]epeated unwanted proselytizing . . . might be found to be harassment."); *see also* Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 NOTRE DAME L. REV. 953, 988 (1996) (suggesting that "a request by an employee that posters, calendars, artwork, or slogans with religious overtones be removed from public spaces in the workplace that is not honored" may properly lead to religious harassment liability); Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81, 140 (2000-01) (arguing that "continued proselytizing, if sufficiently severe and pervasive, can constitute a hostile work environment," so long as there's "more than one incident of objectionable religious expression").

4. *See, e.g.*, Volokh, *supra* note 1, at 628-35. Compare Kent Greenawalt's suggestion that "perhaps employers should not be able in the workplace to try to persuade workers that norms of non-discrimination are ill-founded." Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 39 (2001). I agree that hostile environment harassment law might indeed cover such clearly political advocacy, but I think that such an application of the law clearly violates the First Amendment.

5. Consider the following advice to restaurant managers from an article, titled *Harassment by Nonemployees: How Should Employers Respond?*, in the Society for Human Resource

Religion-based threats or fighting words	Race/sex-based threats or fighting words
Religion-based face-to-face slurs and insults	Race/sex-based face-to-face slurs and insults
Repeated, unwanted religious solicitations	Repeated, unwanted sexual propositions

In some of the rows, the speech is at the core of constitutional protection: offensive political statements, proselytizing (religious or political), and humor are all fully protected by the First Amendment.[7] In other rows, the speech may be more restrictable; threats and fighting words are a clear example, and elsewhere I've argued that unwanted one-to-one speech might be punishable as well.[8]

But the important point is that from a Free Speech Clause perspective, religious harassment law stands or falls with racial and sexual harassment law, and vice versa. If some religiously offensive statements are protected by the Free Speech Clause, then the same must

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Management's *HRMagazine*:

> For mild forms of harassment, a polite request, such as simply asking the offending non employee to refrain from engaging in the harassing behavior can be used. An employee using this technique might say, "Would you please not tell religious jokes in my presence? I take my religion seriously and don't appreciate the jokes."
>
> . . . .
>
> . . . [Or] "Would you please not tell ethnic jokes in the presence of our wait staff. Some of them find these jokes offensive. We appreciate your cooperation . . . ."
>
> . . . .
>
> . . . [T]he nonemployee harasser [must] be stopped from committing additional harassment, be told that the harassing conduct will not be tolerated, and be warned about sanctions for any future harassing conduct in the workplace.

Diana L. Deadrick et al., *Harassment by Nonemployees: How Should Employers Respond?*, 41 HRMAGAZINE 108, 111,12, *available at* 1996 WL 9969552 (written by two management professors and an employment lawyer).

6. *See, e.g.*, EEOC v. Fed. Home Loan Mortgage Corp., 37 F. Supp. 2d 769 (E.D. Va. 1999) (discussing a case brought in part based on jokes making fun of "ebonics," in the wake of an Oakland school board's suggestion that "ebonics" be recognized as a separate language); Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 303-09 (2000) (describing other similar cases).

7. *See generally* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) ("[E]xpression about philosophical, social, artistic, economic, literary, or ethical matters" is "entitled to full First Amendment protection"). *But see* Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace After* Ellerth *and* Faragher, 42 HOW. L.J. 327, 344-45 (1999) ("Courts should presume religious expression to be protected, unlike sexist or racist expression."). In my view, racist or sexist ideas are as protected by the First Amendment as religiously offensive ideas, or for that matter as egalitarian ideas. "Under the First Amendment there is no such thing as a false idea." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

8. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1873-71 (1992), *available in substantially updated form at* http://www.law.ucla.edu/faculty/volokh/harass/permissi.htm.

go for racially or sexually offensive statements. Conversely, if racial or sexual harassment law is categorically immune from Free Speech Clause attack, then religious harassment law must trump free speech too.

This has some important consequences. My sense is that commentators on religious harassment law generally acknowledge that this law must sometimes yield to the Free Speech Clause. Even if a court is willing to find that, for instance, Bible verses on paychecks and religiously themed articles in a company newsletter create an offensive environment for non-Christian employees,[9] it seems clear that the Constitution must protect such speech, just as it protects other speech that some may find offensive.

Likewise, even if a jury finds that moral, political, or theological criticisms of religion—such as posters saying "Get Your Rosaries Off My Ovaries,"[10] or overheard conversations about how "religion is the opium of the masses" or "[o]rganized religion is a sham and crutch for weak-minded people"[11]—may create an offensive environment for religious people, the Constitution must protect such speech, at least in many instances. When employment experts plausibly warn that "repeated, unwanted 'preaching' episodes [by a fundamentalist Christian employee] that offend coworkers and adversely affect their working conditions" are a "bright-line example[]" of what harassment law may punish, and that an employer in such a situation would be "well advised to take swift remedial action,"[12] we can tell that there's a serious Free Speech Clause problem here.

If that's so, then some common defenses of harassment law must generally be invalid. Consider the following arguments:

1. Harassment law is constitutional because speech in private workplaces is already subject to the workplace owner's control and thus

9. Brown Transp. Corp. v. Commonwealth, 578 A.2d 555, 562 (Pa. Commw. Ct. 1990); *see also supra* note 3 (discussing similar cases).

10. Lois Kaplan, *Is Catholic Bashing on the Rise?*, STAR TRIB. (Minneapolis), Dec. 26, 1992, at 5E (discussing use of this slogan as criticism of Catholicism by pro-choice protesters).

11. *Playboy Interview: Jesse Ventura*, PLAYBOY, Nov. 1, 1999, at 55.

12. Schaner & Erlemeier, *supra* note 3, at 26; *see also* Mark A. Spognardi & Staci L. Ketay, *In the Lion's Den: Religious Accommodation and Harassment in the Workplace*, EMPLOYEE REL. L.J., Spring 2000, at 7, 21 ("[A]n employer must be vigilant in guarding against the creation of a hostile environment as a result of the unsolicited and/or unwelcome proselytizing of religious employees."); *id.* at 24 ("In order to proactively attempt to minimize the potential disputes that may arise as a result of the tension between religious proselytizing and freedom from harassment, employers are strongly urged to implement and uniformly enforce a no-solicitation/no-distribution policy.").

the government should also be free to suppress speech in those private workplaces.[13]

2. Harassment law doesn't involve state action because it doesn't itself punish speakers, but only pressures workplace owners into punishing them.[14]

3. Harassment law is content-neutral under the "secondary effects" doctrine and is thus not subject to strict scrutiny.[15]

4. Harassment law is merely part of a ban on discriminatory conduct and thus isn't really a speech restriction.[16]

5. Harassment law is constitutional because the First Amendment doesn't protect "invidious private discrimination,"[17] perhaps because there's a compelling government interest in fighting such discrimination.[18]

6. Harassment law is constitutional because the government has a free hand in restricting speech when necessary to protect "captive audiences," such as employees.[19]

I have argued elsewhere that each of these arguments is unsound.[20] For now, though, I just want to point out that each is equally applicable

13. *See, e.g.*, Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 428-29 (1991) (making this argument).

14. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534 (M.D. Fla. 1991) (making this argument).

15. *Id.* at 1535.

16. *See id.*; Suzanne G. Lieberman, *Recent Development: Current Issues in Sexual Harassment*, 50 WASH. U. J. URB. & CONTEMP. L. 423, 435-36 (1996) ("Proponents of the First Amendment defense to hostile environment sexual harassment claims, however, omit several factors which deserve a place in the analysis. These include the purposes and public policies underlying Title VII, which is to punish discriminatory conduct, not speech.").

17. *See* Letter from John E. Palomino, Regional Civil Rights Director of the United States Department of Education Office for Civil Rights, to Dr. Robert F. Agrella, President of Santa Rosa Junior College, in case no. 09-93-2202, at 2 (June 23, 1994), *quoted in* Volokh, *supra* note 6, at 314-15.

18. *See, e.g.*, Schaner & Erlemeier, *supra* note 3, at 10.

> To avoid liability, the prudent employer will proscribe all speech and conduct that may constitute [religious] harassment. The possibility of creating a "chilling effect" from prohibiting speech and conduct that may constitute harassment is outweighed by the risk of significant liability.
>
> Harassment law may restrict protected speech and conduct, but the restrictions serve a compelling interest—an equal work environment for employees regardless of their race, sex, religion, age, disability, or national origin.

Id.

19. *See, e.g.*, *Robinson*, 760 F. Supp. at 1535-36 (quoting Jack Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423); Marci Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 36 (1990).

(or, in my view, equally inapplicable) to religious harassment law, racial harassment law, and sexual harassment law.

If any of these arguments is correct, then the government may use religious harassment law to restrict offensive ideas about religion, religious proselytizing, and the like. Conversely, if such religiously offensive speech is sometimes protected by the Free Speech Clause despite its tendency to create an offensive environment based on religion (as many cases, from *Cantwell v. Connecticut*[21] on suggest), then the Free Speech Clause has much to say about racially and sexually offensive speech, too.

There might be some distinctions that can be drawn here; for instance, some might argue that there's a more compelling government interest in fighting work environments that are offensive based on race or sex than ones that are offensive based on religion. Others might argue that offensive religious speech is more valuable than offensive political speech or offensive art or offensive humor.

I find these distinctions unpersuasive,[22] but I think the very process of requiring those who defend harassment law against Free Speech Clause arguments to make these distinctions—or to acknowledge that religiously offensive speech may also be suppressed by the government—is an important one.

II. RELIGIOUS HARASSMENT LAW AND SPECIAL PROTECTION FOR RELIGIOUS PRACTICE

One possible response to what I said above would run like this: Speech that creates a religiously offensive work environment, like speech that creates a racially or sexually offensive work environment, is indeed unprotected by the Free Speech Clause. Religiously offensive speech, however, is sometimes protected by the special protections for religion provided under various religious exemption regimes, including the federal and state religious freedom restoration acts,[23] state free exercise clauses,[24] the Federal Free Exercise Clause under the "hybrid claims" theory,[25] or Title VII's religious accommodation requirement.[26]

20. *See generally* Volokh, *supra* note 8, at 1816-62, *available in substantially updated form at* http://www.law.ucla.edu/faculty/volokh/harass/substanc.htm.

21. Cantwell v. Connecticut, 310 U.S. 296 (1940).

22. *See generally* Volokh, *supra* note 8, at 1843-62 (providing a detailed explanation of why I think that even speech that creates a racially, sexually, or religiously hostile environment must often be protected by the Free Speech Clause).

23. *See generally* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

24. *See, e.g.*, Meltebeke v. Bureau of Labor & Indus., 903 P.2d 351, 359-63 (Or. 1995)

This argument is rarely made, and for good reason. First, if religious harassment law does pass scrutiny under the Free Speech Clause, for instance because the courts conclude that it's "narrowly tailored to a compelling government interest," then it should also pass scrutiny under the religious exemption regimes, which call for at most strict scrutiny, and perhaps for less than that.[27]

Also, while the Establishment Clause might tolerate some special exemptions for religious conduct, special privileges for religious *speech* pose both Establishment Clause and Free Speech Clause problems.[28] I think the Court has been quite right to generally say that religious speech gets full Free Speech Clause protection; there's no justification for the government discriminating against religious speech.[29] But neither should the government discriminate in favor of such speech, whether the preference is for speech with a religious content or speech said with a religious motivation. Alan Brownstein has written about this in some detail, and I've also touched on it elsewhere.[30]

In any event, if this argument is made, it should be made and defended explicitly; those who suggest that religious harassment law is special should explain why they think religious speech is more protected than other speech, and defend the implications of this approach. So far there has been very little written on this subject.

III. RELIGIOUS ACCOMMODATION LAW VS. FREE SPEECH

Let me also flag another, comparatively neglected way in which modern antidiscrimination law may violate the First Amendment: the possibility that "religious accommodation" law may require employers

(holding application of state religious harassment law to be unconstitutional under the state free exercise clause).

25. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990).

26. Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1994).

27. Title VII, for instance, which calls only for "reasonabl[e] accommodat[ion]" that doesn't create "undue hardship" for the employer, *id*., certainly would not require an employer to tolerate speech that might help put it in jeopardy of legal liability or that might interfere with morale by helping create an offensive work environment.

28. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989).

29. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845-46 (1995); *see generally* Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 365-73 (1999).

30. Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999); Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda With Test Suites*, 21 CARDOZO L. REV. 595, 610-17 (1999); *see also* Haff v. Cooke, 923 F. Supp. 1104, 1114-15 (E.D. Wis. 1996) (holding that RFRA may not be read to create a religious exemption from a prison policy banning possession of racist material, because such an exemption would violate the Free Speech Clause).

to suppress speech that offends coworkers' religious sensibilities, even if such speech isn't severe or pervasive enough to create a religiously hostile work environment. To my knowledge, this doctrine has been accepted only in one case, but unfortunately the case is a fairly logical application of well-established religious accommodation law (though I think it's wrong as a matter of First Amendment law). Moreover, at least one significant academic article has taken the ball and run pretty far with it.[31]

Victor Lambert worked for Condor Manufacturing, and at Condor many coworkers had posted nude pictures around the workplace.[32] Lambert was not just offended by this; he believed that his religion forbade him from working around such speech.[33] He therefore claimed that the employer had a duty to accommodate his religious beliefs by taking down the speech.[34]

As a matter of religious accommodation law, this is a plausible claim. Title VII requires employers to accommodate their employees' sincerely held religious beliefs, if doing so doesn't create an "undue hardship."[35] Here's how Lambert's argument (which the *Lambert v. Condor Manufacturing* court essentially bought) works:

1. Lambert sincerely believes that it's wrong for him to work around sexually explicit pictures, just as others sincerely believe that it's wrong for them to work on the Sabbath. The court held that the case should go to trial to determine whether Lambert was sincere, but nothing in the opinion suggests that he wasn't sincere.[36]

2. Just as the employer must accommodate the Sabbatarian's beliefs by rearranging his work schedule, so long as doing so doesn't impose an undue hardship, so the employer must accommodate Lambert's belief by rearranging the work environment.[37]

3. The accommodation would be the employer ordering its employees to take down the material that Lambert feels he can't work around. The court held that there was a fact question as to "how much of a hardship in terms of employee morale it would have been for

31. *See* Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L. REV. 577, 626, 634 (1997).

32. Lambert v. Condor Mfg., 768 F. Supp. 600, 601 (E.D. Mich. 1991).

33. *Id.* at 602.

34. *Id.* at 604.

35. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) (interpreting Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1994)).

36. *Lambert*, 768 F. Supp. at 602, 604.

37. *Id.* at 603.

Condor to have accommodated the plaintiff by requiring the removal of the offensive pictures," but there's no reason to think it would have been a substantial hardship.[38] (Among other things, Condor wouldn't have to worry too much about its employees resenting the company because of the order, since it could quite properly say that the fault was the law's, not Condor's.)

4. Finally, the lack of a showing that the pictures are "religiously harassing" in the traditional sense is irrelevant. Though the pictures don't insult Lambert's religion, or even proselytize another religion, Lambert's claim isn't for religious harassment, but for failure to accommodate his religious beliefs, and severity, pervasiveness, and offensiveness based on religion to a reasonable person aren't parts of the religious *accommodation* claim.[39]

There might be a problem with part three of the statutory argument; one can sensibly say that requiring Lambert's co-workers to take down certain pictures is an "undue hardship," not on the employer but on the coworkers themselves.[40] But one can argue this either way as a statutory matter—telling someone to take down a picture isn't that much of a hardship under the lay meaning of "hardship."

The real problem here is a First Amendment problem: religious accommodation law is being used to force employers to suppress speech that Lambert believes shouldn't be said around him. Of course, the employer would have been free to restrict this speech on its own, just as a newspaper publisher is free to restrict the speech of its columnists, a private university is free to restrict the speech of its faculty and students, and a private commercial landlord is free to restrict the speech of its tenants. But here the *government*, acting through the court system, is forcing employers to suppress their employees' speech.[41]

38. *Id.* at 604.

39. *See id.* at 602.

40. *See, e.g.*, Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959, 997-98 (1999) ("[T]o suppress other employees' speech altogether when such speech does not target any co-worker or any particular faith may be 'unreasonable' and 'unduly burdensome.'").

41. This is the problem with the *Lambert* court's First Amendment analysis, which consists simply of the following:

> Defendant also argues that requiring the employees to remove the pictures would violate those employees' right to free expression. This argument, however, ignores the fact that Condor is a private employer rather than a state actor.
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> In this Court's opinion, defendant's arguments, that requiring it to take its employees' pictures down would violate their First Amendment rights, must fail. Certainly, the employer, as a private employer, has the right to require that the pictures

Now many people might not be that bothered about the *Lambert* result because the case involved pornography; but even if pornography should be less protected than other speech,[42] the logic of *Lambert* is in no way limited to pornography.

Imagine that a Lambert-like plaintiff feels his religion bars him from working not just around pornography, but around any pictures of women wearing clothing that his religion regards as "immodest."[43] Or imagine that he feels his religion bars him from working around profanity or blasphemy,[44] or from hearing music that he viewed as containing supposedly satanic imagery, or violent, misogynistic, or sexually explicit rap lyrics.

In all these cases, so long as the plaintiff sincerely believes that he ought not see or listen to such speech, his claim would be as strong as Lambert's. Because *Lambert* involved a religious accommodation claim, not a sexual or religious harassment claim, the court's reasoning never relied on the speech being somehow "of low value," but rather only on the fact that Lambert had a religious objection to working around the speech.[45]

Nor are these hypotheticals purely hypothetical. In *Cook v. Cub Foods, Inc.*, for instance, a plaintiff did indeed bring religious harassment claims based on supervisors playing "offensive 'Satanic death metal' music over the loudspeakers" and posting memos referring

> be taken down, and the exercise of that right would not implicate any First Amendment problems.

Lambert, 768 F. Supp. at 604. That an employer, a university, or a publisher has a right to restrict speech on its own private property doesn't mean that the *government* may pressure the property owner to do so. *See generally* Volokh, *supra* note 8, at 1816-18.

42. I have argued elsewhere against this position, see Volokh, *supra* note 8, at 1857-62, but I set that question aside for purposes of this article.

43. Compare *Moody v. Cronin*, 484 F. Supp. 270, 275 (C.D. Ill. 1979), which dealt with a religious objection to being around immodestly dressed people; I suspect that many people who object to being around immodestly dressed people would also object to being around pictures of immodestly dressed people.

44. *Testimony of Douglas Laycock Before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary of the U.S. Senate*, 103rd Cong. 22-99 (1994) (stating that when "[a] nonreligious supervisor often uses the expressions 'Jesus Christ!' and 'God d——' [expurgation in original] when angry or frustrated," this is probably not religious harassment under existing law, but "the First Amendment [does not stand] in the way if the Commission chooses to call it religious harassment"). I agree that such speech is not religious harassment, but under the *Lambert* theory the failure to suppress such speech might well violate the duty of religious accommodation. I believe, however, that the First Amendment does not allow the government to suppress blasphemy, either through religious harassment law or religious accommodation law.

45. *Lambert*, 768 F. Supp at 602.

to Dungeons & Dragons monsters;[46] in *Juzwick v. Frank*, another plaintiff brought a religious harassment claim based on coworkers playing 2 Live Crew rap music containing sexually explicit lyrics.[47]

Both claims were rejected because they were brought under a religious *harassment* theory.[48] But if the plaintiffs had sincerely claimed that they actually had religious objections to working around satanic or sexually explicit music—hardly implausible claims—then under the *Lambert* religious *accommodation* theory they should have prevailed.

One law review article, Theresa Beiner and John DiPippa's *Hostile Environments and the Religious Employee*, has not just acknowledged this possibility, but has seemingly embraced it.[49] Following a discussion of *Juzwick* and *Lambert*, Beiner and DiPippa conclude that "[c]urrent harassment law should be extended to instances of religious harassment like the above."[50] Whether the label is "religious harassment" or "religious accommodation," they are arguing that Juzwick should have won, and their discussion later of the propriety of "allow[ing] orders banning the general display of pornography" based on "[r]eligious objections" suggests the same.[51]

"[T]he complaint in *Lambert*," they argue, "is not based on either thought control or the message of pornography. A religious employee may see the pornography as an occasion of sin, his sin."[52] This of course would apply equally when the religious employee finds it sinful to listen to songs with sexually explicit lyrics, or to coworkers' profanity or blasphemy, or to music that is supposedly "Satanic." Likewise, they argue that:

> When an employee complains that pornographic material offends his or her religious beliefs, the employee is making a general request: help me avoid sin by removing material from those areas within my view. The religious employee is saying that he or she does not intend to view the material and does not intend to be persuaded that it is acceptable. For the worker who views daily life as sacramental, the very presence of the pictures is almost sacrilegious. It demeans the place where God is made manifest.

46. Cook v. Cub Foods, Inc., 99 F. Supp. 2d 945, 948 (N.D. Ill. 2000).
47. Juzwick v. Frank, No. 90-345, 1994 U.S. Dist. LEXIS 19416 (W.D. Pa. Dec. 27, 1994).
48. *Cook*, 99 F. Supp. 2d at 950; *Juzwick*, 1994 U.S. Dist. LEXIS 19416, at *10.
49. Beiner & DiPippa, *supra* note 31, at 595-610.
50. *Id.* at 626.
51. *Id.* at 626, 634.
52. *Id.* at 634.

> Under these circumstances, refusing to remove the material is the equivalent of a direct insult.[53]

This argument, which explicitly turns not on "the message of pornography" but on the notion that an employee finds it "almost sacrilegious,"[54] likewise supports the governmentally mandated suppression of any speech that an employee finds "almost sacrilegious," whether it's pornography, blasphemy, rap music, or anything else.

Surely the Free Speech Clause can't tolerate such a policy of silencing speakers on the grounds that listeners find their speech "sacrilegious." As worthy as the goal of protecting religious employees' sensibilities may be, it can't justify speech suppression. *Lambert*'s interpretation of religious accommodation law, though a plausible interpretation as a statutory matter, must be constitutionally impermissible.

IV. "DISPARAGING THE RELIGION OR BELIEFS OF OTHERS"

Finally, while I agree that posters, newsletter articles, and other speech proselytizing one's own religion are protected by the Free Speech Clause, I want to caution against a seeming compromise that some, such as the EEOC, have suggested: the notion that speech praising one's own religion is constitutionally protected, but that speech "disparag[ing] the religion or beliefs of others" or "ridicul[ing an] employee's religious beliefs" may be suppressed by harassment law.[55]

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53. *Id.* at 635.

54. *Id.*

55. EEOC FACT SHEET ON PROPOSED GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE OR DISABILITY 112 (1993), *quoted in* Volokh, *supra* note 1, at 630 n.9 (1997). The full quote is:

> It is one thing [and a lawful thing] to express one's own beliefs; another to disparage the religion or beliefs of others. In a diverse workforce, this is a critical distinction and is the heart of non-discrimination law . . . . Thus, a Christian employee would have recourse under Title VII if a "secular humanist" employer engaged in a pattern of ridiculing the employee's religious beliefs.

Id. This principle would also be applicable to similar ridicule by coworkers—so long as the employer doesn't stop it when it learns about it—given that harassment law applies to coworker speech as well as to employer speech. *Cf.* Berg, *supra* note 40, at 1008 (stating that "courts should not treat the playing of the music as harassment unless it explicitly insults and denigrates people on the basis of religion"); Gilmer & Anderson, *supra* note 7, at 341 (suggesting that "posters that denigrate others' religious beliefs" should be actionable harassment, when they "denigrate or intimidate another person," even if they aren't directed at any particular person); Greenawalt, *supra* note 4, at 54 ("If the four Christians in the van continually talk among themselves about how atheists are damned, after their atheist colleague has explained that this bothers him, they are failing to exhibit adequate sensitivity to his feelings. . . . Officials might employ some standards of minimal politeness to determine whether remarks are protected."); *id*. at 39 (suggesting that employers' "religious speech that puts members of other religions down and hints that their status in society

This sounds appealingly Solomonic; but it rests on a "nice speech only" view of the Free Speech Clause that the Court has long rejected. As the Court has held at least since *Cantwell*,[56] the government may not restrict speech because it expresses hostile or offensive ideas, whether about religion or something else.

Much religious discourse, and much ideological discourse more generally, involves condemnation of others' views as well as expression of one's own. One way of proving the merits of your ideas is by showing the error of rival ideas. If the government may use the force of law to suppress such condemnatory speech, then we have lost a great deal of our First Amendment protection.

In *State v. Chandler*, an 1837 case, Thomas Jefferson Chandler was convicted of saying that "'the virgin Mary was a whore, and Jesus Christ was a bastard'"; the court concluded that such speech was so offensive that it may be suppressed.[57] Most observers, of course, have long assumed that this sort of holding is untenable under modern First Amendment doctrine. It's sobering, therefore, to realize that under the EEOC's position such speech may even today lead to legal punishment.

The justifications for restricting such speech have in some measure changed since the 1830s. The punishment is also somewhat different, though note that Chandler was sentenced only to ten days solitary confinement and a fine of ten dollars (a little more than a month's income)[58]—many people might prefer such a sentence to losing one's job, the normal fate of many employees who run afoul of workplace harassment law.

But the underlying principle remains the same: the government has no business suppressing our ideas, whether religious or political, and whether or not they are "disparaging" (the EEOC's term), are made "for the purpose of exposing [another religion] to contempt and ridicule" (*Chandler*'s test),[59] or fail to "exhibit adequate sensitivity to [another's] feelings."[60]

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should be diminished" might be constitutionally unprotected).

56. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

57. State v. Chandler, 2 Del. (2 Harr.) 553, *available at* 1837 WL 154, at *1 (1837).

58. *Id.*; ROBERT F. MARTIN, NATIONAL INCOME IN THE UNITED STATES 1799–1938, at 6 (1939).

59. *Chandler*, 2. Del. at 553, *available at* 1837 WL 154, at *1.

60. Greenawalt, *supra* note 4, at 54.